[2020] UKUT 19 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. CPIP/2722/2018**

ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

CH

Appellant

-v-

Secretary of State for Work and Pensions

Respondent

Before: **Upper Tribunal Judge Poynter**

Decision date: **15 January 2020**
Decided on consideration of the papers

Representation
Appellant: Ms Alison Hodgson, Peasholme Charity, York
Respondent DWP Decision-Making and Appeals, Leeds

DECISION

The appeal succeeds.

The making of the decision of the First-tier Tribunal given at York on 20 June 2018 under reference SC009/17/00800 involved the making of a material error on a point of law.

That decision is set aside.

The case is remitted to the First-tier Tribunal for reconsideration in accordance with the directions given below.

DIRECTIONS

To the First-tier Tribunal

1 The First-tier Tribunal must hold an oral hearing at which it must undertake a full reconsideration of all the issues raised by the appeal and—subject to the discretion conferred by section 12(8)(a) of the Social Security Act 1998 and to its duty to conduct a fair hearing—any other issues it may consider it appropriate to decide.

2 The members of the First-tier Tribunal who are chosen to reconsider the case must not include the judge, medical member, or disability-qualified member who made the decision I have set aside.

REASONS

Introduction

1. The claimant appeals with my permission against the above decision of the First-tier Tribunal.

2. That decision confirmed an earlier decision, made on behalf of the Secretary of State on 4 July 2017, that the claimant—who had previously been entitled to the lower rate of the mobility component and middle rate of the care component of disability living allowance—was not entitled to personal independence payment ("PIP") from and including 5 April 2017.

The written statement of reasons

3. The Tribunal's written statement of reasons was prepared using an unnecessarily small font—I would estimate nine- or ten-point Arial—and very narrow margins. It was difficult for me to read, as it would have been for anyone with less than perfect sight.

4. Such as the claimant. She is registered as partially sighted and, as the Tribunal appears to have accepted at paragraph 26 of the statement, needs printed text to be in at least a 14-point font.

5. There can have been no good reason for the choice. HM Courts and Tribunals Service has adequate supplies of paper on which to print statements that are legible.

6. To have produced a statement in such a form was a discourtesy to all potential readers. To have done so in the case of a partially-sighted claimant is not acceptable.

Protective essays

General observations

7. Turning to the substance of the statement, the final paragraph reads as follows:

> "44. Judge Parker's observations in GR v SSWP 2010 should be noted by the Appellant: *"the test is adequacy of reasons, not perfection, and that can be judged only in the context of the evidence and submissions as a whole. Against that background, and that the tribunal is a body of summary jurisdiction not expected to give a textual analysis akin to that of the Court of Appeal [,] I judge there was no erroneous approach in law in the tribunal's evaluation of the evidence."*"

8. That paragraph amounts to what is known as a "protective essay". It has been included in an attempt to protect the decision against scrutiny by what I will refer to as "appellate judges" (*i.e.*, (1) a District Tribunal Judge in the exercise of his or her powers of review and of granting permission to appeal; and (2) the Upper Tribunal). It seeks to achieve that effect by discouraging the claimant from appealing further.

9. Protective essays have no place in *any* statement of reasons.

10. In *HD v Secretary of State for Work and Pensions* (DLA) [2013] UKUT 340 (AAC), Upper Tribunal Judge Wright stated as follows:

> "8. Given the very considerable inadequacies in the reasoning, it is particularly unfortunate that the statement of reasons spent nearly a whole page addressing what, in the tribunal's view, the law requires in terms of adequate reasoning. This, however, is wholly irrelevant to the key function of a statement of reasons: telling the parties why, on the evidence, an award was made or not made. Not only is it an irrelevant and thus unnecessary exercise, and therefore should not appear in any statement, it comes across here as being a protective gesture and one designed to insulate poor reasoning on the fundamentals. The case-law referred to in this part of the statement is also selective and fails to set out some of the key decisions on reasoning relevant to social security. The classic is R(A)1/72 at paragraph [8], where Commissioner Temple

addressed the obligation in the context of a conflict of evidence (which on the tribunal's reasoning was the case here):

> "**The obligation to give reasons for the decision in such a case imports a requirement to do more than only to state the conclusion, and for the determining authority to state that on the evidence the authority is not satisfied that the statutory conditions are met, does no more than this. It affords no guide to the selective process by which the evidence has been accepted, rejected, weighed or considered, or the reasons for any of these things. It is not, of course, obligatory thus to deal with every piece of evidence or to over elaborate, but in an administrative quasi-judicial decision the minimum requirement must at least be that the claimant, looking at the decision should be able to discern on the face of it the reasons why the evidence has failed to satisfy the authority. For the purpose of the regulation which requires the reasons for the review decision to be set out, a decision based, and only based, on a conclusion that the total effect of the evidence fails to satisfy, without reasons given for reaching that conclusion, will in many cases be no adequate decision at all**".

