IN THE UPPER TRIBUNAL **Appeal No.** CE/685/2020
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

Mr M.H.

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 15 April 2021
Decided on consideration of the papers

Representation:
Appellant: In person
Respondent: Mr Daniel Decker, DMA, Department for Work and Pensions

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 23 December 2019 under number SC068/19/02685 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing (this may be a remote or virtual hearing, e.g. by telephone or Skype or CVP).**

2. **The new First-tier Tribunal should not involve the tribunal judge or medical member previously involved in considering this appeal on 23 December 2019.**

3. **The claimant is reminded that the tribunal can only deal with the facts of the appeal, including his health and any other relevant circumstances,**

as they were at the date of the original decision by the Secretary of State under appeal (namely 16 May 2019).

4. If the Appellant has any further written evidence to put before the tribunal and, in particular, further medical evidence, this should be sent to the HMCTS regional tribunal office in Liverpool within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were <u>at the date of the original decision</u> of the Secretary of State under appeal (see Direction (3) above).

5. The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

The Upper Tribunal's decision in summary and what happens next

1. I allow the Appellant's appeal to the Upper Tribunal. The decision of the First-tier Tribunal involves two legal errors. First, the Tribunal misapplied regulation 35 of the Employment and Support Allowance Regulations 2008 (SI 2008/794) ['the ESA Regulations 2008']. For that reason alone, I set aside the Tribunal's decision. However, the Tribunal also erred in its approach to an Unacceptable Customer Behaviour (UCB) incident report received from the Department for Work and Pensions (DWP) about the Appellant's behaviour on one occasion when visiting the Job Centre.

2. The case now needs to be reheard by a new and different First-tier Tribunal. I cannot predict what will be the outcome of the re-hearing. So, the new tribunal may reach the same, or a different, decision to that of the previous Tribunal. It all depends on the findings of fact that the new Tribunal makes when applying the relevant law.

The background to this appeal to the Upper Tribunal

3. On 27 July 2017 the Appellant, who has mental health issues, underwent a work capability assessment. The health care professional (or HCP, and in this instance a doctor) recommended that the following ESA descriptors applied: personal action (13(b), 9 points), getting about (15(c), 6 points) and coping socially (16(c), 6 points). As a result, a decision-maker concluded that the Appellant scored 21 points and was entitled to ESA at the work-related activity (WRA) group rate (but not the support group rate). The Appellant did not appeal against that decision.

4. On 17 April 2019 the Appellant underwent a further work capability assessment, this time carried out by a registered nurse. On this occasion a slightly different pattern of descriptors (but across the same three activities) was found to be applicable: personal action (13(c), 6 points), getting about (15(b), 9 points) and coping socially (16(c), 6 points). However, on 16 May 2019 a decision-maker accepted only the latter two descriptors, giving a score of 15 points (although it is unclear why the personal action

score was not accepted). As a result, and in any event, the Appellant's award of ESA continued. This time the Appellant lodged an appeal, writing "I wish to appeal your mandatory [reconsideration] decision not to put me on the support group, I told you I get upset and angry, it should be part of Regulation 35 in the letter you sent me."

5. On 23 December 2019, the appeal was heard before the Liverpool First-tier Tribunal, which confirmed the decision of 16 May 2019 and so dismissed the appeal. The Tribunal decided that the Appellant did not qualify for the ESA support group as none of the descriptors in Schedule 3 of the ESA Regulations 2008 applied and nor did the special provision under regulation 35.

6. The Appellant appealed to the Upper Tribunal. I gave permission on two grounds. The first related to the Tribunal's treatment of regulation 35 while the second concerned an evidential matter relating to the UCB incident report.

The first ground of appeal: regulation 35

7. I gave permission to appeal on this first ground, addressing my comments to the Appellant as follows:

> "The first is about regulation 35 (exceptional circumstances). If this rule applied, you would have been put into the ESA support group. It may be arguable that the FTT did not apply this rule properly. In considering whether regulation 35(2) applied, did the FTT pay sufficient regard to the points that you scored under Schedule 2 for the limited capability for work (LCW) test? And did the FTT consider whether there was a substantial risk to the physical or mental health not just of yourself but of others, e.g. because of any inappropriate behaviour?"

