THE UPPER TRIBUNAL **Case No: CSE/266/2018**
ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE JUDGE OF THE UPPER TRIBUNAL

The appeal against the decision of the First-tier Tribunal given at Glasgow on 16 March 2018 is refused.

REASONS FOR DECISION

1. This appeal is principally about natural justice, and the circumstances in which tribunals should put specific matters or observations to claimants and invite their comments on them. In this case, the appellant (the "**claimant**") made a claim for employment and support allowance ("**ESA**"). On 11 October 2017 the Secretary of State for Work and Pensions ("**SSWP**") decided the claimant was not entitled to ESA. The claimant appealed to the First-tier Tribunal (the "**tribunal**"). On 16 March 2018 the tribunal upheld the decision of the SSWP, finding that the claimant scored no points under the Activities in Schedules 2 and 3 of the Employment and Support Allowance Regulations 2008 (the "**ESA Regulations**") and that Regulations 29 and 35 did not apply. The claimant appealed to the Upper Tribunal, and permission to appeal was granted on 27 September 2018 by a judge of the Upper Tribunal.

2. The basis on which permission was granted was that it was arguable there was a denial of a fair hearing because the question of the claimant's tearfulness at the tribunal hearing was not put to the claimant in terms, or alternatively there was an inadequate explanation for the tribunal's conclusion about tearfulness because of the failure to put it to the claimant. Other grounds of appeal were also advanced, as set out in the last part of this decision.

3. I have found below that in the circumstances of this case there was no breach of natural justice arising from the tribunal not putting its conclusions about the claimant's tearfulness to her for specific comment. Nor did the tribunal err by failing to provide sufficient reasons in relation to this matter. Social entitlement tribunals must provide a fair hearing, but the context is often one involving a vulnerable benefit claimant. It is not the job of tribunals to cross examine claimants, or to put to them specifically all matters which do not support their appeal. I summarise the governing principles as follows:

   3.1 Parties before a tribunal are entitled to a fair hearing, conducted in accordance with natural justice. What natural justice requires in any given case varies according to context and circumstances.
   3.2 An aspect of natural justice is the right to be heard. In practice this means parties should have been given notice of the written papers before any hearing. If present at the hearing they should be given a fair opportunity to

give evidence on matters in issue, including correcting or contradicting evidence.

3.3 The general position is that, in the context of social entitlement tribunals, natural justice does not demand matters of inference or credibility be specifically put to claimants at oral hearings. Demeanour (including tearfulness before the tribunal) also does not have to put to a claimant for specific comment. Claimants who have put particular Activities and Descriptors before tribunals can reasonably expect the tribunal to make observations relevant to those matters, and if appropriate take them into account, without specifically putting them to claimants for comment. Claimants have had papers, and are at the oral hearing with an opportunity to give evidence, so in the normal course none of these matters are capable of characterisation as truly new or taking claimants by surprise.

3.4 The caveat to this general position is that natural justice is always assessed in the particular circumstances of a case. It will be contrary to natural justice if a case is decided on a basis a claimant had no fair chance to address. Accordingly, when a new matter arises at the hearing, not foreshadowed in the papers, which is determinative of the appeal, then a claimant should be given a reasonable opportunity to be heard about it. In these circumstances specific matters may need to be put to claimants for comment. In keeping with the ethos of the social entitlement chamber, where possible this should done in an enabling manner.

4. Below I set out more detailed reasons underpinning this summary. At the end of the decision I also explain why I have rejected the other grounds of appeal advanced.

Putting matters to parties: natural justice and the law of evidence

5. The issue of putting matters to the claimant arises in this appeal in the following way. At paragraph 10 of the tribunal's statement of reasons, the tribunal found that the claimant had been controlling her demeanour, and her tearfulness at the hearing was an affectation designed to assist the prospects of her appeal. The tribunal gave reasons for reaching this conclusion. It said it had taken into account all of the other evidence referred to in the statement (which included a healthcare assessment which did not support an award, and inconsistencies in other evidence), but also the claimant's ability to control her demeanour at the hearing when she chose to, including relaxing and smiling in response to a particular comment. It is not in dispute that the tribunal did not expressly put to the claimant that her tearfulness at the hearing was an affectation designed to assist the prospects of her appeal. The question is whether this failure, and the tribunal's conclusions in relation to Activities 16 and 17 in Schedule 2 of the ESA Regulations (which mentioned the tribunal's conclusion on the claimant's tearfulness), were in error of law.

