DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

DECISION

This appeal by the claimant succeeds. Permission to appeal having been given on 7 February 2014 by the First-tier tribunal in accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the First-tier Tribunal made on **13 December** 2013 under reference **SC198/13/00717** and I refer the matter to a completely differently constituted panel in the Social Entitlement Chamber of the First-tier Tribunal for a fresh hearing and decision in accordance with the directions given below.

BACKGROUND TO APPEAL

1. The claimant was entitled to Incapacity benefit. Under the conversion process to Employment Support Allowance ('ESA') he attended medical examination on 15 April 2013. On 30 April 2013 the Decision Maker concluded that he scored 0 points, and was thus not eligible for ESA. The claimant appealed to the First-tier tribunal.

2. The claimant suffers from a number of long-term health conditions including haemophilia A, hepatitis C, arterial disease and peripheral vascular disease. The claimant completed form ESA50 and highlighted difficulties in relation to Activity 1 (mobilising), 2 (standing and sitting) and 5 (manual dexterity). He also highlighted difficulties relating to Activity 13 in part 2, initiating and completing actions, due to severe pain and side effects from medication.

3. A GP's letter dated 15 October 2013 (p80) confirms the Appellant's conditions and medication. The GP was asked a number of questions including question 5 : *'whether there are any risks to Mr Goddard's health if he had to go to work' (p77)*. In relation to that question, the GP wrote*: 'The answer to questions 5 and 6 are probably more difficult for me to answer, whether there is any risk to the claimant's health if he had to go to work. This would obviously be dependent on the type of work and again would there be any risks to the claimant's health if he didn't go to work but had to prepare for work and do things such as attending compulsory interviews. My immediate thought is that attending interviews probably wouldn't increase his immediate risk although, again, this would be dependent on the extent of preparation or travel that he had to do, but I think both questions 5 and 6 would probably be better answered by a doctor with occupational medicine experience'.*

4. The First-tier tribunal determined on 13 December 2013 at a hearing where the claimant was present that the claimant was not entitled to ESA. The tribunal awarded 6 points under Activity 1(d) and no other points.

5. A statement of reasons (p86) sets out in some detail the chronology of the claimant's application and the tribunal's findings.

6. In relation to Regulation 29 the tribunal held: '*there are no exceptional circumstances and Regulation 29 does not apply..there is no indication that there would be a substantial risk to the Appellant's mental or physical health, or that of another person, should he not be found to have limited capability, in the light of the work he might be expected to perform, either part time or full time in an environment where account could be taken of his restrictions. The Appellant's GP says as much when he refers to difficulty assessing any risk to the Appellant's health when he says that this would obviously be dependent on the type of work..the tribunal finds that there should therefore be work within the range that the Appellant could do without the requisite degree of risk to his health. The Appellant stopped work many years ago and has only undertaken limited further education. With an assessment of his aptitude, the Tribunal can conclude that in the light of his physical health he should not be precluded from all types of employment. He may require a work placement which allowed him to alternate his standing and sitting and with reduced need to walk long distances and he may need to consider work on a part-time basis.*'

7. The Appellant's representative submits in the Application for Leave to Appeal (p97) that in relation to Regulation 29:
    a. There is no reasoning or evidence about the type of work which the Appellant could do without there being substantial risk to his health or the health of others (in particular the risk of cross infection with Hepatitis C);
    b. The tribunal did not address the evidence raised by the Appellant in his witness statement (p78) about his propensity to pick up infections, with the obvious risks from contact with others at the Jobcentre, workplace or work programme;
    c. The tribunal did not consider the risks of bleeding linked to travelling to and from work.

8. The Application for Leave and subsequent grounds of appeal also raise issue in relation to Regulation 35, and the tribunal's approach to Activity 1 and 2, and the tribunal's approach to fact-finding generally.

9. The Secretary of State has submitted that the First-tier tribunal has made no error of law. In relation to Regulation 29, the Secretary of State submits (at p110) that:
    a. Although the First-tier Tribunal's finding only 'loosely' followed Charlton, the tribunal was entitled to treat the GP's evidence as persuasive and, in particular that with the right preparation and adjustments within the workplace, the claimant would not be at any increased risk if he had to attend compulsory interviews or the workplace;

b. Any employer would need to make reasonable adjustments under the Equality Act 2010;
c. In terms of travel to and from work, the tribunal had established that the claimant could drive.