For the reasons give above, the reasoning given in this case fell well short of this standard.

9. It is to be hoped that in the future First-tier Tribunals will not feel the need to expend unnecessary time and energy on explaining what an adequate statement of reasons should contain."

11. I acknowledge that the protective essay in this case is much less extensive than that in *HD*. It nevertheless manages to include all the objectionable features that Judge Wright identified as being present in that case as well as a number of others.

Irrelevance

12. To begin with, the essay is irrelevant to any of the issues the Tribunal had to decide: a point that is emphasised by its inclusion, *à propos* of nothing, as the final paragraph of the statement.

13. However, the main objectionable features do not flow from that irrelevance so much as from the essay's deficiency as a statement of the law and the objective that the Judge was attempting to achieve by including it.

Legal deficiencies

14. As seems always to be the case with such essays, paragraph 44 of the statement fetishizes Judge Parker's observations in *GR v Secretary of State for Work and Pensions (DLA)* [2010] UKUT 312 (AAC) to the exclusion of the rest of the considerable body of case law on the adequacy of reasons (including—but not limited to—the observations of Mr Commissioner Temple in *R(A) 1/72* that are quoted above).

15. Further, Judge Parker expressly states that the adequacy of reasons "can be judged only in the context of the evidence and submissions as a whole", *i.e.*, in the context of an individual case. It does not follow from the fact that the approach of the tribunal in *GR* was not erroneous that the same is true of the approach of a tribunal in any other case. There can therefore be no reason why what was said in *GR* "should be noted by the Appellant" in this case.

16. Moreover, the inclusion of a protective essay undermines the principle of "equality of arms" required by Article 6 of the European Convention on Human Rights (as incorporated into domestic law by the Human Rights Act 1998).

17. The Secretary of State, as a repeat litigant before the Social Entitlement Chamber, will be familiar with *R(A) 1/72* and the other relevant authorities and will therefore know that Judge Parker's decision in *GR* is not the only such authority.

18. However, many—if not most—appellants to the Chamber will be one-off litigants and most will not be represented. Such appellants will not necessarily have access to that knowledge. In this case, the judge did not even include the neutral citation for *GR*, thereby making it more difficult for the claimant and her representative to check what Judge Parker had actually said in that case (although I am pleased to note that the claimant's representative has overcome that difficulty).

19. The inclusion of a protective essay in a written statement of reasons is therefore more likely to disadvantage claimants than the Secretary of State.

20. In fact, although my experience is necessarily anecdotal—and I am not in a position to comment on the general practice adopted by the Judge in this case—I do not believe I have ever seen a protective essay included in a statement of reasons where it is likely to be the Secretary of State, rather than the claimant, who will want to challenge the decision.

Impermissible objective

21. Whilst Judge Parker was undoubtedly correct to say that "the test is adequacy of reasons, not perfection", that can only protect a decision from being set aside on appeal if the reasoning is, in fact, adequate.

22. By instructing the claimant to note what Judge Parker said in *GR*, the Judge was therefore arrogating to himself the right to decide on the adequacy of his own reasoning.

23. The law does not give him that right. If the adequacy of a statement of reasons is challenged, the decision falls to be made, first, by a District Tribunal Judge when he or she considers any application for permission to appeal and then, in some cases, by the Upper Tribunal.

24. The inclusion of a protective essay is an improper attempt to discourage claimants from exercising the right, conferred on them by an Act of Parliament, to seek permission to appeal against a decision of the First-tier Tribunal with which they disagree. To put the matter directly, it was none of the Judge's business whether the claimant chose to exercise that right.

25. Furthermore, access to justice is an important principle and one that members of the judiciary should be trying to promote rather than impede. It is no answer to say that the claimant in this case has appealed and so cannot have been discouraged from exercising her rights: the Upper Tribunal never gets to see those cases in which the attempted discouragement has succeeded.

