IN THE UPPER TRIBUNAL **Case No.** CE/1885/2016
ADMINISTRATIVE APPEALS CHAMBER

Before M R Hemingway: Judge of the Upper Tribunal

Decision: As the decision of the First-tier Tribunal (made on 2 March 2016 at Newport under reference SC992/15/01689) involved the making of an error of law, it is set aside under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is remitted to the tribunal for a re-hearing by a differently constituted panel.

Directions:

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

B. In particular, the tribunal must investigate and decide whether the claimant had limited capability for work from 28 September 2015 and, if so, whether she also had limited capability for work-related activity.

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

REASONS FOR DECISION

1. This is the claimant's appeal to the Upper Tribunal, brought with my permission, from a decision of the First-tier Tribunal (hereinafter "the tribunal") of 2 March 2016, allowing her appeal against the Secretary of State's decision of 28 September 2015 (subsequently confirmed upon that mandatory reconsideration) that she does not have limited capability for work and is not, therefore, entitled to Employment and Support Allowance. The tribunal, though, in allowing the appeal, did not go as far as the claimant wanted it to because it did not decide that she also had limited capability for work-related activity. The only matter addressed by this appeal which may conceivably be of wider interest to anyone other than the parties is that of whether third party assistance may be taken into account when considering whether the "substantial risk" envisaged in regulation 35(2)(b) of the Employment and Support Allowance Regulations 2008 ("the 2008 Regulations") might arise see paragraph 19-22 below).

2. By way of brief background, the claimant has health problems. The disabling problems were described in a healthcare professional's report of 22 September 2015 as "arm problem-right anxiety and depression, hypertension, diabetes". She had previously been in receipt of employment and support allowance but, on 28 September 2015, the Secretary of State, having considered what she had had to say in standard questionnaire ESA50 along with what was stated in the aforementioned report, decided that there was no longer any entitlement from that date. Although the claimant sought a mandatory reconsideration the decision was not altered. The Secretary of State took the view that she was entitled to 6 points under the activities and descriptors contained within Schedule 2 to the 2008 Regulations but no further points and that she did not meet the requirements of regulation 29. So, she did not have limited capability for work.

3. The tribunal dealt with the claimant's appeal at an oral hearing which she attended along with her husband. Prior to the hearing taking place it had been provided with a written submission prepared by a Welfare Benefits Caseworker at the Torfaen Citizen's Advice Bureau. That submission specified a number of Schedule 2 descriptors in respect of which it was contended that the claimant should be awarded points. It is worth noting, at this stage, that it was not contended that she should score 15 points under descriptor 14(a) nor 15 points under descriptor 16(a). Nor was it asserted that any Schedule 3 descriptors were satisfied. The Citizen's Advice Bureau also sent to the tribunal a copy of a letter written by the claimant's GP and which said of her;

> "…She suffers with depression and anxiety and has done for many years and takes medication to help her with this problem. The depression and anxiety affects her life greatly, interfering with both daily and social activities. She finds it very difficult to socialise with others and is not able to leave the house without support…"

4. Also before the tribunal was a list of what was said to be the various types of work-related activity which were available in the area in which the claimant resided as at the date of the decision under appeal. Such had been provided in light of what had been said in *IM v SSWP (ESA)* [2014] UKUT 412 (AAC). It seems that the tribunal proceeded on the basis the claimant might be required to undertake any of the sorts of activity specified which, absent any indication to the contrary, was an approach open to it.

5. According to its decision notice, the tribunal decided that the claimant was entitled to 27 points under the activities and descriptors contained within Schedule 2, exclusively on the basis of mental health concerns. Specifically, it awarded points under descriptors 13(c) (Initiating and completing personal action), 14(c) (Coping with change), 15(b) (Getting about) and 16(c) (Coping with social engagement). So it decided, contrary to the view of the Secretary of State, that she exceeded the 15 point threshold with a degree of ease and did, in consequence, have limited capability for work. As to work-related activity, it did not find that she was entitled to 15 points under any one single descriptor contained within Schedule 2. That was important because some, though not all, of the descriptors which carry 15 points

have equivalents within Schedule 3 which, if satisfied, lead to the establishment of limited capability for work-related activity. It decided no Schedule 3 descriptors were met so the only other route by which the claimant could show limited capability for work-related activity was under regulation 35. However, the tribunal decided she did not meet those requirements either and, by way of explanation, said this;

