IN THE UPPER TRIBUNAL **Appeal No: CPIP/1823/2017**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Manchester on 23 March 2017 under reference SC946/16/03189 involved an error on a material point of law and is set aside.

The Upper Tribunal is not in a position to re-decide the appeal. It therefore refers the appeal to be decided entirely afresh by a completely differently constituted First-tier Tribunal and in accordance with the Directions set out below.

This decision is made under section 12(1), 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007

DIRECTIONS

Subject to any later Directions by a District Tribunal Judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The new hearing will be at an oral hearing.

(2) The appellant is reminded that the tribunal can only deal with his situation as it was down to 22 July 2016 and not any changes after that date.

(3) If the appellant has any further evidence that he wishes to put before the tribunal that is relevant to his health conditions and their effects on his functioning in July 2016, this should be sent to the First-tier Tribunal's office in Liverpool within one month of the date this decision is issued.

(4) The First-tier Tribunal is bound by the law as set out below.

REASONS FOR DECISION

1. I am satisfied that this appeal should be allowed on the ground set out below and the First-tier Tribunal's decision of 23 March 2017 ("the tribunal") set aside for material error of law and the appeal remitted to an entirely freshly constituted First-tier Tribunal to be re-decided.

2. The tribunal awarded the appellant six points for the daily living component of the Personal Independence Payment (PIP). Two more points under the daily living descriptors would have led to an award of that component at the standard rate. One basis on which another two points may have been merited is if the appellant met descriptor 1e in Part 2 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013. Four points are merited under his descriptor if the claimant "needs supervision or assistance to either prepare or cook a simple meal". The tribunal awarded the appellant two points for meeting descriptor 1d, so his meeting descriptor 1e would have given the additional two points necessary to meet the eight needed for the standard rate of the daily living component. Accordingly, any error of law here would be material to the decision the tribunal made.

3. The tribunal dealt with the claimed need for supervision when preparing food or cooking as follows. It said that:

> "….[the appellant] cooked mainly at school, requiring supervision to boil an egg……[he stated] that there were 2 teachers supervising a class of 8 students. He used both a knife and a peeler, cooking cakes, apple crumble and pasta. His concern was burning himself on the oven although this had never happened. There were no special measures in place to ensure his safety".

Based on this evidence the tribunal concluded that descriptor 1e was not met because:

> "…..there was not one to one supervision in class (2 teachers for 8 students) nor were there any special measures in place to ensure [the appellant's] safety…..together with [the appellant] being safe and able to use a peeler and a knife…..as he was able to cook without physical

> intervention, there not being one to one support, together with there being no safety issues and there being no special measures in place, ….[the appellant] did not require assistance".

4. In giving permission to appeal I said the following about this reasoning.

> "It would appear to have been a significant (albeit not the only) factor in the First-tier Tribunal finding [the appellant] did not satisfy descriptor 1e that he was not being provided with one-to-one supervision when cooking at school and this was materially relevant to whether he met the 'supervision' test for PIP. However is this the extent of "supervision" under the PIP statutory definition? Can "*continuous presence of another person for the purposes of ensuing C's safety*" not also be met by one person being present in a room with, say, four young adults, watching over what each of them are doing to ensure that they are cooking safely? It may arguably not be a misuse of the statutory language to say that a teaching assistant was performing the same function by being present in a playground and watching over schoolchildren to make sure none of them came to harm. Further, what of the social worker's evidence (page 126) that [the appellant] would require constant support and supervision with tasks when cooking?"

5. In my judgment the observations I made when giving permission to appeal hold good. Those observations are supported by the Secretary of State in paragraphs 4.4 and 4.5 of his submission on the appeal of 18 September 2017 (page 173).

6. The essential flaw in the tribunal's approach was to require, or at least appear to require, the statutory supervision in the PIP statutory scheme to be one-to-one supervision. That in my judgment is not a requirement of the statutory test and unnecessarily narrows the statutory language. A person can be continuously present with the purpose of ensuring a claimant's safety without needing to be in a one-to-one relationship with the claimant. It may be a question of fact and degree whether the number of people the supervisor is continuously present with means he or she can meet the purpose of ensuring an individual claimant's safety. But I can identify nothing in the statutory language that requires the one-to-one supervisory closeness that the tribunal seems to have considered was required.

7. In the circumstances there is no need for me to address any other grounds of appeal as these will be subsumed in the matters the new First-tier Tribunal will need to consider. In considering activity 6 (dressing and undressing) and *why* the appellant may need prompting to change his clothes, the new First-tier Tribunal will be mindful of what was said by Upper Tribunal Judge Hemingway in paragraph 20 of *DP –v- SSWP* (PIP) [2017] UKUT 0156 (AAC).

> "Whilst the evidence clearly showed that the claimant was able to physically dress himself without difficulty, it seems to me that the reference in descriptor 6c(ii) to an ability "to select appropriate clothing", whilst perhaps primarily inserted in relation to a need to select outdoor clothing appropriate for the weather, is a relatively wide concept and is capable of encompassing decision making as to when to select newly washed clothing. Further and in any event, there is the requirement to perform relevant tasks and functions "to an acceptable standard" stemming from regulation 4(2A) of the PIP Regulations. In my judgment dressing to an acceptable standard must include dressing in a way which avoids the selection of items which have, for example, become malodorous or which have already been worn to the extent that it would be unhygienic to wear them again without them having been washed first. That said, a broad common sense approach must be taken to all of this and a claimant is unlikely to score points simply because he/she operates a less fastidious regime than others might. It is also important to stress that, in light of section 78 of the Welfare Reform Act 2012, the inability to dress and undress must be due to a "physical or mental condition" so that mere indifference of itself will not suffice. That means, in the case of this claimant, points will only be scored under activity 6 if the contentions regarding his selection of clothing are ultimately made out and if they are caused by symptoms of health conditions, seemingly in this case impulsiveness when dressing consequent upon the ADHD. What was required, though, were findings in relation to all of this. There was an absence of enquiry and, in consequence an absence of such findings. That does translate into an error of law."

8. For the reasons given above the tribunal's decision dated 23 March 2017 must be set aside. The Upper Tribunal is not in a position to re-decide the first instance appeal. The appeal will have to be re-decided completely afresh by an entirely differently constituted First-tier Tribunal (Social Entitlement Chamber), at an oral hearing.

9. The appellant's success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about whether his appeal will succeed on the **facts** before the First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 30th October 2017