

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Upper Tribunal Case No. CE/2919/2017

Before: Mr. E Mitchell, Judge of the Upper Tribunal

Decision: This appeal succeeds. The decision of the First-tier Tribunal (9 February 2017, sitting at Sutton, file reference SC 154/16/04215) involved an error on a point of law. Under section 12 of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal sets aside the Tribunal’s decision and remits this case to the First-tier Tribunal for re-determination in accordance with the directions given at the end of the reasons for this decision.

REASONS FOR DECISION

Background

1. Mr T appealed to the First-tier Tribunal against the Secretary of State’s decision that he was not entitled to Employment and Support Allowance (ESA).
2. On 1 February 2017, Mr T informed the First-tier Tribunal by email that he could not attend a hearing listed for 9 February 2017. He requested another hearing date. This was a request for postponement of the hearing listed for 9 February 2017.
3. On 2 February 2017, a tribunal caseworker, acting under delegated authority, refused Mr T’s postponement request. The caseworker’s reasons stated “no details have been provided as to why the appellant is unable to attend the hearing”. This was not in fact correct; Mr T relied on ‘family commitments’.
4. The caseworker’s decision notice stated that “the party...may, within 14 days of the date of [2 February 2017], apply in writing for the decision to be considered afresh by a judge”. That reflected requirements in the First-tier Tribunal’s rules. Where a function of a judicial nature is exercised by a member of staff, rule 4(3) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 provides:

“(3) Within 14 days after the date on which the Tribunal sends notice of a decision made by a member of staff...to a party, that party may apply in writing to the Tribunal for that decision to be considered afresh by a judge.”
5. The First-tier Tribunal heard and dismissed Mr T’s appeal in his absence on 9 February 2017. In other words, before expiry of the 14 day period for requesting that a judge consider

afresh the caseworker's decision. On the front page of Tribunal's the record of proceedings is written:

“FTA. P/P request had been refused. Clerk telephoned rep. who had no further info. Interests of justice to proceed.”

The grounds of appeal

6. A hearing in Mr T's absence was held seven days after a tribunal caseworker refused his postponement request. Accordingly, Mr T still had seven days in which to make a written request for the caseworker's decision to be considered afresh by a judge. Mr T was granted permission to appeal on the ground that, arguably, the First-tier Tribunal erred in law by proceeding to decide Mr T's appeal in his absence before the end of the period in which he had the right to apply in writing for judicial reconsideration of the caseworker's decision.

7. Mr T was also granted permission to appeal on the ground that the Tribunal arguably gave inadequate reasons for determining that regulation 29 of the ESA Regulations 2008 did not apply (whether work would give rise to a substantial risk to Mr T's health). Mr T's notice of appeal stated that finished work due to his back condition but the Tribunal's statement of reasons did not address work-related health risks.

8. The Secretary of State supports both grounds of appeal. She invites the Upper Tribunal to set aside the First-tier Tribunal's decision and remit Mr T's appeal against her decision as to his ESA entitlement to that tribunal for re-determination. Mr T's reply, drafted by Robinson Wilson Solicitors, does not dispute that invitation.

Why the First-tier Tribunal erred in law

9. In deciding to hear Mr T's appeal in his absence, the First-tier Tribunal effectively deprived him of his right to request a judicial reconsideration of his postponement request. Tribunal case management decisions cannot lawfully deprive a party of a right conferred by the First-tier Tribunal's rules unless that is provided for the rules. The First-tier Tribunal erred in law.

10. The parties argue that, in proceeding in Mr T's absence, the Tribunal overlooked a relevant consideration namely that Mr T still had seven days in which to request a judicial reconsideration. While this matter was overlooked, the argument presupposes that the Tribunal had power to waive Mr T's right to request a judicial reconsideration which it did not. The Tribunal's power to waive non-compliance with a requirement in the Rules, conferred by rule 7(2)(a), only applies where a party fails to comply with a requirement.

11. I also decide that the First-tier Tribunal's application of regulation 29 of the ESA Regulations 2008 involved an error of law. Mr T's appeal raised an issue as to whether work would affect his health. The Tribunal should have considered whether work-related risks existed and, if so, whether they amounted to a substantial risk to Mr T's health.

12. The First-tier Tribunal's decision is set aside and Mr T's appeal against the Secretary of State's decision of 7 September 2016 is remitted to the First-tier Tribunal for re-determination. Since the Tribunal's decision has been set aside, the next Tribunal panel may not, in its reasoning, take into account its findings of fact and other conclusions.

Directions

I direct as follows:

1. Mr T's appeal against the Secretary of State's decision of 7 September 2016 is remitted to the First-tier Tribunal for re-determination.
2. The Tribunal panel that re-determines Mr T's appeal must not include any person who was a member of the panel whose decision has been set aside.
3. The First-tier Tribunal is to hold a hearing before determining Mr T's appeal.
4. If Mr T wishes to rely on any further written argument or evidence, it is to be received by the First-tier Tribunal within **one month** of the date on which this decision is issued.

Apart from directions 1 & 2, the above directions may be varied by case management direction given by the First-tier Tribunal.

Mr T is reminded that the law prevents the First-tier Tribunal from taking into account circumstances not existing at 7 September 2016, when the Secretary of State's decision was taken (section 12(8)(b) of the Social Security Act 1998). Evidence generated after that date may be taken into account if relevant to the circumstances at that date.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
12 February 2019