Appeal No. CPIP/2222/2018

IN THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Poynter

DECISION

The appeal is allowed.

The making of the decision of the First-tier Tribunal given at Hatton Cross on 12 March 2018 under reference SC173/17/01237 involved the making of an error on a point of law.

That decision is set aside.

The case is remitted to the First-tier Tribunal for reconsideration in accordance with the directions given below.

DIRECTIONS

To the First-tier Tribunal

1 The file for this appeal must be referred to District Tribunal Judge Gill for case management at the earliest opportunity.

2 Subject to any Directions that Judge Gill may give (having taken account of the wishes of the claimant):

(a) the First-tier Tribunal must hold an oral hearing at which it must undertake a full reconsideration of all the issues raised by the appeal and—subject to the discretion conferred by section 12(8)(a) of the Social Security Act 1998 and to its duty to conduct a fair hearing—any other issues it may consider it appropriate to decide;

(b) HMCTS must liaise with the appellant before listing that hearing and must only list it on a day when, at the time of listing, the claimant is able to attend.

3 The members of the First-tier Tribunal who are chosen to reconsider the case must not include the judge, medical member, or disability-qualified member who made the decision I have set aside.

To the claimant

4 You should not regard the fact that your appeal to the Upper Tribunal has succeeded as any indication of the likely outcome of the re-hearing by the new tribunal. You have won at this stage because the process that led to the previous decision of the First-tier Tribunal went wrong, not because it has been accepted that you are entitled to personal independence payment. Whether or not you are entitled will now be decided by the new tribunal.

5 You are reminded that the new tribunal must consider whether the Secretary of State's decision was correct at the time it was made. That means:

(a) it cannot take into account changes in your circumstances that occurred after 12 July 2017; and

(b) it can only consider evidence from after that date if it casts light on how you were on or before 12 July 2017.

REASONS FOR DECISION

Introduction

1 This is an appeal by the claimant, with my permission, against the above decision of the First-tier Tribunal.

2 That decision confirmed an earlier decision, made on behalf of the Secretary of State on 12 July 2017, to the effect that she remained entitled to the daily living component of personal independence payment ("PIP") at the standard rate from 16 August 2017 to 28 June 2020 but was not entitled to the mobility component or to the enhanced rate of the daily living component.

3 The Tribunal reached its decision following a hearing on 12 March 2018, which the claimant was unable to attend.

4 In summary, I have set aside the Tribunal's decision because the process it followed led cumulatively—and largely inadvertently—to a breach of its legal duty to act fairly towards the claimant when it proceeded with that hearing in her absence. That unfairness largely arose from the omissions of a clerk and a Tribunal Caseworker before the day of the hearing.

5 The Secretary of State's representative supports the appeal. She has cited the decision of Mr Commissioner Rowland (as he then was) in *CDLA/3680/1997* as authority for her position. Although I do not disagree with that decision, it was given on different facts under different procedural rules and there is no need for me to discuss it further.

Procedural history

6 I explained the relevant procedural history of this case when giving permission to appeal. What I said was as follows:

"(a) On 13 February 2018, the Social Entitlement Chamber's processing centre at Sutton generated a standard form letter notifying [the claimant] that her appeal would be heard at the Hatton Cross Venue on 12 March 2018. That letter would have been issued under bulk mailing arrangements which may have meant that it was not actually committed to the post until a few days later. I do not know whether it would have been sent first or second class.

(b) On 21 February 2018, [the claimant] says she telephoned the Social Entitlement Chamber and asked for a postponement because of a conflicting appointment. There is no record of that call on the Chamber's GAPS2 computer database, but that does not necessarily mean that the call did not take place.

[It is convenient to add at this point that the claimant's itemised phone bill, which I directed her to produce in the Upper Tribunal proceedings, shows that she did indeed telephone the number given on the appointment letter at 11.50 am on 21 February 2018 and that the call lasted for 9 minutes and 46 seconds. It is unacceptable that that call was not noted on GAPS2.]

(c) Later the same day, [the claimant] wrote to the processing centre in the following terms:

"To confirm our telephone conversation this morning, I am sorry I am unable to attend the hearing on 12/3/18 because I cannot, yet again[,] cancel a previous appointment when everything is arranged for the same date.

