IN THE UPPER TRIBUNAL **Appeal No. CSE/303/2019**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge A I Poole QC

The decision of the Upper Tribunal is **to refuse the appeal**. The decision of the First-tier Tribunal made on 9 January 2019 at Stirling was not made in error of law.

REASONS FOR DECISION

1. This is a case about employment and support allowance ("**ESA**"). It raises issues about adjournments of tribunal hearings, and the application of the law of reasons to tribunal decisions.

2. The appellant (the "**claimant**") applied for ESA. On 18 May 2018 he was found by the Secretary of State for Work and Pensions ("**SSWP**") not to be entitled to ESA. The claimant appealed to the First-tier Tribunal (the "**tribunal**"). In a decision of 9 January 2019, the tribunal refused the appeal, confirming the decision of the SSWP. The claimant appealed to the Upper Tribunal. I granted permission to appeal to the Upper Tribunal on 28 August 2019 and requested submissions on specified matters. The grounds on which permission was granted were:

> (1) Did the tribunal err in law by failing to adjourn to allow the claimant's representative to attend, and the obtaining and presentation of further evidence?
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> (2) Did the tribunal err in law by failing sufficiently to address the claimant's mental health problems and their effect on his functioning in its statement of reasons?
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> (3) Did the tribunal err in law by providing inadequate reasons, in that the claimant's wife was present at the hearing and it is said she gave evidence which is not discussed by the tribunal in its statement of reasons?

As the grant of permission stated, these grounds met the threshold test of arguability for permission. But the grant also warned that "this grant of permission is not to be taken as an indication of the ultimate outcome of this appeal".

3. I have considered the submissions for the SSWP and the claimant, and all of the papers before me. Neither party has requested an oral hearing and I am satisfied I can fairly decide this case without one. I have come to the decision that the tribunal did not err in law and the appeal falls to be refused.

4. The grounds of appeal are in essence matters of procedural fairness; the second and third grounds concern adequacy of reasons, and the first ground concerns a refusal to adjourn. Below, I deal first with the issue of adequacy of reasons, then the tribunal's refusal to adjourn.

Adequacy of reasons

5. By statute, this appeal to the Upper Tribunal is expressly limited to points of law arising from tribunal decisions; Section 11(1) of the Tribunals, Courts and Enforcement Act 2007. A high proportion of applications for permission to appeal before the Upper Tribunal proceed on the basis of arguments that the tribunal erred in law by failing to give adequate reasons or make sufficient findings. While some of these arguments are well founded, others are a thinly disguised attempt to present as an error of law what is in reality a disagreement about the facts found by the tribunal and the outcome reached.

6. The system of social entitlement appeals has been set up to try to ensure affordable access to justice for vulnerable benefits claimants. The amount of money at stake in any particular case may be small in relation to some court actions, but it is recognised that cases may be very important to claimants, many involving subsistence. Provision is therefore made for appeals against decisions by the SSWP. So that appeals to the Social Entitlement Chamber of the First-tier Tribunal are accessible in practice, ordinarily there are no fees payable. Nor do claimants have to spend money on lawyers, because there is no requirement of legal representation, and the tribunal sits with a judge with legal expertise and has an inquisitorial function (*AP v SSWP* [2018] UKUT 307 and *AS v SSWP* [2018] UKUT 260). In benefit cases involving the issue of entitlement to ESA, the tribunal sits with a medical member, to ensure it also has medical expertise. Tribunal judges and medical members quickly become specialists in dealing with benefits appeals, because they deal with a very high number of them. To assist vulnerable claimants to cope with tribunal hearings, they are relatively informal, questioning tends to be led by the tribunal members rather than proceedings being adversarial, and hearings are not long. Eight ESA appeals may be listed for one day, in which evidence and submissions are heard. Decisions are usually issued following the hearing after a short period of deliberation. Requests for statements of reasons must be made within one month of the decision, and should be provided by the judge within one further month or soon as reasonably practicable after the end of that period (Rule 34(4) and (5) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (the "**Tribunal Rules**")). In this way, claimants can access a process to challenge benefit decisions, where they are heard by an independent tribunal. The procedure before the tribunal is deliberately designed to be different from procedures in many courts; it is a simple and quick procedure, designed not to be over-complicated at all levels.

