IN THE UPPER TRIBUNAL **Case No.** CE/2611/2015
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal, sitting at Bolton on 2nd July 2015 (tribunal ref: *SC 122/15/00381*), involved an error on a point of law. Under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, I set aside the Tribunal's decision. Instead of remitting Mr H's appeal to the First-tier Tribunal under section 12(2)(b) of the 2007 Act I re-make its decision as follows:

1. Mr H did not on 10th March 2015 fail to submit to a medical examination for the purposes of regulation 23 of the Employment and Support Allowance Regulations 2008.

2. The Secretary of State's decision of 23rd March 2015 that Mr H was treated as not having limited capability for work under regulation 23 of the Employment & Support Allowance Regulations 2008 is set aside. Since the decision of 23rd March 2015 has been set aside, it had no affect on Mr H's entitlement to Employment and Support Allowance.

REASONS FOR DECISION

Background

1. Mr H, who had an award of Employment & Support Allowance (ESA), was asked to attend a medical examination, on 10th March 2015. Mr H says that, beforehand, he made a request for the examination to be recorded.

2. Regulation 23(2) of the ESA Regulations 2008 provides that "where a claimant fails without good cause to attend for or to submit to an examination…the claimant is to be treated as not having limited capability for work" (one of the basic conditions for ESA). It can be seen that this effectively imposes two requirements, to attend for an examination, and to submit to an examination.

3. Regulation 24 of the ESA Regulations specifies certain matters that must be taken into account in determining whether a claimant has good cause for the purposes of regulation 23. This does not prevent other matters from being taken into account as is shown by regulation 24 stating that the matters to be taken into account "include" the specified matters. The specified matters are:

> "(a) whether the claimant was outside Great Britain at the relevant time;
>
> (b) the claimant's state of health at the relevant time; and

(c) the nature of any disability the claimant has."

4. It is not disputed that Mr H attended an examination centre on 10th March 2015. Mr H says this then happened:

(a) he met the healthcare professional assigned to his case and was asked to sign an audio-recording agreement;

(b) he started to read the agreement but could not "take in" its contents so he signed the agreement but also wrote "unread" on the form. He has anxiety and depression and does not deal well with the unexpected. The agreement was, he felt, sprung on him and he became flustered and unable to process its contents;

(c) the healthcare professional sought a supervisor's advice and then informed Mr H that his 'agreement' was not acceptable. The healthcare professional told Mr H that he could take the agreement away to read in his own time and, if he wished, take advice;

(d) the healthcare professional told Mr H that, if he took the agreement away to read, a fresh medical examination "would be arranged";

(e) Mr H was unable to commit to a fresh examination date there and then because he did not have his diary with him. He was told he would receive a new appointment letter in the post.

5. In his appeal form, Mr H wrote that he had by then read the agreement and was "happy" to sign it but, in the circumstances described above, he felt he had good cause for acting as he did at the examination centre.

6. The healthcare professional's written account of what happened bore many similarities to Mr H's account although she tends to say that he was aggressive when he says he was distressed. The healthcare professional's account is more precise about locations: Mr H was given the audio-recording agreement at the centre's reception desk and sat with it in the waiting area for several minutes; Mr H was called into the examination room and it was from there that the healthcare professional sought her supervisor's advice; he left the room upon being told he could re-book an appointment but aggressively refused to re-book because he did not have his diary with him; Mr H said he could sit in the centre "all day" but, once security guards were called, refused to talk to them and left the building.

7. The Secretary of State decided that, in his words, Mr H had "failed to participate or take part with a medical examination" so that under regulation 23(2) he was treated as not having limited capability for work.

8. Mr H appealed to the First-tier Tribunal. His representative, Bolton Council's welfare rights service, presented his written case on the basis that, as the Secretary of State had said, the issue was whether Mr H had failed to "participate" in a medical examination without good cause. The representative's written argument was:

(a) Mr H could not be said to have failed to participate when he had agreed with centre staff for his examination to be re-arranged;

(b) even if Mr H had failed to participate, he had good cause for the failure, for a number of reasons: he was informed the assessment would be re-arranged; the healthcare professional was not willing to proceed unless Mr H properly signed the audio-recording agreement; due to a combination of mental health problems and the unexpected situation in which he found himself, Mr H was genuinely unable to understand the written agreement;

(c) even if Mr H's behaviour might have appeared unreasonable, account needed to be taken of his mental health problems;

(d) the DWP's decision was in fact a wrongful reprimand for Mr H's perceived bad behaviour at the centre.

The First-tier Tribunal's decision

9. Mr H attended the hearing before the Tribunal with his representative and gave oral evidence. The Secretary of State was not represented.

