IN THE UPPER TRIBUNAL **Appeal No: CE/2506/2018**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant claimant.

The decision of the First-tier Tribunal sitting at Bexleyheath on 17 July 2018 under reference SC168/18/01523 involved an error on a material point of law and is therefore set aside.

The Upper Tribunal is not able to re-decide the appeal. It therefore refers the appeal to be decided afresh by a completely differently constituted First-tier Tribunal at an oral hearing.

(*In the present Covoid-19 emergency it may be that such a hearing will need to be conducted by telephone or by video conferencing (e.g. Skype)*.)

This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(i) of the Tribunals Courts and Enforcement Act 2007

Representation: The appellant neither appeared nor was represented.

Julie Smyth of counsel appeared for the Secretary of State for Work and Pensions instructed by the Government Legal Service.

REASONS FOR DECISION

Introduction

1. This appeal addresses the progress the Secretary of State has made in providing a claimant's employment and support allowance (ESA) 'adjudication history' with the appeal response to the First-tier Tribunal where a claimant appeals a decision on his or her entitlement to ESA in relation to their capability for work and/or capability for work-related activity.

2. Other matters which this decision considers are:

   (i) the role of the 'Work Coach' in Jobcentre Plus in setting work-related activity for an individual claimant and whether that official can have any relevance to the claimant seeking to be put into the 'support group' of ESA on the basis in particular of the claimant satisfying regulation 35(2) of the Employment and Support Allowance Regulations 2008 ("the ESA Regs"); and

   (ii) the provision by the Secretary of State of the appellant's ESA 'action plan' to the First-tier Tribunal in an appeal where regulation 35(2) of the ESA Regs is in issue.

3. In giving the appellant permission to appeal I said the following.

> "1. I give [the appellant] permission to appeal because of issues that arise out of his grounds of appeal, though in and of themselves those grounds appear to be doing no more than seeking to reargue the factual merits of the appeal (which is not an error of law ground).
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> 2. The primary concern I have is with the adequacy of the First-tier Tribunal's approach to regulation 35(2) of the Employment and Support Allowance Regulations 2008 ("the ESA Regs"). Part of the relevant context for that was arguably the basis of the awarding decision the Secretary of State refused to supersede in her decision of 16 April 2018. What, however, was the basis of the awarding decision she refused to supersede? That awarding decision is, as far as I can see, nowhere in the papers the First-tier Tribunal had before it. Why was it not provided? On any analysis it would seem to be relevant information/evidence and so ought to have been provided. This may

be an appropriate appeal in which to explore why the steps the Secretary of State appeared to say she would take about providing at least the past adjudication history (see paragraphs 87-97 (and 95 in particular) of *FN –v- SSWP* [2015] UKUT 670 (AAC); [2016] AACR 24 and paragraphs 51-52 of *JC –v- DSD* (IB) [2011] NiCom 177; [2014] AACR 30) have, seemingly, yet to come to pass. Why is that?

3. Matters are arguably made more confused by what **was** provided by the Secretary of State in and with her appeal response to the First-tier Tribunal. The response itself refers to [the appellant] having been awarded ESA from and including 16 May 2017 (paragraph 1 on page 3). If that is the relevant awarding decision, what relevance could the 2 December 2016 ESA85 and the decision seemingly made after it (see the undated Decision Maker's score sheet on pages 73-75) have to that awarding decision made five months later? Relatedly, why were the findings in the December 2016 ESA85 relevant either to the (contrary) awarding decision made 5 months later or the refusal to supersede decision made 16 months later, and what therefore was the basis of the tribunal's reliance on those findings?

4. Page 77 indicates that the awarding decision was made on 18 May 2017, but the refusal to supersede decision on page 77 says nothing about the basis for that 18.05.17 decision and the decision itself is not in the appeal response bundle. 'Remaining in the WRAG' could either mean, inter alia, [the appellant] had scored 15 points under Schedule 2 to the ESA Regs or had been found to satisfy regulation 29(2)(b) of those regulations. Why was the basis on which [the appellant] had been awarded ESA not considered relevant to whether he had got worse and his award should be superseded: per rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008?

5. And ought the First-tier Tribunal not have addressed all of the above?

6. I am also troubled by adequacy of the approach (of both the Secretary of State's decision maker and the First-tier Tribunal) to [the appellant's] reasons for why he considered he ought to be in the support group. These were (page 83) that he had to attend work related groups once a month but he was finding it very hard to attend each month because of his agoraphobia, panic attacks and sciatica, **and** his work coach had advised him to seek placement in the support group. The advice given by the work coach is not further attested to by [the appellant] nor was it further explored (for example, by the Secretary of State seeking a statement from him). Unless the point made (on page 96) in the mandatory reconsideration is confined to the obvious one of who held the function of ESA decision maker, the second full paragraph on (internal) page 2 of the mandatory reconsideration (i.e. page 96) arguably reads as if the work coach's view was irrelevant. However, even on page 96's own terms, was not the view of the work coach that because of his health conditions [the appellant] could not safely be made "job ready" through work-related activity? Presumably it is accepted that the [work] coach has an expertise in what is constituted in work-related activity? If it is, then why was the evidence of the work coach (if it was his evidence) not

