IN THE UPPER TRIBUNAL **Case No.** CPIP/1423/2016
ADMINISTRATIVE APPEALS CHAMBER

Before M R Hemingway: Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal made at Stockport on 25 February 2016 under reference SC944/15/01496 did not involve the making of an error of law and shall stand.

REASONS FOR DECISION

1. The claimant, as was accepted by the First-tier Tribunal (hereinafter "the tribunal") suffers from medical conditions which include fibromyalgia, asthma, depression, hypertension, back pain and haemochromatosis. She had previously been in receipt of the higher rate of the mobility component and the middle rate of the care component of disability living allowance ("DLA"). On 26 June 2015, seemingly largely on the basis of information provided in a report compiled by a health professional of 11 June 2015, the Secretary of State decided that payment of DLA would cease on 21 July 2015 but that from 22 July 2015 the claimant would be entitled to the standard rate of thedaily living component of personal independence payment ("PIP") for an ongoing period. It was also decided, though, that there was no entitlement to the mobility component of PIP.

2. The claimant sought a mandatory reconsideration of the above decision and on 15 October 2015 the Secretary of State, whilst confirming all other aspects of the original decision, also decided that there was entitlement to the standard rate of the mobility component of PIP from 22 July 2015 for an ongoing period. So, that was to run in tandem with the award of the daily living component. The claimant, though, was not content with that award and appealed to the tribunal aided by her representative from an organisation well versed in providing advice and representation within the welfare rights field. Her representative sent some written material to the tribunal in advance of the hearing and asserted, therein, that sufficient points ought to be scored in order to ground entitlement to the enhanced rates of both components. The tribunal held an oral hearing which was attended by the claimant and her representative. However, it found against her to the extent that not only did it decide she was not entitled to the two enhanced rates which she had sought but that she was not entitled to the standard rate of either component either. More specifically, with respect to daily living it said she scored only 7 points and with respect to mobility only 4.

3. The tribunal clearly and rightly appreciated that in the circumstances it was necessary to say something by way of explanation as to why it was deciding there was no entitlement at all given that the Secretary of State had considered that there was. It did so in its statement of reasons for decision ("statement of reasons"). It made the point that it had warned the claimant that such was a possible outcome and that she had decided, nonetheless, to proceed. As to that, it said this;

> "15. Prior to the hearing, at 2.45pm, the tribunal invited [the claimant's representative] to spend some time with [the claimant] to make her aware that the Tribunal would be considering the entirety of her award, including the points already awarded and the decision to be awarded the standard rate of both daily living and mobility components. [The representative] confirmed that he had already commenced discussion with [the claimant] regarding this.
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> 16. [The claimant] came into the Tribunal at 3pm, pushing a wheeled frame and holding a walking stick in her right hand. [The representative] confirmed that [the claimant] fully understood that the tribunal were considering the entirety of her award. The Tribunal reiterated again to [the claimant] that the Tribunal could decide to keep the award the same, could reduce it, or could reduce the award. [The claimant] confirmed herself that she understood the potential implications for continuing with her appeal.
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> 17. The Tribunal were therefore entirely satisfied that [the claimant] was aware of the potential consequences for her existing awards if she proceeded with her appeal."

3. Pausing there, at paragraph 16 the tribunal had twice said it had the power to reduce the award. It seems likely it meant to make the point that it had the power to reduce or extinguish an award. The claimant's representative has not sought to make anything of this and there is no suggestion that the claimant might have been misled by anything said to her such that she may have thought there was power to reduce it but not to extinguish it.

4. The tribunal, in its statement of reasons, went on to explain why it did not find the claimant to be a credible witness. After doing that it specifically addressed certain of the activities and descriptors placed at issue in the appeal. As to the activity of "Preparing food", it observed that the health professional had taken the view that she ought to receive 2 points under daily living descriptor 1b because of the need to use an aid or appliance to be able to either prepare or cook a simple meal. However, it decided that no points ought to be awarded under that descriptor or, indeed, under any of the descriptors linked to that activity. In explaining why it said this;

> "27. In relation to Preparing food, the Decision Maker following the health care professional's recommendation, had awarded 2 points. [The claimant] sought extra points for either needing supervision and assistance or cannot prepare and cook food. In her claim form, [the claimant] accepts that she can use a microwave and the health care professional recommended points due to a reduced fist grip and weak wrists. The Tribunal disagreed with the health care professional. [The claimant] does have physical limitations as a result of her conditions, but the Tribunal made findings in relation to her ability to make beans in a small pan, make a hot drink and carry it through to the living room and make poached eggs. [The claimant] further confirmed that during

her stay in Canada she was regularly responsible for feeding, and importantly, winding babies which requires the use of her upper limbs and risk [the intended word is clearly wrist] and grip. In addition, the Tribunal observed [the claimant] grip and lift her stick during the tribunal hearing. The Tribunal were therefore persuaded using its own medical expertise and findings to depart from the opinion of the health care professional and find that [the claimant] can safely prepare a cook (sic) a single meal, above waist height, using fresh ingredients and awarded no points."

