

IN THE UPPER TRIBUNAL

Appeal No: CJSA/4557/2013

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

I consent to the Secretary of States withdrawing this appeal from the Upper Tribunal.

A copy of this decision is to be placed on the Upper Tribunal Administrative Appeal Chamber's website.

REASONS FOR DECISION

1. This appeal was stayed (that is, held up from being decided), regrettably for a long time, first because of the litigation that ended in *R(Reilly and Wilson) –v- Secretary of State for Work and Pensions* [2013] UKSC 68; [2014] AC 453 and cases which followed on from it, and then because to await the Upper Tribunal's decision in *SN -v- SSWP (JSA)* [2018] UKUT 279 (AAC).
2. I should emphasise that this appeal does not concern the claimant's referral to the Bluebell Wood Charity shop in July 2012. What this appeal is concerned with is the claimant's earlier referral in April 2012 to Remploy in Sheffield.
3. One of the key issues in issue in *SN* was satisfaction of regulation 4(2)(d) of the Jobseeker's Allowance (Mandatory Work Activity Scheme) Regulations 2011 ("the MWA Regs"): satisfaction both in terms of the notice and the claimant acting in compliance with that notice.

4. Regulation 4(2)(d) provides that the notice must specify details of what the claimant is required to do by way of participation in the mandatory work activity scheme. One difference between the notice in this respect in *SN* and the notice in this case is that the notice in issue in *SN* told the claimant he was to work as a “Retail Assistant”.
5. By directions of earlier this year I asked the Secretary of State in particular to address whether the absence of any job title in the notice of 16 April 2012 issued to the claimant in this case made a material difference. I asked whether the absence of a job title or job description breached the requirements of regulation 4(2)(d) and thus (save for the Jobseekers (Back to Work Schemes) Act 2013 (“the 2013 Act”)) rendered the notice invalid: see paragraph 182 of *SSWP -v- TJ* [2015] UKUT 0056 (AAC) and paragraph 55 of the Supreme Court’s decision in *R(Reilly and Wilson) –v- Secretary of State for Work and Pensions* [2013] UKSC 68; [2014] AC 453 and its reference to the notice giving the reader “[an] idea of the likely nature of the tasks”.
6. I took the view that this was an important issue which required further consideration on this appeal. I stated that the issue did not arise for decision in *TJ* as in those appeals the consideration was in respect of the notice(s) when read with the 2013 Act. And in *SN* I was satisfied that the inclusion of the ‘job title’ gave the claimant notice of the likely nature of the tasks. Furthermore, my decision in *CJSA/4599/2014* (a case involving yet another social security claimant) also concerned a notice with a ‘job title’ of “Retail Assistant”.
7. I considered that resolution of the above issue may have been important on this appeal because if the notice was invalid for failing to meet regulation 4(2)(d) and was only saved by the 2013 Act, then the claimant may have been someone whose rights under Article 6.1 of the European Convention on Human Rights were breached by the 2013 Act. And if that was the case then he, too, may have benefitted from any Remedial Order which may (still to) be made under section 10 of the

Human Rights Act 2010 to address the declaration of incompatibility upheld by the Court of Appeal in *SSWP v Reilly and Hewstone* [2016] EWCA Civ 413; [2017] QB 657; [2017] AACR 14.

8. However, the above issue does not now need to be decided on this appeal given the Secretary of State's reasons for withdrawing the appeal set out below. Those reasons have led me to consent to this appeal being withdrawn. However, the above issue may remain of importance in other appeals and it is for this reasons that I have set it out in some detail above.
9. I set out in full the reasons why the Secretary of State now wishes to withdraw this appeal. I do so because those reasons may themselves be of importance and of relevance in other cases.