> worthy of significant weight? The apparent view on page 96 that the evidence of the work coach is irrelevant would arguably stand contrary to information sharing envisaged in paragraph 102 of *KC and MC v SSWP* (ESA) [2017] UKUT 94 (AAC).
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> 7. The First-tier Tribunal's decision is arguably even more defective on this issue as it doesn't even address the evidence attributed to the work coach by [the appellant] at all.
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> 8. Further, even setting aside the evidence of the work coach, it is arguable that the tribunal failed adequately to interrogate the work-related activity list…..and whether it included, per *IM* and *KC and MC –v- SSWP* (ESA) [2017] UKUT 0094 (AAC) (see paragraphs 87-92 in particular), the most onerous work-related activity that may have been available in the Bromley area in April 2018. Does the list on page 124 really include **all** types of work-related activity available in Bromley in April 2018?"

Background

4. The Secretary of State's decision under appeal to the First-tier Tribunal was dated 16 April 2018. That decision refused to supersede an earlier decision which had found that the appellant had limited capability for work but did not have limited capability for work-related activity.

5. In the jargon of employment and support allowance, the earlier decision had awarded the appellant employment and support allowance (ESA) with the 'work-related activity component' but not the 'support group component'. Put another away, it had decided that the appellant had limited capability for work but not limited capability for work-related activity: per sections 1(3)(a), 2(2)(b) and 4(4)(b) of the Welfare Reform Act 2007 ("the WRA"). The appellant sought supersession of that earlier award on the basis that he had got worse and should be in the 'support group'. The Secretary of State disagreed and so refused to supersede the awarding decision by her decision of 16 April 2018.

6. However, the earlier decision awarding the appellant ESA (with the work-related activity component) was not identified in the Secretary of State's appeal response to the First-tier Tribunal. Nor was any 'adjudication history' in respect of the appellant's claims to and awards of ESA provided in or with the appeal response. Furthermore, any

attempt to construct a logical adjudication history was substantially hindered by the information which had been provided.

7. Page three of the Secretary of State's appeal response spoke in terms of the appellant having been awarded ESA from 16 May 2017 but then referred to a medical examination that had taken place on 2 December 2016. How these two events related to one another (if they did) was not explained. The ESA85 form from 2 December 2016 was included with the appeal response but it only assessed the appellant as meeting the nine points under descriptor 17c in Schedule 2 to the Employment and Support Allowance Regulations 2008 ("the ESA Regs"). If that had been carried forward to any decision it should not have led to an award of ESA with the being made. And, as I have said, the decision the appellant was seeking to have superseded, because he said he had got worse, was not included (whether that was a decision on 18 May 2017 or some other date).

8. In his mandatory reconsideration request in respect of the Secretary of State's decision of 16 April 2018 the appellant had referred, amongst other things, to advice he said he had been given by his 'Work Coach'. This advice, so the appellant said, was that he should appeal against the decision and ask to be put into the support group. In his appeal to the First-tier Tribunal the appellant then referred to finding it very hard to attend his work coach group meetings.

9. The appeal was dismissed by the First-tier Tribunal in a decision dated 17 July 2018 ("the tribunal"). I need not dwell too long on the reasons the tribunal gave for its decision given it is accepted by the Secretary of State that it erred materially in law. However, the tribunal's reasoning, amongst other matters: (a) failed to identify the decision the appellant was seeking to have superseded; (b) wrongly read the ESA85 of 2 December 2016 as if it assessed the appellant as meeting the support group criteria; (c) relied on the appellant as having attended the medical examination centre on 2 December 2016 on his own without addressing the appellant's evidence in the ESA85 that he had got a lift

to the centre; and (d) failed to address, particularly in its consideration of regulation 35(2) of the ESA Regs, the advice said to have been given to the appellant by his Work Coach.

