IN THE UPPER TRIBUNAL **Case No.** CE/2918/2019
ADMINISTRATIVE APPEALS CHAMBER

Before **Thomas Church, Judge of the Upper Tribunal**

Decision: As the decision of the First-tier Tribunal (which it made at Nottingham on 06 June 2018 under reference SC319/17/00538) involved the making of a material error of law, it is set aside and the case is sent back to the First-tier Tribunal for rehearing before a differently constituted panel in accordance with the Directions at the end of this decision.

This decision is made under Section 12 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

What this appeal is about

1. This appeal is about the correct approach to scoring activity 7 in Schedule 2 to the Employment and Support Allowance Regulations 2008 (the **"ESA Regulations"**), which relates to understanding communication.

Background

2. The Appellant was awarded Employment and Support Allowance (**"ESA"**) from 2013 due to problems she reported having with her hearing, her mental health and her ability to learn. In 2016, following assessment by a healthcare professional, a decision maker for the Respondent made a supersession decision, disallowing the Appellant's award of ESA from 27 October 2016 (the **"Decision"**). Another decision maker for the Respondent confirmed that outcome on reconsideration.
3. The Appellant appealed the Decision to the First-tier Tribunal (Social Entitlement Chamber). She asked for an oral hearing. After a couple of false starts the appeal was heard in Nottingham on 06 June 2018 by a two-member panel of the First-tier Tribunal (the **"Tribunal"**). The Tribunal refused the appeal and confirmed the Decision (the **"Tribunal Decision"**).

The permission stage

4. The Appellant applied for permission to appeal to the Upper Tribunal on the basis that the approach the Tribunal took in relation to activity 7 of Schedule 2 to the ESA Regulations was wrong and the Tribunal failed to consider the individual descriptors or to make adequate findings of fact to support the Tribunal Decision.
5. A judge of the First-tier Tribunal gave permission to appeal the Tribunal Decision because the judge thought the matters addressed in the Tribunal Decision and challenged in the application for permission to appeal, warrant consideration by the Upper Tribunal. In the judge's words:

> "There is a legitimate question as to whether the tribunal applied the correct test, and made sufficient findings of fact, in relation to whether the appellant met the criteria for activity 7 (understanding communication) in the light of her ability to understand a written message, but only if it was written in Urdu. If the [Work Capability Assessment] is to be applied in the context of the world of work, is it reasonably (sic) to assume that she would be in a work place with someone able to write Urdu?"

The appeal before me

6. The appeal came before me. I asked the parties to explain their positions in writing (which they both did) and I asked them to tell me if they would like an oral hearing. Neither party asked for an oral hearing and I didn't think the interests of justice required one, so I decided to deal with the appeal on the basis of the papers alone.
7. The Respondent did not support the appeal and maintained that the Tribunal Decision was within the range of decisions open to the Tribunal on the evidence and was supported by the Tribunal's findings of fact.

Activity 7 (understanding communication)

8. The activity of understanding communication is set out in Schedule 2 as follows:

> "7. Understanding communication by –
>
> (i) verbal means (such as hearing or lip reading) alone;
>
> (ii) non-verbal means (such as reading 16 point print or Braille) alone; or
>
> (iii) a combination of (i) and (ii),
>
> using any aid that is normally, or could reasonably be, used, unaided by another person."

9. The descriptors applicable to activity 7 of Schedule 2 are:

> "7. (a) Cannot understand a simple message, such as the location of a fire escape, due to sensory impairment.
>
> (b) Has significant difficulty understanding a simple message from a stranger due to sensory impairment.
>
> (c) Has some difficulty understanding a simple message from a stranger due to sensory impairment.
>
> (d) None of the above applies."

10. The activity is described in the same terms in Schedule 3, but the only descriptor is "Cannot understand a simple message, such as the location of a fire escape, due to sensory impairment."
11. The Tribunal explained its decision-making in relation to the activity of understanding communication in paragraph 9 of its statement of reasons. Since this is at the heart of the appeal I set out its explanation in full:

> "<u>7 – Understanding communication</u>. In the ESA 50 the appellant said that she could not hear speech but could understand a message that was written down in Urdu (p19). It was claimed that she could not lipread or use sign language (p19) although this was not what the appellant herself said at the appeal hearing. In any event the Tribunal considered carefully the interpretation to be placed upon activity 7. The current situation as exemplified in CM v SSWP (ESA) [2016] UKUT 0242 (AAC) is that the yardstick

> is whether a claimant, due to sensory impairment, could not understand a simple message such as the location of a fire escape either at all (descriptor A) or from a stranger (descriptors B and C). It would be erroneous to conclude that those who are unable to hear at all were inherently unable to work. In the present circumstances the appellant was able to understand a message if it was written down for her in her first language (Urdu). In those circumstances even if she did not lipread or understand sign language and was unable to wear her hearing aids, then it was the Tribunal's view that no points were applicable under the terms of this activity. The rules relating to the implications of a hearing impairment were of course different in respect of Personal Independence Payment."

