Claimant Poorly Treated by Tribunal (and/or at Appeal Hearing)

claimant treated poorly by tribunal – fair hearing?

TH v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0303 (AAC) – CE/242/2013 concerned a case where the appellant walked out of the appeal hearing having allegedly been treated poorly by the First-tier Tribunal.

In the view of the Upper Tribunal Judge the question now was whether the appellant was deprived of a fair hearing in these circumstances – whether couched in terms of breach of natural justice in common law or an infringement of the appellant's right to a fair hearing under Article 6 of the European Convention on Human Rights, the basic principles are much the same:

(i) the tribunal must be independent and impartial;

(ii) the tribunal must conduct a proper examination of the submissions, arguments and evidence adduced by the parties;

(iii) the parties must be afforded a broadly equal opportunity to present their case in circumstances which do not put them at a substantial disadvantage as regards the other party (*Dombo Beheer BV v The* (1994) 18 EHRR 213, para [33]).

The Upper Tribunal Judge also held that in hearing an appeal there must be compliance with the overriding objective under Rule 2 of the First-tier Procedure Rules to deal with cases fairly and justly. This rule, it is to be noted, imposes a duty on the appellant to cooperate with the Tribunal.

The Upper Tribunal Judge held:

"17. A Tribunal is an inquisitorial body. It will often have to ask probing questions. This is especially so where an appellant's evidence is inconsistent or improbable, when it may be important to give the appellant the opportunity to clear up any doubts. In *BK v Secretary of State for Work and Pensions* [2009] UKUT 258 AAC (*CDLA/3255/2010*) I said:

> "29. '…While tribunals try to minimise distress by being tactful, they cannot always be successful. Questions cannot always be perfectly phrased in the pressured environment of a hearing and attendees may have a variety of preconceptions – or misconceptions – about a hearing which, when combined with the stress of the occasion, lead them to think that a tribunal is biased or unfair in asking questions which are, in fact, legitimate."

18. Given the nature of the issues that the tribunal may quite properly need to investigate, it is very difficult to envisage circumstances in which a tribunal pursuing a relevant line of questioning, however upsetting, will have failed to provide a fair hearing. To succeed in such a submission, it would have to be shown that the hearing [*sic*] unfair by reference to the general principles of fairness in the context of Art. 6, which have already been set out… It should be emphasised that the test of unfairness is not judged subjectively from the appellant's point of view.

19. The issue of whether the F-tT's [*First-tier Tribunal*] conduct gave the impression of pre-judgment, or a denial of the appellant's right to put her case, should be viewed through the eyes of the fair-minded, informed observer, as taken from *Porter v Magill* [2002] 2 AC 357. [*My insert*]

20. I am satisfied that the observer, who would know that the F-tT had an inquisitorial duty, would not consider that the Tribunal had breached the rules of fairness: The Record of Proceedings shows that the F-tT was asking relevant questions and trying to get important clarification when the appellant abruptly left, some 25 minutes into the hearing. The appellant refused to come back to the hearing room, but her representative had a full opportunity to address the F-tT. He agreed that the appellant was not treated badly. In these circumstances, I agree with the F-tT's view that her departure was unjustified.

21. Nor do I consider that the F-tT's decision not to adjourn created any unfairness. The F-tT could not hear further evidence because the appellant left unjustifiably. In the circumstances, it was appropriate and fair to resolve any outstanding matters on the basis of the representative's submissions and the evidence before it. Where the F-tT was left it [*sic*] doubt, it was required to decide the matter by reference to the burden of proof."

The Upper Tribunal Judge, having made reference to rule 2 The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (which confirms the overriding objective of a First-tier Tribunal is to deal with an appeal fairly and justly and allowing both parties to be are able to participate fully in the proceedings), held:

"23. This was a straightforward IB/ESA [*Incapacity Benefit/Employment and Support Allowance*] conversion appeal. Both sides presented medical evidence which the specialist Tribunal was well equipped to deal with. The F-tT had already heard nearly half an hour of evidence, in a type of appeal normally listed for a half an hour. The appellant walked out without justification and had indicated very clearly that she wanted no further part in the proceedings. There is no reason to think that the appellant would not have remained on benefit until her appeal was decided or that she would have been unable to make a new claim for ESA, so there was little financial detriment attached to the process. In these circumstances, it would be disproportionate use of judicial time and public money to hold a further hearing before a freshly composed panel." [*My insert*]

Judge of the Upper Tribunal S M Lane 1.7.2013

claimant walked out of appeal hearing – decision predetermined…

LD v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0554 (AAC) – CE/782/2013 involved a case where the decision of the First-tier Tribunal held:

"10. The tribunal had not got very far when the Appellant suddenly stated the tribunal had made its own mind up, that the decision would not be in her favour, that we did not live in her head or in her house so how can we who are sitting behind a desk make a decision. It was all shit and we could just 'fuck off' and make a decision. She left. Her daughter apologised.

