

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

The DECISION of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Ashford First-tier Tribunal dated 26 September 2017 under file reference SC322/17/01580 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is able to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

“The Appellant's appeal is allowed.

The Secretary of State's decision of 16 February 2017 superseding the award of Employment and Support Allowance (ESA) is revised. The Appellant is treated as having limited capability for work by virtue of regulation 33(2) of the Employment Support Allowance Regulations 2008. The Appellant therefore remained entitled to ESA at the ordinary rate.

The matter is remitted to the Secretary of State to conduct a further work capability assessment to determine whether the Appellant should be placed in the ESA support group.”

This decision is given under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. This appeal concerns a full-time student's entitlement to employment and support allowance when he is entitled at the same time to disability living allowance. The Appellant's appeal to the Upper Tribunal succeeds. I can also re-make the decision taken by the First-tier Tribunal.

The factual background

2. The Appellant, who is now aged 27, has learning difficulties and dyslexia. At the time in question he also had an ankle problem. In September 2016 (when he was 25) he began attending a two-year full-time course at a local college leading to a Subsidiary Diploma in Animal Management. I understand that since September 2018 he has remained in full-time college education, studying on a further two-year course in Equine Training and Management.

3. The Appellant was awarded employment and support allowance (ESA) from and including 30 September 2016. He had for some time also been in receipt of the middle rate of the care component of disability living allowance (DLA). On 11 January 2017 he underwent a medical examination; the health care professional formed the view that he did not meet any of the ESA descriptors for limited capability for work. On 16 February 2017 the Secretary of State's decision-maker concluded that the Appellant scored 0 points and so did not have limited capability for work as from that date. Accordingly, the Appellant's award of ESA was stopped.

4. The Appellant asked for a mandatory reconsideration of that decision. His support worker completed the relevant form giving reasons as follows:

“I disagree with your decision dated 16/02/17 for the following reasons:

- I am 25 years old. I am not a qualifying young person for benefit reasons/ purposes.
- I am a full-time student.
- I am in receipt of Disability Benefits DLA middle rate care.
- I am entitled to ESA automatically because I am treated as having limited capability for work. Regulations ESA 14(2A).”

5. The request for a mandatory reconsideration was refused. The Appellant lodged an appeal. The DWP response to the appeal quoted the grounds given for the mandatory reconsideration request, but rejected them stating that “DLA is a benefit that can be paid to individuals in or out of employment. The award of DLA has no impact on determining an individual’s ability to work. I acknowledge that [the Appellant] is in receipt of DLA care component. DLA is awarded to a claimant to meet their requirements arising from their disability but the assessment for Employment and Support Allowance takes into account their ability to undertake various activities despite their disabilities.”

6. The Appellant lodged an appeal. He attended the hearing at the First-tier Tribunal on 26 September 2017 with a friend but not with his support worker. The Tribunal dismissed the Appellant’s appeal, albeit finding that he scored 9 points for mobility descriptor 1(c). I subsequently gave the Appellant permission to appeal.

The legal framework

7. One of the basic conditions of entitlement to either form of ESA is that the claimant has limited capability for work (see Welfare Reform Act 2007, section 1(3)(a)). Further conditions of entitlement to income-related ESA are set out in Part 2 of Schedule 1 to the Welfare Reform Act 2007. One of those conditions is that the claimant “is not receiving education” (paragraph 6(1)(g) of Schedule 1). The term “education” has “such meaning as may be prescribed” (paragraph 6(5) of Schedule 1). The combined effect (in broad terms at least) of regulations 14 and 17 of the Employment Support Allowance Regulations 2008 (SI 2008/794) is to exclude full-time students from entitlement to income-related ESA. However, this general principle is subject to an important exception.

8. The exception is to be found in regulation 18 of the Employment Support Allowance Regulations 2008:

“**18.** Paragraph 6(1)(g) of Schedule 1 to the Act does not apply where the claimant is entitled to a disability living allowance, armed forces independence payment or personal independence payment.”

9. Furthermore, regulation 33(2) of the same Regulations (which is headed *Additional circumstances where claimants are to be treated as having limited capability for work*) provides as follows:

“(2) For the purposes of an income-related allowance, a claimant is to be treated as having limited capability for work where–

- (a) that claimant is not a qualifying young person;
- (b) that claimant is receiving education; and
- (c) paragraph 6(1)(g) of Schedule 1 to the Act does not apply in accordance

with regulation 18.”

