SRC-v-Department for Communities (JSA) [2018] NICom 60

Decision No: C2/18-19(JSA)

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998**

**JOBSEEKERS ALLOWANCE**

Application by the claimant for leave to appeal

and appeal to a Social Security Commissioner

on a question of law from a Tribunal’s decision

dated 8 May 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant’s application for leave to appeal from the decision of an appeal tribunal sitting at Belfast.

2. For the reasons I give below, I grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal under Article 15(8) of the Social Security (NI) Order 1998.

3. I proceed to make findings of fact and to determine the issue myself. My decision is that the appellant has shown good cause for failing to participate in the Steps 2 Success scheme on 26 July 2016, and is not to be treated as subject to sanctions for the period from 17 September 2016 to 30 September 2016.

**REASONS**

**Background**

4. The appellant was in receipt of jobseeker’s allowance (JSA) from the Department for Communities (the Department). The Department referred him to the “Steps 2 Success” programme on 20 May 2016. “Steps 2 Success” is a scheme designed to assist claimants to obtain employment. On 9 September 2016 the Department decided that JSA was not payable to the appellant for the period from 17 September 2016 to 30 September 2016 on the basis that he had not attended a “Steps 2 Success” interview on 26 July 2016 and had failed to contact an employment officer within 7 working days of that date. The appellant appealed, but waived his right to attend an oral hearing of his appeal.

5. The appeal was considered on the papers by a tribunal consisting of a legally qualified member (LQM) sitting alone. On 8 May 2017 the tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal’s decision and this was issued on 26 July 2017. The appellant applied to the LQM for leave to appeal from the decision of the appeal tribunal but leave to appeal was refused by a determination issued on 11 October 2017. On 18 December 2017 the appellant applied to a Social Security Commissioner for leave to appeal.

6. The application was late, as it was received some five weeks after the statutory time limit for making an application had passed. The appellant indicates that he had posted the application in time, but that this application was returned to him after more than a month by the Post Office because the postage he paid was insufficient to cover the cost of delivery. I accept that the late application should be admitted under regulation 13(2) of the Social Security Commissioners (Procedure) Regulations (NI) 1999.

**Grounds**

7. The application for leave to appeal runs to eight pages. In summary, the appellant submits that the tribunal has erred in law on the basis that:

(i) it had misdirected itself as to the meaning of “without good cause” in the relevant regulation;

(ii) previous experience had given him a legitimate expectation that he had good cause, since the Department had accepted the same reason as good cause on previous occasions;

(iii) it had made an irrational decision by holding that the fact that he was working on the day of his interview appointment did not amount to good cause for not attending it.

8. The Department was invited to make observations on the appellant’s grounds. Mr Yeates of Decision Making Services (DMS) responded on behalf of the Department. Mr Yeates submitted that the tribunal had not erred in law as alleged and indicated that the Department did not support the application.

**The tribunal’s decision**

9. The LQM has prepared a statement of reasons for the tribunal’s decision. From this I can see that the tribunal had documentary material before it consisting of the Department’s submission, to which was appended the appellant’s statement of his grounds of appeal and various background documents. These included an S2S24: Fail to Participate form, on which it was stated that the appellant had failed to contact the Jobs and Benefits Office/Job Centre within 5 working days to give his/her reason for failing to participate on the programme, signed by an “adviser”. Other material before the tribunal included the record of a previously adjourned hearing, a second submission from the appellant dated 19 December 2016, a further Departmental submission dated 31 March 2017, a further statement from the appellant dated 9 April 2017, attaching copies of S2S21(JSA) 04/16 and S2S22(JSA) 04/16 letters addressed to the appellant.

10. The tribunal found that the appellant had been in receipt of JSA from 25 October 2013 and had been selected to take part in the “Steps 2 Success” programme on 20 May 2016. It found that he was notified that he was required to attend an interview on 26 July 2016 at 4.15pm. It found that he did not attend and did not indicate in advance that he would not be attending. It found that the Department wrote to him on 11 August 2016 pointing out that he had failed to attend the interview and that, if he wanted his JSA to continue, he should contact the local Social Security Office within 7 working days of the letter date and tell his advisor the reason for his failure to attend. The tribunal found that, contrary to what had been asserted in the Department’s decision and reconsideration decisions, the appellant had made contact with an adviser on 12 August 2016.

