IN THE UPPER TRIBUNAL **Appeal No: CJSA/3521/2016**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Birkenhead on 17 August 2016 under reference SC062/16/00223 involved an error on a material point of law and is set aside.

The Upper Tribunal is not in a position to re-decide the appeal. It therefore refers the appeal to be decided entirely afresh by a completely differently constituted First-tier Tribunal and in accordance with the Directions set out below.

This decision is made under section 12(1), 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007

DIRECTIONS

Subject to any later Directions by a District Tribunal Judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The new hearing will be at an oral hearing

(2) The appellant is reminded that the tribunal can only deal with his situation as it was down to 9 February 2016 and not any changes after that date.

(3) If the appellant has any further relevant evidence that he wishes to put before the tribunal, this should be sent to the First-tier Tribunal's office in Liverpool within one month of the date this decision is issued.

(4) The First-tier Tribunal rehearing this appeal is bound by the law as set out below.

REASONS FOR DECISION

1. This appeal is about variations to a "jobseeker's agreement" (now restyled as a "claimant commitment") and the approach to deciding "whether it is reasonable to expect the claimant to comply with the agreement as proposed to be varied" under section 10(5)(b) of the Jobseeker's Act 1995. It also touches on the number of steps a claimant may be required to undertake under a jobseeker's agreement

2. The Secretary of State supports this appeal. The appellant has not made any reply to the Secretary of State's submission, though he has had ample time in which to do so.

3. In my judgment the appeal should be allowed and the First-tier Tribunal's decision of 17 August 2016 ("the tribunal") set aside for material error of law and the appeal remitted to an entirely freshly constituted First-tier Tribunal to be re-decided. My reasons for so deciding are as follows.

4. By its decision the tribunal had upheld the Secretary of State's decision of 9 February 2016 to the effect that the appellant was not entitled to jobseeker's allowance ("JSA") from 10 February 2016. The essential reasons for this decision (and the legislation under which they fell) were that:

   (a) the Secretary of State's decision maker had directed that the terms of the appellant's jobseeker's agreement ought to be varied (section 10(5) and (6) of the Jobseekers Act 1995 ("the Act"));

   (b) the appellant had failed to comply with that direction by refusing enter into that new agreement (contrary to s.10(6)(ii) of the Act);

   (c) as a result, his previous jobseeker's agreement was brought to an end (s. 10(6)(c) of the Act); and

(d) as there was no jobseeker's agreement any longer in force, the appellant's entitlement to JSA also came to an end (such an agreement being in force being a condition of entitlement to JSA: per section 1(2)(b) of the Act).

5. The relevant terms of the Act are as follows:

> "**1**.-(1)An allowance, to be known as a jobseeker's allowance, shall be payable in accordance with the provisions of this Act.
>
> (2)Subject to the provisions of this Act, a claimant is entitled to a jobseeker's allowance if he—
>
> (a)is available for employment;
>
> (b)has entered into a jobseeker's agreement which remains in force; [and]
>
> (c)is actively seeking employment;...."

> "**10**.-(1)A jobseeker's agreement may be varied, in the prescribed manner, by agreement between the claimant and any employment officer.
>
> (2)Any agreement to vary a jobseeker's agreement shall be in writing and be signed by both parties.
>
> (2A)Any agreement to vary a jobseeker's agreement may be in electronic form and signed by means of an electronic signature (within the meaning given in section 7(2) of the Electronic Communications Act 2000).
>
> (3)A copy of the agreement, as varied, shall be given to the claimant.
>
> (4)An employment officer shall not agree to a variation of a jobseeker's agreement, unless, in the officer's opinion, the conditions mentioned in section 1(2)(a) and (c) would continue to be satisfied with respect to the claimant if he were to comply with, or be treated as complying with, the agreement as proposed to be varied.
>
> (5)The employment officer may, and if asked to do so by the claimant shall forthwith, refer a proposed variation of a jobseeker's agreement to the Secretary of State for him to determine—
>
> (a)whether, if the claimant concerned were to comply with the agreement as proposed to be varied, he would satisfy—
>
> (i)the condition mentioned in section 1(2)(a), or
>
> (ii)the condition mentioned in section 1(2)(c); and

