IN THE UPPER TRIBUNAL **Case No.** CE/2904/2017
ADMINISTRATIVE APPEALS CHAMBER

Before E A L BANO

Decision: My decision is that the decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the tribunal's decision and remit the case for hearing before a differently constituted tribunal.

REASONS FOR DECISION

1. The claimant is a single mother of two school-age children who was diagnosed in 2000 as having bi-polar affective disorder, with features of mania and depression. During manic episodes the claimant exhibits angry outbursts of highly agitated verbal and physical aggression and, according to her occupational therapist, at such times there is a risk that she may harm both herself and others. The claimant has been compulsorily detained under the Mental Health Act 1983 twice in five years, most recently in September 2015 following an attack on her mother, but at the time of the decision which is the subject of this appeal she was taking her prescribed medication of Lithium and her condition was being stabilised with professional support provided by a mental health recovery team. The claimant states that she undertakes up to 7.5 hours work a week serving food and reading to children in a nursery, of which four hours are carried out voluntarily to help the claimant to obtain a Level 3 childcare qualification.

2. Employment and Support Allowance (ESA) was awarded to the claimant from 7 June 2013 following an assessment by a healthcare professional on 19 October 2014 advising that she should be placed in the ESA support group. However, the healthcare professional also advised that work could be considered within 12 months, and on 19 December 2015 the claimant returned a new ESA 50 questionnaire. On 18 August 2016 the claimant attended a medical examination carried out by a healthcare professional who assessed her as scoring no points in respect of either the physical or mental health activities of the limited capability for work assessment. The healthcare professional also advised that regulation 29 of the 2008 ESA Regulations did not apply to the claimant and, on the basis of that assessment, a decision was made on 5 October 2016 superseding and removing her award of benefit. After a reconsideration request was refused on 9 November 2016, the claimant appealed against the supersession decision on 30 November 2016

3. In her letter of appeal the claimant described her condition during manic episodes and continued:

> "I am stable and medicated now but pressure of leaving my therapeutic work and working/searching for 16 hours is too stressful. This would put me in danger of a relapse, impacting on my children too, as it did last time."

The claimant submitted a letter from her mother dated 21 November 2016 supporting her appeal and obtained representation from her present representatives, who wrote to the tribunal on 4 April 2017 enclosing a statement from the claimant and a written

submission contending that the claimant satisfied regulations 29(2)(b) and 35(2) of the 2008 ESA Regulations.

4. At the hearing of the appeal, on 11 April 2017, the claimant's representative submitted that the claimant might also score points for ESA Activities 14 and 17 (coping with change and appropriateness of behaviour with other people), but the tribunal rejected both contentions. The tribunal held that neither regulations 29(2)(b) nor 35(2) of the 2008 ESA Regulations applied to the claimant for the following reasons:

> "17. [The claimant] eloquently described how she wishes to continue to expand her skill set and qualifications to take on more special educational needs issues for children and a greater degree of teaching work. This is not simple and straightforward work. An undervalued but highly important occupation is the teaching of children with special needs. It involves a range of skills and attributes. [The claimant] was working towards employment in this area for a greater number of hours. There are numerous less skilled occupations which do not carry with them the stresses and really quite significant responsibility of dealing with children with disabilities nor with the parents or guardians of those children nor the complex structures relevant to the British education system. [The claimant] has capability in terms of driving, using IT, fluent use of English language, demonstrating high intelligence and excellent education. Occupations such as shop assistants, care assistants in a residential home, a driver or escort of children with special needs or a data entry clerk might be regarded as occupations for which she is overqualified. However, provided an employer was made aware of her need for some flexibility, there is a wide range of low skilled, low responsibility work which [the claimant] could undertake. She has no significant physical or mental or cognitive health issues that would prevent her undertaking manual or low skilled work. Only during a relapse of her health would such work become difficult for her.
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> 18. We were not persuaded [the claimant] had suffered a decline in her health since the disputed decision had been made. It was not the need to engage with the Jobseeker's regime that had led to the altercation at the job centre which had been calmed down by a Jobcentre Manager. The incident occurred when [the claimant] perceived she had been treated badly and she did not easily accept to being patronised.
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> 19. The Appellant did not produce evidence that having to apply for jobs is likely to lead to a risk to her health. The tribunal could accept that having to apply for high skill, high pressured jobs would be inappropriate at this stage but that is not what is envisaged. The claimant is not yet ready to take on a more challenging role in children's education but that is only one small aspect of the entire world of work.
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> 20. In her written statement, [the claimant] says she has found it difficult to deal with female members of staff at the jobcentre. In her appeal (page 29) she argues that having to leave the therapeutic work to search for 16 hours