11. The appellant had stated that he was working at the time of the appointment, that this had been accepted as “good cause” on a previous occasion and that, more generally, he was no longer required to participate in Steps 2 Success as he was in employment. The tribunal looked at four previous occasions on which the appellant was said to have missed appointments and found that he was working a small number of hours on each day. It found that the repeated clash of his employment with Steps 2 Success interviews was not coincidental. It accepted that working as a data processor at home might require him to undertake some work at short notice, but found that it would not have been unreasonable to have rearranged his work schedule to attend the interview. It rejected his interpretation of the information received about Steps 2 Success and found that it did not constitute a notice that he was no longer required to participate in the scheme. It did not accept that he had shown good cause and disallowed the appeal.

**Relevant legislation**

12. A regulation making power is established under the Jobseekers (NI) Order 1995 for the imposition of requirements on claimants to participate in schemes designed to help them obtain employment. The relevant provision reads:

19A.⎯(1) Regulations may make provision for or in connection with imposing on claimants in prescribed circumstances a requirement to participate in schemes of any prescribed description that are designed to assist them to obtain employment.

(2) Regulations under this Article may, in particular, require participants to undertake work, or work-related activity, during any prescribed period with a view to improving their prospects of obtaining employment.

(3) In paragraph (2) “work-related activity”, in relation to any person, means activity which makes it more likely that the person will obtain or remain in work or be able to do so.

(4) Regulations under this Article may not require a person to participate in a scheme unless the person would (apart from the regulations) be required to meet the jobseeking conditions.

(5) Regulations under this Article may, in particular, make provision⎯

(a) for notifying participants of the requirement to participate in a scheme within paragraph (1);

(b) for securing that participants are not required to meet the jobseeking conditions or are not required to meet such of those conditions as are specified in the regulations;

(c) for suspending any jobseeker’s agreement to which a person is a party for any period during which the person is a participant;

…

The regulations made under this provision at the relevant period were the Jobseeker’s Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations (NI) 2014 (the SAPOE Regulations). Relevant provisions include the following:

5.—(1) Subject to regulation 6, a claimant selected under regulation 4 is required to participate in the Scheme where the Department or the Department for Employment and Learning gives the claimant a notice in writing complying with paragraph (2).

(2) The notice must specify—

(a) that the claimant is required to participate in the Scheme;

(b) the day on which the claimant’s participation will start;

(c) details of what the claimant is required to do by way of participation in the Scheme;

(d) that the requirement to participate in the Scheme will continue until the claimant is given notice by the Department or the Department for Employment and Learning that the claimant’s participation is no longer required, or the claimant’s award of jobseeker’s allowance terminates, whichever is earlier; and

(e) information about the consequences of failing to participate in the Scheme.

(3) Any changes made to the requirements mentioned in paragraph (2)(c) after the date on which the claimant’s participation starts must be notified to the claimant in writing. Circumstances in which requirement to participate in the Scheme is suspended or ceases to apply

6.—(1) Paragraph (2) applies where a claimant is—

(a) subject to a requirement to participate in the Scheme; and

(b) while the claimant is subject to such a requirement, the Jobseeker’s Allowance Regulations apply so that the claimant is not required to meet the jobseeking conditions(a).

(2) Where this paragraph applies the claimant’s requirement to participate in the Scheme is suspended for the period during which the claimant is not required to meet the jobseeking conditions.

(3) A requirement to participate in the Scheme ceases to apply to a claimant if—

(a) the Department or the Department for Employment and Learning gives the claimant notice in writing that the claimant is no longer required to participate in the Scheme; or

(b) the claimant’s award of jobseeker’s allowance terminates, whichever is earlier.

(4) If the Department or the Department for Employment and Learning gives the claimant a notice in writing under paragraph (3)(a), the requirement to participate in the Scheme ceases to apply on the day specified in the notice.

…

8. A claimant who fails to comply with any requirement notified under regulation 5 is to be regarded as having failed to participate in the Scheme.

9. (1) A claimant who fails to participate in the Scheme must show good cause for that failure within 5 working days of the date on which the Department notifies the claimant of the failure.

(2) The Department must determine whether the claimant has failed to participate in the Scheme and, if so, whether the claimant has shown good cause for the failure.

