IN THE UPPER TRIBUNAL **Case No** CJSA/1156/2018
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant: Mr Elliot Kent, Welfare Benefits Adviser, Shelter

For the Respondent: Ms Alice Richardson, instructed by Government Legal Service

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting at Newcastle-upon-Tyne on 30 January 2018 under reference SC228/17/00222 involved the making of an error of law and is set aside. Acting under section 12(2)(b) of Tribunals, Courts and Enforcement 2007 and having made further findings of fact, I remake the decision as follows:

> The appellant's appeal against the respondent's decision of 22 November 2016 is allowed. He is not excluded from entitlement on his claim for income based jobseeker's allowance ("JSA") made on 2 November 2016 on the ground of lacking the right to reside. The respondent must now reach a decision on the remaining aspects of the claim, which if disputed will carry fresh appeal rights to the First-tier Tribunal ("FtT").

REASONS FOR DECISION

1. The appellant is a Polish national. His claim for JSA was refused on 22 November 2016 on the ground that, put shortly, the period for which he had previously been a jobseeker for the purposes of reg 6 of the Immigration (European Economic Area) Regulations 2006 was such that on making the present claim he became immediately subject to the so-called Genuine Prospects of Work test; and that he did not have a genuine prospect of work.

2. His appeal to the FtT was dismissed. The FtT concluded that the appellant had failed to provide "any credible documentary evidence" in support of a claim that he was employed by X Ltd between 1 August 2015 and 22 August 2015. It noted a discrepancy in the dates between the appellant's CV and those given on his habitual residence test form and concluded that the appellant had not provided evidence of that employment.

3. It found that the appellant had drug and alcohol problems and had spent some time in hospital and then been refereed to a Christian organisation, Betel UK ("Betel"). Between 26 October 2015 and 29 October 2016 he had resided at one of that organisation's community houses and received treatment from the Early Intervention in Psychosis service of his local NHS Foundation Trust. It went on to make findings about the basis of his stay at Betel and about the activities in which he engaged while there, which in the

light of the decision I have reached it is not necessary to set out. Its conclusion was that nothing the appellant had done while at Betel gave him "worker" status.

4. The appellant appealed with the assistance of Mr Kent. The grounds of appeal were that:

> a. the FtT had failed to make findings about a period of employment with "FS Commercial" in September-October 2015; and
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> b. the FtT had erred in its approach to deciding whether or not the appellant had been a "worker" whilst at Betel.

There was originally a third ground, which Mr Kent no longer pursues, so I say no more about it.

5. I gave permission to appeal. The respondent supported the appeal on the limited basis that it was accepted that the FtT had failed to make sufficient findings about the work with FS Commercial which was in evidence. As regards the time at Betel, the respondent did not agree that the FtT had erred in law in its categorisation of the appellant's activities. It was indicated on the respondent's behalf, that if it were to be concluded that the appellant's work with FS Commercial was found to be "genuine and effective", so that the appellant acquired "worker" status, the respondent would have no objection to his being found to retain that status throughout his time at Betel on the basis that he was temporarily incapable of work.

6. I directed an oral hearing at North Shields, which was devoted to receiving evidence from the appellant and submissions from the representatives as to the findings I should make on that evidence and as to whether or not on the available evidence I should conclude that the appellant's employment with FS Commercial was "genuine and effective". If I did, then he would succeed. If I did not, there would have to be a further hearing to consider the FtT's approach to the legal consequences of the activities engaged in whilst the appellant was at Betel.

7. I am grateful to the appellant's support worker for supporting him in attending the hearing and to both representatives for their measured and thoughtful questioning and submissions.

8. The documentary evidence included (p97-98 and p145) a letter from HMRC and supporting documents setting out its records as regards the appellant's employment and benefit history. This included that between 7/9/15 and 4/10/15,the appellant had worked for FS Commercial Ltd, earning £538.41. No tax had been deducted. Those dates were also shown on a further document emanating from HMRC (p163), although "Total pay to date as recorded on your P60" was shown as £nil. Yet further evidence from HMRC listed two employments with unidentified employers, in respect of neither of whom did the "Total Earnings Factor" exceed £500.

9. The documentary evidence also included, as the FtT had noted, the appellant's CV, evidently prepared in late 2016 just after leaving Betel. The dates on the CV were inconsistent with the documentary evidence.