Was the Tribunal entitled to consider the claimant able to understand written communication when she could only understand writing in Urdu?

12. In the grounds of appeal the Appellant's representative questioned the reasonableness of relying on the ability of a stranger to write down an urgent message in Urdu.
13. This misunderstands the proper approach to the assessment of a claimant's ability to perform the activities contemplated by the descriptors in Schedules 2 and 3 to the ESA Regulations. While the ESA Regulations talk of "limited capability for work" and "limited capability for work-related activity" they do not simply assess a claimant's suitability for work or work-related activity. The starting point is that ESA is a disability benefit. Entitlement is based on the degree of functional limitation experienced by the claimant in connection with his or her physical or mental health.
14. The activities set out in Schedule 2 are broad proxies for the kinds of activities a claimant may be expected to do in a workplace or in getting to and from work, but any limitation in a claimant's ability to perform an activity which doesn't result from a health condition is not relevant to the assessment of their entitlement.
15. A lack of facility for English (whether spoken or written) may well limit a claimant's prospects of getting a job or doing a job, and there may be circumstances in which a claimant's lack of facility for English might be relevant to an assessment under the ESA Regulations (for example in considering Regulations 29 and 35, as to which see paragraph 19 below) but it can't of itself establish entitlement to ESA. A claimant cannot, therefore, score points for difficulties with communicating with others or understanding communication if the difficulty stems simply from the claimant and the (hypothetical) other people in question not speaking the same language.
16. The Revised WCA Handbook (MED-ESAAR2011/2012HB~001) to which the Appellant's representative referred in written submissions states that activity 6 "assumes use of the same language as the person with whom communication is being attempted", and the same must apply equally to activity 7 because the point-scoring descriptors in activity 7 expressly require that the inability or difficulty with understanding is "due to sensory impairment".
17. Activity 7 seeks to assess the degree to which a claimant's sensory impairment affects his or her ability to understand spoken or written communication. Although descriptor 7(a) of Schedule 2 and the sole descriptor for activity 7 of Schedule 3 give the example of the location of a fire escape, activity 7 is not intended to involve a risk assessment of how the claimant would stay safe in a hypothetical fire. To ask

whether it is "reasonable" to expect the hypothetical stranger to write the "simple message" contemplated by descriptor 7(b) in Urdu is, therefore, beside the point because any difficulties with understanding that message would be wholly unrelated to the Appellant's sensory functioning. Another non-English speaking Urdu speaker with no sensory impairment would be in exactly the same position.

18. In granting permission to appeal the judge asked whether, if the Work Capability Assessment were to be applied in the context of the world of work, it was reasonable to assume that the claimant would be in a workplace with someone able to write Urdu. I have explained why I don't accept that a lack of facility with English could, of itself, establish an entitlement to ESA, but I envisage there could be circumstances in which a claimant's lack of facility for English might be relevant to an assessment of whether a finding that the claimant does not have limited capability for work (under regulation 29(2)(b) of the ESA Regulations), or for work-related activity (under regulation 35(2)(b) of the ESA Regulations), would give rise to a substantial risk to the mental or physical health of any person. We have to take our claimants as we find them. It may be, for example, that a claimant with a severe anxiety disorder might experience an exacerbation in their symptoms of anxiety if put in a situation which brings with it a high likelihood of being called upon to attempt to communicate with someone with whom he or she doesn't share a language. However, any substantial risk relied upon in such a case would have to be by reason of the claimant's "specific disease of bodily or mental disablement". A claimant who would feel very anxious in such a situation, but whose anxiety did not arise in the context of any such disorder, would not be able to satisfy the requirements of those provisions.

Must impairment relate to understanding of both spoken and written communication to score?

19. The Tribunal correctly identified the Upper Tribunal decision in CM v SSWP (ESA) [2016] UKUT 0242 (AAC) as being relevant to the issue of how to apply the tests under activity 7, but the approach the Tribunal took to activity 7 of Schedule 2 is impossible to reconcile with the approach that Judge Ward took in that decision (which concerned activity 7 of Schedule 3), or indeed with the approach taken by Judge Markus QC in AT and VC v SSWP (ESA) [2015] UKUT 445 (AAC) in relation to the previous version of Schedules 2 and 3, and which Judge Ward wholeheartedly endorsed in his decision.
20. CM v SSWP involved a claimant who had no hearing problems at all. Judge Ward allowed the appeal and found that the claimant fulfilled the requirements of limb (ii) of activity 7 of Schedule 3 on the basis that there was clear evidence that the claimant couldn't read 16 point type due to visual impairment. Judge Ward rejected the proposition that because it was possible for the claimant to understand a simple message that was spoken to her, even if she couldn't read such a message, that was sufficient to disqualify her from the relevant Schedule 3 descriptor.
21. In AT and VC v SSWP Judge Markus QC conducted a helpful review both of the legislative history of the provisions and of the case law. She concluded that, on their proper construction, the upshot of the words in activity 7 and the related Schedule 2 and 3 descriptors was that in order to satisfy a descriptor a claimant need be impaired in understanding either spoken or written communication, but did not need to be impaired in both. As Judge Ward aptly summarised the position in paragraph 8

of his decision in CM v SSWP, the policy intent of the regulations was that "either the requisite degree of impairment of hearing, or of sight, should suffice to enable a claimant to score the points; it was not necessary that both faculties be impaired". The ESA Regulations should be interpreted accordingly.