(3) In deciding whether the claimant has shown good cause for the failure, the Department must take account of all the circumstances of the case, including in particular the claimant’s physical or mental health or condition.

**Hearing**

13. I held an oral hearing of the application. The appellant was not present but made written submissions. The Department was represented by Mr Barker of DMS. I am grateful to both for their assistance.

14. I had the appellant’s written submissions before me. These consisted of three documents of 8, 6 and 6 pages respectively. While lengthy, the appellant’s submissions were focused on the relevant legal issues and articulate.

15. The appellant submitted that the matter for determination in his case was whether he had failed to attend an interview without good cause. He relied on R(SB)6/83 and submitted that the principle in CS/371/49, which was cited in it, was still good law. This was that good cause is “some fact which, having regard to all the circumstances (including the claimant’s state of health and the information which he had received and that which he might have obtained) would probably have caused a reasonable person or his age and experience to act (or fail to act) as the claimant did”. The appellant submits that this shifts focus away from the actual reasons for missing the appointment to the issue of whether it was reasonable for the claimant to conclude that they were valid. In other words, good cause was not to be viewed objectively, but subjectively.

16. The appellant pointed to previous occasions on which he had missed interview appointments citing work commitments, but where it had been accepted that he had good cause by the Department. He noted that the tribunal found that he was not justified in assuming that “merely because a work commitment on a previous occasion had justified him missing a Steps 2 Success interview, that this would be the case in the present circumstances…”. By contrast, he submitted that if several appointments are missed for the exact same reasons and these are determined to be valid reasons, then it is reasonable to believe that missing a further appointment for exactly the same reason is also valid. He submits that he had a diagnosis of Asperger’s Syndrome and that he is biologically predisposed to take words literally and to identify patterns. He submitted that question of good cause had to be viewed from the perspective of the reasonable person with Asperger’s Syndrome.

17. The appellant further submitted that the fact that he was undertaking some work had brought his involvement in the Steps 2 Success scheme to a conclusion, relying on regulation 6(3) of the JSA Regulations. The appellant further submitted that it would not be reasonable to have rearranged his work schedule of the day of the Steps 2 Success appointment.

18. The appellant submitted that it was unlawful for the Department to have made its decision without reference to any statement explaining his absence at the appointment interview. He finally submitted that the tribunal had made a baseless conclusion that his participation in Steps 2 Success would help him find work, saying that he was encouraged by Steps 2 Success to apply for multiple unsuitable jobs rather than target a job he could actually do.

19. In response to the appellant’s submissions, it was accepted by Mr Barker that the appellant had contacted the Department as he had stated, but that there was no record of that attendance and therefore no record of what the appellant had advanced by way of establishing good cause. It was accepted that the appellant had stated to the adviser that his reason for not attending the interview appointment was that he was working that afternoon.

20. At my request, Mr Barker took me through the background correspondence with the appellant and explained the context against the relevant regulations. I observed that the history of the Department’s dealings with the appellant was not fully set out in the papers before the tribunal. I requested Mr Barker to provide copies of previous letters relating to the appellant’s non-attendance at interview appointments and the Department’s related decisions on good cause.

21. Mr Barker referred to letters which were before the tribunal. He submitted that, in compliance with regulation 5(2) of the SAPOE Regulations, the Steps 2 Success claimants are called to interview by the S2S21 letter, enclosing leaflets indicating their responsibility to participate in the scheme and setting out information about responsibilities and sanctions. They are then given the S2S22 letter confirming their participation on the scheme naming the scheme provider and confirming the duration of the scheme. In this case the notification letters were issued on 8 and 20 May respectively and the contractor was identified as Ingeus UK Ltd. The appellant was a “returner” to the scheme, meaning that he had completed it previously.

22. A letter in pro forma S2S9 calling the appellant to interview on 26 July 2016 appeared in the papers, but, anomalously, was dated 27 July 2016. Mr Barker indicated that this was most likely a letter reproduced from the Ingeus Ltd computer system, but he could not say with certainty when notice of interview would have been issued. Nothing turns on this, as the appellant accepted that he had received an invitation to attend an interview. However, I observe that this letter might not otherwise have been acceptable as evidence that the appellant was required to attend for an interview on the relevant date.

