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 Sunderland First-tier Tribunal dated 21 March 2016 under file reference SC226/15/00312 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 appeal is allowed.*
>
> *The Secretary of State's decision of 10 June 2015 is set aside.*
>
> *The Appellant did not fail, without good reason, to attend or participate in a consultation to enable the Department to assess her potential entitlement to PIP.*
>
> *It follows that the Appellant's claim to PIP received on 11 June 2014 should be decided on the evidence currently available to the Department. The case is referred back to the Secretary of State for that purpose. The Appellant will have a fresh right of appeal against whatever decision on entitlement is made."*

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

REASONS FOR DECISION

Introduction

1. This case concerns a claimant's appeal against a decision that she was not entitled to Personal Independence Payment because she had allegedly failed without good cause to attend or participate in an ATOS face to face assessment.

The Upper Tribunal's decision in summary

2. The Appellant's appeal to the Upper Tribunal is allowed. The decision of the Sunderland First-tier Tribunal ("the Tribunal"), dated 21 March 2016, involves an error of law and is set aside. The Tribunal's decision is of no effect.

3. A First-tier Tribunal re-hearing is not necessary in the particular circumstances of this case. I therefore both (a) allow the Appellant's appeal to the Upper Tribunal; and (b) re-make the decision that the First-tier Tribunal should have made and in the terms as set out above. My reasons follow.

The background

4. The Appellant suffers from a number of mental health conditions, including depression and anxiety. According to a locum GP at her local surgery, in a letter dated 13 April 2017 (and so well after the date of the Tribunal hearing):

> "She suffers in particular from social phobia, with a reported tendency to suicidal thoughts and urge to self-harm. As such, I would suggest that the additional stress of a face to face interview would be likely adversely to affect her mental

health and that she is therefore unfit for interview. I would therefore be grateful if [she] did not have an interview."

The sequence of events *before* the First-tier Tribunal's decision

5. The precise sequence of events before the Tribunal hearing is not entirely clear owing to deficiencies in the DWP's response to the appeal as submitted to the Tribunal office. Doing the best I can in the circumstances, and putting together other parts of the evidential jigsaw, what seems to have happened is as follows.

6. On 9 May 2014 the Appellant made a telephone claim for Personal Independence Payment (PIP).

7. On 11 June 2014 the DWP received the Appellant's PIP2 questionnaire "How your disability affects you". The Appellant specified a number of mental health conditions she was suffering from and set out in some detail how these affected her in relation to the various daily living and mobility activities.

8. On 16 October 2014 ATOS Medical Services wrote to the Appellant as follows (emphasis as in the original):

> "We recently asked you to attend a medical assessment at 10:30 am on Friday 31st October 2014. This was in relation to your benefit claim.
>
> We have now received more information and **we no longer need you to come for this assessment.** Please **do not** come to the medical examination centre as this appointment has been cancelled."

9. The ATOS letter of 16 October 2014 does not specifically refer to a claim for PIP, but it is a reasonable assumption that it was concerned with PIP, given the timeline. I simply note at this stage that the ATOS letter was not included in the DWP's response to the Tribunal, but has been provided subsequently to the Upper Tribunal by the Appellant.

10. According to the DWP's response to the appeal, as filed with the Tribunal, the Appellant then "cancelled four appointments in a row". These were said to have been arranged for 9 January 2015, 17 February 2015, 6 March 2015 and 7 April 2015. It was said that on each occasion the Appellant had said that further medical evidence was being submitted and/or she was unfit for assessment. The response added that "the Assessment Provider [ATOS] informed the department of the four unsuccessful appointments in a row".

11. I interpose here that the DWP response to the appeal included no evidence to support this account beyond the narrative account in the submission. There were no copies of any ATOS appointment letters. Nor were there any copies of computer print-outs detailing the issuing of correspondence or the nature of the telephone conversations that were said to have taken place.

12. On 10 June 2015 the DWP wrote to the Appellant stating that she was not entitled to PIP. The reason given was as follows: "This is because we couldn't complete the consultation because you didn't fully take part and we don't think you've given us a good reason for this". A copy of this letter was provided with the DWP response.

13. On 4 August 2015 the Appellant asked the DWP to reconsider its decision to refuse her PIP claim. Again, this letter was included in the DWP response to the appeal. She wrote as follows:

> "… I sent extra paper work in to support my application and I rang ATOS several times and they said that ATOS is not going to call me for a face to face assessment as they have already done the paper based review as they had enough evidence to do the final report… I contacted ATOS several times to see what was happening as I did not hear anything and I was told that the final assessment report is with the decision maker who will take 3-8 weeks to make the final decision."

