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|  | Case No:  |
| BETWEEN: |
|  | MISS X | **Appellant** |
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| - and - |
|  | SECRETARY OF STATE FOR WORK AND PENSIONS  | **Respondent** |
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|  | APPELLANT’S SUBMISSIONS  |  |

1. This is an appeal against the decision dated 14 November 2017 as confirmed by the mandatory reconsideration (MR) notice dated 13 December 2017. The decision was to refuse ESA as it was held that zero points were scored on the work capability assessment (WCA).
	1. The score of 0 points is clearly at odds with Miss X’ss ESA50, but the decision maker (DM) has not included any claimant scores on the score sheet (**pp122-123 of the bundle)**
	2. The DM has simply carried out a rubber-stamping exercise for the HCP and I also note in particular that the DM who carried out the mandatory re-consideration is satisfied with the accuracy and integrity of the HCP report and invites Miss X to complain to Maximus if she has any concerns about the reports accuracy,( **p22 of the bundle**) but I submit that the DM is either under some sort of pressure to accept the Maximus reports uncritically and without considering any other evidence, or is simply not taking responsibility for the decision which is not one that Maximus has any authority to make. I am also reminded that in KN v SSWP (ESA) [2016] UKUT 0521 (AAC) CE/1665/2016 Judge Gray held [at 24]

As to Mr Hampton’s contention that the lack of a formal complaint in relation to the conduct of the medical examination has bearing upon credibility, I do not accept it. It does not seem unlikely to me that claimants believe such matters will be dealt with at the appeal. There is force in the observations of Ms. Blackshaw that the practical and emotional difficulties in dealing with an appeal may overwhelm an appellant even without there being a need to engage in an associated formal complaint process. There is no legal requirement for a complaint to be made in tandem with an appeal, and it seems to me wholly wrong to use the absence of such a complaint as a significant credibility pointer. Such a complaint would be no more than a previous consistent statement, and, although there are no technical issues as to the admissibility of these in an inquisitorial tribunal it must not be forgotten that their treatment in other legal fora1 is prescribed due to their self-serving quality and any slight probative value they may have being generally outweighed by the need to investigate such statements of limited relevance2. As a natural further step from Mr Hampton’s submission in this context, if a complaint had been made and dismissed that could surely not be a reliable indicator as to whether or not the tribunal should accept the appellant’s account of the conduct of the examination or the accuracy of the report, because it is the task of an independent tribunal to decide what evidence it accepts or rejects; it cannot abdicate that decision to another investigative body, indeed it should be highly circumspect about allowing such a decision to influence it at all since it knows little if anything about the standards and operating procedures under which it was made.

1.3 On 7 February 2018 the House of Commons Work and Pensions Committee published a report “PIP and ESA Assessments”. That report concluded inter alia: (*any emphasis is mine*)

Ultimately, while the Department sets quality standards, it is up to contractors to meet them. **The Department’s existing standards set a low bar for what is considered acceptable**. **Despite this, all three contractors have failed to meet key targets on levels of unacceptable reports in any single period**. In Capita’s case, as many as 56% of reports were found to be unacceptable during the contract. The Department’s use of financial penalties to bring reports up to standard has not had a consistent effect. Both Capita and Atos have seen increases in the proportion of reports graded “unacceptable” in recent months. Large sums of money have been paid to contractors despite quality targets having been universally missed. The Government has also spent hundreds of millions of pounds more checking and defending the Department’s decisions

1.4 The DM’s assertions are arguably unsustainable in the light of the above

1. It is common ground that Miss X is suffering from a number of conditions, including post-traumatic stress disorder and borderline personality disorder (also known as emotionally unstable personality disorder)
	1. It is clear that the health care professional (HCP) who carried out the assessment (a physiotherapist who apparently has no specialist training or qualifications) has little or no knowledge of mental health.

2.2.1 I will concede that in JF v Secretary of State for Work and Pensions (ESA) [2013] UKUT 0269 (AAC) CIB/419/2011, Judge Ovey held (at [19]) that as a matter of law, the Secretary of State can rely on a medical report that had been prepared by a non-specialist nurse, but Judge Ovey’s decision does not make an HCP’s qualifications (or lack of them) irrelevant.