23. A further letter on pro forma S2S37 was issued by the Department on 11 August 2016, asking the appellant to contact the Department within 7 working days of the date of the letter. I observe that the timetable set out by legislation enables the Department to require a response within 5 working days. However, this discrepancy is doubtless because regulation 2(2) of the SAPOE Regulations deems a written notice which has been sent by post to have been received on the second day after posting. Again, nothing turns on this.

24. I observed that the tribunal had further information about the appellant’s non-compliance with appointment requests on earlier occasions. The appellant had raised the issue in his submissions to the tribunal. The evidence relating to this appeared at Tab 3 of the tribunal papers on the S2S9 pro forma, which indicated that the appellant had failed to attend an appointment on 7, 14, 21 and 28 June 2016 and 15 July 2016. There had been earlier S2S9 notifications to the Department. The reconsideration decision indicated that it had been accepted previously that the appellant had shown good cause in relation to 14 June as he was working.

25. On the other occasions, it appeared to have been determined by the Department that the address held by Ingeus Ltd was incorrect and that it could not be assumed that he had received notices. By contrast, however, the appellant said he had received the notices. Mr Barker indicated that in a notification issued to advise an appellant that he or she would not be sanctioned, it was unlikely that any detail of the reason would be given. This indicated that the appellant may well have held the belief that he had not been sanctioned on other occasions due to good cause being established by the fact that he was working, whereas the Department’s actual reason for this course of action was that it could not be established with certainty that he had received appropriate notices.

26. In assessing good cause in relation to the appointment of 26 July 2016, Mr Barker submitted that the tribunal was entitled to have regard to all the circumstances, including previous non-attendance. He submitted that this was particularly so, as the appellant had relied upon the earlier occasions in his submissions. Mr Barker submitted that the tribunal was entitled to have regard to the appellant’s conduct on previous occasions, notwithstanding the fact that good cause had been accepted previously. He submitted that the tribunal had addressed the issue of the reasonableness of the appellant’s expectation that good cause would be established in the present situation, and submitted that the tribunal had reached a rational conclusion on the facts.

27. Mr Barker submitted that the tribunal had considered the appellant’s failure to attend the appointment and, although the precise nature of his work was unclear, the tribunal had reasonably expected flexibility from him in terms of making himself available. He pointed out that the tribunal found that the appellant had not suggested that his failure to attend on 26 July 2016 was due in any part to his physical or mental health or condition. He submitted that the fact that the tribunal was unaware of the appellant’s Asperger’s Syndrome meant that no fault could be attached to its decision, relying on the decision of Chief Commissioner Mullan in *AMcC v Department for Social Development* [2015] NI Com 12.

**Assessment**

28. The appellant makes cogent submissions against a background of acceptance by the tribunal that there was a factual error by the Department in his case. I accept that an arguable case is established by his written submissions and I grant leave to appeal. The crux of this case is whether the appellant had “good cause” for his failure to participate in the Steps 2 Success Scheme by not attending an interview appointment.

29. At first instance, the Department made its decision on the basis that “no statement was completed” by the appellant “so there is not good cause for missing appointment”. The appellant had been advised on 11 August 2016 that “you must contact [the relevant office] within 7 working days of the date at the top of this letter and tell your adviser the reason for your failure to attend the Steps 2 Success interview”. The Departmental decision maker proceeded on the basis that he had not done so. However, this was a factually incorrect basis for the decision because, as the Department now accepts, the appellant had made contact with his adviser on 12 August 2016.

30. The appellant sought reconsideration of the decision. In its reconsideration decision the Department maintained the same mistaken understanding that the appellant had not made contact with the relevant office in response to the letter of 11 August. This conclusion was reached after taking “into account all available evidence, including information from the Departmental systems”.

31. The information recorded on the Departmental systems in fact referred to an entry on 12 August. This record was consistent with the appellant’s account of attending the office on 12 August 2016 to discuss his non-attendance at interview. He said in a written submission to the tribunal that he had not been asked to make a statement on that occasion, having referred to the same reason for non-attendance as on previous occasions.

32. While there was an indirect evidence of contact on 12 August in the form of a screen print at Tab 3 in the papers, the actual record of contact was not set out in the tribunal papers. The tribunal adjourned for clarification. However, the Department’s further submission maintained the position in a “schedule of events” that the appellant had not made contact on 12 August 2016. The tribunal, as indicated above, rejected this account, accepting that the appellant had made contact with his adviser on 12 August.