10. The appellant gave evidence at the hearing. He explained that his CV had been prepared so as to look better for employers and might not be accurate. He had worked for X Ltd but not for the dates stated in his CV. He had worked for A Limited between 18 May 2015 and 1 June 2015. Because of his issues with alcohol, he had been in hospital between June 2015 (see p36) until around August 2015. Thereafter he had looked on line for work and had found it through a named agency. The agency had interviewed him and told him to go to the company on the Monday. The engagement was not for a limited period when it started. One day he phoned in saying he felt sick (this was because of his alcohol problem) and they told him not to come in any more. Prior to that there had been no complaints about his work. He was engaged in warehousing work.

11. The appellant said he worked for 40 hours a week at the national minimum wage. He considered the dates shown by the HMRC in evidence were broadly right. He was adamant that he had worked for at last 3 weeks and that he had earned more than the £538 revealed by documents. He has no payslips from that time.

12. Mr Kent invited me to find that the appellant's work had been for 2 weeks only. Two weeks of work for 40 hours a week at the national minimum wage would generate more or less the £538 the appellant is shown as having earned (bearing in mind that the rate of the national minimum wage is reviewed annually at 1 October, i.e. during the period which this case concerns). Ms Richardson did not disagree with Mr Kent on this aspect. I agree: the appellant's recollection of details from what was a difficult time for him may understandably be inaccurate and, while one cannot condone it, one can understand the pressures on him which may have led him to paint an inaccurate picture in his CV. The figure of £538.41 which appears in HMRC's records is a very specific one and is unlikely to be lacking in foundation.

13. Accordingly I find in the terms submitted by Mr Kent as regards the duration and number of hours of employment and as to the level of earnings. I accept the evidence of the appellant about what he did, how he got the work, the lack of complaints and how the job came to an end, none of which was challenged before me.

14. Where Mr Kent and Ms Richardson differ is as to whether work found in those terms amounted to "genuine and effective" work.

15. Mr Kent founded his argument principally on *Barry v LB Southwark* [2008] EWCA Civ 1440. I had considered what was the ratio of Barry in *RP v SSWP (ESA) (Interim decision)* [2016] UKUT 0422(AAC) at [21]-[27]: Mr Kent indicated he was in agreement with what was said there – in particular that "marginal and ancillary" and "genuine and effective" are composite terms and that one is the antithesis of the other. He referred to the principle that

Community law gives the term "worker" a very wide interpretation: see *Barry* at [17] and the authorities there cited. He submitted that the same analysis should be applied as at *Barry*, [23]. The appellant's work was of economic value since if he had not done the warehousing work, someone else would have had to. The work done was not ancillary to any other relationship between the appellant and the company. It was not marginal because it was being properly remunerated at the national minimum wage. He also relies on the appellant having a "true economic motive" for the work in question, just as Lloyd LJ at [42] of Barry found that Mr Barry had had. This was a factor which Lloyd LJ considered relevant as explaining the rationale for the introduction of the "genuine and effective " test by the Court of Justice in 53/81 *Levin*. While he accepted that on the figures quoted in *Barry*, Mr Barry must have been working for very long hours and/or at a higher rate of pay, that did not provide a sufficient reason to distinguish the case when, as here, the appellant was doing a full working week at a properly remunerated rate.

16. Ms Richardson submits that it is necessary to look at all the facts of the case. The duration is not determinative – one also needs to consider, in particular, the type of work and the hours. A contrast may be drawn between working at Wimbledon where the work is for a specific period and agency work such as in the present case. In the latter case, it was imposable to assess how long the work might have lasted, but the appellant's alcohol problem had caused loss of employment previously. Mr Barry had either been doing long hours or had been better paid – the lesser level of remuneration in the present case could be relevant.

17. In addressing the submission in the present case, a convenient starting point is in C-413/01 *Ninni-Orasche* [2004] 1 CMLR 19 where the CJEU held:

> "23. First of all, it is settled case-law that the concept of 'worker', within the meaning of Article 48 of the Treaty, has a specific Community meaning and must not be interpreted narrowly (see, to that effect, inter alia, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 16, Case 197/86 *Brown* [1988] ECR 3205, paragraph 21, Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 14, and Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 13).
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> 24. Moreover, that concept must be defined in accordance with objective criteria characterising the employment relationship in view of the rights and duties of the persons concerned. The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person in return for which he receives remuneration (see *Lawrie-Blum*, cited above, paragraph 17, Case 344/87 *Bettray* [1989] ECR 1621, paragraph 12, and *Meeusen*, cited above, paragraph 13).
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> 25. In the light of that case-law, it must be held that the fact that employment is of short duration cannot, in itself, exclude that employment from the scope of Article 48 of the Treaty.

