THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL JUDGE

Before: A J GAMBLE

Attendances:

For the Appellant: (Claimant) The claimant did not attend personally. Mr C Orr, Adviser, Money Matters

For the Respondent: (Secretary of State for Work and Pensions), Mr P Simpson, Advocate, instructed by Ms C Marshall, Solicitor, Office of the Solicitor to the Advocate General for Scotland

The claimant's appeal is allowed

The decision of the Glasgow First-tier Tribunal of 4 June 2013 is set aside.

The case is remitted to the First-tier Tribunal (Social Entitlement Chamber) for redetermination by a freshly constituted tribunal in accordance with the directions in paragraph 13 of the Reasons.

REASONS FOR DECISION

1. This is an appeal by the claimant, brought with the permission of Upper Tribunal Judge Lunney, against the decision of the Glasgow First-tier Tribunal of 4 June 2013. It is partially supported by the Secretary of State.

2. The Registrar granted a request by Mr Orr for hearing. That hearing took place before me on 24 January 2014 when representation was as stated above. I am grateful to Mr Orr and Mr Simpson for their contributions to the discussion.

3. By their decision the tribunal confirmed the decision maker's decision of 17 May 2012, documents 64 – 65, that decision was reconsidered but not revised on 19 November 2012, document 66.

4. Mr Orr stated the claimant's grounds of appeal on document 77 as follows:

(a) The tribunal's lack of reference to a supportive letter from the claimant's General Practitioner, document 13 except for them saying that they had "noted" its terms in paragraph 1 of their Statement of Reasons, document 70.

(b) Their treatment of Activity 17 of Schedule 2 to the Employment and Support Allowance Regulations 2008 in paragraph 7 of that statement on document 72.

(c) Their failure to address the application of regulation 29(2)(b) of the above regulations in sufficient detail in that statement.

Only the last of those grounds is supported by the Secretary of State's submission writer, paragraph 9 of document 93. Mr Simpson adhered to that written submission. The other two grounds are not supported by the Secretary of State's submission writer in paragraphs 5 – 8 of document 93. Again Mr Simpson adhered to those written submissions. In his oral presentation, Mr Orr maintained all three grounds of appeal.

5. The letter from the claimant's General Practitioner, document 13, was lodged along with the claimant's Letter of Appeal, document 12. It is fairly closely contemporaneous with the decision maker's decision of 17 May 2012, being dated 11 June 2012. In it the claimant's General Practitioner does not only deal with issues of diagnosis but addresses functional restrictions on the claimant both of a mental and physical character. Thus, in my judgement, the contents of the letter in question have a direct bearing on the issues which arose in the appeal. Mr Simpson conceded that the failure on the tribunal's part to do more than merely note the contents of the General Practitioner's letter was an error of law, albeit, in his submission, merely an immaterial one. On balance, taking into account the date of the letter and its focus on functional difficulties in the claimant's everyday living, although expressed in much less detailed terms than the examining doctor's report of 4 May 2012, documents 35 – 59, I consider that the tribunal required to say what they made evidentially of its contents in their Statement of Reasons. It was not enough for them to satisfy that duty merely to note them. I thus accept the first ground of appeal and hold that the tribunal erred in law by failing to state, albeit briefly, what they made of the contents of document 13.

6. The text of Activity 17 of Schedule 2 reads as follows:

7. Appropriateness of behaviour with other people, due to cognitive impairment or mental disorder.	17(a) Has, on a daily basis, uncontrollable episodes of aggressive or disinhibited behaviour that would be unreasonable in any workplace.
	(b) Frequently has uncontrollable episodes of aggressive or disinhibited behaviour that would be unreasonable in any workplace.
	(c) Occasionally has uncontrollable episodes of aggressive or disinhibited behaviour that would be unreasonable in any workplace.
	(d) None of the above apply.

7. The evidence before the tribunal potentially relevant to the application of any of the descriptors of Activity 17 to the claimant was as follows:

> Her diagnosis of anxiety and depression, documents 13 and 35, the statement by her General Practitioner that the claimant "does struggle to cope", document 13, her own statement in her ESA50 that she has "many days where I feel really low and down and very weepy for no reason, document 17, the assessment by the examining doctor that none of the above descriptors were fulfilled by the claimant, document 49 and the claimant's tearfulness during the tribunal hearing, paragraph 7 of the tribunal's Statement of Reasons on document 72.

