

CE/521/2017

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CE/521/2017

Before: A. Rowley, Judge of the Upper Tribunal

Decision: I allow the appeal. As the decision of the First-tier Tribunal (made on 18 November 2016 at Leeds under reference SC007/16/01715) 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.

REASONS FOR DECISION

1. This is an appeal by the Secretary of State with my permission. It concerns activity 9 of Schedule 3 to the Employment and Support Allowance Regulations 2008. If a claimant falls within its provisions, (s)he will have limited capability for work-related activity and will be placed in the Support Group.

2. The activity is described as “learning tasks.” A claimant qualifies if (s)he “**cannot learn how to complete a simple task, such as setting an alarm clock, due to cognitive impairment or mental disorder.**” This descriptor may conveniently be separated into constituent components.

“cannot learn”

3. The activity is concerned with a claimant’s ability to “learn” a new task, i.e. their ability to absorb, understand and retain information. As the WCA Handbook recognises, different people learn in different ways. They may prefer to watch a visual demonstration, have verbal instruction or read instructions. An inability to learn using one method would not generally lead to an overall inability to learn a new task if another way could be employed.

“how to complete a simple task”

4. “Simple task” is not defined. It would be inappropriate for me to offer any further definition, save perhaps to note the obvious - a simple task is one which is easy and straightforward. It is unlikely to involve more than one or two steps.

“such as setting an alarm clock”

5. The words “such as” are important. They confirm that the illustration given - of setting an alarm clock - is merely an example. Other instances may need to be considered by decision makers and tribunals. Further examples are listed in the WCA Handbook:

“Brushing teeth. This would involve remembering to put toothpaste onto a brush and brushing all areas of teeth.

Washing. This would involve the ability to use soap/shower gel and wash their body.

Brushing hair.

Turning on the television/using basic functions on the TV remote control.

Getting a glass of water.”

CE/521/2017

6. These examples may be helpful in some cases, but they are not definitive or exhaustive. Each case will, of course, turn on its own facts, and a tribunal must explore and consider whatever simple tasks may be applicable, given the particular circumstances of the claimant.

“due to cognitive impairment or mental disorder”

7. These words are fundamental to the activity. They are underpinned by regulation 34(6)(b) of the Employment and Support Allowance Regulations 2008, the relevant parts of which provide that:

“In assessing the extent of a claimant’s capability to perform any activity listed in Schedule 3, it is a condition that the claimant’s incapability to perform the action arises –

...

(b) in respect of descriptor[s] 9

(i) from a specific mental illness or disablement; or

(ii) as a direct result of treatment provided by a registered medical practitioner for specific mental illness or disablement.”

8. Put simply, if a claimant is unable to learn how to complete a simple task for reasons which are not due to cognitive impairment or mental disorder (s)he will not satisfy the descriptor.
9. I should say that much of what I have set out above may also be read across to Activity 11 of Schedule 2 to the 2008 Regulations, read with regulation 19(5)(b) and 19(5)(c)(ii). It should be noted that the words “due to cognitive impairment or mental disorder” do not appear in the descriptors for that activity, presumably because the activity falls under Part 2 of Schedule 2 which is headed “mental, cognitive and intellectual function assessment.” In my judgment, nothing turns on the difference.
10. The claimant in this case has, amongst other things, drug dependency, alcohol misuse and depression. On 10 May 2016 a decision maker decided that the claimant scored 6 points under descriptor 15b of Schedule 2 to the 2008 Regulations. That was insufficient to meet the statutory threshold and the claimant’s claim for ESA was accordingly refused.
11. The claimant’s appeal to the First-tier Tribunal was heard on 18 November 2016. The claimant attended the hearing and gave evidence. The tribunal awarded 21 points under the Work Capability Assessment (15 under descriptor 11a of Schedule 2 and 6 under descriptor 15c). It also found that the claimant satisfied activity 9 of Schedule 3 (the terms of which are set out above), with the result that the claimant was placed in the Support Group.
12. One of the grounds upon which I gave permission to appeal was that the tribunal did not explain, adequately or at all, why it rejected what was said in the Healthcare Professional’s report in relation to the claimant’s reported ability to do certain tasks. According to the Healthcare Professional, the claimant had said that he was able to use Google, a mobile phone, a washing machine, a taxi and, indeed, an alarm clock. Whilst the tribunal noted what it generically described as “conflicts in the evidence,” it made no attempt to resolve them. What the claimant is said to have told the Healthcare Professional was highly relevant to activity 9