> (b)whether it is reasonable to expect the claimant to have to comply with the agreement as proposed to be varied.
>
> (6)On a reference under subsection (5) the Secretary of State—
>
> (a)shall, so far as practicable, dispose of it in accordance with this section before the end of the period of 14 days from the date of the reference;
>
> (b)shall give such directions as he considers appropriate as to—
>
> > (i)whether the jobseeker's agreement should be varied, and
> >
> > (ii)if so, the terms on which the claimant and the employment officer are to enter into an agreement to vary it;
>
> (c)may bring the jobseeker's agreement to an end where the claimant fails, within a prescribed period, to comply with a direction given under paragraph (b)(ii);
>
> (d)may direct that, if—
>
> > (i)the jobseeker's agreement is varied, and
> >
> > (ii)such conditions as he considers appropriate are satisfied,
>
> the agreement as varied is to be treated as having effect on such date, before it would otherwise have effect, as may be specified in the direction."

6. The focus of this appeal is on the terms of section 10(5) of the Act. The particular focus of the appeal below was on whether it was reasonable to expect the appellant to have to comply with the proposed new jobseeker's agreement.

7. The key error of law the tribunal made was in not addressing sufficiently what precisely the terms of the proposed new jobseeker's agreement/claimant commitment required of the appellant. In particular, it failed to address whether the wording of the requirement in the proposed jobseeker's agreement of 5 January 2016 to "Search Universal Jobmatch via Gov.UK to identify and apply for jobs you can do – 5 times per week minimum" required the appellant to apply for jobs via Universal Jobmatch. (I will refer to this at times below as the Universal Jobmatch requirement or the disputed requirement.) If it did then it appears it was common ground between the parties that in order to do

so the appellant would have needed to take out an account with Universal Jobmatch by registering with that site and that that step may not have been one it was reasonable to require the appellant to undertake given his security concerns about that site.

8. This was a key area for the tribunal to make findings on given the appellant's concerns about not taking out an account with Universal Jobmatch or, if different, not registering with the same.

9. The notes of 4 January 2016, written or taken when the appellant refused to sign the new proposed Jobseeker's agreement, record the appellant as stating that he was not willing to entertain an account with Universal Jobmatch because, amongst other reasons, "The website is not secure…There are many other reliable websites such as Total Jobs and Indeed Jobs….Frank Field, MP for Birkenhead, recently reported that Universal Jobmatch is bedevilled with fraud…..In the circumstances, I am prepared to search Universal Jobmatch without registering or opening an account".

10. The point about not registering with Universal Jobmatch was returned to by the appellant in his grounds of appeal to the First-tier Tribunal of 7 March 2016. In these grounds the appellant said the following about Universal Jobmatch.

> "The decision maker has stated that I should register with Universal Jobmatch and search for work on that site 5 times per week "minimum". Against this, I have provided clear information as to why registration with and use of Universal Jobmatch would not be reasonable to my circumstances…."

11. It is worth noting in terms of context that the Universal Jobmatch requirement was sandwiched between two other requirements in the proposed jobseeker's agreement, though there were other requirements as well. The first other requirement required the appellant to "Use websites including Total Jobs and Indeed and employers' own websites to find and apply for jobs you can do – 5 times a week minimum". It is thus apparent that the use of Universal Jobmatch was a separate and

additional requirement to using "Total Jobs" and "Indeed" to find and apply for work the appellant could do. The second other requirement, third in order in the proposed jobseeker's agreement, required the appellant to "Contact employers directly to ask about possible work and apply for jobs you can do – up to 4 x per week contacting at least 4 prospective employers per week". I would simply observe at this stage that these three different requirements, or **Actions for Getting Work** as they are described in the proposed agreement, might suggest that the requirement concerning the Universal Jobmatch site was specific to that site and thus did contain a requirement to apply for any jobs the appellant could do via that site.

