IN THE UPPER TRIBUNAL **Appeal No. UA-2022-000624-JSA**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

A.A.

Appellant

– v –

Secretary of State for Work and Pensions (SSWP)

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 15 December 2022
Decided on consideration of the papers

Representation:
Appellant: In person
Respondent: Mr Tom Cockroft of Counsel, instructed by the Government Legal Department

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

This decision is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. In this appeal the Appellant seeks, in effect, to revisit a sanction decision taken in 2010 by the Secretary of State for Work and Pensions and then by the First-tier Tribunal. In 2021 the First-tier Tribunal decided it had no jurisdiction to hear the Appellant's further appeal against the Secretary of State's 2010 decision. I conclude that there is no material error of law in that latter Tribunal's decision and so the Appellant's current appeal to the Upper Tribunal must be dismissed.

2. In this decision I refer to the Appellant simply as "Mr A" in order to preserve his anonymity and so his privacy.

3. I do not consider an oral hearing of this appeal is necessary. It is ready for determination on the voluminous papers and it is fair and just to proceed on that basis.

The key chronology

4. The essential dates in this long-running saga are as follows.

5. On 17 December 2009 Mr A was dismissed from his employment for what was said to be gross misconduct.

6. On 13 May 2010 the Secretary of State for Work and Pensions (SSWP) sanctioned Mr A by deciding that JSA was not payable for the 12-week period from 11 May 2010 to 27 July 2010.

7. On 9 December 2010 a First-tier Tribunal (FTT1) dismissed Mr A's appeal against the sanction decision of 13 May 2010. Mr A appealed to the Upper Tribunal.

8. On 15 March 2012 Upper Tribunal Judge Mesher dismissed Mr A's further appeal. The Upper Tribunal's decision was reported as *AA v Secretary of State for Work and Pensions (JSA)* [2012] UKUT 100 (AAC); [2012] AACR 42.

9. On 29 January 2020, after much correspondence (mostly from Mr A to the DWP), Mr A lodged a further appeal to the First-tier Tribunal "against DWP sanctioning of Jobseeker's Allowance", referring back to the 2010 decision.

10. On 30 September 2021 the First-tier Tribunal (FTT2) found it had no jurisdiction to hear Mr A's further appeal.

The factual background

11. The background to the case can be best understood by reference to the headnote to Judge Mesher's decision as contained in the *Administrative Appeals Chamber Reports* (AACR):

> The claimant was employed by Birmingham City Council as a school business manager in July 2008. In April 2009 he made enquiries of the Head Teacher about alleged discrepancies in her travel expenses claim. He failed to resolve his concerns and in May sent an email to a Principal Employee Relations Officer of the Council which he also copied to the Chair of Governors and several officers within the school who reported to him. On 11 May the claimant was suspended from work and in December he was dismissed on the ground of gross misconduct. He then claimed jobseeker's allowance (JSA) but was disqualified from receiving benefit for

> 12 weeks from 11 May 2010 to 27 July 2010 as he had lost his employment through misconduct. He appealed on the grounds that his dismissal was wrong, as his disclosures were protected under the public interest legislation, and that he had submitted claims to an employment tribunal. The First-tier Tribunal (F-tT) took the view that the claimant had acted correctly in raising his concerns with the Principal Employee Relations Officer but his decision to copy it to junior officers within the school was wrong as it called into question the Head Teacher's integrity and undermined her relationship with her staff. The F-tT disallowed the appeal and confirmed that the 12-week disqualification was reasonable. The claimant appealed to the Upper Tribunal (UT). The issue before the UT was whether there were any errors of law by the F-tT: (1) in failing to consider or even mention the public interest disclosure legislation; (2) in failing to consider whether to adjourn the hearing pending the employment tribunal's decision; and (3) in failing to consider whether the council should have established whether or not the claimant's allegations were correct before dismissing him.

