IN THE UPPER TRIBUNAL **Appeal No. CPIP/863/2017**
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge K Markus QC

The decision of the Upper Tribunal **is to allow the appeal**. The decision of the First-tier Tribunal made on 28 November 2016 under number SC228/16/01145 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remake the decision.

The decision which I make is:
The Appellant's appeal to the First-tier Tribunal is dismissed. The Secretary of State's decision of 3 June 2016 is confirmed. The Appellant is entitled to the standard rate of both the daily living and mobility component of Personal Independence Payment from 3 June 2016 to 24 May 2020.

REASONS FOR DECISION

1. This appeal provides a clear example of the complications that can arise from the First-tier Tribunal's exercise of the powers of review in section 9 of the Tribunals Courts and Enforcement Act 2007, particularly the power in section 9(5)(b) to refer a case to the Upper Tribunal, and illustrates the need for care in doing so.
2. The Appellant had been in receipt of both components of Personal Independence Payment (PIP) at the standard rate. During the period of the award she submitted further evidence and sought the enhanced rate. The Secretary of State carried out a review of her claim and on 3 June 2016 confirmed the previous award, although with a slight reduction in points, terminating on 24 May 2020. The Appellant appealed to the First-tier Tribunal (FTT) against the decision of 3 June 2016. Following an oral hearing on 28 November 2016 the FTT confirmed the award of the mobility component but decided that the Appellant was not entitled to the daily living component. The decision notice stated as follows:

   > "1. The appeal is refused.
   >
   > 2. The decision made by the Respondent on 03/06/2016 is confirmed except in relation to daily living where the tribunal have reduced the number of points from 9 to 5 for the following descriptors. 1(b) preparing food 2 points 3(b) managing therapy 1 point 6(c) dressing and undressing 2 points
   >
   > 3. The tribunal confirm the award of 10 points for mobility descriptor 2(d)
   >
   > 4. Payment from 03/06/2016 to 24/05/2019."

3. On the request of the Appellant the FTT provided a statement of reasons which explained its findings of fact with considerable care, made clear the points which had been awarded for each of the above descriptors, and concluded by stating that the Appellant was not entitled to any award for the daily living activities and was entitled to the standard rate of the mobility component. This was the necessary consequence of the points awarded.

4. The Appellant sought permission to appeal from the FTT. On 17 February 2017 a District Tribunal Judge (DTJ) made the following directions:

> "The Appellant has applied for permission to appeal to the Upper Tribunal against the decision of the tribunal issued on 28.11.16.
>
> Pursuant to section 9(2)(b) of the Tribunals Courts and Enforcement Act 2007 the Tribunal can review a decision when a party has asked for permission to appeal when it considers that the decision contains an error of law.
>
> The Tribunal finds that there might be an error of law in the decision because the Decision Notice issued by the tribunal is not sufficiently clear; and appears to be in error as to the end date of the award it confirmed. The decision under appeal made an award to 24.5.20 - the date adopted by the tribunal, 24.5.19, was the date indicated for anticipated further contact.
>
> In my view the Decision Notice should read: *The appeal is refused. The decision made by the Respondent on 3.6.16 is revised. Mrs [A] is entitled to the standard rate of the mobility component of personal independence payment from 3.6.16 to* ***24.5.20*** *but is not entitled to the daily living component from 3.6.16. She scores 10 points for mobility descriptor 2(d) and 5 points the daily living activities: 1(b), 3(b) and 6(c).*
>
> The parties are invited to make any comments in writing within 14 days of the date that this direction was sent to them, after which the tribunal will make a decision whether, and how, to review the decision of the Tribunal."

