

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. CPIP/13/2018

Before Upper Tribunal Judge Perez

Decision

1. The claimant's appeal is allowed.
2. The decision of the First-tier Tribunal dated 13 September 2017 (heard under reference SC049/17/00071) is set aside. The case is remitted to the Social Entitlement Chamber of the First-tier Tribunal. I direct that the case be reheard afresh by a completely differently constituted panel of the First-tier Tribunal.

Background

3. In giving permission to appeal, I said (page 121)—

"Introduction

3. The claimant said he has brain damage (pages 11 and 44), has difficulty learning jobs (page 12), is now slower in mental processing (page 44), has a poor memory and uses a memory board to help him remember things (page 44), has trouble remembering where he is going (page 44), showed a card in his wallet where he had counted his money and written down exactly how much he had in there to remind him how much he had taken out with him (page 48), and referred in several places to taking "time" to do things: pages 22 (toilet needs), 24 (dressing) and 32 (budgeting). He said he "used to work for Remploy but was unable to cope and left 4-5 years ago" (page 44).

Arguable errors of law

4. The tribunal arguably erred in law in relation to whether there was any intellectual or cognitive impairment of functioning.

5. In summarising the case, the tribunal said—

"The appellant suffered from a head injury following a road traffic accident (RTA) in 1986. He states that he lost sight in his left eye and without glasses, he is blind. He states that he has poor memory, slurred speech and depression." (emphasis added, paragraph 4, statement of reasons, page 108).

This failed to mention that brain damage and difficulties in learning or processing were also part of the case. This failure may be what set the tribunal off on the route to the following arguable errors.

(1) Failure to take issue with HCP failure adequately to assess cognitive and intellectual functioning, and finding insufficiently supported by the evidence

6. First, the tribunal arguably erred in failing to take issue with the fact that the HCP did not do an assessment of cognitive or intellectual functioning and

in finding without sufficient evidence that the claimant has no cognitive difficulties or cognitive impairment (paragraphs 15 and 16, pages 110 and 111)

7. The HCP said—

“[The claimant] reported that he did not have any mental health difficulties that required further assessment. Therefore, a mental function assessment was not conducted at this time. However he said he is depressed because he lost his career and can’t do what he would like to do, but prefers to keep his depression and feelings to himself and has not consulted anyone about it” (page 48).

8. The HCP decision not to do “a mental function assessment” was arguably unreasonable, for three reasons. First, it depended on the claimant’s view of his mental health to decide not to do a “mental function assessment”. Some descriptors are affected not just by mental ill-health, but by other problems with mental, cognitive or intellectual functioning. Second, even in a claimant who has not reported problems with memory or functioning, it is arguably unreasonable for an assessor to depend on a claimant’s own view of whether an assessment is needed. Third, in this case it was arguably the more unreasonable because the claimant had already asserted problems remembering things and with processing. So why should the HCP depend on him to report adequately his mental, cognitive or intellectual function?

9. The tribunal arguably erred in failing to take issue with the HCP’s failure adequately to examine the claimant, in view of (i) the factors at paragraph 8 above, (ii) the evidence suggesting his mental, cognitive and intellectual functioning were not normal (see annex to this decision), and (iii) the factors below.

(2) Failure to notice - and in any event enquire into - red flags indicating possible problems with mental, cognitive or intellectual functioning

10. In addition to the evidence mentioned in the annex to this decision, there were the following red flags as to mental, cognitive or intellectual functioning which the tribunal arguably erred in failing to notice or enquire into.

Discrepancies between tick-box answers and their prose explanations

11. The first type of red flag was apparent discrepancies between what the claimant ticked on the questionnaire and his explanation in the boxes for those same questions in the questionnaire—

- (a) Eating and drinking – the claimant ticked “yes” to needing help (page 15), but his explanation (page 16) does not match that (and does not even make sense: “...and what I am eating out of my home”).
- (b) Managing treatments – the claimant ticked “yes” to using an aid or appliance and “yes” to needing help (page 17), but in his explanation (page 18), he says how he feels rather than what aid or appliance he uses and what help he needs.
- (c) Toilet needs – the claimant ticked “sometimes” to needing an aid or appliance (page 21), but his explanation (page 22) does not say

what aid or appliance he needs or uses but does say it “takes an appropriate time” (which, as with the response for eating and drinking, does not seem to make sense – why mention that it takes an appropriate time unless the time taken is perceived to be an issue?)

