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EMPLOYMENT & SUPPORT ALLOWANCE

THE SUPPORT GROUP

EH v Secretary of State for Work & Pensions – Upper Tribunal considers the operation of the support group element of the ESA Regulations

KEY POINTS

- A person satisfies an ESA descriptor if his/her disability matches that described the majority of the time
- A Tribunal erred in law by deciding that a person's use of a special needs gym could be equated with use of an ordinary gym
- A WCA medical report should have been placed before the Tribunal even though the appeal concerned membership of the support group
- A GP report produced after the date of the decision under appeal was not necessarily irrelevant

Most ESA appeals concern the application of the Work Capability Assessment (WCA). That assessment is used to determine whether a person meets the ESA condition of having limited capability for work. But there is a further statutory mechanism for identifying even more disabled persons. These are persons who are considered also to have limited capability for work-related activity (so that they are not to be subject to conditionality requirements such as work-focussed interviews).

This article reports one of the first Upper Tribunal decisions to consider the operation of the legislation which identifies this most severely disabled group of ESA recipients (often referred to as the 'support group'). The decision turned on the application of general legal principles about the handling of evidence rather than any ruling of legal significance about the nature of the support group legislation. It is nevertheless a useful reminder to advisers that the existence of the support group should not be overlooked. It will normally be in a more disabled client's interests to advance a support group case alongside any argument that s/he satisfies the Work Capability Assessment.

Who was this case about?

An ESA claim was made by a woman with hereditary spastic paraplegia and degenerative lumbar spine disease. Her unchallenged evidence was that she could not walk more than about 15 to 20 feet without having to stop for a rest. For the vast majority of the time, she mobilised using a wheelchair or walking frame.

Unsurprisingly, the woman 'passed' the Work Capability Assessment. Having scored 42 WCA points, she exceeded the 15 point threshold with ease. However, a decision maker decided that she was not one of the more severely disabled 'support group' ESA recipients who are not subject to conditionality and whose award is paid at a higher rate. The woman appealed to the First-tier Tribunal. Her appeal was rejected largely on the basis that the woman could propel her wheelchair herself without significant difficulty.

The support group legislation – what does it mean to have limited capability for work-related activity?

The relevant provisions of the Employment & Support Allowance Regulations 2008 are structured in a similar way to the Work Capability Assessment provisions:

(i) The statutory question is whether a person has limited capability for work-related activity.

(ii) The 2008 Regulations set out how that statutory question is to be answered – by use of descriptors.

(iii) Schedule 3 to the 2008 Regulations contains the descriptors. These all describe various types of severely disabled person. If an individual's presentation matches any of these descriptors, s/he is deemed to have limited capability for work-related activity and, therefore, to be a member of the ESA support group. It should be noted that, unlike the WCA, there are no 'points' involved in applying the support group descriptors. A person simply has to satisfy any one of the descriptors to be deemed to have limited capability for work-related activity.

(iv) Disabilities tend not to be frozen in their effect. Many disabled persons have good or bad days. This must be taken into account when considering whether a person matches a support group descriptor (as it must when considering whether a person matches a WCA descriptor). The relevant provision is regulation 34(2) of the ESA Regulations which states that "a descriptor applies to a claimant if that descriptor applies to the claimant for the majority of the time or, as the case may be, on the majority of the occasions on which the claimant undertakes or attempts to undertake the activity described by that descriptor". In the present case, the Upper Tribunal explained the genesis of this provision as follows:

> "31. In broad terms regulation 34(2) appears to put on a statutory footing for ESA purposes the "reasonable regularity" test approved by the Tribunal of three Social Security Commissioners in reported decision R(IB) 2/99 in the context of incapacity benefit".

The walking or moving support group descriptor

The support group descriptors at issue in this case were the first set of descriptors. These relate to the activity of 'walking or moving on level ground'. They describe a person who:

> "Cannot–
> (a) walk (with a walking stick or other aid if such aid is normally used);
> (b) move (with the aid of crutches if crutches are normally used); or

(c) manually propel the claimant's wheelchair;
more than 30 metres without repeatedly stopping, experiencing breathlessness or severe discomfort".

The focus of this case was on (c), whether the woman could manually propel her wheelchair for more than 30 metres without repeatedly stopping, experiencing breathlessness or severe discomfort.

Why did the tribunal err in deciding that the claimant could manually propel her wheelchair?

Before the First-tier Tribunal (FtT), the woman gave evidence about her use of a gym. The FtT's decision stated that it relied on this evidence to conclude that the woman could manually propel her wheelchair without difficulty. If the woman could regularly use rowing machines and lift weights, reasoned the FtT, she had to be able manually to propel her wheelchair.

On the face of it, the FtT's reasons were plausible and sound. Upon closer analysis, however, it became clear to the Upper Tribunal that they were flawed. What the woman actually said was that she used a special needs gym. The specialist equipment at the gym operated by moving the woman's limbs, rather than by her using her strength to move weights about. Accordingly, the FtT had misconstrued the woman's evidence. It did not show that she had significant strength in her arms and upper body. Therefore, the FtT's linked findings about the woman's ability manually to propel a wheelchair were also flawed. The FtT's decision was set aside and the matter will now be reconsidered by a differently-constituted FtT.

Other flaws in the FtT's handling of the evidence

(i) The report of the clinician who carried out a WCA examination on the claimant was not included in the appeal papers for the FtT. It should have been. There is often common ground between the WCA activities and the support group activities (although of course the support group descriptors for those activities are more difficult to satisfy). That was the case here. The support group activity in issue was 'walking or moving on level ground'. The WCA examination would have assessed walking and upper body ability given that the WCA addresses similar activities (e.g. WCA activity 1 is walking; activity 5 is 'picking up and moving or transferring by the use of the upper body and arms'). It was therefore likely that the report of the WCA examination contained information that was relevant to whether the woman satisfied a support group descriptor. The report should have been before the FtT. The FtT erred by failing to require it to be provided.

(ii) A GP report which illustrated the fluctuating weakness in the woman's hands was discounted by the FtT because it was given some months after the decision under appeal. As an appeal considers the circumstances as they stood at the date of the decision, the FtT decided to ignore the GP report. This was wrong. To the extent that the report threw light on the woman's condition at the date of the decision, it should have been taken into account. In fact, it appeared to be highly relevant to one significant issue on the appeal which was the fluctuating nature of the woman's disability. The FtT should therefore have considered whether it lent weight to the argument that, while on some days the woman was able manually to propel her wheelchair, on most days she was not (the regulation 34(2) point).

The Upper Tribunal (Judge Wikeley) gave its decision in EH v Secretary of State for Work & Pensions on 17 January 2011: [2011] UKUT 21 (AAC).

