DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Newcastle-upon-Tyne First-tier Tribunal dated 14 May 2018 under file reference SC228/17/01776 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the Secretary of State's decision dated 7 August 2017 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the hearing:

(1) The appeal should be considered at an oral hearing.

(2) The new First-tier Tribunal should not involve the tribunal judge, medical member or disability member who previously considered this appeal on 14 May 2018.

(3) The Appellant is reminded that the tribunal can only deal with the appeal, including his health and other circumstances, as at the date of the original decision by the Secretary of State under appeal (namely 7 August 2017).

(4) If the Appellant has any further written evidence to put before the tribunal, and especially medical evidence, this should be sent to the HMCTS regional tribunal office in Newcastle-upon-Tyne within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were at the date of the original decision of the Secretary of State under appeal (see Direction (3) above). However, given the amount of documentation already on file, I doubt very much whether there can be any more relevant evidence to be adduced.

(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 subject matter of this Upper Tribunal decision

1. This is a case about two procedural issues.

2. First, it is a case about appeal bundles. To be more precise, this is a case about a Tribunal Registrar's powers when determining which papers should be included in (or, more particularly, excluded from) the appeal bundle that goes before the First-tier Tribunal that hears social security and child support appeals in the Social Entitlement Chamber

3. Second, this is a case about the admissibility of evidence. To be more precise, this is a case about whether an audio-recording (and the associated transcript) of a consultation with a health care professional for the purposes of personal independence payment should be admitted in evidence by the First-tier Tribunal.

The background to this appeal to the Upper Tribunal

4. The Appellant in the present case was appealing against a decision dated 7 August 2017 that he was not entitled to personal independence payment (PIP). There was, however, a back story to this appeal. The Appellant had first claimed PIP in May 2013. That claim was rejected. Following an unsuccessful mandatory reconsideration, he appealed to the First-tier Tribunal (FTT), which dismissed his appeal in April 2015. He then appealed to the Upper Tribunal. In September 2015 Upper Tribunal Judge Hemingway allowed the appeal (under case reference *CPIP/1922/2015*) and remitted the case for re-hearing before a new FTT. A fresh FTT duly re-heard the appeal in November 2015 – and dismissed the appeal again. In January 2016 Judge Hemingway refused permission to appeal on the 'second time around application' arising out of that FTT decision (*CPIP/281/2016*).

5. The Appellant made a second claim for PIP in May 2016, which was refused in July 2016. However, on this occasion the Appellant appealed successfully to the FTT. In February 2017 a FTT found that he qualified for 6 points for daily living and 8 points for mobility, so awarding him the standard rate of the PIP mobility component from the date of claim until 27 July 2017. There was no appeal by either party against this FTT decision.

6. In June 2017, and so shortly before the FTT's award expired, the Appellant was invited to make a PIP renewal claim. This time his claim was again refused (by the DWP decision dated 7 August 2017), as the Appellant scored just 4 points for mobility and no points for daily living. On 14 May 2018 another FTT dismissed the appeal. The present proceedings before the Upper Tribunal relate to that appeal against the disallowance of the PIP renewal claim. It turns in part on how the appeal bundle for the hearing was managed.

Appeal bundles in the First-tier Tribunal (Social Entitlement Chamber)

7. The 'appeal bundle' is simply lawyers' jargon for the case papers that are put before the court or tribunal. In that part of the FTT Social Entitlement Chamber that deals with social security and child support appeals the basic system is simple. The Respondent (i.e. typically the Department for Work and Pensions (DWP) but Her Majesty's Revenue and Customs (HMRC) for tax credit cases and local authorities for housing benefit appeals) is required to send the FTT office a 'response', principally consisting of a copy of the decision under appeal and an explanation as to why it was made, along with relevant supporting documentation (see the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685; "the 2008 Rules"), rule 24(1)-(5)). The Respondent is also required to

send a copy of the response to the Appellant at the same time as it is sent to the FTT. Depending on the assiduousness of the decision-maker who compiled the response, the supporting documentation will be carefully and coherently organised in chronological order or will be thrown together at random apparently without the input of any human agency at all (or, more often than not, the bundle will fall somewhere on the spectrum in between those two extremes). Although not a statutory requirement, as a matter of good practice the response should include a contents page (often called a 'schedule of evidence') which again, depending on the care taken by the decision-maker, will be of greater or lesser utility in trying to track down any given document in the bundle.

