IN THE UPPER TRIBUNAL **Case No.** CE/175/2017
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway; Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal made when sitting at London on 4 August 2016 under reference SC242/16/04736 did not involve the making of an error of law. Accordingly that decision shall stand.

REASONS FOR DECISION

1. The claimant suffers from a range of health problems some of which impact upon her ability to mobilise. She had been in receipt of employment and support allowance but, on 14 April 2016, the Secretary of State decided to supersede the earlier awarding decision and decided that there was no longer any entitlement from that date. As part of the assessment process which had led to the supersession decision, the claimant had completed standard form ESA50 and had been examined by a health care professional who had subsequently prepared a report. The claimant was dissatisfied with the supersession decision and after an unsuccessful attempt to have it altered by way of mandatory reconsideration, she appealed to the First-tier Tribunal ("the tribunal").

2. There was an oral hearing of the appeal at which the claimant gave evidence with the assistance of an interpreter. She was also accompanied by a friend. Although the North Kensington Law Centre did not field a representative (not a criticism) it did provide a written submission to the tribunal on her behalf.

3. The tribunal dismissed the appeal, concluding that the claimant was entitled to only 6 points under the activities and descriptors contained within Schedule 2 to the Employment and Support Allowance Regulations 2008. It also decided that she did not meet the requirements of Regulation 29. Having issued a decision notice to that effect it went on to produce, at the request of Mr A Cooper of the Law Centre, its statement of reasons for decision ("statement of reasons").

4. Since the claimant's subsequent challenge to the tribunal's decision focused exclusively upon its conclusions regarding her ability to mobilise and hence its findings concerning activity 1 and its associated descriptors, it is convenient to refer, now, to some of the evidence which was before it and which touched upon that particular aspect.

5. In completing form ES50, the claimant had said that, amongst other things, she suffered from osteoarthritis, lower back pain and asthma. She had indicated that she was awaiting knee surgery. She said stated that she was able to walk a distance of 50 metres before having to stop. In a report of 19 February 2016, a GP at the surgery where she is registered had not indicated any known difficulty with respect to "walking or moving" but had referred to her experiencing chronic back pain. According to the report prepared by the health care professional the claimant had indicated that, if unable to get a lift, she would walk to her GP's surgery and that it would take her "about ten minutes" to do so. She was also recorded as having said it would take someone else (presumably a person not troubled by disability) "about five minutes" to walk that same distance. The health care professional had also noted that the

claimant had walked 40 metres to the examination room aided by the use of a stick. The health care professional was of the view that her ability to mobilise was not sufficiently restricted to enable her to score any points at all under the descriptors linked to activity 1.

6. The claimant went on to indicate to the Secretary of State, on 27 April 2016 and as part of the mandatory reconsideration process, that she was unable to mobilise more than 200 metres without discomfort. On 6 May 2016 a different GP from the same medical practice stated that she suffered from various health problems including severe osteoarthritis. It was said that that condition affected her back, knees and shoulders and that it limited her mobility. It was observed that "she struggles to even walk to her local bus stop, despite walking with a stick". In the submission prepared by the Law Centre and referred to above, it was said that the claimant's position was that her walking was very limited and that, when walking, she would have to stop after 20–30 metres. Reference was made to both pain and tiredness. According to the tribunal's commendably legible record of proceedings, she had told it that she had received advice from a physiotherapist to "walk and get out and about", that she would walk when indoors, that she would venture out of doors when she was able to, that she had visited a swimming pool for exercise sessions during a six-week period, that she would try to walk "but pain can sometimes be awful" and that there was a bus stop "just across the road" from where she lived and that it would take her five minutes to walk there though she would sometimes have to stop on the way. What she is recorded as having told the tribunal about walking to her GP's surgery is a little unclear (at least to me) in terms of what she was intending to convey. On one reading she was saying that it would take a normal person ten minutes to walk that distance but that she was unable to walk for ten minutes because of pain. On another reading, it is possible that she was seeking to indicate that it takes her ten minutes to walk to the surgery (which would be in keeping with what she is recorded as having said to the health care professional) but that a person without disabilities would manage it more quickly. In looking at paragraph 6 of Mr Cooper's grounds of appeal (page 154 of the appeal bundle) it appears that he prefers the former interpretation but in looking at paragraph 13 of Mr M Hampton's submission on behalf of the Secretary of State (page 176 of the bundle) it appears he prefers the latter. In any event, that was the evidence concerning mobilising which the tribunal had to consider.