WORK CAPABILITY ASSESSMENT

SC v Secretary of State for Work & Pensions – bending and kneeling descriptors to be applied ignoring the possibility of a claimant gaining support from nearby objects

As drafted in the Employment & Support Allowance Regulations 2008, the Work Capability Assessment (WCA) is complex enough. It comprises numerous descriptions of disability and a claimant's presentation needs to be carefully checked against each of those which may be relevant. To make the WCA even more complex, its legal effect is not always obvious or stable. The Upper Tribunal regularly gives rulings about the legal nature of the WCA. Those operating the WCA need to keep abreast of these rulings. They may make the difference between a successful and rejected claim. The present case is an example of that. The Upper Tribunal has just made it simpler to satisfy some of the bending and kneeling descriptors than some First-tier Tribunals had previously assumed.

Who was this case about?

A 52 year old woman suffered from hip pain and osteoarthritis. A decision maker decided that she did not satisfy WCA descriptors attracting 15 points and, as a result, did not have limited capability for work. This meant that she was not entitled to ESA. She appealed to the First-tier Tribunal (FtT).

What does the descriptor say?

They key issue before the FtT was whether the woman matched any of the descriptors in relation to the activity of bending and kneeling. Two descriptors were potentially relevant:

(i) Descriptor 3(b) which is "cannot bend, kneel or squat, as if to pick up a light object, [such as a piece of paper], situated 15cm from the floor on a low shelf, and to move it and straighten up again without the help of another person"(a). This scores 9 points.

(ii) Descriptor 3(c) which is "cannot bend, kneel or squat, as if to pick up a light object off the floor and straighten up again without the help of another person". This scores 6 points.

The FtT decided that the woman satisfied neither of these descriptors. It concluded that she could perform both of the activities in the descriptors if she held on to something close by such as a chair. She could use that to steady herself as she got down and to push against it to get upright again. The woman appealed to the Upper Tribunal.

How are the descriptors to be interpreted?

The Upper Tribunal held that the FtT had misinterpreted the descriptors. In order to allow for a proper assessment of bending and kneeling ability, the Upper Tribunal held:

> "16...an ability to perform descriptors 3(b) or (c) which can be achieved only by holding on to or pushing up on an object such a piece of furniture must...be disregarded."

The Upper Tribunal went on to modify that general statement but not to any particularly significant extent. The modifications were:

(i) "27...one can take into account such assistance as a claimant may gain from using his hands to steady himself or push up on the floor";

(ii) it will be seen that descriptor 3(b) assumes the existence of a low shelf. In assessing whether a person meets that descriptor, "one is required to take into account such assistance as the claimant may gain from leaning/pushing on that notional shelf itself".

This appeal will now have to be re-heard by a new FtT, applying the Upper Tribunal's above rulings about the nature of these descriptors.

(a) The words in square brackets were accidentally omitted from the description given in the Upper Tribunal's decision.

The Upper Tribunal (Judge Turnbull) gave its decision in SC v Secretary of State for Work & Pensions on 1 February 2011: [2011] UKUT 48 (AAC).

HOUSING BENEFIT

SHELTERED & SUPPORTED HOUSING

Salisbury Independent Living v Wirral MBC – supported housing providers have an independent right of appeal against decisions on benefits claims made by their residents

Housing benefit awards are crucial to the viability of many supported housing schemes. For this reason, supported housing providers will welcome this decision. The Upper Tribunal decided that providers have their own independent right to appeal against decisions made on their residents' housing benefit claims. They may therefore challenge those decisions themselves rather than having to rely on their residents to mount an appeal.

What happened?

An organisation called Salisbury Independent Living (SIL) provided accommodation and support for a number of vulnerable adults. SIL contended that their accommodation was a form of supported housing that was 'exempt accommodation'. The usual restrictions on the amount of rent that is met by housing benefit do not apply to such accommodation (for further details of the nature of exempt accommodation see issue 47).

Claims for housing benefit were made by approximately 70 residents. The council to which the claims were made, Wirral MBC, did not make the decisions that SIL had hoped for. Wirral did not accept that the accommodation was exempt accommodation and, even if it was, concluded that many of the service charges covered by the rent were ineligible for housing benefit. The dispute has been protracted having lasted for some 8 years. It is also potentially expensive, SIL arguing that some £3 million in housing benefit is owed.

A number of the residents appealed, with SIL's assistance, against the decisions on their housing benefit claims. However about 8 of the residents had moved away and could not be contacted by SIL. Another 2 were dead. The issue was whether SIL had the right to appeal against the decision on these former residents' claims. The matter came before the Upper Tribunal.

What did the Upper Tribunal decide?

The Upper Tribunal decided that SIL did have a right of appeal and so could itself challenge the housing benefit decisions. The Upper Tribunal reasoned as follows:

(i) Legislation provides that a "person affected" by a housing benefit decision has a right of appeal against the decision to the First-tier Tribunal (Schedule 7, para. 6(3), Child Support, Pensions and Social Security Act 2000).

(ii) Regulations set out persons who must be considered, for appeal purposes, to be persons affected by a housing benefit decision (reg. 3(1), Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001). This did not include SIL.

(iii) The fact that SIL fell outside the Regulations was not fatal to SIL's case. This was because the Regulations do not contain an exhaustive list of persons affected by a housing benefit decision.

(iv) The Upper Tribunal decided that SIL was a person affected by the housing benefit decisions on the claims made by the now missing former residents. In so doing, the Tribunal relied on old case law about the importance of supported housing providers having the opportunity themselves to challenge decisions on housing benefit claims made by their residents: *R v Stoke City Council, ex parte Highgate Projects* (1993) 26 H.L.R. 551.

The Upper Tribunal (Judge Rowland) gave its decision in Salisbury Independent Living v Wirral MBC on 28 January 2011: [2011] UKUT 44 (AAC).

CP v Aylesbury Vale DC – whether gardening maintenance charges are met under an award of housing benefit for a resident of supported housing

Supported housing projects often have a communal garden. Many councils are reluctant to award housing benefit in respect of services charges for maintenance of such gardens. This decision should cause them to reconsider their approach. Where a supported housing landlord is obliged to maintain a communal garden, it is likely that charges for carrying out that obligation will be eligible for housing benefit.

What happened?

A Housing Association ran a housing project for disabled adults. It was comprised of a block of six flats. The flats had a communal garden. The Association levied a service charge for garden maintenance. The charge was £1.50 per tenant per week. The residents claimed housing benefit in respect of their rent(**a**).

The council to which the claim was made, Aylesbury Vale DC, decided that the gardening maintenance charge was not eligible for housing benefit. As a result, the residents' housing benefit awards did not include an amount to cover the maintenance charge. The council's decision was upheld on appeal to the First-tier Tribunal. The claimants brought a further appeal to the Upper Tribunal.

What did the Upper Tribunal decide?