2.3 In JH v Secretary of State for Work and Pensions (ESA) [2013] UKUT 0269 (AAC) CE/3883/2012 (at [22]) Judge Mark seems to disagree with Judge Ovey

22. Where, however, the disability analyst is a physiotherapist and the problems she is dealing with are mental health problems the opinion of the physiotherapist as to the conclusions to be drawn have no probative value whatsoever. This is because the physiotherapist has no professional expertise in mental health matters. Although the strict rules of evidence do not apply, a tribunal can only take into account evidence that has probative value, so that, for example the decision of another judge as to the facts is simply his or her opinion as to the facts and has no probative value (see AM v Secretary of State, [2013] UKUT 094 (AAC), paragraphs 19-24, and the interim decision of Judge Turnbull in CH/1168/2011 setting aside the decision of a tribunal on the ground that it had relied in part on the findings of fact of another tribunal which represented no more than the opinion of that earlier tribunal as to the matter).

2.4 Mr Commissioner (now Judge) Jacobs held in CDLA/2466/2007 (at [35])

 The tribunal has to decide whether the factual basis of the opinion was correct. To the extent that it was not, and the difference is significant, the value of the opinion is undermined. If the tribunal accepts the factual basis as correct, the tribunal must decide whether to accept the opinion. In doing so, it will be relevant to know the professional background of the disability analyst. The tribunal may accept that they have all been trained and approved. But that training is supplementary to the analyst’s professional training. It cannot turn a doctor into an occupational therapist or a physiotherapist into a doctor. And the professional background may be relevant to assessing the opinion given. To take some obvious examples, an occupational therapist’s opinion on the aids that would assist a claimant may be more useful than that of a doctor, while a doctor’s opinion on the risks of injury during an epileptic seizure may be more useful than those of a physiotherapist. (In practice, I suspect that the matters referred may depend on the particular’s analyst background.) Accordingly, the tribunal will not be able to place much, if any reliance, on an opinion given by an analyst whose primary area of experience and expertise is not known

2.5 A Three Judge Panel (3JP) considered the issue in in [2015] AACR 23, but there is I submit nothing in the decision that would detract from what Judge Jacobs held in CDLA/2466/2007. (or for that matter what Judge Mark held in JH) Indeed, the 3JP held (at [ 38)]:

38 .In a assessing the weight to be given to any report addressing the functional impact of any medical condition on a claimant, a First-tier Tribunal should consider (a) the level of the author’s expertise (for example, an HCP or a consultant psychiatrist) and (b) the knowledge of the claimant possessed by the author (for example, knowledge gained from a one-off assessment or that gained as a treating clinician). Additionally, the date of the evidence, its comprehensiveness, and its relevance to the issues the tribunal has to determine are also key matters for the tribunal to consider. Importantly the tribunal should explain its reasoning for attaching weight to one type or piece of evidence rather than to another.

1. The HCP report is arguably inadequate because insufficient questions were asked. It was also compiled by an HCP who lacked relevant and up to date professional knowledge and may not have the appropriate qualifications or experience in mental health. I therefore invite the Tribunal to follow JH cited at [3.3] above and attach little weight to the HCP report
2. Miss X was very clear in her ESA50 that her condition varies (**p 53 of** **the bundle**). She also says that she has difficulties in dealing with people (**p53 of the bundle),** and that she frequently behaves in a way that upsets other people (**p53 of the bundle**)
3. The DM appears to have ignored the ESA50 in these respects as did the HCP. The HCP appears to have asked no questions as to how Miss X condition may vary, nor did she ask any questions about any situations which may provoke a downward turn. The HCP stated that Miss X never gets violent **(page not numbered**) but appears not to have asked any further questions about how Miss X’ behaviour may upset other people or how often that behaviour may occur. **I therefore submit that the DM cannot have considered Descriptor 17 properly because the correct questions were not asked**.
4. I am reminded that Schedule 2 Descriptor 17 provides (the emphasis is mine)

**17. Appropriateness of behaviour with other people, due to cognitive impairment or aggressive or mental disorder.**

(a) Has, on a daily basis, 15

uncontrollable episodes of

aggressive or **disinhibited**

**. behaviour that would be**

**unreasonable in any workplace**.

(b) Frequently has uncontrollable 15

episodes of aggressive **or**

**disinhibited behaviour that**

**would be unreasonable in any**

**workplace**

(c) Occasionally has uncontrollable 9

episodes of aggressive **or**

**disinhibited behaviour that**

**would be unreasonable in any**

**workplace.**

(d) None of the above apply. 0

* 1. The descriptor is clearly not limited to violence or aggression. (Indeed “violence” does not feature anywhere in the descriptor). The descriptor is also clearly concerned with whether or not the person’s behaviour is appropriate in the context of the workplace, although the word “disinhibited “is not defined. I suggest that it should therefore be given its normal every day meaning, which suggests a lack of inhibition or restraint.
	2. I am aware that the old IB descriptor did not refer to “disinhibited” behaviour but to “disruptive” behaviour. I suggest that the concept of disinhibited behaviour is somewhat wider than the old IB concept of disruptive behaviour although any disinhibited behaviour in the workplace is very likely to be disruptive.
	3. The question of disruptive behaviour was at issue in CSIB/1521/2001and CIB/1374/2006 Mrs Commissioner (as then was) Parker held in CSIB/1521/2001 and Mr Commissioner (as then was) Williams similarly held in CIB/1374/2006 that disruptive behaviour is not limited to aggressive behaviour and can include episodes such as sobbing and excessive displays of emotion. Sobbing and excessive displays of emotion in this context can be seen as examples of the “disinhibited” behaviour in descriptor 17.

