

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CPIP/3257/2017

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: As the decision of the First-tier Tribunal (which it made on 28 April 2017 at Derby under reference SC309/16/01601) involved the making of an error of law, it is set aside under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Further, the case is remitted to the First-tier Tribunal for rehearing by a differently constituted panel under section 12(2)(b)(i) of the same Act.

DIRECTIONS FOR THE REHEARING:

- A. The tribunal must undertake (by way of an oral hearing) a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.
- B. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on his claim that was made on 5 August 2016.
- C. In doing so, the tribunal must not take account of circumstances that were not obtaining at the date of the original decision of the Secretary of State under appeal. Later evidence is admissible provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

REASONS FOR DECISION

1. The claimant, who was born on 24 February 1990, has autism. The tribunal found that he also "suffers from low mood" although no formal diagnosis of depression or any other mental health condition has been made. He was, at all material times, a student attending a university located in London and studying Game Design. He applied for a personal independence payment (PIP) on 5 August 2016 but on 7 October 2016 a decision-maker acting on behalf of the Secretary of State decided that he was not entitled because he did not score any points under the activities and descriptors relevant to either the daily living component or the mobility component. Since the decision was not altered by way of mandatory reconsideration he appealed to the First-tier Tribunal (the tribunal). It held an oral hearing at which the claimant was represented. He also attended the hearing himself as did his mother. The tribunal dismissed his appeal but did decide that he was entitled to 2 points under daily living descriptor 4c and 2 points under daily living descriptor 6c. The claimant, through his representative, then asked for and obtained from a District Tribunal Judge of the First-tier Tribunal, permission to appeal to the Upper Tribunal.

2. The appeal to the Upper Tribunal is concerned only with the daily living component of PIP. Where a claimant "needs prompting to be able to take nutrition" that claimant will score 4 points under daily living descriptor 2d which is linked to the Activity of "Taking nutrition". Where a claimant "needs prompting to be able to engage with other people" that claimant will

score 2 points under daily living descriptor 9b linked to the Activity “Engaging with other people face-to-face”. Where a claimant “needs prompting or assistance to be able to make complex budgeting decisions” that claimant will score 2 points under daily living descriptor 10b linked to the activity of “Making budgeting decisions”. Further, where a claimant needs prompting to be able to wash or bathe that claimant will score 2 points under daily living descriptor 4c and where a claimant needs prompting to be able to dress or undress, that person will score 2 points under daily living descriptor 6c. It was the latter 2 descriptors only which, according to the tribunal’s findings, applied.

3. There are some relevant definitions contained within Schedule 1, Part 1 to the Social Security (Personal Independence Payment) Regulations 2013 (the PIP Regulations). These are as follows:

“Complex budgeting decisions” means decisions involving –

- (a) calculating household and personal budgets;
- (b) managing and paying bills;
- (c) planning future purchases;

“Engage socially” means –

- (a) interact with others in a contextually and socially appropriate manner;
- (b) understand body language;
- (c) establish relationships;

“Prompting” means reminding, encouraging or explaining by another person.

“Take nutrition” means

- (a) cut food into pieces, convey food and drink to one’s mouth and chew and swallow food or drink;...

Also of relevance is the content of regulation 4(2A) and 4(4) of the PIP Regulations. Those provisions are as follows:

(2A) Where C’s ability to carry out an activity as assessed, C is to be assessed as satisfying the descriptor only if C can do so –

- (a) safely;
- (b) to an acceptable standard;
- (c) repeatedly;
- (d) within a reasonable time period; ...

(4) In this regulation –

- (a) ‘safely’ means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity;

- (b) 'repeatedly' means as often as the activity being assessed is reasonably required to be completed;
- (c) 'reasonable time period' means no more than twice as long as the maximum period that a person without a physical or mental condition which limits that person's ability to carry out the activity in question would normally take to complete that activity."

4. The tribunal rejected an argument advanced to it by the claimant's representative to the effect that the claimant should score 2 points under daily living activity 2d. In so doing it said this:

" 28. Activity 2: The appellant is able to physically take nutrition; this is not in dispute. However, it has been submitted that he requires prompting in order to do so. In his claim questionnaire the appellant stated that he needed to be reminded to eat, especially when he was engrossed in something he was interested in. The HCP recorded that the appellant only ate when he got hunger pains, and that occasionally his mum or girlfriend would prompt him to eat. At the hearing his account was that he becomes distracted by what he's doing and forgets to eat unless he is prompted. However, the appellant also stated that he will eat when he feels hungry, weak due to lack of food, or thirsty, and that he will sometimes think about eating but then continue with what he is doing. Therefore, upon consideration of this evidence we found that the appellant was reminded to eat by his own metabolic and physiological functions and that he did not need reminding by another person for the majority of the time. In reaching this conclusion we also noted that the appellant had not spoken to his doctor or been referred to any specialist about his inability to take nutrition properly, and that he was observed to be well-nourished at the assessment. Taking all the evidence in the round, we were satisfied that although the appellant might not always eat at the more socially-accepted meal times, he does eat when he feels hungry, and therefore we concluded that he is able to take adequate nutrition. Accordingly, no points were awarded for this activity."