10. I then gave the appellant permission to appeal for the reasons set out above.

11. In her submission on the appeal the Secretary of State supported the appeal as follows:

> "2. Upper Tribunal (UT) Judge Wright has questioned the adequacy of the First-tier Tribunal's (FtT) approach to Regulation 35(2) of the ESA Regulations 2008 and for the reasons expressed in this submission, I agree with the errors identified in the grant of permission to appeal….
>
> 3. As confirmed in the Secretary of State's initial submission to the FtT [i.e. the appeal response], the Appellant has been in receipt of ESA since 17 May 2017 because of his various health conditions. However, the submission did not explain the Appellant's adjudication history nor the inclusion of a Health Care Professional's report dated 02 December 2016…in which it was recommended that despite some difficulty with his behaviour, the Appellant did not have limited capability for work.
>
> 4. Nevertheless, after making enquiries, I can confirm that following the medical examination of 02 December 2016, a decision-maker determined on 15 December 2016 that despite some difficulty with behaviour, the Appellant did not have limited capability for work.
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> 5. The Appellant sought to appeal against the decision of 15 December 2016 and an earlier FtT sitting on 17 May 2017 found he had entitlement to ESA with the work-related activity component because of problems engaging socially and behaving appropriately……..internal records indicate that neither party appealed the FtT decision of 17 May 2017 any further and so there is no statement of reasons to explain why it reached the decision it did.
>
> 6. I am afraid that I am unable to explain why this information was not provided in the earlier submissions before the FtT.
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> 7. Given the Secretary of State's failure to discharge the obligation under Rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, I submit it may have affected the FtT's analysis of the issues subject to the appeal.
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> 8. With regard to the Appellant's reasons to be placed in the Support Group [including the alleged advice of the Work Coach], I submit that a decision-maker ought to consider the request taking into account any evidence provided and in consultation with internal records.

> 9. Whilst the Appellant may allege that he had to attend work-related groups, it appears that the Department has not asked the Appellant to attend group sessions but he has attended one-to-one appointments.
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> 10. Internal records seem to suggest that the Appellant made a self-referral for cognitive behavioural therapy (which may be in a group setting) and that he has been asked to think of three things he would like to do in preparation for a training course…..
>
> 11. Furthermore, the Appellant failed to attend an interview on 26 June 2018 because of stomach problems but attended a rescheduled interview on 02 July 2018 in which he discussed his appeal. There is no record on internal systems to suggest the work-coach advised the Appellant about placement in the Support Group although it is possible and the work-coach may have failed to update the internal records.
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> 12. As the Appellant's grounds to be placed in the Support Group were based, in part, on the recommendation of the work-coach, I submit the FtT ought to have addressed the matter in its Statement of Reasons.
>
> 13……., I can confirm that the list of work-related activity provided in this case does reflect all work-related activity available nationally under the Jobcentre Plus Offer and represents work-related activity available in Bromley in April 2018.
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> 14. Notwithstanding the appropriate list of work-related activity, as the Secretary of State failed to provide the relevant adjudication history, the FtT did not have the necessary background information in order to scrutinise the list of work-related activity provided to it.
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> 15. Moreover, at paragraph 8 of the Statement of Reasons…, the FtT make references to the least-demanding work-related activity without considering the most onerous work-related activity in accordance with *KC and MC v SSWP* [2017] UKUT 0094 (AAC) and as such, I submit it has erred in law by failing to do so…."

Discussion and conclusion

Errors of law

12. I should say immediately that I am quite satisfied the First-tier Tribunal erred materially in law in its decision and that its decision must as a result be set aside. It erred in law for the reasons I gave when giving permission to appeal and (if different) the reasons set out in the Secretary of State's submission above. The appellant, understandably, has not been able to contribute to the error of law debate.

13. I will highlight just two of the First-tier Tribunal's errors.

14. First, the tribunal's lack of curiosity or concern about the mangled and adjudication history it was provided with in the Secretary of State's appeal response meant that it failed properly to appraise itself of the decision the appellant was seeking to have superseded and changed. It therefore did not understand the ESA relevant basis from the which the appellant was saying he had worsened. Further, if, as the tribunal in effect found, the appellant's condition relevant to ESA had not worsened from that which was in place May 2017, it still had to grapple with the restrictions it was accepting the appellant **still had** on 16 April 2018 under Schedule 2 of the ESA Regs – as we now know, that he could not engage socially with people unfamiliar to him for the majority of the time and had occasional outbursts of behaviour that would be unreasonable in any workplace - in terms of the risks to him and others from the appellant having to engage in work-related activity.

15. Second, as is now rightly accepted by the Secretary of State, if the 'Work Coach' (or 'Job Coach', the titles appear to be used interchangeably) had advised the appellant to seek placement in the support group then that was plainly relevant evidence, and so the First-tier Tribunal's apparent lack of interest in this evidential area was a further material error of law. I should emphasise that I am not here making any finding that the Work Coach had so advised the appellant. The Secretary of State in her submissions to the Upper Tribunal has referred to evidence that *may* suggest such evidence was not given or ought not to have been given[1]. All I am doing is highlighting that this was relevant evidence that the First-tier Tribunal ought to have explored and the new First-tier Tribunal will need to explore.

[1] The Secretary of State's position may have hardened in the course of the Upper Tribunal proceedings as in her last written submissions, made after the oral hearing, she had moved to arguing that the issue of whether the Work Coach had advised the appellant that he ought to be in the support group did not arise on the facts. This was because, so the Secretary of State argued, "on the face of the documentary evidence there is nothing to indicate that [the appellant's] Work Coach did take that view". Although I can see the force of this argument, I am not prepared to rule on it in the absence of any argument or concession from the appellant. It is a matter that will therefore remain for the new First-tier Tribunal to address and determine.