5. On the same date, the DTJ gave permission to appeal, in a separate decision notice. The DTJ set out the same concerns as above about the FTT's decision notice and the proposed amendment. The DTJ said that she had commenced the procedure for reviewing the FTT's decision but did not wish to delay dealing with the application for permission to appeal and so granted permission to appeal against the decision removing the daily living component on the ground that the FTT did not appear to recognise that it was carrying out a supersession of an awarding decision and, if so, on what grounds. The decision notice giving permission to appeal concluded with the following:

> "Rather than set aside the decision, I have granted permission to appeal. This is because the Statement of Reasons is very full; the error may or may not be considered material to the decision."

6. No comments having been received on the proposed review, on 21 March 2017 the DTJ gave a further decision reviewing the FTT's decision on the ground that it contained an error of law, described in the same terms as the DTJ had suggested in the directions of 17 February. The decision notice on the review stated that the FTT's decision notice should read as the DTJ had proposed in the earlier directions (the italicised passage set out above), and concluded with:

> "Pursuant to section 9(4)(c) of the Tribunals Courts and Enforcement Act 2007, the decision of the Tribunal is set aside.
>
> The matter shall be referred to the Upper Tribunal in accordance with section 9(5)(b) of the Act. This is because on 17.2.17 I gave the appellant permission to appeal on another ground".

7. On 10 April 2017 I expressed a provisional view that in the circumstances of this case the DTJ had not had power to review the decision. I directed that the appeal should proceed and invited the parties' observations as to whether there had been an effective review. I expressed the view that the ground on which the

tribunal had purported to review the decision could be addressed as an additional ground of appeal.

8. The Secretary of State has sent written submissions supporting the appeal. He submits that the FTT had no power to review the decision. In the light of rules 39 and 40 of the Tribunal Procedure (First-tier Tribunal) Rules 2008, the FTT may only undertake a review on an application for permission to appeal. Therefore, having determined the application for permission to appeal, the FTT had no power subsequently to carry out a review. The Secretary of State supports the appeal on the grounds on which permission was given (the supersession issue) and also on the ground that the tribunal had acted unfairly in removing the daily living component.

9. In her written response, the Appellant agrees with the Secretary of State's submission on the errors of law. She has made submissions as to remedy which I address below.

10. Neither party has requested an oral hearing and I am satisfied that I can fairly determine this appeal on consideration of the papers. I have all the information that I require in the documentation before me and I would not be assisted by having an oral hearing.

The status of these proceedings in the Upper Tribunal.

11. I must first decide whether this matter is an appeal to the Upper Tribunal which must be determined in accordance with section 12 of the Tribunals Courts and Enforcement Act 2007 or whether it has been referred to the Upper Tribunal under section 9(5). There cannot be both an appeal and a referral in relation to the same matter.

The statutory framework

12. Section 9 of the Tribunals Courts and Enforcement Act 2007 (TCEA) provides for the FTT's powers of review. It includes the following:

> "9 (1) The First-tier Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 11(1) (but see subsection (9)).
>
> (2) The First-tier Tribunal's power under subsection (1) in relation to a decision is exercisable–
>
> (a) of its own initiative, or
>
> (b) on application by a person who for the purposes of section 11(2) has a right of appeal in respect of the decision.
>
> …
>
> (4) Where the First-tier Tribunal has under subsection (1) reviewed a decision, the First-tier Tribunal may in the light of the review do any of the following–
>
> (a) correct accidental errors in the decision or in a record of the decision;
>
> (b) amend reasons given for the decision;
>
> (c) set the decision aside.
>
> (5) Where under subsection (4)(c) the First-tier Tribunal sets a decision aside, the First-tier Tribunal must either–

(a) re-decide the matter concerned, or
(b) refer that matter to the Upper Tribunal.

(6) Where a matter is referred to the Upper Tribunal under subsection (5)(b), the Upper Tribunal must re-decide the matter.

(7) Where the Upper Tribunal is under subsection (6) re-deciding a matter, it may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-deciding the matter.

(8) Where a tribunal is acting under subsection (5)(a) or (b), it may make such findings of fact as it considers appropriate.
…"

13. Rules 39 and 40 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 are made under the authority of the 2007 Act and include the following:

"39 (1) On receiving an application for permission to appeal the Tribunal must first consider, taking into account the overriding objective in rule 2, whether to review the decision in accordance with rule 40 (review of a decision).

