

**DECISION OF THE UPPER TRIBUNAL**  
**(ADMINISTRATIVE APPEALS CHAMBER)**

As the decision of the First-tier Tribunal (made on 13 October 2016 at Manchester under reference SC946/15/03695) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

**DIRECTIONS:**

- A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.
- B. The reconsideration must be undertaken in accordance with *KK v Secretary of State for Work and Pensions* [2015] UKUT 417 (AAC).
- C. In particular, the tribunal must investigate and decide the claimant's entitlement to an employment and support allowance on and from 23 October 2015.
- D. In doing so, the tribunal must not take account of circumstances that were not obtaining at that time: see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

**REASONS FOR DECISION**

**A. The importance of basic principles**

1. In this case, the claimant did not provide until directed to do so a medical report that was not supportive of her case. It would have been a simple matter for the tribunal to decide that, on the evidence now available as a whole, she did not satisfy the conditions of entitlement to an employment and support allowance, taking into account the contents of the report and, as one factor amongst others, that withholding the report cast doubt on her credibility. Instead, the tribunal devoted so much time to the circumstances surrounding the eventual disclosure of the report, more so in its written reasons than at the hearing, that it appears that it failed to undertake a balanced assessment of the evidence as a whole and to give the claimant a fair hearing. As such, the case demonstrates the importance of concentrating on basic principles of fairness and the assessment of evidence, as a bulwark against diversion into satellite issues.

## **B. History and background**

2. The claimant was awarded an employment and support allowance from and including 27 February 2015. The Secretary of State superseded the decision making that award on and from 27 October 2015, deciding that she was no longer entitled to an employment and support allowance. The First-tier Tribunal dismissed her appeal on 26 January 2016, but Judge Cole sitting in the Upper Tribunal set that decision aside and remitted the case to the First-tier Tribunal for rehearing.

3. When the case came on for hearing, the tribunal noticed that a psychological report on the claimant referred to a report by Mr Siddique, a Consultant Orthopaedic Surgeon. It directed the claimant to produce a copy of that report, which she did. It also directed the Secretary of State to produce all papers relating to her claim for a personal independence payment, which was done. This appeal concerns what happened at the subsequent hearing.

4. The hearing began with a series of questions to the claimant about Mr Siddique's report, when she had received a copy, and about her criticisms of it. That covers two of the 14 pages of the judge's record of proceedings. That record does not have to be verbatim. The tribunal's written reasons contain an account that was, no doubt, supplemented by the judge's recollection – which was entirely proper – and an explanation of why the tribunal did not accept what she said.

## **C. The tribunal's reasons**

5. The tribunal threw the thesaurus at the claimant. It set out initially its general assessment:

5. On a balance of probabilities the claimant is not a witness of truth. The tribunal found her evidence contrived, contradictory and inherently incredible. On a balance of probabilities the tribunal finds that the claimant has misrepresented the extent to which her day-to-day function is impeded in a recent personal independence payment claim form. This was a significant misrepresentation which detracts from her credibility.

6. As a result of the contradictions within the evidence, the tribunal places very little weight on the evidence from the claimant. The tribunal finds that she has overstated, exaggerated and embellished her evidence for the purposes of this appeal and for the purposes of her application for PIP [personal independence payment].

6. Thereafter, the tribunal made the same point, again and again. I have assembled them out of context. To be fair, some repetition was necessary and not all of the remarks refer directly to Mr Siddique's report, but the tribunal's reaction to the failure to produce that report is at least a significant background.

Paragraph 26: 'The tribunal found the claimant to be a disingenuous witness who lacked candour and whose evidence was accordingly given very little weight. The tribunal finds that the claimant originally lodged only the

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psychological report to the tribunal as the orthopaedic report did not support her claims.'

Paragraph 27: 'The tribunal rejects the evidence of the claimant that she had only recently received the orthopaedic report. Her evidence in this regard is inherently incredible.'

Paragraph 29: 'The view that the tribunal reached was that the claimant was not being candid or truthful and that when asked questions her answers were inherently incredible.'

