IN THE UPPER TRIBUNAL **Appeal No: CE/1475/2018**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Aldershot on 6 March 2018 under reference SC321/17/00965 involved an error on a point of law and is set aside.

The Upper Tribunal is not in a position to re-decide the appeal. It therefore refers the appeal to be decided entirely afresh by a completely differently constituted First-tier Tribunal and in accordance with the Directions set out below.

This decision is made under section 12(1), 12(2)(a) and 12(2)(b)(i) of the Tribunals Courts and Enforcement Act 2007

DIRECTIONS

Subject to any later Directions made by a District Tribunal Judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The new hearing will be at an oral hearing.

(2) The appellant is reminded that the tribunal can only deal with his situation as it was on or before 4 October 2017 and not any changes after that date.

(3) If the appellant has any further evidence that he wishes to put before the tribunal relevant to his health conditions and their effects on his functioning on or before 4 October 2017, this should be sent to the First-tier Tribunal's office in Cardiff within one month of the date this decision is issued.

(4) The First-tier Tribunal is bound by the law as set out below.

REASONS FOR DECISION

1. The appeal before the First-tier Tribunal in this case concerned whether the appellant no longer had or could be treated as having limited capability for work. The appellant failed to attend the hearing of his appeal. The issue with which this appeal is concerned is to whom the decision whether to proceed in the appellant's absence fell to be made. Was it the judge or the judge and the medically qualified panel member?

2. I am allowing this appeal because I am satisfied that the First-tier Tribunal in its decision of 4 October 2017 ("the tribunal") erred materially in a law. That material error of law was that the judge of the tribunal vested in himself alone, and not the tribunal as a whole (i.e. himself and the medically qualified panel member), the decision whether to proceed and decide the appeal in the absence of the appellant.

3. The language of "the judge was satisfied" in paragraph three of the statement of reasons on its face is deliberate when contrasted with other parts of the statement where the fact-finding or decision-making is expressed as being for "the Tribunal". The material part of paragraph three of the statement of reasons reads as follows.

> "The Appellant did not attend; the judge was satisfied that he had been notified of the hearing, that there was sufficient evidence to determine the appeal on the papers and that it was in the interests of justice to do so."

By contrast, paragraphs four and nine of the statement say: "The Tribunal has also considered whether there would be a substantial risk to any person's health if [the appellant] were found not to have [limited capability for work]" and "The Tribunal finds that at the decision date….". No other reference is made to "the judge" deciding anything. I am satisfied that the use of that phrase in paragraph three was deliberate and shows that

the judge gave to himself alone the decision-making function over whether to proceed in the absence of the appellant.

4. The record of proceedings in the appeal bundle shows that the appeal was listed for an oral hearing at 4pm on 6 March 2018. It is possible that may have been a mistake as it appears from the left-hand side of the First-tier Tribunal's file that neither party may have sought a hearing of the appeal. On the other hand, the record of proceedings records that GAPs (the First-tier Tribunal's database) was checked and that the appellant had been notified of the date and time of the hearing. I will therefore proceed on the basis, as the tribunal did, that the appeal had been appropriately listed for an oral hearing. As I have said already, the appellant failed to attend that hearing.

5. The relevant part of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the SEC Rules) governing proceeding to decide an appeal at an oral hearing in the absence of the appellant (or any other party) is rule 31. It provides as follows:

> "31. If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
> (b) considers that it is in the interests of justice to proceed with the hearing."

This puts the decision whether to go ahead in the absence of the appellant in the hands of "the Tribunal". Under rule 1(3) of the SEC Rules "Tribunal" means "the First-tier Tribunal".

6. Section 7(8) and paragraph 15 of Schedule 4 in the Tribunals, Courts and Enforcement Act 2007 provide the statutory basis for the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 "the 2008 Composition Order"). At the relevant time article 2 of that Order provided as follows:

> "2.—(1) The number of members of the tribunal who are to decide any matter that falls to be decided by the First-tier Tribunal must be determined by the Senior President of Tribunals in accordance with paragraph (2).
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> (2) The Senior President of Tribunals must have regard to—
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> (a) where the matter which falls to be decided by the tribunal fell to a tribunal in a list in Schedule 6 to the Tribunals, Courts and Enforcement Act 2007 before its functions were transferred by order under section 30(1) of that Act, any provision made by or under any enactment for determining the number of members of that tribunal; and
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> (b) the need for members of tribunals to have particular expertise, skills or knowledge.

Article 2(1) thus required the Senior President of Tribunals to determine the number of members of the First-tier Tribunal who were to decide any matter that fell to be decided by the First-tier Tribunal.

