IN THE UPPER TRIBUNAL **Case No** CPIP/2416/2019
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is allowed. The decision of the First-tier Tribunal ("FtT") on 1 February 2018 under reference SC200/17/00697, refusing to set aside the substantive decision of the FtT dated 18 January 2018, involved the making of an error on a point of law and is set aside.

Acting under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 I remake the decision in the following terms:

> The decision of 18 January 2018 is set aside.

So far as necessary, I dismiss the application for permission to appeal against the decision of 18 January 2018 as in consequence of my decision there is no longer anything to appeal against.

REASONS FOR DECISION

1. Both the appellant and the respondent's representative have expressed the view that the decision dated 1 February 2018 involved the making of an error on a point of law and have agreed to a decision in the terms above. That makes it unnecessary to set out the history of the case or to analyse the whole of the evidence or arguments in detail. I need only deal with the reason why I am setting aside the decision of 1 February.

2. The appellant had appealed to the FtT against a decision dated 9 March 2017 which had awarded her the daily living and mobility components of personal independence payment, each at the standard rate. That decision was a supersession, to the appellant's advantage, of an earlier decision under which the mobility component had not been awarded. She has diabetes insipidus and, as found by the FtT, a degree of orthostatic intolerance. It is apparent from the level and circumstances of the award descried above that her conditions caused her a material degree of limitation and that those limitations at least in some respects had increased. The FtT refused the appeal.

3. Quite early in the hearing before the FtT the appellant complained of an episode of tachycardia. She was offered a pillow and lay on the floor for a few minutes before confirming that she did not require the adjournment offered and was able to resume.

4. The appellant subsequently applied for the FtT's decision to be set aside on two grounds, only one of which need detain us: that she had attended the hearing at short notice and that her "support" was unable to attend.

5. On 1 February 2018 a District Tribunal Judge ("DTJ") refused the application for set aside. The material part of that decision was:

> "The hearing was originally listed for 2 o'clock on 18.1.18. Owing to an administrative error it became apparent that another case had been listed for the same time. On 16.1.18 the appellant confirmed when asked that she was able to attend the hearing at 10.00a.m. A letter was sent to her confirming that the hearing was listed for 10 a.m. The panel on the day asked her whether she was able to continue with the hearing and she confirmed that she was…
>
> My decision is consistent with the Overriding Objective according to which the Tribunal must decide cases taking account of a number of factors: fairness, justice, seeking flexibility in the proceedings, ensuring that the parties are able to participate fully, avoiding delay. …
>
> The fact that the appellant attended without her support and that the time of the appeal was changed from 2pm to 10am is not a procedural irregularity."

6. Rule 29 of the FtT's rules of procedure provides:

> "(1) The Tribunal must give each party entitled to attend a hearing reasonable notice of the time and place of the hearing (including any adjourned or postponed hearing) and any changes to the time and place of the hearing.
>
> (2) The period of notice under paragraph (1) must be at least 14 days except that—
> (a) …; and
> (b) the Tribunal may give shorter notice—
> (i) with the parties' consent; or
> (ii) in urgent or exceptional circumstances."

7. The FtT's case management system contains the following entries (I have replaced the names of staff members with initials and removed phone numbers):

27	17/01/2018	11:06:49	LL	Telephoned App on mobile number advising that hrg time tomorrow has been changed to 10.00am. A letter has also been sent by Cardiff, please come at 10.00am tomorrow. I asked to phone me on xxxxx xxxxxx if she has a problem coming at the earlier time.
28	16/01/2018	15:01:04	RW	I have issued a letter to the appellant to advise the change of hearing time from 14:00 to 10:00

8. It is the appellant's case that the call from LL went to her answerphone and that she did not receive the message until 5.30pm or so.

9. Rule 29 requires reasonable notice to be given of (among other things) changes to the time of the hearing. There is no suggestion that the circumstances of the short notice change of timing were urgent or exceptional: they appear to have been an administrative error resulting in the double-listing of cases for the same time. Notice has to be at least 14 days unless the party consents.

10. I do not read LL's note as contradicting the appellant's evidence that the message went to her answerphone. As she points out, there may on occasion be a delay in the notification coming through on one's phone that a message has been received. In any case, even if the call had been received at the time LL made it, it would still have amounted to impermissible short notice unless consent was obtained.

11. I have not been able to find any consent given in advance to the change of time. I have not been taken to any evidence (and cannot myself find any) to support the DTJ's finding that "on 16 .1.18 the appellant confirmed when asked that she was able to attend the hearing at 10.00 am". Indeed, if she had, it is not clear what the reason for the phone call on 17 January would have been.

12. Even if one were to proceed on the basis that a breach of rule 29(2)(b) can in principle be waived on the day, in my view the FtT would have to take great care to ensure that a claimant, who may have felt they had little option but to attend, was giving genuine and informed consent. The panel's enquiry (noted by the DTJ) appears to have been about the appellant's health following her tachycardic episode rather than addressing whether she agreed to waive the short notice of the late change.

13. Was the apparent error of law material? A party to tribunal proceedings may well wish to have a supporter there, not to act as a representative but to provide moral support, to help with communication or to help the party by making suggestions (as a "McKenzie friend" would). Given the appellant's difficulties described in [2], there may have been other reasons why she wished to be accompanied by a supporter also. At the oral hearing of the permission application before me she indicated (and I see no reason to doubt) that she had been intending to be accompanied by her sister, but because of the late change of time her sister had been unable to change her work schedule.

14. I accordingly conclude that to the extent identified in the above paragraphs, the refusal to set aside is in material part unsupported by evidence and that the conclusion that the change of time "is not a procedural irregularity" cannot stand in the light of r.29 and that those errors of law were material. It is common ground between the parties that the DTJ's decision not to set aside must be reversed. That means the FtT's substantive decision is set aside and the appeal must be re-heard.

15. I had originally stayed the application for permission to appeal against the substantive decision (in respect which a late application for a statement of reasons had been permitted, resulting in one being issued on 7 August 2019) pending resolution of the appeal in relation to the decision not to set aside. The challenge to the substantive decision no longer has any relevance.

(signed)

C.G.Ward
Judge of the Upper Tribunal
21 October 2020