10. The Tribunal dismissed Mr H's appeal. In accordance with the written submissions, the Tribunal proceeded on the basis that the issue before it was whether Mr H had failed without good cause to "participate" in a medical examination.

11. The Tribunal's statement of reasons includes the following findings and observations:

(a) Mr H tried to read the audio-recording agreement form "but claims he could not understand it";

(b) through the healthcare professional's supervisor, Mr H was given two options in response to him writing 'unread' on the form. He could either sign the form without qualification or "rearrange the appointment for a time after he had had the form explained to him";

(c) the main dispute between the parties was whether Mr H's conduct was unreasonable;

(d) The "interviewer [HCP] described his manner as "becoming more rude, aggressive and agitated"". Mr H did not, at the hearing, dispute the interviewer's description of his conduct although he thought he was trying to stand up for himself and be assertive.

12. The Tribunal directed itself that a key issue was when the examination ended. If it ended before, or upon, the offer to re-arrange another examination, Mr H could not be said to have failed to participate in the examination. However, the Tribunal concluded that the examination did not end at that point. By this, the Tribunal must have meant that the examination continued after Mr H had left the examination room to remonstrate (a term that is intended to be neutral) with staff near or at the reception desk. As a result, Mr H's behaviour outside the examination room was taken into account and, in the light of that, he had failed to participate in the examination. The Tribunal expressed its conclusion as follows:

> "The Tribunal decided that the examination was still ongoing, that his behaviour at the centre was unacceptable and that the interviewer was entitled to terminate the appointment, the effect being that Mr [H] fails to participate in the examination."

13. So far as Mr H's good cause argument was concerned, the Tribunal concluded:

> "Members of staff at medical examination centres are entitled to work without the fear of physical or verbal abuse. Mr [H's] behaviour at the centre does not constitute good cause for his failure to participate in the examination."

14. Having been refused permission to appeal to the Upper Tribunal by the First-tier Tribunal, Mr H's representative applied to the Upper Tribunal for permission.

Proceedings before the Upper Tribunal

15. I granted Mr H permission to appeal on the ground that, arguably, the First-tier Tribunal erred in law by failing to give adequate reasons for concluding that the examination continued after Mr H left the examination room. This conclusion, arguably, was stated but not reasoned.

16. The Secretary of State supports the appeal. His view is that the First-tier Tribunal gave inadequate reasons for concluding the examination persisted after Mr H was informed that a fresh examination would be arranged. The Secretary of State invited the Upper Tribunal to set aside the First-tier Tribunal's decision and remit to that tribunal for re-hearing.

17. The Secretary of State also supplied a copy of the audio-recording agreement form. It says an attendee's signed agreement is needed "in order for an audio recording of your assessment to be carried out". The form explains that a recording can either be made on the centre's

recording equipment or on an attendee's device but only if s/he agrees to produce two copies of the recording at the end of the assessment which must be on CD or tape cassette. The form says a copy of the recording will be given to the attendee at the end of the examination; a copy will not be supplied to the DWP as a matter of course although they are entitled to a copy on request. The centre's copy will be destroyed after 14 months. The form also says in bold "the copy of the recording you have is to be used solely in relation to your claim for benefit and should not be published or reproduced".

18. Mr H's representative agrees that the First-tier Tribunal erred in law. But the representative goes further and invites the Upper Tribunal to re-make the decision, rather than remit to the First-tier Tribunal for re-hearing. The Upper Tribunal should find that Mr H did not in fact fail to participate because, once he accepted on the day the option of a new booking, the examination was over. In reality, the staff at the assessment centre cancelled the examination so Mr H could not have failed to participate in the examination. He did not refuse to be examined.

Conclusion

19. I allow Mr H's appeal and set aside the First-tier Tribunal's decision. The Tribunal did not give adequate reasons for its finding that the examination was ongoing even though Mr H had left the examination room and re-entered the waiting area. No reasons were given for the Tribunal's adoption of this strained interpretation of "examination".

20 Having thought about Mr H's appeal in more depth, it seems to me that the Tribunal did not in fact apply the correct law.

21. The appeal was presented to the First-tier Tribunal on the basis that the issue to resolve was whether Mr H failed without good cause to "participate" in the medical examination. However, that is not the legal test. Regulation 23(2) of the ESA Regulations deems a person not to have limited capability for work if, without good cause, the person does either of the following:

(a) fails to "attend for" a medical examination;

(b) fails to "submit to" a medical examination.

22. To put it in more everyday turns, (a) refers to a person who fails to turn up for an examination of which s/he has been duly notified and (b) refers to a person who fails to co-operate with the examination process so as to thwart its purpose.

