

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