DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Before Upper Tribunal Judge Paula Gray **CE/3347/2017**

Decision

This appeal by the claimant succeeds.

Permission to appeal having been given by me on 1 December 2017 in accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and rule 40(3) of the Tribunals Procedure (Upper Tribunal) Rules 2008 I set aside the decision of the First-tier Tribunal sitting at Hull and made on 30 August 2017 under reference SC 993/17/00262. I refer the matter to a completely differently constituted panel in the Social Entitlement Chamber of the First-tier Tribunal for a fresh hearing and decision in accordance with the directions given below.

Reasons

Background

1. This is an Employment and Support Allowance (ESA) appeal and references to regulations are to the Employment and Support Allowance Regulations 2008.
2. The matter concerned a man who at the date of the decision under appeal, 13 February 2017, was aged some 48 years. He lived at home with his parents, having always done so.
3. Following a medical examination that took place on 29 December 2016 a decision maker discontinued his award of ESA, on the basis that he scored no points under the schedule 2 descriptors, and thus did not have limited capability for work.
4. An appeal was lodged with the First-tier Tribunal (FTT), and, on the basis of the papers alone, the tribunal dismissed the appeal. A District Tribunal Judge refused permission to appeal.

The appeal before the Upper Tribunal

5. Both parties now agree that the decision of the tribunal was made in error of law, and in those circumstances, although I need only give brief reasons, there are some matters which seem to me to be of more general importance, and my observations below should be read in that context as well as in relation to matters that should be taken into account and dealt with at the rehearing.
6. I granted permission to appeal on the basis that the grounds of appeal drafted by Mr Gee of Shelter in Sheffield were arguable as the matters he set out may have affected the considerations of the tribunal as to the possible applicability of regulation 29 (2) (b). I am grateful to Mr Gee for his helpful grounds of appeal. He has, understandably, not felt it necessary to add to those.
7. In my grant of permission I gave directions for the filing of submissions by the Secretary of State, and I have been considerably assisted by the submission of Mr Thompson. He deals with enough of the points made by Mr Gee for him to argue that there were errors made by the First-tier Tribunal which were sufficiently material to require the decision to be set aside. He requests remission to another First-tier Tribunal for a further hearing, and I agree with that: I do not remake this decision

myself because assessment of the medical position makes it preferable for the tribunal to sit with a doctor.

8. In addition to the points made by Mr Thompson I mention other matters which the fresh tribunal will need to consider.

The place of the appellant's learning difficulties

9. The tribunal may feel that a key element, if not the key element in this case is the extent of the appellant's documented learning difficulties, particularly the extent to which they may make him vulnerable, and therefore open to risk to his health in the world of work or searching for work.
10. I note that in the statement of reasons there is very considerable reliance upon the typical day said to have been described by the appellant to the healthcare professional. Depending, of course, on the level of difficulty, the possibility must always be considered in those with learning difficulties that they lack insight into their own condition and abilities to the extent that they may give an apparently persuasive account of their activities which is at odds with their actual ability, or misinforms the casual listener as to the level of sophistication of behaviour. Tribunals should not be casual listeners. They need to be active listeners, and should probe the account put forward, where possible through hearing evidence from someone close to the appellant who knows the level at which they function. The appellant did not attend this hearing and perhaps more materially, neither did his parents. To fail to positively offer that opportunity in the circumstances may of itself have been an error of law.
11. I make a similar point in relation to the tribunal's reliance (paragraph 10 of the statement of reasons) on the observation in a medical letter of 2013 that, in declining the offer of social services support the appellant had made it clear how independent he was, without any probing of the appellant's level of functioning. This was despite the documented evidence as to his learning difficulties and his GP's letter (page 109) to the effect that they gave him "considerable problems" to the extent that he was said to be unable to manage financially on his own or live independently because of his inability to carry out simple tasks.

The GP's letter

12. As to the GP's letter, it rather seems to have been dismissed by the FTT on the basis that there was no indication that the information was acquired other than by report, presumably from the claimant or his parents, the implication being that it was simply self-serving.
13. The letter, however, was headed "Appeal for ESA" and concluded by expressing the hope that the comments could be taken into account. It would be perhaps unusual for a professional person to put forward such positive assertions in relation to a formal legal challenge if they were based merely on information provided without there being some element of independent knowledge or exercise of professional judgment to corroborate any such report. I refer the fresh tribunal to the decision of Upper Tribunal Judge Wright in *BH-v- Secretary of State for Work and Pensions* [2013] UKUT 241 (AAC). Judge Wright says at [14] that the tribunal used (emphasis as in the original)

"the regrettably overused mantra that the…GP's letter's explanation of the appellant's restrictions in terms of self-care and walking was of less evidential worth than the views expressed in the report because it was **'just the GP reiterating what the appellant had told him'**: This finding appears in many First-tier Tribunals' statements of reasons but rarely, in my experience at least, with proper findings of fact or evidential base to back it up or a proper explanation as to why the tribunal drew this inference (or, indeed, an exploration with the appellant about why his or her GP may simply be saying what he or she had been told by the appellant). A claimant's GP is just as professional as any other doctor or health care professional who gives evidence to a tribunal, and,

save where a proper explanation is given as to why he or she would do this, should not be assumed to simply be a vehicle for repeating what the claimant has told the GP as opposed to offering the GP's professional opinion.