5. That passage might have benefited a little from more careful proof reading but the tribunal's meaning is clear. Permission to appeal to the Upper Tribunal was sought. To paraphrase, the grounds relied upon at that stage were to the effect that the tribunal had erred in concluding the claimant was able to prepare and cook a simple meal unaided solely because it had found she was able to make poached eggs and warm up baked beans. That amounted to an error because the potentially relevant descriptors required an ability to prepare and cook a simple meal using <u>fresh</u> <u>ingredients</u> (my underlining). Further, it was suggested, with an eye to the content of regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013 and particularly the need to be able to perform a task to an acceptable standard, that making poached eggs and warming baked beans did not amount to preparing and cooking to such a standard because a diet consisting of only those sorts of items would not be nutritious.

6. In granting permission to appeal I commented that it seemed to me the tribunal had undertaken a more holistic consideration than had been suggested in the grounds because it had made findings as to the claimant's grip which were, in turn, relevant to an ability to prepare food using fresh ingredients. I had in mind the ability to peel and chop vegetables. I did grant permission though because I thought it might, nevertheless, have erred in failing to address with a necessary degree of specificity the favourable comments (from the claimant's perspective) of the health professional regarding grip and in failing to at least consider calling for the papers relating to the previous award of DLA on the basis that there might have been some relevant medical evidence contained therein.

7. Since granting permission I have received two further written submissions from each party. The Secretary of State has made it clear that the appeal is not supported. An additional issue arose as a result of the first round of submissions because the claimant's representative sought to raise what in my view amounted to an entirely fresh ground of appeal to the effect that the claimant had not been given a proper opportunity to consider her position before having to decide whether to proceed with her appeal or not. Reliance was placed, in this context, upon the decision of the Upper Tribunal in *BTC v Secretary of State for Work and Pensions* [2015] UKUT 0155 (AAC). I raised the question as to whether what the claimant's representative had said should be treated as constituting an application to amend the grounds of appeal and, if so, whether I should permit that. I also asked for further views concerning the matter of whether the tribunal ought to have called for the DLA papers. The Secretary of State, by way of response, suggested that I should treat what was now said as an application to amend but did not, at least not in terms,

make it clear whether such application was opposed. It is apparent though that, in any event, the new ground was not considered by the Secretary of State to be meritorious. As to the DLA papers, the Secretary of State referred to my recent decision in *AP v Secretary of State for Work and Pensions* (PIP) [2016] UKUT 0416 (AAC) and then argued that, specifically, in light of the claimant's competent representative not having sought those papers, the tribunal had not erred in not seeking them. The claimant's representative did not comment further.

8. It is light of all of the above that I must now decide this appeal to the Upper Tribunal.

9. I have decided not to hold an oral hearing of the appeal. That is because neither party has requested one, because the competing arguments have been very fully set out in the written submissions and because, having reminded myself of the content of rules 2 and 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I am satisfied that I can justly decide the appeal without one.

10. The next thing I have to decide is whether or not to permit an amendment to the grounds of appeal to enable the claimant to argue the new point. It was, of course, raised for the first time in a written reply which was filed under rule 25 of the above Rules. The purpose of such a reply would seem to be to give an opportunity to comment upon any points made by a respondent in a written response to an appeal which is provided for under rule 24. Rule 25 does not envisage the introduction, at that stage, of entirely new grounds of appeal. Nevertheless, the Upper Tribunal has wide ranging case management powers including the power under rule 5(3)(c) to "permit or require a party to amend a document". Since I did issue directions specifically affording the Secretary of State an opportunity to deal with the new ground, since that opportunity has been taken, and since the Secretary of State has not clearly sought to oppose an amendment I have decided, without any real difficulty and in the interests of justice, to amend and so consider the new ground. I stress, though, that such a power is discretionary and there may sometimes be circumstances in which it would not be appropriate to exercise it in favour of a claimant though that might be more so in other jurisdictions rather than in this one.

11. I now move on to the substantive arguments.

12. As to those, I would agree with the claimant's representative that the ability to "prepare and cook a simple meal unaided" is to be taken as an ability to do so using fresh ingredients. Indeed, such is apparent from the definition of the term "simple meal" which appears in schedule 3 to the Social Security (Personal Independence Payment) Regulations 2013 as "a cooked one-course meal for one using fresh ingredients". Further, the reasoning contained in the decision of the Upper Tribunal in *LC v SSWP (PIP)* [2016] UKUT 0150 (AAC) bears that out. I would, therefore, also agree with the claimant's representative that if the tribunal had regarded an ability to make poached eggs and heat baked beans in a pan, in isolation and of itself, as evidencing an ability to prepare and cook a simple meal unaided (to borrow wording from the none scoring descriptor within that Activity) and had justified its decision not

to award points under the Activity on that basis alone, then it would have erred in law. However, as I will now explain, I am satisfied that it did not do that.

