[2017] AACR 16

(WT v Secretary of State for Work and Pensions (ESA)
[2016] UKUT 472 (AAC))

Judge Mitchell
CE/3205/2015
19 October 2016

Work capability assessment – mobilising unaided by another person – powered wheelchair not to be taken into account

On the claimant's appeal to the First-tier Tribunal (F-tT) against the Secretary of State's refusal to award him employment and support allowance (ESA), an issue arose as to whether the claimant's mobility was to be assessed on the assumption that he could use a powered wheelchair to mobilise. It was argued on the claimant's behalf before the F-tT that under the *ejusdem generis* principle of statutory interpretation the range of other aids which could be considered was restricted to those relying upon the individual's manual effort, given the references in the Employment and Support Allowance Regulations 2008 to a walking stick and a manual wheelchair, and that as a powered wheelchair fell outside that range, it had been the legislator's intention to exclude it. The F-tT rejected the appeal, holding that the references to specific aids was for illustrative purposes only, that the approach identified on behalf of the claimant would make the test impossible to apply and that a powered wheelchair fell within the range of other aids. The claimant appealed to the Upper Tribunal against that decision and the Secretary of State initially supported the F-tT's reasoning but eventually submitted that it was not permissible to rely on a powered wheelchair when assessing ability to mobilise.

Held, allowing the appeal, that:

1. a powered wheelchair could not be an "other aid" as the legislator's express reference to a "manual wheelchair", and no other, was deliberate, and intended to limit the field to that one type. Further, a manual wheelchair and a walking stick both required an individual to supply all the energy necessary to move, without any external power, and that shared characteristic was sufficient to establish a *genus* which restricted the range of other aids that could be taken into account to those requiring the individual to move under their own power, and which were normally used or could reasonably be used (paragraphs 20 and 23);

2. if the legislative intention had been for the references to "manual wheelchair" and "walking stick" to operate as examples, then this would have been expressly stated or otherwise clearly indicated (paragraph 22);

3. it was quite straightforward to decide which specific aids qualified under the regulations, the range was limited to those requiring the individual to move under their own power, and which were normally used or could reasonably be used (paragraph 23).

The judge set aside the decision of the First-tier Tribunal and remitted the appeal to a differently constituted tribunal to be re-decided in accordance with his directions.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision: The decision of the First-tier Tribunal (6 October 2015, Newcastle, file reference SC 230/15/00212) involved the making of an error on a point of law. It is **SET ASIDE** under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is **REMITTED** to the First-tier Tribunal for rehearing. Directions for the rehearing are at the end of this decision.

REASONS FOR DECISION

Introduction

1. This appeal raises a relatively short point of statutory interpretation. It is whether the assessment of a person's ability to mobilise, for employment and support allowance (ESA) purposes, may take into account the assistance supplied by a powered wheelchair. In dismissing the appellant's appeal, the First-tier Tribunal assessed mobility on the basis that he could reasonably be expected to use a powered wheelchair.

2. I disagree with the First-tier Tribunal and decide that a powered wheelchair falls outside the range of aids that may be taken into account in assessing ability to mobilise.

Legal background

Legislative framework

3. Under section 1 of the Welfare Reform Act 2007, a basic condition for ESA is that an individual has limited capability for work. Section 8(1) of the Welfare Reform Act 2007 ("2007 Act") provides that "for the purposes of this Part, whether a person's capability for work is limited by his physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require him to work shall be determined in accordance with regulations". In other words, the content of the requirement for a person to have limited capability for work is to be found in regulations.

4. Section 8(2) of the 2007 Act requires regulations to provide for the determinations required by section 8(1) to be "on the basis of" an assessment. The assessment must be defined by reference to the extent to which a person with some specific disease or bodily or mental disablement is capable or incapable of performing prescribed activities. Thus section 8(2) draws a distinction between activities and capability to perform them.

