DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Leicester First-tier Tribunal dated 4 February 2016 under file reference SC314/15/01454 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is in a position to re-make the decision under appeal. The decision that the First-tier Tribunal should have taken is as follows:

> *The decision of the First-tier Tribunal issued on 20 January 2016 is set aside. It therefore follows that the Appellant's appeal against the Secretary of State's decision dated 21 August 2015 should be re-heard by a different First-tier Tribunal, subject to the Directions below.*

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the re-hearing:

(1) The appeal should be considered at an oral hearing.

(2) The new First-tier Tribunal should not involve either the tribunal judge or medical member who was previously involved in considering this appeal on 20 January 2016 (or 4 February 2016).

(3) The Appellant is reminded that the tribunal can only deal with the appeal, including his health and other circumstances, as they were up to and as at the date of the original decision by the Secretary of State under appeal (namely 21 August 2015).

(4) If the Appellant has any further written evidence to put before the tribunal, in particular medical evidence, this should be sent to the regional tribunal office in Birmingham within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were at or before the date of the original decision of the Secretary of State under appeal (see Direction (3) above).

(5) The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

The reason why this Upper Tribunal decision is being put on its website

1. This decision discusses whether First-tier Tribunals should consider asking their clerk to telephone an appellant in the event of an explained absence on the day of a hearing. For that reason alone I am directing that this decision be placed on the Upper Tribunal website. In all other respects the case is unremarkable.

Upper Tribunal's decision in summary and what happens next

2. The Appellant's appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal involves an error on a point of law. For that reason – and ignoring for the present some procedural technicalities – I am setting aside the tribunal's decision. The Secretary of State's representative is in agreement on that course of action, but I am giving reasons primarily for the benefit of the First-tier Tribunal.

3. The Appellant's case now needs to be reheard by a new First-tier Tribunal (FTT). I cannot predict what will be the outcome of the re-hearing. The fact that this appeal to the Upper Tribunal has succeeded *on a point of law* (which relates purely to a procedural issue) is no guarantee that the re-hearing of the appeal before the new FTT in Leicester will succeed *on the facts*. The previous Tribunal may have come to the 'right' decision on the facts or the merits of the Appellant's case.

4. So the new tribunal may reach the same, or a different, decision to that of the previous tribunal in January 2016. It all depends on the findings of fact that the new tribunal makes.

The background to this appeal to the Upper Tribunal

5. On August 21, 2015 the Secretary of State's decision-maker made a decision that the Appellant no longer qualified for employment and support allowance (ESA). This was because the Appellant scored only 6 points (for mobilising), less than the 15 points required to qualify for ESA.

6. The Appellant appealed. His appeal was listed for January 20, 2016. The day before the hearing, on January 19, 2016 and at 4.41 pm, his representative's organisation sent the tribunal office an e-mail saying that unfortunately the representative was ill, and asking for a postponement.

7. The FTT convened on January 20, 2016. It considered the representative's request. It noted the representative was ill but noted there was no explanation for the absence of the Appellant himself. The FTT decided to go ahead in his absence.

8. The FTT in the event dismissed the Appellant's appeal, confirming the award of 6 points only on the ESA assessment. The Appellant's representative applied for the FTT decision to be set aside.

9. On February 4, 2016 a District Tribunal Judge refused to set aside the decision.

10. On February 11, 2016 the Appellant wrote to the tribunal office saying that his representative had sent him a text on the day before the FTT hearing, stating that they were unable to attend owing to illness, and that they had asked the tribunal for a postponement. The text did not suggest he should attend the hearing in any event.

11. On March 9, 2016 the FTT issued a statement of reasons for its decision of January 20, 2016. The District Tribunal Judge refused permission to appeal. The

Appellant then appealed to the Upper Tribunal, stating that his representative had informed him not to attend the hearing. This is not quite what the representative's text had said but it could have been (and plainly was) read in that way, especially by an individual who was not well-versed in tribunal procedures.