12. As noted above, Mr A's appeal to the Upper Tribunal in 2012 was dismissed. Judge Mesher held that FTT1 had erred in law (by failing to address the relevance of the public interest disclosure legislation) but, for various reasons, its decision would have been the same even if it had done so. It followed the error of law by FTT1 was not material to its decision. Accordingly, the Upper Tribunal's decision was framed in these terms, as stated at the head of the decision: "The claimant's appeal to the Upper Tribunal is disallowed. The decision of the Birmingham First-tier Tribunal dated 9 December 2010 involved no material error on a point of law, for the reasons explained below, and therefore stands."

An unfortunate administrative error by the Upper Tribunal office

13. Judge Mesher's decision of 15 March 2012 was issued by the Upper Tribunal office on 10 April 2012. The clerk's covering letter stated that "The Upper Tribunal Judge, in his decision, has referred the case back to be decided again by a new First-tier Tribunal. The tribunal clerk will be in touch with you in due course. If you have any queries about the new tribunal hearing you should contact the relevant First-tier Tribunal office." This letter was plainly incorrect and unfortunately misleading in its effect. As I noted in earlier Observations in the current appeal:

> 9. The Appellant argues that the FTT failed to set up a new hearing after the decision by UT Judge Mesher in 2012. As such, he seeks to argue that there was an incomplete legal process through HMCTS error. It is understandable that the Appellant takes this view, as the Upper Tribunal clerk's letter of 10 April 2012 stated quite categorically that the case had been referred back for a fresh hearing by the FTT. But it appears clear to me that the clerk sent the wrong covering letter – the Judge's decision stated quite clearly that the 2010 FTT's decision was not set aside and so the appeal was dismissed. It followed that the FTT's sanction decision stood and there was no remittal for re-hearing. It is the Judge's decision that carries legal effect, not the clerk's letter.

14. The administrative error on the part of the Upper Tribunal office back in 2012 is doubly unfortunate as it has only served to fuel Mr A's sense of grievance in this matter.

The Appellant's case before FTT2

15. The Appellant's case before FTT2 in September 2021 was helpfully summarised by the Judge in his decision notice (at paragraph [5]) in this way:

> The DWP had a power and a duty to investigate, and to obtain information and evidence before deciding a claim for benefit. If it had carried out that duty it could never have come to the decision that he was not entitled to Jobseeker's Allowance. He believed that evidence which emerged after the tribunal hearings would have exonerated him. If the F-tT knew what it knows now, which in short that he was entirely innocent and should never have been dismissed, it would never have found against him in relation to the sanction. He made other points, but this was his core argument in relation to his application to admit his appeal against the decision made by the Secretary of State on 13 May 2010. He contended there was power to re-open an appeal where the Secretary of State (DWP) had failed in its duty.

16. It is only fair to point out that the evidence which had subsequently emerged included a newspaper report some years later to the effect that the Head Teacher in question had resigned from her position following criticism over her expenses and other alleged financial irregularities.

FTT's decision on the Appellant's appeal

17. The First-tier Tribunal correctly identified the issue before it as being whether it had jurisdiction to deal with an appeal against the Secretary of State's original sanction decision of 13 May 2010. FTT2 noted that there had been no further appeal (to the Court of Appeal) against the decision of Judge Mesher in 2012. As a result, "notwithstanding any confusion caused by the error in the letter of 10 April 2012 the decision of [FTT1] is the final word in relation to this matter … To that extent the matter is, legally at an end." FTT2 accordingly refused Mr A's application to admit his appeal against the Secretary of State's decision of 13 May 2010: "This is because the sanction decision has already been dealt with by the F-tT and there is no power to allow the F-tT to reopen the matter".

FTT2's decision to give the Appellant permission to appeal

18. On 22 March 2022 the First-tier Tribunal gave Mr A permission to appeal "because the appeal may raise an important issue about the legal right to rectify a decision which, based upon the available facts, was correct at the time it was made but may now be incorrect as the result of the emergence of further evidence and facts."

