IN THE UPPER TRIBUNAL **Case No.** CE/62/2016
ADMINISTRATIVE APPEALS CHAMBER

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

Decision: **The decision of the First-tier Tribunal sitting at Sutton on 7 August 2015 under reference SC154/15/01542 did not involve an error on a point of law. That decision shall stand.**

REASONS FOR DECISION

Introduction

1. This is the appellant's appeal to the Upper Tribunal, brought with my permission, against a decision of the First-tier Tribunal (hereinafter "the tribunal") made on 7 August 2015 to the effect that he had, on 14 November 2014, failed to submit to a medical examination for the purposes of regulation 23 of the Employment and Support Allowance Regulations 2008 without good cause.

The factual background

2. The appellant had been receiving incapacity benefit or incapacity credits, according to the respondent, since 15 October 2004. He has stated that he suffers from post-viral chronic fatigue syndrome. On 21 August 2013 he was notified that the conversion phase, a process by which persons previously receiving incapacity benefit (or credits) are assessed for possible entitlement to employment and support allowance which is its replacement benefit. As part of that assessment process he was asked to complete a standard form ESA50 which affords an opportunity for claimants to provide information in some detail regarding their health problems. He completed that form on 29 September 2013 making reference to chronic fatigue syndrome and explaining how he felt the condition impacted upon him. He also provided, as requested, contact details for his GP. It appears that not very much happened for some months afterwards but, on 15 July 2014, the appellant's GP, no doubt having been contacted by the respondent, completed standard form ESA113 in which it was indicated that the appellant had not been seen at the practice since 24 October 2008. He was then, as a further part of the assessment process, invited to attend a medical examination, it being scheduled for 6 August 2014. However, he did not attend as a result of his being unwell on that day. He was then invited to attend a medical examination on 28 August 2014 but did not do so though he had indicated, prior to that date, that the timing was unsuitable for him. It was subsequently accepted that he had shown good cause for not attending that examination and he was invited to attend one on 21 October 2014. He did so but the examination did not proceed. There is dispute between the appellant and those tasked with administering and carrying out the examination as to why it did not proceed. I shall look at the differing accounts as to that in more detail below. In any event, although the respondent has maintained that the appellant failed, without good cause, to submit to that examination, no adverse decision was taken with respect to his benefit entitlement as a consequence and, instead, he was invited to attend an examination on 14 November 2014. Once again he attended and once again the examination did not proceed. Again, there is dispute as to why that was. Again, I shall address the detail as to that below.

3. On 12 February 2015 and in light of the above, the respondent decided that since the appellant had, in its view, "failed to participate" in the medical examination of 14 November 2014 and that he, again in its view, lacked good cause for that failure to participate, his existing award did not qualify for conversion to employment and support allowance. It was said that decision would take effect from 6 March 2015 though, as it turned out, the effective date was subsequently adjusted to 15 May 2015 because of a failure on the part of the respondent to notify the appellant of the terms of the decision of 12 February 2015 promptly. The appellant disputed the decision and this led to a mandatory reconsideration of 15 May 2015 which left the original decision unchanged.

4. The appellant, dissatisfied with the above outcome, appealed to the tribunal.

The differing accounts

5. The circumstances surrounding the abortive examinations of 21 October 2014 and 14 November 2014 appear to be very similar.

6. The person tasked with carrying out the examination of 21 October 2014 was one Emma Nicholls, a physiotherapist. Her written account of events appears from page 73 to 76 of the appeal bundle. In summary, she says that the appellant was called from the waiting area and entered the examination room. She was intending to introduce herself, refer to her qualifications and then explain the assessment process, but the appellant, prior to her having a chance to do so, started to ask questions about her qualifications. She told him that she is a physiotherapist and she asked him to permit her to complete her usual form of introduction. He asked her why she was being "so defensive". He continued to ask questions in a manner which made her feel uncomfortable and, in consequence, she requested a chaperone. However, he continued to ask her questions whilst waiting for the chaperone and when that chaperone arrived (a person called Sharon) he asked for her full name too, which she declined to give, and then returned to asking questions of Ms Nicholls. These included questions as to whether she was on the UK register for physiotherapy (to which she says she replied that she was) and when it was that she had qualified. He was making notes and his manner continued to make her uncomfortable. In the end, Sharon decided that the assessment would have to be abandoned.

