

IN THE UPPER TRIBUNAL

Appeal No: CUC/2777/2019

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Nottingham on 5 August 2019 under reference SC319/18/02991 involved an error on a material point of law and is 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.

Subject to the provisions of the ‘Chamber President’s Guidance Note No.3 (SSCS) *Contingency Arrangements and Composition of Tribunals on or after 24th March 2020 pursuant to the Pilot Practice Directions dated 19th March 2020*’ (if still in place at the relevant time), the appeal should be decided afresh only after an oral hearing of the appeal.

(In the present Covid-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

REASONS FOR DECISION

1. I am satisfied on the arguments before me that the First-tier Tribunal erred in law in its decision of 5 August 2019 (“the tribunal”) by basing its decision on materially deficient evidence of work related activity which did not include a

work placement as a possible form of work-related activity. As a result, the tribunal failed to give proper consideration to the most onerous forms of work-related activity that the appellant might have been required to undertake. Given the descriptors the tribunal found the appellant met in Schedule 6 to the Universal Credit Regulations 2013, the above error was plainly a material error of law.

2. There was no direct evidence before the tribunal as to what constituted the most (and least onerous) forms of work-related activity available in the Nottingham area on 1 August 2018. The tribunal relied on pages 6 and 7 of the Secretary of State's appeal response as setting out the most and least onerous forms of work-related activity. However, nothing on those pages, or elsewhere explains what the most onerous forms of work related activity would actually involve, and there is no reference at all to attending a work placement. The phrase in the appeal response "Examples of the most demanding types of Work Related Activity (WRA) in the area where you live would be as per programmes provided by Remploy and Kennedy Scott", is virtually useless as providing clear evidence to the reader of it of what in fact the most onerous work-related activity could actually involve the appellant in undertaking. Nowhere else in the appeal bundle did the Secretary of State expand on what was to be found on the programmes provided by Remploy or Kennedy Scott.
3. Given the above, I simply do not understand on what basis the tribunal could state, as it did, that the above was evidence of "the work-related activities....which included both the least and most demanding types of WRA".
4. The Secretary of State supports the appeal being allowed on the above ground in a helpful response that was made a little late due to Covid-19's effects on staffing levels within the DWP. I extend the time for that submission to be made until its date of receipt by the UT(AAC)'s office on 20 April 2020. The appellant's representative has made no submission in reply.
5. The Secretary of State's support for the appeal is on the following basis.

“10. The other ground of appeal was that the tribunal did not adequately consider whether Schedule 9(4) applied. This applies when there would be a substantial risk to the health of any person if the claimant were found not to have LCWRA, due to a specific disease or bodily or mental disablement. The tribunal stated that in reaching their decision on whether this applied, they considered the work-related activities (WRA) as set out on pages 6-7, which included the most and least demanding types of WRA. On pages 6-7, there is a list of general examples of WRA, and examples of the most demanding type of WRA in the claimant’s area being “*programmes provided by Remploy and Kennedy Scott*”, with the least demanding type being “*actions on the list of ‘Initial Support Options’ provided by Jobcentre Plus and Life Skills*”. As the UT Judge pointed out, it is difficult for the reader to know exactly what these types of WRA entail.

11. In paragraph 66 of the decision [*KC and MC v SSWP* (ESA) [2017] UKUT 0094 (AAC)], Judge Wright found that both appeals under discussion “*were erroneous in material point of law for failing to have any adequate or relevant evidence before them about the work-related activity under the Jobcentre Plus Offer that either appellant might have been expected to undertake at the time relevant to them*”. In paragraph 30 of the DMG memo 01/18, it is confirmed that where the decision under appeal was made on or after 03/04/2017, the appropriate list of WRA should be under the Jobcentre Plus (JCP) Offer, which is included in the appendix of the memo and of this submission. In the present case, the decision under appeal was made on 01/08/2018, so this is the list that should have been considered.

12. Furthermore, at paragraph 106 of [*KC and MC*], Judge Wright stated that “*the lists provided to the First-tier Tribunal need not only to contain but also identify the most and least demanding work-related activity available at the relevant time in the claimant’s area*”. The correct list under the JCP Offer already states whether each of the types of WRA are considered ‘easy’, ‘medium’ or ‘hard’ for claimants in general.

