DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 19 December 2017 at Hull under reference SC265/17/01361) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.

B. The reconsideration must be undertaken in accordance with *KK v Secretary of State for Work and Pensions* [2015] UKUT 417 (AAC).

C. In particular, the tribunal must investigate and decide the claimant's capability for work-related activity on and from 31 May 2017.

D. In doing so, the tribunal must not take account of circumstances that were not obtaining at that time: see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

REASONS FOR DECISION

A. What this case is about?

1. What should the First-tier Tribunal do when there is a contradiction between the decision notice and the written reasons? That is what happened in this case. How did it come about?

2. The claimant was awarded an employment and support allowance on and from 15 May 2014. His capability for work was re-assessed in 2017. He had completed a questionnaire and was interviewed and examined by a healthcare professional. On 31 May 2017, a decision-maker decided that the claimant continued to be entitled to an employment and support allowance on the basis that he had limited capability for work, having scored 15 points for Activities 15 and 16 in Schedule 2 to the Employment and Support Allowance Regulations 2008 SI No 794). However, the decision-maker decided that the claimant was not entitled to the support component under either Schedule 3 or regulation 35.

B. The legislation

3. These are the terms of Activity 16 as at the date of the decision.

Activity		**Descriptors**	**Points**
16	Coping with social engagement due to cognitive impairment or mental disorder.	(a) Engagement in social contact is always precluded due to difficulty relating to others or significant distress experienced by the claimant.	15
		(b) Engagement in social contact with someone unfamiliar to the claimant is always precluded due to difficulty relating to others or significant distress experienced by the claimant.	9
		(c) Engagement in social contact with someone unfamiliar to the claimant is not possible for the majority of the time due to difficulty relating to others or significant distress experienced by the claimant.	6
		(d) None of the above applies.	0

This is the equivalent activity in Schedule 3. It is the same as Activity 16(a) in Schedule 3.

Activity		**Descriptor**
13	Coping with social engagement, due to cognitive impairment or mental disorder.	Engagement in social contact is always precluded due to difficulty relating to others or significant distress experienced by the claimant.

C. The confusion over Schedule 2

4. The decision-maker decided that the claimant scored 6 points for Activity 16(c). That is clear from the contemporaneous documentation completed by the decision-maker; and it is consistent with the healthcare professional's opinion. On appeal, the First-tier Tribunal issued a decision notice recording that the claimant scored 9 points for Activity 16(b) in Schedule 2 and qualified for the support component by satisfying Activity 13 in Schedule 3.

5. The tribunal's written reasons are inconsistent with its decision notice in that they say that the application of Schedule 'did not appear to be in dispute and

there was in our view no need to go behind the Schedule 2 points' and that the points awarded 'were balanced and reasoned and it has chosen to leave them in place [as] there was [no] reason to consider any interference with them.'

6. There are only two possibilities. One is that the tribunal did not intend to change the Schedule 2 points, in which case the decision notice is wrong. The other possibility is that the tribunal did intend to change the points, in which case its written reasons are wrong. The lack of clarity is an error of law.

D. The conflict between Schedule 2 and Schedule 3

7. For the most part, the descriptors in Schedule 3 are the same as the highest scoring descriptor in the equivalent activity in Schedule 2. That is the case with coping with social engagement. The result is that a person who does not satisfy the highest scoring descriptor for the Activity in Schedule 2 cannot satisfy the equivalent Activity in Schedule 3. But that is what the tribunal decided.

8. The First-tier Tribunal refused permission to appeal. The Tribunal Judge who decided the application, and who had not presided at the hearing, recognised at least part of the difficulty but said:

> The Respondent [the Secretary of State] found that the Appellant [claimant] had limited capability for work and this was not the subject of the appeal.* The issue for the Tribunal was to establish if the Appellant satisfied either any Schedule 3 descriptor or Regulation 35. Having made the findings that the Tribunal did was it appropriate to revisit the Schedule 2 descriptors to remove the apparent inconsistency? Whatever the correct answer is the Tribunal did not take that step. Even if the Tribunal considered it was not appropriate to take that step it would perhaps have been helpful for the Tribunal to have addressed the apparent inconsistency by adding a short paragraph to the decision notice. But, again, the Tribunal did not do so. I find that reading the decision notice together with the statement of reasons the apparent inconsistency in the decision notice is explained. It had not been shown that the Tribunal made any error of law in making the decision which it did.

