## 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 Derby First-tier Tribunal dated 8 January 2018 under file reference SC309/16/00871 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is able to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

> ***"The Appellant's appeal is allowed.***
>
> ***The Secretary of State's decision of 13 April 2016 is revised.***
>
> ***The Appellant has shown 'good cause' for failing to attend a consultation in Stoke on 23 February 2016 and also in Nottingham on 8 March 2016.***
>
> ***The case is remitted to the Secretary of State for appropriate arrangements to be made for the Appellant to be offered a new appointment for a PIP assessment consultation in Derby in relation to his PIP claim dated 7 January 2015."***

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

## REASONS FOR DECISION

**The broader lesson of this Upper Tribunal decision**

1. A decision that a claimant has failed to show good cause for not attending a medical assessment – e.g. for the purposes of establishing entitlement to personal independence payment (PIP) – is not a decision to be taken lightly. It may have important and for the claimant costly ramifications in practice. Even if the claimant subsequently makes a successful claim for PIP, the effective date of that later award may be many months (or possibly even years) later. The result of a 'no good cause' decision can therefore be to 'keep the claimant out of their money' for a period during which they would otherwise be entitled to PIP on the basis of their difficulties with the activities associated with daily living and/or mobility. Tribunals should therefore examine the Department's evidence and arguments with some care and, where that material is deficient, with a healthy degree of scepticism.

**The background to this appeal to the Upper Tribunal**

2. The Appellant's previous award of disability living allowance (DLA) ended on 28 April 2015. He was invited to (and did) make a claim for PIP. The substance of that PIP claim has still not been adjudicated upon, over three years later. In the previous Upper Tribunal decision involving the same Appellant and the same PIP claim (*TC v SSWP (PIP)* [2017] UKUT 335 (AAC), I summarised the background as follows:

> "3. The Appellant was then invited to a PIP assessment. There was a long history of difficulties in arranging such appointments which I need not detail here.

> In summary the Appellant said he could attend a PIP assessment in his home city in the Midlands but not in other cities in the East or West Midlands. He was asked to attend a PIP assessment in another city and did not attend. As a result his PIP claim was refused on the basis of his non-attendance."

3. The Appellant appealed against that 'no good cause' decision by the Department for Work and Pensions (DWP). On 26 August 2016 a First-tier Tribunal (FTT) in Leicester dismissed his appeal. On 10 August 2017 I allowed the Appellant's appeal to the Upper Tribunal (under file reference CPIP/903/2017) against that FTT decision. I did so for two reasons.

4. The first was that the FTT had failed to find sufficient facts or give adequate reasons for its conclusion that the Appellant did not have good cause for failing to attend his PIP medical assessment. In doing so, I recognised that the FTT had not been assisted by what I described as the "shockingly inadequate" DWP written response to the Appellant's appeal (*TC v SSWP (PIP)* at paragraph [4]).

5. The second reason was that in any event the FTT on 26 August 2016 was not properly constituted. The Appellant's appeal had been heard by a Judge sitting alone, when it should have been heard by a three-member panel (as per the Senior President's Practice Statement on the *Composition of Tribunals in social security and child support cases in the Social Entitlement Chamber on or after August 1, 2013*).

6. I therefore set aside the FTT's decision and directed a new hearing. In doing so, I observed that "the new FTT will bear in mind that the decision by the Secretary of State which was appealed against to the FTT was taken on April 13, 2016 and concerned a missed appointment on February 23, 2016" (*TC v SSWP (PIP)* at paragraph [11]). I also directed that the Secretary of State's representative should "prepare a fresh response to the Appellant's appeal which actually engages with his reasons for not attending the medical assessment in question" (*TC v SSWP (PIP)* at paragraph [12]).

7. As to that former observation, I can now see that it was based (and I confess very unwisely so on my part) on the summary provided at the outset of the DWP's written response to the appeal. I return to the issue of the details of the operational decision under appeal shortly.