7. The tribunal did conclude that the claimant had greater difficulty than the Secretary of State had thought with respect to mobilising. Whilst the Secretary of State had awarded no points at all, the tribunal, as touched upon above, decided that she was entitled to 6 points under descriptor 1d within Schedule 2. Explaining how it had reached that conclusion it said this in its statement of reasons;

> "21. In relation to mobilising the appellant scored 6 points. The Tribunal reached the conclusion that the appellant was not able to mobilise more than 200 metres on level ground without stopping in order to avoid significant discomfort or exhaustion nor that she could repeatedly mobilise 200 metres within a reasonable timescale for most of the time. However, we were satisfied that she was able to mobilise more than 100 metres on level ground without stopping in order avoid significant discomfort or exhaustion or that she could repeatedly mobilise 100 metres within a reasonable timescale for most of the time.
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> 22. In reaching this decision the Tribunal considered what the appellant had told the HCP about her ability to walk to the bus stop to go to her GP if she was unable to get a lift from a friend which took her ten minutes but would take someone else about five minutes. We considered that even at a very slow pace of 40 metres per minute a distance of 10 minutes would equate to a distance of around 400 metres. The appellant was also able to go to visit a

> friend who lived in the opposite building most days and in her oral evidence to us the appellant told us that she would sometimes go to her local shops where she would purchase small items. The appellant used a walking stick, provided to her by her GP, to be able to mobilise which we decided was reasonable.
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> 23. The appellant had been advised by the physiotherapist to walk and her out and about [sic] and she told us that she would walk around indoors, going out when she was able to. She had also been advised to do exercises in the swimming pool, and she did a six-week session in a place inside a hospital which she found to be helpful and which we decided would have involved her having to be active and mobilise certain distances in order to get to the swimming sessions.
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> 24. The appellant had attended the tribunal hearing by taxi but she told us that she was able to use public transport and that she was able to go to her GP's surgery by bus. She described walking across the road to her local bus stop which took her 5 minutes to walk taking even a very slow pace of 40 metres per minute this would equate to a distance of approximately 200 metres. She explained to us that sometimes she would have to stop when walking this distance due to tiredness but that if it was possible, she could walk without stopping.
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> 25. In her ESA50 claim form the appellant ticked that she could move 50 metres safely and repeatedly on level ground without needing to stop. The appellant declined a musculoskeletal examination of her upper limbs due to pain but she was not breathless during the assessment.
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> 26. The appellant at the medical assessment was observed to walk 40 feet to the medical examination room using a walking stick. The appellant had never been assessed or recommended to use a wheelchair and we did not consider that it would be a reasonable aid for her use. Due to the appellant sometimes having to stop, we accepted that some functional restriction existed with this activity at 200 metres. However, we were satisfied that the appellant was able to mobilise more than 100 metres on level ground without stopping in order to avoid significant discomfort or exhaustion or that she could repeatedly mobilise 100 metres within a reasonable period for most of the time. The evidence confirmed that she was able to repeatedly mobilise for 2-3 minutes which would cover a distance of 80-120 metres, she was also able to negotiate stairs and steps and use public transport. Therefore, 6 points were awarded under activity 1."

8. In seeking permission to appeal to the Upper Tribunal Mr Cooper, on behalf of the claimant, criticised the tribunal for failing to make clear findings as to how far she was able to walk in metres and as to how far in metres the journeys were that she had said she could undertake. It was also argued that the tribunal had erred in focusing its enquiry upon how long she could walk for in terms of minutes rather than upon what distance she could achieve. I granted permission to appeal because I thought that the tribunal might have erred in attaching too much weight to the claimant's own assessments as to how long in terms of time she might be able to walk for. I suggested that its conclusions might have been based exclusively or almost exclusively upon those estimates. I directed, in the normal way, further submissions from the parties.

9. Mr M Hampton, now acting on behalf of the Secretary of State in connection with this appeal to the Upper Tribunal, has provided a written response of 13 March 2017. He does not support the appeal and he invites me to dismiss it. He accepts that the tribunal had "relied heavily on the claimant's own estimate of timings" but argues that, in general, it is reasonable to treat such estimates as being broadly reliable unless there is something specific to indicate the opposite. He adds "to suggest otherwise would be to cast doubt on all claimants evidence where distance, frequency and speed are matters to be considered". He contends, therefore, that it was permissible for the tribunal "to use the evidence it had on timings, and subject that

evidence to a known formula used to assess distance achieved". Mr Cooper disagrees. In a reply to Mr Hampton's response, he points out that the relevant descriptors in issue refer to distance in terms of metres not journey times. He observes "people are often not good judges of time and use five minutes or ten minutes as a figure of speech as much as an accurate estimate". I should add that Mr Cooper's reply was received slightly later than had been permitted by directions. He explained that lateness as a consequence of a change in the Law Centre's computer system which had resulted in computerised key diary dates being erased in error. That sort of difficulty is not uncommon and I am happy to extend time in order to validate the reply. That is what I do.