12. Following directions from the First-tier Tribunal of 7 June 2016 for a further submission from the Secretary of State to address the appellant's grounds of appeal, such a submission was filed by the respondent. It, however, unfortunately was unclear, and so left open, whether the appellant would have been able to meet the disputed requirement set out in paragraph 7 above and apply for jobs he could do without registering with Universal Jobmatch. In directly addressing this issue the submission said that there was no express reference in the proposed new jobseeker's agreement which directed the appellant to register with the Universal Jobmatch website. The Secretary of State's decision maker had "directed [the appellant] should "search" for work on Universal Jobmatch site – but [I] can find no reference to him being directed to register on that site". However, importantly, the submission went on:

> "Like most job websites a person can undertake a search for vacancies without actually logging in. It is only if they find a vacancy that they wish to apply for and that vacancy does not take/direct them to another specific website, that the person would have to create a [Universal Jobmatch] account and then apply via the [Universal Jobmatch] website.....[The appellant] does not need to log in to [Universal Jobmatch] in order to search." (my underlining added for emphasis)

It is the underlined middle sentence of this quotation which is the critical one, and it begs the question whether the disputed requirement in the new jobseeker's agreement was limited to the appellant searching for jobs he could do on the Universal Jobmatch site or, in addition, if he had found jobs he could do on that site, applying for them via that site. I note, moreover, that the submission, rightly, did not purport to rewrite the terms of the agreement, but merely sought to argue how they should be read.

13. It would appear, moreover, that the Secretary of State accepted in this submission that due to the appellant's security concerns it would have been reasonable for him *not* to have registered on the Universal Jobmatch site if he needed to apply for jobs via that site.

14. The terms of section 10(5)(b) of the Jobseekers Act 1995 provides that on reference to him (which is not disputed here), it is for the Secretary of State (and then the First-tier Tribunal on any appeal against the Secretary of State's decision) "to determine… whether it is reasonable to expect the claimant to have to comply with the agreement as proposed or varied". In the circumstances of this case that adjudicatory exercise required the tribunal to first determine what the terms of the proposed new jobseeker's agreement required the appellant to do, as the reasonableness or otherwise of compliance cannot be judged until it has been established just what the requirements are that need to be complied with. That the tribunal did not do.

15. One step the tribunal could have taken was to decide that it was not reasonable to expect the appellant to comply with the proposed agreement because its terms were uncertain. That too, however, would first have involved the tribunal in identifying what the proposed agreement required of the appellant.

16. The approach of the tribunal to the above legal issue is, it is fair to say, somewhat difficult to discern. It referred to the names of the governing legislation but not the terms of section 10 of the Act. It is unclear, moreover, whether it directed itself correctly as to the applicable law. I say this because the tribunal identified the key issue on the appeal as being whether the direction to agree and sign a proposed variation to the appellant's jobseeker's agreement was reasonable, whereas the test under section 10(5)(c) of the Act is in respect of whether it is reasonable to expect the claimant to have to comply with the agreement as proposed; the direction follows under section 10(6) and is not itself subject to any reasonableness test. The tribunal did however at least in some respects seek to address whether the terms of the proposed agreement were reasonable.

17. However, the tribunal did not ask itself the correct first question, namely what the written terms of the proposed new jobseeker's agreement in fact required the appellant to do. This may have been because of its wrong focus on the direction and not the agreement. It was perhaps not helped in the needed focus by some of the wider arguments the appellant sought to make, but for the reasons given above in my judgment the tribunal failed to take the necessary first step in its analysis of the legal issues before it.

18. This is perhaps best shown by paragraph 16 of the tribunal's statement of reasons, where it gets closest to addressing the Universal Jobmatch requirement. In those reasons the issue of the disputed requirement and whether it required registration with that site was addressed only as if a side issue, in brackets, in which the tribunal said:

> "(The Appellant initially had suggested that to use [Universal Jobmatch] he required to register with that service. However, the Tribunal accepted the submission of the Respondent that the Appellant did not have to *register* with [Universal Jobmatch] and could still *use* the [Universal Jobmatch] service to search for job opportunities. The Appellant then, and only at this later stage, maintained that the same security concerns arose whether or not he registered to use [Universal Jobmatch]. This latter contention was not accepted by the Tribunal.)"

