DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 11 July 2017 at Darlington under reference SC262/17/00332) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.

B. The reconsideration must be undertaken in accordance with *KK v Secretary of State for Work and Pensions* [2015] UKUT 417 (AAC).

C. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on her claim that was made on 8 November 2016 and decided on 26 January 2017 from the effective date of 1 March 2017.

D. In doing so, the tribunal must not take account of circumstances that were not obtaining at that time: see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

REASONS FOR DECISION

1. This appeal raises the issue of how a tribunal should proceed when a registrar has refused to postpone a hearing for reasons that are clearly inadequate.

2. The claimant's appeal against the Secretary of State's decision on her entitlement to a personal independence payment was listed for hearing on 11 July 2017. On 3 July, the claimant's welfare rights representative emailed the tribunal to point out that she had been triple booked for two hearings in Darlington and had not been sent notification of the hearings. The claimant's case was one of those.

3. The email was referred to a registrar who refused to postpone the hearing. A registrar is a lawyer to whom limited powers of case management are delegated under rule 4 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI No 2685).

4. The registrar's reasoning was set out in a **Directions Notice**. It began by referring to the application, and continued:

> The tribunal have no record of Durham Welfare Rights being named as representative for the Appellant. The appeal was listed for hearing on 19/04/17.

In fact, that was the wrong date. It was the date of the other clash mentioned in the representative's email. This does not appear to have affected the registrar's reasoning and was probably a typo. The registrar then set out her reasons:

> 1. The hearing scheduled to take place on 11/04/17 at Darlington County Court is not postponed.
> 2. This date has been allocated to the appeal and this is inevitably to the exclusion of other appeals waiting to be listed.
> 3. The Appellant is reminded that she may bring a family member or friend to support her at the hearing.
> 4. The Appellant should attend the hearing at Darlington at 10am as the hearing will take place at that time or shortly after. If you do not attend the hearing may take place in your absence.

Paragraph 1 records the registrar's decision. Paragraphs 3 and 4 contain helpful advice to the claimant in the light of that decision. The only reasoning for the decision is in paragraph 2, which has to be read in the context that the tribunal had not recorded that the claimant had a representative.

5. Just to avoid any misunderstanding, I am dealing with an appeal against the decision of the tribunal on the claimant's appeal, not an appeal against the registrar's decision. Her reasoning is, though, relevant to the appeal before me.

6. The representative's email and the registrar's decision and **Directions Notice** were in the papers before the tribunal at the hearing. The claimant attended with her husband but without a representative. The Secretary of State sent a presenting officer. There is nothing in the record of proceedings or in the tribunal's written reasons to suggest that the possibility of an adjournment was discussed at the hearing or considered by the tribunal.

7. The claimant did not identify a representative in her notice of appeal. I do not know when it was signed as the claimant by mistake put her date of birth in to the box for the date of signature. I have obtained a copy of the First-tier Tribunal's computer records for this case and there is no mention of the tribunal being notified that the claimant had a representative before the email of 3 July.

8. In my grant of permission to appeal, I considered how the registrar should have dealt with that email. I wrote:

> … how did it come about that the representative believed they were representing at least two appellants without the tribunal being aware of it? That required investigation. It may be that the fault lay with the claimant, but it may not. If something had gone wrong, even if it was not the tribunal's fault, it did not follow that the correct approach under the overriding objective was to refuse a postponement. The registrar referred to the inevitable exclusion of other appeals, but why should the inconvenience suffered by others be a reason for depriving the claimant of representation?

There was a balance to be struck, but it seems that the registrar did not engage with that approach. In those circumstances, should not the tribunal have done so?

9. I begin with this proposition: the registrar's reasons as recorded were clearly inadequate to justify her decision. It amounts to saying that any case that has been listed cannot be postponed because inevitably another case was deprived of the slot allocated to the claimant. That cannot be right. The loss of the right to be represented and the delay in having a case come before the tribunal are not directly comparable such that the latter always trumps the former. It would mean that the power to postpone given by rule 5(3)(h) of the First-tier Tribunal's rules of procedure would be in effect redundant.

10. What was required was a judgment of what was fair and just in the light of the overriding objective in rule 2. The registrar needed to consider the positions of the claimant, the party who would otherwise and have been listed, and the knock-on effect of delays if the claimant's appeal had to be relisted. Of these, the party who had missed out to the claimant had the least significant interest. Nothing could be done to retrieve the delay to their appeal and there was nothing to be gained by making someone else suffer a disadvantage to even things up. The balance between the claimant and other appellants was more difficult to judge. An important factor would be how it had come about that the claimant had a representative of which the tribunal was not aware. Given that this was not an isolated case, it could not simply be put down to the claimant's failure to notify the tribunal. It was possible – I put it no higher than that – that something had gone wrong in the tribunal's office. And if that were the case, it would tip the balance in the claimant's favour. What was required was some investigation to find out how this had happened. There is nothing to show that that was done: not in the registrar's decision, nor on the hardcopy of the First-tier Tribunal's file, nor in its computer records.

11. Now, as I have said, this is not an appeal against the registrar's decision. I mention these points because they could and should have occurred to the tribunal when it heard the claimant's appeal. They should have been obvious at a quick glance over the short email and the registrar's reasons that I have set out in full. And that should have been sufficient for the tribunal at least to consider whether to proceed with the hearing. That the tribunal did not do. The failure was a serious procedure irregularity that potentially disadvantaged the claimant and that is a sufficiently serious error of procedure to justify the tribunal's decision being set aside.

12. I am not saying that registrars should compose long explanations to explain every nuance of their reasoning. What I am saying is that tribunals should be alert to the possibility that reconsideration at their own initiative may be appropriate. That is so whether the refusal to postpone was made by a registrar or a judge.

13. There is no new principle involved in this reasoning. The representative's email and the registrar's decision were included in the papers before the tribunal so that it could have the basis on which to consider whether to adjourn and the registrar's reasoning was relevant so that the tribunal could properly understand

the decision she had made. Both points – the need for tribunals to know that a request for postponement had been made and the importance of the reasons for refusing it – were made 20 years ago by Mr Commissioner Rowland in *CDLA/3680/1997*. As that decision may not be readily available, I set out what he wrote:

> 3. I appreciate that chairmen and tribunals are under pressure to resist applications for postponements because they have financial implications for the Independent Tribunal Service. No doubt there are many such applications that can properly be refused but the overriding consideration must be the requirements of justice. I do not know whether the full-time chairman considered the evidence in the case before refusing the postponement. Did he expect the claimant to renew her application personally before the tribunal who could have formed a view as to the extent to which she might be assisted by a representative? Did he disbelieve the representative when it was said that no-one could attend on the claimant's behalf? Did he expect the claimant to find another representative? It would have been helpful if he had indicated what his reasoning was because it might have prompted some appropriate action on behalf of the claimant or her representative. As it was, the tribunal had to consider whether to proceed in the absence of the claimant. I do not see how they could properly consider that question without knowing the ground upon which the application for postponement had been made. Had they been aware of it, they might well have decided to adjourn the hearing in the present case. In my view, the failure of the disability appeal tribunal Central Office to ensure that the tribunal had before them the necessary documents led to a breach of the rules of natural justice because the tribunal were unable to consider the claimant's case on the issue of the adjournment. On that ground alone, I set aside the tribunal's decision.

Signed on original
on 05 April 2018

Edward Jacobs
Upper Tribunal Judge