8. The Appellant then has the right to file a reply, strictly within one month (rule 24(6)-(7)). In practice what happens is that both parties may provide the FTT office with any number of further submissions and evidence at any time, which are then numbered, copied and issued by the FTT office to the parties. The contents page (or schedule of evidence) may or may not be adequately updated to reflect these additional materials. Documents in the bundle may be duplicated (or triplicated or worse). Documents may be submitted by the parties with pages missing, whether accidentally or deliberately. Documents may be photocopied by the FTT office with alternate or random pages omitted. Documents may be photocopied in such a way that they are not readily legible. Nobody really takes responsibility (or 'ownership' in management-speak) for the internal structure of the FTT file, so if extra papers get sent in, they are invariably added by default to the appeal bundle. Unless, that is, they are left on the FTT's internal administrative file and not copied to the parties, despite being relevant to the proceedings, which is by no means unknown. All this is a world away from the prescriptive requirements of the relevant Practice Direction for the composition of appeal bundles under the Civil Procedure Rules. But FTT judges and members are well used to the problems and they just get on with their judicial role as best they can.

The management of the appeal bundle in this case

9. As already noted, this case had quite a complicated back story. On 31 October 2017 the decision-maker sent the FTT office a response on behalf of the DWP which ran to a total of 708 pages. Many judges will have seen bigger bundles but all would recognise that is on the long side for a PIP appeal. In practice this appeal bundle fell into three uneven parts. The first part, at the very front of the appeal bundle (pp.A-H and pp.1-12), comprised the DWP's formal response resisting the appeal, together with the Appellant's notice of appeal. The second part, running from p.13 all the way through to p.512, was simply indexed in the schedule of evidence, with no more ado, and in very general terms, as "Notification and evidence relating to previous decision" from "various" dates. The third part, being pp.513-708, related to some of the latter stages of the (ultimately successful) second PIP claim along with documents about the renewal claim now under appeal. This last part was itemised in the schedule of evidence and indexed to some extent.

10. On 7 November 2017 a clerk sent the file to a Tribunal Registrar with a note stating simply "Response has 700+ pages. Please give listing directions". On 17 November 2017 a Tribunal Registrar issued the parties with Directions, stating that the Tribunal "seeks to remove duplication and intends to utilise only one copy of each document in the papers". To that end, the Registrar annexed a detailed index showing which documentation it was proposed to include. The parties were invited to review the index and to confirm "it reflects the response documentation received to date". The Appellant wrote on 22 November 2017 agreeing to the reduced bundle, and stating that he did not understand why the DWP had sent "additional duplicated papers relating to previous, now closed cases". The Appellant was also given a

deadline to provide any further evidence he wished to have included, which he duly did, providing a further 21 pages of additional evidence (letter dated 3 January 2018). I return later to this further evidence.

11. Subsequently, on 25 January 2018, the Tribunal Registrar issued further directions, requiring the Respondent (i.e. the DWP) "to confirm within 14 days of the date of issue of these directions that they accept the reduced bundle/index to be used at the hearing and that it contains the relevant information for their response (without duplication)". The Registrar added that in the absence of any reply the FTT would proceed with the slimmed down appeal bundle. The directions explained that "the surplus documentation will be retained by the Tribunal but will not be made available in advance of the hearing to the panel, unless the Respondents make a specific request as to the reintroduction of a removed document".

12. On 9 February 2018 the DWP finally acknowledged some directions issued in December 2017 and receipt of the reduced working bundle, stating it had been referred to a presenting officer for feedback and for confirmation as to whether the bundle was acceptable. There was, in the event, no further communication from the DWP. The FTT office therefore went ahead and issued the revised and freshly paginated appeal bundle with the new index drawn up by the Tribunal Registrar. The index, in a small font, ran to more than two printed pages. It meticulously detailed the old and new pagination and included a description of individual documents. Crucially, however, it omitted in its entirety pp.13-512 of the DWP's original response to the appeal. The new bundle was 201 pages long.

The First-tier Tribunal hearing and decision

13. The FTT held an oral hearing of the appeal on 14 May 2018, lasting almost 1½ hours. The Appellant attended but there was no presenting officer. It does not appear from the record of proceedings that there was any discussion of the fact that the appeal bundle had been reduced pursuant to the Tribunal Registrar's directions. The FTT dismissed the appeal, concluding that the Appellant scored 0 daily living points and 4 mobility points. In other words, the decision-maker's decision refusing the PIP renewal claim was confirmed. Neither the FTT's decision notice nor the more detailed statement of reasons made any reference to the fact that the appeal bundle was much reduced in size when compared with the DWP's original response. Presumably the FTT took the view that the Appellant's consent and the Respondent's failure to reply to successive directions meant the question was no longer live.

