IN THE UPPER TRIBUNAL **Appeal No.** CJSA/742/2017 and CJSA/743/2017
ADMINISTRATIVE APPEALS CHAMBER

Before Judge S M Lane

DECISION

This decision is made under section **12(1)(a)** of the Tribunals, Courts and Enforcement Act 2007].

CJSA/742/2017: -

The decision of the First-tier Tribunal ('F-tT') **IS NOT SET ASIDE.** Although the decision of the First-tier Tribunal involved errors of law, the errors could not have affected the outcome of the appeal. I accordingly exercise my power under section 12(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 NOT to remake the decision.

CJSA/743/2017: -

The decision of the First-tier Tribunal ('F-tT') **IS NOT SET ASIDE.** Although the decision of the First-tier Tribunal involved the making of an error of law, the error could not have affected the outcome of the appeal. I accordingly exercise my power under section 12(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 NOT to remake the decision.

REASONS FOR DECISION

1. These two appeals relate to decisions by the Secretary of State in respect of the appellant's entitlement to Jobseeker's Allowance (JSA). They are part of a long-running dispute by the appellant about what he is legally required to do as a jobseeker to remain entitled to Jobseeker's Allowance under Jobseeker's Act 1995 and Jobseeker's Allowance Regulations 1996.

2. The Secretary of State accepts that a number of errors were made, but submits that they were immaterial to the outcome of the legal issues. I agree with him.

CJSA/742/2017: F-tT's failure to consider a ground of the appeal - variation of Jobseeker's Agreement – failure to comply with a direction – termination of Jobseeker's Agreement – reasonableness of direction

3. The Secretary of State's decision in this appeal was that the appellant's Jobseeker's Agreement (JSAg) 'terminated' on 19 July 2015. The JSAg was terminated because the appellant failed to enter a varied JSAg, the terms of which were decided by the Secretary of State following referral of a dispute to him. The dispute arose after both sides proposed variations to an existing JSAg and could not agree on which should be incorporated into the JSAg.

4. Where a dispute over the terms of a JSAg arises, the Secretary of State has a duty to answer certain statutory questions regarding that dispute and to decide the appropriate terms for a varied JSAg: section 10, Jobseeker's Act 1995. If a claimant does not enter the agreement as varied by the Secretary of State, the JSAg may be brought to an end under section 10(6)(c)] of the Jobseeker's Act 1995. The prescribed time allowed to a claimant for entering the JSAg as varied by the Secretary of State is 21 days: regulation 38, JSA Regulations 1996.

5. When the JSAg was terminated, the appellant ceased to fulfil the condition in of entitlement to benefit in section 1(2)(b). This requires a claimant to enter a Jobseeker's Agreement (JSAg) that remains in force. The Secretary of State was accordingly entitled to supersede the appellant's entitlement to benefit, and did so.

6. The facts were these: The appellant had signed a JSAg had in April 2015. On 23 June 2015 the appellant proposed to variations to his JSAg at an interview with his employment adviser. The employment adviser did not agree with the variations and made counter proposals. This led to a dispute over the appropriate terms being referred to the Secretary of State for resolution. On 29 June 2015 the Secretary of State decided that the appellant's proposals were unacceptable, but accepted the variation proposed by the employment adviser which he considered to be reasonable. He gave a direction to the appellant to enter the JSAg. The appellant did not enter the varied agreement within the time prescribed by the JSA Regulations 1996 for doing so, and the JSAg was brought to an end. The end date was 19 July 2015. Following this, the appellant's award of JSA was terminated by supersession.

7. The appellant's grounds of appeal were copious. Some of them relate to, and have been decided in, other appeals of his, and I will deal with them briefly as they impinge on the appeals now before me.

i. He already had 'a perfectly reasonable JSAg' (sometimes called in the papers a Claimant Commitment. I will use JSAg).
ii. His proposals for a variation were only a way of testing the current legislation regarding what was meant by a reasonable JSAg. They were not an admission that his current JSAg was unreasonable.
iii. He considered that he had good cause for not signing it.
iv. The proposals he made on availability were exactly the same word for word as his advisor (employment adviser) used.
v. The DWP's direction did not state any proposed changes to the availability conditions in the existing JSAg of 02/04/15 and were the same as the employment adviser proposed again on 07/07/15. No one has explained why his proposals were unreasonable.
vi. His JSAg was a contract which, because it was reasonable, could not be terminated without his consent.
vii. The DWP had not refunded the cost of a bus ticket to an appointment

8. As regards (i) the short answer is this: the appellant was at liberty to propose variations to his JSAg, as was the employment adviser [section 10(1)]. To be enforceable, they had to be agreed by both sides. In default of agreement, the

proposals could be referred to the Secretary of State. The appellant's proposals proved unacceptable to the employment adviser because, in her view, they would not fulfil the conditions in section 1(2)(a) or (c) of the Jobseeker's Act 1995 that he was, respectively, available for employment and actively seeking employment. The matter was properly referred to the Secretary of State who then had two questions to decide under section 10(5)(a)(b) and give such directions as were necessary for determining the terms of the claimant's JSAg. The appellant then had a prescribed time to enter the agreement. If he did not, the existing JSAg could be brought to an end, and with it one of the conditions of entitlement was no longer fulfilled. If that happened, the Secretary of State could supersede the existing award of JSA and terminate entitlement to benefit.

