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

**Before Upper Tribunal Judge Brunner QC**

**This appeal by the claimant succeeds**
I **set aside** the decision of the First-tier Tribunal reference **SC015/17/01697**: that decision now has no effect.
I **remit** the matter to a differently constituted panel of the First-tier Tribunal for a fresh hearing.

**REASONS**

1. This case concerns the decision by the Secretary of State on 4 July 2017, as revised on 31 August 2017, that the claimant was not entitled to Personal Independence Payment ('PIP'). That decision was upheld by the First-tier Tribunal ('FTT') on 16 April 2018.

2. Leave to appeal the First-tier Tribunal decision was given by District Tribunal Judge Hankey on 25 July 2018 on the ground that arguably the FTT erred in law in adopting a procedure which included making an offer to the claimant before the hearing. In giving leave Judge Hankey observed : *'I had concerns that this amounted to an element of "horse trading" and that the appellant may not understand why he was offered the standard rate only for it to be taken away when he sought a higher award*'.

3. The Secretary of State does not support the appeal, submitting that although it was an error of law for the FTT *'to make an offer prior to the hearing and therefore looking like they had prejudged the appeal'* , the error was not material to the ultimate decision '*as this was adequately justified by the additional oral evidence'*. Neither party asks for an oral hearing, and one is not necessary.

   Chronology

4. The chronology was as follows:

   (1) On 2 February 2017 the claimant applied for PIP. He has post- traumatic stress disorder as well as other conditions.
   (2) On 16 June 2017 a healthcare professional ('HCP') carried out an assessment.
   (3) On 4 July 2017 the claimant was awarded PIP. This was on the basis of 2 points in relation to each of the activities of washing and bathing, dressing and undressing, communicating, and engaging with people. 4 points were awarded under mobility descriptors, in relation to difficulties planning and following a journey. The points awarded reflected the recommendation by the HCP. It followed that the claimant

was awarded PIP with the standard rate of the daily living component, and no mobility component.

(4) On 18 July 2017 the claimant asked for mandatory reconsideration, and supplied further medical evidence. He claimed the enhanced rate of the daily living component, and the mobility component of PIP.

(5) On 21 August 2017 a second HCP wrote a supplementary advice on the Secretary of State's request.

(6) On 31 August 2017 the Secretary of State revised the decision of 4 July 2017 to the claimant's detriment, following the recommendation of the second HCP. The Secretary of State found that the previous award of points for washing and bathing, and dressing and undressing had not been correct. As a result, only 4 points were awarded for daily living: 2 each for the activities of communicating, and engaging with people. The 4 points for planning and following a journey remained. The result was that the decision of 4 July 2017 was revised such that there was no award for PIP.

5. The FTT heard the appeal on 16 April 2018. The claimant was represented. He claimed entitlement to PIP with the enhanced rate of the daily living component, and the mobility component. At the beginning of the hearing the FTT made what it refers to as an 'offer'. The FTT describes what happened in this way in the Statement of Reasons:

    (1) *'the FTT considered the papers in preview and discussed the matter with the representative to reinstate the previous award. The representative who was an experienced representative (who is then named) went out to take instructions from the claimant for some 10 minutes. He came back into the Tribunal room and said that his client was not prepared to accept the offer. The Tribunal indicated that it was open to them to make any decision that they considered appropriate in the circumstances*.' [para 15]

    (2) *'the Tribunal offered to reinstate the original award to the appellant*. *He declined this. The Tribunal made it clear that all options were open if the appellant declined to accept the reinstatement of the previous award. Furthermore he was represented by an experienced representative.' [para 75]*

6. Although the FTT did not specify the basis for their 'offer' in terms of points, it must be that they were referring to the original decision of 4 July 2017, before revision, in which the claimant was awarded the standard rate of daily living. The 'offer' would seem to reflect a preliminary finding that the claimant was entitled to 2 points in relation to each of the activities of washing and bathing, dressing and undressing, communicating, and mixing with people. The 'offer' was in the middle ground between the Secretary of State's position (no PIP) and the claimant's position (PIP with enhanced daily living, and mobility).

7. After the 'offer' was refused, the FTT then proceeded to hold an oral hearing in which the claimant gave evidence. Following that hearing, the FTT decided that the claimant was not entitled to PIP. The FTT decided that the claimant was entitled to 4 points, 2 each for the activities of communicating and engaging with people, which

was in line with the second HCP's advice, and the Secretary of State's revised decision.

8. The FTT decided that the claimant was not entitled to the further 4 points which he had been awarded on 4 July 2017 before the decision was revised, which had been 'offered' by the FTT at the beginning of proceedings, and which related to the activities of washing and bathing, dressing and undressing.

