

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. CCS/1800/2016

Before: Upper Tribunal Judge K Markus QC

The decision of the Upper Tribunal **is to allow the appeal**. The decision of the First-tier Tribunal made on 3 February 2016 under number SC919/15/00169 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 following directions.

Directions

- 1. This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**
- 2. The members of the First-tier Tribunal who reconsider the case should not be the same as those who made the decision which has been set aside.**
- 3. The parties should send to the relevant HMCTS office within one month of the issue of this decision, any further evidence upon which they wish to rely.**
- 4. The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. It will not be limited to the evidence and submissions before the previous tribunal. It will consider all aspects of the case entirely afresh and it may reach the same or a different conclusion to the previous tribunal.**

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

REASONS FOR DECISION

Introduction

- 1. In these reasons I refer to the Appellant and the Second Respondent as “Mrs K” and “Mr K” respectively.**
- 2. Over the course of the proceedings the issues in the appeal have been clarified and narrowed. In particular, there is no longer any issue regarding the decision of 2 July 2014. On 7 April 2017 that decision was revised with effect from 30 June 2014. I note that Mr K does not agree with that decision, but it is not within the scope of this appeal. This appeal is concerned only with the decision by the First-**

tier Tribunal (FTT) regarding Mr K's liability between 24 February and 30 June 2014.

3. On 25 September 2017 I gave permission to appeal following an oral hearing attended only by the Appellant. I identified a possible inconsistency within the statement of reasons, but the main arguable error which I identified was as follows:

"Mrs K¹ also submits that it was not reasonable or fair for the tribunal to have accepted the income figures given by Mr K in the light of his acknowledged failure to provide evidence in accordance with the tribunal's directions. As the tribunal observed at paragraph 36, on the limited documentation provided it was not possible to establish certain key facts. Moreover, Mr K had redacted large parts of his bank statements showing, Mrs K submitted, only those income figures which were consistent with his evidence. It was not possible to tell whether other income was received during the period but, as Mrs K pointed out, it seems from the figures that can be seen on page 53 for the period 14 to 23 April inclusive that other sums of money must have been received during that period. It seems to me that there is some substance in this too and that it was arguably not reasonable for the tribunal to have relied on the largely redacted bank statements."

4. The Secretary of State supports the appeal. Mr K does not, and has provided a witness statement with supporting documentary evidence setting out his case as to his financial position. This evidence is concerned with the factual merits of the case but does not address whether the FTT made errors of law. Mr K's evidence will be relevant to the FTT's decision on the remitted appeal.

The FTT's decision

5. The assessment against which Mrs K had appealed to the FTT was based on the Secretary of State's decision that Mr K had income of £401.50 per week. At an earlier hearing, the FTT had adjourned the appeal because further evidence was required from Mr K regarding his income. He was directed to provide a number of documents. He did not comply in full. At the final hearing Mrs K complained about, and the FTT acknowledged, the inadequate disclosure. In the Decision Notice the FTT said:

"This was a probably unnecessarily complex case made more so by Mr K's unwillingness to provide even basic and innocuous details of his work with [the company]. This unwillingness made it all the more difficult to understand what was going on in the relevant period. There is some force in Mrs K's arguments that Mr K has not properly explained his financial and work position and that he did not comply with the disclosure directions."

6. The tribunal then went on to set out its decision on the basis of the available evidence.
7. In the statement of reasons, the FTT explained what had occurred at the earlier hearing (when it directed an adjournment) and said:

"It was clear that much more information was required to decide this appeal and the matter was adjourned with Directions given for the production of documents by Mr K."

¹ The surnames appear in full in the FTT's statement of reasons.

8. The FTT proceeded to set out the limited information provided by Mr K. At paragraph 40 of the reasons the tribunal said:

“Mr K did not comply with the Directions given and did not really come up with any explanation as to why this was the case.... the disclosure does not meet the Directions given and no satisfactory explanation was offered by Mr K. Wage slips, tax returns and bank statements would have given much greater evidential certainty.”