> employment is too stressful. However, it seemed to the Tribunal that [the claimant] has been persuaded that the Secretary of State is threatening to take her away from her current training/working with small children but that is a misconception. For example, were she to work 2 hours each weekday morning as a care assistant at a residential care home, she would have time left in the remainder of the day to continue her other work, training and study and she would not need to be applying for jobs, attending interviews or going to the job centre
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> 21. We had no difficulty finding that a dramatic and sustained decline in health would put her children at risk but bearing in mind our finding that she has a great deal of insight into her condition this is neither likely to happen nor is having to seek and undertake suitable employment going to lead to such a decline.
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> 22. [The claimant's] mother wrote a strongly worded letter which appears on page 16. She seemed to be saying she would be unable to support her grandchildren if [the claimant] fell ill which is a statement likely to increase the pressure on the claimant rather than to make matters any easier.
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> 23. There is no good reason we could see why undertaking some more hours in a low skilled occupation to present any risk to [the claimants] health or that of another person. She has some concerns about gaps in her CV but, as a mother of young children, many employers would not be surprised to see gaps. It is difficult for single parents to find work to fit around school hours and holidays but to discriminate against job applicants on the grounds of disability is illegal.
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> 24. We were not persuaded Regulation 29 was satisfied. [The claimant] already undertakes more activities which we regard as considerably more onerous in the whole range of work related activity set out on pages 112 – 114.. We rejected the submission that Regulation 35 was satisfied."

5. In their grounds of appeal the claimant's representatives challenged the tribunal's findings with regard to ESA activities 14 and 17. They further submitted that, in considering regulation 29 of the 2008 ESA Regulations, the tribunal made a number of errors in the way in which they compared the risks to the claimant resulting from the work with children which she was carrying out with the possible risks arising from the work which the tribunal considered the claimant could perform without substantial risk to herself or others. Judge Rowland gave permission to appeal on 13 November 2017 because he considered the grounds of appeal to be arguable, but the appeal has been opposed by the Secretary of State in a written submission dated 22 December 2017.

6. I do not consider it necessary to decide the activity 14 and 17 issues because I have come to the conclusion that the grounds of appeal in respect of Regulation 29(2)(b) of the Employment and Support Allowance Regulations 2008 are well-founded. That regulation provides for a claimant to be treated as having limited capability for work if "the claimant suffers from some specific disease or bodily

disablement and, by reason of such disease or disablement, 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". It was not in dispute that the claimant has manic depression, and that the recurrence of a manic episode would create a substantial risk of harm to the mental health of the claimant, and possibly also of physical harm to others. The question which the tribunal therefore had to consider was whether a finding that the claimant did not have limited capability for work would increase the risk of such an episode occurring.

7. The basis of the claimant's appeal to the tribunal was that the stress of giving up her existing largely therapeutic work and of finding new or additional paid work amounting in total to not less than sixteen hours per week would create a risk of deterioration in her condition. The occupational therapist's report dated 14 November 2016 (page 30), to which the Secretary of State's representative refers, expressed the view that the claimant "…needed to maintain her current routine of functioning at present, to minimise stressful or challenging situations to continue to aid her recovery journey." Even if the tribunal was correct in thinking that the claimant would not have to give up her existing work and would only have to find 10 hours per week additional work if she was not found to have limited capability for work, I consider that there is much force in the claimant's representatives' argument that, in the light of the occupational therapist's evidence, the tribunal failed to explain adequately why the change in the claimant's routine which such additional work would entail would not significantly increase the risks of a further manic episode taking place.