I note that there is no record of the claimant's tearfulness in the examining doctor's report. I refer particularly to documents 36, 37 – 38, 46 – 47, 49 – 50 and 57 which all contain information on mental health issues. All of that information was of relevance as background to the tribunal's assessment of the claimant for the purposes of Activity 17.

8. The tribunal deal with Activity 17 in paragraph 7 of their Statement of Reasons on document 72 as follows:

> "The appellant was a little tearful on occasion at the hearing. It was Mr Orr's position that such a situation was far from unusual and that the tribunal may regard that evidence as indicating a propensity to disinhibited behaviour that may be considered as relevant to descriptor 17 or the exceptional circumstances provisions. We came to the view that the appellant does not satisfy this descriptor, having regard to the frequency and nature of such occasions, when compared with and set alongside the variety of other instances of social and other interaction spoken of by (the appellant). When so considered, the behaviour of the appellant in this regard is not such as would be considered unreasonable in any workplace."

The reference in the passage cited from paragraph 7 of the tribunal's Statement of Reasons to "the variety of other instances of social and other interaction spoken of by (the appellant)." ..... is a reference back to some of the contents of paragraph 6 of the tribunal's Statement of Reasons on document 71 i.e.

> "(The appellant) will on occasion go shopping in the company of her husband. Her evidence was that she will use public transport from time to time and will travel with her sister into the city centre for an outing, which she will enjoy. Similarly, she will be interested in and attend parents' nights at school with (her husband) and enjoys family occasions."

9. At the hearing, Mr Orr accepted that the tribunal had applied the correct legal test to the application of Activity 17. However, he went on to submit, they had not explained their determination of that issue with sufficient clarity and detail in paragraph 7 of their Statement of Reasons cited in paragraph 8 above. Mr Simpson resisted that submission. He did so by relying on the tribunal's reference to "the frequency and nature" of the occasions of tearfulness experienced by the claimant. It seems to me, however, that the flaw in the statement of the tribunal's reasoning lies exactly there. "Frequency" in the sense of how often the claimant experienced episodes of tearfulness was one of the key issues in determining which, if any, of the descriptors of Activity 17 applied to her. That is obvious from the statutory text cited in paragraph 6 above with its references to "on a daily basis", "frequently" and "occasionally". Likewise "the nature" of those episodes was a key issue for the tribunal given the reference to "uncontrollable episodes" in that statutory text. Thus to justify the tribunal's conclusion that none of those descriptors applied to the claimant they were required to go into more detail in regard to both the frequency and the nature of the episodes of weepiness which the claimant experienced. They should have estimated and stated how many such episodes occurred and assessed of what degree of severity they were before they could reach and state a conclusion on the application of Activity 17. Their failure to make specific and focussed findings of fact on the issues just referred to renders their Statement of Reasons inadequate. I accept Mr Orr's submission to that effect on document 77 and emphasised by him orally. The tribunal's inadequacy of reasons, just identified and explained, affects their decision with a further error of law.

10. Remaining with the issue of Activity 17, Mr Orr was especially concerned about the contents of paragraphs 6 – 7 of the submissions made on behalf of the Secretary of State on document 93. Indeed it was on the basis of that concern that he sought and was granted an oral hearing. See documents 96 – 98. I note that there is an important typographical error at the end of the first line of paragraph 7 of document 93 in that the word "not" should be inserted after the word "does" in that line. Paragraphs 6 – 7 on document 93 are, in my judgement, merely assertions. No supporting reference to any statutory provision or judicial authority is made in them. I do not accept them. Rather, I hold that the claimant's "anxiety and depression" are within the phrase "some specific disease or .... mental disablement" for the purposes of regulation 19(2) and (5)(b) of the Employment and Support Allowance Regulations 2008 i.e. for the purposes of deciding whether any of Activities 11 – 17 of Schedule 2 to those regulations applied to the claimant. At the hearing Mr Simpson specifically accepted that a claimant's incapability for the purposes of Activity 17 could, as a matter of law, arise from depression. He made that concession without formally abandoning paragraphs 6 – 7 of document 93.

11. As narrated in paragraph 4 above, Mr Orr and Mr Simpson were in agreement at the hearing that the tribunal had dealt inadequately in their Statement of Reasons with the application to the claimant of regulation 29(2)(b) of the above regulations. They concurred in submitting that the brief references to this matter in paragraph 6 on document 71 and paragraph 7 on document 72 were insufficient to justify the tribunal's conclusion that the above statutory provision did not avail the claimant. I agree with those submissions. The tribunal therefore further erred in law in that regard.

