IN THE UPPER TRIBUNAL **Appeal No. UA-2021-001936-PIP**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

G.J.

Appellant

– v –

Secretary of State for Work and Pensions (SSWP)

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 19 December 2022
Decided on consideration of the papers

Representation:
Appellant: Mr Renato Colonna, Tribunal Legal Practice
Respondent: Mr Atif Mohammed, DMA, Department for Work and Pensions

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

This decision is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. This appeal is mainly about questioning techniques in the First-tier Tribunal (Social Entitlement Chamber).

The context

2. This is the Appellant's appeal against the First-tier Tribunal ("the Tribunal")'s decision dated 27 April 2021, following a remote telephone hearing. The Appellant had originally claimed Personal Independence Payment (PIP) on 19 August 2019. The Tribunal was dealing with the Appellant's appeal against the decision by the Secretary of State's decision-maker dated 21 February 2020. The decision-maker had refused the PIP claim, deciding the Appellant scored 0 points for both the daily living and mobility activities. The Tribunal confirmed the disallowance decision, albeit finding that the Appellant scored a total of 4 points for each of the daily living and mobility activities.

The Appellant's grounds of appeal to the Upper Tribunal

3. The Appellant's grounds of appeal to the Upper Tribunal, in summary, were that the Tribunal had erred in law both procedurally and substantively.

4. The procedural grounds of appeal were two-fold. The first ground (ground (i)) – and the primary focus of the grounds as a whole – was that the medical member of the Tribunal panel had engaged in oppressive questioning and cross-examination style questioning without prior warning in breach of the Tribunal's obligation to deal with cases fairly and justly. The second ground (ground (ii)) was that the Appellant was not given prior notice that her role as a town councillor was an issue in the appeal.

5. The substantive grounds were four-fold. Ground (iii) was that the Tribunal had failed to deal properly with the variability of the Appellant's health conditions. Ground (iv) was that the Tribunal had erred in its approach to descriptor 1(d) in relation to the mobility activity of planning and following journeys. Ground (v) was that the Tribunal's decision involved irrational and inconsistent reasoning. Ground (vi) was based on irrational findings of fact, those findings being based on evidence obtained by the medical member's oppressive questioning.

6. The Appellant did not make a complaint of judicial misconduct, and so the Tribunal members were not asked at the time for their recollection of the hearing and the nature of the questioning.

7. In this decision I refer to the Tribunal's medical member as Dr X.

The First-tier Tribunal's decision to give the Appellant permission to appeal

8. A District Tribunal Judge gave the Appellant permission to appeal, but noted that he would not have given permission on ground (ii) alone: "It is surprising that it was not foreseen that the First-tier Tribunal might investigate those duties [as a councillor] and consider to what extent they were consistent with her claimed limitations". As to grounds (i) and (vi), taken together, the District Tribunal Judge observed that "in effect [this] is that the First-tier Tribunal was so oppressive in its questioning of the Appellant that it was an error of law to give any weight to her oral evidence. This is an unusual submission and one which the Upper Tribunal

should have the opportunity of considering". The District Tribunal Judge made no comments of substance on grounds (iii)-(v) inclusive.

Ground (i): oppressive questioning

9. The Appellant's representative argued that from the outset of the Tribunal hearing Dr X "employed an oppressive style of questioning, as well as using cross-examination tactics seen in criminal trials or civil claims in the common law courts". He argued that this approach both impacted on the Appellant's ability to answer questions and did not allow her to participate fully in the proceedings in keeping with the overriding objective under rule 2 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685; 'the 2008 Rules').

10. On receipt of the appeal, I directed that the Appellant's representative be provided with an audio file of the recording of the remote telephone hearing. This was done with the aim of giving the Appellant the opportunity to draw the Upper Tribunal's attention "to what she considers to be the most egregious examples of 'oppressive questioning'" by identifying relevant passages on the digital recording (which ran for just under 1 hour and 40 minutes). The Appellant's representative duly responded with a further written submission and a schedule helpfully setting out in Table 2 the particular passages which had been identified as involving oppressive questioning.