8. As to the latter direction, no such fresh response was forthcoming from the DWP. On 29 September 2017 and then again on 23 October 2017 the FTT also directed the Secretary of State to produce "a clear history of the benefits history of [TC] since the date of the decision on 13th April 2016, to include reference to all or any benefits and any assessments undertaken and their outcome". On 8 November 2017 the DWP provided the following supplementary response, which read, in all its glory, as follows:

> "Please accept my apologies for the lack of response to the directions of 29/09/2017.
>
> I can confirm that our records show there has been no benefits or assessments undertaken for the Claimant since 13/04/2016. The enclosed print from Customer Information System confirms."

9. The DWP's supplementary response therefore completely ignored my Upper Tribunal direction that it "actually engages with the Appellant's grounds of appeal". As the subsequent FTT observed in its statement of reasons, "As a response to Judge

Wikeley's decision, it was shockingly inadequate. Were it not for the fact that we thought it the product of sheer incompetence, we would have thought it contemptuous." Exactly so.

**The second First-tier Tribunal and the grant of permission to appeal again**

10. That new FTT re-heard the Appellant's appeal in his absence at Derby on 8 January 2018. The new FTT dismissed the appeal and again confirmed the Secretary of State's decision. The Appellant again applied for permission to appeal to the Upper Tribunal. My initial reaction was to refuse permission, given the FTT's apparently thorough and cogent analysis as set out in its detailed statement of reasons. However, on further reflection I decided to give permission and explained why in these terms:

> '3. When dealing with the "first time around" application I stated that "I must confess, however, my first inclination was to refuse permission to appeal, as the statement of appeals appears to be comprehensive and detailed. On further consideration, however, I have taken the view it is right to give permission to appeal". The same is true on this occasion.
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> 4. My reservations about giving permission to appeal this time are two-fold. First, there is again apparently a very thorough statement of reasons from the FTT judge. Second, the Applicant's main point is what is, quite simply, a bad point. He continues to take the view that there is no need for him to attend a face to face assessment. The "second time around" FTT answered that point fully at paragraph 14 of its statement of reasons.
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> 5. I am giving permission for a reason which the Appellant himself has not identified. This is in keeping with the Upper Tribunal's inquisitorial function.
>
> 6. The Appellant lives in Derby. He was offered various appointments in Derby, Nottingham and Stoke. Some were cancelled; some it seems he did not attend. It seems fairly clear that the "second time around" FTT thought it unreasonable to expect the Appellant to attend an assessment in either Nottingham or Stoke, given his health conditions (see statement of reasons at paragraphs [7], [20] and [28]; the reference to "Nottingham and Derby" in paragraph [28] must be a typographical error for "Nottingham and Stoke", reading the decision as a whole and in context). Equally the Tribunal plainly considered it was reasonable to expect him to attend an assessment in Derby.
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> 7. So, what was the DWP decision under appeal? I note that the original DWP submission to the first FTT was hopeless and the supplementary submission to the second FTT, as it very properly recognised, was worse than hopeless.
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> 8. The original DWP written response stated that the decision under appeal was that dated 13 April 2016. The second FTT (like the first FTT) dismissed the Appellant's appeal against that decision, stating that the Appellant "has not established good cause for failing to attend the appointment scheduled for him on 23rd February 2016" (see decision notice at p.205; and see statement of reasons at para [7], p.215).
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> 9. However, the decision letter dated 13 April 2016 refers to a failure to attend a medical assessment on 8 March 2016 (p.111A), not 23 February 2016.
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> 10. It gets worse. The (utterly) hopeless DWP submission to the original FTT seems to be the source of the confusion. This read as follows:

> **"Section 4: Claimant's reasons for appeal**
> [The Appellant] was invited to attend an assessment on 23/02/2016 (page 111), and did not attend. [The Appellant] can't be considered for PIP unless he provides a good reason for not attending.
>
> As within the Regulations, [the Appellant's] appointment letter was issued to the correct address and more than 6 days prior to the appointment.
>
> There is no indication within his claim pack that [the Appellant] requires additional support.
> **The specific legislation for this area under dispute is:**
> **The Social Security (Personal Independence Payment) Regulations 2013, regulations 9 and 10**
>
> **Conclusion**
> I oppose this appeal and ask the Tribunal to dismiss the appeal and confirm the Secretary of State's decision."

