IN THE UPPER TRIBUNAL **Case No.** CE/288/2016
ADMINISTRATIVE APPEALS CHAMBER

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

Decision: **The decision of the First-tier Tribunal sitting at Reading on 4 September 2015 under reference SC303/15/00245 involved an error of law and is set aside.**

The appeal is remitted for determination at an oral hearing before a completely differently constituted tribunal.

This decision is made under section 12 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 appeal should be considered at an oral hearing at a venue convenient for the appellant.

2. The new tribunal should not involve the tribunal judge previously involved in considering this appeal on 4 September 2015.

3. The new tribunal must conduct a complete rehearing 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.

REASONS FOR DECISION

1. The appellant, who was born on 10 October 1961, was awarded employment and support allowance ("ESA") from and including 5 March 2011 on the basis that he was suffering from gout and diabetes. He has also indicated that he has had to have an operation to straighten the toes on his left foot, that his has similar difficulties with his right foot and that he has a rib which "pops out of place if stretching or lifting". On 30 January 2014 he completed a standard questionnaire known as Form ESA50 in which he provided information about his various health difficulties. Clearly anticipating that he might be called to attend a medical examination to investigate his ongoing entitlement to the above benefit he wrote on the form:

> "Be advised that if I attend an interview I will be asking questions relating directly to the interviewer's credentials as being interviewed by a so-called 'health care professional' means nothing."

2. As anticipated he was indeed asked to attend a medical examination. It was scheduled to take place on 8 April 2015. He attended the examination centre but the examination itself

did not proceed. There are differing versions as to why it did not. According to the healthcare professional (a doctor) who was tasked with conducting the examination and who has subsequently provided a written narrative, he was "defensive and uncooperative" and requested what the doctor considered to be unreasonable details regarding her credentials and qualifications. He asked her to sign an "agreement form" which she declined to do. He also asked to use his mobile telephone to record what was said, a request which was refused on the basis he had not sought prior agreement. Although the doctor offered to supply him with her name and GMC registration number and confirmed that she was approved by the Secretary of State to conduct the examination that was not sufficient for the appellant who observed that that told him "nothing". The doctor consulted her line manager who attended but was not able to resolve matters. Accordingly, the assessment was abandoned. That is what the doctor says happened in the narrative. There is also a suggestion that the appellant had wanted her to complete a form requiring, amongst other things, her name, information about where she had obtained her qualifications and her full NHS medical history. A copy of that form appears at page 1116 of the appeal bundle. I am not sure whether it is the same form that the doctor referred to as an "agreement form" or whether there were two forms.

3. The appellant's version is somewhat different. In summary, he says that he was called to the examination room some 15 minutes after the scheduled commencement time and that the doctor offered him an insincere apology for the delay. She did not identify herself so he asked for her name and she responded only by showing him a tag around her neck. After some time he asked her "for her qualifications" and showed her "some printed material that I had printed prior to attending" which, I think, was probably the document at page 116 referred to above. She simply told him that she had been "approved by the Secretary of State and that is all that you need to know". Unhappy with this he asked if there was a manager or supervisor available and her line manager was called. He asked the line manager about the doctor's qualifications "and was given the same very basic answer". He says he asked them if they were willing to continue with the assessment "on the basis that in future I could ascertain their qualifications via the GMC and other bodies" and that they refused and decided to terminate the appointment.

4. On 16 April 2015 the respondent issued a decision to the effect that the previous awarding decision was superseded because the appellant had "failed to participate in his medical examination" and he had not shown good cause for that failure. So, he was no longer entitled to ESA from and including 9 April 2015. Since an application for mandatory reconsideration was unsuccessful he appealed to the First-tier Tribunal (hereinafter "the tribunal").