Work Coach and Action Plans

16. This is perhaps a convenient point, before turning to 'adjudication histories', to address what the Secretary of State has filed by way of evidence on the role of the 'Work Coach' and on 'actions plans'. This is provided for information only. It touches only indirectly on the error of law identified immediately above. Before touching on that evidence, I need to say a little more about the statutory scheme.

17. In order to meet one of the basic conditions of entitlement to ESA a person has to have 'limited capability for work for work': per section 1(3)(a) of the WRA. By section 1(4) of the same Act "a person has limited capability for work if (a) his capability for work is limited by his physical or mental condition, and (b) the limitation is such that it is not reasonable to require him to work". As set out above, a person with limited capability for work will be entitled to an increased amount of ESA if he or she has 'limited capability for work-related activity' and so comes within the support group of ESA. In parallel to section 1(4), section 2(5) of the WRA provides that "a person has limited capability for work-related activity if (a) his capability for work-related activity is limited by his physical or mental condition, and (b) the limitation is such that it is not reasonable to require him to undertake such activity" (my underlining added for emphasis).

18. The words I have underlined in section 2(5)(b) do not, however, have any separate adjudicatory function or bite in terms of deciding whether a person **has** limited capability for work-related activity. This can be seen from the terms of section 9 of the WRA (see the underlining which I have added to the "and" in it), which provides insofar as relevant as follows:

> "9.-(1) For the purposes of this Part, whether a person's capability for work-related activity is limited by his physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require him to undertake such activity shall be determined in accordance with regulations.
> (2) Regulations under subsection (1) shall—
> (a) provide for determination on the basis of an assessment of the person concerned;

> (b) define the assessment by reference to such matters as the regulations may provide;
> (c) make provision as to the manner of carrying out the assessment."

(The same applies to having limited capability for work: see section 8(1) of the WRA.)

19. However, it remains necessary from an adjudicatory perspective to identify and understand what amounts to "work-related activity" because of the terms of regulation 35(2) of the ESA Regs. This regulation contains a deeming provision – it allows for certain claimants to be treated as having limited capability for work-related activity even where they do not **have** limited capability for work-related activity under the regulations made pursuant to section 9 of the WRA. Regulation 35(2) is made under section 22 and paragraph 9(a) in Schedule 2 to the WRA and provides as follows (again the underlining is mine and has been added for emphasis):

> "35.— (2) A claimant who does not have limited capability for work-related activity as determined in accordance with regulation 34(1) is to be treated as having limited capability for work-related activity if—
>
> (a) the claimant suffers from some specific disease or bodily or mental disablement; and
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> (b) by reasons 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-related activity."

20. The phrase "work-related activity" is defined in section 13(7) of the WRA as follows:

> "'work-related activity', in relation to a person, means activity which makes it more likely that the person will obtain or remain in work or be able to do so".

By section 13(8) of the WRA "work-related activity" includes "work experience or a work placement".

21. The situation posited by the closing words of regulation 35(2) - "if the claimant were found not to have limited capability for work" – calls for consideration to be given to the 'work-related activity' the claimant may be required to undertake under the conditionality provisions found in sections 12-14 of the WRA. The conditionality steps identified in those sections include the claimant: (i) attending one of more work-focused interviews (section 12(1)); (ii) undertaking work-related activity (s.13(1)), and (iii) being provided with an "action plan" where either (i) or (ii) applies (section 14(1) and (2)).

22. In respect of action plans, section 14 of the WRA provides as follows:

> "14.-(1) The Secretary of State shall in prescribed circumstances provide a person subject to a requirement imposed under section 12(1) with a document prepared for such purposes as may be prescribed (in this section referred to as an action plan).
> (2) Regulations may make provision about—
> (a) the form of action plans;
> (b) the content of action plans;
> (c) the review and updating of action plans.
> (3) Regulations under this section may, in particular, make provision for action plans which are provided to a person who is subject under section 13 to a requirement to undertake work-related activity to contain particulars of activity which, if undertaken, would enable the requirement to be met.
> (4) Regulations may make provision for reconsideration of an action plan at the request of the person to whom the plan is provided and may, in particular, make provision about—
> (a) the circumstances in which reconsideration may be requested;
> (b) the period within which any reconsideration must take place;
> (c) the matters to which regard must be had when deciding on reconsideration whether the plan should be changed;
> (d) notification of the decision on reconsideration;
> (e) the giving of directions for the purpose of giving effect to the decision on reconsideration."

23. Regulation 58 of the ESA Regulations was made under section 14 of the WRA but it was revoked and replaced by the Employment and Support Allowance (Work-Related Activity) Regulations 2011 ("the 2011 WRA Regs") with effect from 1 June 2011. Regulation 5 of the 2011 WRA Regs provides that:

> "5—(1) The Secretary of State must notify a person of a requirement to undertake work-related activity by including the requirement in a written action plan given to the person.
> (2) The action plan must specify—
> (a) the work-related activity which the person is required to undertake; and
> (b) any other information that the Secretary of State considers appropriate."

