

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

Before Upper Tribunal Judge Gray

CPIP/1396/2017

Decision: This appeal by the claimant succeeds.

Having given Permission to appeal on **30 May 2017** in accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the First-tier Tribunal sitting at **Leeds** and made on **16 January 2017** under reference **SC 007/16/02156**. 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 (DTJ) giving listing and case management directions.
2. The case will be listed as an oral hearing in front of a freshly constituted tribunal. The appellant is advised to attend.
3. She should be aware that the new tribunal will be looking at her health problems and how they affected her day-to-day life at the time that the decision under appeal was made, 12/7/2016.
4. The new panel will make its own findings and decision on all relevant descriptors. It must not take into account the appellant's ability to lip read in any assessment under the PIP activities.

Reasons

Background

1. The appeal below concerned entitlement to a Personal Independence Payment (PIP). The appellant has been represented before me by Ms Varley of the Compton Centre Welfare Rights Unit, and I am grateful to her for her detailed grounds of appeal which have both assisted me, and which contain much that will be of practical benefit to the tribunal that now hears the case.
2. Both parties agree that the decision of the First-Tier Tribunal (FTT) was made in error of law, and neither wishes to have an oral hearing. This is a case which I can decide justly on the basis of the papers alone, and in which I need not give detailed reasons.
3. In essence I adopt the reasons set out in the submission of Ms. Powell on behalf of the Secretary of State, which itself accepts a point I identified as arguable in granting permission to appeal, when, disagreeing with the observations of the District Tribunal Judge refusing permission to appeal that the matter was no more than a factual disagreement with the findings of the tribunal, I said the following:

1. *The grounds of appeal seem to me to be arguable. The points made are not so much disputes with the factual findings, but an argument that the underlying assumptions behind the factual findings make them flawed. This is a legitimate ground of appeal, particularly given the technical issues concerning the type and extent of the applicant's hearing loss.*
2. *The tenor of the statement of reasons suggests that there may have been misunderstanding as to aspects of the law in relation to communicating verbally, both as set out in the grounds of appeal, and in the light of Upper Tribunal decisions including that quoted, of Upper Tribunal Judge Rowley, CPIP/1534/2016 and my decision in EG-v-Secretary of State for Work and Pensions (PIP) [2017] UKUT 101 (AAC) (EG hereafter). That decided, inter alia, that Activity 7 is limited to assessing speech and hearing; it does not include the ability to communicate by means such as text. It must be considered in the light of the activities that a claimant might undertake, but not as they may be limited due to choices made because of a disability (here, potentially choosing unnaturally quiet environments in light of a hearing impairment) [precis taken from the Judicial Summary in that case]. Further, given the argument of the Secretary of State in EG that lip reading should not be taken into account in relation to assessing the need for communication support, I adumbrated that the Secretary of State should consider making a general submission to the Social Entitlement Chamber on that issue pending any regulation change. I do not elaborate on that here, but I am concerned that there may be unfairness for this applicant, perhaps others, if the Secretary of State adopts that approach in some cases but not in others. The submission which I direct below should deal with the position regarding that.*
3. *TR-v-SSWP (PIP) [2015] UKUT 0626 (AAC) which establishes that if a claimant is unable to perform an activity for part of a day that day counts towards that period provided that the inability to perform it affects them on that day to more than a trivial extent may have been overlooked.*

The position of the Secretary of State

4. On the issue of the application of activity 7 Ms Powell specifically agrees that the matter I said was arguable at paragraph 2 of my grant of permission to appeal amounts to a material error of law, for which the decision needs to be set aside. In his helpful and thorough submission Ms Powell also identifies a discrepancy between the decision notice and the statement of reasons for the tribunal's decision. In the decision notice four points are said to have been scored under activity 7 descriptor c, relating to the need for communication support to be able to understand complex verbal information, however that was changed in the statement of reasons to descriptor b under that activity, on the basis that the appellant needed to use an aid or appliance to be able to speak or hear. Paragraph 11 of the statement of reasons deals with that.
5. She recommends remission to a fresh tribunal, so that an investigation can occur as to the extent, if any, to which communication support is reasonably required, and if so, whether it is needed to be able to understand complex or basic verbal information. She points out that any other errors do not need to

be dealt with at this stage, because they will be subsumed at the new hearing. I agree with all that.