14. On 20 October 2015 the DWP issued the Appellant with a mandatory reconsideration notice, declining to change the decision.

15. On 18 November 2015 the Appellant lodged her appeal. In doing so, she set out the arguments she had made in her mandatory reconsideration request in more detail. She also asked for the case to be dealt with on the papers.

16. Pausing there for a moment, it is relevant to take stock of the documentation that the Tribunal had before it in the appeal bundle.

17. From the Respondent, the Tribunal had the DWP's formal response to the appeal, detailing by way of a narrative in the submission the series of what it said were cancelled appointments. The response argued that the Appellant had not shown good cause for her non-attendance at the PIP assessments. It stated that she had not made any contact with the Department until 12 months after her original claim (i.e. not until June 2015). The only documents produced by the Department with no input from the Appellant were the original refusal letter and then the mandatory reconsideration notice. There was no other *evidence* at all originating from the DWP.

18. From the Appellant, the Tribunal had copies of (a) her PIP2 questionnaire, (b) her mandatory reconsideration request, (c) her notice of appeal and (d) various evidence from her GP. The medical evidence needs some consideration as it took on added significance when the Tribunal dealt with the case. The GP evidence consisted of (i) a Med 3 sick note confirming that the Appellant had suffered from anxiety and depression for the past 6 years; (ii) a typed and signed letter on headed surgery notepaper, essentially to the same effect and asking for her to be subject to a paper assessment, given her condition (p.58 of the bundle); (iii) a series of three other letters purporting to be from the GP and giving more details of the effects of the Appellant's mental health conditions.

19. There was nothing at all out of the ordinary about documents (i) and (ii). As to the further three letters in category (iii), these were all typed, addressed "to whom it may concern" and on plain (i.e. not headed) notepaper. Each was signed by the GP underneath which the surgery's official stamp had been added. This is not to suggest that there anything sinister in the production of these letters. The contents of the letters were entirely consistent with the sick note and the letter on headed notepaper. An obvious inference was that they had been drafted and typed by the Appellant who had presented them to her GP for his approval, signature and surgery stamp. There was no attempt to pass them off as if they were official letters on headed notepaper.

The First-tier Tribunal's decision

20. On January 2016 a First-tier Tribunal adjourned the appeal "because there is no date or letterhead on the letters said to be sent by the GP with the exception of the letter at page 58". The Tribunal therefore considered it necessary to consider the history of attendances at the GP surgery. As such, it asked the Appellant to sign and return the relevant consent form and directed the clerk thereafter to obtain relevant medical records as from 1 January 2015.

21. The Appellant was sent the relevant consent form twice. Rather than complete and return it, she sent in a new Med 3 sick note and a total of a further three letters in the same format as the previous letters not on headed notepaper but apparently signed and stamped by the GP.

22. On 21 March 2016 the case came back before a fresh Tribunal. The Tribunal dismissed the appeal and purported to confirm the Department's decision of 9 May 2014 (actually it was the decision of 10 June 2015, but the DWP had included the wrong date in its summary at the front of the response). According to the decision notice, the Tribunal decided that the Appellant "had not shown good reason for failing to co-operate with the Department in assessing her claim."

The sequence of events *after* the First-tier Tribunal's decision

23. On 19 April 2016 the Appellant wrote to the Tribunal asking for "a fresh decision or new hearing". She reiterated that she had sent in several letters from her GP to the DWP or to ATOS. This letter appears to have been treated as an implied application for permission to appeal with a request for a review (i.e. under rule 40 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685)).

24. On 6 May 2016 the District Tribunal Judge directed that the Appellant be sent a further GP consent form as regards her medical records from 1 January 2015. The Appellant again declined to return the authority form, but sent in further letters in the same format as the previous letters not on headed notepaper but apparently having been dated, signed and stamped by the GP. She also rang the Tribunal office on 6 June 2016; the clerk's note of that conversation records that the Appellant was "extremely panicky and worried about us requesting medical records which she doesn't want being made public due to her family not knowing".

