IN THE UPPER TRIBUNAL **Case No.** CE/2379/2015
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision: The First-tier Tribunal's decision of 22nd May 2015 (ref. SC 008/15/00365) did not involve any material error of law. This appeal is DISMISSED.

REASONS FOR DECISION

Background

1. Mr O was duly called for a medical examination, in connection with his claim for Employment & Support Allowance (ESA), to be held on 16th December 2014.

2. On 5th January 2015, the Secretary of State decided that Mr O had failed without good cause to submit to a medical examination so that under regulation 23(2) of the ESA Regulations 2008 he was treated as not having limited capability for work (one of the basic conditions for ESA). As a result, his ESA award was superseded (removed).

3. Mr O appealed to the First-tier Tribunal (FtT).

The evidence before the First-tier Tribunal about what happened at the examination

4. On 16th December 2014 (the day of the examination) the assessor completed a form in which she ticked a box to describe herself as a "registered nurse". The form stated:

> "Mr [O] did not want to have the assessment. He wanted to see a copy of my certificate of when I registered as a nurse. He was not satisfied with going on the nursing and midwifery council website. He felt that because it did not have photographic evidence then this website, proof of evidence was not professional. He did not want the assessment to continue due to me not having this evidence to show him.
>
> Mr O was walked back to reception. He then started arguing with the receptionist over seeking a certificate of my nursing qualification. A colleague then had to get security as he refused to leave the waiting room and he was escorted out of the building."

5. The FtT papers also included an undated statement written by a receptionist (whose surname was not given). This stated "a second appointment wasn't offered as the client required the HCP to have their nursing certificate for the next appointment".

6. Mr O made a complaint. A Customer Relations Manager for Atos Healthcare responded on 8th January 2015 stating that Health Care Professionals (HCPs) are required to wear name badges. However, the Manager did not find that Mr O's assessor had failed to wear a name badge. The issue was not directly addressed.

7. In an undated letter (received by the DWP on 29th January 2015) Mr O wrote that "as the assessment took place" he noticed the assessor wore no name badge so he asked for proof she was a nurse but she informed him she did not need to provide proof. Mr O stated that he "said that I wanted a new appointment with an assessor with proof of qualification and waited while the receptionist made a phone call and said they would not make a new appointment".

8. In his notice of appeal, dated 12th February 2015, Mr O asserted that he did not refuse to be assessed. He simply asked the assessor to prove that she was a medical professional because she wore no name badge. Mr O stated that, in response, the medical professional stopped the examination. Mr O added that, when he requested a fresh appointment, he was refused. Mr O denied that he was escorted from the assessment centre claiming he left of his own accord.

9. In his notice of appeal, Mr O also disputed the suggestion that he could have checked the assessor's credentials on the relevant professional body's website. This was pointless because the assessor did not wear photo 'I.D'. I assume the point being made was that he could not be certain that website registration details for a named individual related to an assessor of that name without linking photographic evidence.

10. Mr O gave oral evidence to the FtT (comprised of a single judge, District First-tier Tribunal Judge McDonald). He said he asked the assessor for identification because she did not have a name badge. Mr O said a security guard was called but he left the assessment centre of his own accord. He also told the FtT he would not attend another assessment unless the HCP had some form of identification.

The FtT's decision

11. The FtT found as fact that the assessor was not wearing a name badge. The FtT also found that Mr O was "offered access to the relevant website but chose not to avail himself of it without photographic evidence" (which the FtT considered inconsistent with his claim that, had the assessor worn a name badge, he would have participated in the assessment). In offering Mr O access to the website, the HCP supplied a remedy that was "adequate to allay his concerns". Since Mr O declined this offer, he did not have good cause for failing to participate in the medical examination. On my reading, the FtT rejected the argument run by Mr O at the hearing that he did not take up the offer because he was "not good at websites".

12. I granted Mr O permission to appeal to the Upper Tribunal against the FtT's decision. I thought the question whether a claimant was entitled to insist on proof of an assessor's qualifications was a matter of potentially wider importance.

Proceedings before the Upper Tribunal

13. The Secretary of State does not support this appeal. His representative argues that the FtT was entitled to find that Mr O's refusal of the offer to check the assessor's registration body's website meant he had not shown good cause for his failure to take part in the examination. The Secretary of State also supplied new evidence from the HCP in question which was shared with Mr O but, since it was not before the FtT, I have not taken it into account. I should also add that I do not believe it is disputed that the assessor was in fact a registered nurse.

14. Mr O's reply to the Secretary of State's response mainly re-argues the facts (as, to some extent, had the Secretary of State's representative). He particularly takes issue with the FtT's finding that ATOS name badges do not carry a photo of the assessor. Mr O also complained that, at no point, had his HCP's failure to wear a name badge been addressed.

15. Neither party requested a hearing of this appeal.

Conclusion

16. 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). In this case, there is no dispute that Mr O attended for an examination. The question is whether the FtT erred in law in deciding that regulation 23(2) applied and it can only have applied on the basis that Mr O failed without good cause to submit to a medical examination.