7. The appellant's written account of that examination has some similarities but some significant differences. He says that he asked Ms Nicholls for her name and details of her medical qualifications, that she became defensive and only after some hesitation did she disclose that she was a physiotherapist. He then asked her if she was qualified and registered in the UK and (on the assumption she was qualified) when she had become so. She refused to respond and phoned a colleague to request a chaperone. The two then waited in silence until Sharon arrived who declined to give him her surname. Sharon told him it was not for him to ask such questions, that the examination would not now proceed and that it would be rescheduled. The appellant says that his requests for information were all reasonable and legitimate and were, as he puts it "temperately expressed".

8. As to the abortive examination of 14 November 2014, material relied upon by the respondent, essentially the accounts of one Melinda Finbow and one Ria Blackman-Holman appear from pages 78 to 84 of the appeal bundle. In summary, Ms Finbow says that she is a registered general nurse. Her account of events is that she called the appellant from the

waiting area and walked down a corridor with him towards the examination room and introduced herself as she was doing so. After entering the room he took out a notepad and asked her for her full name which he wrote down. He then asked her questions in what she described as "an intimidating manner" about her nursing qualifications. She told him that she is a registered general nurse and a registered disability analyst qualified to carry out the medical assessment but he was unhappy with that explanation and proceeded to ask when she had last worked as a nurse and what other qualifications she had. She told him she was not obliged to give him any more than her full name and her nursing qualification but that he asserted, by way of response, that it was "his legal right to know all my qualifications". She politely explained that she felt like she was "being interrogated" and was not happy with the situation. She called Ms Blackman-Holman into the room who also told the appellant that Ms Finbow had provided him with all the information he was entitled to. He then proceeded to ask Ms Blackman-Holman for her full name and her qualifications too. According to Ms Blackman-Holman his manner became "increasingly intimidating" and he made allegations that Ms Finbow had been rude and aggressive towards him though there was no indication that she had. Ms Blackman-Holman formed the view that it was unlikely the assessment could continue and says that she later learnt that the appellant had behaved in a similar manner when he had attended on 21 October 2014.

9. The appellant's written version of these events is that he had attended in good time but was kept waiting until 15 minutes after the scheduled commencement time without explanation. He says that Ms Finbow simply introduced herself as "Melinda" and that when he asked her for her surname "she immediately became visibly irritated" and that she only gave him her surname when he persisted. When he then asked about her medical qualifications "she was very annoyed about this" and only when he persisted did she say that she is a registered nurse with over 40 years experience. He acknowledges he asked her if she held any additional qualifications and that he also asked her about her experience and says that she then became "very annoyed indeed" and told him she did not have to tell him any more than she had. She left the room and returned with a colleague who was reluctant to give him her surname. The colleague told him that he was not co-operating and so the assessment would not proceed. He says that Ms Finbow shouted at him and that as he was being escorted along the corridor by her, after they had exited the examination room, "her eyes were flashing with anger". He says that he acted reasonably, put reasonable questions to Ms Finbow, and that she had been aggressive towards him. He describes the incident as being "an extremely unpleasant and distressing experience".

The relevant legal provisions

10. 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". Regulation 24 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.

11. So, regulation 23(2) effectively imposes two requirements, one being to attend for an examination and the other being to submit to that examination. Failure to do either will lead to a claimant being treated as not having limited capability for work unless that claimant can show good cause for his failure to attend or to submit.

The appeal before the First-tier Tribunal

12. There was an oral hearing which the appellant attended. He was not represented. There was no attendance on behalf of the respondent and there were no witnesses other than the appellant himself. The tribunal had before it a bundle of documents which included those referred to above and which was supplemented by copies of two letters of 21 October 2014 and 15 November 2014 which the appellant had brought to the hearing. According to the record of proceedings the hearing lasted for some one hour and five minutes and the appellant gave oral evidence which was similar to his earlier written evidence.

13. The tribunal dismissed his appeal and issued a lengthy decision notice of 7 August 2015. It is clear that it intended that decision notice to contain a much fuller explanation as to its reasoning than is normally the case. It expressed its decision to be as follows:

> "[The applicant] is no longer entitled to be awarded credits on the grounds of incapacity for work and does not qualify for conversion to employment and support allowance from 15 May 2015, because he failed without "good cause" to submit to a medical examination."