CE/521/2017

(and, for that matter, to activity 11 of Schedule 2). At face value, a person who had learned how to do the tasks referred to in the Healthcare Professional's report, may have been unlikely to have satisfied the descriptors. So, if the tribunal found, for whatever reason, that it could not rely on the Healthcare Professional's account of what the claimant had told her, it should have said so and explained why. Its failure to do so amounted to an error of law, and its decision must be set aside.

13. Strictly speaking, that is sufficient to dispose of this appeal to the Upper Tribunal. However, it may be helpful if I address a further aspect of the tribunal's reasoning. The tribunal based its decision that the claimant satisfied activity 9 of Schedule 3 on its finding that he was unable to complete a simple task such as setting an alarm clock. It said:

"The tribunal considered the type of process that would be required in order to set a clock alarm. The tribunal found that whether the clock alarm was an electronic one or one which required winding up, there would have to be an understanding of how to set the time for the clock, or the alarm, and this required an ability to recognise numbers. The tribunal found that even if [the claimant] was shown how to set the clock on at least two occasions, he would be unable to set the clock independently *because he was unable to read numbers or words...*" (my emphasis).

14. There are two significant errors with this approach. First, the tribunal did not focus on the functions involved in "learning tasks." As I have said, the activity is concerned with a person's ability to absorb, understand and retain information. It is not a test of their ability to read numbers or words. I recognise that an inability to read numbers or words may, in some cases, suggest that a claimant has a cognitive impairment or mental disorder which may mean that they are unable to learn how to complete a simple task. I also recognise that that will not necessarily be the position in every case. At most, in an appropriate case, an inability to read numbers or words may suggest that the tribunal should explore the matter further. The tribunal failed to do that in this case.
15. The second error of the tribunal's approach is that it limited its consideration to the claimant's inability to set an alarm clock. As I have said, that task is given in descriptor 9 purely by way of an example. One can think of many other simple tasks which do not require an ability to read or understand numbers. Some of them are listed above. I am by no means suggesting that in every case a tribunal must work through a long list of examples. The amount and depth of consideration will depend on the facts of each case. Some will be more obvious, and demand less enquiry, than others. But in this particular case, by restricting its attention to that one example the tribunal erred in law. It failed to look at the matter in the round.
16. For the reasons given above the tribunal erred in law and I set its decision aside. As further findings of fact are required I remit the matter to be reheard by a new tribunal.
17. I should add that further matters have been raised on behalf of the claimant in the response to the Secretary of State's appeal. I need not deal with them in this decision. They relate to questions of fact, and the appropriate forum for them to be addressed will be the new tribunal.

CE/521/2017

18. The new tribunal should not involve any judge or other member who has previously been a member of a tribunal involved in this appeal. It 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. Whilst the tribunal will need to address the grounds on which I have set aside the decision, it should not limit itself to those, but must consider all aspects of the case entirely afresh.
19. The new tribunal can only deal with the appeal as at the date of the original decision under appeal (10 May 2016).
20. If the claimant has any further written evidence to put before the new tribunal, this should be sent to the new tribunal within one month of the date of the letter sending out this decision. Any such further evidence must relate to the circumstances as they were at the date of the decision under appeal.
21. The claimant may find it helpful to get assistance from a law centre, neighbourhood advice centre or Citizens Advice Bureau (CAB) in relation to the new tribunal's re-hearing of the appeal.
22. For the sake of completeness, I should add that the fact that this appeal has succeeded on a point of law says nothing one way or the other about whether the claimant's appeal will succeed on the facts before the new tribunal.
23. The above directions may be added to or amended by a District Tribunal Judge.

**A. Rowley, Judge of the Upper Tribunal
(Signed on the original)
Dated: 9 August 2017**