8. It will be noted from the summary in paragraphs 3 and 4 above that the Appellant had not been scored any points for "inappropriate behaviour" in either the decision under appeal or in the previous decision awarding ESA. However, on his ESA50 questionnaire, in answer to a question about "behaving appropriately", the Appellant stated that he behaved in a way which upset other people "every day". He added by way of example: "I get angry very easily, the Job Centre threaten to call the police every time I go in, I also have problems with the police because of my anger".

9. Mr Decker, the Secretary of State's representative in these proceedings, has provided a detailed and helpful written submission on the first ground of appeal, which he supports. Mr Decker's conclusion on this ground runs as follows:

> "11. I submit that the tribunal have not made it clear as to the likelihood of the claimant's WRA being tailored so that it would all be able to be done from his home. They considered that there would be no risk to his own health as a result of inappropriate behaviour while undertaking WRA, based on his previous experiences of doing WRA. However, it is not clear what this WRA involved, and whether his behaviour could pose a substantial risk to others if the WRA he was required to do involved interacting with other people. Even if it was confirmed that the WRA he would be asked to do would be of the types mentioned in paragraph 35, it is not clear whether his inability to complete two sequential personal actions would impair his ability to complete some of this WRA, and whether this could pose a substantial risk to his health. For these reasons, I submit that the tribunal erred in law with regard to their assessment of regulation 35."

10. Given the appeal is supported on this point, I consider it both fair and just to decide this case without further delay and in particular without seeking the Appellant's comments on the Secretary of State's response. That is in part because the Secretary of State has supported the appeal to the Upper Tribunal and to save time. It is also because, since there is a need for further factual findings, I cannot see that I would have felt able in any event to do anything other than set aside the Tribunal's decision and remit to a new panel for re-hearing. I should add that the fact Mr Decker supports the present appeal to the Upper Tribunal does not mean that he (or the Secretary of State) supports the appeal on the substantive issue of whether the Appellant is entitled to ESA at the support group rate. That is an issue that needs to be re-heard and determined by the new First-tier Tribunal.

11. In summary, I am satisfied that the First-tier Tribunal erred in law for the reason set out above. I therefore allow the Appellant's appeal to the Upper Tribunal, set aside (or cancel) the Tribunal's decision and remit (or send back) the original appeal for re-hearing to a new tribunal, which must make a fresh decision. I formally find that the Tribunal's decision involves an error of law on the grounds as outlined above.

12. Although it is not strictly necessary for the purposes of allowing this appeal, I also go on to deal with the second ground of appeal, which raises an important evidential issue that also concerns procedure in the First-tier Tribunal (Social Entitlement Chamber).

The second ground of appeal: disclosure of evidence

13. When giving the Appellant permission to appeal I set out my concerns on this second ground of appeal as follows:

> "4. The second is a related issue. The FTT refer to an incident which happened at the Jobcentre on 13 August 2018 (statement of reasons at paras 30 and 34). The FTT refer to the incident in some detail at para 30. That account is much more detailed than the very brief mention of the incident in the DWP response at page F, para 10. Unless I am mistaken, the account can only have been taken from the UCB Incident Report Form sent to the FTT office on 24 July 2019 along with the DWP's response. However, there is no evidence the Incident Report Form was included in the FTT appeal papers. As such, a copy was not sent to the Appellant and he did not have the chance to comment on it. If so, the FTT based their decision in part on evidence the Appellant had not had the chance to comment on, which would be unfair.
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> 5. In many cases the contents of the Incident Report Form will have no bearing on the subject-matter of the appeal. For example, if the appeal was about the date a claim for benefit had been made, it is difficult to see how the Incident Report Form would be relevant. However, the Secretary of State is under a duty to provide "*copies of all documents relevant to the case*" (see rule 24(4)(b)). On the face of it, that would seem to include the report of the incident on 13 August 2018, not least as the Appellant may or may not agree with that account. It is arguable in a case such as this, where the incident potentially had a bearing on the issues to be decided by the FTT, that the Secretary of State should have applied for an order under rule 14(2), redacting some of the information (e.g. the name of the security guard who was involved) but allowing the rest to be disclosed. There is also a second shorter Incident Report Form which the FTT do not seem to have referred to."