> "With help and encouragement [the appellant] would, in the opinion of the tribunal, be able to engage in work-related activity short of an actual work placement. Accompanied by her husband she could get from home to the Job Centre and back and would be able to participate with others in, for example, group discussions once with the support and encouragement of her husband, she had become familiar with the people she needed to meet for this purpose. The tribunal has no reason to believe that such facilities would not be available to [the appellant] in her local area. It seemed to the tribunal that there was a considerable discrepancy between what was said in the submission from [the appellant's] representative, pages 140-143 of the appeal bundle and [the appellant's] oral evidence to the tribunal."

6. It appears that at some point soon after the tribunal had issued its decision, the involvement of the Torfaen Citizen's Advice Bureau ceased. The claimant sent an application for permission to appeal contending, in summary, that the tribunal, having decided to allow the appeal was then obliged to place her in the "support group" (another way of saying it was obliged to conclude that she had limited capability for work-related activity); that it should have placed her in the support group anyway since it had awarded her 27 points under the activities and descriptors contained within Schedule 2; that the decision it had reached was against the weight of the evidence particularly bearing in mind the letter written by the GP; and that since she should have been awarded (she asserted) 15 points each in relation to descriptors 14a and 16a she should have been awarded the Schedule 3 equivalents (being descriptors 12 and 13).

7. Although unpersuaded by the bulk of what the claimant herself had had to say, I did grant permission to appeal because I thought the tribunal might have erred in failing to explain why it had not thought higher scoring descriptors with respect to activities 14 and 16 as contained in Schedule 2 applied; in failing to adequately explain its implied conclusion that the appellant's husband would be able to assist her in getting to and from work-related activity and assisting her in familiarising herself with aspects of such activity; and in seeming to make inconsistent findings as to which descriptor under Activity 14 was satisfied.

8. I subsequently received written submissions from the parties. The Secretary of State opposed the appeal contending that the tribunal had not erred in any of the ways in which I had suggested it might have done when granting permission. The claimant, for her part, pointed out, amongst other things, that she had consistently asserted an inability to cope with change and argued it had been wrong of the

tribunal to simply assume that her husband would be able to accompany her to work-related activity commitments.

9. I have decided to allow this appeal to the Upper Tribunal, to set aside the tribunal's decision and to remit to a new and differently constituted tribunal for a complete re-hearing. My reasoning as to all of that is set out below.

10. The first thing to say is that I have not held an oral hearing of the appeal. The Secretary of State did not seek one. The claimant, however, did. That was, she said, because she wanted an opportunity to explain at a hearing why she felt that the reasons given by the tribunal for its decision were, in her words "flawed, contradictory and wrong in law". It seemed to me, though, that the claimant had stated her view as to all of that clearly and in very considerable detail in her grounds of appeal and in her written submission to the Upper Tribunal. It was not apparent that the holding of an oral hearing before the Upper Tribunal, which in any event would not be concerned with hearing evidence as to matters of fact, would take things any further. I did bear in mind the content of rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in conjunction with rule 2, but I decided that I was able to make a fair and just decision without such a hearing. The claimant will, though, of course, now have the opportunity of putting her case once again to a differently constituted First-tier Tribunal which will be concerned with assessing matters of fact.

11. I now turn to the three different bases upon which I thought the tribunal might have erred in law when I granted permission to appeal.

12. It will be recalled that I had wondered whether the tribunal had sufficiently explained its view that with respect to the applicable descriptors under Activity 14 and Activity 16.

13. Mr M Hampton, who had prepared the Secretary of State's submission to the Upper Tribunal, accepted that the tribunal had not provided an explanation as to why it felt 14c applied rather than one of the higher scoring descriptors within that Activity. However, he said that it was as he put it "reasonably clear" why it had not chosen a higher scoring descriptor. He went on to make the points that the claimant had not specifically addressed the matter in her written grounds of appeal to the tribunal and that there was a lack of supporting evidence. He also pointed out that the claimant's then representative had not contended that any higher scoring descriptor within Activity 14 applied (indeed it had not been claimed that any Activity 14 descriptors applied).

