

IN THE UPPER TRIBUNAL
CE/3255/2015

Case **No.**

ADMINISTRATIVE APPEALS CHAMBER

Before: **M R Hemingway: Judge of the Upper Tribunal**

Decision: **As the decision of the First-tier Tribunal (made on 3 June 2015 at Exeter under reference SC194/15/00147) involved the making of an error of law it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.**

DIRECTIONS

- A The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.

- B In particular, the tribunal must investigate and decide the claimant's entitlement to employment and support allowance from and including 18 February 2015.

- C In doing so, the tribunal must not take account of circumstances that were not obtaining at that time: see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

REASONS FOR DECISION

1. The appellant, who was born on 26 January 1973 and who suffers from health problems which include back pain, asthma, anxiety, depression, tennis elbow and pain in his left leg and left foot had been receiving incapacity benefit since 31 January 1996. Pursuant to what is referred to as "the conversion phase" he was assessed for entitlement to its replacement benefit, employment and support allowance. As a part of that assessment he completed a standard form known as form ESA50 and then attended a medical examination which was conducted by a healthcare professional. That examination took place on 31 December 2014. Thereafter, on 2 February 2015, seemingly in reliance upon the conclusions of the healthcare professional, the respondent decided that the appellant was not entitled to employment and support allowance from that date. In fact, it was decided that he did not score any points at all under the various activities and descriptors contained within Schedule 2 to the Employment and Support Allowance Regulations 2008 and that he did not meet the requirements of regulation 29 of those Regulations. He sought a mandatory reconsideration which did not lead to any alternation in the decision and, thereafter, he appealed to the First-tier Tribunal (F-tT).

2. The F-tT held an oral hearing which took place on 3 June 2015. The appellant attended and gave oral evidence. He was represented, and indeed continues to be represented, by Mr W Hatton of the Exeter Citizens Advice Bureau. The respondent was not represented. The F-tT, after listening to what the appellant and Mr Hatton had to say, dismissed the appeal

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concluding, as had the respondent, that no points were scored in relation to any of the activities and descriptors within Schedule 2 and that the requirements of regulation 29 were not satisfied. It issued its decision notice on the day of the hearing. Thereafter, and upon request, it produced its statement of reasons for decision (“statement of reasons”) in which it set out its reasoning in some considerable detail.

3. The appellant, aided by Mr Hatton, applied for permission to appeal to the Upper Tribunal. The grounds took various points regarding the way in which the F-tT had approached various items of evidence and the way in which it had explained its decision though I did not think, for the most part, that the bulk of those points went beyond an attempt to re-argue matters of fact properly resolved by the F-tT. However, I did grant permission to appeal because I thought it arguable that the F-tT had erred in concluding descriptor 15(c) in Schedule 2 was not satisfied simply because the appellant was able to get to an unfamiliar place by using a taxi. I raised the question of whether or not, in such circumstances, such a journey could not be described as one made “without being accompanied by another person” given the presence of a taxi driver. I noted that, if it had been found that the appellant satisfied that descriptor, it would still only entitle him to 6 points but I considered any such error, if made, might be material on the basis that an inability to undertake a journey to a specified place with which the appellant was unfamiliar might have some relevance to the regulation 29 consideration.

4. In this context, the relevant activity and descriptor are as follows:

Activity	Descriptors
15. Getting about.	15. (a) ...
	(b) ...
	(c) Is unable to get to a specified place with which the claimant is unfamiliar without being accompanied by another person.”

5. As to Activity 15 the F-tT, in its statement of reasons, had said this:

“15. [The appellant] said that he has difficulties in going to unfamiliar places as he does not have a good sense of direction (page 146). He said his difficulties in using taxis would be because he does not like being a passenger in strange cars (page 146). He did not say he would have any other difficulties. He was not able to identify when going out on his own became a problem other than it has been a problem for a few years (page 149). He has recently started therapy for depression and anxiety. A letter from the Depression and Anxiety Service stated that he disclosed symptoms of social anxiety and agoraphobia. [The appellant] had started seeing that service shortly before the date of the decision although he has had depression for many years. However [the appellant’s] evidence was inconsistent. On the claim form he said he cannot go to familiar places (page 48) whereas his evidence to the Tribunal was that he could go to the shop and the GP on his own (page 145). The GP does not mention agoraphobia. We preferred [the appellant’s] evidence to the Tribunal because we found it more likely to be credible as it was coming directly from him whereas the claim form had been completed by his

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partner on his behalf. We found on the balance of probability that he would be able to use a taxi for example to get to an unfamiliar place and that therefore he would be able to get to a specified place with which he was unfamiliar without being accompanied by another person.”

6. Having granted permission I issued directions requiring further submissions from the parties. Ms S Suttentall, who now acts for the Secretary of State in connection with this appeal to the Upper Tribunal, lodged a submission of 15 January 2016 in which she indicated that the appeal was not supported. She agreed with my preliminary view, expressed in my grant, that the bulk of the points made in the grounds did not demonstrate any error of law on the part of the F-tT. As to the specific basis on which I granted permission (though the grant was not limited) she contended that where a claimant is taken to a destination in a taxi the taxi driver, who is simply providing a paid for transport service, cannot be said to accompany that claimant. She compared the situation to that of a claimant undertaking a journey by bus and argued that, on such a journey, it could not be realistically contended that such a claimant would be “accompanied” by the bus driver. She made reference to the dictionary definition of the word “accompanied” and the points she made as to that are encapsulated in paragraph 12 where she said this:

“ 12. I also note the ordinary dictionary definition of ‘accompanied’ – ‘to keep company with, to convoy, escort or attend’. Breaking this definition down, I submit that a taxi driver does not fit the dictionary definition; ‘company’ – the fact or condition of being with another or others especially in a way that provides friendship and enjoyment, ‘convoy’ – a group of ships or vehicles travelling together, typically accompanied by armed troops, war ships or other vehicles for protection, ‘escort’ – a person, vehicle or group accompanying another for protection or as mark of rank, ‘attend’ – to deal with (synonyms cope , manage, organise). In view of this, I submit the dictionary definition suggests something more than being driven from one place to another by a stranger. It suggests some form of protection, managing and/or friendship which is over and beyond what a taxi driver provides.”

