THE UPPER TRIBUNAL **Case No. CSCS/374/2018**
ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE JUDGE OF THE UPPER TRIBUNAL

Before: Upper Tribunal Judge A I Poole QC

The decision of the Upper Tribunal is **to allow the appeal**. The decision of the First-tier Tribunal made on 11 June 2018 at Ayr was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the directions at the end of this decision.

REASONS FOR DECISION

1. This is a case about natural justice and the requirements of a fair hearing in the context of a case about child maintenance. I have come to the conclusion that the decision of the First-tier Tribunal (the "**tribunal**") must be set aside because the appellant ("**KM**") did not receive a fair hearing.

2. Tribunals are entitled to regulate their own procedure under Rule 5 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (the "**Tribunal Rules**"). But this power is subject not only to the overriding objective in Rule 2 of the Tribunal Rules and other enactments, but also the general requirements of natural justice (*Lloyd v McMahon* [1987] AC 625). A hearing must be fair to comply with natural justice. There are certain basic rules of fairness which should always be observed, which include that a party is entitled to put their side of the argument by presenting their case to the tribunal, and calling and producing whatever relevant evidence they wish. That includes leading evidence of witnesses. Case management powers in the Tribunal Rules (including under Rules 15 and 30) are available to ensure that hearings are conducted in an orderly way, but there remains a fundamental requirement that proceedings must be conducted so that a party has a reasonable opportunity to put their case.

3. In this case, the tribunal decided to remove an award of child maintenance which the Child Maintenance Service had decided should be paid with effect from 16 October 2016 by the father ("**DM**") of two children, **R** (born 6 January 2000) and **L** (born 16 January 2005). KM, the mother of the children who had applied for child maintenance, had an obvious interest in this decision. She

was entitled to a fair hearing before the tribunal decided no child maintenance was payable. She did not receive a fair hearing, because witness evidence she wished to produce was not ultimately before the tribunal. R, the daughter of DM and KM, who was by then 18, had come along to the hearing with KM to give evidence on her behalf. The key matters before the tribunal were whether DM was living in the same household with R and L at the relevant times, and if so the levels of care provided by KM and DM. These are clearly issues on which R would have been able to give relevant evidence, and she wished to do so. But in the event the tribunal did not have the benefit of R's oral evidence, and the tribunal did not proceed on the basis of any written statement from R (p167), the bundle of papers that were before the tribunal not containing any such statement. I do not consider that it is necessary to go into precisely how it happened that R's evidence was not heard: there seem to be a number of contributory factors, and it was not an easy situation given the strained relationship between KM and DM. The key point is that evidence of R which KM wished to lead was not before the tribunal when it made its decision. Without this evidence having been heard and taken into account, the requirements of natural justice were not observed.

4. I reject the argument of the Secretary of State for Work and Pensions ("**SSWP**") that the tribunal had all the evidence in front of it, including daughter L's statement, and made the only decision it could have made, so did not err in law. The appeal point is that the tribunal did not have R's evidence before it. L's evidence could never be R's evidence. (And in any event there is no 'statement' from L in the papers. There is a letter to Santa from L asking for a list of clothes at page 98 (of dubious if any relevance to the matters in issue in the appeal). A letter to Santa is not a statement). Without knowing what R's evidence would have been, had she been able to give it, it is unclear to me the basis on which the SSWP can assert that the tribunal made the only decision it could have, particularly since the decision of the Child Maintenance Service under appeal had awarded child maintenance. I also reject the SSWP's argument that KM is not entitled to complain about R's evidence not having been led on appeal because she should have raised the matter at the tribunal hearing itself. The authority cited by the SSWP (CS/343/1994) is a decision in which the claimant was represented at the tribunal hearing. But KM was not represented. In circumstances outlined by KM, where incorrect information may have been given by the tribunal clerk about what R could or could not do, a situation which was not resolved by the tribunal, there is a breach of natural justice which KM is entitled to rely on despite not having expressly complained before the tribunal. DM argues that "we could have been there all day playing table tennis with counter arguments"; but I do not accept that, because the hearing might have taken

more time if R's evidence was heard, this was a good reason not to hear it. All parties are entitled to a fair hearing.