Discussion

6. In ESA cases, claims are made on the basis that, by reason of a physical or mental condition, a claimant's capability is limited. As a result, many claimants at hearings before tribunals are vulnerable individuals. Hearings are therefore set

up to be enabling rather than adversarial. Questioning is led by the tribunal, rather than the hearing being a competition between representatives, or claimant and respondent. Initial questioning tends to be led by the medical member, who can take into account the claimant's medical condition when framing questions. Tribunals are not obliged to follow many of the rules of evidence applicable in civil or criminal cases in court. There is express provision in the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (the "**Tribunal Rules**") that the tribunal may admit evidence whether or not admissible in a civil trial or proof.

7. In this context, a decision of when to put matters to claimants has in practice been a bit of a minefield for tribunals. "Put to" means that a claimant is given a specific opportunity to comment on a particular matter. Some things may be capable of being put to claimants in a non-adversarial way, for example asking them if they have anything they would like to tell the tribunal about a particular document that has been produced. But putting many matters to a claimant, particularly if they are adverse to the claimant's case, runs the risk of the tribunal's questions merging into cross examination. This cuts across the ethos of an enabling hearing, is capable of changing its character, and can upset claimants. Putting to a claimant that they are manufacturing tears to try to increase their prospects of success on an appeal is likely to fall into this latter category.

8. Putting matters to witnesses is a concept familiar to court practitioners. The issue there tends to arise in the context of cross-examination. The law at one point developed so that evidence could be inadmissible if a proper foundation had not been laid for it by putting contradictory evidence which a party wished to rely on to a witness in cross examination (eg *McKenzie v McKenzie* 1943 SC 108 at 109). Over time that position softened, so in some cases the evidence would be admitted subject to comment and effect on weight, even though not specifically put to a witness in cross examination (eg *Dawson v Dawson* 1956 SLT (Notes) 58). Similarly in criminal cases, the law developed so that where there had been a failure to cross-examine a witness by putting a matter to them, this operated as something having an impact on the weight and value of the evidence, rather than as a bar to conviction (*Young v Guild* 1985 SLT 353 at 360).

9. I make these comments about the position in courts for two reasons. First, alarm bells should ring about automatic transfer to tribunals of a concept that was part of the law of evidence governing cross examination in courts. In ESA cases, tribunals have very deliberately moved away from an adversarial system involving cross examination. It is not the tribunal's job to cross-examine the claimant (CSIB/346/08 paragraph 3). Second, even in courts, the result of a failure to put a matter to a witness now tends to have an effect on the weight and value of evidence, rather than undermining the whole case.

10. Against this background, I consider that any requirement to put specific matters to claimants for comment in hearings before social entitlement tribunals has to be approached with caution. At the end of the day, the question is one of natural justice. In limited circumstances discussed below, a claimant before a tribunal

should be given a specific opportunity to comment on evidence (CIB/1480/1998). But it has to be remembered that the content of natural justice is flexible, and adapts to the form of hearing in which it is being applied (*Lloyd v McMahon* [1987] AC 625 at page 702). Natural justice is not intended to operate to undermine the enabling ethos of social entitlement tribunals.

11. It is helpful to go back to first principles in order to work out when a requirement to put a specific matter to a party will arise. At its core, natural justice demands that a tribunal is not biased, but also establishes that a party has a right to be heard before a decision is reached. "Putting things" to parties, and in particular claimants, is to do with the right to be heard. For a right to be heard to be meaningful, a claimant has to have prior notice and an effective opportunity to make representations (*In re Application for Judicial Review by JR17* [2010] HRLR 27, UKSC at para 50 per Lord Dyson). Parties should therefore have been given notice of the written papers before the tribunal, and if present at the hearing should be given a fair opportunity to give evidence, and to correct or contradict evidence. Where a new matter arises at the hearing which is material, then a claimant should be given a reasonable opportunity to be heard about it. The idea is that a case should not be decided on a basis that a claimant had no fair chance to address. The tribunal may also be put into a better position to make an informed decision if it has relevant information before it. There is no prescriptive way in which this opportunity to be heard should be afforded. In a paper case, it might be given by providing papers and considering written representations if provided. In an oral hearing, a fair hearing might be given as a result of the way the hearing was conducted as a whole, where the remit of the hearing has fairly covered matters in issue and the claimant has been given a reasonable opportunity to make representations.