11. Given the detailed submissions made by the Appellant's representative, I then listened to the entire digital recording of the hearing from the beginning up until the end of Dr X's questions (just over an hour in total). I subsequently observed as follows in the course of making further directions on the appeal:

> 6. … I have to say I formed a very different impression to that given by the Appellant's representative. My impression is that throughout the hearing Dr X spoke politely to the Appellant, albeit she was brisk and business-like. I do not consider she was sarcastic (points 6, 9 of Table 2), nor that she used a dismissive tone (point 4 of Table 2) or uttered "sarcastic dismissive laughter" (point 8 of Table 2). Dr X had clearly prepared thoroughly by reading the bundle and tried to get clarification on various points. She asked repetitive questions in situations when she did not get the answer or, quite often, when the Appellant answered by reference to the time of the hearing (the present) as opposed to the time when the Secretary of State had made the decision – February 2020. On several occasions Dr X had to remind the Appellant to talk about her life "before the lockdown", when there were no restrictions on daily life. The examination lasted approximately 1 hour but was interrupted a couple of times due to poor Internet connection, which took time to re-establish. It was ended when the Appellant "broke down", in the words of her representative, when she tearfully said that "it was frustrating", (which may have been said in relation to the questioning or to the fact that she experienced back pain after 20 minutes of riding a bike). Dr X apologised and decided not to ask any further questions.
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> 7. The Appellant's representative makes a series of detailed specific points in Table 2. I give my impressions as follows below:

(1) *"it is one liner isn't it"* – this refers to the medical evidence provided on p.190. The doctor's opinion is contained in one sentence. Dr X was making a statement of fact.

(2) *Carpal tunnel syndrome* – Dr X pointed out that there is no medical evidence referring to treatment of this condition in the bundle, and, why, if the Appellant knew that she suffered from it, she did not discuss this with doctors. See further the evidence on pp 57-59.

(3) and (4) *"Intricate details with use of medical terms"* Dr X asked about the pain relief the Appellant took to alleviate the pain in the coccyx and the pain in the back. She asked specific and focussed questions about whether the Appellant took over the counter medicine or bought on prescription, what kind, liquid or in tablets, how many times a day, etc. See the list of medication provided by the Appellant on pp.9 and 77. There were also questions about taking insulin and monitoring sugar level, the questions were asked with some level of details. See also p.77.

(5) *Anxiety* – Dr X asked sensitively framed questions about the situation in the Appellant's home, i.e. domestic violence incidents, difficult behaviour of her daughter, involvement of social services etc. Dr X admitted that it was difficult to talk about this, and tried to steer the conversation towards how these factors contributed to the Appellant's anxiety. I do not consider that she used a dismissive tone.

(6) and (7) – This part of questioning was about mobility. There were indeed questions relating to the same issue (hence repetitive), in a sense that Dr X tried to establish the Appellant's understanding of distance, i.e. how many metres she could walk/mobilise before stopping, for how long, whether she walked with a stick, how fast etc. The reference to the swimming pool or to the length of the bus served to understand the time and distance the Appellant could cover. The question about swimming pool was not confusing. The Appellant herself referred in her answer to a 50m pool. Dr X wanted to know whether the Appellant referred to any specific pool, as the leisure pools are 25m long. The Appellant replied that she used to be a life-guard, so she was aware what she was talking about when she mentioned a 50m pool. Dr X asked questions about daily activities involving mobility – walking the dog, going to the local shop, supermarket, doctors, including the PIP assessment (when, how often, how far is the shop, how far/fast she could walk around supermarket etc.) I am not clear where the Appellant's representative got the notion that Dr X "does not accept evidence that the appellant's back and knee conditions affect the appellant's ability to walk" (point 7). No view to that effect was offered.

(8) *"ambushed about the role as Town Councillor"* – the questions of Dr X were in relation to mobility (traveling to the meetings or events) and interacting with other people. The Appellant was not asked specifically about her role, position or professional duties. See pp.82 and 87, 95 - the

Appellant had provided information about her role. There was no "sarcastic dismissive laughter" in relation to the Appellant's evidence.

(9) and (10) – Dr X tried to establish whether the Appellant could use the internet (for example check the timetable on-line), whether she interacted with others during for example on Poppy Day, whether she had any cognitive difficulties. There was no "barrage style questioning"; appropriate space was left for the Appellant to reply. There were no "allegations" that the Appellant could ride a bike. Dr X explained that her question stemmed from the witness statement given by her son (pp.175-176) in which he said that "mum rides a bike". The Appellant explained that she could ride a bike but suffered pain in the following days. There were also no "allegations" as to the Appellant's occupation as a dog boarder – see p.77 – the Appellant volunteered this information during the HCP assessment.