14. Pausing there, the Secretary of State's decision maker had, in the decision of 12 February 2015, referred to a failure "to participate" in a medical examination and that wording had been repeated in the mandatory reconsideration decision of 15 May 2015. The requirement, in regulation 23, as noted above, is not to "participate" in a medical examination but to "submit" to one. Whilst I cannot see that the decision would have been any different had the decision maker applied the correct legal language, I have seen decisions wrongly expressed in a similar way in the past and it may be that the Secretary of State would wish to take on board that the requirement is to submit. The F-tT, though, as will be noted from the passage I have quoted above, did not make that mistake.

15. In terms of its reasoning, the F-tT, in the extended decision notice, said this:

> "9. In my view if it is established that [the applicant] behaved in such a manner to a health care professional approved by the Secretary of State that the HCP felt so uncomfortable that he or she reasonably refused to carry out the examination, then [the applicant] is to be treated as having failed 'to submit to' the examination, and I would go on to consider if he had 'good cause' for his behaviour.
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> 10. [The applicant] is entitled to be treated civilly by officers acting on behalf of the Secretary of State, and I believe also that he is entitled to know their names and, if they are to examine him, their qualifications. In my view he is not entitled thereafter to question them on their experience or competence, and certainly not in a threatening manner.

> 11. Regarding the appointment on 21 October 2014 I have had documentary and oral evidence from [the applicant], and the statement from Ms Nicholls (page 75 of the response). In his version, he behaved reasonably sitting with his notepad asking acceptable questions and the two ladies who were standing, intimidated him, then abandoned the examination and colluded in writing up the report. He told me that 'Sharon' was particularly hostile.
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> 11.1 The HCP and physiotherapist Ms Nicholls states that [the applicant] asked questions that made her feel uncomfortable such that she phoned for a chaperone, but he adopted a similar approach with the chaperone, and returned to asking Ms Nicholls whether she was on the register, and the date that she qualified. She claimed that [the applicant] stated that he did not want to proceed with the assessment unless all his questions were answered to his satisfaction.
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> 12. Regarding the appointment on 14 November 2014 again I have had documentary and oral evidence from [the applicant], and the statements made by the HCP and nurse Ms Finbow, and by Ms Blackman-Holman (page 81 to 83). The events described were much as on the previous occasion, with both sides claiming that they had been intimidated.
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> 13. Taking all the evidence into account I have decided, on the balance of probabilities, that by his actions and manner on both occasions [the applicant] was intimidating towards the two lady employees on each occasion, such that they were reasonably entitled not to go ahead with the examinations and [the applicant] by his behaviour failed 'to submit to' the examination on each occasion."

16. The tribunal then went on to explain why it thought, having failed to submit, the appellant had not demonstrated 'good cause' for not doing so. It noted that he was in Great Britain on the date of the relevant examination, he is aged 60 and whilst he appeared to be mentally and physically fit it did accept "that he has health issues". It said it had taken those factors into account (clearly it had in mind regulation 24 as set out above) but that good cause had not been established.

17. In a subsequently produced statement of reasons for decision ("statement of reasons"), it indicated that it had little to add to what was contained in the decision notice but did say it thought that since there had been difficulties on a previous occasion the appellant ought to have been particularly vigilant not to upset members of staff when called for the examination on 14 November 2014. It reiterated its view that having been provided with the name and qualification of the health care professional (that is the indication that she is a registered nurse) who was to have examined him he was obliged to co-operate with the examination process and by persisting in demanding further information he had verbally intimidated her to the extent that she was entitled not to proceed. His behaviour, comprising of the demand for further information and the way he had behaved in demanding it had, therefore, prevented the medical examination taking place and, accordingly, he had failed to submit to it.

18. So, the appellant's appeal was unsuccessful.

Subsequent applications to the First-tier Tribunal.

19. Having received the decision notice the appellant wrote to HM Courts and Tribunal Service (HMCTS) stating that he was not satisfied with the decision as he believed "there were procedural irregularities at the tribunal" and said he wished to take matters further. He asked to be advised "on the necessary steps to take". It is my understanding that, in fact, some