Paragraph 31: 'On a balance of probabilities, the claimant sought to manipulate the evidence that was before the First-tier Tribunal by not disclosing a report that was not favourable to her at the time of that tribunal. On a balance of probabilities the claimant has misrepresented her limitations when seeking personal independence payment. On a balance of probabilities the claimant has then sought to manipulate the content of the Siddique report by attempting to retrospectively complain about the report. To this degree she has not acted with candour. These factors are all very much to the detriment of the claimant and serve to support the strong adverse credibility findings that the tribunal have reached. Put simply, the tribunal does not believe what the claimant has asserted insofar as her day-to-day difficulties are concerned. The tribunal considers that the claimant has sought to manipulate the documents before the tribunal, has exaggerated and overstated her claim both in writing and in person. In this regard her conduct is to be deprecated.'

Paragraph 32: 'Her evidence elsewhere lacked credibility. ... This, in the tribunal's judgment, lacked the ring of truth.'

Paragraph 33: 'For these reasons, the claimant's evidence was rejected in its entirety. The tribunal is satisfied on a balance of probabilities that the claimant has behaved in a manner which is to her discredit. On a balance of probabilities she has made misrepresentations for PIP which she knew to not be true. Given her propensity to misrepresent her situation, the tribunal gives very little weight to her evidence.'

Paragraph 37: 'This disconnect merely serves to emphasise the gulf between what the claimant has reported to healthcare professionals treating her when compared to what the claimant has reported when seeking benefits.'

Paragraph 38: 'We find that the claimant has not been truthful ...'

Paragraph 41: 'The tribunal did not consider that the claimant was a credible witness. Her evidence was disingenuous and contrived.'

7. These are merely the passages that criticise the claimant and her evidence. There are also lengthy passages setting out the tribunal's reasoning on the various matters I have set out in paragraph 10 below, which the tribunal took into account in assessing the claimant's integrity and the reliability of her evidence.

**D. How should the tribunal have dealt with the concealment of the evidence?**

8. In this section, I deal with the case on the basis that there was deliberate concealment, which is what the tribunal found. What can and should a tribunal do in such circumstances?

9. One approach would be to exercise its case management powers in the light of the concealment. The only means by which that could be done is under the tribunal's power to strike out proceedings. Two aspects of that power are relevant here: failing to comply with a direction to produce evidence and failing to cooperate with the tribunal. The former is authorised by rule 8(1) and (3)(a) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI No 2685). It does not apply, because the claimant did comply with the tribunal's direction. The latter is authorised by rule 8(3)(b), read with rule 2(4). It does not apply, because the failure to cooperate must be such as to prevent the tribunal dealing with the proceedings fairly and justly. There was nothing to prevent the tribunal doing that.

10. Strike out aside, the tribunal can only take account of concealment in its assessment of the evidence. The purpose of that assessment is to identify the nature and extent to which the claimant's disablement restricts her functions in performing the descriptors in the relevant legislation. Usually tribunals can make best use of the limited time available for a hearing, or a consideration on the papers, by concentrating on assessing the evidence by reference to the statutory provisions. The claimant's honesty and integrity is, of course, part of that assessment, but there is a limit to which it is possible to carry out the necessary enquiry. This case is a good example. The tribunal's questions to the claimant and its reasons show that it investigated or took account of: (i) the dates when the psychological and Mr Siddique's reports were written; (ii) whether the former was referring to the latter or to some other report; (iii) the standard practice followed by solicitors handling personal injury litigation; (iv) the claimant's account of how her claim was handled; (v) the history and timing of the claimant's criticisms of the report; and (vi) even what the claimant meant by 'double-checking'. The scope for satellite issues to arise and require investigation increases the further a tribunal ventures from the ultimate purpose of the enquiry. All of that takes up time. More importantly, it creates perceptions. It can create the impression that the tribunal is more concerned with the claimant's behaviour than with her capability for work. It can create the impression that the claimant has not received a fair hearing on that issue. As Lord Hewart CJ famously said in *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at 259, 'it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'

11. That is what has happened here. By the number, strength and tone of the tribunal's criticisms of the claimant's evidence and her behaviour, the tribunal has provided a set of reasons that lack balance in the assessment of the evidence and has created an impression that its judgment of the claimant's behaviour has

been a, or possibly even the, primary factor in deciding the case against her. That is why I have set its decision aside.