13. I have set out above what the tribunal had to say about the claimant's ability to prepare and cook a meal. In my judgment it was taking into account her accepted ability to be able to heat beans in a pan, to make a hot drink and to make poached eggs as some of a number of factors of relevance. It was not treating any of them or indeed all three when taken together as being determinative. It was entitled to take account of those matters and of course if it had decided the claimant did not have the ability to do those things it might well have concluded that she did score points under the Activity. So they were pertinent. It is obvious it was not treating them as being determinative though is because it did go on to consider and make findings about grip including the claimant's ability to feed and wind babies and her ability to grip her stick. Further, in concluding the passage I have set out above, it made a specific reference to her ability to use fresh ingredients. So, it was undertaking a holistic consideration and was applying the correct test in light of appropriate definitions. As to the point about nutrition, given its effective finding that she was able to prepare fresh ingredients and had sufficient grip to do so, that argument simply falls away.

14. I now turn to the question of whether the tribunal ought to have said more about why it was rejecting the views of the health professional who had examined the claimant and who had specifically advised that she would require an aid to assist her with respect to chopping and peeling vegetables. The tribunal did remind itself of the health professional's view. It commented at paragraph 27 of its statement of reasons as set out above that it "disagreed with the health care professional". It had already explained why it found the claimant, in general terms, not to be a credible witness and its view as to that was open to it and had been adequately explained (though perhaps no more than that) by what it had to say from paragraphs 20 – 22 of its statement of reasons. It did, as already noted, specifically refer to functions the claimant was, on her own account, able to perform and which it felt informed it as to her ability to grip. It was not required to say more than that and its reasons for departing from the health professional's view were adequate.

15. As to whether the tribunal had erred in failing to consider calling for the DLA papers that was a point which I had raised of my own volition. It was perhaps not wholly enthusiastically embraced by the claimant's representative though I do appreciate that he does not discount the point and he does refer me to the decision in *R(IB) 5/05*. In *AP* I expressed the view that there would be cases where such material would be relevant and capable of affording assistance to tribunals. I gave examples of when that might be so. I did indicate that, in some such cases, failure to call for such evidence was capable of establishing legal error. In this particular case, however, the claimant has been competently represented in the course of the proceedings. She did not seek to urge the Secretary of State to disclose any such documentation prior to the tribunal hearing (or at least there is no evidence that she did) nor did she seek to persuade the tribunal either by way of seeking a direction before the hearing or by way of an adjournment application at the hearing, to take steps to secure such material. Her representative did prepare a written submission for the benefit of the tribunal without raising the issue. There was, in any event, a

quite detailed report prepared by the health professional in addition to some medical evidence prepared by the claimant's GP at the request of her representative. So putting all of that together, I am satisfied that in the circumstances of this case the F-tT did not err in proceeding to decide the appeal without first seeking the DLA papers or without explaining why it did not do so.

16. That, then, only leaves the new ground to which I have referred above. I do not disagree at all with what was said in *BTC*, and in which the Upper Tribunal had warned of the dangers stemming from tribunals raising issues not previously raised by the parties and from failing to make new concerns clear such that they could be properly responded to. The claimant's representative argues that, in this case and following *BTC,* the tribunal was obliged to adjourn with directions warning of the specific concerns it had and which it thought might lead to the award being reduced or extinguished and so, I suppose, affording the claimant time to consider her position without pressure. It does, though, have to be borne in mind that that was a case which involved a claimant who did not have competent representation or, indeed it would seem, representation at all. Here though the claimant had a competent representative from a reputable specialist organisation. If it was felt that the claimant needed a more detailed explanation as to what was in the mind of the tribunal her representative could have invited the tribunal to give such an explanation but there is no indication or contention that such was done. If it was considered that fairness demanded an adjournment to a different date then, again, an application could have been made but none was made. Had the claimant not been represented the situation, and indeed my decision, might have been different but, of course, had that been so the tribunal might have dealt with matters differently anyway. A tribunal is, in my judgment, perfectly entitled, in general terms, to have confidence in a competent representative and to assume, where appropriate, that if an application which could have been made is not made, then an informed view has been taken not to do so. Much will turn on the particular circumstances but here the claimant was aware of the risk she was taking, she had competent representation, she was given a chance to consult with her representative, no further clarification as to the tribunal's concerns was sought and no adjournment request was made. Against that background, whilst the tribunal did not have to proceed in the way that it did, it was open to it to do so. Accordingly, notwithstanding what is said in *BTC*, it did not err in law.

15. In light of all the above, therefore, the claimant's appeal to the Upper Tribunal fails. The tribunal's decision did not involve the making of an error of law and, accordingly, that decision shall stand. Of course, it remains open to the claimant to make a fresh application for PIP if she so wishes. Finally, I would wish to thank the representative of each party for the helpful submissions I have received.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated **1 December 2016**