The Upper Tribunal's analysis

19. A lawyer who came to this case without a background in social security law might well refer to the common law doctrine of "*res judicata*" – this is a case, they might say, of "a matter decided" and so the tribunal has no jurisdiction. But as Mr Commissioner Angus observed in unreported decision *CH/704/2005* (at paragraph 14), "there is virtually no application of the principle of res judicata in the determination of social security benefit and housing benefit questions".

Instead, the answer lies in statute (see also *MW v Leeds City Council (HB)* [2018] UKUT 319 (AAC)). In particular, section 17(1) of the Social Security Act 1998 (as amended) provides as follows:

> "(1) Subject to the provisions of this Chapter and to any provision made by or under Chapter 2 of Part 1 of the Tribunals, Courts and Enforcement Act 2007, any decision made in accordance with the foregoing provisions of this Chapter shall be final; and subject to the provisions of any regulation under section 11 above, any decision made in accordance with those regulations shall be final.

20. The main effect of this provision is to prevent there being two decisions relating to the same individual's entitlement to the same benefit for the same period. As Mr Commissioner Angus observed in *CH/704/2005*, again at paragraph 14, "I regard sub-section (1) as a limited statutory estoppel which allows claimants and the Secretary of State to revisit, by way of revision, supersession or appeal, past decisions in order to take account of mistakes and changes in the fortunes and misfortunes of claimants."

21. It follows that the decision of FTT1 was final subject to (1) revision, (2) supersession or (3) appeal, those being the only three routes available under the legislation to change an earlier decision. Unfortunately for Mr A, and irrespective of the possible or actual merits of his case, none of those three routes is open to him in all the circumstances. The starting point is that FTT1's decision of 9 December 2010 replaced the Secretary of State's decision of 13 May 2010 (see *VW v London Borough of Hackney (HB)* [2014] UKUT 277 (AAC) at paragraph 25). That decision was final for the following reasons.

22. As regards route (1), a decision by a First-tier Tribunal cannot be revised, as confirmed by the Tribunal of three Social Security Commissioners in reported decision *R(IB) 2/04* at paragraph 10(7).

23. As regards route (2), a decision by a First-tier Tribunal can be superseded (e.g. for mistake of fact), but any supersession to the claimant's advantage can only take effect from the date the supersession is requested. In the present case the request to change the decision of FTT1 was made long after the last day covered by the sanction decision and so any supersession would be wholly ineffective.

24. As regards route (3), the decision by FTT1 was subject to an appeal but the appeal to the Upper Tribunal was dismissed by Judge Mesher and there was no onward appeal to the Court of Appeal.

25. In summary, FTT1's decision still stands as a result of the Upper Tribunal's decision in *AA v SSWP (JSA)*. FTT1's decision is also final in the terms of section 17(1) of the Social Security Act 1998. It therefore follows that FTT2 was correct in law to find that it lacked jurisdiction to consider Mr A's further attempt to challenge the Secretary of State's decision of 13 May 2010.

26. I recognise that Mr A sincerely believes that he is the victim of discrimination and injustice. He asserts that his career has been ruined by the failure of his former employer and the DWP properly to investigate his allegations. He makes wide-ranging submissions in support of his appeal, for example drawing on employment legislation and case law that seeks to protect whistle-blowers. However, he has no persuasive answer to the fundamental point that his appeal

against the sanction decision was unsuccessful 10 years ago and there is no provision for that matter to be reopened now. Even assuming that either his ex-employer and/or the DWP have failed to investigate his allegations properly, that would not provide any justification to re-open the 2010 sanction decision under the statutory framework set out in the Social Security Act 1998 and related legislation.

Conclusion

27. The First-tier Tribunal (FTT2) in this case provided an adequate explanation of why it had reached the decision it had. Its decision reveals no material error of law. Accordingly, I dismiss the Appellant's appeal (section 11 of the Tribunals, Courts and Enforcement Act 2007). The decision of FTT1 also necessarily still stands.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 15 December 2022