IN THE UPPER TRIBUNAL **Appeal No. CE/3253/2017**
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 31 July 2017 under number SC049/17/00295 was not made in error of law.

REASONS FOR DECISION

Background

1. This is an appeal about employment and support allowance ("**ESA**"). The main issue is whether the appellant, who has a latex allergy, qualifies for an award of ESA under Regulation 29(2)(b) (read with Regulation 29(3)) of the Employment and Support Allowance Regulations 2008 (the "**ESA Regulations**"). The Secretary of State for Work and Pensions ("**SSWP**") decided on 14 December 2016 that the appellant was not entitled to ESA, and that decision was confirmed by the First-tier Tribunal ("**the tribunal**") in its decision dated 31 July 2017. The appellant has a latex allergy. In the past, as a result of this allergy, she has been found to qualify for various benefits. In 2006, she was assessed as 15% disabled for life due to her latex allergy. She was found incapable of work by a tribunal on 28 April 2009, on application of the provisions of Regulation 27(1) and (2)(b) of the Social Security (Incapacity for Work) (General) Regulations 1995. She has also previously been in receipt of ESA since 2012 (although the healthcare assessment dated 2 November 2012 in the papers before the tribunal did not support an award). She appeals against the decision of the tribunal dated 31 July 2017.

2. I take as the grounds of appeal for the appellant the formal grounds drafted by Counsel and received by the Upper Tribunal on 14 November 2017. Prior to that a letter had been received from the appellant, attaching further evidence which was not before the tribunal. The letter stated that she was appealing because the tribunal failed to make proper finding of facts. The detailed terms of the letter are in essence a disagreement with the facts found and conclusion reached by the tribunal. In my view this letter proceeded on a misunderstanding of the nature of the appeal to the Upper Tribunal, which is not a rehearing of the case at which an appellant is free to lodge further evidence, but an appeal on points of law arising from the tribunal's decision only (Section 11(1) of the Tribunals, Courts and Enforcement Act 2007). I have therefore proceeded on the basis of the grounds of appeal subsequently lodged on behalf of the appellant, which raise points of law. In those, it is argued on the appellant's behalf that the decision of the tribunal should be set aside because of various errors of law, which I summarise as follows.

3.1 Ground 1. The tribunal took into account an irrelevant consideration. It is argued it was irrelevant and irrational for the tribunal to observe that when the appellant sat down in the tribunal she did not ascertain if the cushion on the chair had latex within, given that she had identified in her notice of appeal that she required a latex free environment. It is later added in a letter dated 11 April 2018 that, if the tribunal chose to take this matter into account, they should have ascertained if HMCTS had stated anything in response to her request for a latex-free environment.

3.2 Ground 2. The tribunal's approach to Regulation 29 contained an error of law in that it should have considered whether there was a substantial risk to health and whether the risk could be ameliorated by medication or reasonable adjustments. It did not follow the approach set out at paragraph 41 of *SSWP v Cattrell* [2011] EWCA Civ 572. It is added in a letter dated 11 April 2018 that even though the *Cattrell* case predates Regulation 29(3), *Charlton v SSWP* (2009) EWCA Civ 42 makes it clear that there has to be a consideration of risk when applying Regulation 29(2)(b).

3.3 Ground 3. The tribunal's approach to Regulation 29 contained a further error of law in that it conflated the concept of 'reasonable adjustments' in the regulations with the requirement to make reasonable adjustments pursuant to the Equality Act, an approach rejected in *JS v SSWP* [2014] UKUT 0428 (AAC).

The appellant requests the Upper Tribunal to allow the appeal and order a fresh consideration of the case.

3. Permission to appeal was granted by the Upper Tribunal judge on the basis that the grounds of appeal merited further consideration. The Secretary of State for Work and Pensions ("**SSWP**") made written submissions received by the Upper Tribunal on 21 February 2018. She does not support the appeal. In relation to the three grounds set out above she responds, again in summary:

3.1 The statement about latex and the cushion at the hearing requires to be read in the context of the previous sentence where the tribunal found that the claimant was able to recognise the possibility of potential latex.

3.2 The tribunal did not err in law in its approach. The tribunal identified that there was risk, but also that the risk could be reduced by taking practical measures.

