IN THE UPPER TRIBUNAL **Appeal No.** CUC/1386/2020
ADMINISTRATIVE APPEALS CHAMBER

On appeal from First-tier Tribunal (Social Entitlement Chamber)

Between:

KS

Appellant

- v –

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 3 June 2021
Decided on consideration of the papers

Representation:
Appellant: Joe Power, Kirklees Citizens Advice and Law Centre.
Respondent: Mick Hampton, Decision Making and Appeals Section, Leeds.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 16 June 2020 under case number SC246/20/00221 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, at an oral hearing.

REASONS FOR DECISION

1. I am satisfied on the arguments before me that the First-tier Tribunal erred in law in the decision to which it came on 16 June 2020 ("the tribunal") and that its decision should be set aside as a result. I do not consider I am able to redecide the appeal myself and so the appeal will be remitted to an entirely newly constituted First-tier Tribunal to decide. That should be at an oral hearing.

2. This is yet another case concerning the failure of the Secretary of State to put before the First-tier Tribunal an accurate list showing the least and most onerous forms of work-related activity that were available for the claimant to undertake – here in the context of paragraph 4 in Schedule 9 to Universal Credit Regulations 2013 ("the UC

Regs") - **and** the failure of the First-tier Tribunal to do anything to correct that (obvious) omission. The hope I expressed in *MR v SSWP* (ESA) [2020] UKUT 210 (AAC) that *MR* would be the last word on the provision of accurate lists of work-related activities in appeals concerning regulation 35(2) of the Employment and Support Allowance Regulations 2008 *or its Universal Credit counterpart* has proven to be a forlorn one.

3. I have already set out in *MD v SSWP* (UC) [2020] UKUT 215 (AAC) that the Secretary of State's obligation to provide an accurate list of the least and most demanding forms of work-related activities, including work placements or work experience, is the same in appeals concerning universal credit as it is in employment and support allowance appeals. First-tier Tribunals likewise need to be as astute in universal credit appeals where the issue arises that such a list is before them as they should be in equivalent employment and support allowance appeals. This appeal shows that, regrettably, neither occurred: either when the appeal was written by the Universal Credit Post Handling Site B in Wolverhampton on or after 15 February 2020 or when the tribunal came to consider the appeal on 16 June 2020. Neither omission is excusable. The need for accurate evidence about work-related activities has been a given since *IM v SSWP* (ESA) [2014] UKUT 412 (AAC); [2015] AACR 15 was decided in 2014 and it is unacceptable that the Upper Tribunal is still having to make decisions in 2021 which point this out.

4. I am not sure in the above context if it is therefore right for me to say I am 'heartened' by what Mr Hampton for the Secretary of State has set out in his submission on this appeal about the further 'progress' the Secretary of State has made in complying with *IM* (and subsequent cases) in universal credit appeals in which paragraph 4 in Schedule 9 is in issue; perhaps 'cautiously relieved' may be a better description of my reaction. The new information Mr Hampton was able to provide is that:

> "Universal Credit (UC) appeal writers underwent additional training so as to bring them in line with how Employment and Support Allowance appeal writers present their submissions, and this training was completed in July 2020. It is possible that when the appeal was written, the submission writer had not had this training. Thus, given that UC appeal writers are now fully aware of the requirement to include the WRA list, this error should not present itself for much longer in appeals."

5. I take it that 'how Employment and Support Allowance appeal writers present their [appeal responses]' means consistently with what I was told in *MR*. However, the closing words from Mr Hampton set out above mean that First-tier Tribunals may need to remain vigilant on universal credit appeals especially to ensure they have been provided with an accurate list of work-related activities. One I would have thought reasonably fail safe test is if the list does not include 'work placements' then it is very likely that it is not an accurate list.

6. Having made these opening but important remarks, I can turn now briefly to why the tribunal erred in law.

7. The tribunal first erred in law by failing to ensure it had before it an accurate list of work-related activities. Such a list was needed for the tribunal to properly decide whether there would be a substantial risk to health from the appellant engaging in work-related activity. That such a list should include work placements or work experience (per section 16(3)(e) of the Welfare Reform Act 2012) was particularly relevant on this appeal given that it had been accepted that there **would** be a substantial risk to health if the appellant was found 'fit for work'.

8. The second error of law made by the tribunal is linked to the first error of law. The second error of law is that the tribunal failed adequately to explain why, if, per the mandatory reconsideration on page 79, consideration was properly given in this context to the journey to and from work, and in work itself, the appellant's satisfaction of paragraph 4 of Schedule 8 to the UC Regs was not relevant to whether she also satisfied paragraph 4 of Schedule 9 to the UC Regs. The appellant's satisfaction of paragraph 4 in Schedule 8 – that is, that there was a substantial risk to her health from her being found 'fit for work' – did not mean she satisfied paragraph 4 of Schedule 9 without more, but it was relevant to whether paragraph 4 of Schedule 9 was met.

9. The third error of law is the tribunal failed to interrogate and satisfy itself of the evidential basis for the statement in the 'mandatory reconsideration' decision of 15 February 2020 (page 80) that the most demanding work-related activities would only be considered at a later date. The tribunal placed significant reliance on this (see para. 10 of its reasons). But it failed to properly satisfy itself that there was evidence that the appellant's Work Coach could not in fact, or would not in fact, refer her to a work placement on 15 January 2020 (the date of the decision under appeal to it). If that evidence was, for example, constituted in general instructions given to Work Coaches then those instructions ought to have been in evidence before the tribunal. I should add that there was no evidence that the 'mandatory reconsideration' maker was himself a Work Coach and so more needed to be done by the tribunal to establish the evidential basis for the claim made by him on page 80. The sharing of information between the Secretary of State's decision-makers and her Work Coaches (and vice versa) has been highlighted as an issue in and since *IM* (see by way of example *XT v SSWP* [2015] 200 (AAC)). The decision maker's statement on page 80 may have been based on something told to him by a Work Coach or contained in instructions to all Work Coaches. But that would then be relevant evidence on the appeal which ought to have been disclosed: per rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

10. The other grounds of appeal can be subsumed in the issues the new First-tier Tribunal may need to address. That will include any arguments around the appellant's effective ability (or inability) to communicate with her Work Coach. The appellant's representative draws attention to what the appellant has said at the top of page 4 and on page 8 of the appeal bundle in in this regard and that is evidence the new First-tier Tribunal may need to consider under paragraph 4 of Schedule 9 to the UC Regs.

11. For the reasons given above, the appeal succeeds. The Upper Tribunal is not able to re-decide the first instance appeal. The appeal will therefore have to be re-decided afresh by a completely differently constituted First-tier Tribunal (Social Entitlement Chamber), at a hearing.

12. The appellant's success on this appeal to the Upper Tribunal on error of law says nothing one way or the other about whether her appeal will succeed on the facts before the 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.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 3 June 2021