14. The background to this ground of appeal needs to be unpicked.

15. The DWP's response to the Appellant's appeal included the following abrupt and somewhat mangled observation in its discussion of the applicable descriptors in issue (p.F, paragraph 10): "The Jobcentre Plus computer system indicates that he was aggressive the last time he was aggressive [*sic*] but it was handled by the manager".

16. The Tribunal's statement of reasons then recorded as follows (at paragraph 30):

> "(30) Within the schedule there is some evidence of at least one occasion of unacceptable behaviour as recorded by staff at the Job Centre (p1-3 at the front of the schedule); this is in the form of an incident report from 13/08/2018 of verbal abuse to a number of Job Centre staff including a security guard. This took the form of swearing and refusing to move until he got his money (this appears to be arrears of benefit of £1600). When the Job Centre manager dealt with him he was persuaded to leave after 30 minutes under threat of the police being called. The Job Centre staff carries out an action plan for future dealings with the claimant and decide against a warning letter as they concluded he was vulnerable due to his mental health problems. It is also noted there has been no other incidents noted on their system."

17. I cite from the security guard's account, as recorded in the UCB incident report, which perhaps gives a fuller flavour of the incident on 13 August 2018:

> "… My name is [redacted]. I have worked for G4S as a Guard for 4 years. On 13.08.2018 a customer came in at 11 am. I asked did he know where he was going. He said yes. He sat in the JSA section. DWP Advisor [name redacted] asked did he have an appointment. He said no. [Name redacted] advised him to go to reception. He began shouting "I am not moving until I get my fucking 1600 pounds." I asked him to stop swearing and move to reception. He carried on shouting and swearing. I advised the Job Centre manager [name redacted] of the issue. She approached him and spoke to him. After 30 minutes she convinced him to leave by threatening to call the police. [Name redacted] from G4S assisted me."

18. Mr Decker accepts that if this incident report "was not included in the bundle, there would clearly have been a breach of natural justice. It is axiomatic that an appellant must generally see all the material that has been presented by the respondent (*Home Office v Tariq* [2011] UKSC 35 at [102]-[105])." However, Mr Decker argues that "The copy of the report appears in the bundle, and although the pages are not specifically numbered 1-3, they are included at the front of the bundle. This would presumably have been copied to the claimant along with the rest of the bundle, so I submit that there was no error of law on this point."

19. However, I do not accept that the incident report was disclosed to the Appellant. As I noted in my case management directions when giving permission to appeal, "the two UCB Incident Report Forms … were on the 'internal' side of the FTT file and have not as yet been disclosed to the Appellant". I should perhaps explain that a First-tier Tribunal paper file for an appeal is conventionally organised on the basis of a "right hand side" (RHS) and a "left hand side" (LHS). The papers on the 'public facing' RHS constitute the bundle for the appeal hearing and are sent out to the parties. The papers on the 'internal' left hand tag include miscellaneous papers, typically those which are generated within HMCTS (e.g. a procedural query from a clerk to a district

tribunal judge), and which are not issued to the parties (unless they happen to be duplicates of papers filed on the RHS).

20. However, the LHS often includes some papers received from the parties which do not appear on the RHS. The Appellant's completed Hearing Enquiry Form is usually to be found on the left hand tag. Likewise, if the Appellant makes some incidental enquiry (e.g. as to the availability of travel expenses), that may well be placed on the LHS.

21. The left hand tag also includes what are regarded as administrative papers from the Secretary of State's representative. This includes the Form AT38(Gen), or in plain English the 'Notification of response'. This document is essentially the cover sheet that the Secretary of State's representative sends to the Tribunal office along with the appeal bundle. Notably, Form AT38(Gen) is headed "**Do not copy this form to the appellant or representative**". That stricture may well be because the AT38(Gen) includes personal data about the DWP appeals officer, including their e-mail address and direct line telephone number. But the Form also includes the following question: "Does the appellant or a member of their household have an Unacceptable Customer Behaviour (UCB) marking?" If the answer to that question is YES (as it was in the instant case), then the instructions continue "please attach any relevant documents or a written explanation giving as much detail of the UCB". In the present case the appeals officer did precisely that by attaching the two UCB incident reports referred to above (the report of 13 August 2018 and one later and inconsequential note).

