

reg 35 + S13 (7) WRA -  
2 540 of WRA 2012  
Jon McNeil

THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

**DECISION OF THE UPPER TRIBUNAL JUDGE**

The appeal is allowed.

The decision of the tribunal given at Glasgow on 22 April 2018 is set aside.

The case is referred to the First tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal.

**REASONS FOR DECISION**

1. The claimant has appealed against the decision of the tribunal recorded at page 84. In that decision the tribunal held that regulation 29 of the Employment and Support Allowance Regulations 2008 applied but that regulation 35 of the same regulations did not apply.

2. The grounds of appeal are shortly put. They are as follows:

"The tribunal found that regulation 29 applied but not regulation 35.

They give as their reason in relation to reg 35 "However, the tribunal decided that engaging in appropriate supported activity would be of benefit to the appellant and would help her access work when ready to do so."

This statement is insufficient as it contains inadequate detail. In failing to specify precisely what type of activity might be suitable it is impossible to test what they had in mind with the requirement that an activity must make "It more likely that the person will obtain or remain in work or be able to do so" S13(7) of the Welfare Reform Act 2007.

There was a list of suggested activities at page 77 of the bundle but the tribunal make no mention of these so it is impossible to tell whether they took account of these or not."

3. The Secretary of State supports the appeal. In a submission it is said:

"2. The test for regulation 35 is not whether work-related activity (WRA) would benefit a claimant, as the FtT state in paragraph 38 of its Statement of Reasons (SOR), rather it is whether undertaking such would give rise to a substantial risk to his/her health and safety and/or that of others.

3. Given that the FtT accepts that the claimant has "fragile mental health" and meets the criteria of regulation 29, it needed to explain why the evidence which supported such a determination would not also give rise to substantial risk if the claimant was to undertake work-related activity.

4. I note what the FtT has written in paragraph 29 of the SOR regarding WRA and that a claimant's support needs will be taken into account. However, if one was to accept that such a statement in isolation is sufficient to discharge an FtT's obligation in any assessment of regulation 35 then it would effectively bar all claimants from this provision, which cannot be correct."

4. I am persuaded by both the grounds of appeal and support for them. In these circumstances I hold that the decision of the tribunal errs in law and must be set aside.

5. Having regard to the grounds of appeal and support for them I have no directions to give the freshly constituted tribunal.

(Signed)  
D J MAY QC  
Judge of the Upper Tribunal  
Date: 9 November 2018