26. Finally, when Judge Parker in *GR* drew the distinction between perfection and adequacy, she was explaining the standard by which statements are assessed retrospectively by appellate judges. She was not setting a standard to which those who write statements should aspire.

27. As professional people, judges of the Social Entitlement Chamber of the First-tier Tribunal should be aiming to produce good, or even excellent, statements.

28. It is (perhaps) inevitable that they will sometimes fall short of that aim. But in doing so, they will not necessarily make an error of law. That is where adequacy comes in: if the statement as a whole is adequate, the fact that it may be less than perfect will not lead to the decision being set aside for error of law. If, on the other hand, the statement is both imperfect and inadequate, the underlying decision will be in error of law and will probably be set aside.

29. So, the role of "adequacy"—and its *only* role—is as the *minimum* standard statement must attain to avoid an appellate judge finding an error of law..

30. In that context, the inclusion of a protective essay in a statement gives a truly unfortunate impression of a judge's attitude to his or her work. Saying in a *statement*—*i.e.*, as opposed to an appellate decision—that the judge writing that statement only needs to do his or her work adequately, comes across as telling the claimant "I know this really isn't very good, but you are not entitled to anything better". It is not a good look.

An automatic error of law?

31. For all those reasons, a protective essay should never be included in a statement of reasons.

32. But is it, without more, a material error of law to do so? Does the inclusion of a protective essay in a written statement of reasons automatically make the underlying decision liable to be set aside even if the statement would otherwise have been adequate?

33. In response to my raising that issue when giving permission to appeal, the Secretary of State's representative accepts that it does and supports the appeal on that basis.

34. However, my concluded judgment is that it does not. The legal position is more nuanced than I initially suggested. In my judgment the correct approach is as follows.

35. The inclusion of a protective essay is never required and a judge who includes one runs the risk of introducing a legal error into what may otherwise have been an adequate statement, by either misstating or oversimplifying the legal standard that a statement of reasons must meet.

36. That risk is high because the intended—albeit impermissible—aim of including the protective essay is to discourage the claimant from appealing. Providing her with an even-handed summary of the relevant authorities, rather than a bleeding chunk of the decision in *GR*, is unlikely to achieve that aim.

37. However, the fact that a protective essay is likely to include an error of law, does not mean that the error will always be material.

38. Statements containing protective essays are often so manifestly inadequate that the underlying decision is doomed from the moment a party decides to challenge it. In

such cases, the existence of the protective essay is immaterial because there will be a material error of law with or without it.

39. And even in cases where the statement is not manifestly inadequate, the fact that the content of the protective essay is irrelevant to the issues the tribunal had to decide will often mean that the fact it contains a false proposition of law is also irrelevant.

40. Often, but not always.

41. That depends on what the essay actually says. Although it is not so in this case, it is conceivable that a protective essay might include observations that call the statement as a whole into question.

42. Further, for the reasons given above, the inclusion of a protective essay evinces an improper disrespect for the rights of claimants.

43. It therefore inevitably raises the question whether that disrespect also affected other aspects of the appeal process. It is certainly something that an appellate judge is entitled to take into account if there are other allegations that the procedure adopted was unfair to the claimant or dismissive of her case. And I do not rule out the possibility that, in some cases, the wording of the protective essay might be sufficient on its own to establish hostility or unfairness to the claimant amounting to a breach of a tribunal's duty to act fairly.

44. Finally, the inclusion of a protective essay discloses a concern that the Tribunal's work should not be subjected to appellate scrutiny. That concern inevitably betrays a lack of confidence in the tribunal's decision on the part of the judge writing the statement.

45. Therefore—and contrary to what those judges who include them presumably intend—protective essays are an invitation to appellate judges to scrutinise the statement in greater depth. That is because they will wish to establish whether:

(a) the judge's lack of confidence in the decision is well-founded; and

(b) other parts of the statement are merely a form of words designed to protect the decision from scrutiny, rather than an explanation of the actual reasoning that led to the decision.

Such scrutiny may, in turn, reveal material errors of law in a statement which initially appeared to be adequate, thereby leading to the underlying decision being set aside.