information is sent to claimants with a decision notice advising as to the availability of further courses of action and the steps to take. Be that as it may, and in any event nothing turns on that in this appeal, the tribunal treated his letter as an application to have the decision set aside under rule 37 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 but decided not to so because no detail had been given as to the claimed procedural irregularities. It did, though, direct that the letter also be treated as a request for a statement of reasons. The appellant, in a further letter to HMCTS, and without waiting for the statement of reasons, indicated he was unhappy with that response and said that he had assumed that, by way of reply to his original letter, he would have been sent a form to complete concerning the set aside request. He observed "I have now lost the opportunity to have the tribunal decision set aside, and this is grossly unfair" and went on to set out what he believed were the procedural irregularities which had taken place. These were that the tribunal judge had been looking at a book on two occasions rather than listening to what was being said; there had been no reference by the tribunal in its decision to a point he had made that the appeal bundle had not included two letters he had written to the respondent "complaining about the conduct of ATOS"; that no mention had been made by the tribunal of his complaint that "hearsay evidence and unsubstantiated statements" had been "contained in the submissions made by Atos to the DWP"; that Atos had quoted from "a private letter I had written to the DWP" and which they had no right to see; that no mention had been made by the tribunal of his "arguments concerning the Human Rights Act" and that it was "entirely outside his remit" for the tribunal judge to have referred to his state of health. Of course, Atos is an organisation which had responsibility for carrying out medical assessments relating to entitlement to employment and support allowance though it no longer has that responsibility now.

20. The appellant was sent the tribunal's statement of reasons. He then wrote to HMCTS once again, on 26 November 2015, setting out the reasons why he wished to appeal to the Upper Tribunal. He incorporated the concerns he had previously expressed and which he had described as "procedural irregularities" but added a contention that the tribunal had taken "no account of any part of my verbal submission", an assertion that he had not "upset the staff" at the first abortive examination and that he had merely politely asked for information, an assertion that he had not "verbally intimidated the health care professional" and that there was no evidence to suggest he had and a contention that whilst it had been indicated that the decision notice had been "written immediately following the hearing" (which is indeed stated at paragraph 1 of the statement of reasons) that ran counter to an indication he said the tribunal judge had given to him after the hearing that he would delay issuing the decision because he would need to consider the issues "over the weekend".

21. A district tribunal judge considered what the appellant had had to say but decided not to set the decision aside and not to grant permission to appeal to the Upper Tribunal. That decision was communicated on 30 November 2015.

The proceedings before the Upper Tribunal

22. The appellant renewed his application for permission to appeal with the Upper Tribunal. His grounds were, essentially, the same points which had been made in the applications to the First-tier Tribunal referred to above. Although I took a preliminary view that the bulk of the points made in the grounds were not persuasive, I did grant permission to appeal because I thought the question of what would amount to a failure "to submit" to a

medical examination might merit further attention and I wondered whether the tribunal had made sufficient findings of fact. I did not limit the grant of permission.

23. Mr M Hampton, acting on behalf of the respondent, provided a written submission. He said that the appellant's appeal was not supported and he invited me to dismiss it. He referred me to a decision of Commissioner Rice cited as *CIB/633/1997*, which was concerned with a similar provision in earlier legislation, and quoted from the Commissioner as follows:

> "The central question for the tribunal is whether or not [the claimant] failed to submit himself to a medical examination when properly required to do so. As defined in the Concise Oxford Dictionary 'submit' is a verb which can be used transitively, and intransitively and carries the meaning 'surrender oneself for control etc; subject to operational process; present for consideration or decision; give way, resign oneself, yield, cease or abstain from resistance."

24. Mr Hampton argued that that definition implied that a health care professional would take the active role in controlling the medical examination whilst a claimant would take a more passive role. He accepted that a claimant would be entitled to know the name of the person examining them and "his/her status". He referred me, though I have not found these to be relevant to my decision, to a number of cases concerning the evidential value of a medical report prepared by a physiotherapist in cases which raise issues concerning mental health. Pausing there, there is no medical evidence before me to indicate that the appellant has any mental health problems and he has not, himself, asserted that he has. Mr Hampton submitted that on the occasion of each abortive examination the appellant had sought more information than he was entitled to. He said, in effect, that the tribunal was entitled to make the findings it had regarding his behaviour and was entitled to reach the conclusions it had on the appeal to it.

25. The appellant, in a written reply, asserted, in summary, that he had not refused to submit to an examination, that he had been told "by the ATOS staff" on 21 October 2014 that his questions would be answered on the next occasion, that he had never made any unreasonable demands, that he had attended both medical assessments in good faith, that he had not intimidated anybody, that he does not understand why his straightforward questions could not be answered, that the decision to cease to pay benefit offended his rights under Article 8 of the European Convention on Human Rights (ECHR), that he had been bullied and shouted at by Atos staff such that there had been a breach of Article 3 of the ECHR, that there had been a further breach of Article 8 because his "private correspondence to the DWP was provided to ATOS staff", that he suffers from chronic fatigue syndrome and that these events have caused him considerable stress and unhappiness.