22. The Tribunal's decision that, since the Appellant could understand written communication she couldn't be awarded points under activity 7 even if she did not lipread or understand sign language and was unable to wear her hearing aids, was inconsistent with authority which was binding on it. I am satisfied that the Tribunal misdirected itself in law in this regard.

Was the Tribunal's error of law "material"?

23. Given that I have found that the Tribunal erred in law I need to consider whether that error was material. To decide this I have to look at how the Tribunal dealt with the Appellant's claims about her difficulties with hearing.
24. The Tribunal set out in paragraph 21 of its statement of reasons its findings relevant to the Appellant's claimed hearing difficulties:

> "The Tribunal accepted the appellant had a significant hearing impairment. She had been provided with hearing aids but had experienced difficulties in wearing these because she said they caused her discomfort. It was not clear as to whether she had learnt to lipread or use sign language. There was conflicting evidence in this regard."

25. There is also some discussion of the evidence before the Tribunal relating to the Appellant's hearing and her use of hearing aids in paragraph 2 of the statement of reasons. However, this amounts to a recital of the conflicting evidence and the questioning at the hearing, and no clear findings of fact are made other than a finding that the Appellant "had chosen not to wear her hearing aids".
26. Mrs Tyremen, on behalf of the Respondent, picked up on this reference to the Appellant "choosing" not to wear her hearing aids and argued that "all the evidence presented supports the statement that this was a choice as there is no record of any difficulties with hearing aid use being raised with her doctor to discuss alternatives". The reasoning suggested by Mrs Tyreman may be valid, but it is her reasoning and not the Tribunal's. Although the Tribunal's use of the word "chosen" is a little odd I don't think it should necessarily be inferred from the use of that word that the Tribunal rejected her evidence that it was discomfort that prevented her from wearing her hearing aids and not merely whim or an unreasonable personal preference. On the conflicting evidence before it the Tribunal would have been entitled to reject the Appellant's explanation, but it would equally have been entitled to accept it. Either way, it didn't explain this with adequate clarity. If the Tribunal concluded from the evidence that the Appellant didn't require hearing aids to hear adequately for the purposes of the non-scoring descriptor in activity 7, or that it didn't accept that she experienced significant discomfort wearing them, it should have made clear findings. It is not enough to hint at this by saying that she had "chosen" not to wear hearing aids, and saying that she "said that" they caused her discomfort.
27. Having found that the Appellant had "a significant hearing impairment" it was incumbent on the Tribunal to assess, on the basis of the evidence:
    a. whether the Appellant normally used hearing aids; or

b. if she doesn't normally use hearing aids, whether it would be reasonable for her to do so (given her evidence that wearing them causes discomfort); and
c. which activity 7 descriptor is most appropriate in the light of its findings on the matters listed in a. and b. above.

28. The Tribunal didn't make findings on these issues, presumably because it didn't think it needed to decide them due to its mistaken belief that her ability to read in 16 point print disqualified her from satisfying the point-scoring descriptors for activity 7.
29. Even if the Tribunal did assess these matters its failure to explain that assessment means that its reasons fail to meet the required standard of adequacy. This itself amounts to an error of law.
30. Although the Appellant had been awarded no points at all in relation to the Schedule 2 descriptors it is possible, given the finding of a "significant hearing impairment", that had the Tribunal not made the error it made, it might have awarded the Appellant 15 points under either activity 7(a) (which reads through to the Schedule 3 descriptor and would have meant that she satisfied the conditions for an award of ESA with the support component) or 7(b) ((which would have meant that she satisfied the conditions for an award of ESA with the work-related activity component). I am therefore satisfied that the Tribunal's errors of law were material.

My decision

31. I am satisfied that the Tribunal made errors of law which were material. I therefore allow the appeal and set aside the decision under appeal.
32. Because further facts need to be found I remit the case to be re-heard by another panel of the First-tier Tribunal (Social Entitlement Chamber) in accordance with the Directions below.

DIRECTIONS

A. The First-tier Tribunal must (by way of an oral hearing) undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the First-tier Tribunal's discretion under Section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.
B. The First-tier Tribunal hearing the remitted appeal shall not involve the members of the panel who decided the appeal on 06 June 2018.
C. The First-tier Tribunal hearing the remitted appeal is not bound in any way by the decision of the previous First-tier Tribunal and will consider all aspects of the case, both fact and law, entirely afresh. Depending on the findings of fact it makes the new panel may reach the same or a different outcome from the previous panel.

(Signed on the original)

Thomas Church
Judge of the Upper Tribunal

Dated **06 November 2019**