12. I thus accept all three of the claimant's grounds of appeal. I exercise my discretion in her favour and set the tribunal's decision aside on the basis of the errors of law identified in paragraphs 5, 9 and 11 above. So far as disposal is concerned, it is inappropriate for me to remake the tribunal's decision. I thus remit the case at large for reconsideration by a freshly constituted tribunal in accordance with the directions contained in paragraph 13 below.

Given that I have accepted the claimant's first two grounds of appeal it is unnecessary for me to decide whether it would have been appropriate (as was submitted by Mr Simpson) to remit the case with a restriction on its reconsideration to the applicability of regulation 29(2)(b).

13. My directions for the rehearing are as follows:

(a) The new tribunal should recall that the Secretary of State bears the legal onus of proof, given that the decision under appeal is one which terminated the claimant's award of benefit.

(b) They should also recall that they are restricted to a consideration of the circumstances pertaining on 17 May 2012, the date of the above decision, ignoring subsequent improvement or deterioration in the claimant's condition. Evidence postdating that date should be considered if it relates to those circumstances.

(c) They are entitled to restrict their consideration to such activities and descriptors of Schedule 2 as are specifically put at issue by the claimant's representative. If, however, other activities or descriptors appear to them to be relevant from the whole state of the evidence then they should also consider the applicability of those to the claimant.

(d) So far as the descriptors of Activity 17 are concerned, the new tribunal can accept that episodes of tearfulness can amount to "disinhibited behaviour". However they must carefully assess the frequency and the severity of such episodes as they consider are experienced by the claimant, making appropriate and specific findings of fact. They should then apply to those findings of fact the text of the descriptors of Activity 17 and determine which of them, in the application of their judgement and good sense, apply to the claimant. In doing so, they should be careful to have regard to the statutory text of each of the above descriptors, read as a whole. Additionally, in making those findings and applying their judgement and good sense to them they should have regard to the totality of the evidence about the claimant's degree of interaction with other people and also about the severity of her anxiety and depression.

(e) They should score the claimant under the limited capability for work assessment on the basis of such of the descriptors under that assessment which they consider that she satisfies.

(f) Finally, if they take the view that the claimant does not score sufficient points under the above assessment to satisfy it they should go on to consider whether, alternatively, she satisfies the terms of regulation 29(2)(b). In doing so they should apply the approach to that provision authoritatively down in *Charlton v Secretary of State for Work and Pensions*, R(IB) 2/09. Additionally, they should consider whether a substantial risk to the claimant's mental or physical health or that of any other person arises from the claimant taking part in the process of jobseeking e.g. attending and travelling to interviews.

14. The claimant's appeal succeeds. She should draw no inference from that success as to her eventual success on the merits. Those are for determination by the new tribunal rehearing her case and applying the directions laid out in paragraph 13 above.

(Signed)
A J GAMBLE
Judge of the Upper Tribunal
Date: 30 January 2014

Case No: CSE/536/2014

weighing as disinhibited behaviour follows Judge Gamble para 9.

THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL JUDGE

Before: L T PARKER

1. The decision of the First-tier Tribunal (the tribunal) sitting in Glasgow on 2 April 2014 is in error of law and I set it aside. I return the appeal to a freshly constituted tribunal for rehearing and determination.

The issues

2. The main issue relates to the application of Activity 17 of Schedule 2 to the Employment and Support Allowance Regulations 2008 (as amended); there is a subsidiary issue, which proved decisive in the present case as to how I exercised my discretion, on adequacy of reasons.

"6. The text of Activity 17 of Schedule 2 reads as follows:

17. Appropriateness of behaviour with other people, due to cognitive impairment or mental disorder.	17(a) Has, on a daily basis, uncontrollable episodes of aggressive or disinhibited behaviour that would be unreasonable in any workplace.	15
	(b) Frequently has uncontrollable episodes of aggressive or disinhibited behaviour that would be unreasonable in any workplace.	15
	(c) Occasionally has uncontrollable episodes of aggressive or disinhibited behaviour that would be unreasonable in any workplace.	9
	(d) None of the above apply.	0

The tribunal decision

3. The tribunal unanimously dismissed the appeal to it. On its decision notice, issued the day of the hearing, the tribunal said this about Activity 17:

> "Insofar as activity 17 is concerned the episodes of behaviour including weepiness and aggressive behaviour were not sufficient to justify any award. [The appellant] described one aggressive incident and feelings of irritation and described tearful episodes but these appeared to the Tribunal on the basis of her evidence to be occurring on an irregular basis."