10. Neither party has requested an oral hearing.

REASONS

11. The Tribunal's approach to Regulation 29 was in error of law.

12. The correct approach to Regulation 29 was set out by the Court of Appeal in *Charlton v SSWP [2009]* EWCA Civ 42:

'it is necessary to make some assessment of the type of work for which the claimant is suitable. The doctor, the decision maker, and, if there is an appeal, the Tribunal, should be able to elicit sufficient information for that purpose. The extent to which it is necessary for a decision maker to particularise the nature of work a claimant might undertake is likely to depend on the claimant's background, experience and the type of disease or disablement in question'.

13. In this case, it is necessary to particularise the nature of work which the Appellant might undertake to a significant extent. The type of work which the Appellant could do is far from self-evident because of the complex interaction between his conditions, and the effect of medication. The tribunal accepted that he had significant difficulties in mobilising, that he was in pain, he could not stand for an hour or sit for an hour (although could combine the two), and that he suffered drowsiness from medication. Those factors would clearly curtail the types of work for which the Appellant was suitable. Further, the risk of bleeding from haemophilia may exclude certain types of work, and the risk of infecting others from hepatitis may exclude other types of work. This required detailed consideration by the tribunal before moving on to consider the substantial risk test. The tribunal did not consider what type of work the Appellant might be suitable for at all.

14. The First-tier tribunal placed great weight on the GP's evidence in the context of Regulation 29. The First-tier tribunal equated the GP's comment that assessing risk was difficult and depended on the type of work with an assertion that there was no substantial risk to the Appellant's health from work. In fact, the GP was careful not to offer an opinion as to whether there was such a risk, advising that other professionals should be asked to give that opinion. Similarly, I do not agree with the summary of the GP's evidence set out in the Secretary of State's submission at p110. The GP did <u>not</u> say that the claimant would not be at substantial risk in the workplace.

15. The tribunal did not address substantial risk in terms of the journey to and from work, as well as in the workplace. Although the tribunal had

noted that the claimant could, and sometimes did, drive, this is not the same as considering what risks might attach to a repeated journey to a workplace for someone with the Appellant's conditions.

16. The tribunal did not address substantial risk arising from the claimant being found not to have limited capability for work. In *IJ v Secretary of State for Work and Pensions* (ESA) [2010] UKUT 408 (AAC) Judge Mark observed: *'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'*. This was not addressed at all by the tribunal. It should have been, and given the complexities of the Appellant's conditions the answer is not an obvious one.

17. The tribunal thus erred in law in its consideration of regulation 29.

18. Given that finding, it is unnecessary to determine any other points. This should not be taken as agreement with the First-tier tribunal's approach or findings, and the case will be heard afresh.

PRACTICAL ISSUES

19. A decision is awaited from the Northern Ireland Commissioners in *MM v DSD AV13-14* (ESA) which relates to the approach to combining descriptors in Activity 2. That decision will not be binding upon the First-tier tribunal or the Secretary of State but will be highly persuasive and should usually be followed (*R(SB)* 1/90).

20. The First-tier tribunal should wait for the decision in that case before hearing the claimant's appeal again. I am alive to the delay which may be caused, and understand that the claimant would wish his hearing to be as soon as possible, but I note that the approach to be taken to Activity 2 may be highly significant in the claimant's case and that the decision is expected shortly, and for those reasons I make the directions below.

21. Given the limited evidence from the GP, the Appellant should seek advice as to whether to obtain further evidence about the risks posed to himself and others while in the workplace or travelling to and from the workplace, or if required to obtain and keep Jobseeker's Allowance.

CASE MANAGEMENT DIRECTIONS

1. These directions may be supplemented or changed by a District Tribunal Judge giving listing and case management directions.

2. The case will be an oral hearing listed before a differently constituted panel.

3. The new panel will make its own findings and decision on all relevant matters and will consider all aspects of the case afresh. The fact that the appeal has succeeded at this stage is not to be taken as any indication as to what the tribunal might decide in due course.

4. The hearing should await the decision of *MM: v DSD AV13-14* (ESA). IF that decision has not been issued by 30 September 2014 this case should be put before a District Tribunal Judge for further directions as to listing.

5. Any further evidence should be sent to the tribunal within 28 days of receipt of this decision.

6. The clerk to the First-tier tribunal should send to the presiding Judge of the original panel a copy of this decision and ensure that the same document is placed in the tribunal bundle for the benefit of the panel that will hear the case.

Upper Tribunal Judge Brunner

Signed on the original on 31 July 2014