The requirement to undertake work-related activity is addressed in regulation 3 of the 2011 WRA Regs, which sets out that:

> "3.—(1) The Secretary of State may require a person who satisfies the requirements in paragraph (2) to undertake work-related activity as a condition of continuing to be entitled to the full amount of employment and support allowance payable to that person.
> (2) The requirements referred to in paragraph (1) are that the person—
> (a) is required to take part in, or has taken part in, one or more work-focused interviews pursuant to regulation 54 of the ESA Regulations;
> (b) is not a lone parent who is responsible for and a member of the same household as a child under the age of 3;
> (c) is not entitled to a carer's allowance; and
> (d) is not entitled to a carer premium under paragraph 8 of Schedule 4 to the ESA Regulations.
> (3) A requirement to undertake work-related activity ceases to have effect if the person becomes a member of the support group.
> (4) A requirement imposed under paragraph (1)—
> (a) must be reasonable in the view of the Secretary of State, having regard to the person's circumstances; and
> (b) may not require the person to—
> (i) apply for a job or undertake work, whether as an employee or otherwise; or
> (ii) undergo medical treatment.
> (5) A person who is a lone parent and in any week is responsible for and a member of the same household as a child under the age of 13, may only be required to undertake work-related activity under paragraph (1) during the child's normal school hours."

On the imposition of 'reasonable requirements' under regulation 3(4)(a) of the 2011 WRA Regs see *LM v SSWP* (ESA) [2016] UKUT 360 (AAC).

24. The Secretary of State's evidence explains that there have been two discrete processes for setting work-related activity which she has operated. The first was under the "Work Programme", in which third party organisations were involved in setting the work-related activity. However, all new referrals to the Work Programme had ceased by April 2017. Second, under "the Jobcentre Plus Offer". This is a package of

support available from Jobcentre Plus and has been in place for ESA claimants since June 2011.

25. It is under the Jobcentre Plus Offer that the Work Coach sets work-related activity for an individual ESA claimant. The Secretary of State's evidence is that "[t]he aim is for the Work Coach to apply an individualised approach to the setting of [work-related activity], tailored to the claimant". To choose work-related activity that is suitable for the individual claimant the Work Coach has access to the "District Provision Tool" which contains a large number of different activities. The Secretary of State recognises that a number of ESA claimants may have been out of work for long periods of time "and need to reconnect with society generally".

> "In these circumstances, the Work Coach will set what are often referred to as "soft skills" activities, intended to build confidence and motivation and thereby help the claimant to move closer to the labour market."

26. Since September 2016 "Operational Guidance" has been in place specifying that the ESA85 report of the healthcare professional should be shared with the Work Coach. Further, even though work-related activity may often be outsourced to an external provider, the Work Coach retains control of what work-related activity the individual claimant may be required to do.

27. Pausing at this point, given the role of the Work Coach as outlined above and his or her knowledge of the individual claimant, it is in my judgment obvious that any advice that official *may* have given to a claimant about seeking to be put in the support group would be relevant to whether regulation 35(2) of the ESA Regs was satisfied or not. If such advice has in fact been given then it may imply that there may have been no (or no further) work-related activity the Work Coach considered the claimant could reasonably or safely undertake. In these circumstances, ignoring or not seeking to explore any such alleged

advice will almost certainly amount to an error of law, and did so in this appeal.

28. I should in fairness set out here the evidence put before me by the Secretary of State – in the form of a witness statement by Louise Everett who is a Senior Civil Servant at the Department for Work and Pensions and leads the policy teams for Employment and Support Allowance and Work Capability Assessment – about what the Secretary of State says is the "action a Work Coach should take if they are concerned about a claimant's placement in the [work-related activity group]". I do no more than set this evidence out, and do not comment on it, as it was filed after the oral hearing of this appeal before me. The evidence of Louise Everett which the Secretary of State refers to in this context is as follows (omitting a footnote).

> "135. If a claimant's health condition has changed, their Work Coach might need to advise the claimant how to ask for a repeat [work capability assessment] WCA decision. The decision to ask for a repeat WCA must be made by the claimant or their representative. The Work Coach must inform the claimant of the facts by must not influence the claimant's decision.
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> 136. The claimant must be made aware that the outcome of a repeat WCA could result in them being placed in a different group (Work-Related Activity Group or Support Group) or being found fit for work. If a claimant wants to ask for a repeat WCA, the Work Coach should tell them that they need to provide information/evidence of the change in their condition for consideration by a Service Centre decision maker.
>
> 137. If a claimant's health condition has changed the Work Coach must always consider if a review of Work-Related Activity is needed to support the claimant.
>
> 138. Exceptionally there may be cases where a claimant is placed in the WRAG by the Work Capability Assessment (WCA) and there is genuine doubt about the decision. If, despite attempts to meet the claimant's individual needs, doubts persist about the claimant's ability to participate in the mandatory interview **and** there is evidence for reconsideration of the decision, the Work Coach should phone the WCA Decision Maker (WCA DM) to discuss whether they agree to seeking a review of the WCA outcome. The Work Coach must be able to provide the WCA DM with evidence of engaging with the claimant to support any such request.