3.3 While it is unfortunate that the tribunal refers to the Equality Act 2010 in the context of reasonable adjustment, given that *JS v SSWP* [2014] UKUT 0428 (AAC) establishes that a tribunal cannot assume that because an employer has duties to make reasonable adjustments under that Act there is no risk, this was not an error on the basis of which the appeal should be allowed. An employer is expected to make reasonable adjustments, but also the claimant has to do so using her own knowledge about how to keep safe. In this case if the claimant does so, the risk is unlikely to be substantial.

4. Further submissions were received on behalf of the appellant dated 11 April 2018 in response to the SSWP's submissions. They raise as additional points to those noted in paragraph 2 above:

   4.1 Ground 4. The tribunal should have made findings in fact as to the severity of the problem and specific ability to work rather than generalising.

   4.2 Ground 5. The tribunal should have made clearer findings in fact around how the appellant manages her allergy.

5. Neither party has requested an oral hearing and I am satisfied that I can fairly determine this appeal on consideration of the papers.

Governing law

6. Under Regulation 29(2)(b) of the ESA Regulations, a claimant is to be treated as having limited capability for work (and therefore entitled to ESA) if:

> "(b) the claimant suffers from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work".

7. What counts as a 'substantial risk' within Regulation 29(2)(b) is an objective test, at least as far as physical health is concerned. It does not depend on the appellant's subjective views of existence of significant risk (*MW v SSWP* (ESA) [2012] UKUT 31 (AAC) para 3). In deciding objectively whether a risk is 'substantial', the gravity of the potential harm as well as the likelihood of the risk of it occurring are relevant. But that is not to say that, whenever the gravity of the potential harm is serious (even if life threatening, as argued in this case), it follows that there is a substantial risk for the purposes of Regulation 29(2)(b). It is a question of considering both factors (magnitude of potential harm if risk occurs, and likelihood of the risk occurring), and taking a view on the basis of the facts of the case as to whether the overall risk to the mental or physical health of any person is substantial if the appellant is found fit for work. It is well established that a decision about the level of risk ought to be made in the context of the type of work for which the claimant is suitable. However, "No greater identification of the type of work is necessary other than that which is dictated by the need to assess risk arising from work or the workplace" (*Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42 para 38).

8. It is important to read Regulation 29(2)(b) with Regulation 29(3). This applied with effect from 28 January 2013, and provides:

> "(3) Paragraph (2)(b) does not apply where the risk could be reduced by a significant amount by—
> (a) reasonable adjustments being made in the claimant's workplace; or

(b) the claimant taking medication to manage the claimant's condition where such medication has been prescribed for the claimant by a registered medical practitioner treating the claimant".

9. It is therefore now express that the 'risk mitigation' factors of reasonable adjustments and medication must be taken into account by a tribunal in its application of Regulation 29(2)(b). Regulation 29(2)(b) will not result in an award of ESA if reasonable adjustments in the workplace or prescribed medication reduce risk by a significant amount. 'Significant amount' is not defined in the ESA Regulations. Annotations to the ESA Regulations, at paragraph 9.78 of Sweet & Maxwell's Social Security Legislation 2017/18 Volume 1, suggest that 'significant amount' means where the risk is reduced to a level describable as less than substantial. I agree with this approach. The primary route to an award of ESA is by the requisite number of points being scored under Schedule 2. Regulation 29(2)(b) is an exceptional circumstances provision, designed to cover situations where an award is not merited under point scoring activities in Schedule 2, but where risks of a person being found fit for work are at an unacceptable level or, in the words of Regulation 29(2)(b), 'substantial'. While Regulation 29(3) makes it explicit that assessment of the level of risk should take into account the risk mitigation factors listed, Regulation 29(3) is not intended to undermine protection afforded to claimants where risk is at an unacceptable level. Accordingly, for risk to be reduced by a 'significant amount' so that Regulation 29(2)(b) does not apply, the reduction should result in the overall risk being less than substantial.

