IN THE UPPER TRIBUNAL **Case No.** CE/2606/2017
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal, which it made when sitting at Bexleyheath on 10 March 2017 under reference SC154/17/00049 involved and error of law and is set aside.

The appeal is remitted for determination at an oral hearing before a completely differently constituted tribunal.

DIRECTIONS

Subject to any later directions by a district tribunal judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The appeal shall be considered by way of a complete rehearing (an oral hearing) before an entirely differently constituted panel of the First-tier Tribunal to that which considered the appeal on 10 March 2017.

(2) The new 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.

(3) In doing so, the new tribunal must not take account of circumstances that were not obtaining at the date of the original decision of the Secretary of State under appeal. 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 is the claimant's appeal to the Upper Tribunal from a decision of the First-tier Tribunal ("the tribunal") which it made on 10 March 2017. My decision is that the tribunal's decision involved an error of law. I allow the appeal to the Upper Tribunal and set aside the tribunal's decision. The appeal against the Secretary of State's decision dated 11 November 2016 will have to be reheard by a new tribunal.

2. By way of brief background, the claimant suffers from various health difficulties. In a letter of 13 September 2016 his GP listed those difficulties as prostatism; type 2 diabetes mellitus; depression; generalised anxiety disorder; and anxiety with depression (there does seem to be a degree of overlap between some of those conditions). In a report of 22 June 2016 a health professional who had examined the claimant for the purposes of assessing his entitlement to employment and support allowance listed his medically identified conditions as being diabetes; musculoskeletal problems; anxiety and depression; bladder problems; and hypertension. It is clear from what the claimant has himself indicated that he regards the depression as being his most significant disabling condition.

3. The claimant had been in receipt of employment and support allowance since 18 August 2012. However, having obtained the health professional's report of 22 June 2016 the Secretary of State decided, on 11 November 2016, that there was no longer any entitlement from that date. Since an application for a mandatory reconsideration did not result in any alteration of the decision the claimant appealed to the tribunal. In so doing he ticked a box on a standard form to indicate that he did not want an oral hearing of his appeal.

4. The tribunal did not hold an oral hearing. It decided the appeal on the basis of the paperwork in front of it. In its statement of reasons for decision it explained why it was doing so in this way:

> " 3. Each party consented/had not objected to this case being decided without a hearing. The tribunal considered Rules 2 and 27. The tribunal determined it was able to decide the matter without a hearing. The tribunal had before it adequate information to come to a reasoned decision. The tribunal had before it an appeal bundle totalling 113 pages."

5. Pausing there, rule 2 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 reads as follows:

> "**Overriding objective and party's obligation to co-operate with the Tribunal**
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> **2.** - (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
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> (2) Dealing with a case fairly and justly includes –
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> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the party;
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> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
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> (d) using any special expertise of the tribunal effectively; and
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> (e) avoiding delay, so far as compatible with proper consideration of the issue.
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> (3) The tribunal must seek to give effect to the overriding objective when it –
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> (a) exercises any power under these rules; or
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> (b) interprets any rule or practice directions.
>
> (4) Parties must –
>
> (a) help the tribunal to further the overriding objectives;
>
> (b) co-operate with the tribunal generally."

6. Rule 27, insofar as it is relevant, reads as follows:

" **Decision with or without a hearing**

27. - (1) Subject to the following paragraphs, the tribunal must hold a hearing before making a decision which disposes of proceedings unless –

(a) each party has consented to, or has not objected to, the matter being decided without a hearing;

(b) the tribunal considers that it is able to decide the matter without a hearing …"

7. I granted permission to appeal because I thought the tribunal might have erred in failing, notwithstanding its reference to rules 2 and 27, to adequately explain why it was not adjourning for an oral hearing or at least for enquiries to be undertaken as to whether or not the claimant (notwithstanding his previous indication) might be willing to attend one.

8. The Secretary of State, through his representative Mr D Decker, has opposed the appeal. In a written submission of 13 November 2017 he argues, in summary, that the tribunal had demonstrated that it had considered the relevant Rules of Procedure and was entitled to proceed as it had given its view that there was adequate information before it to enable it to come to a "reasoned decision". The claimant, by way of reply, has said no more than that he does not want a hearing before the Upper Tribunal.

