DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Before Upper Tribunal Judge Paula Gray **CE/708/2017**

Decision

This appeal by the claimant succeeds.

Permission to appeal having been given by me on 5 June 2017 in accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and rule 40(3) of the Tribunals Procedure (Upper Tribunal) Rules 2008 I set aside the decision of the First-tier Tribunal (a District Tribunal Judge sitting alone) at Manchester and made on 17 October 2016 under reference SC 946/16/01996 under rule 37 of the Tribunal Procedure (First-Tier Tribunal) (SEC) Rules 2008 setting aside the decision of a First-tier Tribunal sitting at Manchester and made on 29 September 2016.

I also set aside the decision of the First-tier Tribunal sitting at Manchester and made on 17 November 2016 under reference SC 946/16/01996.

Reasons

In this case, which concerns entitlement to Employment and Support Allowance (ESA) there are two decisions under appeal to me. The parties now agree that the decision of the tribunal (comprising a judge and a medical member) made on 17 November 2016 was made without jurisdiction because the decision made on 17 October 2016 (by a District Tribunal Judge (or DTJ) dealing with post-hearing issues) setting aside a previous decision of the FTT made on 29 September 2016 was itself made without jurisdiction. The claimant's position reverts, therefore, to the decision of that earlier tribunal which the DTJ purported to set aside. Despite the support for both parties for this course I believe an explanation of the legal framework and powers is required.

Background

1. At a hearing on 29 September 2016 the tribunal (the first tribunal, or the first FTT hereafter) allowed the claimant's appeal against a decision of the Secretary of State made on 9 May 2016 but only to a limited extent. I will refer to the decision of the first tribunal as the first decision. It is this decision which is preserved by my decision.
2. It awarded 15 points under the activities set out in schedule 2 of the Employment and Support Allowance regulations 2008, finding the claimant to have limited capability for work and placing her in the Work-Related Activity Group. The representations made on her behalf in that appeal, however, had been for a finding of limited capability for work-related activities and a placement in the Support Group, and the

claimant's solicitors Manchester McKenzie who have represented her throughout emailed HMCTS on 1 October 2016 to request a statement of reasons for the decision. That was sent in to HMCTS by the presiding judge of the first tribunal together with a note which was put before a DTJ. The note, which was dated 14 October 2016, said:

"I support an application of this decision to be set aside. An award of ESA with the work-related activity component was made for an unlimited period. The doctor and myself failed to consider schedule 3 and regulation 35. Other descriptors were asked for which we did not consider. I'm afraid the evidence taken was inadequate."

3. I commend the judge who wrote that note for her frankness; when presented once again with the case papers she clearly realised that the tribunal had failed to consider all the relevant legal aspects. She was doing what she felt she could to have the situation remedied.
4. The later difficulties have arisen because no application had been made by a party to set the decision aside. The email from the representative simply asks for a statement of reasons. There are no reasons in the file for the action taken by the DTJ but I find that either the email asking for the statement of reasons or the presiding judge's suggestion in her note, or a combination of the two, was the basis for the decision being set aside, and that the action taken by the DTJ was under rule 37 of the Tribunal Procedure (First-Tier Tribunal) (SEC) Rules 2008 (hereafter the procedural rules), as opposed to any other power. I explain why I come to those conclusions below.
5. That set aside action was not permitted within the procedural rules because there is no power for a DTJ to set aside under rule 37 without a party having made a written application, and a request for a statement of reasons cannot be treated as an application to set aside. I will deal with those principles below, but initially I will explain why it really mattered.
6. In many cases in the social security field the result is an all or nothing one: win or lose. If an appellant has lost completely then a set-aside followed by a re-hearing of the matter cannot make things worse, but this case was more nuanced. The appellant had succeeded up to a point having been found to have limited capability for work, but not for work related activities. On receiving the statement of reasons and discussing it with her representative it is likely that the risk of either asking for the decision to be set aside or proceeding with an appeal would have been explained to her: at a re-hearing the tribunal would look at the matter afresh and she may lose what she already had. In those circumstances she might, as I pointed out in granting permission to appeal, have decided that half a loaf was better than no bread and let matters lie, but she did not have that choice. The matter was taken out of her hands because on 17 October 2016 the DTJ set aside the first decision, depriving the claimant of that option.
7. I can see no record of the claimant's solicitor having challenged that set-aside decision at the time. It is academic in terms of my conclusions, but I was at one point troubled by that. There did seem to

me to be a question to whether acquiescing in a course of conduct (the re-hearing) might be seen as tacit acceptance of a procedural step that has taken place without a specific application, and that may be a point that will be under consideration in another case. Here, because a written application is required and without one the DTJ had no jurisdiction to act as he did the point is, in this case, immaterial.