10. How does the express requirement to take into account 'reasonable adjustments' in the workplace under Regulation 29(3)(a) fit with the provisions concerning reasonable adjustments in the Equality Act 2010? Care needs to be taken with the case of *JS v SSWP* (ESA) [2014] UKUT 0428 (AAC), referred to in relation to Ground 3 by the appellant and SSWP, because it predated the amendment of Regulation 29 by the addition of Regulation 29(3)(a) (*JS* was an appeal against a decision of the SSWP dated April 2012). *JS* must now be read in the light of the express requirement to consider reasonable adjustments in Regulation 29(3)(a). While I accept that there is no need to make an assessment about reasonable adjustments under the Equality Act 2010 when considering Regulation 29(2)(b), an assessment will have to be made about reasonable adjustments in the workplace in a more general sense. What is required, as accepted in *SB v SSWP* (ESA) [2015] UKUT 88 (AAC) paras 5-6, is a claimant specific risk assessment. This will include what steps could reasonably and realistically be taken on the facts of a specific case to avoid substantial risk. But evidence of what a potential employer would or might do by way of reasonable adjustments in compliance with their Equality Act duties is not necessary.

11. I also accept the SSWP's submission that the reasonable adjustment provision in Regulation 29(3)(a) in conjunction with Regulation 29(2)(b) invites consideration of measures which both employer and employee might reasonably take to reduce risk. The wording of Regulation 29(3)(a) refers to reasonable adjustments in the

claimant's workplace, without confining its application to adjustments made only by an employer. It is normal in the workplace to expect both employer and employee to play their parts in keeping the working environment as risk free as practicable. In my view both employer and employee can be expected to take reasonable measures. Accordingly, measures that a claimant may reasonably take to reduce risk are relevant either under the reasonable adjustment wording in Regulation 29(3)(a), or even if that was wrong to the general consideration of whether a risk is substantial under Regulation 29(2)(b). A tribunal applying Regulation 29(2)(b) is trying to ascertain whether a claimant can operate in the workplace without substantial risk to her health or others. Reasonable adjustments which may be made by both employer and employee are in my view relevant to consideration of whether risk would be at an unacceptable level if a claimant is found fit for work.

12. While a tribunal's reasons must show that it has addressed the tests in Regulation 29, the level of detail required is not necessarily high (*NS v SSWP* (ESA) [2014] UKUT 115 (AAC) para 50). It depends on the particular circumstances whether reasoning is adequate.

This appeal

13. I do not accept the submission on the appellant's behalf that previous awards of benefit are an indicator that the current tribunal erred in its approach. Regulation 29, as in force at the date of the decision under appeal in this case, was in different terms to its statutory predecessors, under which previous awards of benefit were made to the appellant. (Both Regulation 27 of the Social Security (Incapacity for Work) (General) Regulations 1995, applied by a tribunal in 2009, and Regulation 29 before the addition of Regulation 29(3), applied to a decision on benefit shortly after a medical examination on 2 November 2012, are in different terms to Regulation 29 as it applied to the decision under appeal in this case). Some aspects of the old law remain relevant, since Regulation 29(2)(b) is still in force. But before the change in the law there was at the very least uncertainty (as demonstrated by *JS v SSWP* (ESA) [2014] UKUT 0428 (AAC)) about the extent to which reasonable adjustments had to be taken into account. Now it is express that, in appropriate cases, tribunals must take into account reasonable adjustments and medication when assessing whether there is substantial risk. Both factors were important in the present appeal.

14. The tribunal in this case correctly identified the law governing the decision of the SSWP dated 14 December 2016 which was under appeal, setting out that law at paragraph 21 of its statement of reasons. It then applied it in the three following paragraphs and having regard to findings made elsewhere in the statement of reasons. The tribunal identified work that the appellant could do, caring, in paragraph 22, in conjunction with findings in paragraph 14 that she last worked as a carer and now looks after her mother in law and an old friend, making meals for him and others and going to their homes, so making the broad assessment required by *Charlton*. It then assessed risk in that context.

15. In paragraph 22 of its statement of reasons, the tribunal specifically found that the appellant suffered from a latex allergy, which when in contact with latex caused generalised body swelling and a rash and breathing problems. It therefore identified the risk to her health. The reasonable inference from these findings, in particular breathing problems and generalised swelling, is that the magnitude of the potential harm was very serious. There was no need for the tribunal to make any more detailed findings about this, because the gravity of possible harm was evident from the findings it did make. But the fact that magnitude of potential harm is serious does not mean of itself that a risk is 'substantial' for the purposes of Regulation 29(2)(b), as explained in paragraph 8 above. The likelihood of the risk occurring, and the factors mentioned in Regulation 29(3), are also relevant in the assessment of level of risk. The tribunal assessed the likelihood of the key risk (harmful exposure to latex) occurring. On the findings the tribunal made, the likelihood of the risk occurring was very low. The tribunal made these findings in that regard:

> "The appellant has an allergy to latex. This started around 17 years ago….The appellant has an epipen and she has never had to use this in 16 years. She is under the care of her General Practitioner. She has not had any specialist input for many years" (paragraph 13).
>
> "She keeps an epipen to use in an emergency. She has never had to use the epipen. She has not had specialist input or hospital admissions for many years. She has not had an allergic reaction for many years and she knows how to avoid getting in contact with latex. A typical history shows that she is able to attend to hygiene. She wears latex free gloves and does housework. She prepares meals, she goes shopping, she socialises, attends appointments, deals with correspondence and interacts. She is very alert and aware of things that may trigger an allergic reaction, so she avoids contact with latex" (paragraph 22).

These findings have to be seen in the light of other factual findings by the tribunal at paragraph 14 of its statement of reasons about the appellant going to other people's homes, to family and friends and parties, driving her friend's car, going out socially, going to the local pub, and caring for her friends and family. The appellant lives a full life, and in that context has managed to avoid contact with latex for many years - and has never had to use an epipen in 16 years. Accordingly, although the magnitude of potential harm was great, the tribunal's ultimate finding as to the level of risk does not disclose an error of law, given the low likelihood of harm actually occurring on the facts found, particularly after the tribunal had gone on to consider the factors in Regulation 29(3).

16. In relation to Regulation 29(3)(b), the tribunal made findings about medication (cetirizine antihistamines and epipen) taken by the appellant. It found she carried her epipen with her (paragraph 14 of its statement of reasons). These medications operate to reduce symptoms of allergic reaction if there is exposure to latex, and reduce risk of harm to the appellant's health. They therefore assist in managing her latex allergy, and were relevant considerations for the tribunal. The

tribunal also considered the issue of reasonable adjustments for the purposes of Regulation 29(3)(a). As I have found in paragraph 11 above, the wording of Regulation 29(2)(b) read with Regulation 29(3)(a) is wide enough to cover both reasonable adjustments which could be made by an employer, and reasonable adjustments which could be made by an employee. Both types of adjustments are relevant to the level of risk that exists, assessed objectively. The tribunal attached significance to the appellant having had her latex allergy for 16/17 years, being able to manage it well, and recognise the possibility of potential latex (paragraph 23 of its statement of reasons); also wearing latex free gloves, being alert and aware, and avoiding contact with latex (paragraph 22 of its statement of reasons). These are factors which reduce risk. The tribunal also considered at paragraph 23 of its statement of reasons that there were many environments where employers can take the appropriate action to minimise risk from latex. It listed a number of occupations where people worked with latex allergies such as health care workers, including dental practice staff, carers such as residential home staff, cleaners and housekeepers, hairdressers, caterers who wear gloves at work, motor mechanics, people working in the electrical industry and balloon entertainers. Read fairly, the tribunal made findings that workplaces can reasonably be adjusted to reduce risk of latex allergy, with a combination of actions by the allergy sufferer and the employer. It was not only entitled to take into account these reasonable adjustments, but bound to do so.

17. After considering these factors, the tribunal found at paragraph 29 that there was no substantial risk. The tribunal stated that it took the word substantial on its ordinary meaning. This meant a much greater risk than it had found. I consider that the tribunal's approach was not in error of law.

18. This analysis answers most of the five grounds of appeal summarised in paragraphs 2 and 4 above, but I now look at them in turn. I am not persuaded by any of those grounds for the following reasons.

19. Ground 1. It was neither irrelevant nor irrational for the tribunal to take into account that the appellant sat down on a chair without ascertaining whether the cushion on it had latex in it. Tribunals are entitled to take into account observations of appellants (*ID v SSWP* 2015 UKUT 692). They do not have to find out further information from HMCTS before they do so, even when the notice of appeal specifies that a latex free environment is required. Given everything else the tribunal found, the observation made by the tribunal was confirmation of a conclusion it would have reached anyway. Even if I was wrong about this, I would not find any error in this regard to amount to a material error in law, given that it was one brief comment in a decision which correctly identified the statutory test and then gave full reasons (not on any view confined to this one observation) why it found there was no substantial risk within Regulation 29(2)(b).