6.4. It is therefore arguable that 9 points can be awarded on descriptor 17(c)

1. I am also reminded that ESA Regulation 34(2) provides

 (2) A descriptor applies to a claimant if that descriptor applies to the claimant for the majority of the time or, as the case may be, on the majority of the occasions on which the claimant undertakes or attempts to undertake the activity described by that descriptor

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* 1. In EH v Secretary of State for Work and Pensions (ESA)[2011] UKUT 21 (AAC), Upper Tribunal Judge Wikeley held the following at [31]

31. In broad terms regulation 34(2) appears to put on a statutory footing for ESA purposes the “reasonable regularity” test approved by the Tribunal of three Social Security Commissioners in reported decision R(IB) 2/99 in the context of incapacity benefit.

7.2 In AS v Secretary of State for Works & Pensions (ESA) – [2013] UKUT 0587 (AAC) – CE/1470/2013 Judge Wikeley held at [21](the emphasis is mine):

21. Within the legislative scheme as a whole, this principle only makes sense in the context of the needs of a modern workplace and the level of activity that an employer attuned to the requirements of disability discrimination law can reasonably expect. Plainly, the test is not about a high-pressure working environment, e.g. a call-centre with demanding targets or a factory production line with a fast-moving conveyor belt**. Equally, however, the test is not about what the person can do in their own home and entirely in their own time and at their own pace, subject to no external constraints or pressures whatsoever**. If reasonable regularity is judged by the latter criterion, then the test has ceased to be a test of “whether a claimant’s capability for work is limited by the claimant’s physical or mental condition” within regulation 19(1) of the ESA Regulations.

1. Upper Tribunal Judge May QC held in DW v Secretary of State for Work and Pensions (ESA) [2010] UKUT 245 (AAC) that the broad-brush approach adopted by the House of Lords in Moyna should be applied to the Limited Capability for Work Assessment.
2. It seems to me that far from taking a broad-brush approach, the DM has relied on what is a poorly constructed snapshot taken on the day by the HCP, and that in the light of AS the DM has carried out the wrong test in the present case
3. It is common ground that Miss X has been diagnosed with borderline personality disorder.

10.1 The World Health Organisation’s International Statistical Classification of Diseases and Related Health Problems 10th Revision (ICD10) uses the term “Emotionally Unstable Personality Disorder” (F60.3) rather than Borderline Personality Disorder and gives two sub classifications

F60.30 Impulsive type

At least three of the following must be present, one of which must be (2):

1.marked tendency to act unexpectedly and without consideration of the consequences;

2.marked tendency to engage in quarrelsome behaviour and to have conflicts with others, especially when impulsive acts are thwarted or criticised;

3.liability to outbursts of anger or violence, with inability to control the resulting behavioural explosions;

4.difficulty in maintaining any course of action that offers no immediate reward;

5.unstable and capricious (impulsive, whimsical) mood

.

F60.31 Borderline type

At least three of the symptoms mentioned in F60.30 Impulsive type must be present [see above], with at least two of the following in addition:

1.disturbances in and uncertainty about self-image, aims, and internal preferences;

2.liability to become involved in intense and unstable relationships, often leading to emotional crisis;

3.excessive efforts to avoid abandonment;

4.recurrent threats or acts of self-harm;

5.chronic feelings of emptiness.

6.demonstrates impulsive behaviour, e.g., speeding in a car or substance abuse

* 1. ICD10 advises that personality disorders comprise deeply ingrained and enduring behaviour patterns, manifesting themselves as inflexible responses to a broad range of personal and social situations. They represent either extreme or significant deviations from the way the average individual in a given culture perceives, thinks, feels, and particularly relates to others. Such behaviour patterns tend to be stable and to encompass multiple domains of behaviour and psychological functioning. They are frequently, but not always, associated with various degrees of subjective distress and problems in social functioning and performance.
	2. . The above suggests that Miss X may well have enduring and ongoing difficulties with social engagement, but it is also apparent that the HCP had little or no knowledge of the ICD10 criteria for Emotionally Unstable Personality Disorder
1. The 3JP in JC v Secretary of State for Work and Pensions (ESA) [2014] UKUT 352 (AAC) CE/3183/2013discussed (at [ 30-39]) the nature of social contact in the context of Schedule 2 descriptor 16 (and Schedule 3 Descriptor 13). The panel held (at [39]) that:

“In addressing whether the contact with other people has the necessary nature and quality the tribunal should consider in each individual case how the nature and quality of the communications and behaviour would impact on the ability of the individual to work and so whether or not it would be an effective barrier to him working”

11.1 There is nothing in JC to suggest that 3JP disapproved of what Judge Rowland held at paragraph 4 of DW v Secretary of State for Work and Pensions (ESA) [2014] UKUT 0020 (AAC) CE/1278/2013

Neither the judge who granted permission to appeal nor the Secretary of State has indicated why they have doubts about the adequacy of those reasons. However, I am prepared to accept that the First-tier Tribunal did err in law in this regard. The first sentence of that passage refers to social contact with people who were familiar to the claimant and was therefore of relevance only to excluding descriptor 1(a). The second sentence raises two unanswered questions. The first is whether the claimant being “stressed and anxious” amounted to her suffering “significant distress”, since it seems fairly clear that the legislation envisages that social contact that is not “precluded due to”, or is “possible” only with, significant distress is to be excluded from consideration. The answer to that question would have been relevant both to descriptors 16(b) and 16(c). The second is why the First-tier Tribunal concluded that social contact with an unfamiliar person was possible “for the majority of the time” so as to exclude descriptor 16(c). The facts found are not sufficient to support the conclusion and there is no other reasoning.

* 1. The descriptor clearly provides that any social contact that can only be achieved at the expense of suffering significant (not necessarily severe) distress is not to be taken into account.
	2. I therefore suggest that in the light of the above, 15 points should be awarded on Descriptor 16 (a) (*and Schedule 3 Descriptor 13 may apply*)
	3. It is also arguable that 15 points can be awarded on Descriptor 13 (a), 9 points on 14(b) and 6 points on 15(c) (*and Schedule 3 Descriptor 11 may apply*)
1. The Respondent has not made it clear that this is a re-assessment decision. A previous WCA was carried out in September 2015.
	1. It is Miss X’s contention that her condition has **not** improved since the previous WCA, and it is arguable that the burden of proof is on the DM to show otherwise in order to justify his superseding decision. CIB/1509/2004 at [12-13], DB v Secretary of State for Work and Pensions (IB) [2010] UKUT 209 (AAC) CIB/2734/2009 at [17])
2. In KB v Secretary of State for Work and Pensions (PIP) [2016] UKUT 0537(AAC) CPIP/1623/2016 Judge Mesher held that the provisions for superseding an award of PIP following a further HCP report are sufficiently similar to the provisions for superseding an ESA award that the principles established by case law in one domain may apply to the other. Judge Mesher held at [12-13]

12. The effect of regulation 26(1)(a) of the 2013 Decisions and Appeals Regulations taken on its own is relatively uncontroversial. A similar power of supersession has existed for some time for incapacity benefit (IB) and employment and support allowance (ESA) in the 1999 Decisions and Appeals Regulations. In relation to those powers, a three-judge panel of the Upper Tribunal said this in FN v Secretary of State for Work and Pensions (ESA) [2015] UKUT 670 (AAC), now reported as [2016] AACR 24:

“70. We accept this analysis [of how the pre-existing case law fitted together] and although we were not asked to consider the practical application of regulation 6(2)(g) or 6(2)(r)(i) [of the 1999 Decisions and Appeals Regulations], we re-emphasise that the purpose of both provisions is to provide that the obtaining of a medical report or medical evidence following an examination is in itself a ground of supersession and that, accordingly, there is no longer a requirement to identify a regulation 6(2)(a)(i) change of circumstances in order to supersede an IB or ESA decision. More importantly, however, we accept and endorse what was said by Mr Commissioner Jacobs in paragraph 10 of CIB/1509/2004. What both provisions do is to authorise a supersession procedure but do not determine the outcome. What determines the outcome is a decision by the decision-maker (initially) or the First-tier Tribunal (on appeal), after an assessment of all the relevant evidence, as to whether the substantive tests (incapacity for work or limited capability for work) are satisfied.”

Paragraph 10 of CIB/1509/2004 was as follows:

“10. On either approach, regulation 6(2)(g) merely authorises a supersession procedure. It does not determine the outcome. It merely recognises that evidence has been produced that may, or may not, show that the operative decision should be replaced. The outcome is determined by the conditions of entitlement for an award.”

