DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Before Upper Tribunal Judge Brunner QC

This appeal by the claimant succeeds
I **set aside** the decision of the First-tier Tribunal reference **SC242/20/00421**: that decision now has no effect.
I **substitute** the decision that the accident on 23 February 2018 was an accident which arose out of and in the course of the claimant's employment, and make a declaration to that effect under section 29 of the Social Security Act 1998.
It remains for the Secretary of State to make a decision as to the claimant's entitlement to industrial injuries disablement benefit in the light of that declaration.

REASONS

1. This appeal concerns entitlement to industrial injuries disablement benefit in relation to an injury which the claimant sustained while showering on his work premises on 23 February 2018. The question in this case is whether the accident arose out of and in the course of employed earner's employment. The Secretary of State determined on 28 November 2019 that the accident did not arise out of and in the course of employment. The First-tier Tribunal ('F-tT') on 17 September 2020 upheld the Secretary of State's decision. The claimant now appeals to the Upper Tribunal.

2. The Grounds of Appeal at p150 set out detailed submissions under three headings:
(1) the judge did not apply relevant case law about living accommodation provided by the employer
(2) the judge overlooked or failed to have regard to evidence of the claimant's duties outside normal working hours
(3)there was insufficient consideration of case law about risks.

3. Upper Tribunal Judge Ward gave leave to appeal on 29 January 2021 (p165) determining that the grounds were arguable with a realistic prospect of success.

4. The Secretary of State has made further submissions (p166). The Secretary of State does not support the appeal. The claimant has made additional submissions (p176).

5. Neither party requests an oral hearing, and an oral hearing would not assist me to determine this appeal.

A. The facts and the First-tier Tribunal's decision

The Facts

6. Most of the facts were agreed.

7. The claimant was employed from February 2018 as a caretaker at a premises which was let out as serviced office space and meeting rooms. Some clients used the premises during night hours.

8. The claimant was given the option of either living at the premises, or obtaining his own accommodation and being paid £400 more. He chose to live at the premises. His immediate predecessors also slept at the premises part or all of the time. The claimant was given the key to a room which had a television, kitchen and washing machine.

9. The claimant signed a contract on 20 February 2018 (p69). It gave his hours of work as 9-6 with a break. It did not refer to his accommodation. The claimant was told verbally that his working day would start at 8am.

10. There was one shower room in the building which was available to the claimant and other employees who stayed there. The claimant used the shower at times during the day after strenuous tasks as well as when he got up in the morning.

11. On 23 February 2018 around 6.30-7am the claimant was showering before starting his duties. He went to open a window in the shower room and the glass shattered, causing severe lacerations to his arm, wrist and hand.

12. The window was retained by a catch which was about 8 feet above the floor. It was designed to be opened by a hook attached to a pole. The pole was not in the shower room. There is a central pivot to the window: the top moves into the room and the bottom moves out. If the catch was open a person could increase the opening of the window by pushing out the bottom section with their hand. The bottom pane of glass was at a height where it could be reached and pushed by a person standing on the ground (as clear from the photograph at p126).

13. There was evidence that the claimant carried out some duties out of hours and at night. The claimant provided a description of various activities which he carried out overnight at paragraph 19-28 of his

witness statement (p62) with supporting text messages. These included monitoring noise levels from a particular company which had evening parties, checking lights were turned off, assisting with maintenance, and hoovering out of hours when the premises were quieter. There was no evidence to the contrary.

14. There was evidence from a surveyor that the plastic vent in the window would not have provided sufficient ventilation for a shower room, and that the window catch was not suitable for easy opening to provide ventilation to the shower room. There was no evidence to the contrary.

15. A fact in dispute between the claimant and his employer was whether he had told his employer that he 'jumped' to open the window, and whether he had jumped. It is not clear whether that is a fact in dispute between the claimant and the SSWP. The first account signed by the claimant uses the word 'jumped' but that was written by the claimant's employer and presented to him to sign. The claimant's account is that he did not jump. On the claimant's account he would have had no need to jump as the catch was open, and he simply needed to push the bottom part of the window outwards to increase the window opening.

First-tier Tribunal's Decision

16. The First-tier Tribunal judge decided that the accident did not arise out of and in the course of employment.

17. The judge noted the facts as above. The judge expressly found that although the claimant was not required to reside at the premises 'he sometimes had to do tasks at night or outside normal office hours' (paragraph 14 Statement of Reasons). The judge accepted the surveyor's evidence.