26. Although the respondent had not done so, the appellant asked for an oral hearing of the appeal because:

> "I would like the opportunity to present my case, to amplify/clarify points as necessary."

27. It is on the above basis, therefore, that I must now determine the appellant's appeal.

Discussion

28. I have considered, in light of the appellant's request, whether I should hold an oral hearing before the Upper Tribunal. In so doing I have reminded myself of the content of

rules 2 and 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008. I have decided not to hold such a hearing. That is because the parties have fully set out their views as to the tribunal's decision in writing, because although the appellant may think such a hearing would be an opportunity to revisit matters of fact it would principally be concerned with whether the tribunal erred in law and it is not apparent that a hearing would take matters concerning that issue further, because if as a result of any view I reach further fact-finding is necessary that can be accommodated by the mechanism of remittal to a different First-tier Tribunal and because, taking an overall view, I am satisfied I can justly determine the appeal without such a hearing.

29. Turning to the meaning of "submit" although Mr Hampton helpfully referred me to the decision of Commissioner Rice cited above and the dictionary definition which the Commissioner had relied upon, I do not think very much assistance can be derived from dictionary definitions concerning ordinary English words in everyday usage. The word "submit" is such a word and it seems to me that its everyday meaning is well known and well understood. Dictionary definitions, here, are unnecessary and might even cloud what would be otherwise a straightforward issue.

30. There is some, though it seems not very much, previous case law regarding circumstances in which a claimant might be said to have or not to have submitted to an examination. In *R(IB) 1/01* Social Security Commissioner (now Upper Tribunal Judge) Rowland commented that it was arguable that a person who says he will definitely not attend an examination fails to "submit" to it and that it was also arguable that a person who attends but refuses to be examined has not submitted to an examination. In *CIB/849/2001* Social Security Commissioner (now Upper Tribunal Judge) Turnbull found that a person who had 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. In the latter case the claimant had attended for the examination but he was not, in fact, examined because he was not prepared to consent to the medical report which would have been produced as a result of the examination being seen by any person without medical qualifications including a decision maker. The Commissioner (as he then was) set aside the tribunal's decision for other reasons but concluded that the claimant had not submitted to the examination because the condition he was seeking to impose, that no non-medically qualified person such as a decision maker could view it, meant the report would simply be of no value in the decision making process despite that being the whole intention of the examination. So, it was not the case, following that reasoning, that only a person who refused outright to be examined would be said to fail to submit. The claimant in that case was, it appears, fully prepared to submit to the examination itself. Further, it also follows from the above reasoning that the imposition of conditions, depending of course on what they are, is capable of amounting to a failure to submit.

31. I would respectfully agree with the reasoning of the two Commissioners (both now Upper Tribunal Judges) in their respective decisions. I have also read the much more recent decision of Upper Tribunal Judge Mitchell in *PH v Secretary of State for Work and Pensions (ESA)* [2016] UKUT 0119 (AAC). Judge Mitchell's primary focus, though, was upon the issue of whether claimant conduct which only occurred after an examination had already been abandoned could be relevant to the question of failure to submit. He decided it could not. He did though, observe, at paragraph 30 of his decision, that:

> "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."

32. He also pointed out that where a decision is taken by those acting on behalf of the respondent not to proceed with or abandon the examination a question will arise as to whether such decision can be attributed to the claimant such that he/she can properly be said to have failed to submit. He added

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

I would certainly agree with those words and with the propositions that a failure to submit can take place before an actual examination commences and that questions surrounding behaviour of a claimant at an examination and indeed the attempted imposition of conditions should be viewed through the prism of what is reasonable.

33. This case is somewhat different, on its facts, from all of those I have referred to above. There are, perhaps, some similarities with the facts obtaining in *CIB/849/2001* though this appellant's conduct on 14 November 2014, assuming for the moment that the version of events described by Ms Finbow and Ms Blackman-Holman is accurate, did not amount to imposing a condition which would render the examination useless for the purpose for which it was required but it did, if true, amount to the laying down of conditions regarding the provision of information prior to consent to an examination being given.