12. I do not criticise the tribunal for being concerned about how Mr Siddique's report came to be produced. I do not criticise it for exploring the issues with the claimant at the start of the hearing. I do not criticise the tribunal for drawing conclusions and taking them into account in its assessment of the evidence. What I do criticise the tribunal for is the lack of balance and proportion in the manner in which it explained its decision. The critical and condemnatory tone that runs through much of its reasoning creates the impression that the tribunal was more concerned to discover and punish the claimant for what she had done than it was to assess the evidence as a whole by reference to the statutory criteria.

### **E. Why I have directed a rehearing**

13. The tribunal did have other reasons for rejecting the claimant's evidence than those relating to Mr Siddique's report. It summarised some, but not all of that evidence in its written reasons and it referred to some of that evidence in its analysis. Nevertheless, the tribunal's reasons show that its findings on (what it found to be) concealment were highly significant in its assessment of the evidence. That raises the question whether that emphasis contaminated the tribunal's reasons as a whole. The test I have to apply was set out in *HK v Secretary of State for the Home Department* [2006] EWCA Civ 1037 at [46]:

The issue has to be determined partly by reference to the probative value of those reasons, both in absolute terms and by comparison with the rejected reasons, and objectively, but also subjectively, in the sense of seeing what weight the tribunal gave to the various reasons it gave.

14. I have decided that a rehearing is required. It would not be safe to allow the decision to stand. I accept the Secretary of State's submission that the tribunal failed to assess the evidence as a whole. As the claimant's representative has argued, the reasons do not show that the evidence in the GP's notes was taken into account. Most important of all is the lack of balance that the reasons show in what should have been an assessment of the evidence *as a whole*. It would not be appropriate for me to re-make the decision without the benefit of a doctor who always sits on employment and support allowance appeals in the First-tier Tribunal and whose knowledge and experience will assist in the assessment of the evidence.

### **F. At the risk of being pedantic**

15. I have concerns about the detail of the tribunal's reasoning.

16. First, there is some contradiction in the reasoning. The tribunal's written reasons were set out under this heading: 'This statement is to be read together with the decision notice issued by the tribunal.' In that decision notice, the tribunal said:

Whilst the tribunal accepts that [the claimant] has back pain and depression, the nature and extent of the resulting limitations are

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insufficient to score the required number of points. In reaching its decision, the tribunal placed particular reliance upon the evidence of the appellant and the reports of the various health care professionals

Saying that it 'placed particular reliance' on the claimant's evidence does not sit well with the tenor and content of the passages I have set out. In particular, it says the opposite of the statement in paragraph 33 of its written reasons that 'the claimant's evidence was rejected in its entirety.' And that statement is not completely consistent with the statement later in the same paragraph that 'the tribunal gives very little weight to her evidence.'

17. Second, the repeated references to the balance of probabilities show a misunderstanding of the application of the standard of proof. It applies to the issue to be decided. It does not apply to the assessment of particular pieces of evidence, which is how the tribunal says it applied it. Sedley LJ explained the correct approach in *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449 at 477:

. . . a civil judge will not make a discrete assessment of the probable veracity of each item of the evidence: he or she will reach a conclusion on the probable factuality of an alleged event by evaluating *all* the evidence about it *for what it is worth*. Some will be so unreliable as to be worthless; some will amount to no more than straws in the wind; some will be indicative but not, by itself, probative; some may be compelling but contra-indicated by other evidence. It is only at the end point that, for want of a better yardstick, a probabilistic test is applied.

The Court of Session applied this passage in *DK v Secretary of State for Work and Pensions* [2016] CSIH 84 at [12]:

Thus in reaching a conclusion as to whether a particular legal test, such as living together as husband and wife, is satisfied, a court or tribunal must have regard to the totality of the evidence led that has a bearing on the issue. The individual items of evidence do not require to be assessed individually for their probability; what matters is the probability of the ultimate conclusion, and that depends on an assessment of the whole of the evidence that may have a bearing upon it.

**Signed on original**  
**on 30 June 2017**

**Edward Jacobs**  
**Upper Tribunal Judge**