5. The tribunal considered his appeal at an oral hearing which took place on 4 September 2015. He attended but was not represented. No one attended on behalf of the respondent and there were no additional witnesses. The tribunal dismissed his appeal and subsequently went on to issue its statement of reasons for decision ("statement of reasons"). The bulk of that quite brief statement of reasons is taken up with a summary of the appellant's evidence as to what had happened on the day in question. Having summarised that evidence the tribunal went on to say this:

> " 7. On two occasions, in answer to questions from the tribunal, [the appellant] confirmed that the only way through the 'standoff' at his appointment in April would have been for the HCP or their manager to have articulated their qualifications to conduct the assessment. Asked

> how he would conduct himself at a future assessment, [the appellant] replied that, while he might no longer feel able to quiz the qualifications of the assessor, now that the tribunal had alerted him to the legal definition of an HCP (reg. 2 ESA Regulations 2013) he might, however, attempt to make a recording of the proceedings.
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> 8. In explaining its decision to [the appellant], the tribunal made it clear that it was not necessarily endorsing the DWP's account of the ESA appointment in April 2015. However, given his clear oral evidence, it was reasonable for the Decision Maker to have reached the conclusion that [the appellant] had, without good cause, failed to participate in the assessment."

6. The appellant sought permission to appeal to the Upper Tribunal making numerous points. Although I took the view that the bulk of them were unpersuasive I did grant permission to appeal because I thought the tribunal might have failed to make sufficiently clear findings of fact concerning what had happened on the date of the examination.

7. I subsequently received a written response to the appeal from Mr M Hampton who now acts for the respondent in connection with this appeal to the Upper Tribunal. He accepted that the tribunal had erred in law through a failure to give clear reasons as to why it was dismissing the appeal but contended that, on the facts, no other decision could properly be reached and urged me, on that basis, to set aside its decision but to substitute one of my own to the same effect.

8. Mr Hampton also provided, in the submission, some helpful background. He explained that a standard form which accompanies letters informing claimants of medical examination appointments explains that health care professionals have been fully trained to conduct a work capability assessment examination. It also states that any request made by a claimant for an audio recording of the examination, whether the recording is to be made by the claimant himself or by "the health assessment advisory service" must be applied for in advance. He says that records show such a document was issued to the appellant. He also points out that the tribunal's reference to regulation 2 of the Employment and Support Allowance Regulations 2013 and to the definition of a healthcare professional contained therein, was erroneous and that the applicable provision was regulation 2 of the Employment and Support Allowance Regulations 2008 albeit, that the definition in the two regulations is the same.

9. The appellant provided a written reply in which he contended, in effect, that the respondent had had nothing new to say in its response to the appeal, that there were "no facts sufficiently recorded" to enable the Upper Tribunal to decide that the tribunal's decision had been correct and that his appeal ought to be allowed.

10. Since neither party requested an oral hearing before the Upper Tribunal and since it did not seem to me that there was any reason to think such would advance matters, I decided not to hold one.

11. I have carefully considered the issues in this case and the submissions of the parties. I note that the respondent, in the decision under appeal, talked of the appellant's alleged failure "to participate" in a medical examination and that the tribunal used similar language. That is not quite the applicable legal test although I do not think, in this case, that such error of itself would have been capable of making any difference. Nevertheless, this is the second time in a period of only a few days I have seen a decision from the respondent using that particular incorrect language and it may be that the matter merits some attention on its part.

12. As to the appropriate applicable legal tests, regulation 23(2) of the Employment and Support Allowance 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. Regulation 24 of the same 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 well but the matters which must be taken into account are:

> " (a) Whether the claimant was outside Great Britain at the relevant time;
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> (b) the claimant's state of health at the relevant time;
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> (c) the nature of any disability the claimant has."