19. It is not entirely clear to me what the tribunal meant by the appellant only *initially* having raised this as an issue as he had submitted evidence from the BBC News website about the Universal Jobmatch website being "bedevilled with fraud" on the day of the hearing before the tribunal.

20. Be that as it may, and despite the curiosity of reasoning on what was a key issue on the appeal being consigned to brackets and thus as if unimportant, the central failing of the reasoning and fact-finding here is the lack of any consideration as to what, if anything, was being required of the appellant if he found a job he could do on the Universal Jobmatch website and could only apply for the job via that site. The submission of the Secretary of State on this issue quoted in paragraph 12 above did not rule out this eventuality as a possibility. Nor, as I have said, did that submission directly address what the disputed clause in the proposed jobseeker's agreement did require. I accept that it did not expressly require the appellant to register with the Universal Jobmatch website and I further accept that by the express language it did use it plainly did require the appellant to "Search" that website for jobs he could do. However the other (here underlined) phrasing it used of "Search Universal Jobmatch via Gov.UK <u>to identify and apply for jobs you can do</u>", particularly when read in the context of the separate requirement to use employer's own websites to apply for work, leaves it unclear whether if there was a job the appellant could do which could only be applied for via the Universal Jobmatch website, the proposed agreement required him to take that step.

21. Given this, in my judgment it was incumbent on the tribunal to reason out and make findings of fact upon what the disputed term in the proposed jobseeker's agreement required of the appellant in the circumstances postulated immediately above. The tribunal erred in law by not taking that step.

22. Had the tribunal done so then it might have concluded that the disputed term did require the appellant to register with Universal Jobmatch in order to apply for jobs which he could do but which could only be applied for via that website. That might then have led the tribunal to address the reasonableness of requiring the appellant to take such a step given his security concerns, which in turn might have required the tribunal to address the cogency of those concerns and the likelihood of them in fact affecting the claimant (e.g. what was the extent of the alleged security breaches on the site?). Another area the tribunal might have needed to explore (and might still need to be explored) was the evidential likelihood of jobs the appellant could do having to be applied for by registering with the Universal Jobmatch website. For example, evidence might have been available that only one in every fifty jobs had to be applied for by registering with the Universal Jobmatch website, or it might have been every second job. That evidence was not before the tribunal. Another possibility, given the apparent acceptance by the Secretary of State of the reasonableness of the appellant's not wishing to register with the site, would have been (and may still be) that if the term was read by the tribunal in this way then the Secretary of State would have conceded it was not reasonable to expect the appellant to have to comply with it.

23. It may be argued that the above reasoning is to bring into jobseeker's allowance complicated issues arising from contract law. I do not accept this. The terms of section 10(6) of the Act effectively allow the Secretary of State to impose on a claimant the terms of a jobseeker's agreement if the claimant wishes to remain entitled to what for many claimants will be a subsistence benefit. But even in this circumstance it is still an agreement between the parties (which in essence is what a contract is), and what the terms of the agreement are must be clear to both parties to that agreement. However, the Secretary of State cannot impose any terms he likes. As section 10(5) makes clear, compliance with such terms in the proposed jobseeker's agreement have to satisfy the availability for work and actively seeking work requirements of section

1(2) of the Act **and** be something that is reasonable to expect of the claimant. Further, the terms of the jobseeker's agreement are an important aspect of determining whether a claimant is, inter alia, taking steps to actively seek work. The terms of the agreement form a template against which it can be determined if a claimant is actively seeking work and thus continues to be entitled to JSA. In these circumstances it is therefore of central importance that the terms of the agreement are clearly worded and not open to misinterpretation or differing views as to what is required.