22. From my experience of sitting at first instance, and my subsequent experience as an Upper Tribunal Judge, I am satisfied of the following facts:

    (i) The UCB incident reports were sent by the DWP to the Tribunal regional office along with the AT38(Gen) and appeal bundle. The AT38 and the UCB incident reports were filed on the left hand tag and so not disclosed to the Appellant.

    (ii) The appeal bundle issued to the Appellant included the briefest of summaries of the incident on 13 August 2018 (see p.F, paragraph 10, cited at paragraph 15 above).

    (iii) The Tribunal Judge, in preparing the Tribunal's statement of reasons, relied on the much fuller account in the UCB incident report on the LHS, which had not been disclosed to the Appellant.

23. As a result, the Appellant was denied the opportunity to comment in any way on the contents of the UCB incident report. Yet this was a central element in his appeal. For example, his letter of appeal had gone on to say: "I've told you phone [name of DWP advisor redacted] my advisor his number is 0151 (etc)…". If given the opportunity, he may have wished to emphasise how the account supported his points about his own behaviour. He may even have wished to suggest that the account downplayed quite how serious the incident was.

24. It is axiomatic, as Mr Decker said, that a party is in principle entitled to see and comment upon the relevant evidence. As Lord Kerr put it in the passage in *Home Office v Tariq* [2011] UKSC 35, to which Mr Decker helpfully referred me:

> "*The common law right to know and effectively challenge the opposing case*
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> 102. The right to know and effectively challenge the opposing case has long been recognised by the common law as a fundamental feature of the judicial process. In *Kanda v Government of Malaya* [1962] AC 322, 337 Lord Denning said:

> "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education* v *Rice* down to the decision of their Lordships' Board in *Ceylon University* v *Fernando.* It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side made behind the back of the other."

103. The centrality of this right to the fairness of the trial process has been repeatedly emphasised. Thus, in *In re K (Infants)* [1963] Ch 381 Upjohn LJ at pp 405-406 said:

> "It seems to be fundamental to any judicial inquiry that a person or other properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. It cannot be withheld from him in whole or in part. If it is so withheld and yet the judge takes such information into account in reaching his conclusion without disclosure to those parties who are properly and naturally vitally concerned, the proceedings cannot be described as judicial."

104. And in *Brinkley v Brinkley* [1965] P 75, 78 Scarman J said that "for a court to take into consideration evidence which a party to the proceedings has had no opportunity during trial to see or hear, and thus to challenge, explain or comment upon, seems to us to strike at the very root of the judicial process". In *Pamplin v Express Newspapers Ltd* [1985] 1 WLR 689 at 691 Hobhouse J expressed the principle in similarly forthright terms:

> "The first principle is the principle of natural justice which applies wherever legal proceedings involve more than one person and one party is asking the tribunal for an order which will affect and bind another. Natural justice requires that each party should have an equivalent right to be heard. This means that if one party wishes to place evidence or persuasive material before the tribunal, the other party or parties must have an opportunity to see that material and, if they wish, to submit counter material and, in any event, to address the tribunal about the material. One party may not make secret communications to the court."

105. Exceptions to the rule that a party to the proceedings must be informed of every detail of his opponent's case have, of course, been recognised. But it is essential to be aware of the starting point from which one must embark on the inquiry whether the principle of equality of arms (which is such a vital hallmark of our adversarial system of the trial of contentious issues) may be compromised. As a general – indeed, basic – rule, those who are parties to litigation need to know what it is that their opponent alleges against them. They need to have the chance to counter those allegations. If that vital entitlement is to be denied them, weighty factors must be present to displace it. And it is self evident that he who wishes to have it displaced must show that there are sufficiently substantial reasons that this should happen. Put shortly, he who thus avers must establish that nothing less will do."