9. I remind myself of what the tribunal had to say at paragraph 3 of its statement of reasons for decision and which I have set out above. I would accept that, as Mr Decker contends, it will often be permissible for a tribunal to offer only a relatively brief explanation as to why it is proceeding on the papers in circumstances where neither party has sought a hearing. But it must show that it has taken the right approach. In particular, it must demonstrate that it has had proper regard to what is fair and just in all the circumstances (rule 2(1)). Further it must not allow its view as to its ability to arrive at a reasoned decision on the material before it to be determinative or overly influential. In *CE/2784/2016*, a case which raised similar issues and one which although not published on the Upper Tribunal's website has been quoted with approval by the Secretary of State on a number of occasions, I commented:

" 10. The tribunal said this:

'3. The appeal was listed as a paper case but the tribunal considered whether they were able to proceed in the absence of hearing evidence from [the claimant] but concluded that as he had requested a decision on the papers and had given a detailed account of the impact of his medical conditions on him at the examination on 6.10.15 when he attended the Pontypridd Assessment Centre, it was concluded that a decision could be reached based on the available evidence, bearing in mind that [the claimant] had also provided copies of medical evidence confirming his medical conditions.'

11. I would accept the Secretary of State's point that it is not necessary for a tribunal to specifically refer to the relevant rules of procedure in explaining why it has been decided to proceed on the papers so long as what is said demonstrates that the substance of those rules was considered. I would accept, and this might be particularly so in circumstances such as here where a claimant has sought a papers consideration, that a tribunal's explanation as to why it is proceeding on the papers may be, in most cases at least, brief. However, in my judgment it is necessary for the tribunal to demonstrate that it has applied the correct test. The wording used by the tribunal in its Statement of Reasons and which I have set out above suggests that it decided to proceed because it thought, in effect, that there was sufficient material before it to enable it to reason out a decision. However, the

> content of rule 2 of its Rules of Procedure does require it to deal with cases 'fairly and justly'. There is not necessarily a connection between a tribunal having sufficient material to reason out a decision and a tribunal having sufficient material to fairly decide an appeal. This was a case where, as the tribunal itself accepted, the claimant did have health problems. It was not a case where, whether the tribunal was to hear from the claimant or not, the outcome was inevitable. Had what the tribunal had to say in its Statement of Reasons included a reference to its having considered what was fair then I might well have reached a different view. However, the wording it used suggests that it did, in effect, apply the wrong test when deciding whether it ought to proceed in the absence of the claimant. Accordingly, I have decided, on this quite narrow point that its decision does fall to be set aside."

10. In the instant appeal the tribunal did refer to the relevant Rules of Procedure although it did not elaborate, to any extent, as to what it made of the content or how it thought the content applied in the particular circumstances of the case. The only clear reasons it 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. But I would reiterate that there is not necessarily a connection between what is fair and just and an ability to reason out a decision on the available documents. The tribunal, at best in my judgment, attached undue prominence to its view that it could reason out a decision. This too is a case where it could not be said that if the claimant had attended and given evidence (bearing in mind he had been in receipt of the relevant benefit since 2012 and had a range of health problems) the outcome would inevitably have been the same.

11. Accordingly, I have concluded that the tribunal did err in a material way. Its decision, therefore, does have to be set aside. Having so decided I have also concluded it is appropriate to remit. It does seem to me that there are further facts to be found and that that task is best undertaken by a new tribunal which will have available to it through the composition of its panel medical as well as legal expertise. Further, the holding of an oral hearing before the tribunal will afford the claimant an opportunity to attend and give oral evidence to it. Whilst the claimant is not required to attend if he really does not wish to, he might reasonably think it would be in his best interests to do so because that would give him an opportunity to explain to the tribunal, on a face-to-basis, how he feels his health problems impact upon him. It would also give the tribunal an opportunity to ask him any questions of relevance it may have and to clarify any matters of concern with him. If the claimant simply chooses not to attend though, it may be that the tribunal would conclude that he would be unlikely to attend any reconvened hearing and would, therefore, decide the appeal in his absence.

12. Finally, I have decided to place this decision on the tribunal's website because I have come across a number of cases recently where it seems to me that tribunals have relied overly or even exclusively (and therefore wrongly) upon a view that there is sufficient material available to it to make a reasoned decision when deciding whether to proceed on the papers.

Signed

M R Hemingway

Judge of the Upper Tribunal

Dated **19 December 2017**