13. Sections 13(7) and (8) of the Welfare Reform Act 2007 confirm that WRA includes work experience or a work placement, which make it more likely that the claimant will obtain or remain in work or be able to do so. The list under the JCP Offer does include the possibility that WRA may involve undertaking a work placement. Given some of the evidence, such as the GP’s statement that he would pose a danger to colleagues if he were required to seek employment, he may pose a substantial risk to the health of people he may work with if required to undertake a work placement, or work experience. There may also be a substantial risk to his own health, whether this was a deterioration in his mental health if, for example, his anxiety worsened further, or even his physical health, with regard to the evidence that he was assaulted. However, the tribunal did not consider this, whereas if they had considered the possible impact on the claimant of the WRA from the JCP Offer list, they are likely to have done so. This would have led them to provide a more detailed explanation of why Schedule 9(4) did not apply, explaining why there would be no substantial risk to health from the claimant possibly being required to attend a work placement or participate in group activities. Currently, I submit that it is not clear whether there would be or not.

14. In paragraph 22 of the SoR, the tribunal acknowledged that the claimant had lost employment in the past due to occasional outbursts, but

found that WRA could be tailored so that he could avoid activities that may cause him additional stress. An example was given in that his WRA could be tailored to avoid the need to participate in group activities. However, there is no guarantee that WRA would be tailored to suit his needs.

15. In paragraph 24 of the decision CE/1101/2019, Judge Jones found a tribunal to have erred in law by, in part, failing to make sufficient findings of fact that the types of WRA a claimant may be asked to do would be tailored to suit their needs, having relied on this in finding the claimant to not satisfy Schedule 9(4). This was based on previous UT authorities highlighting the risk that such tailoring may not take place because the work capability assessor's conclusions might not be passed on to the work providers or JCP advisors. They might not be aware that certain types of WRA would pose a substantial risk to the claimant's health. In the present case, the tribunal assumed that an advisor would have all the relevant evidence about the claimant's work capability assessment and would be able to tailor WRA accordingly.

16. I submit that, for the reasons set out in paragraphs 10-15 of this submission, the tribunal erred in law with regard to their assessment of whether or not Schedule 9(4) of the UC Regulations 2013 applied. They did not consider the correct range of WRA that the claimant may be required to undertake, including the possibility that he may be required to attend work experience or a work placement, and they made the assumption that WRA would be tailored to suit his needs. If the UT Judge agrees, I would invite them to set aside this decision and remit this case back to the FtT for a rehearing. In this case, the attached JCP Offer list would need to be considered.”

6. I agree with all that is said in this submission by the Secretary of State. The correct list of work-related activity, referred to immediately above by the Secretary of State, is on pages 116-117 of the appeal bundle and will be available to the new First-tier Tribunal to which this appeal is being remitted.
7. Notwithstanding the Secretary of State's support for the appeal, I remain concerned, as I was very recently in my decision in CE-248-2020, that in a case in which the Secretary of State's appeal response to the First-tier Tribunal was written at the earliest in late November 2018, no proper list of work-related activity was made available with that appeal response. The substance of the law on limited capability for work and work-related activity in universal credit is the same as it is in the employment and support allowance scheme, and the same evidential obligations apply to the Secretary of State (which she has accepted in this appeal). The evidence of the Secretary of State in *MR v SSWP (ESA)* [2020] UKUT 0210 (AAC) was clear. By January 2018 the work-related activities list exhibited in all appeal responses should have included

‘work placements’ (as set out in DMG Memo 01/18). That, as the Secretary of State now concedes, ought to have been the case in this universal credit appeal.

8. The Upper Tribunal is not able to re-decide the first instance appeal. The appeal will therefore have to be re-decided afresh by a completely differently constituted First-tier Tribunal (Social Entitlement Chamber), at a hearing.
9. The appellant’s success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about whether his appeal will succeed on the **facts** before the First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

**Approved for issue by Stewart Wright
Judge of the Upper Tribunal**

Dated 6th July 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 limited staffing of the UTAAC’s office in London.)