25. In the present case there is no suggestion that the Secretary of State's representative was deliberately seeking to withhold relevant evidence. Rather, I suspect that simply no thought was given to the potential significance of the UCB incident report, which was simply seen as part of a separate 'tick box' administrative process. There is, however, a more elementary reason why the UCB incident report should have been disclosed in the appeal bundle, albeit in a redacted form so as to protect the personal data of third parties who were mentioned. As I observed when giving permission to appeal, the Secretary of State is under a statutory duty to provide "*copies of all documents relevant to the case*" (see rule 24(4)(b)). "The requirement to provide such documents is mandatory not optional": see *BB v Secretary of State for Work and Pensions (PIP)* [2017] UKUT (AAC) 596 at paragraph 5 (Upper Tribunal Judge Hemingway). The UCB incident report was plainly germane to the question of the Appellant's "Appropriateness of behaviour with other people, due to cognitive impairment or mental disorder" (ESA activity 17 in Schedule 2 to the ESA Regulations 2008).

26. The Tribunal's error in failing to appreciate that the Appellant had not seen the UCB incident report also had the potential to feed back into the first ground of appeal. The Tribunal may have been correct on the facts in concluding that the Appellant did not have "*on a daily basis*, uncontrollable episodes of aggressive or disinhibited behaviour that would be unreasonable in any workplace" (ESA Regulations 2008, Schedule 3, activity 13, emphasis added). However, the incident of 13 August 2018 as reported could certainly have justified an additional finding that the Appellant at the very least "occasionally" and possibly "frequently" had such episodes (Schedule 2, descriptor 17(c) and 17(b) respectively). While this would not have been sufficient to qualify automatically for the support group under the Schedule 3 descriptors, this would have been a further factor to weigh in the balance in making the appropriate exceptional circumstances assessment under regulation 35. As the Appellant had put it in his original letter of appeal, "I told you I get upset and angry, it should be part of Regulation 35 in the letter you sent me."

27. This is not to suggest that UCB incident reports which are provided by DWP appeals submission writers to the First-tier Tribunal's office as an annex to the Form AT38(Gen) should necessarily be disclosed to appellants as a matter of course. Such reports doubtless perform an important function in safeguarding both Tribunal judicial office holders and HMCTS staff from unacceptable and potentially dangerous behaviour by a small (or rather tiny) number of appellants. It will normally be entirely appropriate to treat such reports in confidence. In very many cases all that is required is that on the day of the hearing the tribunal clerk should draw the judge's attention to the relevant document and for a discussion to take place about any necessary arrangements.

28. However, if the contents of the report are relevant to the factual issues the tribunal will have to determine – as in the present case – then it may be that ahead of the hearing the Secretary of State should be invited to submit a suitably redacted copy of the UCB incident report, along with an application under rule 14 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) justifying such redactions. It may be that as a matter of good practice any case in which a UCB incident report is provided by the DWP should be reviewed by a district tribunal judge with a view to making such directions as are appropriate. However, operational issues such as the relevant procedural protocols and arrangements for risk assessments are

undoubtedly a matter for the Chamber President in conjunction with her HMCTS colleagues where relevant, rather than for the Upper Tribunal.

What happens next: the new First-tier Tribunal

29. There will therefore need to be a fresh hearing of the appeal before a new First-tier Tribunal. Although I am setting aside the previous Tribunal's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether the claimant is entitled to ESA (and, if so, at what rate). That is a matter for the good judgement of the new Tribunal. That new Tribunal must review all the relevant evidence and make its own findings of fact.

30. In doing so, however, unfortunately the new Tribunal will have to focus on the claimant's circumstances as they were as long ago as of May 2019, and not the position as at the date of the new hearing, which will obviously and regrettably be more than two years later. This is because the new Tribunal must have regard to the rule that a tribunal "**shall not** take into account any circumstances not obtaining at the time when the decision appealed against was made" (emphasis added; see section 12(8)(b) of the Social Security Act 1998). The original decision by the Secretary of State which was appealed was taken on 16 May 2019.

Conclusion

31. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal
Authorised for issue on 15 April 2021