9. This is precisely what happened. The appellant set in train a statutory procedure which either or both parties were entitled to see through to the end. Once the train was in motion, the appellant could not necessarily stop it by unilateral action. The employment adviser had already referred the dispute to the Secretary of State was entitled to have the contents she proposed put before the Secretary of State.

The appellant's proposals

10. The appellant complained that (i) he had a perfectly reasonable JSAg and (ii) he was only testing the limits of the legislation. As to (i), the tribunal explained why this failed in much the same terms as I have used. As to (ii), the appellant's steps went far beyond testing the limits. He made specific proposals for a variation and his action had legal consequences, as the tribunal explained correctly. I do not see any material error of law.

11. The appellant's variation proposals were to (i) confine his statement of what he would do to find work to *''I will do everything I reasonably can to give myself the best prospect of securing employment'.* He eliminated all references to specific steps he expected to take to secure employment; and (ii) included a statement that he was not obliged to give any names of employers/organisations and websites he had contacted or visited in order to claim or continue his claim for JSA. The appellant submits that these are the same as in his existing JSAg.

12. It is true that the phrase the appellant used in proposal (i) ''*I will do everything I reasonably can to give myself the best prospect of securing employment'* was also used in his existing JSAg. Indeed, it reflects the jobseeker's obligation under s.7(1) of the Act to 'take such steps as can reasonably be expected … in order to have the best prospects of securing employment'

13. But these words plucked from section 7 cannot be considered in isolation from the requirements of regulation 18, 24 and 31 of the JSA Regulations 1996. Regulation 18, which contains mandatory terminology, states:

> (1) '… a person *shall* be expected to have to take more than two steps in any week, unless taking one or two steps is all that is reasonable for that person to do in that week'

14. This is followed by a long list of the types of steps a claimant might reasonably be expected to take. The list is inclusive, so there may be other steps which are not included that a claimant could take to find work, though it would take some creativity to think of them.

15. The appellant's existing JSAg sets out 5 steps he will take to improve his chances of finding a job. This was in addition to stating he would look for all types of work without limitations on the days or hours on which he was prepared to work. There is therefore a significant difference between what the appellant proposed in his variation and what the legislation required (ground (iv)).

16. The Secretary of State is, moreover, entitled under regulation 24 to require a claimant to provide a wide range of information/evidence to support his claim or continuing entitlement. The standard fortnightly declaration is only one of many types of further evidence that the Secretary of State may require. If the Secretary of State does require the production of further information or evidence, there is no doubt from the wording of regulation 24 (1) (2) (4) (5) and (7) that a claimant is under a duty to provide it within time scales set out in regulation 24(8) and (9).

17. Failure to comply with requirements under regulation 24 (1) (2) (4) (5) and (7) does not result in automatic cessation of benefit. But the failure to supply the information clearly may raise doubts about whether a claimant satisfies, or continues to satisfy, one or more of the conditions of entitlement to benefit. The consequence of that doubt may be a decision by the Secretary of State not to award, or to terminate, benefit depending on the stage of the entitlement process.

18. Regulation 31 prescribes the contents of a JSAg. This includes, amongst other things, hours of availability, restrictions on availability including location or type of employment, the type of employment which the claimant is seeking, and the action which the claimant will take to seek employment and improve his prospects of finding it.

19. It is therefore not surprising that the employment advisor declined to agree the appellant's proposals. What is odd, however, is that she viewed them as too vague to show that the appellant was *available* for work in the absence of detail on the types of steps he might take.

20. The appellant's argued that as he had not actually made any proposal to change the hours or days on which he was available, the employment adviser was wrong to say that he did not fulfil the requirement of availability for work.

21. At this point, it is as well to recall that the employment adviser is not the decision maker, and that it is the decision maker's decision that counts. However, the decision maker did partly adopt the employment adviser's view on the issue of availability for work.