13. Clearly the appellant did attend for the medical examination. He arrived at the examination centre and responded when called to go to the room where the examination was to have taken place. A key issue, therefore, for the tribunal was whether or not he then did submit to an examination. One of the points he has made in pursuing his appeal to the Upper Tribunal is that he did not actually refuse to be examined. However, matters are not quite as simple as that. It seems to me, as a matter of logic, that if a claimant seeks to impose an unreasonable condition and, absent that unreasonable conditions fulfilment, withholds consent to the examination taking place, then he does not submit to the examination. I note that in *CIB/849/2001* Commissioner Turnbull (now Upper Tribunal Judge Turnbull) decided that a person fails to submit to an examination not only if he absolutely refuses to be examined but also if he seeks to impose as a condition of being examined a term which would render the examination useless for the purpose for which it is required. In that case the claimant had consented to be examined but had said that he would not give his permission for anyone other than a medically qualified person to read any subsequently produced report. This, of course, would have had the effect of the decision maker not being able to see it. So, the circumstances there were different to what they are here but that appeal did illustrate the point that the imposition of conditions by a claimant might lead to a proper conclusion that such a claimant had failed to submit. In *BH v Secretary of State for Work and Pensions (ESA)* [2016] UKUT 0119 (AAC) Upper Tribunal Judge Mitchell observed that, where a decision is taken by those acting on behalf of the respondent not to proceed with or to abandon the examination, a question will arise as to whether such decision can be attributed to the claimant such that he/she can be properly be said to have failed to submit. As he observed:

> "This opens a door to questions of reasonableness …"

14. I would entirely agree with the above reasoning. I would add that reasonableness is not only potentially relevant to the imposition of conditions but also to general behaviour such that behaviour of, for example, a threatening or intimidating nature, on proper findings, might well amount to a failure to submit so long as the behaviour is the or a reason for the examination not proceeding. So, the tribunal had to ask itself, having made appropriate findings on the evidence, whether the claimant had behaved in an unreasonable manner or had sought to impose unreasonable conditions. As to those sorts of matters, where behaviour is concerned, it

seems to me that a claimant is not required to, for example, exude cheerfulness or be eager to please. He/she may, without in context being unreasonable, be, for example, sullen, unhappy or (save where communication is needed for the purpose of the examination) largely uncommunicative. However, if such behaviour strays into the realm of being obstructive or if it is such as to intimidate the person tasked with conducting the examination or even possibly other support staff (excluding significant over-sensitivity on the part of such examiners or staff) then that is much more likely to found a justifiable decision concerning failure to submit. As to conditions, again it seems to me that reasonableness is the key. I do not think, absent unusual circumstances, there can normally be any sensible objection to a non-aggressively put request for the name of the healthcare professional who is to conduct the examination (unless of course there are security concerns), a verbal assurance from the health care professional that he/she has been properly appointed as a healthcare professional such that they are authorised to carry out the examination and an indication as to which category within the definition of "healthcare professional" as contained within regulation 2 of the Employment and Support Allowance Regulations 2008, they fall within. The alternatives therein are a registered medical practitioner, a registered nurse or an occupational therapist or physiotherapist registered with a regulatory body established by an ordering council under section 60 of the Health Act 1999. It seems to me, though, that any demand for additional information, absent most unusual circumstances, is likely to go beyond what is reasonable. So, looking at matters in the context of the claims which have been made in this appeal, it seems to me it could not be said that any demand for the examiner's qualifications (over and above whether that person is a registered practitioner, a registered nurse or an occupational therapist or physiotherapist) or a demand for the examiner's registration number or their full NHS medical history would come within the bounds of reasonableness such that ordinarily an imposition of a condition that such information be supplied before the examination may commence or continue would constitute a failure to submit.

15. As to the "good cause" aspect, there is the none exhaustive list referred to above to consider. The concept of "reasonableness" which Upper Judge Mitchell identified and which I have referred to above will normally be closely allied to the concept of good cause so it is perhaps quite likely, though it will not necessarily follow, that if a person has failed to submit through the imposition of unreasonable conditions he/she will not be able to then show good cause based on a failure to comply with those unreasonable conditions. Good cause, though, it seems to me, might be established in the event of a refusal on the part of a healthcare professional to provide information which it is reasonable for a claimant to request (such as the matters I have outlined above) and if the information is sought in a manner which is aggressive or intimidating.