- (d) Dressing and undressing – the claimant ticked “yes” to using aid or appliance and “sometimes” to needing help page 23, but his explanation (page 24) does not match.
- (e) Communicating – the claimant ticked “sometimes” to using an aid or appliance and to needing help (page 25), but does not say on page 26 what aid, appliance or help he needs. He just appears to say what causes the need (“sometimes I cannot put my thoughts into words”).

12. The tribunal and HCP focused on the prose text in the boxes without considering what had been meant by the tick-box answers or what the implication was of the discrepancy between the tick-box answer and its prose explanation.

Discrepancies between the questionnaire and what the claimant reportedly told the HCP

13. The second type of red flag was apparent discrepancies between what the claimant had put in his questionnaire and what he had reportedly told the HCP—

- (a) Communicating – the claimant put “Sometimes I cannot put my thoughts into words” (page 26). But then at page 46 the HCP said “he reports that he is able to converse appropriately with people face to face and on the telephone all the time. He says he likes talking to people.”. The tribunal recorded the discrepancy without analysing it (paragraph 12, page 110). It then relied on the HCP’s observation (while also making no reference to the slurred speech which the HCP also observed).
- (b) Budgeting – the claimant ticked “yes” to needing help to understand cost and how much change is due, and to pay bills, manage budgets and plan future purchases, and explained “I have to think a long time before I start to spend money on what I want” (pages 31 and 32). But the HCP reported “He says he feels confident about handing money over and receiving change” (page 46).

14. Both types of discrepancy above arguably suggested the claimant had not understood the form or HCP questions properly and/or had failed to explain himself properly. This was not however a case where the tribunal found the claimant to be intentionally untruthful. In view of that and of his assertion of brain damage (and even the HCP spotted slurred speech, page 44), the tribunal arguably should have enquired into these discrepancies and considered what they meant for cognitive or intellectual functioning.

(3) Proceeding in the claimant’s absence

15. In proceeding without the claimant, the tribunal did not say why it considered that it had adequate information (paragraph 4, page 108). Nor did it mention the claimant's letter dated 2/9/17 at page 99. That letter said he would be unable to attend because he was unable to find his way to Hanley, not because he did not wish to attend. It was not an indication of a refusal to attend if a way could be found for him to do so. Given the matters above which arguably needed further enquiry, the tribunal arguably also erred in law in failing to say why it considered it had adequate evidence on which to proceed without the claimant."

4. The evidence annexed to my grant of permission is repeated in the annex to this decision.

5. I asked the parties whether they objected to the decision of the First-tier Tribunal being set aside solely on the grounds mentioned at paragraphs 4 to 15 of my grant of permission for the reasons in those paragraphs, and to the Upper Tribunal referring the case for re-determination by a completely differently constituted First-tier Tribunal. Both parties said they did not object.

Findings

6. I find that the tribunal materially erred in law in the ways identified in paragraphs 4 to 15 of my grant of permission, for the reasons in those paragraphs.

Rachel Perez
Judge of the Upper Tribunal
16 April 2018

Annex to Upper Tribunal decision on appeal

Copy of evidence annexed to grant of permission

Evidence of problems with cognitive or intellectual functioning

“I have had difficulty in learning jobs and my memory gets worse” (CQ, page 12)

“Sometimes I cannot put my thoughts into words” (CQ, page 26)

He ticked yes to needing help to understand cost and how much change is due, and to pay bills, manage budgets and plan future purchases and explained “I have to think a long time before I start to spend money on what I want” (CQ, pages 31 and 32)

“He had brain damage and has been left with a poor memory and uses a memory board to help him remember things: he says he is now slower in mental processing and learns things but forgets new information easily” (HCP, page 44)

“He says he...has trouble remembering where he his [sic] going” (HCP, page 44)

“He explained how he remembered things, and showed a card in his wallet where he had counted his money and written down exactly how much he had in there to remind him how much he had taken out with him” (page 48)

“had brain damage and has been left with a poor memory and uses a memory board to help him remember things: he says he is now slower in mental processing and learns things but forgets new information easily. He has never seen anyone about his poor memory because he does not want to be reminded about his accident...he says...he has trouble remembering where he is going. He has slightly slurred speech” (page 44)

“I can do this but it takes an appropriate time” (CQ, toilet needs, page 22)

“When getting dressed I have to take my time” (CQ, dressing, page 24)

“I have to think a long time before I start to spend money on what I want” (CQ, budgeting, page 32)

“used to work for Remploy but was unable to cope and left 4-5 years ago” (page 44)