11. So, the decision letter referred to the failure to attend an assessment on 8 March 2016. The submission to the FTT referred to a failure to attend an assessment on 23 February 2016. Which was it supposed to be?

12. It gets worse still.

13. The assessment appointment for 23 February 2016 was at a venue in Stoke (see p.110). Page 110 also records that that appointment was cancelled. It is unclear from p.110 whether Capita cancelled the appointment or the Appellant did. The second FTT seem to have found that Capita cancelled it, and that is the most likely reading of the limited material on file. It seems somewhat perverse to be found to have failed without good cause to attend an assessment appointment which has been cancelled by the Government's contractor.

14. So, what then of the assessment appointment for 8 March 2016? Remember, this is the one which was actually listed in the decision letter. This appointment was notified (in good time) to the Appellant on 23 February 2016 (p.111). It was an appointment at 08:10 hours in the morning at an address in Nottingham. He did not attend. When he had been asked for his explanation for non-attendance (p.112), he said amongst other things "I am not able to travel to either Stoke or Nottingham … I am willing to attend an appointment in Derby … Also trying to travel into Nottingham for 08:10 would have meant having to leave home at about 6.00 to avoid the rush hour down the A52."

15. The DWP's decision was "you're not entitled to personal independence payment. This is because you didn't go the assessment on 08 March 2016 and we don't think you've given us a good reason for this" (p.111A).

16. So, depending which DWP version of events one believes, there are two scenarios.

17. The first is that the Appellant failed without good cause to attend an assessment appointment in Stoke on 23 February 2016 which had been cancelled by Capita.

18. The second is that he failed without good cause to attend an assessment appointment in Nottingham on 8 March 2016 at 08:10 hours, when the Tribunal

had found it was not reasonable to expect him to travel to Nottingham for an appointment (irrespective of the time of day).

19. In neither case was he being "disqualified" for failing to attend an assessment in Derby.

20. The second FTT deal with the sequence of events in some detail. However, they only mention briefly in their narrative the assessment appointment for 23 February 2016 (paragraph [6] at p.215), which they note was cancelled. There is no detailed analysis of the circumstances of the missed appointment on 8 March, which had (apparently) led to the decision that there was no entitlement to PIP.

21. Looking at the whole history of the case, I can see why the FTT came to the conclusion that across the piece the Appellant had failed to show good cause. But that was not the nature of the "charge". The basis of the decision was that he had failed without good cause to attend the assessment appointment for 8 March 2016 (or, possibly, 23 February 2016).

22. I therefore consider I should give permission to appeal.'

11. I referred at paragraph 4 of that grant of permission to the new FTT's comments at paragraph 14 of its statement of reasons. I fully endorse the FTT's passage in question:

> "14. … [The Appellant] has repeatedly questioned why he should have to attend a consultation at all. In his view, that requirement to do so was unnecessary in his case. I make no comment about his opinion on that point since it is clear from the rules that they confer a discretion upon the Secretary of State to require a claimant for PIP to attend for, and participate in, a consultation in person, or to participate in a consultation by telephone. It is for the Secretary of State to decide whether an individual must do either, and, if so, which. Once the Secretary of State has chosen to exercise that discretion, the individual must comply whether he thinks it necessary or not. The penalty for non-compliance is that the claim will be refused, irrespective of what merits it might otherwise have had. Paragraph 9(2) provides that, where a claimant fails without good reason to attend for, or participate in, a consultation a negative determination **must** be made. (My emphasis). The language is mandatory and permits of no discretion."