4. The tribunal's subsequent full statement of the reasons for its decision dealt with the application of activity 17 in the following way:

> "14. The Tribunal next considered activity 17. This was the descriptor which Mr Orr had referred to when he made his submission in respect of Case No. CSE/697/13. He had referred the Tribunal to this decision on the basis of the report by the HCP at page 25. At page 25 the HCP notes under the paragraph headed 'Depression', 'She feels she is low in mood all the time and she gets tearful and snappy. She feels she has gained weight' ...
>
> 15. In the ESA50 the Tribunal noted that the appellant indicated that she occasionally acts in a way which upsets other people. The HCP noted at page 36 that the appellant collects her children from school and that she has a few friends that she sees regularly and her ex-partner who she sees every day. At page 25 it was also noted that 'She has not had any counselling or admissions to a psychiatric hospital. She has medication from her GP. She states her medication does help."
>
> The Tribunal noted the terms of the letter at page 76 from her GP which stated that the appellant last ordered anti-depressant medication in August 2012. It was also noted that she had had no formal mood assessment in recent months and had had no recent contact with psychiatry. That is significant because the date of the decision is 10.06.13, almost a year after it appears that the appellant last asked for anti-depressant medication. The appellant described one instant involving a neighbour in respect to questions asked by Mr Orr. She indicated that she has tearful episodes on a weekly basis and has made complaints about a dog barking.
>
> 16. The Tribunal noted that in terms of activity 17 the episodes must be 'uncontrollable and must be aggressive or disinhibited and that would be unreasonable in any work place'. What the appellant was describing was one episode of aggressive or disinhibited behaviour and episodes where she is tearful. In CSE/697/13 Upper Tribunal Judge Gamble noted in paragraph 7 that the appellant in that appeal had a diagnosis of anxiety and depression. In paragraph 9 he says 'Frequency in the sense of how often the claimant experienced episodes of tearfulness was one of the key issues in determining which, if any, of the descriptors of activity 17 applied to her. In evidence to the Tribunal [the appellant] said that she gets tearful episodes a few times a week and that they can last all day on and off which suggests that she has some control over the episodes. At the Tribunal hearing there was one episode of tearfulness notwithstanding that the hearing might be viewed as a stressful situation. The appellant managed to control her tearfulness and was able to answer all questions put to her during the course of the Tribunal hearing.

17. .... It would not be unreasonable that were the appellant to be experiencing the extent of tearful episodes that she suggested in answer to Mr Orr's questions that she would have sought more help from her GP and the Community Psychiatric Team. Contrary to this, however, the GP indicated that there had been little or no contact regarding this matter. In the description of a typical day at page 25 there is no suggestion there of ongoing, uncontrollable episodes of aggressive or disinhibited behaviour. She is able to use public transport. She goes shopping to Morrisons. She can collect her children from school. She is able to use a computer. She is able to tidy up and watch television. ....

18. Are the episodes of tearfulness uncontrollable. This would not appear to be the case given what the appellant is able to do in respect of looking after her children, going shopping, using public transport and attending appointments. She was able to control her tearfulness at the hearing. She referred to them being 'on and off' which suggest that she has a measure of control.

19. Are these episodes aggressive or disinhibited. Again given the evidence before the Tribunal they would appear to be neither. Although there was one small period of tearfulness at the hearing the appellant was well able to cope and answered all questions put to her. She described one episode involving a dispute with her neighbour which would be termed aggressive. The other incidents were of tearfulness.

20. The question the Tribunal had to answer was would these episodes be unreasonable in any workplace. In terms of the description of a typical day, the evidence of the appellant herself and the medical evidence available to the Tribunal it did not appear to the Tribunal that her behaviour would be such that it would be unreasonable in any workplace. The appellant's evidence did not appear to the tribunal to be credible or reliable in this aspect. We make this finding on the basis that as indicated above, were she to be so affected by episodes of tearfulness as she described then we would have expected her to have consulted her GP more frequently and for there to have been involvement on an ongoing basis with psychiatric care. Equally it would have not been unreasonable for the description of a typical day to be very different whereas it suggests that the appellant is in fact able to do many things which she would not be able do were she experiencing the amount of tearfulness that she described to Mr Orr. ... She herself referred to them being 'on and off'. In these circumstances the Tribunal did not consider that it could be reasonably stated that this activity applied."

