DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeals by the Appellant.

The decision of the Manchester First-tier Tribunal dated 14 February 2017 under combined file references SC164/16/00276 and SC164/16/00322 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is able to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

> *"**The Appellant's appeals are allowed.***
>
> ***The Secretary of State's decisions of 17 October 2016 are both revised.***
>
> ***The Appellant undertook all reasonable work search action for the periods 04/07/2016 to 10/07/2016 and 11/07/2016 to 17/07/2016. It follows that the two medium-level sanctions of 28 days each should not have been imposed.***
>
> ***The Secretary of State should therefore arrange repayment of the moneys deducted under the universal credit sanctions in question with all reasonable speed."***

This decision is given under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. This case concerns the operation of the sanctions regime in relation to universal credit.

2. The Appellant's appeal is supported by the Secretary of State. That fact alone would often be reason enough for the Upper Tribunal to issue a short decision without extensive reasons. However, very few appeals relating to the universal credit sanctions regime have to date reached the Upper Tribunal. As the present case may provide useful guidance for other cases, I am therefore giving full reasons for my decision. For the same reasons I am also arranging for this decision to be added to the Upper Tribunal (Administrative Appeals Chamber) decisions website (see https://www.gov.uk/administrative-appeals-tribunal-decisions).

3. Unless otherwise stated, all references to sections in this decision are to sections of the Welfare Reform Act 2012 and all references to regulations are to the Universal Credit Regulations 2013 (SI 2013/376, as amended).

The Claimant Commitment

4. The Appellant claimed universal credit (UC) in May 2015. One of the basic conditions of entitlement to UC is that the claimant "has accepted a claimant commitment" (section 4(1)(e)). A claimant commitment "is a record of a claimant's responsibilities in relation to an award of universal credit" (section 14(1)). The Appellant was placed, by default (as she did not fall within the terms of sections 19-

21, which provide for less onerous claimant responsibilities), in what is known as the "All Work-related Requirements Group" (section 22), meaning that she was subject to the imposition of both the work search requirement (section 17) and the work availability requirement (section 18).

5. The Appellant duly signed her "Claimant Commitment", a 5-page (and for the most part standard form) document which began with the positively Stakhanovite statement that "I'll do everything I can to get paid work, and will receive Universal Credit payments to support me in this. I'll do all the things my Work Programme provider tells me I must do, as well as the things set out in this Claimant Commitment". The first page of the Claimant Commitment also summarised in general terms the claimant's availability for work and her commitment to apply for vacancies which she was told to apply for, etc. The second page declared that "I'll normally spend 35 hours each week looking and preparing for work". This reflected the statutory requirement that a claimant take "all reasonable action for the purpose of obtaining paid work" as part of the work search requirement under section 17, being for "at least the claimant's expected number of hours per week" (regulation 95). The default position is that this expectation amounts to 35 hours of such activity a week (regulation 88).

6. The fifth and final page of the Claimant Commitment appears to be the only page which was to any extent customised to the particular circumstances of this individual claimant. This page set out "My work search and preparation plan" and listed "regular work search activities". These included the Appellant's commitment to access on a daily basis her Universal Jobsearch (UJ) account, her e-mail account for job vacancy alerts and certain jobsearch websites. The plan also included various activities to be undertaken on a weekly basis, such as checking the local weekly newspaper.

7. Finally, for present purposes, the Claimant Commitment also recognised that "If, without good reason, I don't do all these things, my Universal Credit payments will be cut by £10.40 a day for up to 3 years". This is a (rather generalised) reference to the (much more detailed) sanctions regime in operation under sections 26 and 27 and Chapter 2 of Part 8 of the Regulations (regulations 100-114). These arrangements provide for the reduction of the weekly amount of UC where there has been a sanctionable failure "for no good reason" to comply with one of the specified requirements.

