

Before Judge S M Lane

DECISION

This decision is made under section 12(1) and (2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

The decision of the tribunal heard on 14 February 2017 under reference SC064/16/01217 is **SET ASIDE** because its making involved an error on a point of law. The appeal is **REMITTED** to a completely fresh tribunal for a complete rehearing.

- (i) A First-tier Tribunal Judge may make further directions for the hearing.
- (ii) The claimant should make every effort to attend the next hearing.

REASONS FOR DECISION

1 The appellant in this appeal is the Secretary of State. I shall refer to him as the Secretary of State. The respondent is the claimant, and I shall refer to her as such. The claimant now has a representative, but he did not send a response to the Secretary of State's appeal.

2 The Secretary of State has pointed out an error of law which is material. That means that if the tribunal had considered the law properly, it could have come to a different decision. In these circumstances, I am going to set the decision aside and send it back to a fresh tribunal to hear again from the start.

3 The claimant was awarded 4 points for descriptor 7c (needs communication support to be able to express or understand complex verbal information) and 4 points for descriptor 9c (needs social support to be able to engage with other people).

4 Communication support means that the claimant needs support from a trained or experienced person in communicating with people with specific communication needs (Schedule 1, Part 1, Interpretation, Social Security (Personal Independence Payment) Regulations 2013). There are more words in the definition but they do not apply to the appellant's situation. 'Complex verbal information' means information conveyed verbally in the claimant's own language in either more than one sentence or one complicated sentence.

5 The standard a claimant has to reach is very low. If most of the time a claimant is able to understand and speak two short sentences or one long one without the support of an experienced person, she won't score points under the descriptor the tribunal chose for this claimant.

6 The activity of engaging with others is not the same thing as the activity relating to needing communication support. Engaging with others has been held to import the meaning 'engage socially' in Schedule 1, which I have already mentioned. The claimant must be able to interact with others contextually and socially in an appropriate way; understand body language; and establish relationships.

7 A person may be able to express herself and understand others when speaking or being spoken to in short sentences but not be able to relate to others in the way required for 'engaging with others'. The issue is explained in *SSWP v GJ* [2016] UKUT 0008 (AAC) at [21] and it is applicable here:

21 ' I shall, though, although it is not now essential to this decision, say something about the relationship between activity 7 and activity 9. In fact, I find myself in agreement with the careful submissions of Mr Whitaker which I have summarised above. I accept that anxiety caused by mental health difficulties can potentially lead to the scoring of points under activity 7 such that the activity and its associated descriptors are not simply concerned with physical or sensory impairments to communication. I also accept though, as highlighted in the government response, that there is a distinction to be drawn between the sorts of tasks the two different activities, and the associated descriptors, are seeking to test. In this context there is a difference between communication and engagement. If a claimant has difficulty in speaking as a result of anxiety, or perhaps some other mental health problem, it must be asked what it is that causes that difficulty. Is it a fear of social engagement? Or is it something simply connected to the activity of communicating verbally? It could of course, be both but, equally, it could be one or the other. So, it seems to me an anxious claimant who, for example, is not able to communicate with strangers or persons who are not well known to him or is not able to do so when in the company of a large number of people but is able to verbally express himself or herself and understand communication with a person with whom they are familiar and comfortable would, in all probability score points under activity 9 but not under activity 7. This is because, in such a case, it is likely to be the engagement with others which is triggering the difficulty. So, such a claimant would not be able to score points under both activity 9 and activity 7 as a consequence of an anxiety problem impacting upon the ability to engage with other people. However, if a claimant was so anxious that not only was he impaired with respect to engaging with others but was also impaired with respect to the function of communicating verbally, perhaps a most unlikely eventuality, he might score under both activities.'

8 These two activities have to be carefully picked apart to come to a correct conclusion about them in law. For the reasons given by the Secretary of State in his appeal grounds, the tribunal failed to do this. It did not take into account some important evidence given by the claimant herself when writing to the tribunal:

'I have great difficulty communicating with others, especially people that I do not know, or with people in an official capacity. whenever I attend appointments, I would only ever go alone if I knew the person I was meeting very well'.

9 This suggests that the claimant *can* express and understand verbal information unaided with people she knows well or is comfortable with. It may accordingly mean that her problem is anxiety related *to engaging* with other people that stops her from communicating unaided, rather than a problem with communicating itself. The Secretary of State also points out in his grounds of appeal (paragraph 7), that the health professional (HP) recorded that the claimant was able to speak to her quietly but normally and was able to follow questions and answer appropriately though she needed some prompting. The tribunal did not accept that HP's conclusion but the tribunal did not explain why the content and amount of her speech did not constitute 'communicating' and, indeed, complex communication for the purposes of the descriptors.

10The appellant's representative has commented that the HP's views are different from those of the appellant's psychiatrist (p47). The tribunal that rehears the appeal will have to decide whether the psychiatrist's comments indicate that the claimant is unable, most of the time, to communicate within the meaning of the descriptors, or whether the HP is correct.

11It may seem daunting to have the appeal heard again, but the main thing for the claimant is that she should try to attend the next hearing. Her mother and her partner can accompany her if she would feel less anxious that way. Her attendance may help the tribunal decide which descriptors she satisfies for communication problems and engagement problems.

12No one is saying that they think the claimant has been untruthful. What happened is that the tribunal made a mistake about the law. A fresh tribunal will look at her problems from the correct legal perspective.

[Signed on original]

[Date]

**S M Lane
Judge of the Upper Tribunal
16 November 2017**