The proceedings before the Upper Tribunal

14. The Appellant's own grounds of appeal to the Upper Tribunal were for the most part an attempt to re-argue the case on its factual merits, and as such were not persuasive. However, I gave the Appellant permission to appeal on several grounds, one of which concerned the FTT appeal bundle – an issue which the Appellant himself had not identified in his (lengthy) application. I gave directions that the parties be issued with both the slimmed down FTT appeal bundle and what I described as the "surplus bundle" (or SB), i.e. the original DWP response. In giving permission to appeal, I observed as follows:

> "18. Looking at the bundle marked surplus documents, it appears that in addition to the duplicated documents the Registrar removed documents which were not duplicates. The Registrar created an 'index for docs not in the working bundle'. This shows the extent of the material which she removed from the appeal bundle originally prepared by the DWP. For example, these included papers relating to an unsuccessful PIP claim dated 17.05.2013 (SB pp.13-44), which included a HCP report dated 07.01.2013 (SB pp.64-83). They also include another ESA

> tribunal decision (SB p.103), which may or may not have been relevant. In addition, there is a decision by Upper Tribunal Judge (UTJ) Hemingway in *CPIP/1922/2015* (SB p.291) on an earlier PIP appeal (allowing the claimant's appeal against a FTT decision dated 10.04.2015, which in turn referred to a DWP decision dated 17.02.2014). I can see from the FTT's computer records that that remitted case was reheard by a different tribunal on 30.11.2015 and the appeal dismissed. I am not sure those latter papers are in either bundle. In short, the Registrar appears to have removed any documents which were not directly arising from current appeal or referred to as enclosures in those documents.
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> 19. It is arguable the Registrar's actions went beyond her stated purpose of removing duplicated documents in a way that was not made explicit in her directions. The extent of the elimination of earlier documents sits uneasily with the Upper Tribunal caselaw about the DWP's duty to disclose relevant medical evidence from previous disability claims (see generally *CH and KN v SSWP (PIP)* [2018] UKUT 330 (AAC)). I am sure the Registrar's actions were done from the best of motives, i.e. thinking it would be helpful to both the FTT and the parties to condense the admittedly unwieldy bundle. However, in doing so, she arguably usurped the Tribunal's judicial role in deciding what evidence was relevant to the appeal. I am not sure the claimant's preparedness to agree to the reduced bundle necessarily entitled the FTT not to investigate the position as regards the relevant evidence."

15. Mr R J Whitaker, the Secretary of State's representative, supports the Appellant's appeal on this ground. In his written submission he observes as follows:

> "The registrar had informed the parties that their intention was to remove duplicate copies of documents (p202, new numbering). However, the registrar in fact removed copies of documents from the bundle that were not duplicates. … There is an absence of reasoning by the registrar as to the selection method by which she was reducing the bundle, beyond the issue of duplication. Had the tribunal looked into the matter, then it would have quickly realised that the Registrar had extracted more than just duplicate documents from the bundle. This would have alerted the tribunal to a potential procedural irregularity, and possible prejudice to the parties, which given the overriding objective at hand deserved further investigation. I submit that ultimately the tribunal did err in law on this point, that the error was potentially material, and that therefore the decision should be set aside."

16. I agree.

17. One example will suffice. In the appeal bundle the FTT had before it a copy of the decision notice and statement of reasons for the earlier FTT on 13 February 2017, when the Appellant had been awarded the standard rate of the PIP mobility component (pp.79-80 and pp.16-22 respectively). While recognising that it "did not consider it appropriate to embark upon an analysis of another tribunal's decision", the FTT expressed some perplexity about the earlier FTT's decision: "the exact basis of the award … was not immediately apparent from the Statement of Reasons" (FTT's statement of reasons at paragraph 12(ii)). However, as a result of the Registrar's winnowing, the FTT did not have before it all the evidence that was in front of the earlier FTT in February 2017. It is possible – I put it no higher than that – that the earlier FTT's decision may have made more sense in the context of the evidence that was before it – which was not before the present tribunal.