8. Assuming, however, that it is implicit in the tribunal's findings that it considered that the claimant's condition had stabilised to the extent that she could cope with additional work of the kind which the tribunal considered to be suitable for her, I have nevertheless come to the conclusion that the tribunal did not consider adequately the risks to the claimant of a finding that she did not have limited capability for work. The tribunal found that the claimant could safely carry out work which was less stressful and demanding than the work which she was already doing. However, in considering regulation 29(2)(b) of the 2008 ESA Regulations, in my judgment it may be necessary to consider not only the nature of the work which a claimant may be able to carry out, but also the effect on the claimant's health of any compulsion to carry out that work. In *CMcC v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 176 (AAC), reported as [2015] AACR 9, I held that in applying regulation 35 of the 2008 ESA Regulations:

> "A crucial consideration in this context is the regime of sanctions underpinning work-related activity, as explained by Judge Gray in *MT v Secretary of State for Work and Pensions (ESA)* [2013] UKUT 0544 (AAC) see- [23]. In assessing the risks to the mental health of a claimant from a finding that a claimant does not have limited capability for work-related activity, a tribunal may therefore have to consider the possible effects on a claimant resulting from the element of compulsion which the "conditionality" of work-related activity entails." [9]

9. Although *McC* was concerned with regulation 35 of the 2008 ESA Regulations, I consider that in the case of claimants with fragile mental health the possible effects on a claimant of any compulsion to perform a particular type of work may have to be taken into account when considering regulation 29(2)(b). Since the effect of a finding that a claimant does not have limited capability for work is that the claimant will probably have to look for work and claim jobseeker's allowance, the relevant sanctions regime for the purposes of regulation 29(2)(b) will be that applicable to jobseekers. In the leading case of *Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42, reported also as *R(IB) 2/09*, the Court of Appeal rejected the argument that regulation 29(2)(b) requires identification of the work which would be defined in a jobseeker's agreement if the claimant made a claim to jobseeker's allowance, and held that it was sufficient for the decision-maker to identify the range or types of work for which the claimant was suited as a matter of training or aptitude, and which his disabilities did not render him incapable of performing. In *MW v Secretary of State for Work and Pensions (ESA)* [2015] UKUT 665 (AAC) Judge Lane held emphatically that (apart from risks arising from the decision itself and those arising from travelling to and from work) *Charlton* allowed only the risks resulting from the work itself, and not any more remote consequences of losing ESA, to be taken into account.

10. For my part, I do not consider it necessary to attempt to reconcile the tension between *MW* and those cases, notably *IJ v Secretary of State for Work and Pensions (IB)* [2010] UKUT 408 (AAC) in which a different approach has been taken. In *MW* Judge Lane held [at 14] that (apart from the two exceptions noted above) risks from "some circumstance short of work" should not be taken into account when considering whether a claimant falls within regulation 29(2)(b). However, the words "by reason of" in regulation 29(2)(b) indicate that what must be considered is whether there is a causal connection between a claimant's disablement and a substantial risk to the mental or physical health of the claimant or any other person resulting from the claimant undertaking a particular range or type of work. That inquiry can only be sensibly undertaken if full account is taken of risks to a particular claimant resulting from any compulsion to undertake the work because of an element of 'conditionality' in the relevant benefits regime. Regulation 29(2)(b) is intended to protect third parties as well as claimants, and there is no indication in the legislation that any matter which is relevant to an assessment of the risks resulting from a claimant carrying out a particular type of work should not be taken into account.

11. As the claimant's representative has pointed out, the work which the claimant has been carrying out is very flexible and a large amount of it is in fact performed voluntarily. In my judgment, for the reasons I have given, it was necessary for the tribunal to consider whether the claimant was at risk of further manic depressive episodes if she was required to work for a minimum of sixteen hours in accordance with the requirements which would be imposed on her as a claimant for jobseeker's allowance. Since the tribunal did not undertake that investigation, I reject the Secretary of State's submission that the tribunal's decision should be upheld as one which was open to them on the facts. I therefore find that their decision was in error of law and accordingly set it aside. I refer the case to the First-tier Tribunal for rehearing before a fresh tribunal.

E A L BANO
11 April 2018