weeping 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