20. Ground 2. I do not accept that the tribunal erred in failing to follow the approach set out in paragraph 41 of *SSWP v Cattrell* [2011] EWCA Civ 572. This states:

> "41 In all cases which come before it the tribunal must identify the risk; that is to say it must look at the probability of the suggested adverse occurrence and the gravity of that occurrence if it should occur, and it must say whether there is no underlying work which the claimant otherwise could do which would not carry a substantial risk to her health. If the Secretary of State wishes to contend in a particular case there are clearly some jobs that the claimant can do, whether available in large numbers or in small numbers, it is of course open to him to attend either in person or in writing and to say so".

Cattrell predates the amendment of Regulation 29(3), and the paragraph set out above is an incomplete statement of the test which now must be applied by tribunals. *Cattrell* is still correct that a tribunal must identify the risk, a step in which involves it looking at the probability of the suggested adverse occurrence and gravity of the occurrence if it should occur. As set out in paragraph 15 above, the tribunal did so in this case and was not in error of law. But then in appropriate cases the tribunal also must consider the risk mitigation factors in Regulation 29(3), not mentioned in *Cattrell* (as it did in the present case). The passage in *Cattrell* which I found most in point was in the decision of Lord Justice Hughes at paragraph 37, where he stated:

> "I can see why [the SSWP] wished to say that on the facts the tribunal ought to have found that once you take into account such ordinary precautions as might reasonably be expected, including carrying the epi-pen, against the limited possibility of severe anaphylactic shock, and once you take into account screening out occupations with obvious exposure to rubber and latex, the risk to health should be found not to be substantial. That however is a question of fact in each case. It was not a question of law on appeal of the Upper Tribunal and it is not a question of law here".

As *Cattrell* found, the question of substantial risk was in essence one of fact and was for the tribunal. It was not a question of law for the Upper Tribunal.

21. Ground 3. I accept that the tribunal stated at paragraph 23 of its statement of reasons that "An employer is obliged under the Equality Act to make certain adjustments in the workplace to make certain that an individual is employed in a safe system of work". But I do not find this to be an error of law. The tribunal's statement is correct and not an error, insofar as the individual has a disability and the reasonable adjustment provisions of the 2010 Act apply. While I accept that it would have been an impermissible approach for the tribunal to make a decision that, because the Equality Act 2010 requires an employer to make reasonable adjustments to accommodate a disabled person, there is therefore no risk, or proceed itself to make an assessment of whether duties are owed by employers under the 2010 Act, this is not what the tribunal did in this case. Instead, the tribunal considered a number of adjustments that could be made by both the appellant and employers, as set out in paragraph 16 above. In doing so it completed the 'claimant specific risk assessment' referred to in *SB v SSWP* (ESA) [2015] UKUT 88 (AAC) referred to in paragraph 10 above. After doing this, it found that the risk was not substantial within Regulation 29(2)(b). Under

Regulation 29(3)(a) the tribunal was under a positive duty to consider reasonable adjustments, as it had identified in paragraph 21 of its statement of reasons. Its discussion of adjustments in the workplace requires to be seen in this context, and in this case does not disclose an error of law.

22. In relation to Grounds 4 and 5, I find that the tribunal made sufficient findings in fact to justify its decision under Regulation 29. The tribunal's findings addressed the magnitude of the harm that might occur as well as the likelihood of the harm materialising, as set out in paragraph 15 above. It also made sufficient findings about the appellant's ability to work, having regard to its assessment of her last job being as carer and that she was still looking after her mother-in-law and an old friend who is 88 (paragraph 14). Its findings as to how the appellant manages her allergy (taking antihistamine, carrying an epipen, avoiding contact with latex, wearing latex free gloves, being alert, being aware of things that trigger an allergic reaction, being aware of the possibility of latex, at paragraphs 22 and 23), together with its findings about employers making reasonable adjustments, were sufficient to justify the decision it reached. Although the appellant considers that substantial risk to her health arises if she is found not to have limited capability to work, the assessment of substantial risk is an objective one for the tribunal. The decision reached by the tribunal was one it was entitled to reach on the facts found by it.

Conclusions

23. For these reasons I do not find that the tribunal's decision was made in error of law and I refuse the appeal.

Signed on the original
on 14 June 2016

A I Poole QC
Judge of the Upper Tribunal