The Upper Tribunal allowed the appeal and held that the gardening maintenance charge was eligible for housing benefit. The Tribunal found that none of the criteria which exclude a service charge from housing benefit under the Housing Benefit Regulations 2006 applied in this case. In arriving at that conclusion, the Tribunal placed particular reliance on the fact that the claimants were required to pay the charge under their tenancies and the charge was connected with the provision of adequate accommodation.

(**a**) It is probable that the accommodation in question fell within the statutory definition of 'exempt accommodation'. Accordingly, the usual rules on quantifying the amount of a housing benefit award did not apply and service charges were, in principle, to be met by the residents' housing benefit awards provided that they were not charges excluded by Regulations. For a more detailed analysis of the exempt accommodation rules, see issue 47.

The Upper Tribunal (Judge Turnbull) gave its decision in CP & Others v Aylesbury Vale DC on 10 January 2011: [2011] UKUT 22 (AAC).

DISABLED PERSONS

IB v Birmingham CC – overnight carers' bedroom restrictions compatible with Human Rights Act 1998 but new legislation will soon reverse this ruling

Housing benefit is not unrestricted. To control public expenditure, limits are placed on the amount of rent met by benefit. For the next few weeks, this will continue to cause difficulty for severely disabled housing benefit recipients who need an overnight carer. Their housing benefit will not meet the full costs of renting a property with an extra room as sleeping accommodation for such a carer. Those rules were recently been upheld by the Upper Tribunal. However, the Government has independently decided to relax the rules in the very near future.

KEY POINTS

- Rules preventing overnight carer's bedroom from being taken into account when quantifying housing benefit are compatible with human rights legislation
- The rules will in any event change on 1 April 2011
- The new rules will allow a carer's overnight accommodation to be counted where a care needs conditions and an overnight presence condition are met

What happened?

Due to his spinal and muscular dystrophy, a disabled student was able to claim housing benefit (normally, students cannot claim housing benefit). The operation of the housing benefit rules meant that the student's award was calculated on the basis that he needed a property with only one bedroom.

In reality, the student needed a two bedroom property which included sleeping accommodation for night-time paid carers. The student took a tenancy of a 2 bedroom property but his housing benefit award did not cover the full rent. This was because his paid professional carers could not be considered "occupiers" of his home for housing benefit purposes. When the matter subsequently came before the Upper Tribunal, it concluded that this was the correct result on a strict application of the Housing Benefit Regulations 2006, on the following basis:

> "9...while the claimant as a severely disabled person in receipt of the highest rates of both components of disability living allowance (which he was, and is) was not restricted to the single room shared accommodation rate (as a non-disabled single person of his own age would be: regulation 13D(2)(a)), nor was he excluded from housing benefit altogether (as a non-disabled single person of his own age would be while a full-time student: regulation 56), he was the only resident occupier of his flat; and the regulations simply did not provide for him to be given any extra allowance for his additional bedroom, any more than they did for the extra rent of a more costly flat with special access or adaptations".

The student claimed that this amounted to unlawful discrimination, contrary to the European Convention on Human Rights. The matter came before the Upper Tribunal (which makes binding rulings about welfare benefits law).

What did the Upper Tribunal decide?

The Upper Tribunal rejected the student's argument. He could not claim to have been discriminated against contrary to the European Convention on Human Rights. In fact, he was provided with extra housing assistance by the State because of his disability. If he had not been disabled, as a

student he would not have been entitled to housing benefit at all. His housing benefit award was also higher than normal due to his disability.

Imminent legislative developments

The UK Government has decided to relax the rules about the calculation of housing benefit where a disabled person requires sleeping accommodation for a paid carer. This has been achieved by adding new provisions to the Housing Benefit Regulations 2006(**a**). Under the amended Regulations, in order for an additional carer's room to be taken into account, the claimant or the claimant's partner must be a "person who requires overnight care". This is defined in reg. 2 of the 2006 Regulations. The definition has two elements, a care needs condition and a condition requiring overnight presence of a carer. In more detail:

(i) The care needs condition is automatically met in the case of a person who is in receipt of DLA care component at the middle rate or above or in receipt of Attendance Allowance. But it can also be satisfied by a person (P) who is not in receipt of either of those benefits. This is where the claimant "has provided the relevant authority with such certificates, documents, information or evidence as are sufficient to satisfy the authority that P requires overnight care".

(ii) The overnight presence condition has a number of elements, all of which must be met. In more detail, it requires the council to whom a claim is made to be satisfied that the person (a) reasonably requires, and (b) has actually arranged for one or more people (the carers) who do not occupy the dwelling as their home to:

- be engaged in providing overnight care for P; and
- regularly stay overnight at the dwelling for that purpose; and
- be provided with the use of a bedroom in that dwelling additional to those used by the persons who occupy the dwelling as their home.

The Department for Work & Pensions have issued guidance to local authorities about implementing the change in the Regulations. This estimates that some 10,000 disabled persons will benefit. The guidance is available at www.dwp.gov.uk/docs/a3-2011.pdf.

(**a**) The provisions were added by the Housing Benefit (Amendment) Regulations 2010 (S.I. 2010/2835).

The Upper Tribunal (Judge Howell) gave its decision in IB v Birmingham City Council on 13 January 2011: [2011] UKUT 23 (AAC).

DUAL PAYMENT RULES

MB v Selby DC – where a person has two housing benefit awards, his/her income should only be taken into account once

This decision was good news for persons who are in the relatively unusual position of (a) claiming housing benefit for 2 properties and (b) having an income which means that they do not receive full housing benefit. The Upper Tribunal decided that their income should not be double counted. So, it should only be counted on one claim and, hence, only reduce one award. This means that the other claim should result in a full housing benefit award.

What was the issue?

A man was living in council accommodation in Selby. He claimed housing benefit to cover his rent. His income meant that his housing benefit award was £10 less than his rent. The man than took up the offer of council accommodation in York. As the offer was time-limited, the man accepted the offer before the notice period on his Selby accommodation had expired. This meant that for four weeks the man held tenancies of two properties, one in Selby and one in York.

For those four weeks, the man was entitled to housing benefit on both properties (due to the special 'moving house' provision in reg.7(6)(d) of the Housing Benefit Regulations 2006 which provides an exception to the general rule that a person cannot claim housing benefit for more than 1 dwelling(**a**)). The difficult issue in this case was quantifying the amounts of the man's housing benefit awards for those 4 weeks.

The decision taken by the councils was that the man would receive reduced housing benefit on both the York and the Selby accommodation. So, for both properties, there was a benefit shortfall of around £10 per week. The man considered that this was unfair. He pointed out that his income had been taken into account twice. The result was that he was left with less money per week than the Government had decided it was reasonable for a housing benefit recipient in his position to have. The matter came before the Upper Tribunal.

Why was only one housing benefit award to be reduced?

The Upper Tribunal decided in the man's favour. The Housing Benefit Regulations 2006 had to be interpreted in a commonsense way to avoid unfairness. The man's income was therefore only to be taken into account once. So, it was taken into account on his York claim, resulting in a £10 rent shortfall. But it was not taken into account on his Selby claim, meaning that his full rent for that property was met.