7. In my opinion, it is not in keeping with this approach for judges in the First-tier be held to an excessively high standard in statements of reasons. The Upper Tribunal has an important role to play in ensuring the system works justly, and that tribunals do not make legal errors. But the Upper Tribunal does not ordinarily of itself hear evidence. The hearing of evidence and decisions about which facts to find are primarily for the tribunal, which has the benefit of being able to assess witnesses and access expertise of a medical member. Accordingly, there are careful statutory limits on the Upper Tribunal's jurisdiction; jurisdiction is limited to errors in point of law. Where it is suggested that the tribunal has erred in law by failing to give adequate reasons or record adequate findings, it is important to bear in mind the legal test for adequacy of reasons. The classic test for adequacy of reasons in Scotland is found in *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345. The tribunal must:

> "give proper and adequate reasons for [its] decision which deal with the substantial questions in issue in an intelligible way. The decision must, in short, leave the informed reader … in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it".

There is a helpful review of English authorities on reasons in *Oxford Phoenix Ltd v The Information Commissioner* [2018] UKUT 192 at paragraphs 50-54, including reference to *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48, at paragraph [25], in which Lord Hope said:

> "It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it".

To be adequate, reasons do not have to involve a consideration of every issue raised by the parties, and nor do they require to deal with every piece of material in evidence (*Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119 at paragraph 122 per Griffiths LJ; *AJ (Cameroon) v Secretary of State for the Home Department* [2007] EWCA Civ 373 at paragraph 15 per Laws LJ). Other well established aspects of the legal test for adequacy of reasons are that decision letters must be read as a whole, in a straightforward manner, and recognising that they are addressed to parties well aware of the issues involved and the arguments advanced (*South Bucks District Council v Porter* (No 2) [2004] 1 WLR 1953 at paragraph [36]).

8. In ESA cases, the substantial questions in issue that will often have to be addressed in statements of reasons are whether the claimant scored points under the activities in Schedule 2 of the Employment and Support Allowance Regulations 2008 (the "**ESA Regulations**"), and whether Regulation 29 applied. Broken down further, the substantial questions are often whether points were scored under the descriptors put in issue before the tribunal, and whether the test as to substantial risk in Regulation 29(2)(b) was satisfied. In particular cases, there may be other issues which amount to "substantial questions in issue", such as the applicability of activities in Schedule 3 and Regulation 35, or other matters, depending on the circumstances. The function of the Upper Tribunal in reasons appeals is to decide whether the tribunal's decision on the substantial questions in issue leaves the informed reader in no real and substantial doubt why they reached the conclusions they did – bearing in mind the reasons are addressed to parties well aware of the issues involved.

9. In this case, the activities put in issue were Activities 1 to 5 and 13 to 17 in Schedule 2 to the ESA Regulations, and Regulation 29. Looking at the tribunal's statement of reasons, it clearly addresses whether points were scored under the activities put in issue before the tribunal, and whether the tests as to substantial risk in Regulation 29 were met. Paragraph 38 directly addresses all of the activities in issue, based on 37 paragraphs of findings preceding it, and paragraphs 40 and 43 address Regulation 29. They deal with the substantial questions in an intelligible way, leaving the informed reader in no real and substantial doubt as to the reasons for the decision and what material considerations were taken into account.

10. Given the legal test for adequacy of reasons, that is really the end of the matter. But, since two specific criticisms were advanced, I turn to address them directly. The first criticism is that the reasons did not adequately address the claimant's mental health problems or their effect on his functioning. The second is whether the tribunal's treatment of the claimant's wife's evidence in its statement of reasons was adequate.