Reasons for setting aside the First-tier Tribunal's decision

46. The grounds of appeal do not allege that the procedure adopted by the Tribunal was unfair and there is no reason, other than the inclusion of the protective essay in the statement, to believe that that may have been the case. The wording of paragraph 44 is not sufficient on its own to establish that the Tribunal was in breach of its duty of fairness.

47. However, the statement does not withstand the close scrutiny that is appropriate when there is a protective essay.

Inconsistent findings

48. First, the statement says at paragraph 9 (under the heading "FACTS FOUND"):

> "9. The basic facts of the case set out in section 2 of the papers were not in dispute and were accepted as facts by the Tribunal."

49. It is not, of itself, an error of law for a statement to incorporate all or part of another document by reference. However, that practice is often better avoided because, unless care is taken, there is a risk that a tribunal may unintentionally incorporate material that is inconsistent with its express findings.

50. In this case section 2 of the response includes the following passage:

> "**Illnesses and disabilities**
>
> [The claimant] has
>
> - Aphakic Glaucoma
> - Visual impairment registered as partially sighted
> - Divergent squint
> - Severe depression
> - Moderate anxiety/panic attacks
> - ADHD
> - Mild right handed hand tremor
> - Mild tinnitus
> - Temporomandibular disorder
>
> A full history and details of current medical treatment can be found at pages 18-19 and 77-78. This includes medication levels and levels of specialist input."

51. Pages 77-78 record part of what the claimant is recorded as having told the health care professional ("HCP")—not, it must be noted, the HCP's assessment of the claimant's conditions, but the claimant's own description of them—and pages 18-19 are the claimant's description of her medical problems in her claim form. Paragraph 9 of the statement therefore means that the Tribunal has accepted what is said on those pages, and also the list of illnesses and disabilities, "as facts".

52. That is unfortunate because many of the claimant's statements which the Tribunal has thereby accepted as facts are contradicted elsewhere in the statement.

53. For example the Tribunal has accepted by incorporation from page 77 that the claimant's anxiety "stops her from going out and doing things (making appointments, socialising, assignments etc)". That is inconsistent with its express findings at paragraphs 21-23, 25, 28 and 30 (first sentence). The Tribunal's findings as a whole are inconsistent with its incorporation—from the main part of section 2 of the response rather than from the further pages referred to in that section—of a finding of fact that the claimant was suffering from "severe depression" at the time it had to consider.

54. That inconsistency is a material error of law.

Variability

55. Paragraph 39 of the statement says:

> "It may be that there is variability; however, the Tribunal reached its decision by considering Regulation 7 of the PIP Regulations (see JC v SSWP 2015 UKUT 0144)."

56. *JC v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 144 (AAC) (to give it its correct citation), merely states that the former rule in *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44 (reported as R(DLA) 7/03) (about the assessment of variability when considering entitlement to disability living allowance), does not apply to PIP and that regulation 7 of the Social Security (Personal Independence Payment) Regulations 2013 applies instead.

57. The proposition of law for which *JC* is authority had little relevance to the appeal before the First-tier Tribunal in this case. Given the error made by the First-tier Tribunal in that case, it was necessary for the Upper Tribunal to hold that, for PIP, regulation 7 applies to the exclusion of *Moyna*. But no-one who had actually read the PIP Regulations could ever have thought otherwise. And *JC* does not say anything about how that regulation should be applied in any individual case.

58. Paragraph 39 of the statement might not have survived even normal appellate scrutiny.

59. It is said that there may have been variability. Well, was there or wasn't there? If there wasn't, why did the Tribunal reject the claimant's evidence that there was? If there was, what was the pattern of variation and how does the 50% rule in regulation 7 apply to it?

60. On the other hand, there was evidence on which the Tribunal would have been entitled to take the view that the 50% rule was not satisfied and I might have decided that the statement as a whole implicitly explained why it had taken that view, with the result that the failure to do so explicitly was immaterial.

61. Be that as it may, paragraph 39 cannot survive the closer scrutiny that is appropriate where the statement includes a protective essay.

62. The paragraph consists of a general assertion that the Tribunal's approach to the case accorded with the law. It does not back that assertion with particulars. Rather, it is said to be backed by the authority of a decision of the Upper Tribunal that, when examined, has only the most tangential relevance. Given the desire to avoid appellate scrutiny apparent from the inclusion of the protective essay, I regard the paragraph as classic "appeal-proofing": it is an attempt to give the impression that the statement has dealt with an issue which has in fact been glossed over.