The Upper Tribunal's analysis and the Tribunal Registrar's role

18. Section 40(1) of the Tribunals, Courts and Enforcement Act 2007 provides that "the Lord Chancellor may appoint such staff as appear to him appropriate for the purpose of discharging his general duty in relation to the tribunals". Rule 4(1) of the 2008 Rules further provides that staff so appointed "may, with the approval of the Senior President of Tribunals, carry out functions of a judicial nature permitted or required to be done by the Tribunal". Any such decision may be challenged within 14 days, in which event the matter must be considered afresh by a judge (rule 4(3)). The Senior President of Tribunals has accordingly issued a *Practice Statement: Delegation of Functions to Registrars First-tier Tribunal (Social Entitlement Chamber)* (December 1, 2016) which provides that legally qualified members of staff appointed under section 40(1), and who are designated as Registrars by the Chamber President, may carry out the following functions:

> "3. A Registrar may make all decisions that a judge assigned to the Social Security and Child Support /Criminal Injuries Compensation jurisdiction may make under the Tribunal Procedure (First Tier Tribunal) (Social Entitlement Chamber) Rules 2008 save those which are substantive final decisions."

19. There is no suggestion in the present case that the Tribunal Registrar sought to make a "substantive final decision". As indicated in my grant of permission to appeal, I am entirely satisfied that she acted of her own initiative and with the best of intentions. However, as a registrar does not make final decisions, then he or she will not always be best placed to determine what should be included in the appeal bundle as being relevant. The Upper Tribunal has frequently had cause to criticise DWP decision-makers (and other respondents in the Social Entitlement Chamber) for their failure to produce all relevant documentation in accordance with the requirements of rule 24 of the 2008 Rules. That type of criticism cannot be made in this case. Rather, the DWP decision-maker had arguably erred on the side of caution and had apparently included everything to hand, including the kitchen sink, relating to the Appellant's previous PIP claims, whether successful or unsuccessful, as well as the documentation relating to the decision on the renewal claim now under appeal. The starting point in the present case was that the DWP considered a bundle running to just over 700 pages was necessary for it to comply with its statutory obligation under rule 24(4) of the 2008 Rules. While there might in theory be a case for avoiding duplication, the Registrar had put forward no justification for the removal of the other documents submitted by the DWP.

20. Where did this leave the FTT? The FTT should have considered the issue for itself. This is illustrated by *JC v Secretary of State for Work and Pensions* [2018] UKUT 110 (AAC), a case in which a tribunal registrar refused a postponement request and the subsequent tribunal did not discuss, or even consider, the possibility of an adjournment. Upper Tribunal Judge Jacobs noted that the tribunal should have been alive to the issue in the light of the registrar's short (and unsatisfactory) reason for refusing the postponement in that case (namely that "This date has been allocated to the appeal and this is inevitably to the exclusion of other appeals waiting to be listed"):

> "11. Now, as I have said, this is not an appeal against the registrar's decision. I mention these points because they could and should have occurred to the tribunal when it heard the claimant's appeal. They should have been obvious at a quick glance over the short email and the registrar's reasons that I have set out in full. And that should have been sufficient for the tribunal at least to

> consider whether to proceed with the hearing. That the tribunal did not do. The failure was a serious procedure irregularity that potentially disadvantaged the claimant and that is a sufficiently serious error of procedure to justify the tribunal's decision being set aside.
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> 12. I am not saying that registrars should compose long explanations to explain every nuance of their reasoning. What I am saying is that tribunals should be alert to the possibility that reconsideration at their own initiative may be appropriate…"

21. For the same reason this FTT erred in law; as a result, the appeal is allowed and the FTT's decision set aside.

22. The reality is the Tribunal Registrar in the present case was probably being over-ambitious. There are many court and tribunal jurisdictions where similar directions seeking the parties' agreement to surplus papers being removed from the bundle may well be entirely appropriate. I venture to suggest this is unlikely to be the case in the Social Entitlement Chamber. Tribunals in this Chamber operate in a jurisdiction with a high and often relentless volume of cases, where appellants are typically not represented and where respondents (and indeed some appellants) are often less than diligent in their engagement with the tribunal process. All FTT judges in this jurisdiction will be familiar with cases where directions (and sometimes repeated directions) have been met with a wall of silence from the DWP (or HMRC or local authority). As a result of all these factors, the logistics of getting the parties to agree changes to the bundle will usually be impracticable. Tribunals will doubtless muddle through as best they can, and as they always have. The position in the brave new digital world may be different, but even then much will depend on the quality of the indexing.