5. KM requested an oral hearing of this case, but neither DM nor the SSWP did so. I have read all of the papers and submissions of the parties carefully, and listened to the recording of the hearing. I am satisfied that I am able to decide the case justly on what is before me and nothing would be gained by holding an oral hearing. I set the decision aside on the basis that the tribunal erred in law because it did not act in accordance with natural justice. The case will now have to go back to the First-tier Tribunal again, for a fresh consideration by a newly constituted tribunal on the basis of all the evidence, including relevant witness evidence KM wishes to lead, and in accordance with the directions given at the end of this decision. I express no view on whether child maintenance is due or not during the relevant periods. That is for the new tribunal to decide.

Additional comments

6. This is the second time that a decision by the First-tier tribunal about the child maintenance assessment in this case has been set aside because of procedural unfairness. In those circumstances, and because the circumstances suggest there may be confusion at some levels of the First-tier Tribunal about who is entitled to be in a hearing, I offer some general comments.

<u>Who is entitled to be in a hearing and in what capacity</u>

7. The default position is that all interested parties may be present in a public hearing before the Social Entitlement Chamber of the First-tier Tribunal, unless that in some way compromises the fairness of the hearing or there is some other good reason, **and** appropriate directions have been made.

8. Under the Tribunal Rules, the general position is that parties are entitled to be in a hearing, as are their representatives or people assisting in presenting a party's case (Rule 11(7)). Often a party will bring along an additional person for support who is present in the hearing. Or witnesses may be in the hearing too, and in some cases a person might be both a witness and offering moral support.

9. If the tribunal wishes to regulate who is going to be in the hearing to enable it to deal with the case fairly and justly (Rule 2), there are powers in the Rules for it to do so. The tribunal has powers under Rule 30(3) to direct that a

hearing is in private where this is in the interests of justice, and if such a direction is made then express powers under Rule 30(4) are available for the tribunal to direct who may be in the hearing and who may not be. However, most tribunal hearings are heard in public, and in that situation powers to exclude people arise principally under Rules 30(5) and 30(6) (although there are also general procedural powers under Rule 5). Tribunals may exclude witnesses until other evidence has been given, for example if there are issues of credibility that warrant hearing evidence separately (Rule 30(6)). Tribunals can also exclude people if they might prevent other people from giving evidence freely, or be disruptive, and various other reasons (Rule 30(5)). Tribunals may also give directions under Rule 15, for example restricting the number of witnesses, and indicating whether evidence is to be given orally or in writing. Where child or vulnerable witnesses are involved (a matter which has not arisen at the last two hearings in this case before the tribunal), there are additional considerations under the Practice Direction on Children and Vulnerable Witnesses and *JP v SSWP* (DLA) [2014] UKUT 275. What is clear from the scheme of the Rules is that witnesses are entitled to be in a tribunal hearing even while other evidence is being given, unless an appropriate direction has been made.

10. Ultimately, tribunals may admit evidence whether or not admissible in a civil trial (Rule 15(2)(a)); and can take into account evidence given by a witness present throughout the tribunal hearing. Of course, the fact that a witness has been in the hearing room throughout the hearing and heard other evidence may be relevant when the tribunal is assessing the weight of evidence. In some cases, evidence is given more focus by a witness having been at the hearing and knowing what is in issue, resulting in it being found pertinent and persuasive. In other cases, a tribunal may find the presence of the witness throughout has an adverse effect on the weight given to their evidence, if their evidence has been adjusted inappropriately to take account of other evidence. But that does not stop it being admissible evidence.

11. It would therefore be wrong to suggest, in the absence of a direction from the tribunal, that a person accompanying a party can only be in the hearing room throughout the hearing if giving moral support, and not if giving evidence.