(2) If the Tribunal decides not to review the decision, or reviews the decision and decides to take no action in relation to the decision, or part of it, the Tribunal must consider whether to give permission to appeal in relation to the decision or that part of it.

…

40 …(2) The Tribunal may only undertake a review of a decision—

(a) pursuant to rule 39(1) (review on an application for permission to appeal); and

(b) if it is satisfied that there was an error of law in the decision.

(3) The Tribunal must notify the parties in writing of the outcome of any review, and of any right of appeal in relation to the outcome.

(4) If the Tribunal takes action in relation to a decision following a review without first giving every party an opportunity to make representations, the notice under paragraph (3) must state that any party that did not have an opportunity to make representations may apply for such action to be set aside and for the decision to be reviewed again."

14. Rule 36 of the 2008 Rules allows the FTT to correct any clerical mistake or other accidental slip or omission in a decision.

Discussion

15. The effect of Rule 39(1) and (2) is: a) the FTT may not consider whether to review a decision unless it receives an application for permission to appeal; b) on receipt of an application for permission to appeal, the FTT must first consider whether to review the decision; and c) the FTT may not consider the application for permission to appeal unless it has decided not to review the decision or to review it and take no action in relation to the decision, or part of it. See also JS v SSWP [2013] UKUT 100 (AAC); [2013] AACR 30 at [22].

16. I am prepared to assume for present purposes that rule 39(2) permits a decision to be reviewed in part and for permission to appeal to be given in relation to the remainder. It seems to me that the separation by commas of the phrase "or part of it" from the rest of the text of rule 39(2) indicates that that phrase governs both of the preceding clauses in that subparagraph, with the effect that subparagraph (2) can be read as: "If the Tribunal decides not to review the decision or part of it, or reviews the decision and decides to take no action in relation to the decision or part of it, the Tribunal must consider whether to give permission to appeal in relation to the decision or that part of it." If that is correct, where a tribunal decides either not to review part of a decision or to review and take no action in relation part of a decision, it must consider whether to give permission to appeal in relation to that part. I have not reached a concluded view on this issue because the parties have not addressed me on the point and it is not necessary for me to do so because, even if the analysis is correct, for reasons which I explain the DTJ's approach was in error. In addition, even if rule 39(2) does permit a review of part of a decision and permission to appeal in relation to another part, it seems to me that this is an approach which is rarely helpful. Attempts to split the decision can lead to unfortunate complications, as in the present case, and it is difficult to see when it would be appropriate to do so. If a DTJ identifies a clear error of law in part of a decision but considers it appropriate to give permission to appeal in relation to other parts, the clear error can be subsumed within the grant of permission to appeal to the Upper Tribunal.

17. In the present case it is apparent from the wording of the decision giving permission to appeal that the DTJ first considered whether to review the decision. The DTJ decided that there *might* be an error of law and invited the parties' views before deciding whether and how to review the decision. That was consistent with the provisions of rule 40 and accorded with good practice. Thereafter, what the DTJ did was misconceived.

18. The first problem with the DTJ's approach is that she did not comply with rules 39(1) and (2). Although the DTJ was considering reviewing the FTT's decision on limited grounds and to limited effect, she was considering reviewing the whole of the decision and not merely part of it. At the same time she gave permission to appeal against part of the decision (to remove the daily living component). It was premature do so because she had not yet decided whether to review the decision (including that part of the decision).