63. The glossing over amounts to a material error of law.

The assessment of the health care professional's evidence

64. Paragraph 37 of the statement is in the following terms:

> "37. Having considered all of the information available it is clear that whilst there is no dispute as to the medical issues there is a significant divergence between the degree of disability claimed by the Appellant and that identified by the HCP. Having regard to the totality of the information and using its said expertise, the Tribunal ultimately decided that it preferred the evidence and opinion of the HCP where this might be thought to contradict the information in the claim pack or otherwise provided by the Appellant or on the Appellant's behalf. The Tribunal reached this conclusion because the HCP had an opportunity to observe, and discuss matters with, the Appellant and to carry out a physical examination and the opinion/assessment reached appears consistent with the clinical information and the oral evidence which has been put before the Tribunal".

(The phrase "its said expertise" is a reference to rule 2(2)(d) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008. It should perhaps be noted that the rule does not provide that all tribunals have "special expertise" as a matter of law. It merely establishes the objective that any special expertise the Tribunal may in fact have should be used effectively.)

65. On the other hand, paragraph 41 reads as follows:

> "41. For the avoidance of doubt so far as the PIP assessment is concerned the Tribunal agreed with the assessment of the HCP who is a qualified and duly authorised person and who is trained specifically for the purpose of the said assessment and who made that assessment following an examination and discussion with the Appellant and sight of the completed PIP claim pack."

66. In the absence of paragraph 41, paragraph 37 is acceptable so far as it goes. It would have been preferable if examples had been given in which the Tribunal considered the HCP had drawn a sound inference from the clinical evidence, which did not support the claimant's case.

67. Paragraph 41, however, puts matters in a different light.

68. When a statement has already explained why the Tribunal accepted a particular piece of evidence, giving a second—and different—explanation does not "avoid" doubt: it introduces it.

69. Moreover, the second "explanation" in this case is a mantra.

70. If claimants do not attend a face-to-face consultation, with the effect that the HCP cannot carry out an examination or discuss matters, then a "negative determination" is made under regulation 9 of the Social Security (Personal Independence Payment) Regulations 2013, and they are excluded from entitlement to PIP without consideration of the activities in Schedule 1.

71. It follows that what paragraph 41 says about the HCP in this case is inevitably true of *every* HCP in *every* case where an award of points for those activities is in issue. The paragraph amounts to saying that the Tribunal preferred the evidence of the HCP over that of claimant simply because she is an HCP.

72. If it were permissible for the Tribunal to take that approach there would be no point in having a right of appeal in such cases: the claimant would inevitably lose.

73. I am prepared to assume that the Tribunal in this case did not in fact adopt such an unfair approach to the evidence. But if that is so, then paragraph 41 cannot represent the Tribunal's true reasoning and must have been included as a further attempt to appeal-proof the decision.

74. Finally, the inclusion of paragraph 41 calls into question whether the earlier explanation in paragraph 37 genuinely expresses the Tribunal's reasons for preferring the HCP's evidence. Why give a second, false, explanation if you have already given a true one? And when considering that question in the light of paragraph 41, the fact that what is said in paragraph 37 is not supported by specific examples—see paragraph 68 above—acquires a new significance.

75. For those reasons, viewing the statement as a whole through the prism of the protective essay, I do not accept that it adequately explains why the Tribunal preferred the HCP's evidence to that of the claimant. That, too, is a material error of law.

Reasons for the Upper Tribunal's decision.

76. Under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, I have a discretion not to set the First-tier Tribunal's decision aside even though it is in error of law.

77. It would not, however, be appropriate to exercise that discretion in this case. Although I cannot hold that the claimant is definitely entitled to PIP, the errors discussed above may well have affected the outcome of the appeal before the First-tier Tribunal. Fairness and justice entitle the claimant to have her appeal re-heard.

78. I have therefore set aside the decision under appeal and remitted the case to the First-tier Tribunal for reconsideration in accordance with the directions on page 2 above.

Coda

79. Although, as is usual, I have prepared this decision using a 12-point font, and it will go on the Administrative Appeals Chamber's website in that form. I have arranged for the text of the copy that is to be sent to the claimant to be in a 16-point font.

(Signed on the original)
on 15 January 2020
Corrected 27 January 2020

Richard Poynter
Judge of the Upper Tribunal