IN THE UPPER TRIBUNAL **Case No.** CE/281/2017
ADMINISTRATIVE APPEALS CHAMBER

Before E A L BANO

Decision: My decision is that the decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the tribunal's decision and remit the case for hearing before a differently constituted tribunal.

REASONS FOR DECISION

1. The claimant is a man now aged 63 with rheumatoid arthritis, cervical spondylosis and gout, together with cancer of the genitalia and an oesophegeal condition which limits the anti-inflammatory medication which he is able to take. The claimant also has anxiety and depression and is reported to have had episodes of disinhibited behaviour.

2. Having been in receipt of ESA since 20 March 2014, the claimant completed and returned an ESA 50 questionnaire on 9 February 2016 and underwent a medical examination on 8 March 2016. The healthcare professional assessed the claimant as scoring 6 points in respect of descriptor 1(d) of the limited capability for work assessment, and on the basis of that assessment a decision was made on 16 March 2016 superseding and removing the claimant's entitlement to benefit. That decision was maintained on mandatory reconsideration on 25 April 2016 and the claimant appealed against it through his present representatives on 13 May 2016.

3. The representatives' submission to the tribunal included a letter from the claimant's GP dated 19 May 2016, written in response to a letter which was not in evidence before the tribunal when the appeal was heard. After setting out the claimant's medical conditions, the GP continued:

> "Due to the above conditions he has difficulty mobilising more than 50 metres on level ground without stopping in order to avoid significant discomfort o[f] exhaustion. He also has difficulty mobilising repeatedly 50 meters within a reasonable time scale because of significant discomfort or exhaustion. He needs to have strong analgesia in the form of Matrifen patched which affects his cognitive ability he finds it difficult to complete simple tasks it also affects him in his awareness of everyday hazards."

4. At a hearing on 16 August 2016 the tribunal applied ESA limited capability for work descriptor 1(c), but they awarded the claimant no further points and held that regulation 29(2)(b) of the 2008 ESA Regulations was inapplicable in his case. The tribunal made the following observations about the GP's letter:

> "The letter has clearly been written for the purposes of the appeal but we have not been provided with the letter to which it is responding which affects the weight we attach to it. Further, whilst we accept the GP's professional

> opinion of the heath conditions, the GP does not state the evidence upon which he has based the limitation in activities or given examples e.g. what he considers simple tasks. The letter does not say the type of disinhibited behaviour or how often or when in the past. The letter also conflicts with [the claimant's] own descriptions of his limitations e.g. regarding distance of mobilising, ability to carry out simple tasks and awareness of hazards. We therefore attach little weight to the GP's opinions of the limitations."

Dealing with regulation 29, the tribunal said:

> "The condition, history, physical and mental state examinations, medical knowledge of the conditions and the GP's and consultant's letters do not suggest that there would be a substantial risk to the physical or mental health of any person, including [the claimant], if he were found not to have limited capability for work. Neither do we consider that there is evidence to suggest that being found not to have limited capability for work would cause [the claimant's] condition to deteriorate. The evidence does not suggest that any requirements that may be made of [the claimant] as a result of such a decision would be detrimental to his health to such an extent that it would constitute substantial risk.
>
> Whilst [the claimant] suffers from some restrictions, there is limited evidence to suggest that he could not function in the modern workplace which allows for reasonable adjustments or aids as required. {The claimant] last worked in 2005 as a shelf stacker in a supermarket when he left to become a carer for a parent, rather than due to health conditions. Evidence in the bundle, including the description of a typical day, demonstrates a range of skills transferable into the workplace for example using the phone, watching a TV screen, engaging with people, making meals and hot drinks, using a washing machine, putting away shopping.
>
> Taking account of the transferable skills performed in his previous role, we consider that, subject to reflecting the reasonable limitations that his health imposes on him, (including consideration of reduced hours or workplace adaptations), there is an adequate range of work which [the claimant] could undertake without creating a substantial risk either to himself or others.
>
> As [the claimant] uses buses and taxis, attends appointments and goes out alone, the evidence does not suggest that there would be a significant risk due to any journey involved in employment that he may need to make."

5. The claimant applied for permission to appeal on a number of grounds, arguing that the hearing of the appeal had been conducted unfairly, but in giving permission to appeal on 6 February 2017 Judge Ward raised questions as to whether the tribunal correctly applied regulation 29, as interpreted by the Court of Appeal in *Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42, and whether the tribunal gave adequate reasons for rejecting the evidence of the claimant's GP with regard to the distance which the claimant could walk. The

Secretary of State has opposed the appeal in a written submission dated 13 March 2017.