5. The Employment and Support Allowance Regulations 2008 (SI 2008/794) are made under section 8. They name the assessment required by section 8 the Work Capability Assessment (WCA). Regulation 19 contains general WCA rules (the WCA itself is set out in Schedule 2 to the Regulations). Relevant features of regulation 19 are as follows:

> (a) regulation 19(1) provides that "whether a claimant's capability for work is limited by the claimant's physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require the claimant to work is to be determined on the basis of a limited capability for work assessment of the claimant in accordance with this Part". The "Part" is Part 5 which includes Schedule 2;
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> (b) regulation 19(2) respects the distinction drawn by section 8 of the 2007 Act between activities and capability to perform them. It reads:
>
> > "The limited capability for work assessment is an assessment of the extent to which a claimant who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in Schedule 2 or is incapable by reason of such disease or bodily or mental disablement of performing those activities.";
>
> (c) assessing capability to perform activities involves comparing an individual's capability with pre-determined capability levels known as "descriptors" to which are allotted various points. Regulation 19(3) translates the total points scored into a determination whether a person has limited capability for work. At least 15 points must be scored in order for a person to have limited capability for work;

> (d) regulation 19(4) provides that "in assessing the extent of a claimant's capability to perform any activity listed in Part 1 of Schedule 2, the claimant is to be assessed as if…(b) wearing or using any aid or appliance which is normally, or could reasonably be expected to be, worn or used". I note that here the Regulations operate on the descriptors – which deal with capability – rather than the listed WCA activities.

6 Schedule 2 contains a "mobilising" activity:

> "Mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid is normally, or could reasonably be, worn or used."

7. It can be seen that, despite the general incorporation of aids and appliances in the WCA descriptors by regulation 19(4), the legislator decided to include aids within the prescribed mobility activity itself.

8. The mobilising *descriptors* refer to a person who "cannot unaided by another person either (i) mobilise more than [50/100/200] metres on level ground without stopping in order to avoid significant discomfort or exhaustion: or (ii) repeatedly mobilise [50/100/200] metres within a reasonable timescale because of significant discomfort or exhaustion". If an individual cannot so mobilise more than 50 metres, 15 WCA points are awarded and thus the person meets the threshold for having limited capability for work. Where the individual cannot mobilise more than 100 metres, 9 points are awarded and, for 200 metres, 6 points.

SI v Secretary of State

9. The question whether a powered wheelchair may be taken into account as an "other aid" was touched on by a three-judge panel of the Upper Tribunal in *SI v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 308 (AAC); [2015] AACR 5. In that case, the parties agreed a powered wheelchair was capable of being an "other aid" to mobility so that it was to be taken into account if normally used or if it could reasonably be used. The Upper Tribunal, however, said this:

> "65 … on reflection, we prefer to leave open the question whether for Activity 1 a powered wheelchair is an 'other aid' or an 'other aid' that could reasonably be used, given the specific reference in the legislation to a walking stick and a manual wheelchair and the *ejusdem generis* rule, and in any event there may be questions as to whether use is 'normal' for a claimant if, for example, his or her powered wheelchair can only be used in certain circumstances or in certain places".

10. In his submissions on this appeal, the Secretary of State informs the Upper Tribunal he is no longer of the view that a powered wheelchair may be taken into account.

Ejusdem Generis

11. *Bennion on Statutory Interpretation* (5th edition), at section 379, describes the *ejusdem generis* principle of statutory interpretation as follows:

> "The Latin words *ejusdem generis* (of the same kind or nature) have been attached to a principle of construction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character. The principle may apply whatever the form of the association, but the most usual form is a

> list or string of genus-describing terms followed by wider or residuary sweeping-up words."

12. In section 380, Bennion adds:

> "If a genus cannot be found, the *ejusdem principle* does not apply. It is necessary to be able to formulate the genus; for if it cannot be formulated it does not exist."

13. A list establishing a genus need not be extensive. In fact, a single limiting word may do (*DPP v Vivier* [1991] 4 All ER 18) although, as Bennion says at section 381, "in such cases the presumption favouring the principle is weakened because of the difficulty of discerning a genus".

14. Certain formulations are used where the legislator wishes to exclude operation of the principle, such as linking the wider words with the terms "whether or not of the same kind as those mentioned", "of whatever description" or "whatsoever" (*Larsen v Sylvester* [1908] AC 295).

15. We are concerned here with a principle, rather than a true rule, of statutory interpretation. The overriding aim is to discern the legislator's intention. This may call for a finding that the legislator impliedly intended to exclude the principle if its application would produce a result contrary to the legislator's intention (*Quazi v Quazi* [1979] 3 All ER 897).

16. I should also refer to the *expressio unius* principle, which Bennion at section 390 of Statutory Interpretation, writes is "applied where a statutory proposition might have covered a number of matters but in fact mentions only some of them" and "unless these are mentioned merely as examples, or *ex abundanti cautela*, or for some other sufficient reason, the rest are taken to be excluded from the proposition".