(**a**) The actual wording of the provision is as follows: "Where a person is liable to make payments in respect of two (but not more than two) dwellings, he shall be treated as occupying both dwellings as his home only... (d) in the case where a person has moved into a new dwelling occupied as the home...for a period not exceeding 4 benefit weeks from the date on which he moved if he could not reasonably have avoided liability in respect of two dwellings".

The Upper Tribunal (Judge Rowland) gave its decision in MB v Selby District Council on 7 January 2011: [2011] UKUT 5 (AAC).

COUNCIL TAX BENEFIT

Wirral MBC v GP – overpayment of advance credit of council tax benefit only recoverable in so far as it related to a period after alteration of the benefit award

This case is a reminder that the special overpayment rules for council tax benefit only apply after the date on which an award is altered. Before then, the normal rules apply. That provides an opportunity for a recipient to avoid having to repay overpaid council tax.

What happened?

In January 2009, a sole parent claimed council tax benefit (CTB). Her local council awarded her CTB. The award was an advance credit made until April 2010. The individual had disclosed her income to the council, including her Child Tax Credit. But the council mistakenly ignored the Tax Credit income when calculating the amount of the CTB award.

In July 2009, the council realised their mistake and altered the individual's CTB award. The council decided to try and recover the overpaid CTB. The question of whether the council was entitled to recover the overpayments came before the Upper Tribunal.

What did the Upper Tribunal decide?

The Upper Tribunal's decision differed as between the overpayments that came before and those that came after the formal decision in July 2009 to alter the CTB award:

(i) Prior to July 2009, the ordinary overpayment rules applied. Accordingly, the overpayment of about £250 was non-recoverable because (a) it arose from official error, and (b) the recipient could not reasonably be expected to know it was an overpayment (reg. 83(2) Council Tax Benefit Regulations 2006).

(ii) But all of the overpayment following the July 2009 alteration decision was recoverable. Overpayments made after a decision to alter (revise or supersede) a CTB award are fully recoverable if they are caused by official error (reg. 83(5) Council Tax Benefit Regulations 2006). This is so even if a claimant could not reasonably have been expected to know that s/he was being overpaid.

The Upper Tribunal (Judge Wikeley) gave its decision in Wirral MBC v GP on 6 January 2011: [2011] UKUT 7 (AAC).

INCOME-RELATED BENEFITS

HOUSING COSTS

KWA v Secretary of State – it is for a claimant to show that a repair or improvement loan qualifies as an allowable housing cost

Complex and technical rules set out which home improvement loans are housing costs qualifying for funding under an award of an income-related benefit. Despite their complexity, these rules must be applied. In this case, a tribunal erred by taking a more general approach. What it should have done was analyse each of the home improvements relied on by the claimant in order to decide whether they fell within the rules.

What happened?

A householder was in receipt of an income-related benefit, State Pension Credit. Potentially, therefore, his award could include an amount for his housing costs. One allowable housing cost is interest payments on certain home improvement loans. The householder argued that he had taken out £25,000 of qualifying home loans, to repair a garage and update a kitchen and bathroom.

KEY POINTS

- Repairs and improvements only qualify under the housing costs rules if undertaken with a view to maintaining fitness for human habitation
- Accordingly, enhancements to existing facilities do not count
- A claimant must prove that repairs and improvements qualify as housing costs; it is not for the benefits authorities to prove that they do not qualify
- In order to qualify, a repair or improvement must fall within the prescribed list: not all repairs and improvements qualify

The householder's case came before the First-tier Tribunal (FtT). The FtT decided that many of the householder's loans qualified. The FtT's decision was challenged on appeal to the Upper Tribunal.

The First-tier Tribunal's failure to apply the Regulations

The Upper Tribunal allowed the appeal. The regulations governing housing costs are detailed and technical. They do not simply include all home improvement loans as qualifying loans. Two characteristics of the rules in particular needed to be recognised and applied by the FtT in this case:

(i) The first requirement is that, in order to qualify, an improvement must have been carried out with a view to maintaining a dwelling's fitness for human habitation.

(ii) Secondly, the improvements must fall within a prescribed list the contents of which may not match everyone's idea of what is a repair or

improvement. For example, repair of a structural defect only counts if the defect is "unsafe"(**a**). As the Upper Tribunal also pointed out in this case, "there is no discretion to award housing costs in relation to works which do not fall within the headings set out".

The Upper Tribunal decided that the FtT had not applied the regulations to the facts of the case. It did not assess whether each and every home improvement was to maintain the dwelling's fitness for human habitation. It also failed to consider whether the different types of home improvement matched the descriptions in the Regulations. The FtT's decision therefore involved an error of law and was set aside. This case will now have to be re-heard by a differently-constituted FtT.

What is the practical effect of the 'fitness for human habitation' condition?

As mentioned above, as well as being of a type set out in the prescribed list, a repair or improvement must be "undertaken with a view to maintaining the fitness of the dwelling for human habitation". This is how the Upper Tribunal put it in this case:

> "12...That is a low standard. It does not reflect the highest standards of living a person may wish to have".

The effect is that only quite basic repairs and improvements will qualify. An enhancement of an existing facility or part of a dwelling does not count. If a loan is spent on repairs or improvements that exceed this standard, only the portion which can fairly be said to have been spent on maintaining the fitness of a dwelling for human habitation will be allowed.

Why was it for the claimant to prove his home loans qualified?

The Upper Tribunal found that the FtT had also erred by failing to make adverse findings against the householder due to his failure to produce evidence about the purpose to which his home loans had been put. It was for the householder to produce evidence to support his case. The Department for Work & Pensions could not be expected to do so (*Kerr v Department for Social Development* [2004] UKHL 23). To the extent that the householder did not produce the necessary evidence, his claims should have been decided against him.

The Upper Tribunal went on to give the claimant the following advice about the sort of information he should produce when the FtT hears his case afresh:

> "The appellant is strongly advised...to produce such specifications, invoices, receipts and so on as he may have. In addition, he may well be asked to write up a list of the work he has done in the house which can be tied up with [the allowable categories of repair and improvement] and to give the best estimates that he can. It may be worth a small outlay for the appellant to find a builder who can give rough estimates of either what the works would have cost when they were done, or what they would cost now. The tribunal may be able to work backwards from the latter".

The extent of the repairs and improvements categories which were relevant in this case

The Upper Tribunal also addressed the nature of the list of repairs and improvements which potentially qualify. Its findings of interest were as follows:

(i) "**repairs of unsafe structural defects**". The FtT allowed £3,000 in respect of works that were said to have been done to underpin a garage. The FtT did not inquire into whether, prior to the underpinning works, the garage was unsafe. This was an error. Unless it was satisfied that the garage was unsafe, it could not lawfully conclude that the works qualified.

