IN THE UPPER TRIBUNAL **Case Nos** CTC/9/2019
ADMINISTRATIVE APPEALS CHAMBER CE/10/2019
CE/11/2019
CE/12/2019
CE/13/2019
CIS/14/2019
CIS/15/2019

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is allowed. The decisions of the First-tier Tribunal sitting at Burnley on 6 March 2018 under the references listed in the Appendix to this decision involved the making of an error of law and are set aside. The cases are referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out in paragraph 27 of the Reasons.

Had I not allowed the appeal against the decisions of 6 March 2018, I should have allowed an appeal against the decision of 17 May 2018 refusing to set aside the decisions of 6 March 2018 and should have substituted a decision setting the decisions of 6 March 2018 aside under rule 37 of the First-tier Tribunal's rules of procedure.

REASONS FOR DECISION

Introduction

1. Each of these cases, some raising questions of entitlement and some the recoverability of any overpayment, ultimately concerned whether the appellant was living together "as a married couple" with Mr A, who was in remunerative work. The ESA and income support cases were being heard for the second time, appeals to the Upper Tribunal having succeeded against earlier decisions of the First-tier Tribunal ("FtT") following a hearing on 8 February 2016 which the appellant had attended. References in this decision to the FtT's reasons are to those given (collectively) in the income support and ESA appeals; the reasons in the tax credit case were not different in respects that are material for present purposes.

The FtT proceedings

2. On remittal, the ESA, income support and tax credit cases were directed to be heard together. They were listed initially for 11 October 2017 but postponed following a late request by HMRC. They were then relisted for 13 December 2017, but on 11 December there was a further application for postponement, this time by the Secretary of State. HMRC's representative was not informed in time by the FtT, so attended anyway. Eventually the cases were re-listed for a full day on 6 March 2018, with a 10am start. There was also apparently a housing benefit appeal, but it is not under appeal to the Upper Tribunal and I say no more about it.

3. The appellant was late for the hearing, believing it to have been due to start at 1030 am. At 1015 she had not arrived and the FtT went ahead without her and by 1022 had concluded its decision before she arrived (at a time which is disputed, but which no one suggests was later than 1032 and by which time the representatives of HMRC and the Secretary of State had already left.) She told the judge that she had received a letter informing her that the hearing was at 1030 but was unable, either then or subsequently, to produce it and subsequently withdrew this suggestion. An application for the decisions to be set aside was refused on 17 May 2018.

The FtT's decision to go ahead in her absence

4. The judge set out the reasons for deciding to go ahead in the absence of the appellant as follows:

> 13…[T]he Tribunal had regard to its duties, particularly those under Rules 2 and 31 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the Rules"). Rule 2 set[s] out the overriding objective which is to enable the Tribunal to decide cases fairly and justly.
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> 14. Dealing with the case fairly and justly includes, among other things, avoiding delay so far as compatible with proper consideration of the issues and ensuring, as far as possible, that the parties are able to participate fully in the proceedings.
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> 15. The Tribunal also had regard to the comments of Upper Tribunal Judge Rowland in *LR v Secretary of State for Work and Pensions (ESA)* [2017] UKUT 412 (AAC) concerning the requirement for a First-tier Tribunal to consider not only whether the evidence before it is sufficient to enable it to reach a decision but also whether the evidence is sufficient to enable it to do so fairly in the absence of the appellant.
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> 16. The Tribunal carried out a balancing act when deciding whether or not it was fair to proceed in the absence of [the appellant].
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> 17. It was satisfied that she had received notice of the hearing and so had been given the opportunity to participate fully in the proceedings; there was nothing on the GAPS system to explain her non-attendance and two of the three respondents to the appeals had sent Presenting Officers to appear at the hearing.
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> 18. The latest of the social security decisions had been made over two and a half years before the hearing dates. The Tribunal decided that it would not be in the interests of justice to adjourn as this would be disproportionate and would cause further delay.
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> 19.The Tribunal decided that it had sufficient information before it to decide the appeal and, in addition, that information would enable it to decide the appeals fairly and justly."

