DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision

This appeal by the claimant succeeds. Permission to appeal having been granted by me on 8 August 2016, in accordance with the provisions of section 12(2) (a) and (b) (ii) of the Tribunals, Courts and Enforcement Act 2007 and rule 40(3) of the Tribunals Procedure (Upper Tribunal) Rules 2008 I set aside the decision of the First-tier Tribunal sitting at Birmingham and made on 1 February 2016 under reference SC 319/15/01908. I refer the matter to a completely differently constituted panel in the Social Entitlement Chamber of the First-tier Tribunal for a fresh hearing and decision in accordance with the directions given below.

Directions

1. These directions may be supplemented or changed by a District Tribunal Judge giving listing and case management directions.
2. The case will be an oral hearing listed before a differently constituted panel.
3. Now that I have set aside the decision of the FTT the decision under appeal is a decision that the appellant has neither limited capability for work nor limited capability for work related activities. The Secretary of State shall file a supplemental submission indicating his view on the limited capability for work aspect, given his submission before me which did directly take issue with the points awarded. His observations as to the points felt to be merited by the previous tribunal may help to narrow the issues in relation to the rehearing.
4. The appellant shall send to the HMCTS regional office as soon as possible any further relevant written medical or other evidence, if there is any. If she cannot send that evidence within 4 weeks of the issue of this decision she will need to contact that office to let them know that further evidence is expected. That is not to say that any further medical or other evidence will be necessary.
5. The appellant must understand that the new tribunal will be looking at her health problems and how they affected his daily activities at the time that the decision under appeal was made, 21 October 2015. Any further evidence, to be relevant, should shed light on the position at that time.
6. The new panel will make its own findings and decision on all relevant descriptors, considering all aspects of the case afresh

REASONS

The background

1. This matter concerned an award of Employment and Support Allowance to the appellant. The decision was made on 21 October 2015 that she scored

no points, did not have limited capability for work, and her award was terminated.

2. That decision was made following the appellant having completed a form ESA 50, and a healthcare professional, Dr. Atherton having examined her on 15 October 2015. An appeal to the FTT followed.

The appeal before the FTT

3. The appellant was not represented at the hearing but Ms Blackshaw of the Nottingham City Council Welfare Rights Service, who had previously communicated with the Department in relation to the unsuccessful mandatory consideration, prepared a written submission.
4. The FTT heard the oral evidence of the appellant and her partner. It found that she had limited capability for work, scoring 18 points due to a combination of physical and mental health problems, under descriptors 1 (d), 15 (c) and 16 (c), each meriting six points. She was found not to have limited capability for work related activities, neither any of the schedule 3 descriptors nor regulation 35 (2) being applicable to her.
5. The appellant sought a statement of reasons, and thereafter permission to appeal. This was refused by the District Tribunal Judge who had presided at the hearing, but granted by me.

The appeal to the Upper Tribunal

6. In granting permission to appeal I said

1. While to an extent the grounds of appeal seem to me to be attempting to reargue the facts, there may be an overarching argument that generally the reasons for the findings of the tribunal may have required a fuller explanation than that provided, given its adoption of some of the conclusions of the Healthcare Professional's report, but not others. Such a pick and mix approach to the evidence is of course legitimate, but tends to demand more explanation than where evidence is accepted or rejected wholesale; this is particularly so where the decision maker, relying on the Healthcare Professional's report, awarded no points.

2. Related to, but independently of the above, there may be an inadequacy of reasons bearing in mind the detailed criticisms made of the Healthcare Professional by the appellant's representative in submissions before the FTT. These seem not to have been dealt with, save by the generalised statement that the report was relied upon because it was balanced.

3. There may be error or inadequacy of explanation regarding the possible applicability of regulation 35 (2) (b) Employment and Support Allowance Regulations 2008.

The position of the Secretary of State before the Upper Tribunal

7. The Secretary of State does not support the appeal. In a submission from his representative Mr Hampton, the appellant's entry into the work-related activity group is not contested. The findings of the FTT and its explanation are said to be sustainable, given that the test for a statement of reasons is adequacy rather than perfection and that the tribunal's reasons were at least in part based upon the appellant's lack of credibility in relation to the severity of her functional problems.
8. The finding that the appellant's partner, who accompanied her when she went out, could accompany her to work related activities was supported on the basis that such activities are 'intermittent'.

9. As to the report of the healthcare professional and the representative's submission that certain matters were misrepresented in the report, he argues that in the absence of a complaint about that report to the organisation charged with providing it such allegations could be given little weight.

The position of the appellant

10. The appellant's representative Ms Blackshaw takes issue with the argument that in the absence of a formal complaint about the conduct of the examination any criticism is of little validity. She points out the practical difficulties that many people have in formal interactions of this sort, in which she includes appeals to the first-tier Tribunal, and the very limited availability of welfare rights assistance, in which, in her experience, appeals are prioritised.