13. In my judgment, those statements of principle apply just as much to the operation of regulation 26(1)(a) of the 2013 Decisions and Appeals Regulations in relation to PIP. Thus the tribunal of 11 March 2016 was correct in paragraph 20 of its statement of reasons in so far as it was referring to regulation 26(1)(a), but subject to the important proviso that, although it is not necessary to identify a change of circumstances in order to authorise a supersession, it may be necessary to consider the circumstances obtaining when the existing award was made and during the period of the award as part of “all the relevant evidence” and as part of an adequate explanation of the outcome if it is less favourable than the existing award that is being replaced on supersession. Although the tribunal here did plainly consider whether the substantive test for entitlement to PIP was met as from 22 July 2015, I conclude in paragraphs 27 and 28 below that there was an error of law in the inadequacy of reasons.

 And at [ 16-17]

16. Does regulation 11 go further than that provision of context? The notes to regulation 11 in the 2016/17 edition of Volume I of Social Security Legislation (Non-Means Tested Benefits and Employment and Support Allowance) start by suggesting that it appears to mean that a decision awarding PIP can be reviewed and superseded by the Secretary of State at any time and for any reason, although they go on to suggest that that is not the case. However, some may have interpreted regulation 11 in the first sense and it is possible that the tribunal of 11 March 2016 had such a meaning in mind in paragraph 20 of its statement of reasons. If so, it would have been wrong.

17. The precise terms of regulation 11 have to be looked at carefully. They only allow the Secretary of State to make a determination on the question of whether the claimant continues to have limited or severely limited ability to carry out daily living and/or mobility activities, not an overall decision on entitlement or otherwise to PIP. It may be that too much significance should not be placed on the use of those particular words, but examination of the provisions of the Welfare Reform Act 2012 on PIP shows many references (see in particular sections 80 and 81) to the determination of various questions (including the question just mentioned) in accordance with regulations, in contrast to provisions as to entitlement or non-entitlement, under which entitlement follows from positive determinations on a number of questions. A positive answer to each necessary question is one element (in the past sometime described as one building block) that goes towards an eventual decision on entitlement. Thus, regulation 11 does not directly allow a supersession of a decision making an award whenever the Secretary of State feels like it. To put it another way, the mere existence of a subsequent determination on one question, that the claimant does not have limited or severely limited ability to carry out daily living and/or mobility activities, cannot if itself take away the authority entitling the claimant to payment of benefit under the decision awarding entitlement. That authority can only be removed by the Secretary of State under his powers of revision and supersession in the 2013 Decisions and Appeals Regulations

* 1. In SF v SSWP (PIP) [2016] UKUT 0481 (AAC) CPIP/1693/2016 Judge Wikeley held (at [22]

22. Thus, the principles and guidance set out by Mr Commissioner Howell QC in R(M) 1/96 are not rendered redundant by the simple fact that the Secretary of State has instigated a Planned Review, obtained a fresh HCP report and concluded that there is now no longer any ongoing entitlement to PIP, making a supersession decision to that effect. The extent to which reasons have to be given in such a case will obviously be context-dependent. However, in a case such as the present, where there was such a stark contrast between the two decisions, the FTT could not simply pretend that the award the previous year was simply a matter of ancient history and of no current potential relevance. It was incumbent on the FTT at least to express a view e.g. that there had been a significant improvement in the Appellant’s condition and functioning in the intervening 15 months. That may well have been the situation in the present case, but the FTT did not say so and certainly did not make the necessary findings of fact to support such a conclusion. I therefore allow the appeal on this ground too.

* 1. The principles in R(M)1/96 were set out at [15-16]

“15.It does however, seemto me to follow from what is said bythe Court of Appealin *Evans, Kitchen & Others*, that while a previous award carries no entitlement to preferential treatment on a renewal claim for a continuing condition, the need to give reasons to explain the outcome of the case to the claimant means either that it must be reasonably obvious from the tribunal’s findings why they are not renewing the previous award, or that some brief explanation must be given for what the claimant will otherwise perceive as unfair. This is particularly so where (as in the present and no doubt many other cases) the claimant points to the existence of his previous award and contends that his condition has remained the same, or worsened, since it was decided he met the conditions for benefit. An adverse decision without understandable reasons in such circumstances is bound to lead to a feeling of injustice and while tribunals may of course take different views on the effects of primary evidence, or reach different conclusions on the basis of further or more up to date evidence without being in error of law, I do not think it is imposing too great a burden on them to make sure that the reason for an apparent variation in the treatment of similar **relevant** facts appears from the record of their decision.