1. The Secretary of State for Work and Pensions ("**SSWP**") hereby gives notice to the Upper Tribunal ("**UT**") that she wishes to withdraw her appeal against the decision of the First-tier Tribunal dated 20 February 2013 pursuant to rule 17(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("**the TPR**"). The SSWP requests the UT's consent to this withdrawal.
2. The SSWP has undertaken a review of the case file since the lifting of the stay in this case and in light of the Directions of UT Judge Wright dated 7th September 2018. The SSWP is grateful to the UT for the extensions of time in which to respond.
3. In particular, the SSWP has reviewed the basis of [the claimant's] referral to the Mandatory Work Activity ("**MWA**") Scheme, in light of the facts which were known about [the claimant's] situation at the time of that referral. In particular, [the claimant] had multiple problems, including drug addiction (for which he was receiving methadone treatment for withdrawal), depression, he was a recent prison-leaver and had a series of criminal convictions, and was (or had recently been) homeless.
4. At that time, the DWP's Operational Guidance (in force at the relevant time) provided as follows under the heading "*Identifying claimants suitable for MWA*" (as far as material for present purposes):

"17. As MWA places are limited, it is imperative that the provision is deployed appropriately. Where the primary barrier to a claimant finding work is a lack of focus and discipline on their part, MWA has the potential to help them. But where that lack of focus and discipline has a serious underlying cause, for example:

- a significant disability (whether physical or mental)*
- a low level of basic skills*

a chaotic lifestyle due to drug/alcohol misuse or where the primary barrier is something else altogether, for example:

a background that includes serious criminal convictions

MWA participation would only be beneficial, and therefore appropriate, if it were deployed as a step within a structured approach designed to address the claimant's multiple barriers. Deployed in isolation or as the first or primary step, MWA would be wholly inappropriate." (emphasis added)

5. Despite investigation, there is unfortunately insufficient evidence to determine whether the guidance was in fact applied, based on the records which are available. However, it is the SSWP's position that had that guidance been (properly) applied in [the claimant]'s case, [the claimant] should not have been referred to the MWA Scheme, given his complex barriers to employment and background of criminal convictions, without this being part of a structured approach addressing his multiple barriers to employment (which it was not). The SSWP acknowledges that this part of the operational guidance cited above should have been placed before the FtT in line with the SSWP's duty under r 24 of Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 as being a document relevant to the appeal.
 6. In line with the case of *NM v SSWP* [2016] UKUT 351 (AAC), the SSWP therefore submits that [the claimant] had good cause for not attending bearing in mind the fact that (as above) he should not have been referred to the MWA because of the complex range of barriers to work set out at paragraph 3; and also in light of the evidence [the claimant] presented in his appeal that his inability to obtain a methadone script impacted on his ability to attend at the time required.
 7. Accordingly, in view of the above, the SSWP wishes to withdraw her appeal.
10. If I may say so, I find it astonishing that such plainly relevant guidance was not made available to the First-tier Tribunal which decided the appeal on 20 February 2013. Just as worryingly, the guidance has only been disclosed at the very tail end of these Upper Tribunal proceedings and after several submissions from the Secretary of State. This was an appeal in which, but for the "Reilly and Wilson" litigation, the First-tier Tribunal would have accepted the Secretary of State's submission that the claimant had not shown good cause within five days of his failure to participate in the mandatory work activity scheme. The Secretary of State's decision had led to a thirteen-week sanction (that is, non-payment) of the claimant's jobseeker's allowance, which is a minimum safety net benefit. That decision, ought, however, on the basis of the

guidance only now disclosed, never have been made in the first place as the appellant ought not to have been referred to mandatory work activity to start with. However, how can justice be done if even the decision maker does not know his or her own guidance, let alone the tribunals on appeal?

11. All that I berated the Secretary of State about in *NM v SSWP* [2016] UKUT 351 (AAC) about 'hiding' her guidance applies with equal force in this case.
12. Given I am consenting to the Upper Tribunal appeal being withdrawn, the effect of which is to keep in place the First-tier Tribunal's decision setting aside the Secretary of State's 13 week 'sanction' decision of 6 July 2012, I need not trouble to consider in any great detail how the good cause could be shown given it appears undisputed that the claimant did not supply any reasons for his failure to participate in the particular mandatory work activity within the statutory five working days. One answer may be that had the Secretary of State made available the above guidance to the public, as she ought to have done, then that guidance in and of itself would have shown 'good cause' well within the five days, indeed even before those five days had begun to run, regardless of what steps the claimant did or did not take within the five days.
13. As the withdrawing of the Secretary of State's appeal gives the claimant all he could have hoped to have gained as the respondent in these Upper Tribunal proceedings, I have not thought it necessary to seek his views on whether consent should be withheld from the Secretary of State to withdraw her appeal.

**Signed (on the original) Stewart Wright
Judge of the Upper Tribunal**

Dated 12th December 2018