11. She argues, also from her experience, that far from work-related activities being, in Mr Hampton's words, intermittent in nature, they are regular scheduled activities, and it would be unreasonable to expect the appellant's husband, who works full time, to accompany her. She reiterates that the appellant sustained two traumatic assaults which led to her anxiety and to which her difficulties in going out and meeting people are related.

The regulation 35 issue

Regulation 35 (2) Employment and Support Allowance Regulations 2008

12. The provisions of regulation 35 (2) read as follows

A claimant who does not have limited capability for work related activity as determined in accordance with regulation 34 (1) is to be treated as having limited capability for work related activity if-

(a) the claimant suffers from some specific disease or bodily or mentally disablement; and

(b) by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant was found not to have limited capability for work related activity.

13. It is settled law that the risk to health referred to in subparagraph (b) includes the health of the claimant.
14. The points awarded for difficulties going out to unfamiliar places alone and engaging with other people arise from mental health problems. Given the wording of the chosen descriptor in relation to social engagement, that 'social engagement with someone unfamiliar to the claimant is not possible for the majority of the time due to difficulty relating to others or significant distress experienced by the individual', if the appellant was expected to attend work-related activities as directed an explanation was required as to how those effects were to be avoided and if they could not be, whether they were considered to amount to a substantial risk to her health. The more generalised assertion that her mental health condition was moderate rather than severe was insufficient in my view, particularly since at least part of that

conclusion appears to have been based upon her being able to carry out day-to-day activities within her home, whereas there was evidence that her anxiety arose when she had to leave that place of security, so the factors cited in support of that conclusion were not truly pertinent.

15. Although I have previously said that 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 *(MT-v Secretary of State for Work and Pensions (ESA) [2013] UKUT 545 (AAC)[35])* there is other judicial authority to the effect that third-party help may be taken into account in relation to regulation 29, and implicitly regulation 35 considerations. In *PD-v- Secretary of State for Work and Pensions (ESA) [2014] UKUT 148 (AAC)* Upper Tribunal Judge Ward indicated that such help could be taken into account, where there was *"appropriate evidence"* [22]. That it is necessary to determine whether the support is in fact available is made abundantly clear in his judgment, in particular at paragraph 28 in which it was said

"it is open to a tribunal to conclude that the risk to the health of the claimant may be mitigated by the availability of strategies to enable him to get to work, including through the assistance of a third party. Such a conclusion would, though, have to be based on proper, evidence-based findings of fact.".

16. Judge Ward also made observations as to the importance of such arrangements appearing capable of being maintained. [25]
17. The statement of reasons says that the appellant's evidence was that her partner was always with her when she went out, but there is nothing to indicate whether she planned her somewhat limited outings around his availability.
18. Thus, if, following Judge Ward's approach, the availability of another suitable familiar person to accompany a claimant when necessary is critical to any reliance on that person to assist in attendance at work related activity. Judge Ward's case concerned regulation 29 and getting to and from an unfamiliar place of work until it became familiar; in this case it is not clear from the tribunal statement, bearing in mind the points awarded which indicate that the claimant had difficulty relating to people as well as in getting to unfamiliar places, whether her partner's assistance was also deemed necessary to help her relate to others during any work-related activity or interviews concerning that. Those are findings which in the circumstances were necessary. In *BJ-v- Secretary of State for Work and Pensions (ESA) CE/102/2014* Upper Tribunal Judge Markus also drew this distinction, commenting that

"the considerations may be different if third-party help was needed for other purposes, for example to assist the claimant in their participation in a work-related activity. The FTT should focus on the nature of the assistance that is required in considering whether regulation 35 (2) applies."

19. Judge Ward in *PD* said that *"what is difficult in relation to transport is yet harder in relating to accompaniment within the workplace*."[27] He described such arrangements as "*highly unusual, even if only to help with the first few days."* It was not a matter which he had to decide, and at that stage it was unclear

whether an answer would lie in the applicability of aspects of the Equality Act 2010. Since *PD* was decided it has been clarified that duties under that Act cannot be relied upon in relation to a risk assessment under regulation 29. (*JS-v-SSWP (ESA) [2014] UKUT 428 (AAC); [2015] AACR 12); t*hat must apply to regulation 35 considerations in relation to work-related activity.