12. I then directed that the Secretary of State's representative be given an opportunity to listen to the digital recording and comment on the schedule drawn up by the Appellant's representative. Unfortunately this took some time to arrange, as the Upper Tribunal and the Secretary of State's IT systems (or protocols) did not wish to talk to each other in that there were difficulties in providing the audio file in a compatible format. These problems were eventually overcome, and the Secretary of State's representative duly listened to the digital recording, subsequently making a further submission as follows:

> 4. After listening to the recording, I find there to be no oppressive style of questioning. I agree with Judge Wikeley's assertion on page 299 paragraph 6 that Dr X was brisk and business-like. Whilst listening to the recording I have taken particular note of the contents of the table provided in addition to the Appellant's submission, where specific examples of the reported oppressive style of questioning have been identified [pages 295-296]. I submit that I find the questions to be direct and reasonable in the "business-like" manner. For example, the reference to the evidence being a "one liner" at 11:05 of the recording wasn't in my view taking a dismissive tone of the evidence but rather when heard in context was clearly a means at identifying the correct evidence due to the difficulties arisen from the paginating of the bundle.
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> 5. The Appellant has stated at point 8 of table 2 [page 296] that Dr X had ambushed her with questions regarding her role as a town councillor and had during the provision of answers laughed in a sarcastic and dismissive manner. I do not believe Dr X's tone was dismissive as they were exercising their inquisitorial duty to gain an understanding on how the Appellant usually travels to her council meetings as the Appellant had just described that they have back problems, and this restricted her ability to walk as she reported to be in pain.
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> 6. On point 9 table 2 the Appellant states that the panel member engaged in a barrage style of repetitive oppressive questions. I find the questioning not to be oppressive nor repetitive, Dr X was questioning in a fair but direct manner. The appellant was given time to reply and was not interrupted whilst giving a response.

> 7. As noted at the outset of my submission, after listening to the recording of the hearing I do not find that Dr X, or the tribunal panel, were oppressive with the line of questioning they have taken with the Appellant. It appears in my view that the Appellant has misinterpreted a dispassionate tone as being a dismissive tone, but that does not mean she was treated unfairly but rather that Dr X had taken an objective view of exploring her evidence. Therefore, it is my submission that the FtT has not erred on a material point of law. I respectfully invite the Upper tribunal to dismiss the appeal.

13. I conclude that this was a case of a Tribunal medical member conducting questioning in the context of a PIP appeal in an entirely appropriate inquisitorial style which cannot fairly be described as "cross-examination" or "oppressive questioning". If the Appellant's representative thought that Dr X was stepping over a line, then the time to raise the issue was at the hearing. I emphasise I have no doubt that by the end of Dr X's questioning the Appellant was distressed, but I regard that as more because of the nature and stress of the occasion and the issues being discussed rather than a response to a style of questioning or e.g. the tone of Dr X's voice. I also recognise that tribunals have a demanding and difficult task in hearing appeals relating to PIP (and also DLA) claims. As Upper Tribunal Judge Shelley Lane observed in the case of *BK v Secretary of State for Work and Pensions (DLA)* [2009] UKUT 258 (AAC) at paragraph 29 (and the same applies now to PIP appeals):

> DLA appeals frequently involve medical conditions and personal care needs of an intimate or embarrassing nature. If such conditions or needs are seen to arise, the tribunal must explore them in order to establish entitlement to benefit, whether or not the questions are embarrassing, insensitive or upsetting. A tribunal would be keenly aware that adults from *any* background could well find it embarrassing to tell strangers these things, but it is the tribunal's duty to ask. While tribunals try to minimise distress by being tactful, they cannot always be successful. Questions cannot always be perfectly phrased in the pressured environment of a hearing and attendees may have a variety of preconceptions – or misconceptions - about a hearing which, when combined with the stress of the occasion, lead them to think that a tribunal is biased or unfair in asking questions which are, in fact, legitimate.

14. It follows that ground (i) does not succeed.

15. I should not leave this ground of appeal without recognising that the Appellant's representative has diligently researched the question of what he describes as the use of adversarial practices in an inquisitorial jurisdiction. In summary, he raises the following questions: "is cross-examination ever allowed in proceedings at the Social Entitlement Chamber; if so can panel members be allowed to cross-examine appellants, or should it only be the remit of advocates; if cross-examination is to be allowed, what provisions are to be implemented to guarantee procedural fairness – such as notifying appellants beforehand that cross-examination will take place, and a notification of the issues that cross-examination will be inquiring into." In that context the Appellant's representative refers to several authorities from other jurisdictions (e.g. *MNM v Secretary of State for the Home Department (Surendran guidelines for Adjudicators) Kenya* [2000] UKIAT 00005).

16. The Appellant's representative invites me to provide judicial guidance on such issues. I decline that invitation, given my finding that Dr X's questioning was consistent with the inquisitorial ethos of the Social Entitlement Chamber. It did not amount to cross-examination.