7. The relevant Practice Statement of the Senior President made under that Order - *Composition of Tribunals in Social Security and Child Support Cases in the Social Entitlement Chamber on or after 1 August 2013* - provides the rules for determining First-tier Tribunal membership. It provides, so far as is material, as follows:

> "5. Where .....
> b. the appeal involves the limited capability for work assessment under Part 5 of the Employment and Support Allowance Regulations 2008, under Part 5 of the Universal Credit Regulations 2013 or under Part 4 of the Employment and Support Allowance Regulations 2013.....the Tribunal must, subject to paragraphs 7 to 14, consist of a Tribunal Judge and a Tribunal Member who is a registered medical practitioner.
> 6. In any other case the Tribunal must consist of a Tribunal Judge.
> 7. The Chamber President may determine that the Tribunal constituted under paragraph 5 or 6 must also include –
> a. a Tribunal Member who is an accountant within the meaning of Article 2(i) of the Qualifications Order, where the appeal may require the examination of financial accounts;
> b. an additional Member who is a registered medical practitioner, where the complexity of the medical issues in the appeal so demands;
> c. such an additional Tribunal Judge or Member as he considers appropriate for the purposes of providing further experience for that additional Judge or Member or for assisting the Chamber President in the monitoring of standards of decision-making.

> 8. Where the Chamber President considers, in a particular case, that a matter that would otherwise be decided in accordance with paragraphs 4 or 5 only raises questions of law and the expertise of any of the other members is not necessary to decide the matter, the Chamber President may direct that the Tribunal must consist of a Tribunal Judge, or a Tribunal Judge and any Tribunal Member whose experience and qualifications are necessary to decide the matter.
> 9. The powers of the Chamber President referred to in paragraphs 7, 8, 10 and 12 may be delegated to a Regional Tribunal Judge and those referred to in paragraphs 7, 8 and 12 may be delegated to a District Tribunal Judge.
> 10. A decision, including a decision to give a direction or make an order, made under, or in accordance with, rules 5 to 9, 11, 14 to 19, 25(3), 30, 32, 36, 37 or 41 of the [SEC Rules] may be made by a Tribunal Judge, except that a decision made under, or in accordance, with rule 7(3) or rule 5(3)(b) to treat a case as a lead case (whether in accordance with rule 18 (lead cases) or otherwise) of the [SEC Rules] must be made by the Chamber President.
> 11. The determination of an application for permission to appeal under rule 38 of the [SEC Rules] and the exercise of the power of review under section 9 of the Tribunals, Courts and Enforcement Act 2007 must be carried out –
> a. where the Judge who constituted or was a member of the Tribunal that made the decision was a fee-paid Judge, by a Judge who holds or has held salaried judicial office; or
> b. where the Judge who constituted or was a member of the Tribunal that made the decision was a salaried Judge, by that Judge or, if it would be impracticable or cause undue delay, by another salaried Tribunal Judge, save that, where the decision is set aside under section 9(4)(c) of the Act, the matter may only be re-decided under section 9(5)(a) by a Tribunal composed in accordance with paragraph 4, 5 or 6 above." (underlining added by me to emphasise the two critical provisions)

8. As can be seen, paragraph 5b of that Practice Statement provides that where, as in this case, "the appeal involves the limited capability for work assessment" the Tribunal **must**, subject to paragraphs 7 to 14, consist of a Tribunal Judge and a Tribunal Member who is a registered medical practitioner. On the face of it, that means that the rule 31 decision whether to proceed in the absence of the appellant was for the judge and the medical member, and not (as statement of reasons says occurred) the judge alone.

9. I am satisfied, moreover, that nothing in paragraphs 7 to 14 of the Practice Statement takes away from this conclusion. The only relevant paragraph appears to be paragraph 10. Paragraph 10, subject to some immaterial exceptions, allows certain decisions to be made by the judge

alone. As can be seen, these are decisions "made under, or in accordance, with rules 5 to 9, 11, 14 to 19, 25(3), 30, 32, 36, 37, or 41 of the [SEC Rules]". Rule 31 does not appear in this list of 'judge only' decisions. On the face of it, therefore, the decision to proceed in a party's absence contained in rule 31 may only be made by the judge and the medical member in an appeal such as that here. And in an appeal concerning disability living allowance or the personal independence payment, the decision would fall to be made by the three-person tribunal membership of the legally qualified panel member, the medically qualified panel member and the disability qualified panel member.

10. The only contrary argument I can identify would be that rule 5(3)(h) of the SEC Rules covers the ability of the Tribunal to "adjourn or postpone a hearing", and the Practice Statement allows such case management decisions to be made by the judge alone. In my judgment, however, the more particular rule in rule 31 must take precedence over the more general case management rules covered by rule 5, following the rule of statutory construction that more general words must yield to more specific words if they may otherwise conflict: see *L v SSWP* [2015] UKUT 612 (AAC) at paragraph [19] and *SSWP v Brade* [2014] CSIH 39; [2014] AACR 29 at paragraph [42].

11. It should be noted that paragraph 10 of the Practice Statement allowing for a judge alone to make certain decisions covers more than just rule 5 in the SEC Rules and more than the power to adjourn or postpone found in rule 5(3)(h) of those rules. Moreover, the use of the word 'may' in paragraph 10 of the Practice Statement shows that it is not necessary for the judge alone to make all case management decisions under rule 5 and so it does not necessarily fall to the judge on a two-person limited capability for work appeal to decide whether to adjourn or postpone the appeal. The latitude given by the word 'may' is another reason, in my judgment, for reading the rule 31 decision as falling to be made by the all the members of the First-tier Tribunal. Were it otherwise, and the judge alone was required to make any decision to adjourn the hearing of an appeal, it would allow the curious (and arguably absurd) result to

arise that any decision to proceed (or not proceed) in the absence of any party to the appeal made by two person a three person tribunal could be overset by the judge's decision not to adjourn (or to adjourn) the hearing of the appeal.