14. Essentially, I have decided to accept Mr Hampton's submission on the point. The appellant has pointed out that she ticked a box to indicate an inability to cope with change when she completed her form ESA50 and that she had given a similar indication when she had completed similar questionnaires in the past. Nevertheless,

it is right to say that the matter was not highlighted in her written grounds of appeal, that no specific difficulty of that sort was identified by her GP and that no difficulty with respect to the relevant Activity was pointed to in the written submission prepared by the Citizen's Advice Bureau and which was very clearly intended to be comprehensive. The latter point is, in particular it seems to me, one of real significance. In the circumstances, on the material before it, I have concluded that the tribunal did not err in its failure to explain why it was not awarding points under a higher scoring descriptor.

15. As to the award under Activity 16, the tribunal did note that the evidence showed that the claimant had some friends who would visit her and with whom she could engage in normal social contact. It said that, nevertheless, it was satisfied that for most of the time it would not be possible for her to engage in social contact with someone with whom she was not familiar. In my judgment what the tribunal had to say about her ability to socialise to an extent was properly grounded in the evidence including the evidence the claimant had supplied herself. I would accept that although its reasoning as to this Activity was brief, it was adequate in light of the material before it.

16. My concern that the tribunal might have made contradictory findings as to the Activity of Coping with change was based on its comments at paragraph 8 of its Statement of Reasons that it thought the claimant was "unable to cope with minor planned change". (My underlining). That sat unhappily with its subsequent comment that it thought she was unable to cope "with minor unplanned change" and its award of only 6 points under descriptor 14(c) which is concerned with difficulties regarding unplanned rather than planned change. I have decided, however, that when looked at in context this is no more than a simple typographical error. What the tribunal had intended to say and what the tribunal had intended to and indeed did award by way of points is clear.

17. I now turn, albeit briefly, to some points made by the claimant herself which I did not find persuasive when granting permission to appeal but which it is appropriate to deal with given that I chose not to limit my grant of permission. As to those points, whilst I agree with the appellant that certain of the 15 point descriptors to be found in Schedule 2 do have equivalents in Schedule 3 which, if satisfied, would give rise to a finding of incapability for work-related activity, I do not agree that the evidence before the tribunal was such that it had, inevitably, to conclude that descriptors 14(a) and 16(a) were met with the result that the Schedule 3 equivalents were met too. The claimant's view as to this appears to rest upon the content of the GP letter referred to above. That rather brief letter certainly does indicate some concerns of significance with respect to mental health as the tribunal itself acknowledged. However, its wording does not begin to justify a conclusion that, simply on the basis of what is said therein, those high scoring descriptors which, in truth, require a very significant degree of impairment, are satisfied. It is not right to say that having decided to allow the appeal the tribunal was somehow obligated to conclude that the appellant ought to be placed in the support group. If that were right

then any decision maker or tribunal concluding that a person had limited capability for work would be obliged to simultaneously conclude that that person also had limited capability for work-related activity. That cannot be right because the tests are different and the latter one is significantly more stringent than the former.

18. The remaining concern was whether the tribunal had erred in assuming, without enquiring into the matter, that the appellant's husband would be willing and able to accompany her to work-related activity and to spend some time with her when she was participating in such activity.

19. There is, though, a threshold question before that aspect has to be considered. That relates to whether or not it is permissible, in principle, to consider third party assistance when evaluating whether the Regulation 35(2)(b) risk arises. The matter was, so far as I can see, first considered by the Upper Tribunal in *MT v Secretary of State for Work and Pensions (ESA)* [2013] UKUT 0545 (AAC). The background circumstances in that case appear to have had some similarity to those obtaining in this appeal. The Judge, in specifically addressing the issue, said this;

> "I do need to deal however with the observation of the F-tT in its statement of reasons that the appellant could take another person with her to any work-related activities. It may be that the Secretary of State would be facilitative in any matter which helped a claimant engage so as to improve their ultimate prospects of retaining work. I do not know. Whether or not that is so is not relevant. As a matter of law any work related activity which could only be accomplished because of the presence of another person must be looked upon as not being an activity that the claimant can carry out. The issue under regulation 35(2)(b) as to whether there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity cannot be assessed as if the claimant under consideration had somebody else by their side. There will be claimants who have a need for the personal reassurance of another person, but who do not have anybody available to perform that role. Even if they did, it would not be reasonable for such an assessment to be made on the basis of reliance on another's good will. Legal tests cannot depend upon that."