12. It follows that natural justice does not demand that all adverse matters be put expressly to a party for their comment in order for there to have been a fair hearing. But in limited circumstances, it might be necessary expressly to put a particular matter to a claimant (*CIB/1480/1998*). Some examples are straightforward. A tribunal may wish to rely on a new piece of evidence, such as a google map, not in the bundle of papers the parties have been given in advance of the hearing, to rule out an award of benefit. If so, it should give parties a chance to comment on the map - because it may be the claimant's position it is inaccurate, or there is a short cut not on the map, or something similar (*HI v Secretary of State for Work and Pensions* [2014] UKUT 0238). Another relatively straightforward example, albeit at the other end of the spectrum, is credibility. Matters of credibility do not, as a generality, have to be put to claimants in advance of a decision (*CIS/4022/2007*). As it was put in *CSIB/377/2003* at paragraphs 38 and 40:

> "The tribunal is in no way required to put, for earlier comment, every inference it later draws. Such a process would entirely stultify the tribunal system. What is required is that there is no breach of natural justice….Where the adverse implications for the claimant's case might not immediately strike either him or his representative, then it may be contrary to the rules of natural justice to decide the case without the party being given the opportunity of rebuttal…But where the representative reads or

> hears the evidence which the tribunal later infers is inconsistent (and ex hypothesi such reference is rational), this is not a new point. It does not therefore require being drawn specifically to the attention of the parties."

It has to be remembered that claimants will have been given the papers which are before the tribunal in advance. They, or their representatives, can be taken to have notice of what is in them before the hearing. If evidence is given at the hearing which is inconsistent with what is in the papers, this cannot be said to be a matter taking claimants by surprise, since they have had the papers. Natural justice does not necessitate all inconsistencies in the evidence before the tribunal being put to claimants at hearings.

13. Observations by a tribunal are a more difficult area. It is part of the function of any decision maker assessing evidence to assess credibility and reliability of a witness. In doing so, they will take into account the demeanour of a witness. Tribunals would not be carrying out their jobs properly if they failed to have regard to the way in which claimants give their evidence at the tribunal hearing. It is not, in general, necessary for the decision maker to put their thoughts about demeanour to a witness for specific comment. Demeanour is just one consideration used in the assessment of evidence, and it is ordinarily sufficient if any conclusions drawn about demeanour are used as part of the reasoning as to why a tribunal accepts or rejects evidence as credible and reliable.

14. However, in an ESA appeal, the use of observations may go further than the demeanour of a witness while giving evidence. A tribunal is not entitled under Rule 25 to carry out a medical and physical examination. But it is entitled to take observations into account. (What the tribunal may draw from any such observations is circumscribed by Section 12(8)(b) of the Social Security Act 1998, which has the effect that the tribunal should consider evidence post dating a decision under appeal only insofar as it casts light on the circumstances at the date of the decision). Where a claimant has, for example, put in issue activities relating to their mobility, and sitting and standing, it is entirely sensible for the tribunal to observe how the claimant walks, sits and stands at a hearing, while taking into account any evidence about whether a condition has got better or worse since the decision under appeal. Tribunals are entitled to use all of their senses, including sight, in assessing evidence before them (*R4/99(IB)).* A claimant who has put Activities 1 and 2 in Schedule 2 of the ESA Regulations in issue cannot be said to be taken by surprise by the tribunal making observations on walking, standing and sitting. The claimant is there at the hearing, and they are carrying out the observed activities in question, so in most cases it will be unrealistic to suggest they have no knowledge or notice of them. If a claimant has received papers in advance of an oral hearing, and has then been given a fair opportunity to give evidence about the activities in issue at the hearing, it seems to me that the right to a fair hearing is likely to have been observed. The point is that there have to be particular circumstances present before it is necessary as a matter of law to put observations made by a tribunal to a claimant. One example could be where something new arises that was not foreshadowed in the papers and the claimant had not had a chance to address, for example an observation that the claimant is seen carrying rather than using a walking stick where this has not previously been raised, or an observation based

on something seen outside the tribunal room. Another example may be if the observation is going to be determinative of itself, rather than being used purely as confirmation of a conclusion that the tribunal would have reached anyway (*ID v SSWP* [2015] UKUT 692 (AAC), and *R(DLA)* 8/06 paragraph 17; compare *CSIB/346/08* paragraph 3). Advice has previously been given that it may be good practice at the end of a hearing to put to a claimant any impression that may have been formed as a result of observations made during the hearing, so that the claimant may have a chance to comment (*CDLA/4485/1997* paragraph 17). However, at this stage the tribunal members will not ordinarily have had a chance to discuss their findings, so it may not be possible to put all finalised views to a claimant. Further, given what was said at the outset about the enabling ethos of ESA hearings, ending a hearing with cross examination is unlikely to be appropriate, and might leave a perception of unfairness. Accordingly, whether or not observations should be put to claimants is a matter which needs to be approached sensitively and not as a matter of course. And it needs to be remembered that good practice is not the same as a legal requirement. What the law demands is that there has been a fair hearing, with the claimant having been heard on whether they qualify for a benefit.