(ii) "**repairs of unsafe structural defects**". The FtT also allowed the costs of works to repair a leaking garage roof. A leaking roof is not necessarily unsafe (see decision *CIS/2132/1998).* The FtT should have explained why the roof was considered unsafe.

(iii) "**provision of facilities for preparing and cooking food**". The Upper Tribunal stated that this could "not extend to kitchen cupboards, which are for storage, nor a refrigerator: CIS/363/1993".It also said that "insofar as the gas cooker was replaced, it would not count unless it was a fixture, by analogy with CIS/363/1993". Finally, in relation to this category, the Upper Tribunal held that "the provision of a kitchen sink may be allowed insofar as it was done with a view to maintaining fitness for human habitation rather than for coordination with the new cupboards".

(iv) "**provision of electric lighting and sockets**". In relation to this category, the Upper Tribunal said: "while the provision of electric lighting and sockets can be allowed under heading (h), it is only permissible if done with a view to maintaining fitness for human habitation. The tribunal will therefore have to consider whether the lighting was to maintain fitness or as an enhancement".

(v) "**repairs to existing heating systems**". The Upper Tribunal said that "the provision of new radiators is not an allowable cost" presumably because it is not a repair. However, it could be argued that installing new radiators is a repair to the heating system as a whole if the old radiators were so defective that the system would not work adequately to warm a home.

(vi) The claimant claimed for the cost of constructing a utility room. This could not be allowed. The Upper Tribunal pointed out that "the creation of a utility room does not fall within any of the provisions".

(**a**) As this was a Pension Credit case, the list was to be found in paragraph 12 of Schedule 2 to the State Pension Credit Regulations 2002 but the same list is found in the Regulations governing the other income-related benefits.

The Upper Tribunal (Judge Lane) gave its decision in KWA v Secretary of State for Work & Pensions on 7 January 2011: [2011] UKUT 10 (AAC).

TAX CREDITS

CHILD TAX CREDIT

CM v HMRC – tribunal should not simply award Child Tax Credit to the parent who would benefit most from the award

Where separated parents contest a Child Tax Credit award, a tribunal must determine their claims on their merits. It should not do what the First-tier Tribunal (FtT) did in this case which was take the easier option of making an award to the parent with the lower income. Instead, a decision is required as to which parent has main responsibility for the child.

KEY POINTS

- Tribunal should not have discounted child's evidence on the basis that in family disputes children's evidence is generally unreliable
- A finely balanced case as to which parent had main responsibility for a child does not permit a tribunal to decline to decide that question
- It was wrong for a tribunal to have awarded tax credit to the parent who would receive the greater cash sum

The course of the tax credit claim

Separated parents shared the care of their son. They could not agree on which of them should be awarded Child Tax Credit. This meant that the Tax Credit award was to be made to whichever parent was adjudged to have "main responsibility" for the child(**a**). The matter came before the First-tier Tribunal (FtT).

Despite the child having written a letter for the FtT stating that he lived with his mother, the FtT decided that he spent equal amounts of time with both parents. The FtT said that, as a result, it was unable to decide which parent had main responsibility for the child. To resolve the impasse, the FtT decided that it would award the tax credit to the party who would most benefit from the award. That was the father as he had the lower income. The mother appealed to the Upper Tribunal.

Why was the First-tier Tribunal wrong to ignore the child's evidence?

The FtT decided that it would attach "no weight" to the child's evidence (the letter) because evidence given by children in family disputes could not be relied upon. The Upper Tribunal held that this was an error of law. The FtT made its decision as to the weight to be attached to the child's evidence on the basis of a general assumption as to the reliability of children's evidence. That was wrong and a material error of law. The FtT should have assessed the evidence on its merits.

Why was the First-tier Tribunal wrong to select the party who would most benefit from a Tax Credit award?

The Upper Tribunal was highly critical of the FtT for resolving the appeal by awarding Tax Credit to the party who would derive the most financial benefit from the award. The Upper Tribunal said that "the tribunal was not entitled to avoid making a decision on who had the main responsibility for the younger son". The FtT's approach also involved it taking into account an entirely irrelevant consideration when deeming the father to have main responsibility, which was that he would gain more financial benefit from an award than the mother. That was irrelevant to the question of who had the main responsibility for the child.

Why did the FtT determine the appeal in this odd fashion?

In making its decision, the FtT said that it was applying the decision in *CTC/4390/2004* which it considered entitled it, in an equally balanced case, to award Tax Credit to the parent who would be granted the largest award. The Upper Tribunal found it difficult to identify the legal ruling in *CTC/4390/2004* but in any event the Upper Tribunal was clear that it was not appropriate for the FtT to resolve a finely-balanced main responsibility case by awarding Tax Credit to the parent who would gain the highest award. In the Upper Tribunal's words:

> "8...The tax credit for a child is paid to a parent and not to that child. The parent will apply that credit for the benefit of the child in the context of his or her general household expenditure including items which are general to the household such as accommodation, heating, lighting and items which are particular to the child such as clothing. It can therefore be seen that it would be both illogical and wrong to prefer one parent over the other for the purposes of the credit on the basis of their respective incomes and the effect that these would have in the calculation of any award".

(a) See section 8(1) of the Tax Credits Act 2002 and reg. 3 of the Child Tax Credit Regulations 2002.

The Upper Tribunal (Judge May QC) gave its decision in CM v HMRC on 20 October 2010: [2010] UKUT 400 (AAC).

WELFARE BENEFITS – GENERAL ISSUES

TRIBUNALS

Roberts v Carlin – the borderline between a Judge giving a provisional view and improperly pre-judging a case

This was an Employment Tribunal case but it illustrates a point of relevance to benefits tribunals. Judges may, if it serves some useful purpose, express preliminary views but they should ensure that the parties are aware that the view is provisional and a final opinion will not be arrived at until all the evidence and submissions have been heard and considered.

The Judge's preliminary views

Before a party had given evidence, the Employment Tribunal Judge informed her that she had a "very steep hill to climb". Apparently, this was intended to encourage a settlement and during a short adjournment the parties discussed a compromise. But they could not reach agreement and the hearing resumed at the outset of which the Judge commented that he hoped the party would not "rue the day". The Tribunal then decided the case against the party who appealed to the Employment Appeal Tribunal (EAT). She alleged that the Judge's comments showed that the Tribunal was subjectively biased.

The test for subjective bias

The test for what is known as subjective (rather than actual) bias was set out in *Porter v Magill* [2002] 2 AC 357: would a fair-minded and informed observer, having considered the facts, conclude that there was a real possibility that the Tribunal was biased?