The background to the appeal to the First-tier Tribunal

8. On 18 July 2016 – so a little over a year after first claiming UC – the Appellant attended a 'work search review' at her local 'UC outlet' where she saw a 'work coach' (previously known as a 'personal adviser') from her Work Programme provider. This work coach (who I shall call G) was not her usual work coach. What happened next was described by the Secretary of State's submission writer, in the response to the first of the Appellant's subsequent appeals, in the following terms:

> 'The work coach felt that [the Appellant's] work search was insufficient for the period 04/07/2016 to 10/07/2016. The work coach asked [the Appellant] how she conducted her work search and she advised that she uses the internet and answers her email alerts and if there are any suitable jobs she will apply. The work coach noted that her work search activity is very poor and asked her to demonstrate how she uses UJ. The work coach noted that [the Appellant] stated that she had never been questioned about her work search before and asked that someone else interview her in the future as she did not like the work coach's attitude. The work coach explained that one of the purposes of the appointment

> is to check her 35 hour work search. After consulting a colleague the work coach issued [the Appellant] with the relevant forms on which to provide details of her work search.'

9. The Secretary of State's submission writer also included an almost identical passage to that cited immediately above in the response to the second of the Appellant's subsequent appeals. The only difference in the second response was that the period in dispute for the second appeal was identified as the following week, i.e. 11/07/2016 to 17/07/2016. I interpose here that the Appellant does not accept that narrative as an entirely accurate description of what took place. Be that as it may, the 'relevant forms' comprised copies of DWP Form UC71, documents which are headed "You could lose some or all of your payment".

10. On 28 July 2016 the Appellant returned the two UC71 forms. In relation to the first week, and by way of explanation as to why she should not be given a sanction, the Appellant wrote:

> 'I have been accused of not doing enough job searches between 4/7/16 and the 10/7/16 – this is incorrect as my online account shows entries up to the 9th July which the advisor saw himself. He is now being investigated for his misconduct in the way he has handled this after I made a complaint about his attitude.'

11. The Appellant also added that her original (and usual) work coach "will be able to determine the truth of the matter".

12. On the second UC71 form the Appellant referred to G having been "extremely insulting to me". In addition, in explaining why no sanction should be imposed, she stated:

> 'I have been falsely accused of not doing enough of a job search between 11/6/16-17/7/16 – this is incorrect – the update was done on the 18th the job search was valid, it just was not entered into the account due to a family crisis impacting other things taking precedence 3 weeks previously'.

The sanction decisions and the Appellant's appeal

13. On 17 October 2016 a decision-maker considered the referral for a possible imposition of a sanction. The decision-maker concluded that the Appellant had not been engaged in work search amounting to 35 hours a week, as agreed in her Claimant Commitment. The decision-maker also took the view that the Appellant had not provided any good reason for that failure. As there had been no previous sanctionable failures within the previous year (or technically the previous 365 days), a medium-level sanction of 28 days was applied in respect of each of the weeks in question (regulation 103).

14. As a result the Appellant's entitlement to UC was docked by 56 days multiplied by £10.40, i.e. £582.40, as the sanctions ran consecutively rather than concurrently (see regulations 101(2) and 106(c)). It should be obvious that this is a very considerable sum of money for anyone whose circumstances are such that they have to claim UC. The impact on the Appellant has undoubtedly been distressing – she has gone into debt, has had to have recourse to a food bank and has faced repossession proceedings for non-payment of rent.

15. The Appellant applied for a mandatory reconsideration of the two sanction decisions, pointing out she had lodged a complaint against the work coach G. However, the mandatory reconsideration decision, taken on 2 November 2016,

confirmed the sanction decisions, adding that "the issue regarding the complaint for a member of staff is a totally separate issue and is currently being reviewed by the Complaints Team".