16. Of course, there is a wide range of circumstances which might lead to an examination being frustrated or abandoned or not commenced and it is impossible to lay down hard and fast rules which will cover every circumstance or eventuality. What the above does serve to illustrate, though, as well as perhaps indicating the broad approach that might be taken, is that fact-finding is likely to be of considerable importance. Only then, ordinarily at least, will there be a proper basis for taking a decision as to matters such as reasonableness of behaviour, the imposition of conditions and aspects of the good cause issue.

17. In this case, there were really very few factual findings. It might even be said that there were no clear, direct findings of fact as to what occurred on the day in question at all. Of course, there will be times when the evidence is not of such quality as to justify the finding of

very precise facts. However, I do not really think that was the situation here. The tribunal had clear written versions and had the benefit of the appellant's own oral evidence. It specifically did not make any clear finding concerning the respondent's account as to what had happened at the examination as the comment at paragraph 8 of the statement of reasons to the effect that the tribunal "was not necessarily endorsing the DWP's account of the ESA appointment in April 2015" makes clear. As to the document at page 116 and referred to above, it did not make a clear finding as to whether the appellant maintained the condition that he had to be supplied with such details as NHS history and a registration number prior to giving consent for the examination to proceed. There is, indeed, some suggestion in his written comments that he did not though that is not supported by the written evidence of the doctor. The tribunal did not make a clear finding as to whether the appellant had sought to make his request for recording the examination using his mobile phone a condition of submitting or whether he had simply, even if grudgingly, accepted he would not be permitted to do that. The tribunal did not make a finding as to whether the appellant had behaved in a threatening manner despite a suggestion by the doctor that he had sounded threatening. The tribunal thought it did not have to make extensive fact-finding on the basis that the appellant had told it that the impasse could only have been resolved if the doctor or the line manager had articulated their qualifications to conduct the assessment. However, its focus should have been, initially at least, upon what had actually occurred. Had it found the appellant had at some point dropped his demand for any more than an indication that the healthcare professional was a registered medical practitioner or one of the other categories appearing in regulation 2 as noted above and had been properly appointed as a healthcare professional and had it found he had not been aggressive or intimidating it might conceivably have resolved matters in his favour even if it accepted he had initially made unjustified and unreasonable demands for information. It seems to me that the appellant's own account does not quite preclude the possibility of such a conclusion being reached by a rational tribunal and the absence of any clear factual findings is troubling.

18. In the circumstances, therefore, and against the above background, I have to conclude that the tribunal failed to make sufficient factual findings to justify the conclusion it reached on the appeal. Accordingly, I do set its decision aside.

19. I have considered Mr Hampton's submission that I should simply make the decision myself on the basis that, on the evidence, there is no decision other than to dismiss the appeal which can be made. I do not think, though, that that is quite the position though I am close to being persuaded that it is. I do, therefore, decline to remake the decision myself. I remit to a new and differently constituted F-tT.

20. The new tribunal will consider matters entirely afresh. It should bear in mind what I have had to say above about what might ordinarily and what might not ordinarily amount to a failure to submit. Since there appears to be no basis to dispute the fact that the appellant did attend the examination it will have to consider, first of all, whether he did fail to submit and, if so, whether he had good cause for so doing. It will need to make clear findings, insofar as the evidence enables it to do so, regarding what did or did not happen on the date of the examination.

21. Finally, although I have allowed the appeal and remitted, in case it is not obvious already, there is nothing in this decision which should be taken as condoning, to any extent at all, behaviour which might reasonably be thought to be aggressive or intimidating.

22. The appeal, then, is allowed on the basis and to the extent explained above.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated: **27 April 2016**