The admissibility of the transcript of the HCP consultation

23. When giving permission to appeal I raised two other matters. The first related to the question of whether the FTT should have considered adjourning for sight of an another earlier FTT decision, but this time one relating to the Appellant's entitlement to employment and support allowance (ESA). Given my conclusions above, I need not resolve that issue now. However, the other ground on which permission was granted does need some consideration. This concerns the admissibility of the Appellant's audio-recording of his consultation with the health care professional (or HCP).

24. On 25 July 2017 the Appellant attended an ATOS (now Independent Assessment Services or IAS) assessment centre for an appointment with a HCP, in this instance a paramedic. It appears that the Appellant tape-recorded this interview. There is no indication from the HCP's report (the PA4) that the paramedic was aware that the consultation was being recorded. Having received the DWP's disallowance decision, and a copy of the HCP report, the Appellant then lodged a detailed letter of complaint with IAS about the report, which he claimed included "blatant misquotes, inaccuracies and misleading representations" (letter dated 23 August 2017, p.159). The complaint letter ran to 9 pages in the course of which the Appellant set out 'chapter and verse' by way of what purported to be verbatim questions and answers as part of his challenge to the accuracy of the HCP report. There was no mention by the Appellant in that letter of the existence of any tape-recording.

25. The IAS's letter by way of response to the Appellant's complaint noted that as "most elements of this complaint amount to disputes over what did or did not occur during the assessment", and as there was no independent evidence as to what took

place, those matters could not be resolved. It added that the HCP's report had been properly compiled in accordance with official guidance and so the complaint was rejected (IAS letter dated 26 September 2017, pp.9-11). On 29 September 2017 the Appellant wrote to IAS again, taking issue with its handling of his complaint, and this time enclosing an audio-cassette recording of the interview with the HCP (pp.4-8). There appears to have been no further reply from IAS; or, at least, there does not seem to be a reply on file in the appeal bundle. At the same time the Appellant also sent the DWP a copy of the audio-cassette recording (letter dated 29 September 2017, p.3).

26. When responding to the Tribunal Registrar's various directions the Appellant made it perfectly clear that his central ground for appealing to the FTT was, in essence, his disagreement with the HCP report that formed the basis for the decision-maker's refusal of his renewal claim. With his letter to the FTT dated 22 November 2017, he included a further copy of the audio-cassette for the tribunal, expressing his "hope that the Tribunal will consider this recorded evidence in support of my complaint to IAS … which I feel is salient to the appeal, also in order to corroborate that the comments within the HP's consultation report presented to the DWP decision maker, were/are not consistent and accurately described as per the consultation conversation."

27. In a subsequent letter dated 3 January 2018 the Appellant wrote as follows:

> "The recording of the full 35 minute assessment consultation conversation was made on my own portable dictaphone, transferred onto standard audio cassette tapes to pass on to DWP, Independent Assessment Services and to HMCTS, only if it had been necessary to do so. In this case I felt that it was. The reasons for recoding the assessment consultation is that I experienced previous problems with ATOS Healthcare inasmuch as similarly the HP at the time produced an inaccurate misleading consultation report to the DWP decision maker regarding a PIP assessment consultation on 7/1/14."

28. The Appellant also included with the letter of 3 January 2018 a 21-page handwritten transcript of the recording. He explained that "as I am unfamiliar with the format of writing a transcript, I have wrote it word for word as per the recording"). On 9 January 2018 a copy of this transcript was issued to the parties as pp.203a-203x of the appeal bundle. A registrar issued directions on 16 January 2018, requiring the DWP – if it did not accept the transcript reflected what was said at the assessment – to "provide a further submission outlining any errors etc within 21 days". There was no response from the DWP.

29. In its statement of reasons, the FTT noted that (i) the Appellant had tape-recorded the consultation with the HCP; (ii) a copy of the Appellant's transcript was in the appeal bundle; and (iii) the DWP had been given the opportunity to challenge the accuracy of the transcript but had made no representations. The FTT added that "at the commencement of the tribunal hearing the tribunal sought and obtained from the Appellant an assurance that no recording was being made of the proceedings". There was, of course, the FTT's own handwritten record of proceedings (pp.206-241). The FTT's statement of reasons considered each of the PIP descriptors in issue in turn. In doing so the FTT made findings of fact, referring to various evidence on file and to the Appellant's own oral evidence. However, throughout all this part of the statement of reasons (paragraphs 17-21, which in fact covered a total of 6 printed pages, albeit double-spaced), the FTT made not a single reference to the HCP's report (or the Appellant's transcript and his challenge to the report's accuracy).