18. The judge gave the following reasons for the decision (paras 31-32 Statement of Reasons) :

31. I decided that the claimant's accident was not an industrial accident. I considered that the claimant was not acting in the course of his employment when he was taking a shower before work. Showering was not part of what he was paid to do or incidental to it. It was just part of normal hygiene. I found that there was nothing in the nature of his employment that exposed him to any increased risk.

32.I do not accept that the glass in the window should have been safety glass. The window did have a handle..albeit one that was out of reach, which required a special pole to open it. The claimant could have asked his employers for the pole, or otherwise how to open the window, rather than trying to open it by hitting or pushing it with his hand when it was closed with the catch'.

B. The Legal Framework

19. Industrial injuries benefit is payable under s94(1) Social Security Contributions and Benefits Act 1992 where an employed earner suffers personal injury '*caused by accident arising out of and in the course of his employment'*.

20. Under section 29 of the Social Security Act 1998 '*where, in connection with any claim for industrial injuries benefit, it is decided that the relevant accident was or was not an industrial accident- (a) an express declaration of that fact shall be made and recorded…*'.

21. There is no dispute that the claimant suffered an injury caused by accident. The issue is whether that accident arose out of and in the course of his employment. Although there are clear overlaps between the phrases 'out of' and 'in the course of', it is instructive to consider the law relating to each phrase separately.

22. Various cases have been relied on by the claimant's representative. Those cases may provide useful illustration of how Commissioners and then judges applied the principles, but each case turns on its own facts. As the Court of Appeal said in *Nancollas v Insurance Officer* [1985] 1 All ER 833 at 835-840 the authorities have to be studied for guidance as to the approach to be adopted, rather than as providing an answer in a particular case. The factual picture as a whole must be looked at.

'Out of' employment

23. The phrase 'arising out of employment' relates to a causal link between the employment and injury.

24. In *Thom or Simpson v Sinclair* [1917] AC 127 the House of Lords addressed the meaning of 'arising out of' employment within the Workmen's Compensation Act 1906. A woman had been injured when a wall of a property neighbouring her workplace collapsed, bringing down upon her the roof of the shed in which she was packing fish. The House of Lords rejected the argument that there had to be a causal link between the nature of the work and the accident. Viscount Haldane held (at 269):

'The question really turns on the character of the causation through the employment, which is required by the words 'arising out of'. Now it is to be observed that it is the employment which is pointed to as the distinctive cause, and not to any particular kind of physical occurrence. The condition is that the employment is to give rise to the circumstance of injury by accident. If therefore the statute when read as a whole excludes the necessity of looking for remoter causes, such as some failure in duty on the part of the employer as a condition of his liability, and treats him rather as in a position analogous to that of a mere insurer,

the question becomes a simple on- Has the accident arisen because the claimant was employed in the particular spot on which the roof fell? If so the accident has arisen out of the employment, and there is no necessity to go back in the search for causes to anything more remote than the immediate event, the mere fall of the roof, and there need be no other connection between what happened and the nature of the work in which the injured person was engaged'.

25. Lord Shaw reached the same conclusion, expressed in this way (p271): *'My view of the statute is that the expression 'arising out of employment' is not confined to the mere 'nature of the employment'. The expression in my opinion applies to the employment as such- to its nature, its conditions, its obligations, and its incidents. If by reason of any of these the workman is brought within the zone of special danger and so is injured or killed, it appears to me that the broad words of the statute 'arising out of employment' apply.*

26. The House of Lords referred to a line of authorities where a similar conclusion had been reached, terming them 'location cases' (p272). Although the interpretation of the phrase 'out of employment' has widened since the days of such cases concerning the Workmen's Compensation Act, the principle from 'location cases' has been imported into decisions of Commissioners relating to industrial injuries benefits. For example in R(I) 4/61 the Commissioner found that an accident arose out of employment where it had been caused by the inherent danger of a place of work.

27. The Secretary of State's Decision Makers use a Decision Makers' Guide. That is not, of course, a binding authority on any tribunal but it appears to have been overlooked by the decision maker in this case. There is a section headed 'Locality risks' at paragraph 66709-66710 which guides decision makers in this way: 'if there was a special risk and the accident was caused by the inherent danger of the place, they can accept the accident as arising out of the employment'.

28. A locality risk is just one type of risk which an employee can be exposed to, and which can form the nexus between their work and accident such that the accident arose 'out of' the work.