This case

15. The discussion above sets out the general approach to cases involving a complaint that a matter should be "put to" a claimant, and explains in part why I reject the main ground of appeal before me. In this case it is suggested there was a breach of natural justice because the tribunal's conclusion about the claimant's tearfulness (that her tearfulness at the oral hearing was an affectation designed to assist the prospects of her appeal) was not put to her. I disagree. The true question is whether the claimant had a fair hearing, and in particular whether she had notice of a material matter and a reasonable opportunity to address it. The claimant had specifically put her tearfulness in issue both in advance of the hearing (when mentioning tearfulness in her criticism of the healthcare assessment (p3)), and at the hearing, where she is recorded as saying that it was an impediment to her normal daily living (paragraph 10). She was at the hearing, and spoke about her tearfulness while there. Mental health activities in Schedule 2 of the ESA Regulations were put in issue by her and she raised her tearfulness in that context. On no view could it be said that tearfulness was a new matter or that the claimant was taken by surprise by the tribunal considering tearfulness. The claimant was clearly given an opportunity to give evidence about her tearfulness because her position is recorded at paragraph 10 of the statement of reasons. The tribunal was entitled to consider tearfulness, both as part of its consideration about demeanour and credibility, and also its consideration of whether the claimant's mental health problems resulted in her satisfying Schedule 2 activities. The claimant might not agree with the conclusion reached by the tribunal about her tearfulness, but the assessment of the facts and evidence was for the tribunal. Natural justice does not entail a tribunal being obliged to accept what a party says when they are heard. The requirement of natural justice is that a claimant is heard, and she was.

16. Even if I was wrong about that, I would still have found there was no material error in law by the tribunal. The tribunal's conclusions about the claimant's

tearfulness were not the only basis for its decision on Activities 16 and 17. The tearfulness issue falls to be regarded as relied on to support a conclusion already reached on the basis of other evidence. In those circumstances it was not necessary to give the claimant a chance to comment on the tribunal's conclusion about the claimant's tearfulness in order for there to be a fair hearing (*CDLA/4585/1997*). In relation to Activities 16 and 17, at paragraphs 14 and 15 the tribunal incorporated the findings of the assessor and decision maker about the claimant, which included a normal mental state examination, ability to go alone to GP appointments, go shopping and engage with shop staff, take public transport, engage weekly with family members, give a stranger directions, be a member of a gym and go to yoga classes, go for walks in the park, and cope well at healthcare assessment, and she was not physically aggressive. The tribunal also found the claimant could go out of doors unaccompanied as required, and would engage normally with persons whom she met on such occasions. Earlier in its decision the tribunal had found: there were no current specialist treatments or hospital referrals for the claimant a a wide range of normal findings on medical examination in all categories; the claimant's typical day was not subject to any significant limitations (paragraph 8); the claimant was in receipt only of minimal medication and had not received any of the specialist referrals or attention that would be expected if her mental health condition had had a significant effect upon her daily living and her ability to carry out the activities referred to in the appeal (paragraph 11); and that the claimant had recently completed a degree in Microbiology (paragraph 17). The tribunal's conclusion that no points were scored under Activities 16 and 17 were supported by the other findings made, and the tribunal's conclusions about the claimant controlling her demeanour and her tearfulness being an affectation did not have specifically to be put to her at the hearing.

17. I also reject the argument that the tribunal's reasoning was inadequate in explaining its conclusion about tearfulness. In my view, in paragraphs 10, 14 and 15 of its statement of reasons, the tribunal provides an adequate explanation why it concluded that the claimant's tearfulness was an affectation and she was controlling her demeanour, and why she did not score points under Activities 16 and 17. The tribunal did not rely only on the claimant smiling and changing her demeanour in response to a particular comment during the hearing, but also all of the other evidence referred to in the statement. As set out in paragraph 16 above, there was significant other evidence of how the claimant functioned in her day to day life which also supported the tribunal's conclusion. The claimant's disagreement with the conclusion reached by the tribunal does not render the tribunal's reasoning inadequate.