22. That view that the appellant was not *available* for work appears to me to be a strange way to describe the problem with his proposals. I assume that the employment adviser had *R(U)5/80* at [14] in mind, and it is clear that the submission writer was relying on it in *CJSA 743/2017*. *R(U)5/80* concerned a previous kind of

unemployment benefit in which a claimant was required to be available for work but for which there was no discrete requirement that a claimant be *actively seeking employment*. Section 17(1)(a)(i) of the Social Security 1975 Act provided, as relevant: -

> 17 Determination of days for which benefit is payable
>
> (1)For the purposes of any provisions of this Act relating to *unemployment benefit…*—
>
> (a)subject to the provisions of this Act, a day shall not be treated in relation to any person—
>
> (i)as a day of unemployment unless on that day he is capable of work and he is, or is deemed in accordance with regulations to be, *available to be employed* in employed earner's employment; … (italics added)

Regulation 7 of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 dealt with restrictions placed by a claimant on the nature, hours, rate of remuneration, locality and conditions of entitlement. If such restrictions resulted in the claimant having no reasonable prospects of securing employment, he was not to be treated on that day as unemployed. Regulations 6, 7 and 8 contain of the JSA Regulations 1996 contain similar restrictions.

> 7(1) For the purposes of unemployment, sickness and invalidity benefit –
>
> (a) Where in respect of any day a person places restrictions on the nature, hours, rate of remuneration or locality or other conditions of employment which he is prepared to accept and as a consequence of those restrictions has no reasonable prospects of securing employment, that day shall not be treated as a day of unemployment unless –
>
> …(i) he is prevented from having reasonable prospects of securing employment consistent with those restrictions only as a result of adverse industrial conditions…' or
> (ii) the restrictions are nevertheless reasonable in view of his physical condition, or
> (iii) the restrictions are nevertheless reasonable having regard both the nature of his usual occupation and also the time which has elapsed since he became unemployed;
> ...

23. It was in this context that a Commissioner stated in *R(U)5/80* [14] that

> '…Being available to be employed in employed earner's employment, in terms of section 17(1)(a)(i) of the said Act, means being available in an active, positive sense, that is by making oneself available. Availability implies some active step by the person concerned to draw attention to his availability: it is not a passive state in which a person may be said to be available provided he is sought out and his location is ascertained. He must also be able and prepared to accept any offer of suitable employment brought to his attention.'

24. The Commissioner was clearly trying to fill a gap in the law arising from the lack of any obligation actively to seek work. In Ogus, Wikeley and Barendt's *The Law of Social Security* (4th edition, 1995) comment (p109) the authors note that doubts expressed by other Commissioners about the correctness of *R(U)5/80* led to the change in law by which the unemployed were required not only to be available for work, but actively seeking it. The change was effected in the Social Security Contributions and Benefits Act 1992.

25. So, since 1992, the requirements of availability for employment and actively seeking employment are separate conditions of entitlement. One could still say that

the two conditions may shade into each other at some point, so that where a claimant's proposals are devoid of any detail or steps that one would normally expect him to take to find work, one may conclude that he does not really mean to be available for work despite the declaration he signs to that effect. Given that more than 25 years have passed since the distinction became embodied in law, it is a mystery why decision makers and employment advisers continue to rely on availability for work instead of the tailor-made concept of actively seeking work.

26. But the real problem here, which the decision maker recognised (p23-24), was whether the appellant's proposals were sufficient to indicate that he was actively seeking work. By his decision on 23 June 2015, the decision maker rejected the appellant's proposals on grounds of *both* actively seeking employment *and* availability. (p25-26). Either of these was a sufficient basis on which to reject the appellant's variation and, ultimately, bring his JSAg to an end.

27. There can be no real doubt that the appellant's proposed variations were insufficient to show that he was actively seeking employment. That was fatal to the appellant's case and no tribunal could reasonably have come to any other conclusion. Indeed, the tribunal clearly did come to this conclusion at [7] of its decision. Its omission to explain why it rejected his submission on availability could not make any difference to the result.

Why were his proposals unreasonable?

28. The appellant's next ground is that no one has explained why his proposals were unreasonable since, by his reckoning on availability, they were exactly the same word for word as his advisor's (ground v).

29. This harks back to section 10. The reference to the Secretary of State under section 10(5) requires the Secretary of State to answer the questions (i) whether the claimant would satisfy the conditions for actively seeking employment and availability if he complied with the agreement as varied; and (ii) whether it is reasonable to expect him to have to comply with the agreement as proposed to be varied.

30. In the usual run of cases, the claimant is asking the tribunal to decide it would not be reasonable to ask him to comply with the Department's proposals because the claimant considers them to be too onerous. In this case, however, the appellant has turned the question the other way around: would it be reasonable for him to comply with his own vague proposals? To ask the question is to answer it: To require a claimant to comply with terms that were considered inadequate to fulfil the conditions of entitlement would be absurd.