A borderline case but no finding of subjective bias

In the present case, the Employment Appeal Tribunal decided that the test for subjective bias was not met. The EAT said that this case was "very close to the borderline between a helpful provisional view, designed to assist the parties in resolving their differences by a mutually agreed settlement and the manifestation of a closed mind before hearing the whole of the evidence and argument". But, ultimately, the EAT decided that the *Porter v Magill* test was not met. The Employment Judge asserted that his views were only preliminary. That was accepted by the EAT. In addition, it was clear that the party's case had always faced significant obstacles.

The Employment Appeal Tribunal (chair: HHJ Clark) gave its decision in Roberts v Carlin on 17 December 2010: [2010] UKEAT 0183 09 1712.

MT v Secretary of State for Work & Pensions – tribunal should have addressed what action to take following non-compliance with direction that Presenting Officer attend a hearing

The fairness of a tribunal hearing is not always judged simply on what went on in the hearing room. The totality of the proceedings has to be considered in order to decide whether a fair hearing was had. This means that the actions of the DWP can cause an unfair hearing. This is what happened in this case. The DWP failed to comply with a direction for a Presenting Officer to attend a tribunal hearing of a complicated overpayment appeal. To compound matters, the DWP's written submission to the tribunal failed to explain why the decision under appeal had been taken. Overall, this meant that the claimant did not know the case he had to meet. That was unfair.

KEY POINTS

- The First-tier Tribunal should have expressly considered what action (if any) to take in response to the DWP's failure to comply with a direction to send a Presenting Officer
- The Tribunal should also have recorded its decision on what action to take
- DWP tribunal submissions should be written in such a way that the appellant can understand the case s/he has to meet
- The Upper Tribunal suggested that the First-tier Tribunal's practice of sometimes leaving matters of quantification to the parties is lawful

What was this case about?

An income support recipient was adjudged by the Department for Work & Pensions (DWP) to have undeclared capital. If the capital, in the form of shares, had been taken into account, he would not have been entitled to income support. Once the capital was retrospectively taken into account, an overpayment of about £8,000 was generated. The DWP decided that it was recoverable because it arose in consequence of a failure to disclose a material fact (the recipient's capital): s.71 Social Security Administration Act 1992.

The recipient appealed the decision that the overpayment was recoverable to the First-tier Tribunal (FtT) but it rejected the appeal. As a result, the decision that the overpayment was recoverable became final. However, the FtT did not confirm the amount of the overpayment. This was because it appeared to the FtT (correctly) that Jobcentre Plus had not applied the diminishing capital rule so as to reduce the amount of the overpayment. The tribunal directed that a diminishing capital calculation be carried out and the matter returned to the tribunal in the event of a dispute.

In due course, Jobcentre Plus applied the diminishing capital rules which resulted in the overpayment being reduced to around £4,000. The recipient challenged this re-calculation of the overpayment and so the matter came back before the FtT. The FtT issued a direction that it was "essential" for a DWP Presenting Officer to attend the hearing of the recipient's challenge.

How should the Tribunal have responded to the failure to send a Presenting Officer?

Despite the direction, a DWP Presenting Officer did not attend the hearing. The FtT decided to proceed anyway. Its statement of reasons gave no reason for doing so. The Upper Tribunal held that the FtT erred in law. A direction had been made that it was essential for a Presenting Officer to attend. The DWP failed to comply with that direction. As a result, Rule 7(2) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 came into play.

Rule 7(2) applies where a party to tribunal proceedings has failed to comply with (amongst other things) a direction. It states that, in response to the failure, the FtT may take whatever action it considers just which may include such things as waiving the requirement or striking out a party's case. The Upper Tribunal held that in the present case the FtT erred in law by either (a) failing to turn its mind to what would be the "just" response to the DWP's failure to send a Presenting Officer or (b) if the FtT did turn its mind to that matter, failing to explain why it decided that proceeding in the absence of the Presenting Officer was considered just. The Upper Tribunal added that it was particularly important that the claimant be given an explanation because the disobeyed direction had said that it was "essential" that a Presenting Officer attend.

The Upper Tribunal went on to provide some general guidance as to the factors to be taken in to account under Rule 7(2) when deciding the course of action that it would be just to take in response to the DWP's failure to send a Presenting Officer:

> "24...These include the role the presenting officer might be expected to play, the effect that the absence of a presenting officer may have both on the tribunal's position in hearing the appeal and on the claimant's ability to formulate and present a critique of the decision under appeal. Such factors will inevitably carry different weight in different circumstances. Sometimes they may point to it being just for the tribunal to press on and so to proceed in the absence of a presenting officer. In other situations they point to it being just for the tribunal to adjourn the hearing. Where a party's failure is particularly egregious, it may point to it being just for the tribunal either to strike out a party's case or prohibit the party from further involvement in the proceedings. It all depends".

Why was the appellant prejudiced by the defective DWP submission?

As the Upper Tribunal said, social security law is "highly complex" and "many claimants are not able to understand its intricacies". So that claimants know the case they have to meet, DWP appeal submissions should meet certain standards. These were described as follows by the Upper Tribunal in the present case:

> "the Department's written submission to the tribunal should aim to explain the background to the case and set out the material facts and the relevant law. In short, the submission should explain why the decision was taken in such a way that, so far as is possible, claimants understand the case they have to meet."

The Upper Tribunal said that the submission in the present case was "very poor". It contained numerous pieces of evidence such as copies of bank statements. But it did not explain how the diminishing capital rule had operated to reduce the overpayment from £8,000 to £4,000. It simply said that a diminishing capital calculation had been "done". This was unfair to the appellant. In order to be able to challenge the DWP's calculation, he needed to be told how the diminishing capital rule legislation operates. That unfairness was not corrected during the course of the short (15 minute) hearing before the FtT which upheld the DWP's calculation.

Due to a combination of the flawed submission and the FtT's flawed response to the DWP's failure to send a presenting officer, the FtT's decision was set aside. The appeal will be re-heard by a differently constituted FtT.

How does the diminishing capital rule work?

A key issue in this case was confusion about how the diminishing capital rule works and where it is to be found. It may therefore be useful to set out the diminishing capital rule (which is not to be confused with the separate reducing notional capital rule).

The diminishing capital rule is contained in regulation 14 of the Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988. Regulation 14 is a concession to persons who have been overpaid certain income-related benefits due to their failure to disclose their capital. As Commissioner Jacobs said in case *CIS/2287/2008*, "it works on the assumption that the claimant would have drawn on the capital if the benefit had not been paid". This is how it operates:

(i) it applies where a person has been overpaid certain benefits, such as income support, as a consequence of a failure to disclose the existence of, or a misrepresentation as to, the person's capital;

(ii) each 13 week period beginning with the start of the overpayment period is divided up. This period is referred to by reg.14 as a quarter;

(iii) at the end of each quarter, the person's capital is treated as being reduced by the amount by which the benefit in question was overpaid during that quarter;

(iv) over time, therefore, the person's capital will reduce to a point so that it comes beneath the capital threshold. From that point on, the overpayment will not equate to the amount actually paid to the person. This is because, on the person's deemed reduced capital, the person will be treated as entitled to some, and eventually a full, payment of income support.