The arguments

17. Before the First-tier Tribunal, Mr T's representative argued the *ejusdem generis* principle operated to restrict the range of other aids that could be taken into account in applying the WCA mobility activity. The activity identified a class, namely walking stick and manual wheelchair, which are "characterised by the lack of any "motorised propulsion". They assist mobility by supporting parts of the body but still need significant manual effort in order for a person to mobilise". This class restricted the other aids that could be taken into account. A powered wheelchair fell outside that class. The representative also relied on the legislator's decision to specify in terms a manual wheelchair. This indicated that non-manual wheelchairs were excluded.

18. The First-tier Tribunal rejected the representative's argument for the following reasons:

> "[other aid] is general in terms and covers everything else that exists or might exist in the future. [*SI v Secretary of State*], paragraph 65 supports the contention a powered wheelchair is an 'other aid'…The Tribunal concludes the terms stick and manual wheelchair are there for illustrative purposes only. This fits in with the way the legal test is written. If the terms were not illustrative it would be necessary to look at each and every aid/appliance to decide whether it is excluded from being part of the term 'other aid' because of the similarity they may have to a stick or manual wheelchair. It would become an impossible test to apply. The phrase other aid would effectively be redundant. Would an elbow crutch be excluded from consideration because it is not a stick? A common sense and practical real world interpretation of the phrase 'other aid' also supports the view the

reference to stick and manual wheelchair are there only for illustrative purposes i.e. examples."

19. Following my grant of permission to appeal to the Upper Tribunal, the Secretary of State supplied a written response to the appeal. This response agreed with the reasoning of the First-tier Tribunal but nevertheless supported the appeal because, in the Secretary of State's view, the Tribunal gave inadequate reasons for deciding it was reasonable for Mr T to use a powered wheelchair. In a supplementary written submission, however, the Secretary of State altered his position and instead agreed with Mr T's representative that it was not permissible to rely on a powered wheelchair when assessing ability to mobilise. Neither party requested a hearing of this appeal.

Conclusion

20. I agree with the parties that a powered wheelchair cannot be an "other aid" for the purposes of the WCA mobility activity. The legislator's decision to refer expressly to a "manual wheelchair", but no other type of wheelchair, must have been deliberate. The intention was to limit the field to that one type of wheelchair. Further, a manual wheelchair and a walking stick share a common characteristic. They both require an individual to supply all of the energy necessary to move without relying on any external source of power. That shared characteristic is sufficient to establish a *genus* which then influences the range of other aids that may permissibly be taken into account.

21. The First-tier Tribunal tackled the issue head-on and constructed a coherent argument that a self-propelled wheelchair could be taken into account. While neither party seeks to uphold its reasoning, out of respect for the Tribunal I shall explain why I disagree with it.

22. If the legislator had intended for "manual walking chair" and "walking stick" to operate merely as examples, it could have said so expressly. In fact, other parts of the WCA enact provisions that are illustrative in nature. One of the descriptors for the 'picking up and moving' activity refers to a person who "cannot transfer a light but bulky object *such as* an empty cardboard box". The legislator could also have used one of the established formulations for indicating that the range of "other aids" was not limited, for example "whether or not of the same kind as those mentioned".

23. I do not agree that the above conclusion makes the WCA mobility activity "an impossible test to apply". If the mobility provisions are properly construed, the range of "other aids" is limited to those whose use still requires the individual to move under his or her own steam (and which are normally used or could reasonably be used). I think it is quite straightforward to decide which aids qualify under that test and which do not.

24. If the legislative intention was as the First-tier Tribunal thought, the legislator would not have provided for aids and appliances within the mobilising activity itself. It could have said nothing about this within the prescribed *activity* and instead relied on regulation 19(4)'s general incorporation of aids and appliances in the WCA *descriptors*.

25. I set aside the First-tier Tribunal's decision because it involved an error on a point of law and remit Mr T's appeal for re-hearing.

Subject to any later Directions by a judge of the First-tier Tribunal, I direct as follows:

(1) A complete rehearing of Mr T's appeal against the Secretary of State's decision of 11 May 2015 must be held by the First-tier Tribunal. The Tribunal's membership must not include anyone who was a member of the Tribunal whose decision I have set aside.

(2) Mr T is reminded that the law prevents the First-tier Tribunal from taking into account circumstances not obtaining at 11 May 2015, when the decision of the Secretary of State was taken.

(3) In its reasons, the First-tier Tribunal must not take into account the findings or reasons of the Tribunal whose decision I have set aside.

(4) If either party wishes to rely on any further written evidence or argument, this must be supplied to the First-tier Tribunal within one month of the date on which this Decision is issued.