33. I consider it to be a matter of concern, in terms of standards of public administration, that:

(i) in the context of applying a sanction of two weeks loss of benefit, which is a serious consequence for an individual dependant on the benefit for subsistence, the appellant’s contact with the Department was so inadequately recorded as to be overlooked by two decision makers;

(ii) whereas the tribunal had received a submission from the appellant pointing to evidence of contact on 12 August, and requested clarification from the Department, the Department’s further submission to the tribunal failed to address that evidence and maintained the position that no contact had been made.

34. As indicated, the tribunal rejected the Department’s schedule of events, accepting that the appellant had made contact with his adviser on 12 August. This was based on the evidence of contact on 12 August indirectly referenced in a screen print from the Department’s own computer system, coupled with the appellant’s written account of what occurred on that day. Therefore, the tribunal rejected the Department’s rationale for its decision, which had been that good cause was not established by the appellant as he had not made any contact to explain his absence.

35. The tribunal then proceeded to address the issue of “good cause” on the material before it, and reached the decision which is now challenged before me. In the context of the present appeal, this raises four basic questions about the tribunal:

a) Was it entitled, as a matter of jurisdiction, to proceed as it did?

b) Did it proceed in a fair manner?

c) Did it make a reasonable assessment of the facts?

d) Did it apply the relevant legal test to those facts correctly?

*The jurisdiction of the tribunal*

36. The tribunal was seized of an appeal from the Department’s decision. That decision was to the effect that the appellant had not contacted the Department to explain his non-attendance at an interview, and therefore had not demonstrated “good cause”. The tribunal accepted that the factual premise on which the Department had based its decision was incorrect. It found that he had made contact with the Department. However, it then proceeded to address the issue of “good cause” itself.

37. Article 13(8)(a) of the Social Security (NI) Order 1998 (the 1998 Order) provides that a tribunal need not consider any issue that is not raised on the appeal. This is a practical measure that permits tribunals to decide one aspect of say, entitlement to a particular benefit, without having to revisit and determine matters which are not in dispute. It gives broad discretion to a tribunal to accept aspects of decisions that are not of themselves controversial.

38. In the particular case, the question of whether the appellant had “good cause” for not attending an interview was in issue. The Department had determined this on an erroneous understanding of the facts. The tribunal, having accepted the appellant’ submissions of fact, was faced with an altered understanding of the case.

39. As has been clarified in jurisprudence, the tribunal has the same powers and obligations in determining an appeal as the Department would have at first instance (see R(IB)2/04, paragraphs 72-80). As characterised in the well-rehearsed expression, it stands in the shoes of the Department. Article 13(8)(a) of the 1998 Order allows it to adopt aspects of any first instance decision which are not controversial. However, it is obliged to deal with the issues arising before it where there is a dispute.

40. In this case, it had been established that the appellant had failed to comply with a requirement to participate in a scheme by non-attendance at an interview. In such a case, by regulation 9(2) of the SAPOE Regulations, the Department “must determine whether the claimant has failed to participate in the scheme and, if so, whether the claimant has shown good cause for the failure”. The tribunal was in the shoes of the Department. Therefore, the tribunal not only had jurisdiction to determine the matter of “good cause” independently, it had an obligation to do so. It could not simply have allowed the appeal on the basis that the Department had misunderstood the facts surrounding the appellant’s reasons for non-attendance. It had to investigate the issue of “good cause” itself.

*Procedural fairness*

41. By regulation 9(3) of the SAPOE Regulations, “in deciding whether the claimant has shown good cause for the failure, the Department must take account of all the circumstances of the case, including in particular the claimant’s physical or mental health or condition”. The tribunal was therefore required to take account of all the circumstances of the case.

42. In the course of the appeal, the applicant had provided substantial written submissions to the tribunal in the form of a 4-page statement appended to a pro forma NOA1(SS) appeal form of 26 September 2016, a response to the Department’s appeal submission dated 19 December 2016 and a response to the Department’s further submission dated 9 April 2017.

43. I do not need to set out the detail of these submissions for present purposes. However, it is fair to characterise these as challenges to the Department’s approach to the issues in the case and, therefore, as focussed on the flaws in the Department’s approach. They are not addressed purely to the substantive merits of the case and to the issue of whether he had good cause for non-attendance, although obviously touching on that question.