17. In my determination, a claimant is entitled to make a reasonable request for proof that a purported healthcare professional is in fact a health care professional.

18. Regulation 23(1) of the ESA Regulations 2008 provides:

> "Where it falls to be determined whether a claimant has limited capability for work, that claimant may be called by or on behalf of a health care professional approved by the Secretary of State to attend for a medical examination."

19. ""Health care professional" is defined by regulation 2(1):

> ""health care professional" means-
>
> (a) a registered medical practitioner;
>
> (b) a registered nurse; or
>
> (c) an occupational therapist or physiotherapist registered with a regulatory body established by an Order in Council under section 60 of the Health Act 1999."

20. The definition of "registered nurse" needs to be read with Schedule 1 to the Interpretation Act 1978 which enacts the following general statutory definition:

> ""Registered" in relation to nurses and midwives, means registered in the register maintained under article 5 of the Nursing and Midwifery Order 2001 by virtue of qualifications in nursing or midwifery, as the case may be."

21. It can be seen that each limb of the definition of health care professional includes the word "registered". Unless an individual is so registered, there is no power under regulation 23(1) to call a claimant to be examined by the individual. A reasonable request for proof of registered status is therefore no more than a reasonable request that the State demonstrates it has lawful authority to take action that is coercive in nature. I say 'coercive in nature' because a failure to attend may result in the person having no entitlement to ESA.

22. Furthermore, an ESA medical examination is, by its nature, an invasion of privacy. I reject the Secretary of State's representative's argument that, even though an examination may involve some physical contact and discussion of sensitive matters, an ESA examination cannot properly be considered an invasion of privacy. Given the nature of a medical examination, and that a failure to attend is likely to result in cessation of ESA payments, it does amount to an invasion of privacy. It is not therefore unreasonable for claimants to seek confirmation that a prospective assessor is a properly registered health care professional.

23. Despite all that, I reject Mr O's appeal.

24. The FtT found that Mr O's assessor wore no name badge and the documentary evidence shows that this was contrary to usual ATOS policy. Mr O cannot be considered to have acted unreasonably by responding to the absence of a name badge with a request for proof of the assessor's credentials. And indeed the FtT did not, on my reading of its statement of reasons, consider Mr O's actions at this stage to be unreasonable. The FtT went on, however, to conclude that the offer extended to Mr O at the assessment centre to check the assessor's credentials on the Nursing and Midwifery Council website was sufficient to "allay his concerns" so that he should have allowed the examination to proceed. Read sensibly, that must amount to a finding that, by declining the offer and refusing to participate in the medical examination, Mr O did not have good cause for failing to submit to the examination.

25. The Upper Tribunal's jurisdiction is limited to errors on points of law. I agree with the Secretary of State that it was open to the FtT to decide that, at the assessment centre, reasonable steps were taken to deal with Mr O's concerns arising from the absence of a name badge so that he did not have good cause for failing to submit to a medical examination. The FtT found that the offer to view the NMC website was a satisfactory means of demonstrating to Mr O that his assessor was a properly qualified healthcare professional. That was not an irrational finding. Mr O argued a photographic link between the person standing before him and the NMC registration details was required. However, the FtT was entitled to find that staff at the examination centre had given Mr O a proper opportunity to check whether the

assessor was properly qualified and, once Mr O had declined that offer, he could not show good cause for his failure to submit to examination.

26. The FtT's approach is supported by the case law.

27. In *CIB/849/2001*, Social Security Commissioner (now Upper Tribunal Judge) Turnbull dealt with a case in which a claimant sought to impose a condition on his participation in a medical examination (that the report of the examination would not be disclosed to any layperson including an Adjudication Officer without medical qualifications). The Commissioner found:

> "11…A person "fails" to submit himself 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."

28. In the present case, Mr O did not seek to impose a condition that would render a medical examination useless for the purpose for which it was required. Rather, he sought to impose a condition on his submission to examination.

29. A more recent (and more relevant) decision is that of Upper Tribunal Judge Hemingway in *JW v Secretary of State* [2016] UKUT 0208 (AAC), which was relied on by the Secretary of State in his written submissions on this appeal. Judge Hemingway found that "as a matter of law, a person can fail to submit by imposing unreasonable conditions". I respectfully agree with Judge Hemingway.

30. Mr O sought to impose a condition on his submitting to a medical examination that, on my reading of the statement of reasons, was considered by the FtT to be unreasonable. And Mr O's failure to submit to the examination without that condition being met led the FtT to conclude he had not shown good cause for the failure. That reasoning is in accordance with Judge Hemingway's decision in *JW*. The FtT's decision did not involve a material error of law.

31. For the above reasons, I dismiss this appeal.

(Signed on the Original)

Mr. E Mitchell
Judge of the Upper Tribunal
27th August 2016