Procedural Fairness

9. Procedural fairness is a central and essential feature of a lawful hearing. There are a number of sources of the right to fairness:

    (1) Procedural fairness is guaranteed by the common law principles of natural justice. These principles include the right to know what the matters in issue are, and the right to a fair opportunity to address them.

    (2) Article 6 ECHR guarantees the right to a fair hearing, but adds little to the principles of natural justice in this context.

    (3) Procedural fairness is enshrined in the overriding objective under the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chambers) Rules 2008, which requires that cases are dealt with fairly and justly, including by seeking flexibility in the proceedings, ensuring that parties can participate fully, and avoiding delay.

10. Case law provides this further assistance:

    (1) There is no general prohibition on judges giving a preliminary view before conclusion of proceedings. As Sir Thomas Bingham MR remarked : '*In some jurisdictions the forensic tradition is that Judges sit mute, listening to advocates without interruption, asking no question, voicing no opinion, until they break their silence to give judgment. That is a perfectly respectable tradition, but it is not ours. Practice naturally varies from Judge to Judge, and obvious differences exist between factual issues at first instance and legal issues on appeal. But on the whole the English tradition sanctions and even encourages a measure of disclosure by the Judge of his current thinking."* ( *Arab Monetary Fund v Hashim* [1993] 6 Admin LR 348 at p 356 A-C).

    (2) Where a tribunal gives a preliminary view it should indicate that it has not closed its mind. In a case concerning an allegation of apparent bias by a tribunal which had indicated its preliminary view, Gibson LJ said : *'I would add a word of caution for tribunals who choose to indicate their thinking before the hearing is concluded. As can be seen from this case, it is easy for this to be misunderstood, particularly if the views are expressed trenchantly. It is always good practice to leave the parties in no doubt that such expressions of view are only provisional and that the Tribunal remain open to persuasion*.' (*Jiminez v London Borough of Southwark [2003] EWCA Civ 502).*

(3) In some circumstances a claimant should be given a warning that a tribunal is considering issues which the claimant may have assumed are not issues in the appeal. For example, when a tribunal in a PIP case is contemplating removing points previously awarded in circumstances where, if it does so, that will or may have a material impact upon the outcome it should send a signal that such is being contemplated. It is not able to justify avoiding doing so simply because the claimant has an experienced representative (*LJ v SSAP (PIP) [2017] UKUT 455)*.

(4) For reasons to be adequate they must leave the parties, especially the losing party, in no doubt as to why they have won or lost (*Flannery v Halifax Estate Agencies Ltd [2000] 1 WLR 377* at 381).

Inadequate Reasons

11. The procedure adopted by the FTT was ill-advised. It was also in error of law in at least one respect: the FTT failed to give adequate reasons for its change of mind.

12. The claimant would have understood from the 'offer' that the FTT's preliminary view, based on the paperwork, was that 8 points were to be awarded under the daily living activities. The claimant would have inferred that (i) the FTT accepted the written evidence of the first HCP (p83) which recommended that 8 points should be awarded; and (ii) the FTT rejected the second HCP's written advice (p129).

13. By the end of the oral hearing, the FTT had reversed its view. It apparently accepted the second HCP's advice, and rejected the first. The effect was that the FTT changed its mind about whether there was a need for prompting in relation to the activities of washing and bathing (2 points), and dressing and undressing (2 points). The removal of those 4 points removed entitlement to PIP .

14. The FTT was entitled to change its mind. Indeed, it was obliged to change its mind if, on a full exploration of the evidence, it considered that the claimant was not entitled to PIP. However, the course which the FTT had adopted meant that it was also obliged to give a clear explanation as to why it had changed its mind about two descriptors. Otherwise, the claimant would not understand why he had lost his appeal. Extracts from the Statement of Reasons which address the two descriptors where the FTT changed its mind are set out below.

15. In relation to washing and bathing, the FTT recorded in the Statement of Reasons (p161):

(1) '*The claimant told the Tribunal that sometimes he needs reminding to wash. The claimant was vague on the frequency. He was going out to work 3 days a week and working at home 2 days a week. The claimant's wife said that he didn't wash. However, the FTT treated his evidence with caution and came to the conclusion that it was a lifestyle choice when he chose not to wash*.' [para 31]

(2) '*The claimant's questionnaire says his wife supervises and reassures him. He told the Tribunal that he does wash and bathe when he goes to work. Insofar as what he does at home is a lifestyle choice. His wife told the Tribunal that he doesn't wash when he sits in his pyjamas. The Tribunal*