The proceedings before the Upper Tribunal

12. Upper Tribunal Judge Mitchell subsequently gave permission to appeal. Mrs J Tarver for the Secretary of State supported the appeal, arguing that the tribunal had failed to have regard to rules 2(2)(c) and 31(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685). In particular, she suggested that the FTT should have arranged for the Appellant to be telephoned to enquire as to the reason for his absence. In making that submission Mrs Tarver relied upon the Employment Appeal Tribunal's decision in *Cooke v Glenrose Fish Co* [2004] ICR 1188.

13. The case was subsequently transferred to me for decision. I was less persuaded that the FTT's decision was necessarily wrong in law, despite the support from the Secretary of State. I therefore issued further observations to the following effect:

> "1. This appeal has been transferred from Upper Tribunal Judge Mitchell to myself for decision. I note it is a supported appeal. Mrs J Tarver, the Secretary of State's representative, essentially supports the appeal on a procedural ground. Mr Sutcliffe has written stressing his medical conditions but understandably has not addressed the procedural point. I have to say I am yet to be satisfied this First-tier Tribunal erred in law. In those circumstances I make the following comments. They do not represent a decided view.
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> 2. First, the Tribunal hearing was on 20 January 2016. The representative's postponement request was e-mailed to the Tribunal office at 16:41 on the 19th, and forwarded remarkably promptly to the venue at 17:11 the same day. It may well not have been seen until the morning of the 20th. An experienced representative (and this was the Community Legal Service) should know that in such circumstances they should advise the Appellant to attend in any event (see Commissioner's decision CDLA/3680/1997). Representatives, like appellants, are under a duty to co-operate with the Tribunal.
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> 3. Second, the Tribunal on the 20th clearly gave some consideration to whether to adjourn or whether to proceed. The Tribunal has a fair degree of discretion in making such case management decisions. It is not for the Upper Tribunal to micro-manage such interlocutory rulings. The Upper Tribunal can only interfere if there is an error of law.
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> 4. Third, I have to say I am by no means convinced there is *always* a duty on a Tribunal to arrange for a non-attending appellant to be telephoned on the day of the hearing to ascertain their intentions. I do not think the employment case law cited by Mrs Tarver is clear authority for such a proposition. It may well be good practice to do so but much will surely depend on the factual circumstances. However, is it really necessarily an error of law for the Tribunal not to (i) make a telephone call and/or (ii) make a record of same?
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> 5. Fourth, rule 2(2)(c) refers to the importance of participation. However, the Tribunal in the present case noted the age of the case, which it was entitled to regard as significant by virtue of rule 2(2)(e).

> 6. Fifth, it may well be that in the present case the decision to go ahead was within the range of reasonable responses by any tribunal (in which case it can hardly be an error of law), given the information to hand. Arguably the less satisfactory decision was the later refusal to set aside. However, while that decision might be seen as robust, it is arguably again sustainable on the information that was then before the District Tribunal Judge. I can see that the text sent by the representative and reproduced at p.82 *might* have given the Appellant the impression that he need not attend the hearing. However, that evidence was not before the Tribunal either on the hearing date or when considering the set aside application.
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> 7. I am therefore asking whether the Secretary of State's representative wishes to adjust her position on this appeal."

14. Mrs Tarver duly reconsidered the matter as I requested. She now accepts there was no *duty* on a FTT to telephone an absent appellant, but suggests on the basis of *Cooke v Glenrose Fish Co* that tribunals should always give *consideration* as to whether that was an appropriate course of action. I disagree with that proposition for the reasons I explain further below.

15. Mrs Tarver also argues on the basis of *Cooke v Glenrose Fish Co* that where a robust approach is taken by a tribunal to proceeding in the unexplained absence of the appellant, it behoved tribunals thereafter to adopt a more flexible and discerning attitude when considering a subsequent application to set aside (see also *DG v Secretary of State for Work and Pensions (DLA)* [2011] UKUT 14 (AAC) at paragraph 32). I agree with that proposition, for the reasons I gave in *DG* and for the reasons given by the Employment Appeal Tribunal in *Cooke v Glenrose Fish Co*.