9. The FTT set out its findings and then said:

“[Mrs K] is right to say that we have not had full disclosure but that does not mean that the calculation is wrong. Mr K has not given anything like his full records but to allow this appeal I must be satisfied on the balance of probabilities, that his income was more than £401.50.”

10. The tribunal judge said that he made his decision on “All the evidence that I do have”.

Discussion

11. It is clear from the above that, although the FTT had decided at the first hearing that it needed more information in order to determine the appeal, it then determined the appeal without that information. I appreciate that some information had been provided pursuant to the tribunal’s directions, but it was not all that the FTT had said was “required” to determine the appeal. The FTT saw fit to rely on the incomplete information which was available, even though Mrs K’s case was that this did not show the full picture. The missing documentation was potentially significant, in particular the 2014 tax return and SA302 and the extensive redaction of the bank statements.
12. There is no explanation for the FTT’s change of position. One is left wondering why the FTT thought that it could decide the case without information which it had previously said that it needed. This may not matter if the FTT’s reasons show that, as things turned out, the evidence that was provided was sufficient to determine Mr K’s income. But in this case it could not rationally be said that the information was sufficient. The FTT’s apparent confidence that Mr K’s income could not have been greater than £401.50 was based largely on the limited information that Mr K had provided. It is impossible to understand on what basis the FTT concluded that the documentation which had not been provided would have made no difference. This is of particular concern in the light of the FTT’s observation that there was some inconsistency between the evidence provided by Mr K and that information in the DWP screenshots.
13. This leads me to the next problem with the FTT’s decision, which is that it did not address the powers that were available to it in the light of Mr K’s inadequate compliance with the directions. It had a number of options under rule 7(2) of the Tribunal Procedure (First-tier Tribunal) Rules 2008. In determining the appeal on the available evidence, the FTT in essence decided to waive the requirements of its previous directions. That was only one of the available options, but there is no indication that the FTT considered the range of powers before deciding what to do. In addition, the FTT could have considered whether to estimate Mr K’s income pursuant to paragraph 9A of Schedule 2 to the Child Support (Maintenance Calculation and Special Cases Regulations) 2000. As I said in TJ v Secretary of State for Work and Pensions (ESA) [2014] UKUT 0445 (AAC) at

paragraphs 12-14, a tribunal must consciously exercise a discretion which is available to it and explain how it has done so (albeit briefly, if that is all that is called for).

14. Finally, there was a specific error in the FTT allowing Mr K to rely on the extensively redacted bank statements. Mrs K's position was that other evidence including the unredacted bank statements may show other income which Mr K had not declared. Mr K said that he redacted the statements to protect his privacy but permitting him to withhold such extensive financial information was unreasonable and unfair. If the FTT took the view that there was any justification for Mr K's concerns as to privacy or misuse of the materials, it had powers under rule 14 of the Tribunal Procedure Rules to limit disclosure or publication of the materials.
15. For all of the above reasons, the FTT erred in law in its approach to Mr K's non-compliance with the directions and in determining the appeal on the available evidence.
16. That is a sufficient basis to allow this appeal and set aside the FTT's decision. At paragraph 7 of the observations of 13 March 2017 I identified an issue regarding motor expenses. I need say only that there is a conflict between what the FTT found at paragraph 29 (that the expenses were paid by the company) and the FTT's note of Mr K's evidence which was that those expenses were not paid by the company. It may be that what appeared at paragraph 29 was a typing error, but it is not clear. I do not need to resolve it. I am not in a position to re-make the decision under appeal and so I am remitting the case to be determined by a different FTT. The matter of motoring expenses can be picked up by that tribunal.
17. There is some indication in Mrs K's latest written submissions that she does not want to attend a further tribunal hearing, but it is not clear. In any event, it will be for the next FTT to manage the future progress of the appeal.

**Signed on the original
on 8 May 2018**

**K. Markus QC
Judge of the Upper Tribunal**