> *came to the conclusion again that this was a lifestyle choice. He has held down a job for a number of years. His work is currently assisting a business to grow, he is losing his hours to some 40 hours a week* [sic]. *Prior to that he was working a lot longer. Overall the clinical picture at p78 which is dated 3 January 2017 the case notes from Combat Stress there was no neglect issues identified* [sic] . *He is able to concentrate, and the report says at p79 that he enjoys craft wood carving. He goes to the gym for exercise. For those reasons, no further points were awarded*.' [para 53]

16. In relation to dressing and undressing, the FTT recorded in the Statement of Reasons (p161):

    (1) '*The claimant told the FTT that he does not get dressed when he works from home. However, when he does go to work he does get washed and dressed. The FTT found this to be a lifestyle choice*'. [para 32]
    (2) '*The appellant goes to work 3 days a week. He describes himself as turning up for work well turned out. It was put to him that he was in the Military, and Military individuals normally have a good routine. He told the Tribunal that he does not get dressed when he works from home. However, if he is not going out he also does not get dressed'*.[para 50]
    (3) *'The Tribunal did not find from the claimant's overall evidence and from his demeanour* [sic]. *He had been on holiday in April 2017. He went to Mexico. He has a caravan, he uses the caravan and the fact he did not get dressed on the days he does not go to work were simply a lifestyle choice. It is not because the clinical picture fitted in with this*.' [para 51]
    (4) '*He told the HCP in his functional history that he sometimes needs reminding to change clothes and finds choosing clothes difficult. The informal observation of the HCP was that he presented well. His mental state examination showed he had mild anxiety. He had had intensive rehabilitation. For those reasons, no further points were awarded in respect of this descriptor*.' [para 52]

17. The reasons are difficult to follow, partly because of the disjointed way in which they are written, and partly because some of the information appears irrelevant, including wood carving or caravanning. Most of the information which the FTT cites in support for deciding that no points were awarded for these descriptors was evident from the papers, including the fact that the claimant worked, and that he was prompted by his wife to wash on work days. The FTT does not cite any oral evidence which is significantly different to the evidence it had on the papers. There is a fragment of a sentence ('*the Tribunal did not find from the claimant's overall evidence and from his demeanour'*) which might provide some clue as to why the FTT changed its mind, but neither the claimant nor I should be required to guess how that sentence was intended to end. It would not be possible for the claimant to understand from these reasons what new information the FTT had heard or taken note of during the oral proceedings which led to its change of mind. The lack of a clear explanation for the FTT's change of mind rendered the reasons so inadequate as to be in error of law.

Observations on Sharing Preliminary Views

18. I make the following observations about First-tier Tribunals sharing preliminary views with a claimant before an oral hearing. These observations are deliberately not prescriptive, given the huge variety of situations which face First-tier Tribunals, but set out guidance which is derived from the principles and cases above.

    (1) There is nothing in principle wrong with a tribunal coming to a preliminary view after a preview of the papers.

    (2) There is nothing in principle wrong with a tribunal sometimes sharing that preliminary view with the parties. To do so may be entirely in line with the overriding objective, demonstrating flexibility and seeking to resolve matters without undue delay. An example may be where the tribunal has, on the papers, reached a clear view that the claimant is entitled to the highest award of the benefit in question. Another example may be where the tribunal accepts the claimant's written submissions in relation to three of four issues in the appeal, and wishes the claimant to direct his or her oral evidence to the one remaining issue. This is not an exhaustive list, and the appropriateness of this course will very much depend on the details of individual cases.

    (3) There are obvious dangers in sharing preliminary views, particularly in cases such as this where the tribunal's preliminary view is a half-way house between the Secretary of State's decision, and the award sought by the claimant. The danger in such cases is that a claimant may feel pressured into accepting the tribunal's preliminary view and deciding not to give oral evidence, rather than taking the risk of losing everything. That may result in the tribunal making incorrect decisions based on partial evidence. There is also a danger of the appearance of bias. The dangers may well be increased in cases where claimants are not represented. Tribunals should thus be cautious about sharing preliminary views, and should not do so without a clear purpose in mind, and having considered all the potential ramifications.

    (4) Where a tribunal does share its preliminary view it should do so in clear language which does not put pressure on the claimant to take any particular course. Language such as 'offer' is not appropriate. The tribunal should make plain that its view remains provisional until the conclusion of the proceedings, and that its ultimate view after hearing oral evidence might be more or less favourable to the claimant. The tribunal should inform the claimant of its purpose in sharing its preliminary view, which may be, as an example, that in the tribunal's view oral evidence is not necessary on some of the issues, and so time and effort can be saved.