6. Dealing first with the evidence of the GP, I consider that the tribunal gave adequate and valid reasons for rejecting the GP's assessment of the claimant's walking ability. In his claim form the claimant stated that the distance which he could walk in the terms of the relevant descriptors was 100 metres and, even if the GP did base her assessment of the claimant's walking ability on what the claimant told her about how far he could walk from his house, the tribunal was in my view entitled to reject the GP's assessment for the reasons it gave. I also accept the Secretary of State's submissions with regard to the claimant's other grounds of appeal concerning the GP's evidence.

7. I have however come to the conclusion that the tribunal's reasons for rejecting the application of regulation 29 were inadequate. Although the Secretary of State's representative has submitted that the claimant's representatives did not invite the tribunal to consider regulation 29, the representatives have explained that the reason for that omission was that they were contending that the tribunal ought to find that the claimant had limited capability for work-related activity. However, the tribunal did in fact consider regulation 29, as they were required to do once they decided that the claimant did not have limited capability for work or for work-related activity, and were therefore obliged to give adequate reasons for their decision on the regulation 29 issue.

8. Regulation 29(2)(b) of the Employment and Support Allowance Regulations 2008 provides that a claimant is to be treated as having limited capability for work if:

> "the claimant suffers from some specific disease or bodily or mental disablement and, by reason of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work."

In *Charlton* the Court of Appeal held in relation to the similar provision in the incapacity benefit scheme that:

> "In order to determine whether there is any health risk at work or in the workplace it is necessary to make some assessment of the type of work for which the claimant is suitable. The doctor, the decision-maker and, if there is an appeal, the tribunal, should be able to elicit sufficient information for that purpose. The extent to which it is necessary for a decision-maker to particularise the nature of the work a claimant might undertake is likely to depend upon the claimant's background, experience, and the type of disease or disablement in question. It is not possible and certainly not sensible to be more prescriptive. The most important consideration is to remember that the purpose of the enquiry is to assess risk to the claimant and to others arising from the work of which he is capable. No greater identification of the type of

> work is necessary other than that which is needed to assess risk arising from risk or the workplace."

9. It is clear from the judgment of the Court of Appeal in *Charlton* that the question of whether regulation 29 applies to a claimant is fact-specific and that a tribunal's findings in relation to the Regulation must therefore be based specifically on a claimant's individual circumstances. That is not to say that the reasons for a tribunal's decision on whether regulation 29 applies to a claimant need necessarily be long or elaborate, and in many cases the tribunal's findings in relation to matters such as the nature and extent of a claimant's disablement will also provide a basis for their conclusions in relation to regulation 29. However, in carrying out the risk assessment required by the Regulation, it is in my view necessary that it should be reasonably apparent from the reasons, read as a whole, that the individual circumstances of the particular claimant have been fully and properly taken into account when deciding whether the Regulation applies.

10. The tribunal in this case found that the claimant had last worked in 2005 as a shelf stacker in a supermarket and considered that his skills in that role were transferable to other work. Although the tribunal did not accept the evidence of the claimant's GP with regard to the extent of the claimant's limitations, they did accept her opinion with regard to the claimant's medical conditions. They included inflammatory joint disease, rheumatoid arthritis, gout, pain and swelling in the claimant's hands, together with stiffness in the hands affecting fine manipulation of the claimant's fingers. Those conditions could be expected to call into serious question the claimant's ability to resume work as a supermarket shelf stacker or to carry out similar work, e.g. work in a warehouse, and in fact the claimant told the Healthcare Professional that he cannot bend forward to put on his socks and shoes and relies on his neighbours to do housework, to get things down from the top of a wardrobe, to use a vacuum cleaner and to hang out his washing. The claimant also told the Healthcare Professional that because he cannot bend he keeps everything at work surface level.

11. The tribunal also referred to the activities carried out by the claimant noted by the Healthcare Professional in her description of a typical day, including watching television, engaging with people, making meals and hot drinks, using a washing machine and putting away shopping. The claimant did not in fact tell the Healthcare Professional that he watched television and stated that, although he had a mobile phone, he never used it, but in any case the tribunal did not make clear the type of work to which those activities were relevant.

12. I therefore reject the submission of the Secretary of State's representative that the tribunal's reasons were adequate in relation to the regulation 29 issue. Although the representative has submitted that the tribunal must be taken to have decided that there was a wide range of work that the claimant would be able to do, in my judgment an informed reader of the statement of facts and reasons in this case is left guessing as to what specific type of work the tribunal considered that the claimant could undertake without substantial risk to his mental or physical health. For that reason, I consider that the tribunal did not identify the type of work which the

claimant might undertake with the particularity required by *Charlton*, that is, to enable an assessment to be made of the risks to the claimant arising from work or the workplace.

13. I therefore hold the tribunal's decision to be in error of law and, accordingly, I do not need to consider the other grounds of appeal.

14. For those reasons, I allow the appeal, set aside the tribunal's decision and refer the case to the First-tier Tribunal for complete rehearing before a fresh tribunal.

E A L BANO
7 June 2017