44. In looking at the issue of good cause, the tribunal referred to four previous occasions on which the appellant had failed to attend Steps 2 Success interviews, namely 14, 21 and 28 June, and 15 July. It is clear that the tribunal drew a negative inference from the previous occasions. It said “with due apologies to Oscar Wilde, to lose one appointment may be regarded as misfortune; to lose five in succession looks like something more than carelessness”.

45. The tribunal’s reasons indicate that the appellant did not provide any explanation as to why the work which occupied one hour of his day on 27 July 2016 would have prevented him from attending the interview at 4.15 on that date. It held that, given his repeated failure to attend interviews, it would not have been unreasonable for him to have made an effort to rearrange his work schedule on 26 July 2016 in order to attend the interview. It said that the appellant “had not suggested that his failure to attend on 26 July 2016 was due in any part to his physical or mental health or condition”.

46. The appellant had, in fact, in his appeal form of 26 September 2016, submitted that his work had to be done at set times that could not be moved. In terms of his physical or mental health or condition, he submitted to me that he has a diagnosis of Asperger’s syndrome. This issue was not known to the tribunal. However, evidence dated July 2013 from a consultant clinical psychologist working for the Adult ASD Diagnostic Team of the Belfast Health and Social Care Trust indicates that the appellant is functioning on the Autistic Spectrum and had a diagnosis of Asperger’s Syndrome.

47. Mr Yeates for the Department submits that this evidence pre-dated the hearing of the appeal. He referred to the case of *AMcC v Department for Social Development* [2015] NI Com 12. He submitted that the tribunal could not be faulted for not considering evidence that could have been presented to it, but was not.

48*. AMcC v Department for Social Development* addressed the *Ladd v Marshall ([1954] 3 All ER 745)* principles in circumstances where the Department submitted that a tribunal had made a mistake as to a relevant fact. In an appeal on point of law, *Ladd v Marshall* principles generally require that new evidence should not be admitted unless it is demonstrated that the evidence could not have reasonable diligence have been produced at the relevant time, it was material to the outcome, and the appellant or his advisers were not at fault for failing to adduce the evidence.

49. This is not, however, a case where the appellant was seeking to rely on a mistake of fact. His purpose in raising this issue was to demonstrate that his approach to the issues in this appeal was affected by Asperger’s syndrome. He points to the decision in R(SB)6/83, where it was stated that good cause is “some fact which, having regard to all the circumstances (including the claimant’s state of health and the information which he had received and that which he might have obtained) would probably have caused a reasonable person or his age and experience to act (or fail to act) as the claimant did. The parallel between this articulation of the relevant test and the wording of regulation 9(3) of the SAPOE Regulations, whereby the decision maker must take account of all the circumstances of the case, including in particular the claimant’s physical or mental health or condition, is obvious. This was the relevant question before the tribunal, having rejected the main premise of the Department’s case and having turned to determine the issue of good cause *de novo*.

50. However, the appellant was not present at the hearing. He was not asked by the tribunal whether he had any physical or mental health or condition that was relevant. He was not asked about the way in which he was given particular work tasks, either in terms of the notice he received or to what deadline he was required to complete them. He was not asked about any impediment to flexibility in attending a Steps 2 Success interview on a day when he had work to complete. The applicant had waived his right to an oral hearing. However, waiving the right to an oral hearing does not waive all aspects of the right to a fair hearing.

51. It appears to me that the appellant’s submissions to the tribunal were addressed to the merits of the Department’s decision on the facts as it argued them. Once the tribunal had rejected the Department’s account of the facts, a paradigm shift occurred. By this I mean that the basis on which the appeal was being argued had altered. As indicated above, the tribunal had jurisdiction to, and an obligation to, determine the issue of good cause. However, it proceeded to determine the issue solely on the evidence then before it. I consider that it was wrong to do so.

52. While the onus of showing good cause is on the claimant, the decision maker must take account of all the circumstances including physical or mental health. This indicates to me that an inquisitorial obligation falls on the decision maker to establish the circumstances. Thus, the Department wrote to the appellant on 11 August 2016 to require him to make contact and explain why he did not attend the interview. However, his response to the Department was not recorded. Whereas determination of the issue of good cause in accordance with regulation 9 of the SAPOE Regulations requires evidence of the appellant’s physical or mental condition, the Department had not provided any. The tribunal itself did not ask the appellant for any.