    (5) There is nothing in principle wrong with a tribunal realising in the course of proceedings that its preliminary view was wrong, and changing its mind. Indeed, a tribunal is obliged to keep an open mind until the end of all of the evidence. A tribunal may realise that its preliminary view was

wrong for a variety of reasons, such as learning some new information from oral evidence, or finding the claimant not credible.

(6) Where a tribunal does share its preliminary view and then changes its mind, the tribunal should consider whether the principles of natural justice and the overriding objective require it to alert the parties to that change before the close of proceedings. (That may, of course, require a short break in proceedings for a panel to confer). The tribunal should have in mind the right of the parties to know what the issues are and to have a fair opportunity to address them. The danger in some cases is that the claimant may believe that those matters which were accepted in the tribunal's preliminary opinion are not in issue, and may not have given all the relevant evidence about those matters. This may arise, for example, where the tribunal has not sought oral evidence directly on an issue which in its preliminary view was decided in the claimant's favour, but where the tribunal has heard tangential evidence which has changed its mind.

(7) Where a tribunal has shared its preliminary view with the parties, this should be recorded in the Statement of Reasons.

(8) Where a tribunal has shared its preliminary view and subsequently reached a different conclusion, the reasons for that change of mind should be clearly stated in the Statement of Reasons in addition to the usual reasons.

Assessing Motivation

19. The FTT also erred in law in its approach to whether the claimant required prompting to wash and dress. There was evidence that the claimant was promoted by his wife to wash and dress on days when he worked, but that on other days he was not so promoted, and did not wash and dress.

20. Assessing motivation in the context of mental health difficulties is not always straightforward. In the case of *GG v SSWP (PIP) [2016] UKUT 0194 (AAC)* Judge Hemingway set out the correct approach:

*'7. Further, regulation 7(1)(a) of the Social Security (PIP) Regulations 2013 indicates that a particular descriptor is satisfied in circumstances where a claimant is unable to perform the relevant function on over 50% of the days of the period under consideration. The tribunal appeared to accept that around the time of the decision, though it seems matters may have subsequently improved, the claimant did not normally attend to his hygiene needs adequately, and, perhaps by implication, did not always dress himself either. However, it appears to have taken the view that prompting was not needed for the majority of the time because when there was an imperative he was capable of acting. That seems to me to be too simplistic an approach. The mere fact that a claimant might be sufficiently motivated to perform a task when there is specific or unusual impetus to do so does not, of itself, inform as to the overall position and the generality of the situation. So it is not appropriate to limit the scope of the enquiry to such days. True an ability to perform a task without prompting when there is particular pressure to do so might be indicative of a*

*claimant simply exercising a choice not to perform such a task on impetus absent days but that will not necessarily follow. What has to be undertaken is a more general and all encompassing consideration. So, there needs to be an assessment, in such cases, of why it is that, on days when a claimant does not perform certain tasks, he/she does not do so. If it is because, without any specific impetus, s/he is not motivated to do so as a result of health difficulties, and that such days exist for more than 50% of the time in the relevant assessment period, then absent other pertinent considerations, the relevant descriptor or descriptors will apply. That was not this tribunal's approach and I conclude that, in consequence, it did err in law. Of course, though, and obviously, mere indolence will not lead to a genuine need for prompting being established.'*

21. The FTT in this case concluded that because the claimant could wash and dress on some days, when he was required to for work, that indicated that the claimant's failure to do so on other days was a 'lifestyle choice'. That approach falls into the error of being 'too simplistic' as Judge Hemingway identified. The FTT's focus on the claimant's 'choice' not to bathe did not address the question of why the claimant 'chose' not to bathe, and whether as a result of the lack of motivation there was a need for prompting, and if so whether that was the result of mental health difficulties. The same shortcomings are evident in the reasons regarding dressing. The FTT's approach is not in line with the approach required by the PIP Regulations and set out in the case above, and is an error of law.

22. The errors of law identified above were material, given that a different decision as to those two descriptors could have led to an award of PIP, and so it follows that the decision will be set aside.

**DIRECTIONS**

23. The case is remitted to the FTT for reconsideration at an oral hearing.

24. The members of the FTT which reconsiders the case should not be the same as those who made the decision which has been set aside.

25. The new FTT is not bound in any way by the decision of the previous FTT, and the fact that this appeal has succeeded is no indication as to what the new FTT will determine. The new FTT will consider all aspect of the case entirely afresh and it may reach the same or a different conclusion to the previous tribunal.

**Upper Tribunal Judge Kate Brunner QC**

**Signed on the original on 31 January 2019**