I would be grateful for a postponement and would need a taxi as I cannot access public transport from my home."

(d) That letter was received on 26 February 2013 and the application was referred to one of the Tribunal Caseworkers at Sutton for decision.

(e) On 28 February 2018, the Tribunal Caseworker refused the application in the following terms:

"1. [The claimant] has requested the hearing be postponed as they have *[sic]* a conflicting appointment on the same day.

2. The request to postpone the hearing is refused.

- [The claimant] does not say what the conflicting appointment is for, why it cannot be rescheduled or why she considers it more important than her appeal

- The request has been made when it is too late to arrange for the Tribunal to hear another appeal in the time allocated to [the claimant's] appeal.

- [The claimant's] medical records have now been obtained. The request can be reconsidered by the Tribunal, who will have access to the appeal file, and can make any appropriate decision or directions on the day of the hearing."

(f) The Tribunal duly reconsidered [the claimant's] application, refused it, and proceeded to refuse her appeal and confirm the Secretary of State's decision in her absence."

The Tribunal's decision to proceed in absence

7 The Tribunal's reasons for its decision to proceed in the claimant's absence were as follows:

> "7. [The claimant] originally indicated that she did not wish to attend a hearing and asked the Tribunal to determine her appeal based upon the evidence contained in the papers. An earlier Tribunal decided that there was insufficient evidence contained within the papers to enable a decision to be made and adjourned the hearing with directions to obtain further medical evidence from [the claimant's] GP, and inviting [the claimant] to attend. However [the claimant] contacted the Tribunal to ask for an adjournment as she had a conflicting appointment. The request for an adjournment was refused prior to the hearing. In view of the receipt of [the claimant's] medical records from her GP, the Tribunal considered that there was now sufficient evidence to enable it to make a decision based upon the written evidence, and that it was in accordance with its overriding objective to proceed with the hearing in [the claimant's] absence. The respondent did not attend."

Why the claimant was unable to attend the hearing

8 The claimant was unable to attend the hearing because she had an urgent medical appointment to receive treatment for cancer. Sadly, I am informed that her cancer has now become terminal.

Where the First-tier Tribunal went wrong

9 As a general rule, an inquisitorial tribunal that lacks relevant information should ask for it.

10 That is particularly the case where, as here, a claimant has not previously been asked to provide the information and it is intended that the consequences of the Tribunal's ignorance should be visited on her.

11 When a claimant applies for the postponement or adjournment of a hearing because of a conflicting appointment, it is always going to be relevant for the person who decides that application to know the nature of that appointment.

12 To take extreme examples at opposing ends of a spectrum, if (as was the case here) the appointment is to receive urgent therapy for cancer, that would normally be strong grounds for postponing or adjourning. If, on the other hand, the appointment is with the claimant's hairdresser or barber, the case for adjournment or postponement will be considerably less compelling and the judge or caseworker who decides the application is likely to take the view that the claimant should give priority to the legal proceedings that she has commenced.

The telephone conversation

13 The clerk to whom the claimant spoke on 21 February 2018 should have asked her the nature of the conflicting appointment and recorded the information on GAPS2. I consider it probable that the question was asked—the claimant's subsequent letter is predicated on some such conversation having taken place—but the clerk's failure to record the information meant that the information was lost.

14 It is arguable that the clerk should also have advised the claimant to include the information in her written application for a postponement and also to send in copies of any evidence she had (e.g., appointment letters) to support her application. I consider it probable that that advice was not given. If it had been I am sure, given the way in which the claimant has conducted herself in the Upper Tribunal proceedings, that it would have been followed.

15 The clerk's omissions amounted to administrative errors. But they were not failures of judicial procedure.

The Tribunal Caseworker's decision

16 The Tribunal Caseworker, however, was exercising the judicial power of the Tribunal including its inquisitorial and enabling jurisdiction. She was therefore under an obligation to give effect to the overriding objective.

The conflicting appointment

17 When the Tribunal Caseworker refused to postpone the hearing, it was nearly two weeks away. It is clear from her comments that she—correctly—regarded the questions about what the conflicting appointment was, and why it could not be rescheduled, as relevant to what she had to decide.