The FtT's decision to refuse to set aside

5. In relation to the refusal to set aside the judge set out his reasoning as follows:

> "82.1 [a] This was a rehearing of appeals which had been appealed to the Upper Tribunal previously and the latest of the decisions under appeal was made some two and a half years before the hearing date;
>
> 82.1 [b] This, coupled with the fact that there had been postponement of earlier hearing dates (admittedly not at [the appellant's] request) mean that there had been considerable delay in rehearing the appeals since the Upper Tribunal's decision made in July 2017;
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> 82.2 [The appellant] appears to have been untruthful in respect of the time she said she arrived at the venue which is not a court building to be gone through before getting to the location of the hearing rooms. The security guard is positioned immediately outside the hearing room and the Tribunal has no reason to doubt his statement that [the appellant] arrived moments before 10:32am;
>
> 82.3 Similarly, she appears to have been untruthful about the reasons for her late attendance, backtracking on her claim to have received a letter giving a later time once she was asked to provide a copy;
>
> 82.4 When considering its duties under the Rules, the Tribunal considered not only the rights and responsibilities of [the appellant] but also those of the respondent. Two of them (the Secretary of State and HMRC) had sent representatives who were present at the time that the hearing was due to start.
>
> 83 Whilst recognising that the resources of the respondents are greater than those of [the appellant], the Tribunal decided that it would be disproportionate and not in the interests of justice to set aside its decisions even though there had been a procedural irregularity under Rule 37(2)(c). This was not an appointment at the hairdressers – [the appellant] had been notified of the correct hearing time and had failed to attend on time for no good reason."

Permission to appeal

6. I held an oral hearing of the application for permission to appeal on 13 March 2019 in Leeds, which the appellant attended; neither respondent had been directed to attend and neither did so. I gave permission to appeal both against the substantive decisions and against the subsequent refusal to set them aside, observing:

> "A. When she wrote in after the FtT hearing the appellant said that she could not understand why the FtT did not ring her to see if she was on

her way, as she had attended each case previously. I have looked at a couple of the FtT's files to see whether the appellant's mobile phone number was shown and it was- e.g. on the hearing enquiry form on what is now CE/10/2019 (previously SC123/15/00594). The decision of the Upper Tribunal in *PS v SSWP* (ESA) [2017] UKUT 55 (AAC) says that the FtT when hearing social security cases is not required as a matter of law in every case to telephone the person who has failed to attend on time. That may be so, but (a) the appellant had a previous track record of attending; (b) this was an unusual case in being listed for a whole day, rather than for 4 or 5 cases to a session as is more typical; (c) not merely one, but two, presenting officers were in attendance and (d) the amounts at stake were large, running to tens of thousands of pounds. I consider it arguable that this was a case in which the particular circumstances might have required more to be done.

B. The corollary of a robust approach to going ahead in the absence of a party is the need for a greater preparedness to consider setting a decision aside: see *Cooke v Glenrose Fish Co* [2004] ICR 1188; *GA v LB Southwark (HB)* [2013] UKUT 170 (AAC). If notwithstanding A the FtT was entitled to go ahead, ought the same circumstances to have been taken into account or, if they were, to have carried more weight when considering the application for set aside?

C. …Mindful of what Mr Justice Megarry said in *John v Rees* [1970] Ch 345 at 402 C-E that:

"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events"

…considerable though the weight of the documentary evidence against her at first glance may appear to be, I cannot say that she has no realistic chance of her explanations being accepted by a First-tier Tribunal."

HMRC's submission

7. In relation to the tax credit case in which they are the respondent, HMRC supports the appeal insofar as it relates to the decision not to set aside the FtT's decision. They submit that the judge was entitled to proceed on the day, but because of the features I had identified at (a) to (d) under A above, *Cooke*

and *GA* had not been properly applied and so the refusal to set aside was in error of law.

Secretary of State's submission

8. In relation to the employment and support allowance and income support cases where she is the respondent, the Secretary of State does not support the appeal.