11. The tribunal deliberated and decided to proceed to make a decision. The Appellant made a deliberate decision to walk out. Her behaviour was deliberate. The tribunal decided it was an action designed to try and stop the hearing rather than a consequence of a mental health problem. The tribunal found her behaviour was deliberate and calculated.

12. The Appellant brought the appeal. She claimed the decision of the Secretary of State was wrong. There is a legal duty on her to cooperate with the tribunal and this means attending the tribunal she has requested and behaving in such a way so questions can be asked and information obtained. Her behaviour was in breach of that legal duty.

13. To have adjourned to enable another hearing to take place would have rewarded her for her behaviour. It would have meant other appeals would have been delayed unnecessarily. As the tribunal finds the behaviour was not part of a mental health problem but deliberate it was not appropriate to adjourn. It decided to proceed. The overriding objective in Rule 2 of the Tribunal procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules applied."

In seeking permission to appeal the claimant did not identify any apparent legal error in the tribunal's decision. The claimant only apologised for her behaviour, which she accepted was wrong: "I truly am sorry for walking out of my appeal (but) my depression has took over my life". She added: "I was very upset that day and I did not fully understand about what was expected of me. I was very anxious and upset and frightened as I was bombarded with questions that was [*sic*] not relevant really." The claimant was therefore simply seeking a fresh hearing.

The Upper Tribunal Judge granted permission to appeal stating:

"1. I am giving permission to appeal with some hesitation. To start with it is important to understand that an appeal to the Upper Tribunal can only succeed if the First-tier Tribunal (FTT) went wrong in law in some way. So I cannot interfere with the FTT's decision unless the tribunal misunderstood or misapplied the law or its procedure was unfair in some way. It is certainly not the task of the Upper Tribunal to tell the FTT how to make basic case management decisions (such as whether to adjourn or not). That is a matter of judgement for them.

2. It will be difficult on an appeal limited to a point of law to say that the FTT was wrong to go ahead and decide the case once the Appellant had sworn and stormed out of the hearing. Other tribunals might well have decided to adjourn to allow the Appellant to calm down. The fact that this tribunal decided not to adjourn does not make their decision wrong. At this stage, when deciding whether to give permission, I do not have to be satisfied that the Appellant's appeal <u>will</u> succeed. Rather, I simply need to think that it <u>might</u> succeed. I am giving permission to appeal for two main reasons.

3. First, the Appellant was accompanied at the hearing by her adult daughter. Her daughter stayed long enough to apologise for her mother's behaviour. It is unclear from the record of proceedings whether the daughter got up and left at the same time as her mother, apologising as she left the room with her, or stayed for a limited period and left shortly afterwards. Should the tribunal have considered continuing with the hearing with the daughter alone, who would presumably have been in a position to provide relevant evidence? Was it a failure of the inquisitorial role not to consider that option (rather than regard the only alternative option being an adjournment to another day?)

4. Second, the tribunal found as a fact that "the evidence did not suggest there was a problem with inappropriate behaviour" (statement of reasons paragraph 9). However, this was an Appellant who had been in work until 2011, but whose life seems to have fallen apart as her marriage broke up (and she appears to have been a victim of domestic violence). There was an overdose incident 3 months before the date of the decision and a close bereavement 4 weeks before the tribunal hearing. So there was plenty of evidence of a depressive condition (whether it would be enough to score sufficient points is another matter). However, the tribunal was told in oral evidence that "daughter had to move out due to mood swings" (p.98). Was that not at least an indication that there was some evidence of a problem with inappropriate behaviour which needed to be explored?

5. I therefore, with some hesitation, give permission to appeal."

The Upper Tribunal Judge held:

"11. Denise Taylor, who now acts for the Secretary of State in these proceedings before the Upper Tribunal, supports the Appellant's appeal from the tribunal's decision. She suggests that the matter is remitted (or sent back) for re-hearing to a new tribunal. Ms Taylor supports the appeal for two reasons.

12. First, Ms Taylor argues that as part of its inquisitorial function the tribunal should have considered continuing the hearing with the Appellant's daughter, and its failure to do so amounted to an error of law.