12. The conclusion reached here is not an empty formalism. The SEC Rules and Practice Statement as I read them deliberately place the decision to proceed with a hearing in a party's absence in the hands of all the members of the First-tier Tribunal who are to decide the appeal at the oral hearing. The different specialist experiences of the First-tier Tribunal may bring different perspectives to bear as to (a) why the party may be absent, and (b) whether it is in the interests of justice to proceed with the hearing in the absence of that party.

13. By way of contrast, and notwithstanding the terms of article 2(2)(a) of the 2008 Composition Order before its amendment from 18 May 2018 (it is the form of that Order in force before 18 May 2018 which applies on this appeal and which is set out in paragraph six above), it would seem, curiously, that the conclusion reached above differs from that which applied as a matter of law (whatever the practice may have been) before the jurisdiction over social security appeals was transferred to the First-tier Tribunal when it was created on 3 November 2008.

14. I say this because the language of regulation 49(4) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 on its face vested the decision to proceed in the absence of a party to the appeal proceedings in the chairman of the appeal tribunal alone. When in force regulation 49 provided so far as is material as follows:

> "49.—(1) Subject to the following provisions of this Part, the procedure for an oral hearing shall be such as the chairman, or in the case of an appeal tribunal which has only one member, such as that member, shall determine.
> (2)…….. not less than 14 days notice (beginning with the day on which the notice is given and ending on the day before the hearing of the appeal is to take place) of the time and place of any oral hearing of an appeal shall be given to every party to the proceedings, and if such

> notice has not been given to a person to whom it should have been given under the provisions of this paragraph the hearing may proceed only with the consent of that person.
>
> (4) If a party to the proceedings to whom notice has been given under paragraph (2) fails to appear at the hearing the chairman, or in the case of an appeal tribunal which has only one member, that member, may, having regard to all the circumstances including any explanation offered for the absence, proceed with the hearing notwithstanding his absence, or give such directions with a view to the determination of the appeal as he may think proper." (my underlining added for emphasis)

The views of the other members (if there were such) of the appeal tribunal would have to be taken into account as part of "all the circumstances", but the decision whether to proceed with oral hearing (which must cover a decision not to proceed) still vested in the chairman alone.

15. However, it would appear that the decision to adjourn an oral hearing was to be taken by the appeal tribunal as a whole: see regulation 51(4) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. Regulation 51 provided, so far as is relevant, as follows:

> "51.—(1) Where a person to whom notice of an oral hearing is given wishes to request a postponement of that hearing he shall do so in writing to the clerk to the appeal tribunal stating his reasons for the request, and the clerk to the appeal tribunal may grant or refuse the request as he thinks fit or may pass the request to a legally qualified panel member who may grant or refuse the request as he thinks fit.
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> (2) Where the clerk to the appeal tribunal or the panel member, as the case may be, refuses a request to postpone the hearing he shall—
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> (a)notify in writing the person making the request of the refusal; and
> (b)place before the appeal tribunal at the hearing both the request for the postponement and notification of its refusal.
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> (3) A panel member or the clerk to the appeal tribunal may of his own motion at any time before the beginning of the hearing postpone the hearing.
>
> (4) An oral hearing may be adjourned by the appeal tribunal at any time on the application of any party to the proceedings or of its own motion." (again, my underlining for emphasis)

When read with sections 7(1) and 39(1) of the Social Security Act 1998 and regulation 36 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999, it seems plain that the phrase "appeal tribunal" used in regulation 51(4) was being used to refer to all the members of the appeal tribunal (where there was more than one member of that tribunal) and not just the chairman of the appeal tribunal.

16. A consideration of the caselaw in respect of appeals heard before 3 October 2008 does not reveal that the since revoked provisions in regulations 49(4) and 51(4) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 caused any real difficulties in practice, and so it is perhaps best not to dwell on difficulties that could as a matter of law have arisen. I merely note that on one reading of these provisions a decision of the chairman to proceed with the oral hearing in the absence of the appellant in a disability living allowance appeal could have been frustrated by the other two members of the tribunal agreeing that the oral hearing of the appeal ought to be adjourned because of the absence of the appellant.

17. I am however satisfied, for the reasons I have given above, that such a potentially troublesome result need not arise in social security and child support appeals in the social entitlement chamber of the First-tier Tribunal.

18. The tribunal's decision of 6 March 2018 must be set aside. The Upper Tribunal is not able to re-decide the first instance appeal. The appeal will have to be re-decided by a completely differently constituted First-tier Tribunal (Social Entitlement Chamber), at an oral hearing. I cannot compel the appellant to attend that hearing but it is likely to assist the First-tier Tribunal to best understand how the appellant's functioning was being affected by his health conditions on and before 4 October 2017 if he was to attend that hearing.

19. The appellant's success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about whether his appeal will succeed on the **facts** before the new First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 17th December 2018