Is the First-tier Tribunal permitted to make a decision but leave matters of recalculation to the benefits authorities?

As we saw above, the present case began with the FtT making a decision but leaving it to the DWP to re-calculate the overpayment. At the same time, it granted the parties 'liberty to apply' in the event that the re-calculation was disputed. In other words, the parties were given the right to bring the matter back before the FtT if they could not agree the amount of the overpayment. Before the Upper Tribunal, the DWP's representative

argued that, in overpayment cases, the FtT has no power to take this course. The Upper Tribunal did not need to resolve the issue but it appeared to have little doubt that the DWP were wrong and that the FtT is permitted to send matters of quantification back to the DWP to determine.

The Upper Tribunal (Judge Wikeley) gave its decision in MT v Secretary of State for Work & Pensions on 18 October 2010: [2010] UKUT 382 (AAC).

Basildon DC v AC – appellant's new evidence at tribunal hearing should have led to an adjournment so that council could respond

The law requires a fair hearing of a benefit appeal. This is as much for the benefit of the public body whose decision is being challenged as it is for a claimant even if, as is usual, the public body is unrepresented at a hearing. In this case, a council did not have a fair hearing. New evidence was produced at the hearing. The council was unrepresented and so did not have an opportunity to comment on the new evidence. That was unfair. The tribunal should have adjourned the hearing.

KEY POINTS

- If an appellant's oral evidence diverges significantly from statements recorded in the papers, a tribunal should consider whether to adjourn in order to allow the public body to respond
- A hearing should have been adjourned as new evidence was material and a council was likely to have records that could confirm or contradict the evidence
- A tribunal should consciously exercise its discretion as to whether to proceed with a hearing in the absence of a party

What happened?

A council decided that a housing benefit recipient had been overpaid and that the overpayments were recoverable. A key issue was whether the recipient had received certain overpayment notices from the council.

The recipient appealed and the appeal came on before the First-tier Tribunal (FtT). The recipient attended the FtT hearing but no officer from the local council attended.

The recipient gave oral evidence at the hearing which conflicted with his earlier written statements. The fresh evidence was that he claimed to have visited the council's offices in connection with this matter on a number of occasions. The FtT accepted (i.e. believed) the fresh evidence and allowed the appeal. The council appealed to the Upper Tribunal.

What did the Upper Tribunal decide?

The Upper Tribunal allowed the appeal. The council had been treated unfairly. The recipient's new evidence was highly material to the resolution of the appeal. As a result, the council should have been given the opportunity to challenge the fresh evidence about visits made to its offices. The FtT should therefore have adjourned the appeal in order to provide the council with that opportunity.

Does fresh evidence at a hearing always call for an adjournment?

The answer to this is 'no'. This is how the Upper Tribunal described it in the present case:

> "4. A party must be given a fair opportunity to present his case. Where a party has elected not to attend a hearing, he takes the risk that evidence of which he was previously unaware will be presented. While a tribunal cannot be expected to adjourn a hearing simply because an attendee's evidence does not conform precisely to what he has said in the papers, there comes a point where the divergence is so significant that the issue of whether it is necessary to adjourn arises".

In this case, the divergence was significant and so the FtT was required to consider whether to adjourn. If it had considered the matter, there was only one decision open to it given that the new evidence related to matters on which the council could be expected to keep records, namely attendance at its offices. That decision was to adjourn:

> "6. Where a party unexpectedly gives oral evidence materially different from his previous evidence, certainly where that evidence is of a type on which the other party is likely to keep records and which the tribunal considers significant, the absent should be given the opportunity to rebut that evidence.
>
> 7. In a case as extreme as this, the tribunal should have adjourned. That was a material error of law which resulted in the Authority being denied the opportunity of putting its case".

Is it permissible for a tribunal to proceed with a hearing in the absence of a party?

Normally the public body responsible for the decision under appeal is not represented. It is not therefore surprising that the First-tier Tribunal has the power to proceed in a party's absence. However, the Tribunal must not exercise the power without consideration. This is what the Upper Tribunal said:

> "8....The tribunal has the power to proceed with a hearing where a party fails to attend, but can only do so if it is in the interests of justice to proceed with the hearing: (rule 31(b), Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008). The fact that the absent party has not requested an oral hearing and did not consider it necessary to send a representative is a powerful factor in proceeding in their absence. But the interests of justice must be considered, as well as the overriding objective under rule 2 to treat cases fairly and justly. The tribunal did not address its mind to these issues, which plainly arose under the Rules. This was a further material error".

The Upper Tribunal (Judge Lane) gave its decision in Basildon DC v AC on 13 January 2011: [2011] UKUT [2011] UKUT 16 (AAC).

EUROPEAN LAW

SS v Secretary of State – mentally ill French national without the necessary immigration documentation could not secure the right to reside through her sister

An EU national's serious mental illness does not in itself provide access to the UK social welfare system. If the individual does not fall within one of the technical categories of persons with the 'right to reside' in the UK, a claim for social welfare assistance will fail.

What happened?

A French national had a serious mental illness diagnosed as a Schizoaffective Disorder with persistent delusional and hallucinatory symptoms. The individual came to the UK to live with her sister who, while also French, had the right to reside in the UK. The individual made a claim for Employment & Support Allowance.

The claim was rejected by the Department for Work & Pensions because the individual did not have the 'right to reside' in the UK. For that same reason, the individual would also not have been entitled to housing benefit or mainstream social housing. The question of whether the Department were right to conclude that the individual did in law have the right to reside in the UK came before the Upper Tribunal.

What did the Upper Tribunal decide?

The Upper Tribunal held that the individual did not have the right to reside in the UK. Her benefit claim therefore failed.

The individual's case was derived from her sister's status; she did have the right to reside in the UK. In order for the individual to have the right to reside, she had to show that she was her sister's 'family member' for the purposes of the Immigration (European Economic Area) Regulations 2006.

The individual fell outside the main category of 'family member' under the 2006 Regulations. She therefore had to show that she was an 'extended family member' in order to attain the right to reside. In order for a person to be an 'extended family member' a particular document must have been issued by UK immigration authorities. This individual had no such document and so her claim was, on that simple basis, bound to fail.

The Upper Tribunal (Judge Jacobs) gave its decision in SS v Secretary of State for Work & Pensions on 6 January 2011: [2011] UKUT 8 (AAC).