18 I can therefore see no reason why she could not have asked one of the clerks at Sutton to ring the claimant up and ask for that information.

19 But, even if the Tribunal Caseworker chose not to take that course (perhaps because of the legitimate considerations set out in her third bullet point), she should still have directed the claimant to provide that information by post so that it would be available when her application was reconsidered by the Tribunal on 12 March 2018.

Could the application to postpone have been made sooner?

20 I should add that I also have concerns about the Tribunal Caseworker's second bullet point. I remain to be persuaded that the application could have been made any sooner than it was. As I have said above, the notice of hearing that was generated on 13 February 2018, may not have been committed to the post until some days later and, if it was sent by second class mail, then it is possible that the claimant did not

receive it until 21 February. If so, any application she could possibly have made was likely to have been considered at a time when it was not possible to list another appeal in the slot that would be vacated by a postponement.

21 Alternatively, the claimant may not have received the appointment for her cancer treatment until 21 February.

22 I had intended to investigate those issues in more detail in this decision by seeking evidence about the First-tier Tribunal's bulk-mailing arrangements, including the class of postage used.

23 I also intended to consider whether if—as I believe may have been the case—the Secretary of State was notified of the hearing by email as soon as the appeal was listed, that raised issues of "equality of arms" under Article 6 of the European Convention on Human Rights. If the Secretary of State was notified immediately, she could, had she wished to do so, have applied for an adjournment sooner than the claimant and would not have had the type of considerations set out in the Tribunal Caseworker's second bullet point weighed against her when the application was decided.

24 However, given the deterioration in the claimant's health, those issues will have to be decided in a future case. As I am able to decide this appeal in the claimant's favour today, the overriding objective requires me to do so.

The "importance" of the hearing

25 The Tribunal Caseworker's tendentious observation that the claimant had not explained why she considered the conflicting appointment to be "more important than her appeal", turns out to have been unfortunate in the circumstances of this case.

26 Moreover, the comment confuses importance and urgency. A person who applies to postpone a hearing because of a clashing appointment is not saying that the appeal is unimportant, or even that the appointment is more important, but rather that the appointment is more urgent. As was in fact the case here.

The Tribunal's decision

"Sufficient evidence" and "the interests of justice"

27 The Tribunal's decision to proceed in the claimant's absence also involved an error of law.

28 Paragraph 7 of the statement (quoted at paragraph 7 above) explains that the Tribunal made that decision because it had "sufficient evidence" to do so. However, the test under rule 31 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the Procedure Rules") is not whether there is *sufficient evidence* to make a decision in the absence of a party, but whether it is *in the interests of justice* to do so. That requires the Tribunal to consider what is fair. And if a statement of reasons is requested, it also requires the Tribunal to explain its decision that the course it chose was in the interests of justice.

29 It will often not be possible to decide whether it is fair to proceed to a decision in a party's absence without knowing what that decision will be. It is not difficult to think of circumstances in which it would be in the interests of justice to decide an appeal in

favour of an absent party when it would not be in the interests of justice to decide it against her.

30 In other words, the question that rule 31 requires the Tribunal to ask itself is not "*Can* we make *a* decision in the party's absence?" but "Would it be *fair* for us to make *this particular decision* in the party's absence?".

31 I acknowledge that the statement also records that the Tribunal decided "that it was in accordance with its overriding objective to proceed with the hearing in [the claimant's] absence" and I have considered whether that might be read as indicating that the fairness issue had also been considered. I do not think it can. In my judgment, the sentence:

> "In view of the receipt of [the claimant's] medical records from her GP, the Tribunal considered that there was now sufficient evidence to enable it to make a decision based upon the written evidence, and that it was in accordance with its overriding objective to proceed with the hearing in [the claimant's] absence"

taken as a whole, includes a silent "therefore": *i.e.,* the Tribunal now had sufficient evidence and *therefore* it was in accordance with the overriding objective to proceed. In other words, the opening clause "In view of the receipt of [the claimant's] medical records from her GP," seems to govern both the clauses that follow it and not merely the clause about there being sufficient evidence.