5. The tribunal rejected a contention made by the claimant's representative to the effect that the claimant ought to score 2 points under daily living activity 9b and explained its reasoning in this way:

" 31. Activity 9: It was submitted that the appellant required prompting in order to engage with other people. We noted that one of the potential traits of autism was a difficulty to interact socially and that this had been discussed with the appellant during his autism assessment. However, we gave regard to the fact that the appellant was living in a house with nine other students whom he stated that he got on with okay, and that he was attending university and therefore engaging with his tutors, with his peers, and with university services staff, and that no cause for concern had been highlighted due to his inability to engage appropriately in any of these situations and no adjustments had been put in place for him to help him manage. Also, we placed weight upon the fact that the appellant had formed a relationship with his girlfriend whilst at university and that he had been able to maintain that relationship for over one year. Further, we took into account the fact that the appellant had been able to engage with the HCP during the assessment and was noted in the mental state examination to only be mildly distracted at times. Therefore, although we accepted that the appellant may have some difficulties with engagement we did not find on the evidence before us that he would require prompting to engage with others for the majority of the time; therefore, no points were awarded for this activity."

6. The tribunal rejected a contention made by the claimant's representative to the effect that he ought to score 2 points under daily living descriptor 10b. It explained its reasoning in this way:

" 32. Activity 10: The appellant also claimed that he needed assistance to make complex budgeting decisions. On his claim form he stated that he did not deal with his bills but that his mother sorted out his post and organised his affairs for him, and that he would forget to deal with such matters as he felt that it was a waste of his time and that he could spend that time doing something else instead. At the hearing his evidence was that he could understand the math involved, but that he did not understand the full importance of budgeting. He explained that he did not budget for the academic year and that he rarely

checked his bank account and had periods where he had no money in it. His mother's evidence was that he did not open his letters and that she had to do this for him, but that he became agitated when she did. When determining this matter, we placed weight upon the fact that the appellant had attended mainstream school and achieved sufficient marks to be able to continue on to higher education. We also considered the fact that he was undertaking an intellectually challenging degree that would involve the use of numbers and strategic thinking. Overall, we found that this demonstrated that he had the cognitive and intellectual facilities to be able to understand a complex budget. In respect of his motivation to undertake the activity, we found that the appellant had the motivation to undertake activities which he enjoyed, such as his degree course, and that on his evidence the issue was more that he could not see the point in dealing with budgeting matters when he could be spending that time doing something else more appealing to him. We noted that he had periods where he did not have any money in his account due but we found that this was a situation many university students would find themselves in over the course of an academic year. Overall, we found that the appellant chose not to engage with this activity rather than lacked the capabilities to be able to undertake this activity without prompting. Therefore, we found that he did not satisfy any of the descriptors for this activity and awarded no points accordingly."

7. In the grounds of appeal to the Upper Tribunal it was asserted that the tribunal had erred in law through failing to consider whether if a claimant will only eat when feeling hungry or when feeling weak due to a lack of food, such a claimant can be said to be taking nutrition safely and/or to an acceptable standard. It was also asserted that the tribunal had erred with respect to daily living activity 9 through failing to consider all of the evidence before it concerning difficulty it was said that the claimant would experience in engaging with people not known to him.

8. Permission having been granted I directed written submissions from the parties in the usual way. The Secretary of State's representative provided a submission in which unusually (not a criticism) the particular grounds relied upon by the claimant's representative were not addressed. Instead, the Secretary of State's representative argued that the tribunal had erred with respect to its consideration of daily living activity 10 and, in particular, daily living descriptor 10b. It was pointed out that the tribunal had before it a document headed "Autistic Spectrum Disorder (ASD) assessment" relating to the claimant and which had been prepared by one Dr Royle, a Clinical Psychologist, on 8 February 2016. In a section of the assessment report Dr Royle had commented as follows:

"Many people with ASD suffer from executive functioning problems. Executive functioning is a term used to describe a collection of tasks that the brain performs to help us with our day-to-day functioning. These tasks include using working (short-term) memory, reasoning, flexibility, problem solving, as well as planning and execution of tasks. Difficulties with executive functioning make things such as time management, the planning and execution of assignment tasks and keeping on top of the tasks of day-to-day living very challenging. Often people with ASD can become narrowly focused on one thing (usually relating to a special interest) to the exclusion of other tasks which hold less importance. Executive functioning problems mean that it is difficult to switch tasks, divert attention or change priorities. This can therefore reduce the ability/inclination to deal with day-to-day tasks, stop what you are doing in order to be on time for something else or stick to assignment plans. The combination of preservation and perfectionism are likely to make it very hard for you to finish a task and feel completely satisfied with it, which may partly explain why it is hard for you to complete assignments on time."

9. The Secretary of State's representative's position was that the assessment report and in particular that section I have just reproduced suggested the claimant may have particular types of problems in making complex budgeting decisions which the tribunal had failed to take account of in its relevant reasoning. The Secretary of State's representative, accordingly, urged me to conclude that the tribunal had erred in law, to set aside its decision and to remit for a complete rehearing. Consent was also given to the issuing of a decision with only limited reasons.

10. The claimant's representative, as directed, provided a written reply. He said he did not support the request "for a decision without reasons" (to be pedantic the Secretary of State's representative had only indicated consent to a decision with limited reasons) because, it was said the giving of reasons would further the development of case law relating to PIP. As to both Activity 2 and Activity 9 the reasoning as contained in the grounds of appeal was maintained. In particular concerning the former it was contended that "consuming food at times when weak or feeling faint is not taking nutrition to an acceptable standard". The claimant's representative said he was content for the Upper Tribunal to reach its own view, without any urging one way or the other, as to whether it might be able to remake the decision or whether remittal would be the appropriate course in the event of an error of law being found.

11. I will, first of all, address the possible error identified by the Secretary of State's representative. The tribunal did not specifically refer to Dr Royle's assessment report but it did make it clear in general terms (see paragraph 2 of its statement of reasons for decision) that it had taken into account all of the documentation in front of it. It founded its decision as to budgeting upon its finding that the claimant had the cognitive and intellectual talents to be able to, as it put it, "understand a complex budget" and had appropriate motivation given that he had been sufficiently motivated to undertake his degree course. It concluded, in effect, that he did not attend to budgeting matters because he was exercising a choice not to do so. It is easy to see why the tribunal had reached that conclusion. But the assessment report of Dr Royle was, in my judgment, a potentially significant item of evidence. The passage from which I have quoted does demonstrate that certain claimants who have the same or similar conditions to the one which this claimant has, might have difficulties with respect to budgeting as a result of the condition even if there is sufficient intellectual ability and even where there is a demonstrable ability to motivate in the context of the performance of other sorts of tasks. In particular what is said about persons with ASD (an abbreviation for autistic spectrum disorder) becoming narrowly focused to the exclusion of other tasks which hold less importance might be thought to hold relevance. Of course, these considerations have to be placed alongside the fact that at least for some people (including I suppose many degree level students) the making of even complex budgeting decisions as defined is not exacting. Nor is it obviously so burdensome as to seem to require, in general terms, all that much by way of motivation. Nor will it be the case that a mere degree of difficulty in motivating will of itself suffice. Any prompting must be needed. But despite the tribunal's reasoning being otherwise most careful I have concluded that it erred in law through failing to address those specific points made by Dr Royle prior to reaching its conclusions as to the ability or otherwise of the claimant to be able to make complex budgeting decisions absent prompting.

12. It is, I think, perfectly reasonable to say that the tribunal might have reached the same outcome even if it had considered Dr Royle's report. Indeed the comment that the executive difficulties described might "reduce the ability/inclination to deal with day-to-day tasks" (my underlining) might even be taken to afford some support for the tribunal's reasoning that the claimant was merely exercising a preference. But I am not sure the evidence, if it had been considered and addressed, could not have impacted upon the decision not to award points under daily living descriptor 10b. So I do regard the error I have just identified as being, in that sense, material. But although the Secretary of State's representative urges me to set aside the tribunal's decision on that basis I cannot do so on that point alone because, since no-one had argued that a higher scoring descriptor linked to activity 10 applied, even if daily living descriptor 10b did apply that would only have led to the scoring of 6 points which would still

be below the 8 point threshold which has to be attained for an award to be made. So, it is still necessary for me to consider at least one of the remaining grounds.