29. Sometimes the risk which an employee is exposed to is a risk which members of the public are also exposed to (such as the risk of getting grit in the eye when on a motorbike, or being hit by lightening). Such risks are referred to as 'common risks' in the case law. Generally authorities say that where a common risk led to the accident there must be some additional risk created by the employment in order for any accident arising to be found to have arisen 'out of' that employment (see analysis in*CI/1654/2008*). The concept of common risk does not have much bearing on this case, given that members of the public did not have access to the shower room and were not exposed to risks associated with the window in the shower room.

30. One case dealing with common risk was *CI/1654/2008* which the F-tT and this Upper Tribunal have been referred to. The case involved an employee who was injured when she slipped in a hotel shower. Comissioner Jacobs (as he then was) found that there had been an error of law, and remade the decision. Commissioner Jacobs found that the accident had happened 'in the course of' employment because the claimant had been making herself presentable before attending a training session at the hotel. However, Commissioner Jacobs held that the accident did not arise 'out of' the employment because :

'*the risk was not created by her employment. It was inherent in the nature of a shower. It was a risk that anyone would run who took a shower. There was a similar risk in the bathroom outside the shower. The claimant's employment did not expose her to any hazard that was additional to, or exceptional when compared with, the risk that anyone else would run who was taking a shower or using a hotel bathroom'*.

31. That case *CI/1654/2008* was a case about a 'common risk'. There was nothing particularly hazardous about the particular shower. It was not a case about locality risks. It does not create any sort of precedent that a shower before work cannot be an industrial accident.

'In the course of' employment

32. The phrase 'in the course of' employment requires an analysis of when, where and what the employee was doing at the time of the accident. The following principles from appeal cases are of particular assistance:

    (i) Lord Loreburn said in *Moore v Manchester Liners Ltd* [1910] A.C 498 at 500: '*An accident befalls a man 'in the course of' his employment if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time to do that thing';*
    (ii) An employee is acting in the course of his employment when he is doing what he is employed to do or anything which is '*reasonably incidental*' to his employment (*Smith v Stages* [1989] AC 928)*;*
    (iii) It was held in *R v Industrial Injuries Commissioner Ex p A.E.U (no.2)* [1966] 2 Q.B.31 that *'the test of whether a man is acting 'in the course of his employment' is not the strict test of whether he is at the relevant time performing a duty for his employer, for he may be 'in the course of his employment' when he acts casually, negligently or even disobediently, so long as it is something reasonably incidental to his contract of employment'.*

33. Commissioners have applied those principles to situations where an employee is living or staying in accommodation provided by the employer. Plainly, whether living in accommodation provided by an employer is incidental to employment depends on all of the

circumstances, and the extent of any nexus between that accommodation and the employment.

34. Commissioners have also applied those principles to personal activities such as resting, eating, and going to the toilet. If done under the employer's roof those may well be acts which are incidental to specific employment: they are acts which enable employees to continue at work.

35. As an example, in *CI/1654/2008* although the claim ultimately failed Commissioner Jacobs found that the employee was acting 'in the course of' employment when taking a shower as she was required to be at the hotel in order to carry out the training session, and was preparing herself to be presentable at that session. Even if it was not part of her duties to shower before the session, it was within the contemplation of her and her employer that she might take a shower before a session, and it was reasonable for her to do so. Taking a shower was therefore reasonably incidental to her duties.

C. Error of Law: Submissions and conclusions

Error of Law: Submissions

36. The Secretary of State's position has always been that the claimant was carrying out the personal act of taking a shower and not performing an act in connection with his employment. The Secretary of State's submissions to the Upper Tribunal (p166) are in essence that the F-tT reached the correct decision because the claimant was not required by the terms of his employment contract to reside at the workplace and he was simply getting ready for work when the accident happened. Reference is made to the facts in CI/1654/2008, seemingly to support a conclusion that showering before work is not an activity in the course of employment.

37. The claimant's position has always been that he was employed as a live-in caretaker, that he was required to shower because he had to be presentable, and he had to use that particular bathroom. The claimant through his representative submits to the Upper Tribunal (p150,176) that the judge placed too much weight on the contractual position, did not have regard to the claimant's duties outside normal hours, and did not consider the risk associated with that particular shower which the claimant had to use. It is submitted that reasons were inadequate, and that the judge reached a conclusion on the facts which she was not entitled to reach, not being supported by evidence.

Error of Law: Conclusions

38. The Statement of Reasons discloses the following errors of law.

39. The first part of paragraph 31 appears to be a consideration of whether the accident happened in the course of employment. The F-tT judge

seems to have relied solely on the finding that 'showering was not part of what he was paid to do or incidental to it. It was just part of normal hygiene'. The fact that the claimant would have had to shower at home if he lived at home is not decisive as to whether he was doing something which was incidental to his work. There is nothing in the wording of the statute or case law which supports the F-tT's approach that activities which are 'normal hygiene' are not incidental to work. Accidents at work involving people who are using a toilet or eating in a canteen or who are walking are all accidents involving 'normal' day-to-day activities which may also be carried out at home. That does not prevent them being industrial accidents if they meet the legal tests.