SOCIAL FUND

Bozzo v Social Fund Inspectors – recipients of contributions-based incapacity benefit and ESA remain excluded from applying for community care grants

The community care grant eligibility criteria prevent awards being made to persons who are in receipt of contributions-based incapacity benefit or Employment & Support Allowance. A challenge to this exclusion was recently rejected by the High Court, for the following reasons:

(i) The exclusion of persons receiving contributions-based benefits is achieved by directions of the Secretary of State which govern the detailed operation of the discretionary Social Fund. The claimant argued that these directions were unlawful on the ground of irrationality because they ran counter to the underlying purpose of the Act under which they were made (the Social Security Contributions and Benefits Act 1992). The Court rejected this argument as follows:

> "19...Nor does it seem to me to be irrational to distinguish between those who receive benefits which are means tested [such as income-based incapacity benefit and income-based ESA], and which inevitably are paid to those who are in most need, with a view to targeting support for their benefit out of a fund which necessarily is limited rather than those who by definition potentially have funds at their disposal."

(ii) The claimant argued that the current configuration of the community care grant scheme (excluding those with contributions-based sickness benefit awards) breached Article 1 of the First Protocol of the European Convention on Human Rights. That Article protects property rights and case law of the European Court of Human Rights has assimilated a right to receive a welfare benefit with a property right (*Stec and Others v UK* [2005] 41 EHRR). However, that was of no assistance to the claimant simply because he had no right under domestic law to receive a community care grant. Accordingly, he had nothing analogous to a possession.

(iii) The claimant's final argument was that he had been discriminated against contrary to Article 14 of the Convention. This prohibits discrimination in matters falling within the ambit of the Convention's other provisions such as Article 1 of Protocol 1. The claimant argued that he was subject to discrimination on the grounds of sex because a greater proportion of contributions-based sickness benefit recipients are men rather than women. The Court rejected this argument. Even if there was a difference of treatment it was not discrimination because it could be justified. The State was focussing resources on those with the lowest incomes and doing so in a way which made the community care grant scheme relatively easy to administer.

The High Court (Langstaff J) gave its decision in Bozzo v Social Fund Inspectors & the Secretary of State for Work & Pensions on 27 October 2010: [2010] EWHC 3571 (Admin).

X v Mid Sussex CAB – employment-based disability discrimination law does not apply to volunteers

Volunteers are not protected by the equality legislation as if they were employees. In this case, brought by a Citizens Advice Bureau volunteer adviser, the Employment Appeal Tribunal held that the employment-based provisions of the Disability Discrimination Act 1995 (DDA) do not apply to voluntary workers. The same result can be expected under the new equality legislation contained in the Equality Act 2010. Whether this is a good or a bad thing is a matter of contention.

KEY POINTS

- Disability Discrimination Act does not have to be read as if it treated volunteer workers in the same way as persons working under contract such as employees
- The same result can be expected in relation to the other strands of discrimination law under the Equality Act 2010
- Voluntary work was not in fact a work test to which discrimination legislation did apply

Background to this case

Ms X did unpaid voluntary work at a Citizens Advice Bureau. She had studied law and hoped that her CAB experience might help her to secure work as a paid adviser. She signed a 'volunteer agreement' which was described as "*binding in honour only … and not a contract of employment or legally binding*". The CAB asked Ms X to stop attending as a volunteer. The case report does not say why this decision was taken but it does state that Ms X had missed about 30% of the advice sessions that she had been booked to take.

Ms X was disabled. She brought a claim before the Employment Tribunal which alleged that the CAB had discriminated against her contrary to the Disability Discrimination Act 1995 (DDA). There were two key issues on the claim:

(i) Are voluntary workers such as Ms X afforded the same rights under the DDA as employees (and voluntary workers with a contract of employment). Ms X argued that this was necessary in order to ensure compliance with the European Directive which the DDA sets out to implement (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ("the Framework Directive")).

(ii) Regardless of whether Ms X was a worker for DDA purposes, she argued that the CAB's voluntary work arrangements were for the purpose of deciding to whom subsequently to offer employment (a decision to which the DDA does apply). Ms X argued that the CAB's termination of her voluntary work agreement was a decision not to offer her employment (which involved discrimination against her because of her disability).

The outcome of the litigation

Ms X's claims were rejected at first instance by an Employment Tribunal. X appealed to the Employment Appeal Tribunal (EAT). The EAT rejected the appeal as follows:

(i) The Framework Directive does not require disabled voluntary workers without a contract of employment to be protected as if they were disabled workers employed under a contract of employment. Accordingly, there is no need to read the DDA as if it applied to voluntary workers without a contract of employment.

(ii) When the case was in the Employment Tribunal, it had concluded that, as a matter of fact, there was no preferential treatment given to volunteers when it came to filling paid adviser posts. Accordingly, this CAB's voluntary work arrangements were not part of a process for deciding to whom to offer employment. This finding of fact was open to the Employment Tribunal on the evidence and so could not be challenged on an appeal to the EAT whose jurisdiction is limited to questions of law. The result was that the termination of the voluntary work arrangement was not something which could be controlled or punished under the DDA.

The EAT also observed, in arriving at its conclusions, that official reports had recognised the difficulties that voluntary organisations might face if employment-based discrimination law were extended to volunteers. It quoted from the final Report of the Disability Rights Task Force (December 1999) "*From Exclusion to Inclusion*", which stated as follows:

> "[there are a wide] diversity of organisations that engage volunteers, from small local community groups with few resources to large national charities. Volunteers also undertake a wide range of activities from one-off charity collections for a few hours to regular part-time work. We recognised that organisations may have concerns about being held legally responsible for discrimination by one volunteer towards a disabled volunteer, especially given the lack of control over who is engaged as a volunteer and to some extent what they do and the absence of available sanctions. Similarly organisations may feel that the burden of having to understand the law in this area and make reasonable adjustments, for a volunteer working just a few hours, is too onerous."

Ms X appealed to the Court of Appeal. Her appeal was rejected as the Court of Appeal upheld the decision of the EAT.

Application of this finding to other strands of discrimination law

The EAT, it should be noted, confirmed that its conclusion as to the operation of disability discrimination law in relation to volunteers also applied to the operation of the other strands of discrimination law:

> "Any construction or interpretation of the DDA upon which [the EAT resolves], as a result of the argument in this case, must also have a similar knock-on effect in relation to all the equivalent sections in other anti-discrimination legislation: so far as s.68 of the DDA is concerned that would mean, for example, the same interpretation, and/or the same disapplication... of the interpretation clauses e.g. in s78 of the Race Relations Act 1976 and s82 of the Sex Discrimination 1975".

Since the events in this case, the Equality Act 2010 has come into force to replace the relevant provisions of the DDA. However, that does not affect the practical conclusion in this case. This is because the definition of "employment" in s.83 of the 2010 Act continues to exclude voluntary workers without a contract of employment.

The Employment Appeal Tribunal (Burton J) gave its decision in X v Mid Sussex Citizens Advice Bureau on 30 October 2009: [2009] UKEAT 0220_08_3010.

The Court of Appeal gave its decision in X v Mid Sussex Citizens Advice Bureau on 26 January 2011: [2011] EWCA Civ 28. The Court was comprised of Rix, Elias and Tomlinson LJJ.

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