13. As to those, the issue with respect to Activity 2 also related to whether there was or was not a need for prompting. Aspects of the ways in which that activity and its associated descriptors operate were considered by the Upper Tribunal in *MM and BJ v SSWP (PIP)* [2016] UKUT 490 (AAC). In that decision the Upper Tribunal made it clear that the term “take nutrition” had a narrow meaning and that it related to the specific definition set out above and so to the act of eating and drinking and which included such matters as cutting food into pieces, conveying food and drink to the mouth, chewing food and swallowing food or drink. So that, for example, excluded a need for such as prompting to encourage a person to follow a nutritious or healthy diet. Repeatedly choosing sausages over lentils or beer over green tea, for example, would not lead to the scoring of points. But I agree with the claimant’s representative that there is nothing in that decision which rules out the scoring of points where there is a need for prompting to enable a person to actually undertake the straightforward tasks just referred to. But even here it is worth remembering that what is being tested is not the motivation to prepare a meal or make a drink but merely to eat or drink once such has been prepared. In the context of distraction rather than say, for example, a type of eating disorder it might be thought at least generally speaking that such tasks could usually be accomplished without the need for prompting. But such a need is not actually inconceivable.

14. As to what the tribunal had to say at paragraph 28 of its statement of reasons for decision (set out above) I see no difficulty, in general terms, in a conclusion that a claimant does not need prompting from another in circumstances where that claimant’s “own metabolic and physiological functions” act in an efficacious manner as the prompt. A claimant would not score points, for example, simply on the basis that he/she diverted from the normal convention of having three meals each day. Nor do I see anything wrong in principle with a tribunal concluding that it is satisfactory for a claimant to take nutrition simply when hungry or when thirsty. Further, the tribunal noted the absence of medical input and it was entitled to take that into account in its overall consideration of the activity 2 descriptors. But matters are, in my judgment, complicated by two things. First of all, the tribunal did appear to accept by implication that sometimes the claimant would not eat until feeling “weak due to lack of food”. Secondly, although he had said he sometimes did not eat because he would become distracted by other things (and perhaps there was some support for that in what was said by Dr Royle) it did not make a clear finding as to whether and if so to what extent that was a difficulty which prevented the claimant from taking nutrition when he was hungry or thirsty and, if it did, for how long.

15. As to the “weakness” issue, it does seem to me that if a claimant sometimes does not take nutrition until the onset of weakness that might be indicative of that claimant not performing the activity of taking nutrition to an acceptable standard, subject of course to the situation arising with the necessary degree of frequency. Perhaps if the tribunal had simply found and then said he would eat when he feels hungry and drink when he feels thirsty and left it there that would have been acceptable. But it did not. As to the “distraction” issue, since the question of distraction had been clearly raised before it, it does seem to me that it was required to make a clear finding as to whether such would serve to prevent the claimant, absent prompting, from taking nutrition even in the face of his becoming hungry or thirsty. So I have concluded that the tribunal did err with respect to its consideration of activity 2.

Had it not made that error and had it not made an error with respect to activity 10 then the outcome of the appeal might (I do not say would) have been different.

16. There remains the question of the tribunal's consideration of activity 9. However, I am of the view that there would be nothing profitable in my saying anything further about it. I note the claimant's representative's general point that giving reasons might contribute to the development of PIP case law. However it does not seem to me that the arguments raised in connection with activity 9 point to any new issue. If the tribunal did overlook some evidence said to support difficulty in engaging with persons not known to the claimant then that evidence may be pointed out at the rehearing which will now (for the reasons which I will set out below) have to follow. As to any suggestion that the tribunal might have applied the wrong test (and I am not clearly satisfied that it did) then it is already well established that a consideration of an ability to engage with others requires an evaluation of an ability to engage with people generally and not just those that a claimant knows well. Nothing would be gained by my repeating that (although I suppose that is exactly what I have just done).

17. I have, as will now be obvious, decided to remit rather than to attempt to remake the decision myself. That is because I do not think the facts are sufficiently well established for me to reach an informed view, for example, as to the possible applicability of daily living descriptors 2d and 10b. There is a need for further fact-finding as to those issues and that being so, the task is best undertaken by an expert fact-finding body. The tribunal is such an expert fact-finding body and will have available to it a range of expertise through the composition of its panel.

18. The rehearing will not be limited to the grounds on which I have set aside the tribunal's decision. The tribunal will consider all aspects of the case, both fact and law, entirely afresh. Further, it will not be limited to the evidence and submissions before the tribunal at the previous hearing. It will decide the case on the basis of all of the evidence before it including any further written or oral evidence it may receive.

19. This appeal to the Upper Tribunal then is allowed on the basis and to the extent explained above.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated

14 May 2018