What happened next?

8. On 17 November 2016 a second tribunal hearing took place as a result of the first decision being set aside. That tribunal took a different view of the evidence than had the first tribunal and the claimant was found not even to have limited capability for work (the second decision). She scored no points under the schedule 2 descriptors. Once again the claimant's representative requested a statement of reasons. That was supplied. It is clear from that document that the extent of the claimed functional limitations was not accepted; indeed significant credibility findings were made against the claimant. I will return to the significance of the two tribunals having come to different conclusions because this was a ground of appeal before me.

The jurisdiction issue

9. This is in three parts.

(i) Did the DTJ have the power to set aside the first decision?

(ii) If he did not, did the second tribunal have jurisdiction to re-hear the appeal?

(iii) What is my jurisdictional position on an appeal to the Upper Tribunal in either event?

Under the Tribunal Procedure (First-Tier Tribunal) (SEC) Rules 2008 there is a set-aside procedure in respect of a decision which disposes of proceedings.

37. (1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and remake the decision, or the relevant part of it, if –

(a) the Tribunal considers that it is in the interests of justice to do so; and

(b) one or more of the conditions in paragraph (2) are satisfied

(2) The conditions are –

(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;

(b) the document relating to the proceedings was not sent to the Tribunal at an appropriate time;

(c) a party, or a party's representative, was not present at the hearing related to the proceedings; or

(d) there has been some other procedural irregularity in the proceedings.

(3) a party applying for a decision, or part of a decision, to be set-aside under paragraph (1) must make a written application to the Tribunal so that it is received no later than one month after the date on which the Tribunal sent notice of the decision to the party.

10. In providing for decisions to be set-aside where it transpires that there has been some procedural irregularity the rule is an important safeguard. SSCS is a busy jurisdiction in which robust decisions may be taken, for example to proceed with a hearing. Such a decision may later be found to have been flawed. This set-aside process is readily used to redress possible injustices so caused. As Upper Tribunal Judge Mark said in *GA-v-London Borough of Southwark [2013] UKUT 170 (AAC)* (hereafter *GA*)

> I agree with what is said at paragraph 5.327 of volume III of the Social Security Legislation 2012/13, *Administration, Adjudication and the European Dimension*, that "tribunals are entitled to take a robust approach to the non-appearance of parties and proceed to hear cases in their absence, but a necessary concomitant of such a robust approach must be a greater preparedness to set aside decisions under r.37(2)(c)".

11. Since none of the conditions under rule 37 (2)(a) (b) or (c) were made out on the facts here, unless the more general (d) was satisfied, and there was something which could be construed as *"some other procedural irregularity in the proceedings"* the conditions precedent for a procedural set-aside were not made out.

12. The judge's note said that the tribunal had not considered certain legal provisions that were germane to the case put forward by the appellant.

13. Is the FTT's failure to consider a legal provision an error of law or a procedural error? I do not need to finally decide that, although I am inclined to the view that the error was one of law, as it was a failure to apply the law. However, as Upper Tribunal Judge Wikeley said in *Worcestershire CC –v- J [2014] 406 (AAC)* (which related to equivalent provisions under the procedural rules that govern the Health Education and Social Care Chamber) in distinguishing between setting aside on review for error of law and setting aside in the interests of justice due to procedural irregularity:

"There is some overlap between the circumstances so covered: some but not all errors of law also amount to a procedural irregularity, and some but not all procedural irregularities constitute a (material) error of law. There are also important distinctions between the two routes. Tribunals must bear these differences in mind as otherwise the distinction between an error of law and a procedural irregularity, plainly contemplated by the statutory scheme, disappears to the point at which it vanishes."