40. The F-tT judge had accepted that the claimant carried out some duties overnight. The F-tT judge appears not to have made a finding as to whether residing on the premises was thereby 'reasonably incidental' to the claimant's employment. Considering that step would have assisted the F-tT to give fuller consideration as to whether activities such as showering in that particular shower room and stopping the shower room steaming up were also 'reasonably incidental' to his employment. It may be that the F-tT was drawn into an overly simplistic approach by the Secretary of State's submissions. In any event, that approach to the question of 'in the course of employment' was an error of law.

41. The F-tT also found at paragraph 31 that 'there was nothing in the nature of his employment that exposed him to any increased risk'. That appears to be a determination that the accident did not arise 'out of' employment although there is no reference to that phrase. That is a misstatement of the legal test. It is right that one way of showing that an accident arose out of employment is to show that the nature of the employment exposed the employee to an increased hazard on top of a common risk. However, that is not the only route to a finding that an accident arose out of employment, and it should not be elevated to a complete legal test. Risks attached to locations are another way in which the required nexus between employment and accident can be shown. The F-tT should have considered whether the claimant's employment and activities reasonably incidental to employment had put him in a hazardous place, such that the accident arose out of the employment. The F-tT's approach to the question of 'arising out of employment' was in error of law.

42. The evidential basis for F-tT's finding in paragraph 32 of the Statement of Reasons that the claimant jumped up to open the window is unclear. Further, the relevance of a number of findings in paragraph 32 to the legal test is unclear. What relevance did it have if the claimant jumped, or failed to ask where the pole was? The F-tT may have considered that a careless act by an employee cannot be an act in the course of employment. If so, that is wrong in law: see *R v Industrial Injuries Commissioner Ex p A.E.U (no.2)* [1966] 2 Q.B.31 above. In any event the reasons in paragraph 32 are insufficient so as to be in error of law.

43. As there were errors of law which may have been material it follows that the F-tT decision is set aside.

44. I am in a position to re-make the decision. An oral hearing is not necessary as I have all required information in the papers before me. I do not have a record of the proceedings in the F-tT but given that the facts and submissions are clear from the documentation before me I do not consider it appropriate to delay resolution of this point by awaiting that document.

D. Substituted decision

45. The accident arose out of and in the course of the claimant's employment.

46. I adopt the facts above. The precise manner in which the claimant opened the window is not relevant to my decision. I find that there was no safe method readily available to open the window, meaning that the claimant had to use his hand to apply some pressure to the lower section of the window.

47. I turn first to whether the accident arose in the course of the claimant's employment.

48. Although the claimant was not required to reside on the premises, once he was staying there his employer took advantage of the fact that he was onsite, and he was expected to perform tasks. He was not treated as if he was simply renting a room from his employer. Although his contractual hours were between 8 or 9am and 6pm those timings were not strictly observed, and he carried out work during at least some evenings and nights. I find that residing on the premises was incidental to the employment.

49. Showering on the premises was also incidental to his employment. Showering was an act which enabled the claimant to continue in his work, given that he was expected to be clean. Making adjustments to the ventilation so that he could shower in comfort was part and parcel of that activity.

50. The accident therefore arose in the course of employment.

51. I turn next to whether the accident arose 'out of' the claimant's employment. There was a particular risk attaching to the locality of the claimant's employment, which included the residential quarters and associated facilities. The particular risk was that the sole shower had inadequate ventilation and a window which had no safe method of opening readily available. That risk materialised on 23 February 2018 when the claimant tried to open the window by pushing on it with his

hand. There is a causal nexus between the claimant's employment and the accident.

52. I therefore find that the claimant's accident arose out of and in the course of employment.

E. Next steps

53. The next step is a determination of whether the claimant suffered personal injury and if so the extent of any disablement. The Secretary of State invites me to direct that those questions are referred to the medical authorities. I decline to make that direction. The Secretary of State has a discretion under s19 Social Security Act 1998 to refer a person for such medical examination as is necessary for the purpose of decision-making. There is already a body of medical evidence, and the Secretary of State should decide what, if any, medical examination is necessary, and make arrangements accordingly.

Upper Tribunal Judge Kate Brunner QC

Signed on the original on 10 September 2021