53. As stated by Baroness Hale at paragraph 61-62 of *Kerr v. Department for Social Development* [2004] UKHL 23 (also reported as an annex to R1/04(SF)), the process of benefits adjudication is inquisitorial rather than adversarial. In determining entitlement to benefit, both the claimant and the Department must play their part. The Department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the Department rather than to the claimant, then the Department must take the necessary steps to enable it to be traced. Lord Hope in *Kerr v. Department for Social Development* has said at paragraph 15:

*“in this situation there is no formal burden of proof on either side. The process is essentially a fact-gathering exercise, conducted largely if not entirely on paper, to which both the claimant and the Department must contribute”.*

54. When a decision taken by the Department is appealed, the appeal tribunal stands in the shoes of the Department and has the power to consider any issue and make any decision the Department could have made. The principles set out by Lord Hope at paragraph 16 of *Kerr v. Department for Social Development* equally apply in the context of an appeal. Thus, facts which may reasonably be supposed to be within the claimant’s own knowledge are for the claimant to supply at each stage of the appeal. However, the claimant must be given a reasonable opportunity to supply them.

55. When this appeal fell to the tribunal for a decision on merits, the evidence was relatively insubstantial. As a matter of procedural fairness, it appears to me that it was incumbent on the tribunal to seek further evidence of all the circumstances, which included information about the appellant’s physical or mental health or condition. Had it done so, the issue of Asperger’s syndrome would have emerged. The tribunal would then have been able to address the reasonableness of the appellant’s behaviour and whether it amounted to good cause in that light.

56. This is not a case where the appellant seeks to correct a mistake as to the facts found by the tribunal. Therefore, it is not a scenario such as considered in *AMcC v Department for Social Development*. The tribunal made no finding about the appellant’s health, as it had no evidence about it at all. I consider that it was obliged to address this issue in order to decide the appeal in accordance with regulation 9 of the SAPOE Regulations, but that it did not. Had the necessary inquisitorial approach been adopted, it is inconceivable that the issues of Asperger’s Syndrome would have been overlooked. In all the circumstances, I consider that the proceedings were not procedurally fair. Therefore, I allow the appeal and I set aside the decision of the appeal tribunal.

57. It follows that I do not need to reach a conclusion on the other issues raised by this appeal, which concern the relevant statutory test and the rationality of the tribunal’s findings of fact.

**Disposal**

58. I have an option of referring this case to a newly constituted tribunal for determination. However, as a legally qualified person sitting alone, I consider that I am in as good a position to decide the appeal as a new tribunal, and that I should determine the appeal myself.

59. The appellant has Asperger’s syndrome. From his submissions, it appears to me that he has a good insight into his condition. He explains that he has a logical, rigid, focussed, obsessive and literal way of looking at language. He has made substantial but clear and articulate submissions to me, and is obviously a person of considerable intelligence. However, it does appear to me that he has genuine difficulty understanding why, the Department having accepted that missing an interview due to work commitments on one occasion amounted to good cause, the same principle was not applied on the second occasion. It seems to me that this lack of understanding is a consequence of Asperger’s syndrome.

60. I accept that the Department previously communicated to the appellant that having a work commitment on the day of an interview appointment amounted to good cause for not attending the interview. I accept that the appellant, on the basis of his previous engagement with the Department, believed that having a work commitment on the same day as his Steps 2 Success interview amounted to good cause. I accept that his Asperger’s syndrome meant that it was reasonable for him not to attend the interview, based on the state of his knowledge at the particular day. Therefore, having regard to all the circumstances, including the appellant’s physical and mental health and condition, I accept that he had good cause for his failure to participate in the Steps 2 Success scheme on 26 July 2016.

61. However, the appellant should be aware that social security adjudication is not like a computer system where the same input can be guaranteed to result in the same output on each occasion. Simply because these circumstances have been accepted as good cause twice does not indicate that this will continue to be the case. He has gained knowledge from this appeal that he did not have before. In any future occurrence of the same circumstance, I would expect the decision maker to take account of all the circumstances, including what the appellant can be expected to know now, and whether or not the appellant is capable of flexibility to avoid a clash between his work and any Steps 2 Success interview.

(signed): O Stockman

Commissioner

8 January 2019