The role of the tribunal clerk

12. It is helpful for the tribunal clerk to ascertain in advance of a hearing who has come to the tribunal centre and wishes to come into the hearing, and to tell the tribunal members. The tribunal can then consider which, if any, of its

powers under the Tribunal Rules it may wish to exercise; for example if it wishes to exclude a person from all or part of the hearing.

13. But it is not for the clerk to decide who should be in the hearing. Nor is it for the clerk to decide the capacity in which a person who is not a party attends the hearing, for example as witness or to give moral support or both. It is the tribunal which bears ultimate responsibility for acting in accordance with natural justice and providing a fair hearing, not the clerk. That is why any decisions about people in the hearing, and their role in that hearing, must ultimately be for the tribunal.

14. If there are people accompanying parties, clerks should not tell them that they can only be present throughout the hearing if they are there for moral support, rather than as a witness. There are at least three reasons for this. First, unless the tribunal has already made a direction with the effect that the person is not allowed in the hearing, telling somebody they are not allowed to be in the hearing if a party wants them to give evidence on their behalf is wrong in law (as explained in paragraphs 7-11 above). Second, it would be overstepping the role of clerk, because decisions about people in the hearing are for the tribunal. Third, care has to be taken because not everybody attending hearings will understand a distinction between being there to give evidence or moral support. On one view, both can be seen as forms of support for a party. "Moral support" is not a concept mentioned in the Tribunal Rules, even though it tends to be used in tribunal practice as a term to distinguish an accompanying person who is there to give support but not evidence from a witness. It cannot be assumed that tribunal users will know or understand this practice.

The role of the tribunal

15. Many of the people who appear before the First-tier Tribunal's Social Entitlement Chamber (including in child support cases) are litigants in person, and many representatives are lay representatives. Chapter 1 of The Equal Treatment Benchbook contains a chapter on dealing with litigants in person and lay representatives. It contains a checklist of introductory explanations by the judge at hearings, which includes at paragraph 60:

> "Individuals present need to be introduced and their roles explained".

16. While I accept that procedure has to be adapted to the particular case before a tribunal, it seems to me that, when ascertaining who people in the tribunal

hearing room are and what their role is, it is helpful for the tribunal to ask open questions. What the tribunal has understood from the clerk is not conclusive, and it should not be assumed that lay people understand that a distinction is being made between people being at a hearing for moral support or to give evidence. As a matter of fact, people can be at a hearing in the capacity both of moral supporter and witness, and evidence from a person who has come along primarily to provide support can be helpful to a tribunal in making its decision. An open question about why a person is at the hearing, and what they see their role in the hearing as, seems more likely to elicit that they wish to give evidence for a party, as opposed to a closed question suggesting they are there for moral support. If a recording is being made of the hearing, it may be possible to do this in the context of getting people to introduce themselves for the benefit of the recording, and then picking up on any issues arising. It cannot be assumed that an unrepresented person will be in a position to insist that a particular person in the room is questioned by the tribunal, particularly if they have been politely requested by a judge not to interrupt during the process (even if also told to take notes if anything important arises which can be addressed later). Ultimately it is for the tribunal to provide a fair hearing and give both sides a full opportunity to present their case. Ascertaining at the outset of the hearing whether a person wishes to give evidence may assist the tribunal in doing so.

DIRECTIONS

1. **The case is to be reconsidered at an oral hearing. The member of the First-tier Tribunal who is chosen to reconsider the case is to be different from the two First-tier Tribunal judges who have previously made substantive decisions in this case.**

2. **There should be a case management hearing in advance of the substantive hearing of this appeal, to ascertain (i) the matters the tribunal will address in the substantive hearing, so that the evidence parties choose to lead is relevant to those matters (ii) which witnesses parties wish to lead and how their evidence is to be given (iii) the date by which parties must provide any further evidence to the tribunal.**

3. **The new First-tier Tribunal is not bound in any way by the decisions of the previous tribunals. It will not be limited to the evidence and submissions before the previous tribunals. It will consider all aspects of the case entirely afresh and it may reach the same or a different conclusion to the previous tribunals.**

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

A I Poole QC
Judge of the Upper Tribunal
Date: 6 February 2019