* The judge was referring to section 12(8)(a) of the Social Security Act 1998, which provides:

> (12) In deciding an appeal under this section, the First-tier Tribunal-
>
> (a) need not deal with any issue that is not raised by the appeal; …

9. There are three flaws in that reasoning, which demonstrate the error in the tribunal's decision. First, the tribunal did 'revisit the Schedule 2 descriptors'. Second, even if it had not, the result was still a contradictory decision notice. It is that notice which records the tribunal's decision and it is that decision which is operative for the claimant's entitlement from the date of the Secretary of State's decision: *R(I) 9/63* at [19] and *R(IB) 2/04* at [15]. It is essential that the notice be legally coherent. If it is self-contradictory, it is not. Third, it is not possible to separate Schedule 2 and Schedule 3 descriptors as separate issues. The issue was the claimant's capability to cope with social engagement. There cannot be

different findings on that capability depending on whether the tribunal is applying Schedule 2 or Schedule 3. The tribunal's conclusion on Schedule 3 had to be brought into line with the decision in respect of Schedule 2. The decision was in legal terms a refusal to supersede. The tribunal should have substituted a decision to supersede with the necessary change to the capability for work issue under Schedule 2. Although the claimant may, quite understandably, have presented his case as relating only to Schedule 3, logically and legally the decision on that Schedule followed from the findings of facts relevant to the equivalent Activity in Schedule 2. Contrary to the argument of the claimant's representative, this is not a case of 'a technical error.'

10. The claimant's representative has tried to avoid the problem by relying on regulation 19(6), which provides that if more than one descriptor applies, only the highest is counted. That argument does not work, because the regulation only applies to capability for work and, therefore, Schedule 2. It does not apply to capability for work-related activity and, therefore, Schedule 3; nor does it deal with the relationship between those Schedules.

E. What should the First-tier Tribunal have done?

11. Whenever there is a mistake in a decision notice, the first question to ask is whether it could be corrected under rule 36 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI No 2685). This only applies to 'any clerical mistake or other accidental slip or omission in a decision'. What happened here was beyond correction under this rule.

12. If correction is not possible, the only alternative is to use the tribunal's powers of review under section 9 of the Tribunals, Courts and Enforcement Act 2007. The tribunal might be able to remove a contradiction between a decision notice and the written reasons by amending those reasons (section 9(4)(b) and *JS v Secretary of State for Work and Pensions* [2013] UKUT 100 (AAC)). Failing that, it could set the decision aside and re-decide the matter or refer it to the Upper Tribunal (section 9(4)(c) and (5)).

13. Doing nothing is not an option.

F. Why there was an error of law in the tribunal's decision on coping with social engagement

14. The Secretary of State's representative has argued that the decision was not supported by the evidence:

> … given that the claimant is able to engage with friends and family and his support worker, [the tribunal's finding] is not justifiable from the evidence presented.
>
> …
>
> While evidence shows he has issues with unfamiliar people, he does interact with his sister and the HCP at the assessment..

The claimant's representative has argued that the tribunal 'made detailed and convincing findings of fact on the issue … and gave reasons for the findings'.

15. I accept the Secretary of State's argument. It is clear from the evidence recorded by the tribunal that the claimant does have some contact with family members and a support worker. That makes it difficult to justify finding that 'social contact is always precluded'. The claimant's representative has referred to the tribunal's reasons, but they do not contain anything that reconciles the apparent contradiction between the evidence before the tribunal and its findings of fact. It may be, as the claimant's representative suggests, that the type of contact that the claimant has with his family and support worker is not 'social contact'. It may be possible to have contact that is not social within the meaning of the Activities. It cannot be right, to use the representative's words, that 'only hermits would satisfy the Schedule 3 descriptor.' If that is what the tribunal meant, though, it did not say so and any decision on that basis would require legal analysis of the language in the legislation and careful fact-finding by reference to the conclusions of that analysis. Its decision contains neither. That is why I have set aside the tribunal's decision and directed a rehearing. This will allow the representative, who did not represent the claimant in the First-tier Tribunal, to develop his argument. It will also allow the tribunal to consider whether regulation 35 is satisfied.

Signed on original
on 04 September 2018

Edward Jacobs
Upper Tribunal Judge