16. In the particular circumstances of the present case, Mrs Tarver further submits that the District Tribunal Judge adopted an unduly rigid approach to the set aside application and so erred in law. She accepts that the reasons for the Appellant's non-attendance did not come to light until after the District Tribunal Judge had refused the application. Nonetheless, she argues that the Appellant was effectively mis-advised by his representative, and fairness and justice required a fresh hearing on the merits of the appeal.

17. The Appellant is understandably content with that solution.

The Upper Tribunal's decision

18. Despite my earlier misgivings, but given the Secretary of State's support, I therefore conclude that the FTT's decision of February 4, 2016 refusing to set aside its earlier substantive decision of January 20, 2016 involves an error of law. I therefore allow the Appellant's appeal (which in terms has always been, in effect, an appeal against both the original decision and the refusal to set aside). I accordingly set aside the FTT's decision refusing to set aside its earlier decision.

19. There is no point in remitting the set aside application to the FTT. I re-make that decision to the effect that the FTT's original decision of January 20, 2016 is set aside and a fresh hearing before a new FTT panel is directed.

20. There is, in fact, a further reason for adopting this course of action, albeit a reason that has only just come to light on closer scrutiny. The FTT on January 20, 2016 noted two reasons in the record of proceedings for deciding to go ahead. One was the unexplained absence of the Appellant. The other was that "this is a claim that is almost a year old." The FTT's statement of reasons made the same point:

"The appellant's claim questionnaire is dated 20/02/15 and the claim is almost a year old. It is important that the matter is heard without further delay".

21. It is true that the original ESA award was made on January 15, 2015, 12 months previously. The Appellant also completed the ESA questionnaire in February 2015. However, the Appellant did not undergo an ESA medical assessment until August 11, 2015, and the supersession decision which had the effect of stopping his award of ESA was made on August 21, 2015.

22. On those facts, the FTT at the hearing in January 2016 was obviously concerned with the Appellant's condition down to the date of the decision under appeal (i.e. August 21, 2015) – see section 12(8)(b) of the Social Security Act 1998. The hearing on January 20, 2016 was therefore only 5 months later, not a year later. The fact that the *claim itself* was a year old was neither here nor there. The original award decision could have been made in January 2014, but it would have been equally plainly wrong to say "the claim is two years old so the matter should be heard without further delay". What matters is how old the operational *decision* was.

23. This is, of course, a reason for finding that the FTT erred in law in the original decision on January 20, 2016 by proceeding to hear the case in the Appellant's absence, as in refusing an adjournment it took into account an irrelevant consideration. However, technically this point has not been put to the parties and so it would be inappropriate to rely exclusively on that matter. I can get to the same result by setting aside (and re-making) the FTT's decision on the set aside application.

What happens next: the new First-tier Tribunal must start again

24. There will accordingly need to be a fresh hearing of the appeal before a new FTT. Although I am setting aside the FTT's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether or not the Appellant still qualified for ESA. That is a matter for the good judgement of the new tribunal. That new tribunal must review all the available relevant evidence and make its own findings of fact.

25. In doing so, the new FTT will have to focus on the Appellant's circumstances as they were as long ago as August 2015, and not the position as at the date of the new FTT hearing, which will obviously be more than 18 months later. This is because the new FTT must have regard to the rule that a tribunal "**shall not** take into account any circumstances not obtaining at the time when the decision appealed against was made" (emphasis added; see section 12(8)(b) of the Social Security Act 1998). As already noted, the decision by the Secretary of State which was appealed against to the FTT was taken on August 21, 2015.

26. In the remainder of this decision I deal with the implications of the EAT's decision in *Cooke v Glenrose Fish Co* for tribunal practice.

The significance of the decision in *Cooke v Glenrose Fish Co*

27. In *Cooke v Glenrose Fish Co* the applicant's unfair dismissal complaint was listed for hearing before an employment tribunal. On the day of the hearing the employers and their representative attended; however, neither the applicant nor his solicitor was present. The employment tribunal waited 20 minutes and then decided to proceed in the applicant's absence. Perhaps unsurprisingly, the complaint of unfair dismissal was dismissed. It subsequently transpired that the non-appearance on the day by the applicant and his representative was due to an administrative oversight by those solicitors.