> 26. In order to be treated as a worker, a person must nevertheless pursue an activity which is effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and accessory (see, in particular, *Levin*, cited above, paragraph 17, and *Meeusen*, paragraph 13).
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> 27. When establishing whether that condition is satisfied, the national court must base its examination on objective criteria and assess as a whole all the circumstances of the case relating to the nature of both the activities concerned and the employment relationship at issue."

18. The appellant was for "a certain period of time" (in this case 2 weeks) "performing services for and under the direction of another person" (in this case the task of a warehouseman in accordance with instructions given to him by the agency and/or the business for which he was working) in return for which he receive[d] remuneration (a sum well in excess of £200 weekly, calculated in accordance with national minimum wage legislation).

19. I am unable to conclude it was any more marginal and ancillary than was Mr Barry's work. In each case, the work was in response to an employer's need: in Mr Barry's case that of his employer (Group 4 Securicor) to have staff so they could fulfil their contract with the Wimbledon Championships (*Barry* at [9]), in the appellant's case, staff to perform the warehousing function.

20. There was nothing distinctive about Barry's employment: it did not require special security qualifications (which he lacked - *Barry* [22]): the appellant may or may not have used his qualification as a fork-lift driver in the course of his warehousing work (he was not asked) but there is no comparison with Barry to be made to the appellant's disadvantage in that regard.

21. As regards hours, while Lloyd LJ speculated at [41] that Mr Barry may have worked long hours (and I am prepared to accept that that was so) there is no indication that it was the excess of those above the length of a more conventional working week that made the difference (and the appellant's working week was itself at 40 hours at the upper end of the spectrum of the conventional working week).

22. As regards pay, whilst I am mindful that Mr Barry's work was performed in 2006 and there will have been some degree of wage inflation since, he was as I have noted unqualified and much of the difference in gross pay with that earned by the appellant is in all probability attributable to the lengthy hours Mr Barry worked which I have already considered. Further, there is no principle which requires pay to have been earned at a particular level and in my view it is impossible on the ground of the wage level to exclude, from being genuine and effective, warehousing work in the north of England carried out at the legally set national minimum wage.

23. As regards the duration of the contract, Lloyd LJ at [44] noted the local authority's reliance on, amongst other matters, the fact that Mr Barry's

employment "could not have lasted for longer"; however, as he had previously pointed out at [39], ECJ decisions, in particular *Ninni-Orasche*, "show that a short period of employment, even one which was never going to be other than short, can qualify so long as the activity pursued is genuine and effective". The fixed-term nature of Mr Barry's employment gave rise to a legal obstacle which he had to overcome, rather than providing any particular basis for the finding in his favour. In the present case, the appellant's engagement was open-ended when it started so he did not face the same legal obstacle to overcome, but nor is he at any disadvantage in claiming that there is no valid basis to distinguish *Barry*.

24. To the extent that the appellant having a "true economic motive" for the work in question is relevant, the appellant plainly did so, having come out of hospital following a period of illness and applying for a job through a conventional process. Mr Barry's problems were different – largely the introduction of a requirement to hold a particular qualification which he did not possess – but his work at Wimbledon likewise came following a period in which he had not been working. The two situations while different are comparable in this respect.

25. Ms Richardson invites me to take into account that the appellant had lost (it appears) at least one previous job due to his alcohol issue. Even if that be so and even if it be permissible to take it into account, I am not persuaded that it could make any difference. He was taken on through a reputable agency, following interview. He was paid an appropriate wage rate, in all probability the same one as would have been applied to anyone else. There were no complaints about his work while he was working there. If the alcohol issue which may have caused him trouble in a previous employment one day got the better of him, so that, in the vulnerable situation of an agency worker, he lost the job, I cannot see that that affects the "genuine and effective" character of the work so long as he was doing it.

26. It follows therefore that he maintained "worker" status by virtue of this work and, following the respondent's concession that it was retained through his time at Betel, he had a right to reside as a worker sufficient for his claim made on 2 November 2016.

CG Ward
Judge of the Upper Tribunal
17 September 2018