7. The appellant, through Mr Hatton, indicated that all the original grounds of appeal were still relied upon. He argued that there was a significant difference between travelling by bus and travelling by taxi, not least because a taxi is usually provided for the exclusive use of a hirer and because a taxi normally conveys a passenger “door-to-door”. He also drew attention to the appellant’s evidence to the F-tT that he would not wish to be conveyed in a taxi, in any event, unless he knew the taxi driver.

8. It does seem to me in looking at, in particular, the closing sentence of paragraph 15 of its statement of reasons as set out above, that the F-tT was deciding that the appellant could get to an unfamiliar place by taxi and that an ability to do that meant he could not show an inability to get to a specified place with which he is unfamiliar without being accompanied by another person. I appreciate that the use of the term “for example” might be taken to suggest that the F-tT may have thought there were other ways he could get to an unfamiliar place unaccompanied but none of these other ways, if it did think there were any, were referred to or explained. Accordingly, it does seem to me, that if it was not permitted to conclude as a matter of law that a journey in a taxi was an unaccompanied journey or if it failed to adequately explain why it thought such a journey should be regarded as an unaccompanied one, it would err in law.

9. Ms Suttentall’s submission is to the effect that the nature of the relationship between a taxi driver and a passenger and the function of a taxi driver who is driving a passenger is such

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as to preclude, having regard to a dictionary definition, that journey being, from the passenger's perspective, an accompanied one. I see the point she makes but I do not think, in context, the approach of taking a dictionary definition is helpful.

10. The basic question posed by descriptor 15(c) is whether a claimant is unable, in consequence of difficulties with mental, cognitive and intellectual function (because this is a mental health descriptor), to get to an unfamiliar place without being accompanied by another person. In this context it is worth considering why a person might want to or might need to undertake a journey by taxi as opposed to by another means such as walking.

11. Such a person might be prone, because of difficulties with cognitive or intellectual function, to getting lost. Such a person might be very nervous of crowds or even small groups of people such that he/she would not want to be in a position where such crowds or groups might be encountered. Such a person might have a fear of open spaces. At the opposite end of the spectrum a person might simply prefer to ride in a taxi due to indolence.

12. I think the answer lies, then, in looking at the situation from the perspective of the relevant claimant taking into account the particular mental health problems which are said to create the difficulties in getting about. If a claimant suffers from anxiety such that he would not be able to undertake the journey on foot but would be sufficiently reassured by the mere presence of someone else in a vehicle with him, then such a taxi journey would be "accompanied" because, even if the claimant and the taxi driver did not interact by way of discourse, the presence of the taxi driver would be a significant contributory factor to that claimant's ability to make that journey. If a claimant would otherwise get lost, the taxi journey is an accompanied one because the taxi driver is acting as the claimant's navigator and, again, making a significant contribution to the ability of the claimant to make the journey. If a claimant cannot face crowds in open spaces then the taxi driver is ensuring he is not put into a situation where he has to do so and, therefore, once again, is playing a significant role in the completion of the journey. Put another way, if a claimant can only undertake a journey to an unfamiliar place by taxi because of a requirement of undertaking the journey in the presence of another person or because the assistance of that other person is required, then that journey is, for the purposes of the relevant descriptor, an accompanied one.

13. That was not the approach which was taken by this F-tT. It appears to have simply assumed that a journey in a taxi would be an unaccompanied journey without enquiring into whether the presence of the taxi driver was essential or important to the appellant's ability to make a journey to a specified place with which he was unfamiliar. It did, thereby, err in law.

14. The error, though, as I say, had it not been made, would not have been material insofar as points are concerned because it would not have led to the appellant, even if there had been an award under 15(c), reaching the 15 point threshold. However, it is possible that if the F-tT had decided the appellant was not able to get to unfamiliar places unaccompanied as a result of mental health difficulties (the depression and anxiety) this would have caused it to consider whether such mental health difficulties had a bearing upon the regulation 29(2)(b) test. As it was, the F-tT did not make any specific reference to mental health difficulties other than what appears to be mild obsessive compulsive disorder when explaining its regulation 29 reasoning. Further, as was pointed out in *EJ v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 511 (AAC) when a person does satisfy descriptor 15(c) in Schedule 2 then it may be necessary to consider whether embarking upon a hypothetical journey to a hypothetical

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workplace might lead to the risk envisaged in regulation 29(2)(b) arising until such a journey becomes familiar. It was also said that third party assistance by way of accompaniment might be a possible means of avoiding any such risk but that evidence regarding the availability or otherwise of such third party assistance will be required. This was not, however, something which the F-tT looked into at all. So, I conclude that the error the F-tT did make was a material one and that, in consequence, its decision must be set aside.

15. It is not, then, necessary for me to say anything further about the other grounds of appeal which were advanced on the appellant's behalf other than what I have already said. Any further errors of law the F-tT may have made will be subsumed by the fresh hearing which will now follow. There will be a fresh hearing because there are further facts to be found, in consequence of my having set the decision aside, and that is a task best suited to the F-tT as an expert fact-finding body and as a body which will have, available to it, both legal and medical expertise.

16. This appeal to the Upper Tribunal, therefore, is allowed on the basis and to the extent set out above.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated:

18 February 2016