20. That reasoning was considered by a different Judge of the Upper Tribunal in *PD v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 0148 (AAC). Although the tribunal, in *PD*, was concerned with the equivalent provision appearing in Regulation 29 and which relates to risk if a person is found to have limited capability for work as opposed to limited capability for work-related activity, the same sorts of considerations apply. Having quoted the passage from *MT* which I have set out above that Judge said this;

> "To the extent that the passage quoted is saying that it is incorrect to conduct the

assessment required by Regulation 35 "as if" a third party were present, I respectfully
agree, if by that is meant without consideration of whether the third party's presence
would be made out in fact."

21. However, the Judge said that insofar as those remarks in *MT* might be read as going further, he would have to respectfully disagree. He thought the wording "as a matter of law any work-related activity which could only be accomplished because of the presence of another person must be looked upon as not being an activity that the claimant can carry out" amounted to the asking of the wrong question. He added;

> "The issue, it seems to me, is not whether or not it counts as the claimant doing the activity, but about the risks which ensue if he or she does."

22. For myself, I cannot see any reason why a third party's assistance ought not to be taken into account, in principle, when assessing whether or not the risk envisaged by the regulation would arise. There is nothing within the legislation which suggests that third party assistance cannot be relevant. The language of the test focuses upon risk. It would be artificial to approach the question of risk in a vacuum and without having regard to the prevailing circumstances. Such circumstances might include the availability of assistance. So, to the extent that it might be thought there is disagreement between what is said in *MT* and what is said in *PD*, I prefer the approach taken in the latter decision. I am satisfied therefore, that so long as it can be demonstrated by evidence that third party support of some sort will be available, that that can be taken into account when assessing whether the relevant degree of risk arises.

23. Here, though, the tribunal did not enquire into the question of availability of the third party support in the form of the claimant's husband. Rather, it simply appears to have assumed that that support would be available. One can understand why it might have so assumed because there was evidence before it that the claimant received a good deal of assistance from her husband. It noted at paragraph 6 of its Statement of Reasons that when she ventured out of doors "she is accompanied by her husband". It noted that he was "retired from work" and may have inferred from that that he would generally be available. Mr Hampton sought to persuade me that the tribunal had been entitled to assume the availability of assistance from the husband bearing in mind that there were indications that he would accompany her to various locations such as, for example, her GP's surgery. However, I have reached a view that it was incumbent upon the tribunal to make proper enquiry as to the matter using its inquisitorial function. It had an opportunity to do so because it did have the claimant and her husband before it at the oral hearing. Whilst it had evidence that he would accompany her to various places, which might well suggest that he might be able to accompany her to work-related activity venues, it did not necessarily follow that he would always be available to do that or that he would be willing to do it at all. It did not follow that he would be available to or as a separate matter willing to assist with initial participation in work-

related activity such as, to adopt the example given by the tribunal, group discussion.

24. Of course, even if the husband had told it that he would not assist the tribunal was not required to believe him. But it ought properly to have enquired into the issue and made findings about it before relying upon the anticipated assistance for its conclusion as to risk. It did, therefore, err in law and in a way which was material in that it might have had an impact upon the outcome. Its decision is set aside.

25. The next question is whether I should remake the decision myself or remit. I have decided upon the latter course of action. I appreciate that the claimant is of the view, if I interpret what she says correctly, that I should remake the decision and should do so in the only way in which she thinks it could properly be remade, but I have not accepted the reasoning which appears to underpin her view in that regard. Further, the task of remaking will encompass further fact-finding. The First-tier Tribunal is an expert fact finding body well fitted for that task. Accordingly, I am satisfied that in this case remittal is the appropriate course of action.

26. There will, therefore, be a fresh hearing before an entirely differently constituted tribunal. That tribunal will not be bound in any way by the findings and conclusions of the First-tier Tribunal. It will reach its own findings and its own conclusions on the evidence before it including any further oral evidence it might receive. Since the decision of the previous tribunal has been set aside its starting point will be the decision of the Secretary of State of 28 September 2015 as confirmed on mandatory reconsideration to the effect that the claimant does not have limited capability for work.

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

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated **28 October 2016**