9. In relation to the substantive decisions, she submits that the statement of reasons had directed nine paragraphs to the decision to proceed with the hearing in the absence of a party; that the FtT had made clear findings and had given proper consideration to rules 2 and 31; the FtT detailed the enquiries made regarding the appellant being notified of the hearing as well as whether she had attempted to contact the tribunal and they explain what considerations were taken into account.

10. In submitting that the refusal to set aside was not in error of law, the Secretary of State cites para 38 of *PS*:

> "38. None of the discussion above should be regarded as detracting from the validity of the entirely separate point made in *Cooke v Glenrose Fish Co* to the effect that a more robust approach to proceeding in the unexplained absence of a party should be matched subsequently by a "less stringent attitude on a review [or, in the SEC context, an application for a set aside] if a party who has not attended comes forward with a genuine and full explanation and shows that the original hearing was not one from which he absented himself" (at paragraph 21(1)).

11. She also relies upon *SOA v LB Ealing* [2012] UKUT 437 (AAC) where Upper Tribunal Judge Lane suggested that:

> "[T]he correct approach to whether the judge's decision was erroneous in law must be to look at whether the decision was objectively fair in light of the generous ambit given to judges when weighing up the factors involved in exercising a discretion."

12. She submits (a) that the judge did not accept the genuineness of the appellant's explanation and (b) that the decision lay within the ambit of the judge's discretion.

The appellant's submission

13. In reply on the tax credit case, the appellant reiterated that she thought the outcome of the previous tribunal was unfair as she got mixed up with the time by 15 minutes and that if she had been phoned she could have been in on time. She finds it unfair that she was denied the chance to put her side of the case. No separate submission in reply has been received from her on the ESA and income support cases, but she has informed Upper Tribunal staff

that she has said all she wishes to. As the issue is common across all her appeals, it can be assumed that her position is the same.

Relevant FtT procedure rules

14. The relevant provisions of the FtT's rules are as follows:

> "2.— Overriding objective and parties' obligation to co-operate with the Tribunal
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> (d) using any special expertise of the Tribunal effectively; and
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
> (a) exercises any power under these Rules; or
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
> (a) help the Tribunal to further the overriding objective; and
> (b) co-operate with the Tribunal generally.
>
> 31. Hearings in a party's absence
>
> 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.
>
> 37.— Setting aside a decision which disposes of proceedings
>
> (1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if—

> (a) the Tribunal considers that it is in the interests of justice to do so; and
> (b) one or more of the conditions in paragraph (2) are satisfied.
>
> (2) The conditions are—
> …;
> (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
> (d) there has been some other procedural irregularity in the proceedings.
> (3) …."

The decision in *PS*

15. In *PS*, Upper Tribunal Judge Wikeley rejected, first, the Secretary of State's original submission on the appeal, made on the basis, relying on *Cooke*, that the FtT ought to have telephoned the claimant in that case and then, secondly, the Secretary of State's modified position that the FtT ought at least to have given consideration to whether telephoning was the appropriate course of action. *Cooke* was an employment case. Judge Wikeley reviewed at [28]-[32] the relevant employment tribunal rules. He noted at [33] that the employment rules contained the phrase "after any enquiries that may be practicable" which is not found in the rules of the Social Entitlement Chamber. He noted at [36] that asking a tribunal clerk to telephone a non-attending appellant was "not unproblematic", for reasons which he gave. For present purposes though, the key passages are paras 34 and 35:

> "34. Second, the decision on whether to proceed in the absence of a party who fails to attend may be affected by the jurisdictional context. The employment tribunal is a party and party tribunal in which a contested unfair dismissal hearing may easily take a day or indeed several days of hearing time. The practical incentive in that jurisdiction to ensure that appeals listed for hearing are effective may well be far more pressing than in the Social Entitlement Chamber, where the typical hearing is probably no more than an hour and a non-attended case can be readily set aside and relisted where appropriate. Furthermore, the standard notice of hearing letter sent to appellants in the Social Entitlement Chamber states quite clearly that "If you do not attend, the tribunal may decide the appeal in your absence." In addition, of course, parties must "co-operate with the Tribunal generally" (rule 2(4)(b)), which must of necessity include advising the tribunal office if there is a problem with attendance.
>
> 35. Third, the decision by any tribunal on whether to proceed in the absence of a party who fails to attend will necessarily be heavily fact-specific. As the EAT has noted more recently, "there is some authority that suggests that in certain circumstances in the event of non-attendance by a party it is incumbent on the Tribunal to contact that party and discover why there has been non-attendance" (*Quashie v Methodist Homes Housing Association* [2012] ICR 1330 at paragraph