24. The above error of law is sufficient for me to set aside the tribunal's decision for material error of law. Given the error of law and the failure on the part of the tribunal to investigate relevant evidential issues surrounding whether it was reasonable to expect the appellant to have to comply with agreement *if* it required him to register with the Universal Jobmatch website in order to apply for jobs which could only be applied for under that site, I do not consider I am in position to redecide the first instance appeal. The Secretary of State has not sought to argue before me that the disputed term in the proposed jobseeker's agreement cannot be read as imposing such a requirement, and as I have indicated above I can see the force in the argument (without deciding the point) that it may have involved such a requirement. If I were to decide that it did so then evidence as to (a) the alleged security issues for those registering on the site, and (b) how many jobs could only be applied for via the Universal Jobmatch website would need to be considered, but that evidence is not in front of me. In these circumstances it seems to me that the fairest result is for all issues to be remitted to the First-tier Tribunal to be decided.

25. Before parting with this appeal I wish to touch on one other matter. This concerns the tribunal's view that under the law there can be no objection in principle to a claimant being required to engage in actively seeking work "as a full-time task". I consider some care needs to be taken with the expression of such wide a view. In terms of the actively

seeking work requirements set out in a proposed jobseeker's agreement a key consideration under the law is, as set above, whether it is reasonable to expect the claimant to have to comply with the requirement. Of more relevance perhaps is the still in force form of regulation 18(1) of the Jobseekers Allowance Regulations 1996. This provides that:

> "For the purposes of section 7(1) [of the Act] (actively seeking employment) a person shall be expected to have to take more than two steps in any one week unless taking one or two steps is all that is reasonable for that person to do in that week".

Prior to 2004 regulation 18(1) expected a person only to take more than one step in a week. The phrase "more than two" means taking at least three steps, and perhaps more than that number. However, the statutory wording remains with the starting point being on taking at least three steps in a week. In these circumstances, it may take very cogent reasoning to justify a person having to take very well in excess of this number of steps in a week, as the tribunal's "full-time task" remark implies.

26. The terms of regulation 18 of the Jobseekers Allowance Regulations 1996 were considered in *CJSA/1814/2007*. That decision speaks (in paragraph [11]) of regulation 18(1) setting the "benchmark for judging the reasonableness of the claimant's actions. Regulation 18(2) illustrates (but does not define) this by listing steps that are reasonable for a person to be expected to take". And it goes on in paragraphs 13 and 15 to say:

> ".......there is nothing in the Act or the Regulations requiring that a claimant must comply with everything in the Agreement. The reverse is the case. The agreement must comply with the law. To be valid, a jobseeker's agreement must comply "with the prescribed regulations in force": section 9(1) of the Act. The pattern of the legislation is that a jobseeker's agreement must comply with the test of actively seeking work in sections 1(2)(c) and 7 of the Act and regulation 18 of the Regulations and not the other way round.
>
> "The questions to be asked where it is alleged that someone is not actively seeking work are those following from section 7(1) and

regulation 18(1), not from the agreement. They pose three questions, to be answered by the claimant's actions that week:
(a) Should the claimant be expected to take at least three jobsearch steps that week, or is it reasonable that only one or two be taken?
(b) What steps were taken?
(c) In the light of that reasonable expectation and those findings, were the steps taken by the claimant "such steps as he can reasonably be expected to have to take in order to have the best prospects of securing employment" (section 7(1))?"

27. Such considerations would be relevant in my judgment to whether the terms of section 10(5) of the Act are satisfied and in particular whether it would be reasonable to expect the claimant to have to comply with the actively seeking work terms in the agreement.

28. I cannot, however, see any lawful basis for the argument the appellant appeared to seek to make that, even if the above arguments did not fall in his favour, his previous jobseeker's agreement should have remained in place. If the 5 January 2016 proposed jobseeker's agreement was not legally flawed or unreasonable, section 10(6)(c) of the Jobseekers Act 1995 provided a clear power for the Secretary of State to bring the old agreement to an end if the directed jobseeker's agreement satisfied section 10(5) of that Act but was not accepted by the appellant.

29. For the reasons given above the tribunal's decision dated 17 August 2016 must be set aside. The Upper Tribunal is not in a position to re-decide the first instance appeal. The appeal will have to be re-decided completely afresh by an entirely differently constituted First-tier Tribunal (Social Entitlement Chamber), at an oral hearing. The appellant's success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about whether his 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.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal
Dated 28th September 2017