32 But even if I am wrong about that—and it may be that I am over-analysing words that were not written to be interpreted so closely—the fact the remains that the statement announces that it was in accordance with the overriding objective to proceed, without even a brief explanation of why it was fair to do so, or any reason at all other than that the Tribunal now had sufficient evidence. And, as Upper Tribunal Judge Hemingway said in *FY v Secretary of State for Work and Pensions* (ESA) [2017] UKUT 501 (AAC) (which was dealing with the similar issues that arise under rule 27 of the Procedure Rules):

> "The only clear reasons [the First-tier Tribunal] gave for deciding to proceed on the papers was its view that it was "able to decide the matter without a hearing" coupled with its related view that it had "adequate information to come to a reasoned decision". So it is fair to conclude that that represented its only thought processes on the point."

33 The problem with that state of affairs is that the explanation of why the Tribunal considered it fair to proceed in a party's absence is usually the bit that matters. There is almost always sufficient evidence to make *a* decision, but there may not be sufficient to make a *fair* decision. And, in any event, the sufficiency of the evidence is not the only factor to be taken into account when deciding what is fair.

Was the error material?

34 Where a party has been notified of a hearing, but has not attended it, it will often be in the interests of justice to proceed in his or her absence. If the absence is unexplained, then the Tribunal may conclude that, if it was to adjourn rather than proceed in absence, the party is equally unlikely to attend any future hearing. Not

proceeding in absence therefore involves the certainty of delay with little probability of enhancing the proper consideration of the issues or promoting the participation of the absent party. Any weighing of the factors listed in rule 2(2) as being included in the overriding objective is therefore likely to favour proceeding, particularly since the Tribunal is entitled to take the view that, if it turns out there is a good reason for the absence, a District Tribunal Judge has power to set its decision aside under rule 37(1) and (2)(c).

35 In this case, however, the position was not so clear cut. The Tribunal may not have had all the relevant information about the claimant's absence but it did know that she had a conflicting appointment and that she wanted to attend the hearing. It was therefore a possible inference that, but for the conflicting appointment, she would have attended and that, if the hearing were to be rearranged for another date on which she was free, she would attend then.

36 In those circumstances, weighing the rule 2(2) factors tends towards a different conclusion. Although not proceeding in the claimant's absence would have involved delay, it would have promoted her full participation in the proceedings (as the Tribunal was required, so far as practicable, to do by rule 2(2)(c)). And the fact that the claimant's presence at a hearing would assist the Tribunal's proper consideration of the issues was a factor that tended to trump the requirement to avoid delay under rule 2(e).

37 The real problem faced by the Tribunal at the hearing is that, because of the earlier failures in the appeal process, it did not know the nature of the conflicting appointment and therefore could not form a judgment about where it lay on the hairdressing/cancer treatment spectrum (see paragraph 12 above). It needed to make that judgment because, if the claimant had absented herself from the hearing for a trivial reason, then the Tribunal might have concluded that it was less likely she would attend any future hearing and, as I have explained, that affects what the overriding objective requires.

38 In this case, I cannot say that the decision of the Tribunal on 12 March 2018 to proceed in the claimant's absence would have been different had it applied the correct law. I have am sure that, if it had known the claimant's conflicting appointment was for cancer treatment it would have had no hesitation in adjourning. But, on the information that was available to it, the Tribunal would have been entitled to take the view that the proceedings had reached a stage at which the interests of justice would be best promoted by proceeding and allowing the claimant to apply for its decision to be set aside if she had a good reason for her absence. To that extent, the error made by the Tribunal on 12 March 2018 may well have been immaterial.

39 However, the Tribunal did not have all the relevant information when it made that decision because the clerk to whom the claimant spoke by telephone did not record it properly and the Tribunal Caseworker who dealt with the application to postpone the hearing did not request it. The Tribunal's processes as a whole have therefore led to a situation where a claimant who wished to explain her case in person to the Tribunal and who—on the facts as they are now known—should obviously have been granted a postponement or an adjournment to enable her to do so, had her appeal decided against her in her absence, in circumstances that amounted to a breach of her right to a fair hearing.

40 Therefore, taken cumulatively, the errors that have occurred in this case *are* material and, in my judgment, the Tribunal's final decision cannot be allowed to stand.