16. Relating this to attendance or mobility cases, if a tribunal, in a decision otherwise complying with the requirements as to giving reasons and dealing with all relevant issues and contentions, records findings of fact on the basis of which it plainly appears that the conditions for benefit are no longer satisfied (e.g. a substantial reduction in attendance needs following a successful hip operation, or the claimant being observed to walk without discomfort for a long distance) then in my judgment it is no error of law for them to omit specific comment on an earlier decision awarding benefit for an earlier period. Their reason for a different decision is obvious from their finding. In cases where the reason does not appear obviously from the findings and reasons given for the actual conclusion reached, a short explanation should be given to show that the fact of the earlier award has been taken into account and that the tribunal have addressed their minds for example to any express or implied contention by the claimant that his condition is worse, or no better, than when he formerly qualified for benefit. Merely to state a conclusion inconsistent with a previous decision, such as that the tribunal found the claimant “not virtually unable to walk” without stating the basis on which this conclusion was reached, should not be regarded as a sufficient explanation, and if the reason for differing from the previous decision does not appear or cannot be inferred with reasonable clarity from the tribunal’s record, it will normally follow in my view that they will be in breach of regulation 26E(5) and in error of law

1. Miss X is at least entitled to a proper explanation as to why the DM departed from the previous decision. The DM has clearly not provided a proper explanation as to why he has departed from the previous decision and appears to have had little regard to the principles outlined by the Commissioner in R(M)1/96. Those principles have stood the test of time and were highlighted more recently by Judge Wikeley in SF and by Judge Mesher in KB.
2. The Respondent purports to have considered Regulation 35 and suggests that following the decision of the 3JP in IM that all that is necessary is that the decision maker should provide a list of the kinds of work related activity made available by providers in the area. (**Response p10**). The DM has provided a (limited) list, (**pp167-168 the Soft Skills from District Provision Tool)** but it is strongly arguable that the DM’s suggestion in this respect is not correct, and far more is required.
	1. Upper Tribunal Judge Jacobs considered the issue at length in AH v Secretary of State for Work and Pensions [2013] UKUT 0118 (AAC.) CE/1750/2012. Judge Jacobs held at [24-26]

**Charlton**

24. The Court of Appeal considered regulation 27(b) in Charlton v Secretary of State for Work and Pensions reported as R(IB) 2/09. Moses LJ said that, although the case concerned incapacity benefit,

4. … the question of interpretation remains relevant to the regulations made under the new scheme introduced by the Welfare Reform Act 2007.

In other words, it remained relevant to employment and support allowance. It is directly relevant to regulation 29(2), which differs from regulation 27(b) only in the change of terminology appropriate to employment and support allowance. But to what extent, if at all, is it relevant to regulation 35(2)? In order to answer that, it is necessary to see what the Court decided.

25.The Court first decided that the paragraph applied to the effect of work and not just, as its language suggested, to the effect of being found capable of work. In other words, the paragraph applied not only to the immediate effect of the decision that the claimant was no longer entitled to incapacity benefit, but also to consequence of having to seek and then undertake work, including travel to work. That conclusion is equally applicable to both regulation 29(2) and regulation 35(2).

26.The Court then explained how to identify the type of work that had to be taken into account:

45. … The decision-maker must assess the range or type of work which a claimant is capable of performing sufficiently to assess the risk to health either to himself or to others.

Obviously, that is not directly applicable to regulation 35(2), which does not envisage the claimant working. However, the Court’s reasoning can be applied by analogy to the work-related activity. Translating the language of the judgment into terms of work-related activity comes to this:

The decision-maker must assess the range or type of work-related activity which a claimant is capable of performing and might be expected to undertake sufficiently to assess the risk to health either to himself or to others.

* 1. The 3 JP in IM would find itself bound by Charlton and there is no indication that they interpreted Charlton any differently to that of Judge Jacobs in AH. Indeed, the panel held the following at [106] (the emphasis is mine)

106. But what the Secretary of State can and should provide is evidence of the types of work-related activity available in each area and **by reference thereto what the particular claimant may be required to undertake and those which he considers it would be reasonable for the provider to require the claimant to undertake**. The First-tier Tribunal would then be in a position to assess the relevant risks

* 1. It is clear that the DM is not only required to provide a list of what is available, but also to indicate what the claimant may be required to undertake. The decision maker has not given any indication of the range or type or work or work-related activity that Miss X can perform, or may capable of performing, or may be required to undertake.
	2. I would add that in KC and MC –v- SSWP (ESA) [2017] UKUT 0094 (AAC) Judge Wright is critical of DWP submissions post IM and reminds us that the list must show clearly what are the most and least demanding activities in the claimant’s area, and that the least and most demanding activity that the claimant could be expected to undertake should be indicated by reference to that list