14. I should say that Judge Wright goes on to say that GPs "can express their evidence in careful terms if it is no more than what they are being told". That caution is not apparent in this letter.
15. As to the GP's letter in this case the final substantive paragraph is worded as follows:

    Due to his ongoing mental illness [I pause here to mention that this illness is schizophrenia] *alongside his learning disability, he struggles with any new tasks or any difference in his routine as previously mentioned. If anything like that happens, he becomes extremely anxious and deteriorates rapidly. I find it very difficult to see how [name] could manage any job, no matter how simple. Any need for regular attendances to sign-on/attend appointments for his benefits causes him considerable stress and he deteriorates."*

16. That part of the letter is so patently of relevance in relation to the potential application of regulation 29 that it was essential that its evidential value was clearly assessed and explained; the comment at paragraph 19 that *"The tribunal would have expected a significant deterioration to have resulted in a change of medication or referral to secondary services"* is simply insufficient to explain the implicit finding that the doctor had expressed himself in such terms despite that not being so.

The perceived need to formally challenge the ESA85

17. In my judgment it was also unfair of the FTT (at paragraph 12) to pray in aid against the appellant the lack of complaint about the healthcare professional's report (the ESA85) prior to May 2017 when a letter from the CAB was lodged fleshing out the appeal points.
18. The medical examination had taken place in December 2016. There was then the mandatory consideration process so the appeal was not made until March 2017, and it was made apparently without the informed assistance later available from, initially the CAB and later Mr Gee of Shelter. However that original appeal form, I think filled in by one of the appellant's parents, puts forward the argument that the appellant's learning difficulties have not been fully appreciated, and that remark of itself is a challenge to the opinion of the healthcare professional expressed in the report. Further, my understanding is that it is not until the response is filed that the full report is available to an appellant and that occurs after the appeal form is completed and the appeal lodged. If I am wrong about this, the Secretary of State will be able to put that right in a brief submission to the fresh FTT.
19. It must also be remembered that the right of appeal is to have the decision considered again *ab initio*: the tribunal stands in the shoes of the Secretary of State's Decision Maker and considers matters completely afresh. Whilst the tribunal is entitled not to deal with matters not raised by the appeal it would be a rare ESA appeal in which there was no need to make an evaluation of the healthcare professional's report because it had not been formally challenged: that report is generally the only evidence put forward by the Secretary of State, and whether or not it is formally put in issue it must be assessed as to its probative worth in the light of the other evidence then available in order for the tribunal to properly undertake the task of a rehearing on the merits.
20. If there was any criticism implied in the tribunal's comments as to the lack of a formal complaint about healthcare professional's report I draw attention to my decision in *KN-v- Secretary of State for Work and Pensions* [2016] UKUT 521 (AAC) in which I said paragraph 24 that "there is no legal requirement for a complaint to be made in tandem

with an appeal, and it seems to me wholly wrong to use the absence of such a complaint as a significant credibility pointer."

21. I have already dealt sufficiently with the treatment of the GP letter, to which there are further references in that paragraph.

Other matters

22. I do not need to deal with every issue because, as Mr Thompson correctly states, they will be, in legal parlance, subsumed by the appeal; that is to say that the fresh tribunal will start again, and consider all matters afresh, but it may be helpful if I observe that there is in the papers the report of a previous medical assessment conducted on 25 July 2012, where, although the appellant's answers to questions about his schizophrenia suggested that it was stable on medication, and his description of a typical day implied little difficulty coping with common daily activities, the assessment was curtailed. The explanation for that appears at page 93 of the bundle (page 27 of that ESA 85) and seems to me pertinent

"At interview, he has remarkably slow speech, no eye contact and he has reduced facial expression, he needed prompting to answer the questions, though his father came with him but he told him to wait in the waiting room. From the whole body of evidence he is likely to have restrictions due to his mental health condition."

The new hearing

23. Both the grounds of appeal and the submission of the Secretary of State will be before the tribunal, which will take a completely fresh look at the case, noting the matters that I deal with here.
24. The appellant is encouraged to attend the hearing preferably together with somebody who knows him well, his mother or father perhaps, who can speak to the tribunal about the practical problems that his learning difficulties in particular cause him.
25. The appellant should understand that the fact that the appeal has succeeded at this stage because of errors of law is not to be taken as any indication as to what the new tribunal might decide on the evidence before it.

CASE MANAGEMENT DIRECTIONS

1. These directions may be supplemented or changed by a District Tribunal Judge giving listing and case management directions.
2. The case will be an oral hearing listed before a differently constituted panel.
3. The parties shall send to the HMCTS Leeds office as soon as possible any further relevant written medical or other evidence, if there is any. If they cannot send that evidence within 2 weeks of the issue of this decision the parties will need to contact that office to let them know that further evidence is expected. That is not to say that any further medical or other evidence will be necessary.
4. The appellant must understand that the new tribunal will be looking at his health problems and how they affected his daily activities at the time that the decision under appeal was made, 13 February 2017. Any further evidence, to be relevant, should shed light on the position at that time.
5. The new panel will make its own findings and decision on all relevant descriptors considering all aspects of the case afresh but noting the matters set out here.

Upper Tribunal Judge Paula Gray

Signed on the original on 29 March 2018

CE/3347/2017