> [14], emphasis added). For example, it should be noted on the facts of *Cooke v Glenrose Fish Co* itself that the appellant had solicitors on the record who had been involved in negotiations over the agreed bundle shortly before the hearing. Accordingly, as Burton J noted "at the very least, a question mark would have been raised in the mind of the tribunal" (at paragraph [13]) as to why one party had not attended at all. So in those particular circumstances, Burton J felt able to describe the employment tribunal's decision not to institute a telephone enquiry as an "extreme step" (at paragraph [15]). In the Social Entitlement Chamber, in contrast, and in part for the reasons canvassed in the previous paragraph, such an omission would be entirely normal in the typical case."

16. Thus, concluded Judge Wikeley (emphasis in original):

> "37. For all these reasons I do not accept that *Cooke v Glenrose Fish Co* is a read across authority for the proposition that tribunals in the Social Entitlement Chamber (SEC) must *as a matter of law* consider whether to telephone an appellant in the event of an unexplained absence. Where there is an unexplained absence, the First tier Tribunal must consider and apply rules 2 and 31. It must check there has been proper notification of the hearing (rule 31(a)). It must also consider whether or not it is in the interests of justice to proceed (rule 31(b)), taking into account the overriding objective. There may be situations in which making such further enquiries is good practice, but it all depends on the circumstances. The test in rules 2 and 31 cannot be fettered by elevating what may in some circumstances be an example of good practice into a proposition of law."

Application of *PS* and rules 2 and 31 to the present appeals

17. I respectfully agree with Judge Wikeley both that *Cooke* is not a "read-across authority" on the duty to telephone and that the test is that provided by rules 2 and 31. However, I note that many of the features of the employment context relied upon by Judge Wikeley to distinguish it from the typical social security case are in fact present in the present, atypical, social security cases. As he noted, decisions on whether to proceed are heavily fact-specific. A case listed for a full day and at which Presenting Officers from two public bodies were required is very different from the more typical one hour appeal, at which the Secretary of State or HMRC may well not be represented at all. The difficulties in setting up a hearing date in the present cases are reflected in the two previous postponements, one at the request of each public body. The resulting delay and the potential risk of further delay are, if anything, reasons why increased efforts should have been made to ensure that the hearing was (properly) effective, not the converse. The same goes for the history of attendance: when there had been an effective previous hearing, the appellant had attended it. Why would she not wish to attend the present hearing, with a potential liability of more than £20,000 hanging over the head of her and her young family? As in *Cooke* itself, at very least a question-mark would (or should) have been raised in the minds of the tribunal.

18. The overriding objective does, as previously noted, contain the requirement to seek to give effect to the objective of "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings". Clearly, if one has available (as the FtT did) a person's mobile phone number and (it must be assumed) the use of a telephone somewhere on the tribunal premises, it is on one level "practicable" to make a phone call to that number. *PS* holds that one is not required as a matter of law in every case, but that the requirement is to apply rules 2 and 31. It seems to me to be important to recognise that in so doing, the various constituent parts of the overriding objective may each have different weight according to the circumstances of the case.

19. However, in the present case we do not really know from paras 13 to 18 of the FtT's reasons why the judge considered that, despite the unexplored absence of the appellant to give evidence about the nature of her personal and family life the FtT could nonetheless decide the case fairly (or that the issues could receive proper consideration), as the reasons on this point are little more than a statement of the test and a conclusion that the test is satisfied. Pressing ahead on such a basis and without having checked that the further evidence the appellant could potentially provide was indeed unobtainable necessarily diminishes the weight that can be given to the avoidance of delay in applying rule 2.

20. The FtT's reliance on the appellant being "given the opportunity to participate fully in the proceedings" comes some way below the level of "ensuring so far as practicable" that this can be done.

