

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CPIP/2034/2017

Before: A. Rowley, Judge of the Upper Tribunal

Decision: I allow the appeal. As the decision of the First-tier Tribunal (made on 24 March 2017 at Manchester under reference SC946/16/03752) 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. Whilst I have decided that the First-tier Tribunal erred in law on a number of grounds, this decision may be of general interest in relation to my consideration of daily living activity 9 (“engaging with other people face to face”) at paragraphs 11-19 inclusive. In particular, I have decided that: (a) an inability to engage with adults, irrespective of an ability to engage with children and young people, is of sufficient scope to satisfy the descriptors; and (b) the tribunal’s reliance on the claimant’s ability to use a phone to send text messages as evidence of his ability to “engage with other people” was misplaced. I also make some observations as to the potential invalidity of the appointment of the claimant’s appointee (paragraph 23) and indicate that the tribunal to which the appeal has been remitted for rehearing may wish to explore the nature of any vulnerability the claimant may have, and to make any consequential amendments to its style and procedure which it considers to be appropriate (paragraph 24).
2. The claimant had been in receipt of the lower rate mobility and highest rate care components of DLA. On reaching the age of 16 he was assessed for PIP. In a decision dated 19 April 2016 the claimant scored 1 point under daily living descriptor 3b and 0 points under the mobility activities, and so was not entitled to an award of PIP. Following an unsuccessful mandatory reconsideration, the claimant appealed to the First-tier Tribunal. The tribunal confirmed the award of 1 point under daily living descriptor 3b and in addition awarded 2 points under daily living descriptor 9b. However, that was still insufficient to qualify for an award of PIP.
3. The claimant sought permission to appeal to the Upper Tribunal. In general terms, his representative (Mr Serjeant of Manchester City Council's Benefits Team) submitted that the tribunal failed to make adequate findings of fact and gave insufficient reasons to explain its decision. A District Tribunal Judge gave permission to appeal to the Upper Tribunal on the basis that the grounds of appeal were arguable. Mrs Hawley, the Secretary of State's representative, supports the appeal.

The claimant

4. The claimant is a young man who has been diagnosed with selective mutism, social anxiety and obsessive compulsive disorder. He has a learning disability. His mother also thinks he may have autism, but he has not yet been assessed. The claimant was referred to the Child and Adolescent Mental Health Services ("CAMHS") in 2008 and, at the time of the decision, was still under their care. He was taking sertraline at a prescribed dose of 50 mg per day, although this was increased to 200mg during 2016 by the psychiatrist (Dr Trumper) who then started to treat him, and who was of the view that the claimant had been "under medicated". Having been unable to cope in a mainstream setting, the claimant was attending a "hospital school" which, according to his mother, had "very small settings as to not cause his anxiety to be through the roof". To that end, he was in a class of only four pupils. Mrs Hawley makes the point that the teachers would, inevitably, have had specialist training to help teach and support the students.
5. It was said on the claim form that the claimant got overly anxious "at even the thought of talking, he does not make eye contact and does not understand body language", and communication made him "extremely upset and tend to lash out". His mother expanded on this in a letter dated 6 May 2016:

"[The claimant] can't read facial expressions or body language and takes anything said literally thinking it's about him if a joke is told [the claimant] assumes it's about him and this makes him very anxious and hard to be around people as he can become violent with outbursts ... [He] will agree to anything rather than talk so it's always a simple nod of the head no speech language or eye contact is used as this distresses [him] tremendously and has to be avoided at all cost, as [he] will become very agitated anxious and upset biting his own hand. [He] has an open wound on his hand ... as this is the spot he bites at when anxious causing undue distress ... [he] will not communicate with somebody he doesn't know at all".
6. In March 2016 his (then) consultant psychiatrist expressed the view that the claimant was usually unable to express himself clearly in appointments, and in August 2016 Dr Trumper noted "anxiety regarding spoken language specifically with adults ... he would not speak to me but managed to communicate if I asked direct questions". No further details as to how the claimant communicated were given.
7. According to his mother, the claimant is "an extremely vulnerable young boy who is very easily taken advantage of ... if somebody told [him] to do something he would (anything)". Indeed, there was some evidence that during 2016 the claimant was associating with a group of boys who were "getting him into drugs". His other friends were a girlfriend whom he had met at school and who "also had [unspecified] difficulties" (p129), and Anthony, a young man who lived with the

claimant's family and who, according to Dr Trumper, appeared to be being "looked after" by the claimant's mother.