20. The leading case of *Charlton-v-Secretary Of State for Work and Pensions [2009] EWCA Civ 42* is also applicable to considerations of risk under regulation 35. *(AH-v- Secretary of State for Work and Pensions (ESA) [2013] UKUT 118 (AAC); [2013] AACR 32).* In *Charlton* Moses LJ indicated that an aspect of risk, albeit one that was probably rare, is potential deterioration to health caused by the decision of being found capable for work itself. In a similar vein Upper Tribunal Judge Rowland has observed, in relation to the approach in *PD* that the risk of additional anxiety in worrying about whether or not they can be accompanied could be a feature of the risk assessment. He said in *SS v Secretary of State for Work and Pensions (ESA) [2015] UKUT 0101 (AAC)* at [5]

As to my observation about PD, Ms Sue Suttenstall on behalf of the Secretary of State submits that, although the evidence before the First-tier Tribunal showed that there clearly were people who accompanied the claimant to appointments and on the occasions when she attended college, "the First-tier Tribunal not only failed to address the issue of the practicalities of the claimant being able to be accompanied to the workplace but also whether this help could be maintained". I agree, but would add that, if there was a risk of the help not being available or not being maintained, it would be necessary to consider whether that might give rise to a substantial risk to the claimant's health through, for instance, increased anxiety.

21. The statement of reasons does not explain the extent of the anticipated involvement of the appellant's partner, his availability, and whether in all the circumstances it is reasonable to rely upon his presence; neither does it deal with the it deal with the potentially relevant issue of increased anxiety related to his availability to assist; accordingly it does not demonstrate that proper consideration was given to the factual issues that Judge Ward considered of such importance. That is a material error because satisfaction of regulation 35 (2) was, on the view that the FTT took of the appellant's limitations in light of the points awarded, not fanciful.

22. Since I am of the view that the errors in approach to the regulation 35 considerations are sufficient to vitiate the decision the other matters that I now mention briefly are *obiter dicta*, by the way remarks not critical to the outcome of the appeal.

Other matters

23. Whilst reasons need to be adequate and not exhaustive, they do need to explain to an appellant why their major contentions were not accepted. Here an important issue in the appellant's submissions was the accuracy and reliability of the healthcare professional's report. The view taken by the tribunal that the report was reliable required more explanation than usual because the tribunal had chosen descriptors which were completely at odds

with the examining doctor's opinion as to function (at page 91 the score sheet indicates that no points are merited) which was accepted by the decision-maker; although the tribunal felt that its award was consistent with the tenor of the report that was not obvious given the points disparity and it did require some elaboration. I said of that issue in *PF-v- Secretary of State for Work and Pensions (ESA) [2013] UKUT 634 (AAC)*: *The issues that I raised in granting permission to appeal arose out of the statement of reasons provided, and were firstly as to the apparent reliance placed upon the HCP report by the FTT, which in its decision disagreed with the conclusions. My concern was whether bearing in mind that dichotomy the FTT should have explained its reasoning more fully ….[3]*

13. The question is not whether the FTT is able to rely on the HCP report; they are entitled to accept whatever evidence they feel is most persuasive, however in doing so there may be a need for explanation. The wholehearted way in which the report appears to have been accepted in this case flies in the face of the ultimate conclusion of the tribunal, which was against the opinion of the HCP….It is not impossible for that conclusion to be arrived at, but it needs some explanation, and in particular it needs to disentangle the factual evidence which was accepted from the opinion which was clearly not.

24. As to Mr Hampton's contention that the lack of a formal complaint in relation to the conduct of the medical examination has bearing upon credibility, I do not accept it. It does not seem unlikely to me that claimants believe such matters will be dealt with at the appeal. There is force in the observations of Ms. Blackshaw that the practical and emotional difficulties in dealing with an appeal may overwhelm an appellant even without there being a need to engage in an associated formal complaint process. There is no legal requirement for a complaint to be made in tandem with an appeal, and it seems to me wholly wrong to use the absence of such a complaint as a significant credibility pointer. Such a complaint would be no more than a previous consistent statement, and, although there are no technical issues as to the admissibility of these in an inquisitorial tribunal it must not be forgotten that their treatment in other legal fora[1] is prescribed due to their self-serving quality and any slight probative value they may have being generally outweighed by the need to investigate such statements of limited relevance[2]. As a natural further step from Mr Hampton's submission in this context, if a complaint had been made and dismissed that could surely not be a reliable indicator as to whether or not the tribunal should accept the appellant's account of the conduct of the examination or the accuracy of the report, because it is the task of an independent tribunal to decide what evidence it accepts or rejects; it cannot abdicate that decision to another investigative body, indeed it should be highly circumspect about allowing such a decision to influence it at all since it knows little if anything about the standards and operating procedures under which it was made.

[1] E.g. Civil Evidence Act 1995 section 6(2)

[2] Fox –v-GMC [1960] 1 WLR 1017 (Privy Council) following R-v-Roberts [1942] 1 All E.R. 187

25. I finish by explaining to the appellant that the case will now be reheard, and her success here on a point of law is no indication of the result of that rehearing. The Secretary of State has not argued that her entry into the work-related activity group was wrong on the evidence, nonetheless as I am setting aside the tribunal's decision the position reverts to that set out in the decision under appeal under which she was awarded no points at all. I have made provision in my directions as to a further submission from the Secretary of State to clarify his position in respect of the points awarded by the previous tribunal.

Paula Gray

Judge of the Upper Tribunal

Signed on the original on 16 November 2016