16. On 7 November 2016 the Appellant lodged her appeal. She set out her grounds of appeal in some detail. She explained the steps that she had taken by way of job search in the fortnight in issue. She stated that G had been wrong to say she had not logged on to UJ: "I had in fact logged on, what I had not done as often as I normally do was to update the system as I normally do. This should have been noticed, when someone who normally updates the activity section as often as I do, this should have been noticed as an oddity and not as a deliberate action taken by someone who is actively looking for work".

17. The Appellant again added by way of further explanation that she had been somewhat distracted during the period in question due to a family crisis (and that she was due in the local Family Court on 8 November 2016 in relation to that same matter). She also stated that she had received a telephone call from the local Jobcentre who, she said, had apologised for G's behaviour and had said that they might monitor his behaviour with other claimants. She elaborated on her criticisms both of G and of the UC sanctions process in a series of further e-mails, explaining that she did not feel she could have disclosed the confidential information about the family court case under the unsatisfactory circumstances in which she was being interviewed.

The First-tier Tribunal's decision

18. The First-tier Tribunal dealt with the appeal (or technically the two appeals) on the papers, neither side having requested an oral hearing. The First-tier Tribunal dismissed both appeals. The separate Decision Notices stated that the Appellant had "not undertaken all reasonable word [sic] search action" for the fortnight in issue. The First-tier Tribunal subsequently issued a single statement of reasons, covering both appeals, and explaining the basis for its decision.

19. Having provided a detailed narrative account of the process leading to the imposition of the sanctions, the First-tier Tribunal concluded (at paragraph 11 of the statement of reasons) as follows:

> 'In this case [the Appellant's] own evidence indicates firstly that she did not carry out work search activity in accordance with her claimant commitment and secondly that she has failed to provide evidence of what activity she did undertake other than reference to the Jobmatch account. Subsequently she has failed to give any good reason why her work search commitment for the relevant periods fells below that agreed in her claimant commitment.'

20. In reaching this conclusion, the First-tier Tribunal placed particular emphasis on the Appellant's admission as summarised in paragraph 16 above. Thus "it seemed to the Tribunal however that [the Appellant] herself … accepted that what she had done during that period had been inadequate".

The application for permission to appeal to the Upper Tribunal

21. I subsequently gave the Appellant permission to appeal to the Upper Tribunal in the following terms:

> '5. The main ground of appeal is that the FTT [First-tier Tribunal] judge did not give adequate reasons for his decision. This ground is arguable. In particular, did the FTT need to address (i) the Appellant's point about the alleged behaviour of

> the work coach G and (ii) the Appellant's contention that she had had to devote time to a family emergency over the relevant period? Given how long family proceedings can take, the mere fact that there was a hearing in November 2016 does not preclude there being related difficulties in July 2016. Point (ii) raises two other possible issues.
>
> 6. First, did the FTT need to engage in more detailed fact-finding? I say that as regulation 95(1)(a) and (2) of the Universal Credit Regulations 2013 (SI 2013/376) require one to deduct – from the time devoted to jobsearch – time spent dealing with domestic emergencies etc. It may be argued on behalf of the Secretary of State that it is for the claimant to prove her case. However, at first sight it seems to me the DWP response to her appeal did not draw her attention to the precise terms of regulation 95, so she may not have appreciated the significance of the point.
>
> 7. Second, I accept the FTT considered whether it had enough evidence to proceed. The FTT took the view "a decision could be made fairly without the need to take oral evidence" (statement of reasons para 2). Was that right, given (i) her written submission that she had received an apology from the Jobcentre and (ii) the lack of detailed information about the nature of the crisis in the family proceedings?'

22. Technically there are now two appeals before the Upper Tribunal, one in relation to the first week in dispute (Upper Tribunal file number CUC/1808/2017) and one in relation to the second week in issue (Upper Tribunal file number CUC/1810/2017). As with the First-tier Tribunal, I am issuing a single joint decision covering both appeals as the issues are effectively identical for each week.