30. Mr Whitaker, in his submission for the Secretary of State, argues that the FTT did not err in law as it placed no reliance on the HCP report in making its findings. In those circumstances, he contends, there was no error in the FTT not referring to any criticisms of that report.

31. I do not agree with Mr Whitaker on this issue. The decision-maker's formal response, resisting the appeal, had almost exclusively relied on the accuracy of the HCP report. The Appellant's grounds of appeal in turn were almost exclusively based on his challenge to that report. In its statement of reasons the FTT had declared, rather formulaically, that it had "considered all the documentary evidence in the appeal bundle and made its findings of fact on the balance of probabilities". Yet apart from recognising that they both existed, the FTT made no substantive reference to either the HCP report or the Appellant's transcript of that consultation. There is no evidence they considered what the HCP recorded about the Appellant's ability to move around or what the Appellant's own transcript recorded him as having said, issues which were central to the question of potential entitlement to the PIP mobility component. Perhaps the FTT decided to ignore the transcript because of some concerns about its provenance. I consider the (apparent) complete exclusion of any consideration of the substance of both the HCP report and the Appellant's transcript, and the associated absence of reasoning, as a further error of law that justifies allowing the appeal and setting aside the FTT's decision.

32. In this context I note that the DWP's official guidance (*PIP Assessment Guide: The Assessment Process*, November 2018, pp.30-31) includes the following passage (so far as the possibly unfamiliar acronyms are concerned, AP = Assessment Provider, CM = Case Manager and HP = Healthcare Professional):

> **"Audio recording of PIP consultations**
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> 1.6.56 The audio recording of face-to-face consultations is not currently part of the contractual specification for PIP assessments.
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> 1.6.57 Claimants may use their own equipment to audio record their face-to-face consultation, should they wish to, subject to any reasonable conditions the DWP chooses to impose on such recordings. These reasonable conditions are:
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> • The claimant must inform the AP in advance that they wish to audio record their consultation. This is to allow the AP to ensure that the HP scheduled to carry out the consultation is willing to be recorded. If the HP is unwilling to be audio recorded, an alternative appointment should be made with an HP who is willing.
>
> • The claimant must be able to provide a complete and accurate copy of the audio recording to the HP at the end of the consultation. For this reason, certain devices that are capable of editing, real-time streaming or video recording the session are not approved. Non-approved devices include (but are not limited to) PCs, tablets, smart phones, MP3 players, smart watches, and devices that are not capable of providing a verifiable media copy that can be easily checked during the assessment. Acceptable formats for such recordings are restricted to CD and audio cassette only.
>
> • The claimant must sign a consent form in which they agree to provide a copy of the audio recording and not use the audio recording for unlawful purposes.
>
> 1.6.58 APs must publicise these conditions and ideally include them in communications sent to claimants before they attend a face-to-face consultation.

1.6.59 Video recording of consultations is not permitted. This is to ensure the safety and privacy of staff and other claimants.

Restrictions on claimants' use of recordings

1.6.60 If it is only the claimant's personal data that is being recorded then there are no restrictions on the use the claimant can make of the recording. However, the DWP reserves the right to take appropriate action where the recording is used for unlawful purposes – for example, if it is altered and published for malicious reasons.

Covert recording of consultations

1.6.61 If the HP notices that a claimant is covertly recording their consultation, the restrictions relating to the recording of consultations should be explained to the claimant. If the HP is content to be recorded, the claimant is content to sign the agreement form and the claimant's equipment meets the specified requirements, the consultation can continue. If this is not the case the claimant should be asked to stop recording. If the claimant refuses, the consultation should be terminated and the case should be returned to the DWP using the return assessment function with reason failure to participate. The CM will consider whether the claimant has good reason for failing to participate in the consultation."

33. I also observe that the Department's conditions for permitting claimants to tape-record PIP assessments today are not as restrictive as they were a decade or more ago for incapacity benefit medicals (see *AF v SSWP (IB)* [2009] UKUT 56 (AAC)). The extract above from the *PIP Assessment Guide* is, of course, simply a statement of DWP policy. It rightly does not purport to extend to cover what FTTs should so when faced with a recording (covert or otherwise) of a PIP consultation. The question of the audio-recording of ESA or PIP assessments (whether by the assessor or the claimant) has arisen tangentially in Upper Tribunal decisions on "good cause" (see e.g. *PH v SSWP (ESA)* [2016] UKUT 119 (AAC) and *JW v SSWP (ESA)* [2016] UKUT 207 (AAC)), but I am not aware of any appellate decision where the issue has arisen in the present way.