34. As to what did occur at the examination of 14 November 2014, the tribunal, having heard the appellant's oral evidence and having considered the written information referred to above, decided that the version given by Ms Finbow and Ms Blackman-Holman was, in fact, more likely to be accurate than the appellant's own version. It also decided that the same applied with respect to the examination of 21 October 2014 though, of course, what must not be lost sight of is that it was the latter of the two which was the relevant one for the purposes of the decision under appeal. After setting out the varying accounts regarding both examinations, in its decision notice, which is properly incorporated into its statement of reasons, it accepted the versions which had been given by Ms Nicholls, Ms Finbow and Ms Blackman-Holman. It was, of course, faced with clear conflicts regarding the questions of the reasonableness of the appellant's behaviour and whether he had behaved in a way which might reasonably be thought to be intimidating. I do not think there was dispute as to whether or not the appellant had sought information beyond that which had been willingly given. He seems to accept that he did ask further questions having obtained the name and the professional qualification of the healthcare professional (that is to say that she is a qualified general nurse) and that he was not prepared to allow the examination to proceed without it.

35. Faced with the conflict in the evidence the tribunal, of course, had to resolve it. In my judgment it was perfectly entitled to do so in the way it did and to make the findings it did. I say that despite the appellant's assertions that he behaved, at all times, in a reasonable and civil manner. It is true that the tribunal might have said a little more than it did as to why it was preferring the version relied upon by the respondent rather than the appellant but it seems to me, on a proper reading of its decision notice and statement of reasons, that it had found the respondent's version, in general terms, to be the more compelling. It could, I suppose, have observed that the respondent's version was more persuasive because two different healthcare

professionals on two different dates had given similar information regarding the appellant's conduct at an examination, because on the face of it neither Ms Nicholls, Ms Finbow or Ms Blackman-Holman had anything to gain by presenting an untruthful account of events or because Ms Finbow and Ms Blackman-Holman corroborated each other about the events of 14 November 2014 assuming it had thought any of that to be the case. However, it did not have to. What it did was sufficient. It reached findings which were open to it despite the appellant's contentions to the contrary.

36. It must then be asked whether what the tribunal found had occurred was conduct which it was open to it to regard as constituting a failure to submit. I have concluded that it was.

37. As a matter of commonsense if a claimant attends the examination centre but then says, without reasonable excuse, that he does not consent to being examined he is failing to submit. Here, though, the appellant did not say, outright, that he was refusing to be examined. Nevertheless, he was laying down conditions. That raises the question of whether such conditions are reasonable. I would agree with the tribunal that a person who is being medically examined is, ordinarily, entitled to know the name of the person examining him (though security concerns may point to that not being so in a particular case), and that person's professional qualification (that is to say whether the person is, for example, a physiotherapist, an occupational therapist, a registered nurse or a doctor). I note here that such information will usually be contained within the subsequently produced report in any event. I also note that according to regulation 2 of the Employment and Support Allowance Regulations 2008 the term "healthcare professional" is defined as being one of those types of medical professional. Indeed Mr Hampton agrees a claimant will, in general, be entitled to such information (see paragraph 24 above). I would also take the view that a claimant is entitled to know that a person examining him is authorised to do so for the purposes of the assessment of his entitlement to benefit, in other words, that the person has been properly appointed though it might be thought there would be little doubt about that anyway. However, according to his own evidence the appellant was demanding to know more than that. He was not prepared to consent to the examination until he did know more than that. On 14 November 2014 he had wanted to know the details of Ms Finbow's experience as a nurse, the history of her career as a nurse and the qualifications she had over and above the fact that she was a qualified general nurse. Although he says he has an "inalienable right" to such further information I cannot see any proper legal basis for such an assertion.

38. It seems to me that, given my acceptance that, as a matter of law, a person can fail to submit by imposing unreasonable conditions and given the tribunal's findings it was clearly open to it to conclude that the additional information he was seeking, as a condition of allowing the examination to proceed, was being unreasonably required and did amount to a failure to submit. He already knew he was to be examined by a person whose name he was aware of and he knew that she was qualified as a registered general nurse. He also knew that she was authorised to carry out the examination for the purpose for which it was required. That ought to have been sufficient to reassure him as to any genuine concerns he might have had. It was open to the tribunal to conclude his insistence on more than that, even absent the intimidating behaviour it found him guilty of, amounted to a failure to submit.

39. There is, though, also the question of how he did behave. The tribunal, and it was open to it to do so, rejected his claim to have acted appropriately, its deciding that he had been "intimidating" on the occasion of both examinations to an extent that both healthcare

professionals, although it is only the latter examination which the tribunal was primarily concerned with, were reasonably entitled not to proceed.