11. I accept that, in explaining why it found the claimant did not score points under particular activities and why Regulation 29 did not apply, it had to be discernible from the tribunal's reasons what effect the tribunal found the claimant's mental health conditions had on his functioning for the purposes of activities in issue. But before looking at the reasons themselves, because the legal test for adequacy of reasons has to be applied in the context of the "informed reader", and on the assumption that parties are well aware of the issues involved, some background is relevant. The claimant was formerly a psychiatric nurse, as noted by the tribunal at paragraph 12 of its statement of reasons. The claimant can be taken to have an awareness of mental health conditions and the effect they may have on people. Indeed, he had suffered from depression in the past so was aware of the condition. When the claimant submitted his claim leading to the decision in question, the claim form at page 12 asked about his "disabilities, illnesses or health conditions". Although a number of conditions are set out by the claimant, there is no mention of depression or a particular mental health condition; merely mood swings and being argumentative and snappy. In the hearing bundle available to the claimant, there was an ESA 113 dated 23 March 2018 (page 32). In this, the claimant's GP was asked about current conditions, and only asthma and COPD are mentioned. A letter from the GP (page 99) confirms that an anti-depressant was only started after 23 August 2018 because of low mood related to financial difficulties (the claimant's ESA money had ceased). But the date of decision under appeal was 18 May 2018. The GP records show there had been no treatment, consultations or medication for mental health problems during the period from 1 May 2016 to 23 August 2018. (no earlier records are available as they were not covered by the tribunal's direction).

12. Against that background, extracts from the tribunal's statement of reasons about the claimant's mental health are as follows:

> "14. The appeal concerns a claim for benefit dating from 13 December 2013. The certified cause of incapacity was depression. The appellant was not on any relevant medication or receiving any therapy at the date of the decision under appeal and this had been the case since before May 2016…
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> 20. The respondent requested information from the appellant's GP in a form ESA 113. The GP stated on 23 March 2018 that the appellant had last seen a GP on 2 August 2016 and there was no record of any condition necessitating that the claimant was unable to work. Asthma and COPD were listed as current conditions not affecting the appellant's ability to work. No other conditions were listed…
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> 22. The appellant's medication as at the relevant date is as listed at page 34. [I observe that this list did not include medication for mental health problems].
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> 29. On 23 August 2018 Dr Sheehan issued a fit note on the basis of the appellant having depression and COPD. The appellant was started on Sertraline.
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> 30. On 24 August 2018 Dr Baillie, the claimant's GP, refused to issue a backdated fit note under explanation that there was no information that the appellant was unwell at that time. It was noted that the appellant was not on an anti-depressant, his asthma review was okay and he appeared active given that he had been playing football in January.

> 31. On 30 August 2018 Dr Sheehan issued a fit note covering the period from 18 May 2018 to 23 August 2018. The condition causing incapacity was said to be COPD.
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> 32. We were not satisfied that the appellant was inactive and impaired, physically or mentally, to the extent he claimed or the extent of meeting the criteria to have, or to be treated as having, limited capability for work.
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> 34. We came to the view that the appellant's evidence was overstated and accepted it only insofar as independently verified.
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> 35. This applied equally to the claimant's evidence regarding his mental health. The claimant told us that he had been drinking to excess for 2 to 3 years and drank a bottle of whisky a night. Alcohol dependency was not indicated by what the HCP was told about the appellant's activities or by the appellant's state of health or his medical records. We were unconvinced that the appellant found it too embarrassing to tell his GP but not us. The appellant's evidence to us that he had been depressed for a few months and the absence of any consultation or treatment until August 2018 are not indicative of depression being a significant problem at the time in question.
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> 36. ….Dr Sheehan's letter did not provide support for the appellant having mental health problems over the period at issue or address the appellant's ability to perform the prescribed activities".

The tribunal went on to find the claimant did not score any points, and to find Regulation 29 did not apply. At various points in paragraph 38 of its statement of reasons, where the tribunal considered activities 13 to 17 in Schedule 2 to the ESA Regulations, the tribunal expressly rejected any reported restrictions being attributable to the state of the claimant's mental health.