19. In any event, I have real difficulty understanding why the DTJ thought it appropriate to review the decision on the basis identified by her and I do not consider it was a proper exercise of the power to do so. Neither of the matters relied on in support of the review were errors of law. The first basis of the review was that the FTT's decision notice was not sufficiently clear. I have set out the terms of the FTT's decision notice at paragraph 2 above. It lacked in punctuation but it was abundantly clear which points were awarded in respect of which descriptors. The notice did not state the award of PIP but, in the light of the points awarded, it was clear that there was no award of the daily living component and an award of the mobility component at the standard rate. If there were any doubt, that was dispelled by the statement of reasons. If the DTJ felt the words of the decision notice needed to be tidied up, that could have been done under rule 36. The second basis of the review was that the FTT had specified the wrong end date of the award. Again, this was clearly a mistake in the record, possibly copied

from the same error at page C of the Secretary of State's response. The same mistake was repeated in the statement of reasons, but at paragraph 14 the tribunal correctly recited the actual period of the award as set out in the Secretary of State's decision. It is clear that the FTT did not intend to depart from that period. It simply inserted the wrong date in the decision notice. That too could have been corrected simply under rule 36.

20. Section 9(4)(a) allows for the correction of accidental errors on review, but review can only take place if there is an error of law. An accidental error does not provide a ground for review.

21. The next problem with the DTJ's approach is in her referring the matter to the Upper Tribunal under section 9(5)(b). The reason for doing so was because she "gave the appellant permission to appeal on another ground". It seems that the DTJ intended that the Upper Tribunal should correct the clear errors which she had identified in the decision notice and determine the ground of appeal. Unfortunately, on a reference the Upper Tribunal must re-decide the matter: section 9(6). That is likely to require the Upper Tribunal to make primary findings of fact, including if necessary hearing oral evidence, but without the benefit of the specialist expertise of the FTT. It does not give the Upper Tribunal the option of remitting a case to the FTT to make further findings of fact, as it is able to on allowing an appeal under section 12. I note in passing that the commentary in the second paragraph of section 5.40 of Butterworths Social Security Legislation 2017/18 suggests that the course adopted by this DTJ may be appropriate, but I cannot see in what circumstances it would be appropriate and it was not in this case.

22. I have identified a number of errors in and difficulties arising from the DTJ's approach in this case. What can be done about it?

23. I bear in mind the overriding objective, in particular the need to deal with a case proportionately, avoiding unnecessarily formality and to seek flexibility in the proceedings. At risk of repetition, I am satisfied that what the DTJ intended was (i) to correct any formal mistakes in and clarify the record of the FTT's decision, without altering the substance of that decision and (ii) that the Upper Tribunal should decide whether the FTT made a material error of law in removing the award of the daily living component. There is nothing in the DTJ's directions or decisions to indicate that she intended that the Upper Tribunal should remake the FTT's decision on its substantive merits, including making findings of fact, rather than leaving that to the Upper Tribunal's discretion under section 12(2)(b) of the 2007 Act.

24. The DTJ's procedural errors did not render the grant of permission a nullity. The DTJ did not contravene any of the provisions of section 9 of the Act. Rule 7(1) of the First-tier Tribunal Rules provides that an irregularity resulting from a failure to comply with a requirement in the Rules does not render void any step taken in the proceedings. This applies to non-compliance by the tribunal as well as by a party. I am satisfied therefore that there is no obstacle to the Upper Tribunal proceeding to address this matter so as to give effect to the DTJ's intentions and this matter should proceed as an appeal.

25. Before I deal with the grounds of appeal I address one further aspect of the DTJ's review decision. The decision which the DTJ considered that the FTT should have made included the phrase "The decision made by the Respondent on 3.6.16

is revised". The language of revision is inapt in this context. See paragraph 55(3) of R(IS)2/08. The FTT did not revise the decision under appeal. It was standing in the shoes of the decision-maker: R (IB) 2/04. In the present case that meant deciding whether to supersede the existing award.

The appeal

26. In the light of the parties' agreement as to the FTT's errors of law, I need explain only briefly why I am allowing the appeal.