Appeal to the Upper Tribunal

5. An oral hearing of the appeal was held on 3 December 2014. The appellant was represented, as she had been before the tribunal, by Mr Orr, Adviser, Money Matters, and the Secretary of State was represented by Mr Webster, Advocate, instructed by Mrs Kelman, Solicitor, of the Office of the Solicitor to the Advocate General. Mr Webster did not support the appeal, although in different terms to the Secretary of State's written submission; his argument was that the tribunal did not believe the appellant and, on that basis, rightly rejected her case. I am grateful to both representatives for their helpful submissions. I mean no discourtesy to the able arguments put when I deal mainly in my own conclusions with those propositions which I also accept.

Discussion

The application of Activity 17(c)

(i) "Occasionally"

6. At the oral hearing, Mr Orr adhered to the claimant's written ground of appeal:

> "They have failed to have regard to the statutory test which only requires the behaviour to be 'occasional' which is not countered by listing activities that are undertaken as they would not contradict the presence of something that only needs to be 'occasionally present".

Mr Orr further submitted that the decision notice was wrong in suggesting that "irregular" episodes were insufficient, because such episodes could qualify under the term "occasionally". Mr Webster argued that the word "irregular" was not synonymous with "occasional"; furthermore, the whole tenor of the tribunal's statement of reasons made apparent that it rejected entirely the appellant's account of tearfulness, which left just one episode of aggression for consideration and the statutory requirement was for "episodes".

7. It seems to me, however, that "occasionally" means, essentially, that an episode happens more than once or twice; sometimes, intermittently, irregularly or infrequently, are happenings which all fall within the statutory term, albeit it is for a tribunal on the facts of an individual case, to determine whether a claimant's circumstances can be thus described. Moreover, the tribunal does not clarify whether it rejected all of the appellant's evidence with respect to tearfulness, or only some of it. The tribunal plainly considered that she exaggerated and that was within its exclusive remit to assess the evidence; but it is not apparent whether its opinion related to the genuine nature of any episodes, or to their stated length or their number or severity or to a combination of all of these factors. As Mr Webster conceded: "there were no findings of fact with respect to tearfulness". I accept that a total rejection of an appellant's evidence on a particular aspect necessarily means that an adjudicating body can not make any relevant findings; the difficulty is that the tribunal narrate much of the appellant's own evidence about tearfulness, rather than making primary findings, and that it further narrates observation of an episode of tearfulness at the hearing, without any assessment of whether it considered such to be genuine. The tribunal erred in law either in its interpretation of "occasionally" or, alternatively, in its lack of clarity.

(ii) "Uncontrollable"

8. If a claimant is fully able to regulate his or her conduct, then it is not "uncontrollable"; where there is a measure of control, while this is undeniably relevant to the overall impact in any workplace of such episodes, yet to the extent and degree and duration to which a claimant is unable to restrain herself, such episodes can be regarded as "uncontrollable". Again, the tribunal erred; because I am unsure whether it was holding that, in fact, the appellant could wholly control tearfulness, or whether it was applying too strict a test by regarding only total lack of control as counting.

(iii) "Disinhibited"

9. Paragraph 19 of the Tribunal's full statement (see my paragraph 4 above) seems to suggest that tearfulness is not capable of being "disinhibited behaviour". In CSE/697/13, Judge Gamble directed the new tribunal that "episodes of tearfulness can amount to 'disinhibited behaviour'" (para. 13(d)). There is no reported discussion in that case on the point, but it does not appear that the submission on behalf of the Secretary of State resisted such a conclusion. At paragraph 8 of CSE/859/2013, Judge May QC was persuaded by Mr Webster's submission "... that disinhibited behaviour requires the context of an inhibition". There is a socially accepted inhibition against weeping on occasions when it is not usual to weep, and therefore I endorse Judge Gamble's conclusion that episodes of tearfulness can amount to "disinhibited behaviour". The tribunal erred by its further failure to make its stance clear.

(iv) "That would be unreasonable in any workplace"

10. As Mr Webster submitted to me, Judge Williams in *KE v SSWP (ESA)* [2013] UKUT 0370 (AAC), with respect to descriptor 17(c), noted that "the incidence [of disinhibited behaviour] is at a lower level of occurrence but at a higher level of intensity than the previous test, although the underlying issue manifested by these forms of conduct is the same" (paragraph 17). The statutory text of a descriptor must be read as a whole and a tribunal must use its common sense, having regard to all of the evidence, to determine whether a claimant's situation falls within the entire descriptor; even if a claimant satisfies the four constituents of the partial test: "occasionally has uncontrollable episodes of aggressive or disinhibited behaviour", she must still have the cap fit that such episodes "would be unreasonable in any workplace".