> 139. The WCA DM will decide on the evidence available, whether to revisit the decision. Where the WCA DM has been asked to consider seeking a review of the WCA outcome decision, the Work Coach might decide to defer the mandatory interview to a later date to allow the review to take place.
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> 140. A DWP-wide policy also applies for managing customer's declarations of intention to attempt suicide and/or self-harm, known as the 6-point plan. In the event that a Work Coach was faced with a claimant declaring intention to attempt suicide or self-harm, the 6-point plan would be actioned to effectively and safely deal with the situation. The six steps are as follows: 1) Take the statement seriously - remain calm and listen carefully; 2) Summon a colleague – to act as a support partner; 3) Gather information – to gauge level of risk; 4) Provide referral advice – if situation is non-urgent, e.g. general distress but no immediate plans or means to attempt suicide or self-harm; 5) Summon Emergency help – if customer is distressed, at serious risk or in immediate danger; and 6) Review – discuss incident with line manager and record."

29. As for 'action plans' as the legislation makes clear, and the Secretary of State accepts, if a claimant has been required to carry out work-related activity then an action plan must be in place: see regulation 5 of the 2011 WRA Regs. In the course of these Upper Tribunal appeal proceedings I was provided with the appellant's 'action plan' and it will now form part of the evidence on this appeal. The action plan had not appeared previously in the First-tier Tribunal proceedings.

30. It is the Secretary of State's case that claimants ought to have a copy of their action plan to put before the First-tier Tribunal, though appeal response writers can view them electronically (but see further paragraph [145] of Ms Everett's evidence quoted in the next paragraph of this decision). I simply observe that in the *LM* case referred to above the Secretary of State accepted that she ought to have provided the claimant's action plan to the First-tier Tribunal as a document in her possession that was relevant to the appeal. The same would seem in my judgment to apply with equal force here given the action plan's potential relevance to the issue of the appellant engaging safely in work-related activity.

31. Ms Everett's witness evidence also deals with 'action plans'. It does so as follows (again omitting one footnote):

> "95. It is a requirement of regulation 5 of the [2011 WRA Regs] that a claimant must be notified of a requirement to undertake mandatory [work-related activity] by way of a written Action Plan……If a claimant is not issued with an agreed Action Plan and ESA49, he/she cannot be sanctioned for non-compliance.
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> 96. The Action Plan, (which is created on the Department's Labour Market computer system (LMS), is usually drawn up the Work Coach in collaboration with the claimant during the [work-focused interview]. The Action Plan should record the WRA the claimant is required to undertake, how the WRA will be met (it can consist of several steps), when it must be done by and other information the Work Coach considers appropriate, to support claimants in overcoming existing barriers to a future return to work. Work Coaches actively involve the claimant in drafting the Action Plan to secure their commitment.
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> 97. As set out above, it is during the initial [work-focused interview] that the Work Coach starts to establish a relationship with the claimant and to explain the way forward, rather than prioritising the setting of work-related activity. As such, if an Action Plan is not agreed at the initial [WFI], it can instead be agreed at a subsequent WFI.
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> 98. Claimants do not have to sign the Action Plan but a copy must be given to them. Action Plans can often appear as a simple list of agreed activity with nothing more by way of explanation as to the consequences of failing to undertake that activity without good cause. As such, once the Action Plan has been agreed, claimants are also then issued with an ESA49 formal notification letter, attaching a list of the specific activity or activities they are required to undertake, whether those activities are mandatory or voluntary and the consequences of failing to undertake any mandatory activities without good cause (i.e. sanctions).
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> 99. If a claimant feels that the WRA they have been asked to undertake is unreasonable and this cannot be resolved with their Work Coach, they can request a formal reconsideration of the Action Plan……
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> 145. In March 2018, chronologies were added into the Appeal Template Creator (ATC), which tells Dispute Resolution Team appeal writers what information they need to include when writing appeal submissions. There is, in addition, a section in the Appeals Template Creator which directs appeal writers to cut and paste Action Plans into the appeal bundle."

32. I am sure that it will be noted with interest that, where applicable, an appellant's 'action plan' ought to have appeared with the Secretary of State's appeal response in ESA appeals since April 2018. However, the decision under appeal in this case was made on 16 April 2018 and the appeal against that decision (giving rise to the need for an appeal response from the Secretary of State) was obviously made after this date. As I have noted above, the appellant's action plan did not appear with the Secretary of State's appeal response to the First-tier Tribunal. (Nor did the 'adjudication history' – see below.) The Secretary of State has investigated, at my request, why these omissions occurred.

> "The answer is that the individual appeal response writer made an error and selected the wrong appeal template."