The tribunal's decision

8. The tribunal accepted that the claimant had social anxiety and selective mutism, but it did not consider his learning disability to be significant. I agree with Mr Serjeant and Mrs Hawley that the tribunal failed to give sufficient weight to the fact of the claimant's attendance at the hospital school, described above. I also agree with them that it placed undue emphasis on the fact that the claimant started to "attend" a construction course at a college (some five months after the date of the decision) without additional support and without an Education, Health and Care ("EHC") Plan, without making further enquiries as to why there was no such support, failing to take into account that the claimant had very poor attendance at the college (to the extent that his mother was worried that he would lose his place), and that the college had actually triggered an assessment process for an EHC Plan which was, apparently, supported by Dr Trumper.
9. Furthermore, I agree with Mr Serjeant's submission that the tribunal placed too much weight on Dr Trumper's comment that, according to a school report, the claimant's difficulties were not as severe as his parents reported. There is no copy of the school report (or indeed any school report) in the papers. Nor is there any indication as to its date or what, precisely, it was referring to. For instance, one does not know whether it referred to all of the claimant's difficulties or only some or one of them, and if so, which. Nor does it indicate what the school considered the level of the claimant's difficulties to be. I accept Mr Serjeant's submission that the tribunal selectively cited Dr Trumper's comment without putting it in the context of the plentiful other evidence from Dr Trumper, some of which I have referred to above.
10. These errors are, in themselves, sufficient to justify a finding that the tribunal erred in law and its decision must be set aside. However, they also lead into a discussion of the tribunal's consideration of daily living activity 9. I should say at the outset that I have not received detailed submissions on the following issues, but nevertheless take this opportunity to express my views on them.

Daily living activity 9

11. Daily living activity 9 is in the following terms:

Column 1 Activity	Column 2 Descriptors	Column 3 Points
9 Engaging with other people face to face	a. Can engage with other people unaided.	0
	b. Needs prompting to be able to engage with other people.	2

	c. Needs social support to be able to engage with other people.	4
	d. Cannot engage with other people due to such engagement causing either- (i) overwhelming psychological distress to the claimant; or (ii) the claimant to exhibit behaviour which would result in a substantial risk of harm to the claimant or another person.	8

12. It will be recalled that the tribunal awarded 2 points on the basis that the claimant needed prompting to be able to engage with other people. The tribunal based its findings on the following: (a) the claimant required prompting to engage with others, particularly adults; (b) "he seems to be able to engage with other people of his age as he has found a girlfriend and is friendly with Anthony", and was able to engage with "some people that are unsuitable"; (c) he could use his phone to engage with others; (d) he managed to attend school without extra help; (e) he went to college without extra support. I have addressed the issues surrounding the claimant's attendance at school and college above.
13. It is now widely accepted that the definition of "engage socially" in Part 1 of Schedule 1 to the Social Security (Personal Independence Payments) Regulations 2013 applies to daily living activity 9, even though the expression does not actually appear within the terms of the activity or its descriptors. The expression is defined as meaning: "(a) interact with others in a contextually and socially appropriate manner; (b) understand body language; and (c) establish relationships". If a claimant is unable to satisfy these criteria, it follows that (s)he is unable to engage with other people "to an acceptable standard" (regulation 4(2A)(b)).
14. For completeness, Part 1 of Schedule 1 defines "prompting" as meaning "reminding, encouraging or explaining by another person", and "psychological distress" as meaning "distress related to an enduring mental health condition or an intellectual or cognitive impairment".
15. It is implicit from the tribunal's conclusion - that the claimant needed prompting to engage with other people - that it considered that he was able to engage with other people without social support, without overwhelming psychological distress and without exhibiting behaviour which would result in a substantial risk of harm to the claimant or another person.
16. In my judgment it was incumbent on the tribunal to consider the claimant's ability to satisfy the three components of the phrase "engage socially", and to make adequate findings of fact as to the nature and quality of his interactions with other people (*HJ v SSWP* [2016] UKUT 0487 (AAC)). However, the tribunal simply

listed those with whom it said the claimant could engage, without investigating or making findings in relation to what actually happened during his interactions with them. In the light of the evidence as to (for example) his selective mutism, his inability to make eye contact and read facial expressions, his inability to understand body language and his tendency to bite himself or lash out during communication, it did not necessarily follow that – without more - the claimant was able to “engage socially” even with those people listed by the tribunal, for the purposes of daily living activity 9, at least on over 50% of days (regulation 7).