25. On 24 June 2016 the District Tribunal Judge issued a further directions notice, noting that the Appellant had refused to provide a consent form but rightly acknowledging that she may have good reason not to do so and could not be compelled to do so. It added, again correctly, that the weight to be attached to such letters as had been provided was a matter for the Tribunal. It further added that "the Tribunal can also strike out the Appellant's appeal for failure to comply with a Tribunal direction". Again, that was perfectly true as a statement of principle. In practice, however, its relevance was unclear, given the Appellant's appeal had already been dismissed three months previously. Be that as it may, the Appellant was given another 21 days in which to return the consent form.

26. On 22 July 2016 the Appellant wrote to say her GP was on sick leave.

27. On 12 August 2016 another District Tribunal Judge issued directions explaining that the Tribunal did not want to see handwritten letters from the GP but rather a copy of the Appellant's GP surgery computer records. She was given a further 21 days to return the consent form. The District Tribunal Judge added that if the consent

form was returned the Tribunal would consider setting aside the decision of 23 March 2016 disallowing the appeal.

28. On 5 September 2016 the Appellant replied, explaining her position again at some length and asking for the matter to be resolved because of the added stress it was causing her.

29. On 13 September 2016 the District Tribunal Judge refused to set aside the Tribunal's decision on the appeal.

30. On 4 October 2016 the Appellant asked for a statement of reasons. This was sensibly treated as an in-time request in relation to the original decision of 21 March 2016 and not the refusal to set aside.

31. On 11 November 2016 the District Tribunal Judge who had presided at the substantive hearing issued a statement of reasons for the Tribunal's decision. The Tribunal identified the issue it had to determine as being whether "the appellant had shown good cause in failing to attend the medical assessment" (paragraph 6). The Tribunal concluded, in summary, that "she had failed to co-operate with both the Department and also with the Tribunal and had in the Tribunal's view not shown good cause for that failure to co-operate" (paragraph 6 again).

32. The Tribunal's statement of reasons explained that "in coming to that conclusion the Tribunal had regard to the history of the case" (paragraph 7). The Tribunal then referred to the chronology of the case from 18 January 2016 through to the refusal to set aside in September 2016. In other words, the focus of that explanation was exclusively directed to the Appellant's dealings with the Tribunal, as set out in paragraphs 20-29 above.

33. The Tribunal then concluded as follows:

> "8. There is a history of non-compliance by this appellant both in respect of the request by the Department for Work and pensions but also and in particular despite several requests by the Tribunal to assist the appellant with her appeal in the obtaining of GP records which two Tribunal Judges felt were essential to her case. The letters purported to be from her doctor cannot be verified without sight of her original GP records and in view of the doubts that the Tribunal had with regard to the authenticity of those letters the Tribunal disregarded those letters in making its decision concerning the extent to which the appellant had shown good cause in her failure to comply with the request that she attend for an assessment.
>
> 9. The Tribunal ultimately base upon the whole evidence available decided that the appellant in this case had not shown good reasons for her non-attendance and for that reason the appeal failed."

The proceedings before the Upper Tribunal

34. I subsequently gave the Appellant permission to appeal. The appeal is supported by Ms Teresa Tosta for the Secretary of State. In short, she agrees that the Tribunal failed to make proper findings of fact and give adequate reasons for not attending the medical appointments. Ms Tosta accepts that the Appellant had been told, and reasonably believed, that she did not need to attend such an appointment if she filed medical evidence, as she had. Ms Tosta therefore contends that the Tribunal erred in law and so its decision should be set aside. She invites me to make "further directions or decision as appropriate".

The Upper Tribunal's analysis

35. I start by reminding myself as to the relevant legislative framework.

36. In summary, a person claiming PIP <u>may</u> be required to "attend for and participate in a consultation in person" (see regulation 9(1)(a) of the Social Security (Personal Independence Payments) Regulations 2013 (SI 2013/377)). Where such a person "fails without good reason to attend for or participate in a consultation … a negative determination must be made" (regulation 9(2)). In deciding whether a person has good cause under regulation 9(2), their "state of health at the relevant time" and "the nature of any disability" are among the matters to be taken into account (regulation 10).

37. The First-tier Tribunal's decision in this appeal was fundamentally flawed in several respects.

38. First, the Tribunal failed to make any findings of fact as to the nature of the Appellant's alleged failure to participate. Beyond a generalised reference in the statement of reasons to "a history of non-compliance", there were no findings as to the supposed failure or failures to participate. Indeed, the only evidence the Tribunal had from the Department that she had failed to participate was the narrative in the submission. This was evidence, and had some probative value (see *Walsall Metropolitan Borough Council v PL* [2009] UKUT 27 (AAC) at paragraph 10), but the narrative provided (a) was plainly contested, (b) was supported by no other evidence and (c) has been now demonstrated to be incomplete. As such the Tribunal did not properly address the requirements of regulation 9.