(Quite why the old, wrong template remained available for use in and possibly after April 2018 is no longer a fruitful exercise in which to engage in this appeal. However, given just how deficient the history that was provided in the appeal response was in this case, I would question how it could possibly have come from a 'quality assured' appeal template.)

33. I would just end this part of this decision by noting that this is an appeal where the appellant had been found under the refusal to supersede decision of 16 April 2018 to *continue to have* limited capability for work. As long ago as nearly six years ago the three-judge panel in *IM v SSWP* [2014] UKUT 412 (AAC); [2015] AACR had commented at paragraph [113] as follows.

> "The position may be slightly different where the Secretary of State accepts that the claimant does have limited capability for work for two reasons. First, the Secretary of State can be expected to make a more focused submission as to why regulation 35(2) does not apply given the accepted disablement of the claimant. Secondly, in at least some of those cases a work-focused interview will have been carried out and the provider may have considered whether the claimant should be required to carry out work-related activity before the appeal is heard by the First-tier Tribunal. Information about the outcome of such consideration of the claimant's case is likely to be relevant to the First-tier Tribunal and reduce the element of prediction required and so

> ought to be provided to the first-tier tribunal where possible. Thus, in *CMcC*, Judge Bano was able to take account of an employment adviser's abandonment of any meaningful form of work-related activity out of concern for the claimant's health as a reason for finding that regulation 35(2) should have been found to apply in her case. In other cases, the effect of evidence may be to show that the provider is well aware of the claimant's state of health and is unlikely to overlook risks. This suggests that the provision of information should be a two-way process. It should be remembered that section 12(8)(b) of the Social Security Act 1998 applies to the application of such evidence and so it should only be taken into account so far as it is relevant to the position at the time of the decision of the Secretary of State." (my underlining added for emphasis)

Although it is evident from the decision in *KC and MC v SSWP* (ESA) [2017] UKUT 94 (AAC) and from this appeal that much work has been done by the respondent both in seeking to provide more information to First-tier Tribunals and making the decision-making on ESA and the setting of work-related activity more 'joined-up', it is disappointing that it took well into 2018 before concrete steps were taken for the statutorily required 'action plans' to be provided as relevant evidence on ESA appeals to First-tier Tribunals.

Adjudication histories

34. The three-judge panel in *FN v SSWP* [2015] UKUT 670 (AAC); [2016] AACR 24, said the following on the provision of 'adjudication histories' by the Secretary of State to the First-tier Tribunal.

> "87. During the course of the oral hearing before us, we asked Mr Webster to outline for us the Secretary of State's response to the decision of Judge Wright in *ST*. Mr Webster confirmed that the decision had not been appealed. He also made reference to paragraph 23 of his skeleton argument, where he stated:
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> > "However it is to be noted that the Secretary of State in guidance to officials requires in second and subsequent decisions as to whether a claimant has limited capacity for work *that are appealed to the First-tier Tribunal*, in limited and defined circumstances, to provide to the Tribunal in the response, so far as possible the earlier papers (or explain why that cannot be done). Thus the departmental document *Submitting appeals to Her Majesty's Courts and Tribunals Service* provides, *inter alia*:

> '4255 In second or subsequent PCA/LCW cases where there has been an award and there has been no clear change or the appellant says that their condition has not changed or has worsened since that award, the earlier PCA/LCW papers should be included. If they cannot be produced an explanation should be provided. Where storage contractors have destroyed earlier PCA/LCW papers (they are routinely destroyed after 15 months) include this information as part of the explanation.'"

88. It seems to us that this is a pragmatic response to the requirements on the Secretary of State set out by Judge Wright in *ST*.

89. In *JC*, the Tribunal of Commissioners had been informed by officials from the Department for Social Development in Northern Ireland (DSDNI) that "… it should be straightforward in most cases to list details of all previous PCA determinations within a current claim from computer records". The Tribunal of Commissioners, in paragraph 51, recommended that this course of action should be adopted. As was noted, the Tribunal of Commissioners allayed the fears of DSDNI officials, who had baulked at the idea that the paperwork associated with previous determinations in connection with the all work test or personal capability assessment may have to be made available, by concluding that the previous adjudication history would only become relevant in the limited class of case referred to above.

90. In the instant case, we asked Mr Webster to provide an additional written submission on the practical consequences of a recommendation that the Secretary of State in Great Britain routinely includes, in the appeal response, details of a previous adjudication history and an indication as to whether assessments and reports associated with such a history are available for consideration by the First-tier Tribunal. After setting out details of the variety of database systems which are utilised within the Department, Mr Webster submitted that:

> "It is submitted that if this Tribunal is minded to determine that to comply with rule 24(4)(b), TPR more information ought to be produced by the respondent to inform the claimant and the Tribunal of potential existence of potentially relevant material it is submitted that obligation would be met by a short statement of known decisions and referrals……."