28. At that time the employment tribunal's procedural rules (the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 (SI 2001/1171) made the following (very general) provision in rule 11(3):

> "(3) If a party fails to attend or to be represented at the time and place fixed for the hearing, the tribunal may, if that party is an applicant, dismiss or, in any case, dispose of the application in the absence of that party or may adjourn the hearing to a later date; provided that before dismissing or disposing of any application in the absence of a party the tribunal shall consider his originating application or notice of appearance, any representations in writing presented by him in pursuance of rule 10(5) and any written answer furnished to the tribunal pursuant to rule 4(3)."

29. In *Cooke v Glenrose Fish Co* the applicant's subsequent appeal to the Employment Appeal Tribunal (EAT) was allowed. Burton J, giving the EAT's judgment, referred to judicial guidance given to chairmen by the President of the Employment Tribunal, which had stressed the need for a judicial discretion to be exercised in making a decision as to whether to proceed in a case where one party was absent. The EAT, following its earlier decision in *Southwark LBC v Bartholomew* [2004] ICR 358, further held as follows (see paragraph [12]; emphasis as in the original):

> "It is plainly essential for the Employment Tribunal to exercise that judicial discretion, and consequently whereas it may be wrong to say that in every case a Tribunal must telephone if there is an absent party, it is on the other hand clearly right to say that in every case a Tribunal must *consider* whether to telephone, and must, as it appears the Tribunal did not in this case, enquire further particularly of a represented other party what news there is or was of the other party, and as to whether in those circumstances it is possible that the other party is delayed or has forgotten about the matter but was, so far as can be understood, intending to come."

30. The EAT accordingly concluded as follows (at paragraph [16]):

> "that in ordinary course the best procedure is that which is followed by this Employment Appeal Tribunal; but we are not laying down as a requirement that every Tribunal should telephone, we are saying that that course should be considered, and, in a case such as *Bartholomew*, or such as this, we would need very good reason why the course of a telephone call would not have been followed."

31. It should also be noted that the current Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013/1237) give effect to the ruling in *Cooke v Glenrose Fish Co* by specifically providing as follows (see Schedule 1, rule 47; emphasis added):

> **"Non-attendance**
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> 47. If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. *Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.*"

32. However, I am not satisfied that *Cooke v Glenrose Fish Co* can be taken as good authority for a proposition that First-tier Tribunals in the Social Entitlement Chamber should consider in every non-attended case whether to arrange for the appellant to be telephoned to ascertain the reason for the non-appearance. I say that for a number of reasons.

33. First, while the EAT's decision in *Cooke v Glenrose Fish Co* may be a decision by a court or tribunal of equivalent seniority to the Upper Tribunal, it is not a decision on the identical legal provision (in contrast, see e.g. R(IS) 3/08) at paragraph 22). As noted above, rule 11(3) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 vested employment tribunals with a broad discretion in very general terms. Rule 31 of the Social Entitlement Chamber's procedural rules specifically directs tribunals that they may proceed in a party's absence (a) if satisfied the party has been properly notified; and (b) if they consider "it is in the interests of justice" to proceed with the hearing. As a matter of common sense, any FTT in the Social Entitlement Chamber would, of course, "consider any information which is available to it … about the reasons for the party's absence" in deciding what the interests of justice and the overriding objective require. However, there is no express requirement in the Social Entitlement Chamber's procedural rules that such information should be "after any enquiries that may be practicable".

34. Second, the decision on whether to proceed in the absence of a party who fails to attend may be affected by the jurisdictional context. The employment tribunal is a party and party tribunal in which a contested unfair dismissal hearing may easily take a day or indeed several days of hearing time. The practical incentive in that jurisdiction to ensure that appeals listed for hearing are effective may well be far more pressing than in the Social Entitlement Chamber, where the typical hearing is probably no more than an hour and a non-attended case can be readily set aside and relisted where appropriate. Furthermore, the standard notice of hearing letter sent to appellants in the Social Entitlement Chamber states quite clearly that "If you do not attend, the tribunal may decide the appeal in your absence." In addition, of course, parties must "co-operate with the Tribunal generally" (rule 2(4)(b)), which must of necessity include advising the tribunal office if there is a problem with attendance.