I respectfully agree, and would observe that it may be unhelpful to set out the demarcation lines

14. In any event, even if the issue amounts to a procedural irregularity, the judge's power is limited by sub-paragraph (3) which provides that there must be a written application for such a set-aside. That is the position unless there is some other power within the rules or other statutory provision for the judge to act on his or her own initiative. *DC-v-Secretary of State for Work and Pensions [2015] UKUT 150 (AAC)* establishes that the power to set aside is available only when an application has been made and admitted. Paragraph 29 deals with a position which is on fours with that before me. Upper Tribunal Judge Mitchell said:

29…. While Mr C did write to the Tribunal within that period of one month, his letter cannot fairly be considered an application of the set-aside under rule 37 because all he asked the Tribunal to do was supply him with a statement of reasons. His letter did not describe any procedural irregularity of the sort which might fall within rule 37.

15. He points out later in that decision that there is power under rule 41 to treat an application for permission to appeal as an application for a decision to be set-aside. Rule 41 gives the Tribunal power to treat an application for a decision to be corrected, set-aside or reviewed, or for permission to appeal against the decision, as an application for any other one of those things. I note though, that under the procedural rules an application for a statement of reasons does not appear as an application that can be treated as a different application.

The position of review

16. The other process for setting aside a decision arises on review under section 9(4) (c) Tribunals Courts and Enforcement Act 2007 (TCEA), and it is one in which a judge can act on their own initiative, section 9 (2) (a) TCEA providing specifically for that, however it seems to me unlikely that the setting aside was under that power because the procedures set out under that rule were not adopted. The procedural rule governing reviews is rule 40 and I replicate the relevant parts of it below.

Review of a decision

40- (2) the tribunal may only undertake a review of a decision-

(a) pursuant to rule 39 (1) (review on an application for permission to appeal); and

(b) if it is satisfied that there was an error of law in the decision.

(3) The tribunal must notify the parties in writing of the outcome of any review, and of any right of appeal in relation to the outcome.

(4) If the tribunal takes any action in relation to a decision following a review without first giving every party an opportunity to make

representations, the notice under paragraph (3) must state that any party that did not have an opportunity to make representations may apply for such action to be set-aside and for the decision to be reviewed again.

17. In this case neither was there an application for permission to appeal nor was one invited, and there was nothing which could have been treated as such an application. The requisite notifications and opportunity to make submissions were not given. Overall it seems likely that the DTJ purported to exercise his powers to set aside for procedural error under rule 37 for the reasons I have set out at [4]. As the above demonstrates he did not have the power to do so on his own initiative.

The position before the Upper Tribunal

18. As to my powers, I said at the permission stage that I would consider argument as to the status of the interlocutory set-aside decision. I was concerned as to whether it was indeed appealable, and, if not, whether Judicial Review was the appropriate remedy and whether I could or should treat the application for permission to appeal it as an application for permission to commence Judicial Review proceedings in accordance with the Lord Chief Justice's Practice Direction under section 18(6) TCEA in conjunction with section 16 TCEA and rule 28 Tribunal Procedure (Upper Tribunal) Rules 2008.
19. Happily, in view of the complexity of the alternative process, I am satisfied that I have jurisdiction over the set-aside decision as a statutory appeal, because it was made under rule 37.

Foundation for the statutory appeal against a rule 37 set-aside

20. Section 11 (1) provides for a right of appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision. That this includes interlocutory decisions is clear from *LS-v- London Borough of Lambeth [2011] AACR 27)*.
21. *GA*[1] is authority for the proposition that a section 37 set-aside decision is indeed appealable. Referring to the view of the judge below that there was no right of appeal because section 11 (5) (d) TCEA includes as an excluded decision *"a decision of the First-tier Tribunal under section 9… (iii) to set aside an earlier decision of the tribunal",* Upper Tribunal Judge Mark, at [13] pointed out that this referred only to a set aside following a review under section 9 (and the procedural provisions set out at rule 40), but not a rule 37 set-aside. That is why it has been important for me to establish the provision under which the set-aside was likely to have occurred.