Other grounds of appeal

18. The three other grounds of appeal relate respectively to Activity 14, the tribunal's findings at paragraph 18 of its statement of reasons, and the tribunal's findings that the claimant's medical treatment is minimal.

19. The ground relating to Activity 14 is that the tribunal failed to deal with unplanned change as well as planned change. It is true that under Activity 14 both planned and unplanned change are mentioned, as follows:

Coping with change.	(a)	Cannot cope with any change to the extent that day to day life cannot be managed.	15
	(b)	Cannot cope with minor planned change (such as a pre-arranged change to the routine time scheduled for a lunch break), to the extent that overall day to day life is made significantly more difficult.	9
	(c)	Cannot cope with minor unplanned change (such as the timing of an appointment on the day it is due to occur), to the extent that overall, day to day life is made significantly more difficult.	6
	(d)	None of the above apply.	0

However, I do not accept that the tribunal's reasoning discloses that it failed to consider unplanned change. In paragraph 13 of the statement of reasons the tribunal gives a number reasons for finding the claimant scores no points under Activity 14. These include accepting the findings of the healthcare assessor and decision maker, who in turn mention a number of situations in which unplanned change tends to arise, for example taking public transport, going to assessment alone, going to new places, answering a mobile phone when it rings, seeing different GPs, giving strangers directions, and shopping. The tribunal also expressly mentioned the claimant having coped with moving house. While a house move of itself may be planned, to achieve a house move involves numerous other steps such as finding alternative accommodation, arranging packing up, transporting and unpacking of belongings, and so on, all of which potentially involve unplanned change. I do not consider that it can fairly be said that the tribunal failed to consider unplanned change, because unplanned change was implicit in the matters it took into account. The tribunal's finding that the claimant did not score points for Activity 14 was not in error of law.

20. The next ground of appeal, which takes issue with the tribunal's findings at paragraph 18 relating to the claimant's criticisms of the healthcare assessment, also does not disclose any material error of law. It is true that the claimant requested reconsideration of the SSWP's decision, and sent a two page letter in support which contained criticisms of the healthcare assessment, including that the information she had put forward had been twisted, misconstrued or completely omitted. But the claimant attended an oral hearing and so was given an opportunity to put forward what she considered to be the correct position, as well as her letter being before the tribunal. It was then the tribunal's job to decide what evidence it accepted. The tribunal in paragraph 4 of its statement of reasons expressly finds that the report by the healthcare professional was a reliable record of what was said and what was done in the course of the examination. It expressly found the claimant's evidence to be unreliable in paragraph 10 and gave reasons for doing so. The factual findings to make were

matters for the tribunal. Its statement of reasons must be read as a whole. The tribunal finds in paragraph 18 that no "material" inaccuracy in the healthcare assessment is suggested by the claimant, not that no inaccuracy was claimed. In the following sentence the tribunal states that the claimant's criticisms "related to other matters dealt elsewhere in this statement". Read fairly and as a whole, what the tribunal is saying in summary is that it has had regard to the claimant's criticisms of the healthcare assessment, but has decided to accept the evidence of the healthcare assessment, so the claimant's criticisms are not material to the outcome. Those were conclusions the tribunal was entitled to reach.

21. The final ground of appeal is that the tribunal was not entitled to reach the conclusion that the claimant's medical treatment was minimal when it did not have her full medical history, as people have different tolerances to drugs. The tribunal had before it the claimant's claim form in which she recorded that the only medication she took was mirtazapine (page 11). At page 29 of the healthcare assessment it is recorded that the mirtazapine is taken regularly every day at 15mg dosage once a day, that the claimant has had the same dosage for one year, and gets her medication monthly. The assessment also records that the claimant has no input from psychiatry, has never been hospitalised, does an online CBT course, and sees her GP monthly or when required. The tribunal sits with a medical member who is entitled to use their expertise, including as to medication dosages and treatment. In that context, the finding made by the tribunal at paragraph 11 that the claimant was in receipt only of minimal medication was a conclusion the tribunal was entitled to make on the evidence before it. There was sufficient evidence to support the finding without any need to recover full medical records.

Conclusion

22. For these reasons I have refused the appeal.

(Signed)
A I Poole QC
Judge of the Upper Tribunal
Date: 7 January 2019