39. Second, the Tribunal made no findings about the nature of the Appellant's health conditions or disability, beyond a passing reference to an (unspecified) "list of medical conditions that she complained of" (statement of reasons at paragraph 5). Putting to one side the letters which were not on headed notepaper, there was clear and undisputed medical evidence before the Tribunal that the Appellant suffered from significant mental health problems. In addition, the Tribunal made no reference to the Appellant's repeated arguments that she had been in contact with the DWP and ATOS (and not simply a year after claiming) and that she had been assured she did not need to attend a face to face assessment. In failing to make any findings on all such matters, the Tribunal failed to address the requirements of regulation 10.

40. Third, and on a related point, the Tribunal became unduly fixated on the authenticity of the letters which were not on headed notepaper. It recorded its doubts on this matter, without actually making a finding as to whether they were or were not authentic, and yet then disregarded the letters in their entirety – without having regard to the other medical evidence from the GP. There were realistically only four scenarios:

(i) the letters in question were a complete fabrication by the Appellant with no input from the GP;
(ii) the Appellant had written the letters and the GP had dated, signed and stamped them without reading or discussion them with her;
(iii) the Appellant had written the letters and the GP had dated, signed and stamped them after reading them;
(iv) the Appellant had written the letters and the GP dated, signed and stamped them after both reading and discussing them with her;

The Tribunal really had to form a view as to which of those scenarios was most likely on the balance of probabilities, rather than simply referring to "doubts".

41. Fourth, and finally, the Tribunal was also unduly fixated on the Appellant's refusal to return the consent form. The bulk of the Tribunal's narrative of events and its reasons are concerned with this non-compliance with the Tribunal's directions. This approach was problematic. The issue was the Appellant's compliance with the Department's request (on which, I repeat, there was no evidence forthcoming from the DWP, beyond the submission) rather than any non-compliance with the Tribunal's directions. Moreover, she was of course entitled to refuse to consent to disclosure of her medical records. For good measure, the history of her non-compliance with the Tribunal by definition took place well after the date of the decision by the Department; such consideration accordingly amounted to an obvious breach of section 12(8)(b) of the Social Security Act 1998.

42. I therefore find that the Tribunal's decision involves an error of law and should be set aside.

Disposal of the appeal

43. In all the circumstances, and not least the time that has elapsed, I take the view it is right for me to re-make this Tribunal's decision. Sending the case back for a new hearing before the First-tier Tribunal will achieve nothing except further delay. Given her mental health problems, there is little if any chance that the Appellant will attend any re-hearing. Accordingly any new First-tier Tribunal will realistically not be any better placed than I am in making the substantive decision. There is plenty of evidence on file (at least from the Appellant). I therefore propose to re-make the Tribunal's decision under appeal.

44. I can deal with this shortly. The Department has singularly failed to provide sufficient probative evidence that the Appellant failed to participate in a PIP face to face assessment. Even if she did so fail, she had good reason for not participating for two main reasons. The first was because of her mental health problems, as confirmed by her GP. In doing so I can simply rely on the basis of his letters on headed notepaper, without regard to those about which the Tribunal had "doubts". If necessary I conclude as regards those letters that the Appellant drafted them for the GP to sign and either scenario (iii) or (iv) in paragraph 40 above applied. The second is because she had been assured by telephone that she had provided sufficient information for a face to face assessment to be unnecessary (and as confirmed by the ATOS letter of 16 October 2014 which was not put before the First-tier Tribunal).

45. The decision that the First-tier Tribunal should have made, and which I now make, is therefore as follows:

> *The appeal is allowed.*
>
> *The Secretary of State's decision of 10 June 2015 is set aside.*
>
> *The Appellant did not fail, without good reason, to attend or participate in a consultation to enable the Department to assess her potential entitlement to PIP.*
>
> *It follows that the Appellant's claim to PIP received on 11 June 2014 should be decided on the evidence currently available to the Department. The case is referred back to the Secretary of State for that purpose. The Appellant will*

have a fresh right of appeal against whatever decision on entitlement is made.

Conclusion

46. The decision of the First-tier Tribunal involved 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 also re-make the tribunal's decision (section 12(2)(b)(ii)) in the terms set out above.

Signed on the original
on 11 September 2017

Nicholas Wikeley
Judge of the Upper Tribunal