23. The concept of "participating" in an examination does not feature in regulation 23 of the ESA Regulations 2008 (it is though found in various regulations imposing conditions on Jobseeker's Allowance claimants). While the concepts of participating in a medical examination and submitting to an examination are related, they are not necessarily synonymous. The First-tier Tribunal should have asked itself whether Mr H had submitted to a medical examination (it is clear he did attend for an examination).

24. Unfortunately, in granting permission to appeal, I did not appreciate that the test applied by the First-tier Tribunal had deviated from regulation 23's wording. As a result, that deviation was not reflected in the grounds of appeal (neither party had raised the point) and the parties did not have the opportunity to make submissions on whether Mr H did or did not submit to a medical examination.

25. However, the parties have made submissions about the First-tier Tribunal's interpretation of the word "examination" which does, of course, feature in regulation 23.

26. It is not disputed that:

(a) Mr H entered the examination room with the healthcare professional;

(b) if "examination" is given its technical and literal meaning, as I think it should, Mr H's planned examination did not begin. The healthcare professional did not start the process of investigating the nature and extent of Mr H's relevant health conditions;

(c) the examination did not begin because (i) the healthcare professional (or her supervisor) would not permit it to be recorded because, in her view, Mr H had not properly completed the audio-recording agreement form, and (ii) Mr H was unwilling to have an unrecorded examination;

(d) Mr H was informed that he could either (i) complete another audio-recording form by signing it without adding "unread", or (ii) "re-book" another medical examination;

(e) Mr H chose option (ii). However, he was not willing to agree to a specific date for examination there and then because he did not have his diary to hand;

(f) at this point, matters clearly became fraught. From Mr H's perspective he was simply distressed and, I believe, annoyed but from the healthcare professional's perspective he was rude and aggressive.

27. The initial question is whether Mr H failed to submit to a medical examination (if so, good cause would need to be considered).

28. Similar wording to that found in regulation 23 has been used in other social security regulations over the years so that there is some potentially relevant case law.

29. In *R(IB) 1/01* Social Security Commissioner (now Upper Tribunal Judge) Rowlands observed it was arguable that a person who says he will definitely not attend an examination fails to "submit" to it, and also arguable that a person who attends but refuses to be examined has not submitted to an examination. In that decision the Commissioner also found that it was legally impossible for a person to fail to attend an examination that had been cancelled. I am not aware of any existing authority on the question whether a person is capable of failing to *submit* to an examination that has been cancelled, although in *CIB/849/2001* Social Security Commissioner (now Upper Tribunal Judge) Turnbull found that a person who sought to impose a condition on examination "that would render the examination useless for the purpose for which it is required" would fail to submit to the examination.

30. I do not think that conduct within the examination room, and only in that room, is all that can be taken into account in deciding whether a person has failed to submit to a medical examination. Indeed, the authorities referred to above support this proposition. If, for example, an individual's disruptive conduct in the waiting area was designed to prevent an examination from going ahead, a decision-maker might properly conclude that the individual had in fact failed to submit to a medical examination. However, once a decision has been taken not to proceed with or to abandon an examination, I do not see how a claimant's subsequent actions can amount to him/her failing to submit to a medical examination. There is nothing left to submit to.

31. The remaining question in such cases is whether the decision not to proceed with or to abandon the examination can be attributed to the claimant such that s/he can properly be said to have failed to submit to the examination. This opens a door to questions of reasonableness, a concept that is closely allied to "good cause" which of course becomes relevant once it has been determined that a person failed to submit to an examination. I do not think that is objectionable, it is simply a consequence of the nature of a failure to "submit".

32. On this case's undisputed facts, Mr H's medical examination did not begin. The evidence cannot support a contrary finding. The planned medical examination was abandoned or cancelled once it became clear to the healthcare professional that Mr H would not, on the day, complete the audio-recording form in the way the centre's management thought he should. If Mr H's refusal was in the circumstances unreasonable, in the light of the examination's purpose, he could properly be said to have failed to submit to the examination. However, it was not viewed as unreasonable by the assessment staff as is shown, in my view, by the staff

informing Mr H that another examination could be arranged. For that reason, I conclude that Mr H's conduct before the planned examination was cancelled was not unreasonable. And what happened afterwards is not relevant to the question whether he failed to submit to the medical examination.

33. On this appeal's undisputed facts, there is only decision that can properly be made. Mr H did not fail to submit to a medical examination. Accordingly, regulation 23(2) of the ESA Regulations 2008 did not operate to deem Mr H not to have limited capability for work.

34. This decision should not be read as condoning abusive behaviour towards assessment centre staff (although I should point out I make no finding as to whether Mr H's conduct can properly be described as abusive). Of course, that is unacceptable. The point made above is simply that, once a medical examination has been abandoned or cancelled, an individual's conduct after that point cannot amount to him/her failing to submit to an examination.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
25th February 2016