92. Mr Webster submitted that the production of a comprehensive adjudication history beyond the time-limited summary information drawn from MSRS as to medical referrals made and any PDF copy reports stored and the time-limited summary information provided DMACR as to decisions following medical examinations would be

unproductive in terms of additional workload for decision-makers and time involved.

93. Mr Hodge's response to the additional submission and the description of the disparate systems which exist within the Department was to submit that there were aspects of it which were unclear to him. Further, having considered the elements of the Department's systems he was equally not clear as to why it would take the suggested length of time to go through the file, identify the relevant decisions and provide an adjudication history. He added that he was not sure why data protection principles demanded that the computer records only go back for a period of fourteen months when the hard copy of the file can be stored for a period of five years in the case of ESA and ten years in the case of IB. Finally he submitted that in his experience, in the vast majority of appeals that he had dealt with since CE/829/2012, the previous medical report had always been part of the papers from the outset. Accordingly:

> "it would appear that the Department have been capable of sourcing the report and including it in the papers as a matter of course, and it would seem to me that this is a very sensible approach rather than the expense of numerous Tribunal hearings being adjourned for the provision of such evidence."

94. It does seem to us that the systems described by Mr Webster are unwieldy and cumbersome. We also find it unusual that there does not appear to be a single electronic database which records the adjudication history relating to an individual claimant. Further it is our understanding that the completion of assessments by healthcare professionals in connection with ESA is undertaken in electronic format. We are unsure why the requirement to have a readily available copy of the report of an assessment undertaken by a healthcare professional is dependent on whether the report was converted to a .pdf format.

95. The decision of Judge Wright imposed requirements on the Secretary of State in connection with the preparation of a response to an appeal against an ESA supersession decision. That aspect of the judge's decision is binding on the Secretary of State and it is for him to ensure compliance with it. For our purposes, we repeat the recommendation which was made in [51] of *JC*, namely that details of the previous adjudication history are set out in the response to the appeal to the extent that this information is available to the Secretary of State. We endorse the comments of Judge Wright in [23] of *ST*….

96. We would also emphasise that there are parallel duties and obligations on the representatives and appellants. Representatives have to be proactive in alerting First-tier Tribunals to evidence which it is submitted is relevant to the issues arising in the appeal and where it is

possible to do so to seek that evidence on behalf of appellants. In paragraph 53 of *JC*, the Tribunal of Commissioners warned that:

> "… Appeal tribunals should not be overwhelmed with submissions that there has been no change in the appellant's medical condition and that, accordingly, the evidence associated with previous determinations in connection with the all work test or personal capability assessment should be produced."

35. *FN* was decided nearly five years ago. Even ignoring what it recorded in respect of "second or subsequent decisions", and ignoring further that this appeal concerned a subsequent decision on the appellant's ESA award in which he was arguing that his condition had worsened, progress on providing 'adjudication histories' would arguably not win any prize for promptness.

36. The evidence concerning the provision of adjudication histories has again been provided by Ms Everett. I set it out here (omitting references to exhibits to the witness statement).

> "143. DMG Memo 19/17 (issued in February 2018) set out the SSWP's responsibility to provide the [First-tier Tribunal] with all relevant information in relation to a decision to supersede an award of ESA following a second or subsequent [work capability assessment]. The memo confirmed that SSWP is to provide all relevant information including a decision-making chronology and history (supported by documentation where available). If medical reports are no longer in the SSWP's possession (storage contractor's routinely destroy earlier [work capability assessment/limited capability for work] papers after 15 months) the [Fist-tier Tribunal] should be made aware of this.
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> 144. DMG Memo 19/17 was later incorporated into the DWP Code of Appeals Procedure Guide at paras 228-229, and into DMG Chapter 6 at para 06333 as of 18 May 2018.
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> 145. In March 2018, chronologies were added into the Appeals Template Creator (ATC) which tells Dispute Resolution Team appeal writers what information they need to include when writing appeal submissions. There is, in addition, a section in the Appeal Template Creator which directs appeal writers to cut and paste Action Plans into the appeal bundle.
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> 146. From April 2018-July 2018, the Dispute Resolution Team carried out a quality assurance one-off exercise to check that DMG Memo 19/17 was being implemented correctly. This involved quality checking a sample to identify whether supersession and adjudication

> histories had been included in the appeal response and, where omitted, further training was provided to relevant appeal writers."

37. I was told further that although DMG Memo 19/17 may have been retained by individual Local Dispute Resolution Teams, the Secretary of State was considering expanding the DMG to incorporate Memo 19/17.

38. The same individual error as befell the appellant's 'action plan' being provided with the Secretary of State's appeal response to the First-tier Tribunal (see paragraph [32] above) also led to his ESA 'adjudication history' not being provided either.

39. It remains to be seen whether ESA 'adjudication histories' and 'action plans' have been provided in relevant ESA appeal responses since July 2018.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

Dated 29th April 2020
(The above is the date this decision was made. It may however take some time to be issued given the current Covid-19 medical emergency and the very limited staffing of the UTAAC's office in London.)