27. The FTT's decision to remove the daily living component from 3 June 2016 was a supersession of the award. The approach to supersession of PIP awards has been considered in a number of Upper Tribunal decisions, summarised most recently in TH v SSWP (PIP) [2017] UKUT 0231 (AAC). For present purposes it is sufficient to note that the FTT did not recognise that it was superseding a previous award. Moreover the FTT could not make a supersession without identifying a ground for doing so and establishing that it was made out on the evidence. The FTT did not do this. It acted as if it was considering a new claim. In consequence, although the FTT explained its conclusions as to the applicable descriptors, it did not explain why this differed from the previous award. Indeed the tribunal did not find that the Appellant's condition had in relevant respects improved since the previous award had been made.

28. I also agree with the Secretary of State that it was unfair of the FTT to remove the award of the daily living component when that was not in issue in the appeal. The FTT had power to consider an issue not raised by the appeal: section 12(8)(a) Social Security Act 1998.

29. In R(IB)2/04 a Tribunal of Commissioners said:

> "194. An appeal tribunal is entitled to make a decision less favourable to the claimant than the decision under appeal…However, unless the Secretary of State has in his submissions to the appeal tribunal raised the issue as to whether a less favourable decision should be made, the tribunal must consciously consider whether to exercise its discretion under section 12(8)(a) of the 1998 Act to take into account issues not raised by the appeal. This is a discretion to be exercised judicially, taking into account all relevant circumstances. If a statement of reasons is given, then reasons for the exercise of the discretion should be set out. In addition, the appeal tribunal must be satisfied that there has been compliance with the requirements of Article 6 of the European Convention on Human Rights and of natural justice…"

30. The Tribunal of Commissioners elaborated on the requirements of natural justice at paragraph 94. A tribunal must at least ensure that the claimant has had sufficient notice of the intention to consider superseding adversely to enable her properly to prepare her case.

31. In the present case, there was no indication that the FTT consciously considered whether it was appropriate to exercise the discretion under section 12(8)(a). It cannot be said that this was an obvious case of the sort envisaged by Mr Commissioner Rowland at paragraph 10 of CDLA/884/2008: "where the evidence is overwhelming or the facts are not in dispute and no element of judgment is involved or where the law has been misapplied by the Secretary of State".

32. I cannot discern why the FTT thought it was appropriate to revisit the existing award and in my judgment it was not. The Secretary of State's decision was

supported by the HCP report following an examination of the Appellant. There was no good reason for the tribunal to investigate all of the activities in Schedule 1 of the PIP Regulations, even though the Appellant challenged the award in respect of only five.

33. In addition, although the FTT warned the Appellant at the start of the hearing that the award might be reduced and gave her an opportunity to withdraw the appeal, I do not consider that she had a fair opportunity to address the possible removal of the award. The Secretary of State's submission to the FTT had explained that the daily living descriptors were not disputed. The Appellant did not have any indication, prior to the hearing, that her existing award was at risk. She would have thought her task was to persuade the tribunal that her condition had got worse such that she should be awarded the enhanced rate. In that regard she was focussing on daily living activities 2, 3, 4 and 6, and mobility activity 2 but she would have had no idea that she also had to defend the award in relation to activities 4 and 5.

Conclusion and disposal

34. For the above reasons I am satisfied that the FTT decision was made in error of law and should be set aside.

35. The Appellant has asked that her previous points are reinstated. She does not want this appeal to be remitted to another FTT because she says that it will be hard to show what her position was in June 2016. She says that, since the FTT's decision, her condition has deteriorated and that she intends to "make a new claim" on that basis. I take it from that that she intends to seek a supersession of the existing award, with effect from a date after the FTT's decision.

36. I am satisfied that it is appropriate for the Upper Tribunal to remake the FTT's decision pursuant to section 12(2)(b)(ii) of the Tribunals Courts and Enforcement Act 2007. It would not be proportionate to remit it to another FTT, given the Appellant's present position. Accordingly I remake the FTT's decision as set out at the beginning of this decision.

Signed on the original
on 13 October 2017

Kate Markus QC
Judge of the Upper Tribunal