My observations

6. I also agree with Ms Powell's point as to the discrepancy between the decision notice and the statement of reasons; that inconsistency vitiates the reasoning: *LA v Secretary of State for Work and Pensions [2014] UKUT 482 (AAC): [12]* "While there may be two documents involved, there can only ever have been a single reasoning process. Therefore, if the contents of the two documents are inconsistent, the Tribunal will not have given adequate reasons".
7. In the light of Ms. Powell's submission, which together with the grounds of appeal will be before the fresh tribunal, I do not think I need to say more about the approach of the previous tribunal, as any other procedural errors or inadequacies in the statement of reasons fall by the wayside given the general support for remission and rehearing.

The lip reading issue

8. However there is one further point which arises that I will mention. It concerns the matter that I raised in my grant of permission to appeal above, which arose out of my own decision *EG* (cited in my grant of permission above) which, like this case, concerned a young woman whose hearing was impaired. In that case construing activity 7 I was unable to accept the submission of the Secretary of State that what I was told was policy intent enabled the ability to lip read to be ignored activity 7 for reasons that I set out at paragraphs 34-40. However I accepted the concession in that case that it should not be used, essentially because of the inherent unreliability of such a method of communicating, and the concession was in effect that the provisions of regulation 4 could not be satisfied.
9. In this case the same concession has, in effect, been made in Ms Powell's submission. I accept that concession and I direct that the tribunal which rehears this case must not take into account any ability that the appellant has to lip read in assessing her abilities under activity 7. There is, however, a wider point that I wish to make.
10. I was concerned in *EG* case that pending any attempt to amend the regulations to reflect what I was told was the policy intent the appellants for whom this may be an issue were dealt with at appeal fairly across-the-board. I suggested that the Secretary of State provide a general submission to the Social Entitlement Chamber pending any regulation change. Ms Powell tells me that this has not been done on behalf of the Secretary of State, although guidance has been issued to decision-makers to say that lip reading is not considered an acceptable way to interpret verbal communication. Ms Powell tells me that this should ensure that what there will be a consistent approach with regard to that issue by decision-makers. She may well be correct in that; however the decision-makers guide is not binding on tribunals, and there is undoubted variability in the levels of deaf awareness in the judges and members of the tribunals, perhaps dependent upon the extent to which the matter has been at issue in front of them.
11. There was certainly a time, which coincided with my sitting on such cases at the FTT, when similar issues were to the fore albeit in a different legal context

in relation to DLA entitlement. The submissions and evidence put forward at that time, in particular by organisations with specialist knowledge of such matters was informative for those of us who heard them, but once the legal parameters in that sphere were established the cases really ceased to be appealed. I am not aware of these matters being recently litigated other than in this newer PIP context, and I wish to express my concern that if there is not a public acknowledgement to the FTT in a general way by the Secretary of State there may be a difference of approach in the way tribunals deal with the issue. Where a concession has been made, however, although it does not have to be accepted, a tribunal which decided not to accept it would have to explain its position on that with some particularity.

Legal issues for the new FTT

12. I reiterate the concession, and my consequential direction in this case in relation to lip reading. I add only that, given the nature of the appellant's problems it will be critical for the FTT to focus on the terms of regulation 4 in relation to the quality of performance of the activities; I think in particular of activity 7, in which the appellant's ability to express and understand verbal information should be assessed with the standards set out in regulation 4 firmly in mind. That is in addition to the rule set out in regulation 7 as to the need for performance to be affected for the majority of the time.
13. As to the application of regulation 7 the decision of Upper Tribunal Judge Hemingway in *TR-v-SSWP (PIP) [2015] UKUT 0626 (AAC)* is likely to be pertinent. It establishes that if a claimant is unable to perform an activity for part of a day that day counts towards that period provided that the inability to perform it affects them on that day to more than a trivial extent: in particular see [32-34].

A word of caution

14. The appellant must understand that the fact that her appeal has succeeded before me on legal points is not to be taken as any indication as to what the tribunal might decide as to the facts in due course.

Upper Tribunal Judge Paula Gray

Signed on the original on 20 October 2017