34. The starting point must be rule 15 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685):

"**Evidence and submissions**

15.—(1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Tribunal may give directions as to—

(a) issues on which it requires evidence or submissions;

(b) the nature of the evidence or submissions it requires;

(c) whether the parties are permitted or required to provide expert evidence;

(d) any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally;

(e) the manner in which any evidence or submissions are to be provided, which may include a direction for them to be given—

(i) orally at a hearing; or

(ii) by written submissions or witness statement; and

(f) the time at which any evidence or submissions are to be provided.

(2) The Tribunal may—

(a) admit evidence whether or not—

(i) the evidence would be admissible in a civil trial in the United Kingdom; or

(ii) the evidence was available to a previous decision maker; or

(b) exclude evidence that would otherwise be admissible where—
(i) the evidence was not provided within the time allowed by a direction or a practice direction;
(ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or
(iii) it would otherwise be unfair to admit the evidence.
(3) The Tribunal may consent to a witness giving, or require any witness to give, evidence on oath, and may administer an oath for that purpose."

35. Obviously rule 15 must be read in the light of the overriding objective in rule 2 of dealing with cases fairly and justly. Bearing in mind that context, evidence of the type in issue here may raise issues as to relevance, receivability and admissibility (see the discussion in E. Jacobs, *Tribunal Practice and Procedure*, 4th edition, 2016 at paras.10.56-10.68).

36. So far as *relevance* is concerned, the evidence must be directly or indirectly probative of a material fact. Given, as we have seen, that the decision-maker's response to the appeal was largely based on the accuracy of the HCP assessment, and the Appellant's grounds of appeal were almost exclusively based on a challenge to that report, it is difficult to see the transcript of the recording as anything other than relevant to the issues the FTT had to determine.

37. So far as *receivability* is concerned, the FTT plainly received the evidence. The Appellant sent in a copy of the audio-cassette recording along with his own handwritten transcript. This was then correctly added to the appeal bundle and issued to the parties.

38. So far as *admissibility* is concerned, evidence may be excluded if to admit such evidence would be unfair (see rule 15(2)(b)(iii) and *Snowball v Gardner Merchant Ltd* [1987] ICR 719). This brings us back to the circumstances in which the Appellant tape-recorded the assessment. I recognise that he has not actually been asked that question directly. A possible inference from the chronology and the Appellant's explanation as set out above is that he did not request permission to record the consultation. This supposition is supported by the protocol set out in the *PIP Assessment Guide*, as there is no suggestion in the HCP's own report that those conditions were followed. I should add that I have listened to the first 6 minutes of the audio recording. Nothing of any substance (save for some rustling and indistinct voices off) is heard for the first minute or so. The next five minutes records the consultation meeting and, so far as I can tell, is accurately recorded verbatim in the Appellant's transcript. Certainly, there was no discussion of any tape-recording being made. It is also obviously not an independently compiled and authenticated written transcript of the HCP assessment such as might be required in the courts. Without making any finding of fact on the matter, and solely for the purposes of argument, I will assume for present purposes that the tape-recording was indeed conducted covertly. But does that matter?

39. The question of the admissibility of <u>*covert*</u> audio-recordings may not have been considered in the Upper Tribunal case law but has arisen in several cases in the employment tribunals. The leading case is *Chairman & Governors of Amwell View School v Dogherty* [2007] ICR 135, in which the employee, a teaching assistant, had secretly recorded a series of three disciplinary hearings in which she was involved. She had managed to record both the 'open' part of each hearing, during which she had attended, and the 'closed' section when the disciplinary panel was deliberating in private. The Employment Appeal Tribunal (EAT) held by a majority that the employment tribunal was right to permit her to put in evidence transcriptions of the

'open' parts of the proceedings. However, the EAT held unanimously that the employment tribunal had erred in law in not barring her from making use of the recordings of the 'closed' part of the hearing. As to the former point, the EAT gave its reasons as follows (Ms Sethi appeared for the employer and Mr Thorogood for the employee):