A reality check?

41 I suspect that a number of those who have followed this decision so far will have done so with increasing irritation. "Isn't it obvious," they will say, "that an application to postpone a judicial hearing because of a conflicting appointment needs to explain what that appointment is?" "Surely," they will add, "the claimant should have known without being told that she needed to give that information?" "Is she not," they will conclude, "the author of her own misfortune?".

The claimant's position

42 As those questions affect the claimant in this case, the answers are straightforward. It is probable that the claimant did tell the clerk to whom she spoke by phone on 21 February 2018 what the conflicting appointment was for. The call lasted for 9 minutes and 46 seconds and, the subsequent letter suggests that the claimant told the clerk that she had previously cancelled a similar appointment. It would be astonishing if the nature of the conflicting appointment had not been mentioned.

43 Therefore, when the claimant wrote to the Tribunal later the same day, she considered—and reasonably considered—that she was writing "[t]o confirm our telephone conversation this morning" rather than to make a fresh application for a postponement. She was not to know that the clerk had failed to make any note of the call and that those who considered her application for a postponement would not know what her appointment was for unless she repeated the information in her confirmatory letter. She appears not to have appreciated that the Tribunal did not have that information until I raised it in a Direction before I gave permission to appeal.

44 There is also the consideration that claimant—in common with many other appellants in the Social Entitlement Chamber—was ill. At least in some cases, cancer is a painful and debilitating condition. And the treatment for it can also be debilitating. A person who is suffering fatigue and pain cannot necessarily be expected to draft applications to the Tribunal with the same thoroughness that she would bring to the task if she were well.

Other claimants

45 As those questions affect claimants in general, the answer is that they are asked from the point of view of someone who understands that a social security appeal is a judicial proceeding, and that a judicial hearing is something that can only be postponed or adjourned for a good reason and cannot just be cancelled as one might cancel most other appointments.

46 But, in my experience, many social security claimants do not understand either of those things. During my time as a District Tribunal Judge of the First-tier Tribunal, I dealt with literally thousands of postponement applications. It was far from uncommon for unrepresented claimants to give no reason for the application, or to fail to include all the information that was desirable. Many unrepresented claimants—

and also a smaller number of representatives, including solicitors—clearly believed they were just giving notice to cancel an appointment, as they might in any other area of their lives.

47 Such an approach should not be held against unrepresented claimants, at least when there is no reason to believe they have been told what is actually required.

48 And even if a claimant has been given that information, the Tribunal has an enabling role. Proceedings in the Social Entitlement Chamber are part of a system that is "there to ensure, so far as it can, that everyone receives what they are entitled to, neither more nor less" (per Baroness Hale of Richmond in *Gillies v SSWP* [2006] UKHL 2 at [41]).

49 Particularly as many people are better at expressing themselves by word of mouth than they are in writing, allowing claimants to attend hearings and explain their situation in person is an important tool for achieving that objective. Over time, thousands of pounds can turn on the decision of a social security tribunal on an individual appeal. It is disproportionate to refuse a postponement that is likely to lead to a claimant's absence from the hearing merely because a claimant has omitted to supply necessary information in circumstances where that information could still be readily obtained.

Remission to the First-tier Tribunal

50 Having set aside the Tribunal's decision, I must either re-make it myself or remit the case to the First-tier Tribunal with directions for its reconsideration. In this case, it is expedient that I should do the latter.

51 As far as directions are concerned, the claimant's health may by now have deteriorated to the extent that different arrangements are necessary to enable her to participate fully in the proceedings. I have therefore given no directions other than that the file should referred for case management to the District Tribunal Judge with responsibility for the Hatton Cross venue (who was not the District Tribunal Judge who refused permission to appeal) and that, if the claimant still wants to attend a hearing and is able—with assistance if necessary—to do so, a hearing should be held at a time that is convenient to her.

52 Although it is not a matter on which I can give a direction in this case, I express the view that the First-tier Tribunal should take every reasonable step to provide the claimant with assistance to attend the hearing, if she still wishes to do so.

(Signed on the original)

Richard Poynter
Judge of the Upper Tribunal

21 December 2018