10. The combined effect of these intersecting statutory provisions is well summarised in CPAG’s Welfare Benefits and Tax Credits Handbook 2017/18 (19th edition) at p.881:

“If you are ‘receiving education’ you can only qualify for income-related ESA if you are getting DLA, PIP or armed forces independence payment ... Unless you are a ‘qualifying young person’ for child benefit purposes, if you qualify for income-related ESA as a full-time student because you are getting DLA, PIP or armed forces independence payment, you automatically count as having limited capability for work”.

Where did the First-tier Tribunal err in law?

11. The First-tier Tribunal went wrong by simply treating the Appellant’s ESA appeal as a standard limited capability for work appeal. The Tribunal went through the physical and mental descriptors, finding that the Appellant only scored 9 points, and concluded also that regulation 29 did not apply. Its only comment about the other benefit was to “note” the award of DLA, but to remark that it “appeared to relate to the support he needed with aspects of his daily living.”

12. I recognise that the Appellant’s appeal was a rather unusual case. There are all sorts of relatively obscure by-ways in social security law which do not arise on a daily basis in tribunal hearings. This was arguably one such case. However, the approach of both the Department and the First-tier Tribunal in this case is disappointing. The Appellant’s support worker, Ms C Sullivan, had repeatedly spelt out the case on his behalf. She set it out in the request for a mandatory reconsideration, in the notice of appeal, in a post-hearing application for a set aside and in a subsequent application for permission to appeal. She had made the point very shortly and very clearly. She had specifically referred to regulation 33(2) in the notice of appeal. She really could not have made the point any more clearly and yet for some reason her argument was repeatedly ignored. Reading the grounds of appeal is always a good place to start.

The Upper-Tribunal’s re-making of the original decision under appeal

13. I have considered the written submissions by Miss N Needham, acting for the Secretary of State in these proceedings, and by Ms Sullivan. I am satisfied that I can re-make the decision under appeal. This means considering the issues that arise under regulation 33(2).

14. *Regulation 33(2)(a): was the claimant not a qualifying young person?* A ‘qualifying young person’ has the same meaning as in section 142 of the Social Security Contributions and Benefits Act 1992 (see regulation 2(1) of the Employment Support Allowance Regulations 2008), i.e. in the context of child benefit awards. Was the Appellant aged 16-19 and undergoing a full-time course of non-advanced education or approved training that began before he reached 19? The short answer to the question put that way is No, he was not a qualifying young person, as he was aged 25.

15. *Regulation 33(2)(b): was the claimant receiving (full-time) education?* The short answer is Yes. The First-tier Tribunal found he was in full-time education. I adopt that finding of fact, which was plainly sustainable on the documentary and oral evidence.

16. *Regulation 33(2)(c): was it the case that paragraph 6(1)(g) of Schedule 1 to the Act did not apply in accordance with regulation 18?* The Appellant was entitled to

DLA. Accordingly, paragraph 6(1)(g) of Schedule 1 to the Act did not apply in accordance with regulation 18.

17. It follows that the Appellant met all the conditions set out in regulation 33(2). He was therefore treated as having limited capability for work and so entitled to ESA. He was also relieved from the information-gathering duties in regulation 21 (see regulation 21(3)).

So what happens next?

18. In those circumstances Miss Needham proposes that I remit the matter to the Secretary of State to conduct a further work capability assessment to determine whether the Appellant should be placed in the ESA support group.

19. I therefore allow the Appellant's appeal to the Upper Tribunal and set aside the FTT decision for error of law (Tribunals, Courts and Enforcement Act 2007, sections 11 and 12(2)(a)). However, I can re-make the decision (section 12(2)(b)(ii)) and do so as follows:

“The Appellant’s appeal is allowed.

The Secretary of State’s decision of 16 February 2017 superseding the award of Employment and Support Allowance (ESA) is revised. The Appellant is treated as having limited capability for work by virtue of regulation 33(2) of the Employment Support Allowance Regulations 2008. The Appellant therefore remained entitled to ESA at the ordinary rate.

The matter is remitted to the Secretary of State to conduct a further work capability assessment to determine whether the Appellant should be placed in the ESA support group.”

**Signed on the original
on 17 September 2018**

**Nicholas Wikeley
Judge of the Upper Tribunal**