12. Furthermore, as Mr Commissioner (now Upper Tribunal Judge) Rowland observed in joined decisions *CIB/2011/2001, CIB/2012/2001 and CIB/2013/2001*: "The integrity of the social security system depends on there being appropriate tests in place and I am not satisfied that it was unreasonable of the Secretary of State to require an examination in this case" (at paragraph [16]).

**The parties' submissions on this Upper Tribunal appeal**

13. Ms Clare Keates, for the Secretary of State, does not dissent from the provisional analysis I set out in the grant of permission to appeal. She agrees that the decision of the new FTT should also be set aside as being in error of law.

14. The Appellant understandably agrees. He adds, perhaps more in hope than expectation given the history of these proceedings, "I just want a decision to be made after waiting nearly three years. I expect common sense to be applied."

**The Upper Tribunal's analysis**

15. The decision of the new FTT involves an error of law. Despite the obvious care taken by the FTT in many respects, it failed to "drill down" sufficiently into the documentary evidence and identify the relevant date for the missed consultation. As with the first FTT, it was not assisted by the very poor written responses prepared by the Secretary of State's decision makers. As a consequence, the new FTT did not consider the issue of 'good cause' in the specific context of the allegedly missed consultation appointment (whether it was 23 February 2016 or, as now seems more likely, 8 March 2016). Accordingly, I set aside the decision of the new FTT.

16. It would be wholly disproportionate to send this appeal back again to what would be a third FTT for another re-hearing. I therefore proceed to remake the decision originally under appeal to the First-tier Tribunal. In reaching my decision I adopt and endorse the second FTT's findings as to the Appellant's health conditions, which were such that it was reasonable to expect him to attend an appointment in Derby but not in Nottingham or Stoke (or indeed anywhere else beyond Derby). I need not reiterate the details of those findings here. I can then deal with the issue of 'good cause' in short order, bearing in mind of course, amongst other relevant matters, the considerations identified in regulation 10 of the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377).

17. If the Secretary of State's decision was that the Appellant had not shown good cause for failing to attend the consultation in Stoke on 23 February 2016, I disagree. The Appellant has shown good cause as (i) the appointment was not in Derby; and (ii) that consultation had in any event been cancelled by Capita. As I said when giving permission to appeal, "it seems somewhat perverse to be found to have failed without good cause to attend an assessment appointment which has been cancelled by the Government's contractor."

18. If the Secretary of State's decision was that the Appellant had not shown good cause for failing to attend the consultation in Nottingham on 8 March 2016, I disagree. The Appellant has shown good cause on the basis of his circumstances as the appointment was not in Derby. Given that, I need not decide whether an appointment at 08.10 involving a departure from home at a much earlier hour was reasonable.

19. So, whichever way one looks at it, the Appellant has shown he had good cause for not attending the two PIP assessment appointments as specified in the Secretary of State's decision and subsequent response to the appeal.

20. However, with apologies for the double negative, the Appellant has *not* shown he has good cause for not attending *any* PIP assessment appointment. Subject to any issue of 'good cause' which may arise, it is wholly reasonable to expect him to attend a PIP consultation in Derby. It is entirely in his interests that he does so in order that the real merits of his PIP claim can be addressed and an appropriate decision on entitlement (if any) made. The Appellant cannot continually opt out of an appointment in Derby. The case is therefore remitted to the Secretary of State for such a new appointment in Derby to be arranged. In that context, I draw the Appellant's attention again to the observations at paragraphs 11 and 12 above.

**Conclusion**

21. 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)). I remake the decision as follows (section 12(2)(b)(ii)):

***The Appellant's appeal is allowed.***

***The Secretary of State's decision of 13 April 2016 is revised.***

***The Appellant has shown 'good cause' for failing to attend a consultation in Stoke on 23 February 2016 and also in Nottingham on 8 March 2016.***

***The case is remitted to the Secretary of State for appropriate arrangements to be made for the Appellant to be offered a new appointment for a PIP assessment consultation in Derby in relation to his PIP claim dated 7 January 2015.***

**Signed on the original**
**on 24 August 2018**

**Nicholas Wikeley**
**Judge of the Upper Tribunal**