13. It is abundantly clear from these extensive reasons that the tribunal was aware the claimant had been found to have limited capability for work due to depression in 2013, but it did not accept that the claimant's mental health was problematic at the date of the decision under appeal. The tribunal did not accept that the claimant's mental health caused limitations on his functioning sufficient to score any points under the activities in issue. It may be that the claimant's state of mental health on 21 December 2018 when consulting with his new representative gave the representative cause for concern. But as a matter of law (under Section 12(8)(b) of the Social Security Act 1998) the tribunal was prohibited from taking into account circumstances not obtaining at the time when the decision appealed against was made. The tribunal properly considered the position as at the date of the decision. The facts were for the tribunal, and it was entitled to reach the conclusions it did on the evidence before it. The SSWP suggests there were some matters raised that might bear on mental health not expressly mentioned by the tribunal in its statement of reasons. I do not consider any of these matters qualify as "substantial questions in issue". As the authorities cited in paragraph 7 above make clear, it was not necessary for the tribunal to deal with all matters raised in evidence; it just had to give adequate reasons dealing with the substantial questions in issue in an intelligible way. It did so. Accordingly, I do not consider that the SSWP's concession was correctly made and I do not accept it. It appears to me to proceed on a misapprehension of the standard of reasons required from a tribunal; as do her submissions in relation to ground (3). I therefore reject the arguments for both the claimant and the SSWP on ground of appeal (2).

14. Ground of appeal (3) can be dealt with shortly. The claimant's wife's evidence was not a "substantial question in issue". It was not necessary for the tribunal to set out her evidence and comment on aspects of it; reasons do not have to deal with every piece of material in evidence (paragraph 7 above). What the tribunal had to do was take the wife's evidence into account in reaching its decision, attaching such weight to it as it saw fit. It is evident from the tribunal's decision that it took the claimant's wife's evidence into account, noting her presence at the hearing at paragraph 9, and expressly mentioning her evidence at paragraph 38 of the statement of reasons. The legal requirement of adequate reasons did not, in the circumstances of this particular case, require the tribunal to do anything more.

15. The tribunal's statement of reasons was a well written and comprehensive document, which fully dealt with the substantial points in issue. It met the necessary legal standards. Grounds of appeal (2) and (3), based on inadequacy of reasons, fail.

Adjournment

16. Ground of appeal (1) is that the tribunal erred in law in failing to adjourn to allow the claimant's representative to attend, and the obtaining and presentation of further evidence. HMCTS was contacted on the morning of the hearing of 9 January 2019 to say that the representative could not attend due to illness, and it is argued that the tribunal should have adjourned. It is also argued that at a consultation on 21 December 2018 with the representative, additional evidence had emerged about the claimant's alcohol consumption and abuse while he was a child, and the tribunal should have adjourned to give an opportunity to submit that evidence.

17. Fairness (including issues of whether a refusal to adjourn was unfair) is always assessed in the circumstances of the particular case. In this case, the initial hearing bundle contained evidence including the claimant's ESA claim form, a healthcare assessment dated 24 April 2018, and an earlier healthcare assessment dated 1 August 2016. When the tribunal initially sat to hear the appeal on 15 October 2018, the tribunal adjourned the case to obtain the claimant's GP records, including any secondary care reports, from 1 May 2016. Thereafter further medical information was lodged with the tribunal. This included GP records printed out on 23 October 2018. It also included an ESA 113 from 23 March 2018 recording asthma and COPD but not mental health problems, and saying "We have no record of any condition necessitating that patient is unable to work". The new information also included a later letter from a GP dated 27 September 2018 (page 99) who had seen the claimant on three occasions since 23 August 2018 mainly in connection with asthma and COPD. On 23 August 2018 the claimant had "started an anti-depressant for low mood/depression symptoms that are in part related to his financial difficulties". There was therefore a significant amount of written evidence before the tribunal, as well as oral evidence heard at the hearing.