17. The remaining grounds of appeal can be taken much more shortly.

Ground (ii): no prior notice about questions on role as town councillor

18. The second ground of appeal is not persuasive. The Appellant had previously volunteered the information that she had a role as a town councillor. The Tribunal's questions in that regard were relevant to understanding how this role was affected both by her mobility issues and any difficulties in interacting with others. A claimant can reasonably be expected to be asked questions about any matters relevant to their daily living or mobility activities and disclosed on the PIP claim form and/or in related documents. Moreover, as the District Tribunal Judge correctly noted in particular when granting permission to appeal, "It is surprising that it was not foreseen that the First-tier Tribunal might investigate those duties and consider to what extent they were consistent with her claimed limitations".

19. It follows that ground (ii) – essentially a complaint of a breach of natural justice – is unsuccessful.

Ground (iii): failure to consider variability of health conditions

20. This ground of appeal is that the Tribunal erred in law in evaluating the variability of the limitations in the Appellant's ability to undertake the various daily living and mobility activities. The further particulars of this ground are to a great extent based on criticisms of Dr X's approach to questioning, and are unpersuasive for that reason alone. More generally this ground of appeal is at heart an attempt to re-argue factual issues which were for the Tribunal to determine.

21. Accordingly, ground (iii) is not made out.

Ground (iv): mobility descriptor 1(d)

22. This ground of appeal is that the Tribunal failed properly to consider and apply the decision in *Secretary of State for Work and Pensions v IV (PIP)* [2016] UKUT 420 (AAC), and especially the guidance on assessing eligibility for mobility descriptor 1(d) at paragraph 26 of Upper Tribunal Jacobs's decision.

23. The Tribunal addressed the mobility activity of planning and following a journey in paragraph 42 and 43 of the statement of reasons. The Tribunal's findings, though concise, appear to be consistent with both those of the health care professional and the oral evidence given to the Tribunal. In particular, the Tribunal's findings in paragraph 43 as to what would happen if the Appellant had to travel on her own by public transport appear to be consistent with the oral evidence. There is no indication in this passage that the Tribunal erred in law in its approach – rather this ground of appeal essentially represents a disagreement with the Tribunal's factual findings.

24. As such, ground (iv) also does not succeed.

Ground (v): irrational and inconsistent reasoning

25. The Tribunal's decision notice recorded that with effect from 21 February 2020 the Appellant scored 2 points for daily living descriptor 2(b) (taking nutrition) together with 2 points for descriptor 4(b) (washing and bathing). The Tribunal's subsequent statement of reasons corrected two accidental errors in the decision notice under rule 36 of the 2008 Rules. The first was that 2 points should have been awarded for the daily living activity 1 (preparing food), and not for taking nutrition (activity 2). The second was that the correct effective date for the award of points was as from 19 August 2019 and the date of the DWP decision was 21 February 2020.

26. The Tribunal then went on to set out its findings and explain its reasoning as regards daily living activities 1 and 2 at paragraphs 19-20 and 21-22 respectively of the statement of reasons. Those findings are sustainable on the evidence. The very fact that the accidental error on the decision notice had been corrected is sufficient answer to the suggestion that the Tribunal's decision involves irrational and inconsistent reasoning. Any inconsistency is necessarily cured by the correction of the accidental error, which is precisely the sort of unintended slip that may happen in a busy first instance tribunal. The remaining submissions on this ground of appeal all rely on ground (i) succeeding. As ground (i) has been dismissed, those other submissions fall away.

27. It follows that ground (v) does not succeed.

Ground (vi): irrational findings of fact

28. This ground of appeal – that the Tribunal erred in law by making irrational findings of fact, those findings being based on the Appellant's oral evidence obtained during questioning by Dr X – stands or falls with ground (i). Given my conclusion above on that primary ground of appeal, ground (v) necessarily falls.

29. All in all, in the present case the Tribunal dealt systematically and thoroughly with the relevant issues in its statement of reasons. Those reasons, taken as a whole, are sufficient and indeed more than adequate – they are clear, comprehensive and cogent. I appreciate this will be disappointing for the Appellant, but my conclusion is that the Tribunal has both found sufficient facts and given adequate reasons to justify its decision to refuse her PIP appeal.

Conclusion

30. The First-tier Tribunal in this case provided an adequate explanation of why it had reached the decision it had. Its decision reveals no error of law. Accordingly, I dismiss the Appellant's appeal (section 11 of the Tribunals, Courts and Enforcement Act 2007). The decision of the First-tier Tribunal stands.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 19 December 2022