13. Second, Ms Taylor notes that the tribunal accepted the evidence of the health care professional (a registered nurse) as "sufficiently accurate and consistent for the purposes of deciding on the level of disability". The Appellant told the nurse (in the 'description of a typical day') that:

> “Daughter does the cooking at home. Can do light snacks for herself. Daughter does the housework. Is smoking in her bedroom. Spends a lot of time in there. Does no housework. Daughter does the housework.”

14. However, as Ms Taylor observes, the nurse translated this account into the following summary assessment: “From her typical day she is able to self care, cooks and cleans”. Ms Taylor argues that “the tribunal’s reliance on the healthcare professional’s report as being accurate appears misconceived in light of the above.” I agree; the nurse’s account was plainly not consistent. The tribunal’s findings were accordingly not supported by the evidence before it.

15. The Upper Tribunal should not be quick to interfere in tribunal’s case management decisions, especially where they are supported by a categorical finding of fact as here. However, exceptionally in this case, and for the reasons above, I find that the tribunal’s decision involves an error of law. I therefore allow the Appellant’s appeal.

16. I have considered refusing to set aside the tribunal’s decision in the exercise of my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. However, I have decided that would not be appropriate, given the tribunal’s reliance on the report which has been shown to be inconsistent. I therefore also set aside the tribunal’s decision and direct a re-hearing before a new tribunal.”

See also TH v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0303 (AAC) – CE/242/2013.

Judge of the Upper Tribunal Nicholas Wikeley 8.11.2013

two representatives – oppressive or bullying conduct – natural justice?

WG v Secretary of State for Work and Pensions – [2012] UKUT 460 (AAC) – CH/2790/2011, CH/2791/2011 and CIS/2793/2011 held:

“15. First, it is submitted that there was a breach of natural justice because both the local authority and the Secretary of State had two representatives at the hearing.

> “It was decided by the judge to allow two to represent the departments and two would be observers only. However, during proceedings there was [sic] conversations between the observers and representatives, constant note swapping and during the hearing one observer left the room to bring further paperwork from their office, this paperwork was then allowed to be used as evidence without copies being given to the appellant or her representative. As such, these so called observers took part in the appeal. This made the session very intimidating for the appellant and we feel had an adverse effect [*sic*] on her ability to answer questions clearly. It was clear as [*sic*] proceedings went on these representatives did not attend as observers and attempted to take part whenever they were allowed to.”

Before granting permission to appeal, the First-tier Tribunal obtained comments on this ground from the judge and the other parties.

16. It appears clear that, as has been alleged, the local authority observer left the hearing room and brought back documents relating to an earlier claim from her office. It is also clear that the observer with the Secretary of State’s representative was a trainee presenting officer and that she did pass a note to the presenting officer. In relation to the documents brought back by the local authority observer, the judge says they were included in the bundle and it would have been out of character for him not to have arranged for them to be copied to the claimant. The local authority says they were copied. I think that that evidence is now included in the council tax benefit file before me. There is no indication in the statement of reasons that any document I do not have was taken into account by the First-tier Tribunal and the claimant has not suggested that any evidence that is now before me was not available during the hearing. I am not satisfied that the First-tier Tribunal saw any evidence that has not been seen by the claimant.

17. In my judgment, this first ground of appeal is unarguable. It is well recognised that tribunal proceedings can be stressful and that the presence of too many people from a public authority at a hearing can be intimidating, particularly where a citizen is unrepresented. However, most hearings before the First-tier Tribunal are open to the public, even if members of the public seldom attend, and, subject to what a tribunal may decide in any particular case, a public authority is entitled to send more than one person to a hearing, whether it is for training reasons or merely because a person who is not a presenting officer has a more complete knowledge of the appellant’s case and so can assist the presenting officer. There is nothing unlawful about another representative communicating with a presenting officer during a hearing. What is important is that the representatives of a public authority should not act in an intimidating way. Moreover, even if there is a breach of good practice, it does not follow that the conduct is such as to be oppressive and unlawful. In the present case, even if there was more communication between those designated observers and the presenting officers than they remember, it clearly was not oppressive or bullying conduct. No complaint was made at the time by the claimant’s representative nor did the judge observe anything that appeared unfair.

18. Nor have any particulars been given as to the evidence that the claimant feels she neglected to give. She does appear to have given a different version of events in her letter of 16 March 2011, but there is no suggestion in that letter that her earlier version had been inaccurate because she had felt intimidated. She may have been under stress, but I do not consider it possible to hold the conduct of the other parties’ representatives significantly to have increased it.”

Judge of the Upper Tribunal Mark Rowland 26.11.2012