35. Third, the decision by any tribunal on whether to proceed in the absence of a party who fails to attend will necessarily be heavily fact-specific. As the EAT has noted more recently,

> "there is some authority that suggests that *in certain circumstances* in the event of non-attendance by a party it is incumbent on the Tribunal to contact that party and discover why there has been non-attendance" (*Quashie v Methodist Homes Housing Association* [2012] ICR 1330 at paragraph [14], emphasis added).

For example, it should be noted on the facts of *Cooke v Glenrose Fish Co* itself that the appellant had solicitors on the record who had been involved in negotiations over the agreed bundle shortly before the hearing. Accordingly, as Burton J noted "at the very least, a question mark would have been raised in the mind of the tribunal" (at paragraph [13]) as to why one party had not attended at all. So in those particular circumstances, Burton J felt able to describe the employment tribunal's decision *not* to institute a telephone enquiry as an "extreme step" (at paragraph [15]). In the Social Entitlement Chamber, in contrast, and in part for the reasons canvassed in the previous paragraph, such an omission would be entirely normal in the typical case.

36. Fourth, and more pragmatically, asking a tribunal clerk to telephone a non-attending appellant to ascertain the reason for their non-attendance is not

unproblematic. Even assuming the clerk has the time to do so (and he or she may be having to cover more than one hearing room), clerks vary in their inter-personal listening and communication skills (see also *GK v Secretary of State for Work and Pensions (ESA)* [2016] UKUT 465 (AAC) at paragraph 10). The appellant might say, on being telephoned on the day, that she was not feeling very well. The clerk might reply "Well, if you prefer, the tribunal can always deal with your case in your absence". The appellant's response "well, I suppose that's alright as I said what I wanted to say in my appeal letter" can then easily get translated by the clerk giving a message to the tribunal that the appellant "is happy for you to go ahead in her absence", and duly recorded as such in the record of proceedings. There may have been no discussion of the option of an adjournment and the appellant's response is unlikely to be a fully informed one but none of that will be evident on any subsequent application for a set aside or a further appeal.

37. For all these reasons I do not accept that *Cooke v Glenrose Fish Co* is a read-across authority for the proposition that tribunals in the Social Entitlement Chamber (SEC) must *as a matter of law* consider whether to telephone an appellant in the event of an unexplained absence. Where there is an unexplained absence, the First-tier Tribunal must consider and apply rules 2 and 31. It must check there has been proper notification of the hearing (rule 31(a)). It must also consider whether or not it is in the interests of justice to proceed (rule 31(b)), taking into account the overriding objective. There may be situations in which making such further enquiries is good practice, but it all depends on the circumstances. The test in rules 2 and 31 cannot be fettered by elevating what may in some circumstances be an example of good practice into a proposition of law.

38. None of the discussion above should be regarded as detracting from the validity of the entirely separate point made in *Cooke v Glenrose Fish Co* to the effect that a more robust approach to proceeding in the unexplained absence of a party should be matched subsequently by a "less stringent attitude on a review [or, in the SEC context, an application for a set aside] if a party who has not attended comes forward with a genuine and full explanation and shows that the original hearing was not one from which he absented himself" (at paragraph [21(1)]

Conclusion

39. I conclude that the decision of the First-tier Tribunal dated February 4, 2016 involves an error of law. I allow the Appellant's appeal and set aside that decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). I also re-make the FTT decision so as to set aside the substantive FTT decision dated January 20, 2016 (section 12(2)(b)(ii)). The result is the case must be remitted for re-hearing by a new tribunal subject to the directions above. My decision is also as set out above.

Signed on the original
on 7 February 2017

Nicholas Wikeley
Judge of the Upper Tribunal