21. In dealing with the case in a manner which is proportionate to (amongst other things) the importance of the case, it is not apparent that the importance of the case -principally because of the amounts of money at stake –to the appellant was considered.

22. Had the importance of the case to her and the potential for her own evidence to contribute to the proper consideration and fair and just deciding of the appeal been considered, and *PS* been properly applied, noting the features which distinguish the typical social security case on which *PS* is predicated from the present appeals, I consider that a tribunal would have been required to attempt to contact the appellant by telephone. Whilst I accept of course that in case management matters the FtT must be afforded a significant degree of discretion, in my view for the above reasons, the exercise of it in this case falls outside the bounds of that discretion.

The refusal to set aside

23. If, contrary to my primary position, the FtT was justified in proceeding without making the telephone enquiry, in my view that can only be justified on the basis of being prepared to exercise a greater willingness to set the decision aside. I do not consider that that was shown by the decision to refuse to set aside.

24. The appellant explained what had happened: she made a mistake about the start time. Why she made that mistake was something of a satellite issue, yet the judge seems to have been quick to view her original indication that she thought she had had a letter with the later start time and subsequent backtracking as "untruthful" as opposed to merely mistaken: it is not always easy to pin down why one holds a mistaken view of a situation. He also appears to have taken the appellant's initial non-attendance as a slight to the tribunal, making the homely, but perhaps ill-advised, observation that "this was not an appointment at the hairdressers".

25. Whether or not for these reasons, the grounds on which set aside was refused give no consideration at all to whether the FtT's decision to go ahead without any attempt to contact the appellant in what, if contrary to my view it was not an error of law, was at best for the reasons given above a borderline decision, had anything to contribute to the application of the "interests of justice" test. That is the ground on which, in essence, HMRC supports the appeal and without prejudice to the primary basis on which this decision is reached, I consider it to be correct so far as it goes.

26. Whilst I would if necessary allow the appeal against the decision to refuse to set aside and substitute a decision setting aside the FtT's substantive decisions under rule 37 of the FtT's Rules, I do not need to do so as I am in any event setting the substantive decisions aside for error of law and remitting the appeals for rehearing.

Directions

27. I direct therefore that:

(a) the questions of whether the questions of the appellant's entitlement to the various benefits in these appeals and, to such extent (if any) that she is held not to have been entitled, of whether any amounts overpaid are recoverable from her are to be looked at by way of a complete re-hearing in accordance with the legislation and this decision;
(b) unless otherwise directed, the appellant must ensure that any further written evidence is filed with the First-tier Tribunal no less than 21 days before the hearing date;
(c) the tribunal will need to make full findings of fact on all points that are put at issue by the appeal. If the tribunal rejects the appellant's evidence, it must provide a sufficient explanation why it has done so and must give adequate reasons for its conclusions; and
(d) the tribunal must not take account of circumstances that were not obtaining at the time of the decisions under appeal - see section 12(8)(b) of the Social Security Act 1998 - but may have regard to subsequent evidence or subsequent events for the purpose of drawing inferences as to the circumstances obtaining at that time: R (DLA) 2/01 and 3/01.

28. Whilst it is not a matter for me to direct, it is strongly suggested that the appellant should attend the re-hearing.

29. She may wish to consider whether Citizens Advice or other organisation with welfare benefits expertise may be able to assist her with the preparation and/or presentation of her case.

30. The decision on the re-hearing is a matter for the First-tier Tribunal and no inference as to the outcome should be drawn from the fact that this appeal has been allowed on a point of law.

CG Ward
Judge of the Upper Tribunal
6 January 2020

APPENDIX

CTC/9/2019
Tribunal Case No: SC123/16/00196

CE/10/2019
Tribunal Case No: SC123/15/00594

CE/11/2019
Tribunal Case No: SC/123/15/00726

CE/12/2019
Tribunal Case No: SC/123/15/00590

CE/13/2019
Tribunal Case No: SC/123/15/00591

CIS/14/2019
Tribunal Case No: SC/123/15/00592

CIS/15/2019
Tribunal Case No: SC/123/15/00593