40. As to behaviour, of course, a person attending an examination does not have to be happy about the fact that he/she is being required to do so. He/She does not have to be pleasant to those involved in carrying out the examination and an appearance of being unfriendly, uncommunicative (save where communication is required for the purposes of the examination) and disenchanted but does not go beyond that would not ordinarily amount to a refusal to submit. Further, if an examination does not proceed merely because a healthcare professional does not wish to examine an unfriendly claimant who is not otherwise being obstructive or intimidating or threatening or anything similar, that would not normally mean there has been any failure to submit. But the tribunal did find that, here, the appellant's behaviour had been of an intimidatory nature. That is clear from what it said at paragraph 13 of its decision notice and paragraph 6 of its statement of reasons. In my judgment behaviour which is intimidating to the extent that it is reasonable for a healthcare professional not to proceed with the examination does amount to a failure to submit. The tribunal was entitled to so find.

41. In light of all of the above, therefore, I conclude that the tribunal made findings open to it and did not err in law in its approach to what would amount and what did amount to a failure to submit.

42. That deals with the concerns I had about the decision when I granted permission to appeal. However, the appellant has, as noted above, taken various other points which I will now deal with, albeit, quite briefly.

43. The tribunal did not err in law as a consequence of the judge looking at a book, if indeed that is what he did, during the course of the hearing. It is often the case that a judge will look at a document of some sort during a hearing and that does not mean the judge is failing to listen to what is being said. Whilst the appellant complains that two letters he had written to the respondent making complaints about ATOS were not within the appeal bundle, he has not explained their relevance to the issues the tribunal was called upon to decide. Further, he could have supplied copy letters himself had he wished. Further still, he could have informed the tribunal of the content of those letters had he thought them to be relevant. I do not really understand the point about "hearsay evidence" but it seems to me, if this is the point, that there was nothing to prevent the respondent from relying upon the statements made by the healthcare professionals and Ms Blackman-Holman when presenting its case to the tribunal. It was then for the tribunal to decide what it made of that evidence. I am not clear which "private" letters the appellant says he had sent to the respondent and which he feels ATOS should not have seen but its relevance to the issues the tribunal had to decide is not explained and is not obvious. There was no reason why the tribunal should not refer to the appellant's health situation and, indeed, it might be thought that it had to have some regard to his health given the content of regulation 24(b) and (c). In any event, such reference was extremely fleeting and had nothing to do with the tribunal's ultimate conclusions as to key matters. As to human rights arguments, there is nothing to indicate that the appellant raised the arguments he has subsequently raised regarding Article 3 before the tribunal. In any event, on its findings the appellant did not receive inhumane or degrading treatment or punishment and nor was he tortured. I base that on its acceptance of the evidence offered by the respondent. Additionally, even if everything the appellant had said about the unpleasantness of the persons who dealt

with him was true (and I am very far indeed from saying it was) such would still not reach the high threshold required to invoke Article 3. As to Article 8, it is right to say that the record of proceedings does show the appellant referred to that Article before the tribunal and it seems he was suggesting at the time, as I understand it, the refusal to give the information he was seeking yet still require him to submit to the examination amounted to "compulsory medical treatment". It is right that the tribunal did not specifically refer to this argument either in its decision notice or in its statement of reasons but, in truth, it cannot realistically be contended that there was any question of enforced medical treatment as the appellant was not actually forced to submit to the examination at all. The relevance of Article 8 was not properly articulated on a basis which called for the tribunal to address it particularly in light of its factual findings and its acceptance of the respondent's version of events. As to the contention that the tribunal erred by not referring to the oral submissions, it appears from the record of proceedings that much of that replicated the written contentions rather than constituting new points and, in any event, it clearly did take both into account.

44. Finally, I can find no fault with the tribunal's reasoning as to the "good cause" issue. Indeed, on its findings, its decision as to good cause was inevitable. Of course, that and the question of whether behaviour or the imposition of conditions is reasonable will normally be closely linked as they were here. I would just add that a claimant is obviously entitled to be treated with proper courtesy at an examination but the tribunal, not having accepted his evidence, can be taken to have concluded that he was.

Conclusion

45. In light of the above I dismiss the appellant's appeal to the Upper Tribunal. The decision of the First-tier Tribunal shall stand.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated: 28 April 2016