23. Ms Helena Thackray acts for the Secretary of State for Work and Pensions in these proceedings before the Upper Tribunal. In a helpful submission she supports the Appellant's appeal and invites me to set aside the First-tier Tribunal's decision and to substitute my own decision to the effect that there was no sanctionable failure by the Appellant in relation to her UC job search activity for the fortnight in question. I agree with her submission for the following reasons.

The Upper Tribunal's analysis

24. The fundamental error of law by the First-tier Tribunal was to proceed on the basis that the 35 hour work search requirement was immutable. It was not.

25. Section 17(1)(a) provides that the "work search requirement" is a requirement that the claimant take "all reasonable action" and "any particular action specified by the Secretary of State", A failure to comply with the work search requirement may lead to the imposition of a medium-level sanction (regulation 103(1)(a)). Section 25(a) enables regulations to be made as to the circumstances in which a claimant is to be treated as having "complied or not complied with any requirement imposed under this Part". In the context of the work search requirement that takes us to regulation 95(1):

> '**95.**—(1) A claimant is to be treated as not having complied with a work search requirement to take all reasonable action for the purpose of obtaining paid work in any week unless—
> (a) either—
>
> (i) the time which the claimant spends taking action for the purpose of obtaining paid work is at least the claimant's expected number of hours per week minus any relevant deductions, or

(ii) the Secretary of State is satisfied that the claimant has taken all reasonable action for the purpose of obtaining paid work despite the number of hours that the claimant spends taking such action being lower than the expected number of hours per week; and

(b) that action gives the claimant the best prospects of obtaining work.'

26. In the present case, regulation 95(1) necessarily prompts consideration of two further issues. First, what is "the claimant's expected number of hours per week"? Second, what are "any relevant deductions" from those expected hours?

27. As to the former question, regulation 88(1) provides as follows (and there is no suggestion in this case that any one of the exceptions in paragraph (2) applies, e.g. as regards caring responsibilities):

'(1) The "expected number of hours per week" in relation to a claimant for the purposes of determining their individual threshold in regulation 90 or for the purposes of regulation 95 or 97 is 35 unless some lesser number of hours applies under paragraph (2).'

28. As Ms Thackray observes, according to the decision-maker's reasoning she imposed the medium-level sanctions for the Appellant's failure to comply with the "claimant commitment [which] states she will prepare and look for work for 35 hours per week" in view of the finding that the actual "amount of work search does not equate to 35 hours as agreed in her claimant commitment". However, as Ms Thackray goes on to note, this does not properly reflect the actual terms of this Appellant's claimant commitment. Her undertaking was that "I'll *normally* spend 35 hours each week looking and preparing for work" (emphasis added). It was not in terms that "I'll *always* spend 35 hours each week looking and preparing for work".

29. Indeed, neither the decision-maker nor the First-tier Tribunal had looked at the precise terms of the claimant commitment in the light of the bigger picture about the Appellant's previous history of regular compliance. I agree with Ms Thackray's submission that "this claimant appears to have always met her responsibilities during the 14 months of her claim and had indeed undertaken some work search and applied for suitable jobs during the relevant 2 week period although it did not amount to 35 hours". Those factors were not addressed at all by the First-tier Tribunal in its reasoning when it seized upon the Appellant's admission as set out in paragraph 16 above.

30. As to the latter question, namely the meaning of the phrase "any relevant deductions" from those expected hours, an answer is provided by regulation 95(2):

'(2) In this regulation "relevant deductions" means the total of any time agreed by the Secretary of State—

(a) for the claimant to carry out paid work, voluntary work, a work preparation requirement, or voluntary work preparation in that week; or

(b) for the claimant to deal with temporary childcare responsibilities, a domestic emergency, funeral arrangements or other temporary circumstances.'