17. In any event, all of the “other people” in the tribunal’s examples were, as the tribunal stated, of the claimant’s age (16). They would not, therefore, generally be regarded as adults. Just as Upper Tribunal Judge Jacobs was of the view that a claimant’s inability to engage with men (albeit having an ability to engage with women) was of such a magnitude as to satisfy the descriptors (*RC v Secretary of State for Work and Pensions* [2017] UKUT 0352 (AAC)), equally, in my judgment, a claimant’s inability to engage with adults falls into the same category, irrespective of his or her ability to engage with children and young people. There was ample evidence before the tribunal to indicate that the claimant had considerable difficulties engaging with adults due to his anxiety. In my judgment the tribunal did not adequately explain why it considered that he would be able to engage with adults if he simply had another person “reminding, encouraging or explaining” and why it considered that the higher point-scoring descriptors of daily living activity 9 were not satisfied.
18. Further, the “other people” relied upon by the tribunal were all people known to the claimant. However, the term “engage socially” is not limited to such people. Rather, a tribunal must consider a claimant’s ability to engage with people generally, and not just those people they know well (*HJ v SSWP* [2016] UKUT 0487 (AAC)). The tribunal did not address whether the claimant’s ability to engage with those listed by it showed that he was able to engage with people generally, rather than just those whom he knew well. That, also, constituted an error of law.
19. Finally, the tribunal’s reliance on the claimant’s ability to use a phone to engage with others was misplaced, and amounted to a further error of law. The tribunal did not explain in what way it considered that the claimant could use a phone to engage with other people. In fact, the evidence was that he would send texts by phone¹. The description of the activity is “engaging with other people *face to face*” (my emphasis). I am quite unable to see how a claimant’s ability to use a phone to send texts could possibly demonstrate an ability to engage with other people “face to face”, not least because one of the requisite criteria of an ability to “engage socially” is an ability to understand body language.

¹ Whilst there was also reference to the claimant using the internet on his phone, the tribunal did not explore this further.

Conclusion

20. For the reasons set out above the tribunal's decision involved the making of errors in point of law, and I set aside its decision. As fresh findings of fact are required, I remit the matter to be reheard by a new tribunal.

Directions to the new tribunal

21. I give the following directions to the new tribunal. They may be added to by a District Tribunal Judge.
22. The new tribunal should note that it will be considering a closed period to 16 May 2017 in the light of the recent award of the daily living component at the standard rate with effect from 17 May 2017.
23. Whilst I have not had submissions on the matter, and whilst it is not an issue on the appeal to the Upper Tribunal, I wonder whether the claimant's appointee (his mother) has been validly appointed. It seems that the Secretary of State's normal practice is to limit an appointment to a specific benefit. Thus, it may be that the claimant's mother was made his appointee for the purposes of DLA, but that that has not been carried forward for the purposes of PIP. Mr Serjeant may wish to look into the matter and, if appropriate, seek a fresh appointment under regulation 33 of the Social Security (Claims and Payments) Regulations 1987.
24. I would also like to make some observations regarding the claimant's potential vulnerability, and how that may impact upon the fairness of the hearing before the new tribunal. I do not know what further evidence (if any) as to this will be placed before the new tribunal. However, I note that his (then) representative told the tribunal that the claimant needed it "to be sensitive" (p124). Irrespective of whether the claimant may be a "vulnerable witness" within the meaning of *The Senior President of Tribunals' Practice Direction on Child, Vulnerable Adult and Sensitive Witnesses 2008*², nevertheless the new tribunal may feel it appropriate to explore the nature of any vulnerability the claimant may have, and to make any consequential adjustments to its style and procedure which it considers to be appropriate, further to its duty under the overriding objective to ensure that his case is dealt with fairly and justly, and that he is able to participate fully in the proceedings.
25. 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.
26. The new tribunal must not take account of circumstances that were not obtaining at the time of the decision: 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. 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.

² As to which see *JH(S) v SSWP (ESA)* [2015] UKUT 0567 (AAC)

27. 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.

**A. Rowley, Judge of the Upper Tribunal
(Signed on the original)**

Dated: 14 February 2018