10. It is in light of all of the above, therefore, that I must now decide this appeal. I should add that I have not directed an oral hearing before the Upper Tribunal because neither party has sought one and because it seems to me that the competing arguments have been fully set out in the documentation. Indeed, I have found the written grounds and the submissions of both parties to be most helpful.

11. I have not found myself in agreement with everything Mr Hampton has to say. Nor have I found myself in agreement with everything Mr Cooper has to say.

12. As to Mr Hampton's submissions, anyone who has spent much time representing persons in the field of disability law or who has spent time on tribunals with fact-finding obligations concerning persons with disabilities will, I am sure, immediately appreciate that an individual's assessment of distance can often (though not always) be unreliable. I think it is fair to say, in general terms, that it can be quite difficult for a person to make an assessment as to how far she or he is able to walk or as to how far away from a fixed point (perhaps a person's home) might be a GP's surgery, a particular shop or some other place which is often visited. That is perhaps why tribunals, appropriately in my opinion, often use other devices as well as estimates of distance to try to gain a firm impression as to how far someone might be able to walk. One such device might be to ask about the time taken to accomplish a specific journey instead. Another might simply be to ask how long in terms of time a person can manage to walk without stopping. I would agree with Mr Hampton that it is not impermissible for a tribunal to factor in what a claimant tells it about time taken in that regard. But I think he goes too far if what he has to say is to be taken as suggesting that a tribunal, if provided with such a time estimate, is simply bound to accept its accuracy and to base a decision upon that estimate absent something specific suggesting otherwise. It seems to me that if one is to accept that an estimate as to distance might be inaccurate then there is, in principle, the same possibility, at least to some extent, with respect to time estimates. That is not to say that all such estimates are to be regarded as unreliable and therefore evidentially valueless. I do not regard myself as coming even close to saying that. But I do think tribunals have to appreciate that whilst such estimates can be helpful, and sometimes they will be very helpful indeed, and whilst it is permissible in principle, to extrapolate a distance from time estimates given, the approach must be to look at what it is that the evidence as a whole points to in terms of an ability to mobilise such that a claimant's own estimate of the time he or she is able to walk for is a component of the total picture but not necessarily, at least in every case, more than that.

13. As to Mr Cooper's points, it is of course entirely correct that the distances referred to in activity 1 and its linked descriptors are expressed in terms of metres. But that does not preclude a tribunal from looking at a range of indicators which might inform it as to where, within the range of possible distances covered by the descriptors, a particular claimant's ability

to mobilise will fall. Here, the tribunal was not focusing upon time for its own sake but because the time the claimant could walk for had the potential to assist with respect to the finding as to distance. Further, the tribunal was not required to make a precise finding as to exactly how many metres the claimant could mobilise for. Absolutely precise findings as to something like that will often, realistically, be simply impossible. All it was required to do was make a finding as to which category the claimant fell into as to the range of distances contained within the relevant set of descriptors.

14. I would also make the general observation that a tribunal might feel it is more able to rely upon a person's estimate as to the time it might take to accomplish a journey if it is one which is undertaken with regularity. Further, there may be a particular reason for thinking an estimate as to a particular journey might be reliable. Such a journey might be one from home to a bus stop given that a person embarking on such a journey will obviously wish to be sure that they set off in sufficient time to ensure that they get to the bus stop before the bus they propose to catch is due to arrive. Here, one of the journeys the tribunal was concerned with was that from the claimant's home to her local bus stop and all of them were journeys with which she appeared to be familiar through repetition.

15. Applying the above to the tribunal's findings, I do note that it did rely to a significant extent upon the claimant's own estimates as to time when reaching its findings as to distance. It does not appear to have expressly warned itself that time estimates will not necessarily be reliable and I cannot see that it further probed matters by way of an enquiry as to whether those estimates were likely to be reliable or not. But nevertheless, the estimates, in particular the important one concerning the time taken to get from home to a bus stop, related to familiar journeys. Further, it cannot be said, in my judgment that the tribunal relied exclusively upon the time issue. Its consideration of matters demonstrates that it was taking into account the fact of the claimant undertaking journeys, the fact that she had received advice from a physiotherapist to walk and get out and about, the fact that she must have mobilised to some extent when going to the swimming pool, the fact that she did use public transport and the fact that she had been observed walking 40 metres at the medical examination conducted by the health care professional. There was, of course, also the health care professional's view that her mobility problems were not overly significant.

16. I have decided, therefore, that the tribunal did not err in law. Its assessment was sufficiently holistic. It was not based solely upon the claimant's own subjective estimate as to how many minutes she might be able to walk for. It was entitled, given the nature of the examples given, to attach some weight to those estimates on the facts of this case. It was not required to make a finding as to the distance which could be achieved with any greater specificity than it did.

17. In the circumstances I have to dismiss the claimant's appeal to the Upper Tribunal.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated **5 June 2017**