11. There is a real distinction between the descriptors which lies in how often relevant episodes occur; but how often they do so is also very pertinent, when balanced against the nature and intensity of such episodes, in making the categorisation on whether they "would be unreasonable in any workplace". I agree with the view expressed by several other tribunal judges that the mischief which the Activity is designed to remedy is the creation of an unacceptable work environment for fellow workers. The extent, incidence and nature of a claimant's conduct necessarily feeds into the evaluation involved in that consideration. For example, if only occasional, episodes of unprovoked weeping would usually require to be unanticipated, prolonged and very audible, for them to be sufficiently serious to fit the statutory test. Quite different might be a similar incidence of episodes, notwithstanding shorter in duration, which involved screaming abuse at one's boss or at one's co-workers. Therefore, even when "occasional", "disinhibited" and "uncontrollable episodes" exist, a reasonable tribunal may nevertheless conclude that a particular claimant's conduct, looked at in the round, does not fit the descriptor.

Adequacy of Reasons

12. Mr Webster, submitted that credibility is an issue for a tribunal. I agree. I also agree with him that the tribunal listed activities that the appellant undertook in order to carry out the legitimate purpose of evaluating the appellant's credibility. However, a tribunal's assessment, if resting on a stated premise, must involve reasonable steps to check that such a premise is accurate. Insofar as the tribunal regarded the point as significant, which it clearly did, that the " .... appellant last ordered anti-depressant medication in August 2012", I accept Mr Orr's submission that, given all the circumstances, more exploration and explanation was needed.

13. A Health Care Professional (HCP) on 8 November 2012, and a different one on 22 May 2013, both noted that the appellant's medication included "Imipramine (for anxiety or depression)". The appellant's GP by letter dated 15 November 2013 wrote:

> "In July 2012 ... [the appellant] was attributed a diagnosis of irritable bowel syndrome (IBS) ... and commenced on medication in the form of Imipramine. She continues on this to date at a dose of 75mg at night ... [She] also presented to surgery in June 2012 with symptoms of depression. She was commenced on anti-depressant medication. She last ordered this medication in August 2012 and it is not clear from her records whether she has stopped this of her volition and why she may have done so."

14. The GP does not say what was the specific anti-depressant medication, as distinct from Imipramine. Mr Orr pointed out that Imipramine is used both as an anti-depressant and also for pain management in IBS cases. My later search on the internet corroborated this. The two HCPs categorised the Imipramine as targeted at the claimant's depression; IBS was a condition mentioned separately by both HCPs. With respect to the appellant's credibility, (and Mr Webster submitted that the tribunal's conclusion against her in this respect affected the whole case), whether she was or was not on anti-depressant medication at the relevant date, as she claimed, is important; it also informs any assessment of the nature and frequency of her asserted episodes of weeping. It is open to argument that the appellant herself was understandably confused as to the role of Imipramine and whether it was being used to combat her depression; its potential use in that way may also affect how severe any depression is. At minimum, adequacy of reasons required the tribunal to address the potential contradictions which the use of this drug, available both for depression and for IBS, causes in the present case.

15. The tribunal thus erred in law in several respects. If I could regard the tribunal's assessment of credibility as reliable, I might have exercised my discretion not to remit to a fresh tribunal; on the basis that I was not satisfied that there were any circumstances of an intensity that would be unreasonable in any workplace. However, I am unable to rely on its assessment, because the tribunal did not, as it should have done, clarify the role of Imipramine in the present case.

Summary

16. The appeal is therefore remitted to a new tribunal to begin again. It is emphasised that it will be a complete rehearing on the basis of the evidence and argument available to the new tribunal, and in accordance with my guidance above, and that the determination of the appellant's case on the merits is entirely for them. Although there has been success in this appeal limited to issues of law, the decision on the facts of the case remains wholly open.

17. I am disturbed to note that, in the papers before the tribunal, it is not reminded that, in a case as is the present where the claimant's award of benefit is terminated, the legal onus of proof lies on the Secretary of State. I therefore bring that to the new tribunal's attention.

18. The new tribunal must not take account of circumstances that were not obtaining at the time of the decision, which is now already eighteen months ago. However, later evidence is admissible, provided that it relates to the time of the decision. If either of the parties has any further written evidence to put before the new tribunal, this should be sent to it within one month of the issue of this decision.

(Signed)
L T PARKER
Judge of the Upper Tribunal
Date: 4 December 2014