18. In addition to the adjournment on 15 October 2018, the claimant also had the benefit of a further postponement granted on 27 November 2018. This had been requested after the claimant changed his representative following withdrawal of an earlier representative. The Directions Notice granting postponement of a hearing which had been rescheduled for 3 December 2018 stated "All parties should be aware that further postponement is unlikely to be granted in this case unless good

reason is given and, where appropriate, documentary evidence is produced". The tribunal hearing was rescheduled for 9 January 2019.

19. A further postponement request was made by the claimant on 13 December 2018 because the representative had said to the claimant he wanted to contact the doctor and get full medical records. Perhaps unsurprisingly, given that GP records and a letter from a GP had already been lodged following the tribunal's direction on 15 October 2018, this postponement request was not granted.

20. The tribunal sat on 9 January 2019. The claimant attended with support from his wife, but there was no representative. A request was made to adjourn the hearing for the representative to obtain further evidence, which was refused because the tribunal did not consider it was necessary in the interests of justice to adjourn and more compatible with the provisions of the overriding objective in rule 2 of the Tribunal Rules. Evidence was heard, including oral evidence from the claimant and his wife, and the papers considered.

21. A very long paragraph of reasons was given for the refusal to adjourn in paragraph 10 of the tribunal's reasons. This covered a number of matters, such as the tribunal finding the claimant had seen the papers and there was a further set he could refer to on the day; a submission from his former representative being before the tribunal; the tribunal already had the medical records and more which contained a good quantity of pertinent evidence; and the tribunal's inquisitorial function. Paragraph 10 also included a sentence saying that the representative had not contacted HMCTS to say they were unable to attend the hearing. I am prepared to proceed on the basis that this sentence was an error of fact, because although HMCTS have no record of any such contact, there is a letter from the representative confirming that such contact was made on the morning of 9 January 2019. But that was only one of many reasons given for not adjourning. The question is whether the tribunal materially erred in law by failing to afford a fair hearing.

22. In this particular case, I do not find that the tribunal erred in law in any material way by refusing to adjourn. There is no automatic unfairness in a hearing where a claimant is unrepresented; the tribunal has an enabling and inquisitorial function, and many claimants appear before it unrepresented. The factors identified by the tribunal which supported a refusal to adjourn were more than sufficient to justify its decision, even if the representative had contacted the tribunal. The tribunal correctly identified that the overriding objective was relevant to its consideration of adjournment in paragraph 9 of the statement of reasons. It set out the history of the case, which included both a previous adjournment and postponement to allow the claimant to obtain and lodge evidence and representation. It took into account the previous opportunities afforded to obtain and lodge further evidence, and that further evidence had been lodged. It also took into account the tribunal's inquisitorial function, and the previous submission from a representative. These factors were sufficient of themselves to support the tribunal's decision not to adjourn, and any error of fact by the tribunal about the representative not contacting the tribunal was not material to that decision.

23. Moreover, I do not find that there was unfairness because the tribunal did not adjourn to allow more evidence about the claimant's drinking and the issue of childhood abuse to be lodged. I have considered the case *MI v SSWP* [2013] UKUT 447 relied on by the claimant, but I find that the tribunal correctly decided the case on the basis of the evidence before it and was not required to adjourn to obtain further

evidence. It is evident from the mention of the claimant's drinking at paragraph 10 and paragraph 35 of the statement of reasons that evidence about alcohol was led and considered at the hearing. As for the issue of childhood abuse, the question for the tribunal was whether the claimant's health conditions at the time of the date of the decision under appeal resulted in him scoring points or otherwise qualifying under Regulation 29, and not whether he had suffered abuse or the effect that abuse had on him. The claimant's mental health at the relevant time was fully considered as set out in paragraphs 11 to 13 above. It was not an error of law to proceed without adjourning to obtain additional evidence. Ground of appeal (1) also fails.

24. There being no error on a point of law by the tribunal in its decision, I refuse the appeal.

Signed on the original
on 4 November 2019

A I Poole QC
Judge of the Upper Tribunal