[1] Cited at [10]

22. The application to appeal the set-aside decision to the Upper Tribunal was outside the one month time limit, but, as I explained in granting permission to appeal, under rule 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I waived that procedural irregularity because of the potential for injustice if that decision stood.

Two irreconcilable decisions: an error of law?

23. A ground of appeal has been that two tribunals have come to two wholly different conclusions on the same evidence. That is not quite the position here, but even if it were it would not necessarily be legally irrational.
24. At the two substantive hearings in this case it cannot be said that the evidence was the same: the claimant gave evidence at each, and there were some differences. There are indications that the functional difficulties described to the second tribunal were considerably more than to the first. It was, at least in part, the view of the second tribunal that any possible functional problems to which the various diagnoses might lead would not have been at the level described that led to the finding that the claimant was exaggerating, or worse.
25. But even had the evidence been identical, for example with two tribunals dealing with the cases sequentially on the papers alone, the process of fact-finding by inference and with the use of expertise means that there is room for two such tribunals to come to differing views on the same evidence whilst applying the correct legal tests. That is apparent from a well-known case within the Social Security jurisdiction, the decision of the House of Lords in *Moyna (Respondent) v. Secretary of State for Work and Pensions (formerly against the Social Security Commissioner) (Appellant) [2003] UKHL 44*. Lord Hoffman giving the opinion of their Lordships said (as is relevant here):

14. Mrs Moyna then appealed to the commissioner, saying that the tribunal has misconstrued the requirements of section 72(1)(a)(ii). The commissioner found no error of law. The test, he said, is whether the claimant can cook a "labour intensive reasonable main daily meal freshly cooked on a traditional cooker". Not all tribunals might have reached the same conclusion but the tribunal was entitled on the evidence to reach the conclusion it did.

15. In the Court of Appeal the leading judgment was given by Kay LJ and the other two members of the court agreed. He did not accept that one could have facts on which different tribunals could properly reach different conclusions about whether the "cooking test" had been satisfied. The test was intended to be "straightforward" and produce the same answer on the same facts…

19. I therefore agree with the commissioner that the question involves taking "a broad view of the matter" and making a judgment. The standard of motor abilities required by the cooking test is not so precise as to allow calibration by arithmetical formula….

20. In any case in which a tribunal has to apply a standard with a greater or lesser degree of imprecision and to take a number of factors into account, there are bound to be cases in which it will be impossible for a reviewing court to say that the tribunal

must have erred in law in deciding the case either way: see George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 2 AC 803, 815-816. I respectfully think that it was unrealistic of Kay LJ to think that he was able to sharpen the test to produce only one right answer. In my opinion the commissioner was right to say that whether or not he would have arrived at the same conclusion, the decision of the tribunal disclosed no error of law.

So, what should I do, given the position set out above?

26. The claimant's representative asks that she be given a month from the date of my decision to request written reasons if desired. The Secretary of State does not demur from that, Mr Spencer being of the view that the request for a statement of reasons must now be properly considered.

27. If the set aside decision is a nullity the second decision was made without jurisdiction, and the position reverts to the status quo ante: unless and until the decision is (validly) set aside it is extant, and the judge has already written a statement of reasons, which is on the file.

28. The statement of reasons, I should explain, does very little more than re-state the judge's frank note that I have set out above, but it is nonetheless a statement of reasons, and it was, belatedly, issued to the parties. On the file is a note from the DTJ at the time of his set-aside to the effect that because he had set the decision aside there was no need to send the statement of reasons to the parties. Later, however, on 2 March 2017, the same DTJ in response to an email from the claimant's representative directed that the statement be issued. So the position now is as it is in all such cases where a statement of reasons is requested. Either party may apply for permission to appeal.

29. I emphasise that I am not seised of an appeal in respect of that first decision; my powers relate only to the two decisions in respect of which I was asked for and granted, permission to appeal, those being the set aside decision and the second FTT decision. Either party could make a late application for permission to appeal against the first FTT decision from a District Tribunal Judge of the FTT, which carries the right to renew at the Upper Tribunal.

Upper Tribunal Judge Paula Gray

Signed on the original on 9 October 2017