* 1. I note that the 3JP which decided IM did not disapprove of Judge White’s decision NS v SSWP (ESA) [2014] UKUT 115 (AAC) and that NS is reported as [2015] AACR 33. I do so because Judge White reviews the authorities regarding the application of Regulation 29. I note in particular that Judge White (at [45]) cites LJ v SSWP(IB) [2010] UKUT408 (AAC) where Judge Mark observed
1. Further, the test is not limited to whether there would be a substantial risk to the claimant from any work he may undertake. The test is as to the risk as a result of being found capable of work. If he was found capable of work, he would lose his incapacity benefit, and would very possibly need to seek work and apply for jobseeker’s allowance. That would involve his attending interviews and going through all the other steps that would be needed to obtain and keep jobseeker’s allowance. In the present economic climate, a claimant who is 62 years old with mental health problems, and who has not worked since the early 1990’s, is unlikely to find work quickly and would very possibly never find it. His GP’s assessment that it is inconceivable that he would ever be able to earn his living may be right. The tribunal would then have to determine how this change from his being in receipt of incapacity benefit would affect the claimant’s mental health, looking not at some work he may do, but at the effect on his mental health of fruitless and repeated interviews and the possibly hopeless pursuit of jobs until he reached retirement age. These factors were not considered by the tribunal, and indeed they did not elicit the information necessary to enable them to be considered, such as whether he had in fact applied for jobseeker’s allowance and if not, how he was coping or would cope.

Judge White also goes on to say at [50]

50. I would agree with the observation of Judge Ward in *RB v Secretary of State for Work and Pensions (ESA),* which I have quoted in paragraph 35 above, that the more narrowly focused the descriptors become, the more likely it is that the safety net provision of regulation 29(2)(b) will be in issue

* 1. It is also arguable that some of the activities on the list provided by the DM (**p167 of the bundle**), e.g. considering referral to professional services such as counselling, are so far removed from the context of the workplace so as not to amount to work related activity in any realistic sense at all.
	2. I am supported in this by the observations of Judge Bano in [2015] AACR 9 at [8] (the emphasis is mine)

Although ESA work-related activity and a course of therapeutic occupational therapy in a psychiatric hospital might be said to share the aim of enabling people to undertake or resume paid employment, in my view in most cases any similarities between those two forms of intervention end there. Treatment in a psychiatric hospital is designed to overcome the often-devastating effects of mental illness. Its purpose is therapeutic, and it is carried out by qualified mental health professionals in a way which is designed to improve and not to harm the health of the patient. **Work-related activity, on the other hand, is designed to overcome obstacles to gaining employment for people who may have no relevant health problems, and employment advisers are not required to have mental health qualifications or experience**. I therefore reject the argument that the tribunal was entitled to find that work-related activity posed no substantial risk of harm to the claimant on the basis that she was already receiving occupational therapy in hospital

1. I am reminded that in [2015] AACR 9 Judge Bano also held at [9] (again the emphasis is mine)

9. A crucial consideration in this context is the regime of sanctions underpinning work-related activity, as explained by Judge Gray in MT v Secretary of State for Work and Pensions (ESA) [2013] UKUT 0545 (AAC) – see [23]. In assessing the risks to the mental health of a claimant from a finding that a claimant does not have limited capability for work-related activity, **a tribunal may therefore have to consider the possible effects on a claimant of stress resulting from the element of compulsion which the “conditionality” of work-related activity entails.** Under regulation 3(4) of the Employment and Support Allowance (Work-Related Activity) Regulations 2011 (SI 2011/1349),a requirement of work-related activity must be reasonable, but as Judge Gray pointed out, there may be no opportunity for a claimant to challenge such a requirement until after a sanction has been imposed. For the reasons given by Judge Jacobs in relation to regulation 29 of the ESA Regulations in CH v Secretary of State for Work and Pensions (ESA) [2014] UKUT 0011 (AAC), any possible benefit to a claimant from engaging in work-related activity is irrelevant.

 16.1 In IB v Secretary of State for Work and Pensions (ESA) [2013] UKUT 0359 (AAC) CE/0261/2013 Judge Ramsay held [14-15]

14.However, there is in my view a more important reason why the claimant’s appeal should be allowed, and that goes back to the words used by the claimant in his letter of appeal which I reproduced at paragraph (8) above, namely:

 “… I would not be able to hold down a regular job as some days I am unable to even leave my house due to the severity of my ailments …”

This put squarely at issue the exceptional circumstances provision. As the tribunal found that the claimant did satisfy Schedule 2 and obtained sufficient points from descriptors, it did not then need to consider regulation 29(2)(b) ESA Regulations. However, having found that the claimant did not satisfy any Schedule 3 activities, it was then, given the specific terms of the letter of appeal, incumbent on it to consider whether the claimant should be treated as having limited capability for work related activity. Regulation 35(2)(b) provides that a claimant is to be treated as having limited capability for work related activity if by reason of his disease or disablement there would be a substantial risk to the mental or physical health of any person if the claimant was found not to have limited capability for work related activity.