31. Thus regulation 95 does not mean that a failure to engage in work search for 35 hours a week necessarily leads to a finding that the claimant has failed to comply with the work search requirement. Rather, the question is whether the claimant has spent time amounting to "the expected number of hours per week minus any relevant

deductions". There is no statutory definition of either "domestic emergency" or "other temporary circumstances" in the Regulations. However, on a plain reading of the words they might well encompass having to attend to the fall-out from divorce or other family proceedings. I agree with Ms Thackray that the work coach focussed on what the Appellant had not done, rather than given any consideration to the reasons why she had not maintained her usual level of work search activity. Had the decision-maker or First-tier Tribunal then explored the matter further, they would have established that the family proceedings were impacting on the steps the Appellant could reasonably take in July as well as in November 2016. On this basis the Appellant's expected number of hours should have been reduced through the application of regulation 95(1)(a)(i) and 95(2)(b). Whether or not the precise terms of those provisions had been met, the same result could have been achieved by deciding that the Appellant had taken all reasonable action despite not meeting the expected number of hours per week (see regulation 95(1)(a)(ii)).

32. Furthermore, another way of arriving at the same end point might have been to consider regulation 99. This deals with circumstances in which e.g. work search requirements must not be imposed. According to regulation 99(2A) (inserted by the Universal Credit and Miscellaneous Amendments Regulations 2014 (SI 2014/597), regulation 2(7)(b)):

> '(2A) Where paragraph (5) applies—
>
> (a) the Secretary of State must not impose a work search requirement on a claimant;
>
> and
>
> (b) a work search requirement previously applying to the claimant
>
> ceases to have effect from the date on which the circumstances set out in paragraph (5) begin to apply.'

33. Regulation 99(5) then provides as follows:

> '(5) This paragraph applies where the Secretary of State is satisfied that it would be unreasonable to require the claimant to comply with a work search requirement …, including if such a requirement were limited in accordance with section 17(4) … of the Act, because the claimant—
>
> (a) is carrying out a work preparation requirement or voluntary work preparation (as defined in regulation 95(4));
>
> (b) has temporary child care responsibilities or is dealing with a domestic emergency, funeral arrangements or other temporary circumstances; or
>
> (c) is unfit for work for longer than the period of 14 days specified in paragraph (4)(a) or for more than 2 such periods in any period of 12 months and, where requested by the Secretary of State, provides the evidence mentioned in paragraph (4)(b)(ii).'

34. Thus the "Secretary of State must not impose a work search requirement on a claimant" where the claimant, again adopting the same statutory formulation, "is dealing with a domestic emergency, funeral arrangements or other temporary circumstances".

35. There is therefore a potential overlap in the practical application of regulation 95(2)(b) on the one hand and regulation 99(2A) and (5)(b) on the other. However, the underlying distinction appears to be as follows. Regulation 95 is concerned with reducing the expected number of hours per week of jobsearch activity for one of the prescribed reasons. Regulation 99 seems to be concerned with the position where it

is unreasonable to impose such a requirement at all for a certain period but again owing to one of the prescribed reasons.

36. The First-tier Tribunal's failure to take into account (in particular) regulation 95 amounts to an error of law. I agree with Ms Thackray that as a result the First-tier Tribunal erred in law in finding that the Appellant had failed "for no good reason to comply with a work-related requirement" (section 27(2)(a)). Accordingly I allow the Appellant's appeal and set aside the First-tier Tribunal's decision.

37. I should add that in reaching this decision there are two issues I have not had to resolve.

38. The first is that I make no finding as to the nature of the work coach G's behaviour at the work search review on 18 July 2016. I accept that the Appellant has received an oral apology, but I do not know the precise terms of that apology and, of course, G has not had the opportunity in these proceedings to explain his version of events. Rather, the appeal succeeds because of the First-tier Tribunal's failure to apply regulation 95 and to make sufficient findings of fact about the reasons for the Appellant not engaging in her usual level of jobsearch activity.