Termination of a JSAg by effluxion of the prescribed time

31. When granting permission to appeal, I was concerned about the use of the phrase 'the [existing] Jobseeker's Agreement came to an end … because the appellant failed to comply with a direction within the prescribed period'. This appeared to suggest that it was the JSAg automatically came to an end after the prescribed period of 21 days given to claimants to enter a varied JSAg. That would have been incorrect as a matter of law. A decision maker has a discretion whether to

terminate the JSAg under section 10(6)(c). He *may* bring it to an end, but he may not. If the decision maker had gone awry by considering that the JSAg automatically came to an end, the error was put right in the mandatory reconsideration in January 2016.

32. The tribunal did not fall into error. It states in [7] that it was necessary for the Secretary of State to bring the JSAg to an end.

33. It would certainly be better if, in making decisions under this subsection, the wording made it clear that the decision maker consciously decided to bring the JSAg.

Miscellaneous points that do not require further discussion.

34. Good cause: The appellant argued that no one considered whether he had good cause for not entering the agreement as varied by the Secretary of State (ground (iii). He cites section 19(5)(c) of the Jobseeker's Act 1995. That section relates to sanctions, which did not arise in the decisions before me.

35. Jobseeker's Profile: The appellant objects that the JSAg as varied requires him to look for work as 'a catering assistant, in call centre, as a telesales operative…'. The submission writer refers to this 'variation' at Section 4 of the submission, and the tribunal considered these jobs to be part of the employment adviser's proposal [5].

36. The reference to these specific jobs is contained in the 'Jobseeker's Profile', which is clearly stated in the form NOT to form part of the JSAg (e.g. p17). However, the actual decision varying the JSAg does not identify these as part of the commitment. It does identify eight steps to replace the five in the existing JSAg. It cannot be seriously argued that the newly specified steps did not improve the appellant's likelihood of finding work, given his previous lack of success in finding work.

37. The Secretary of State accepts that the tribunal should not focus on jobs in the Jobseeker's Profile. I agree. But the tribunal did not more than mention these in passing, and they played no further part in its decision. In the circumstances, I do not consider that the tribunal erred by relying on immaterial considerations.

38. This leave two matters:

(i) Contract issues: The appellant wrote on 23 June (p22) that he would sign the employment adviser's proposals conditionally on being paid £25,000 by the DWP, and also submitted that, as his contract (in his eyes) reasonable, it could not be terminated without his consent. Both of these submissions have as their basis his mistaken belief that mistaken belief that a JSAg is an enforceable civil contract. As explained in *CJSA/2170/2016 – CJSA/2176/2016;* this is simply wrong. One really need not look further than section 9(2) Jobseeker's Act 1995.

(ii) his unpaid bus fare: That is not a matter within the jurisdiction of the Tribunal.

CJSA/743/2017: availability for employment in the weeks from 20 July 2015

39. This case follows on from CJSA/742/2017**.** The Secretary of State decided on 28 July 2015 that the appellant was not and could not be treated as available for employment in the weeks from 20 July 2015 because he had imposed restrictions on the nature terms, conditions or locality of employment he was prepared to accept and had not shown that he had reasonable prospects of securing employment thereby. The decision was confirmed on a mandatory reconsideration dated 19 January 2016.

40. The appellant submitted, as he did in the previous appeal, that this cannot be correct since he did not propose any change to the hours, days, nature of work, locality or remuneration for which he was seeking employment.

41. At the heart of the matter is the appellant's view that the Secretary of State had no right to ask him to divulge information about his jobseeking activities.

42. As mentioned earlier, it is possible that a claimant's refusal to divulge information about his jobseeking activities may indicate that he has no genuine intention to be available for work. That, however, is qualitatively different from different from saying he has restricted his availability under regulations 6 – 8 (hours, nature of employment, terms and conditions, locality) and different findings of fact would be needed to support such a finding. Nor would regulation 10 (reasonable prospect of finding employment) be engaged, since it relies on a relevant restriction under regulation 7 or 8 of the JSA Regulations 1996. The solution to this problem lies in deploying the condition of actively seeking employment instead of availability for employment.

43. The question, then, is whether the tribunal failed to deal with the appellant's submission and the effect, if any, that this had on the decision.

44. I find that the tribunal not deal with the availability issue adequately. At [7] of CJSA/743/2017 the tribunal cross refers to [7] in *CJSA/742/2017* and asserts that it dealt with the availability issue there. Paragraph 7 of *CJSA/742/2017*, however, just contains an assertion of non-compliance in respect of availability. It does not tackle the submission the appellant made.

45. This leads to the question of whether it makes any difference. I consider that it does not. First, the tribunal did briefly deal with the problem as being one of actively seeking employment which is, in my view, the more correct approach. Secondly, the finding that the appellant would not satisfy the condition of actively seeking employment is a knock-out blow since his entitlement to JSA falls if one or the other of the two conditions is not made out.

46. Since the appellant's grounds of appeal are, by and large, the same in both appeals, I will not prolong this decision by repeating them.

[Signed on original]

S M Lane
Judge of the Upper Tribunal

[Date]

17 May 2018