15. It seems to me that the significance of the exceptional circumstances provisions is that they enable a tribunal to look at the individual claimant as a whole person or system of interrelated functions and abilities. The sum of the disabilities may exceed their individual parts. In some circumstances it is not enough to measure the ability to engage in each activity in turn, and then exclude limitations insufficient to score points. The activities in the schedule examine the ability to perform an isolated function. For example, the person who, as the tribunal found the claimant could, can mobilise more than 50 metres, can use the keypad on a telephone, and turn the pages of a book, will not get the relevant points which enable that person to be found to have limited capability for work related activity. While consideration of the individual activities does not permit a decision maker or tribunal to take account of limitations below the score threshold, this is what regulations 29(2)(b) and 35(2)(b) permit. They permit account to be taken not only of a claimant’s physical and mental attributes, but also the extent of what might be extreme variability. Regulation 34(2) ESA Regulations encapsulates the ‘reasonable regularity’ test established in previous case law, but it may not be sufficient to cope with what might be extreme variability, which may not occur regularly. An example might be where a claimant is subject to infrequent, but not rare, periods of severe exacerbation

16.2 In GB v Secretary of State for Work and Pensions (ESA) {2015] UKUT 0200 (AAC) CE/4153/2013 Judge Rowland held at [6-7]

6. The difficulty highlighted in IM is that, because the results of work capability assessments are not routinely passed to providers who determine what work-related activity a claimant should be required to do, there may a risk of a provider requiring a person with, say, mental health problems to perform unsuitable work-related activity, due to the provider’s ignorance of those problems or their extent. This difficulty is liable to be exacerbated if, as in both IM and the present case, the claimant is, or is likely to be, unable to engage in social contact with the provider and so explain her difficulties herself.

7. Thus, in the present case, the First-tier Tribunal’s finding that “the Respondent will … take into account the Appellant’s mental health” appears unwarranted or, at best, not supported by adequate reasoning. If there was a significant risk of the claimant being required to engage in work-related activity that would be as stressful as being required “to attend a Job Centre and to carry out the requirements of a jobseeker’s agreement”, which the First-tier Tribunal had found would give rise to a substantial risk to her mental health, the First-tier Tribunal would have been required to find that regulation 35(2) was satisfied in the claimant’s case.

* 1. The concerns expressed by Judge Rowland in GB have also been expressed in far more detail by Judge Sutherland-Williams in SL v Secretary of State for Work and Pensions (ESA) [2016 UKUT 0170(AAC) CE/1867/2015. I note in particular that Judge Sutherland-Williams held at [ 63];

“In the instant matter I find that the appellant’s health would be at further risk if he was found capable of the above types of work-related activity. Taking a broad view, I have concluded that he could not reasonably be expected to perform the activities set out on the list at a time when his condition was in a fluctuating, if not deteriorating, state…”

Judge Sutherland-Williams goes on to hold at [70] (*emphasis mine*)

**I have reservations about relying upon the ‘reasonable regard’ requirement in a mental health case such as this, bearing in mind the Upper Tribunal’s comments in IM about the failure to pass on to the external work providers relevant information** such as a person’s inability to get anywhere outside on their own: see, for example, paragraphs 59 – 62 and 101 of IM. I further have in mind UT Judge Gray’s comments in XT v Secretary of State for Work and Pensions (ESA) [2015] UKUT 0581 (AAC) (at paragraph 9), where she noted that the decision was predicated upon the assumption that the reservations of the tribunal in this regard would be communicated to the provider of work related activity – which in itself implied the tribunal had identified an activity or activities that would pose a substantial risk to health

1. I have cited a number of decisions where Regulation 29 or 35 has been at issue and have quoted from them at considerable length because when taken together they illustrate the various risks that may be relevant and confirm that whilst it is not sufficient for claimants to merely asset that Regulation 29 and/or 35 may apply, it is nevertheless the case that all the circumstances must be considered

1. Miss X’s answers on her ESA50 may in any case be the kind of examples Judge Ramsay would have had in mind when deciding IB, and it is arguable that Regulation 29 and/or 35 should be applied on that basis
2. I ask the Tribunal to allow the appeal for the reasons outlined above.



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 22 May 2018