39. The second is that for present purposes I do not need to determine whether there is in principle a difference between the test for UC sanctions – whether the claimant fails to comply "for no good reason" – and the test that applies under the old-style jobseeker's allowance sanctions regime, namely whether the claimant fails to comply "without a good reason". The potential nuances of these different formulations are discussed in the commentary in Mesher et al., *Social Security Legislation 2017/18*, Volume V, *Universal Credit* at p.80. That is an issue that will have to be resolved in a case where it may actually make a difference.

The Upper Tribunal's re-made decision

40. Miss Thackray for the Secretary of State very properly accepts that the Appellant's reduced work search activity in the fortnight in question still amounted to "all reasonable action" for the purposes of section 17(1)(a) and regulation 95. As well as allowing the appeal to the Upper Tribunal and setting aside the First-tier Tribunal's decision, I also re-make the decision of the First-tier Tribunal in the following terms:

> *"The Appellant's appeals are allowed.*
>
> *The Secretary of State's decisions of 17 October 2016 are both revised.*
>
> *The Appellant undertook all reasonable work search action for the periods 04/07/2016 to 10/07/2016 and 11/07/2016 to 17/07/2016. It follows that the two medium-level sanctions of 28 days each should not have been imposed.*
>
> *The Secretary of State should therefore arrange repayment of the moneys deducted under the universal credit sanctions in question with all reasonable speed."*

41. I do not have the power to make any further award in terms of interest on those arrears of UC or any compensatory payment.

Some wider issues of note

42. There are three wider issues which should perhaps be noted.

43. The first is that it is obviously a matter of great regret that it has taken a year to get from the sanction decision via a mandatory reconsideration process and a First-tier Tribunal appeal to a satisfactory resolution of this case in the Upper Tribunal. During that time the Appellant has had to endure very difficult financial circumstances. Her written submissions throughout this process show that she is an articulate and determined individual who has persisted when many others might have given up.

44. Secondly, it is unfortunate (putting it mildly) that the Secretary of State's original response to the appeal, as submitted to the First-tier Tribunal, was less than comprehensive in terms of its coverage of the relevant law. The response included a somewhat garbled version of the text of regulation 95(1), but no reference to the possibility that the "expected number of hours" might be subject to a deduction on account of any of the specific mitigating circumstances set out in regulation 95(2)(b). Similarly there was a passing but unparticularised reference to regulation 99 as listing "circumstances in which a work search requirement no longer applies" followed by the bald statement that "none of those circumstances apply in this case". Just as there was no explicit reference to the category of domestic emergencies or other temporary circumstances in regulation 95(2)(b), so the parallel terms of regulation 99(5)(b) were not cited. Accordingly there was no hint to the Appellant that her particular situation was arguably accommodated by the Regulations.

45. Thirdly, tribunals must always bear in mind that the UC sanctions regime involves a financial penalty, and so the provisions should be strictly construed (see by analogy *DL v Secretary of State for Work and Pensions (JSA)* [2013] UKUT 295 (AAC) at paragraph 14). Putting the matter another way, I subsequently suggested that "there is an argument in sanctions cases that the claimant should be given the benefit of any doubt that may reasonably arise" (*CS v Secretary of State for Work and Pensions (JSA)* [2015] UKUT 61 (AAC) at paragraph 19). I do not suggest that in the present case there is any need to give the Appellant the benefit of the doubt. However, especially with the increased severity of the UC sanctions regime, as compared with the previous arrangements, tribunals need to scrutinise sanctions decisions with considerable care.

Conclusion

46. For those reasons the decision of the First-tier Tribunal involves an error of law. I therefore allow this appeal to the Upper Tribunal (Tribunals, Courts and Enforcement Act 2007, section 11) and set aside the decision of the First-tier Tribunal (section 12(2)(a) of the 2007 Act). However, I can re-make the decision (section 12(2)(b)(ii) of the 2007 Act), and do so as above at paragraph 40.

Signed on the original
on 24 November 2017

Nicholas Wikeley
Judge of the Upper Tribunal