> "69. As to the former, we are not prepared to hold that the Tribunal should have excluded – on public policy grounds – the recordings of the 'open hearing' parts of the panels' proceedings in the instant case. It was always intended that there would be at least one written record of the 'open hearing' parts of the proceedings in the form of the Minutes. In appearance they constitute what (but for Mr Thorogood's disputes as to their accuracy and adequacy) look like an almost verbatim record. Ms Sethi conceded, correctly, that there could have been no objection to Mrs Dogherty having had her own written record made during the course of the 'open hearing' by a shorthand writer or by her own noting of the proceedings.
>
> 70. Notwithstanding that the background to the proceedings was incidents which had taken place in a school and concerning children (and for that reason the proceedings having been held in the absence of the public), it must have been understood by both the employers' representatives and by Mrs Dogherty that if either of them subsequently raised in litigation some issue with the conduct or result of those proceedings, the Minutes might be properly be referred-to as a record of what had occurred. If the employers' Minutes are disputed as to accuracy on a relevant issue, as they are in this case, we fail to see what 'public policy' could shut-out the production in that litigation of any further or other note of the proceedings that Mrs Dogherty might have made herself or commissioned from, for example, a shorthand writer. By extension of reasoning, the transcriptions of her recordings are such a note. Although the making of a mechanical recording is not as obvious or open a method of obtaining a 'script' of what occurred as the employment of a shorthand writer would have been, we can identify no basis of principle upon which this Tribunal might be said to have erred in not excluding the transcripts of the 'open hearing' parts of the proceedings. The conclusions reached, and reasons given, in this paragraph and in paragraph 69 are again those of the majority (Mr Recorder Luba and Mr Lewis). For her part, Ms Tatlow does not accept that there is a valid analogy between the admission in evidence of notes openly taken by either of the parties and the admission of transcripts of clandestine and covert recordings. She would have held that the transcripts of such recordings of the 'open hearings' ought also to have been ruled inadmissible by the Employment Tribunal on public policy grounds."

40. The factual contexts of the present case and *Dogherty* are certainly different. Notwithstanding those differences, there are undoubted parallels between the covert recording of (i) an HCP consultation and (ii) the 'open' part of an employee's disciplinary hearing. In both instances an individual may see themselves as vulnerable in the face of a more powerful party (ATOS/DWP in the one instance and an employer on the other) where that latter party has the authority to make an important decision over the individual's future – whether to allow or refuse a claim to benefit or whether to apply a workplace sanction or indeed terminate employment. In such circumstances the individual may see themselves as morally justified in making a covert recording 'for their own protection'. The reasons advanced by the majority of the EAT in *Dogherty* for the admissibility of the transcript of the 'open' part of the hearing can be readily applied to the present case. If there is any dispute as to what was said at the HCP appointment, then in principle relevant evidence should be

admitted even if it was obtained in what might be regarded as an underhand fashion (as to which, I repeat, I make no finding). If the HCP did indeed agree to the consultation being tape-recorded, then of course any objection on the grounds of unfairness necessarily fall away.

41. Given the requirements of rule 2, the question of admissibility also needs to be considered in the wider picture. This was a case in which the Appellant sent the DWP a copy of the audio-cassette on 29 September 2017 and forwarded a further copy to the FTT office on 22 November 2017. He also sent a copy of his transcription of the consultation to the FTT office on 3 January 2018 and it was issued to the DWP shortly thereafter. The FTT also issued directions to the DWP on 16 January 2018 inviting it to make any objections. No such objections were received. The FTT hearing then took place on 14 May 2018. In those circumstances the DWP can hardly claim to have been taken by surprise or ambushed, and Mr Whitaker rightly makes no such suggestion. My conclusion is that the FTT should have addressed the issue of the transcript head on rather than ignored it.

42. None of this should be taken as suggesting that the Appellant's transcript is the magic bullet that proves his case. It may be that the observations and findings as set out in the HCP's report are sustainable by way of direct or indirect inference from the conversation that took place. However, those are issues of fact for the next FTT to determine.

What happens next: the new First-tier Tribunal

43. There must be a fresh hearing of the original appeal before a new FTT. Although I am setting aside the FTT's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether or the Appellant is entitled to PIP (and, if so, which component(s) and at what rate(s) and for what period). That is all 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 accordingly.

44. In doing so, however, unfortunately the new FTT will have to focus on the Appellant's circumstances as they were as long ago as August 2017, and not the position as at the date of the new FTT hearing, which will obviously be about two years later. This is because the new FTT 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 decision by the Secretary of State which was appealed against to the FTT was taken on 7 August 2017.

Conclusion

45. 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.

Signed on the original
on 6 June 2019

Nicholas Wikeley
Judge of the Upper Tribunal