EXTRA DIVISION, INNER HOUSE,
COURT OF SESSION

[2014] CSIH 39
XA81/13

OPINION OF LADY SMITH

in the Appeal Under the Tribunals, Courts and Enforcement Act 2007, section 13

by

THE SECRETARY OF STATE FOR WORK AND PENSIONS

Appellant;

against

KEVIN BRADE

Respondent:

_____

Lady Smith

Lady Dorrian

Lord Clarke

Appellant: Webster; Solicitor to the Advocate General

Respondent: Skinner; Francis Gill & Co.

1 May 2014

Introduction

[1] The capturing of a butterfly in a net may prove to be an easier task than that of capturing Parliamentary intention in the language of legislation, particularly when the latter involves the need to place human beings - in their myriad of forms - into limited categories. It is the difficulty inherent in that unenviable task that has given rise to this appeal.

[2] It concerns the interpretation of a regulation which determines whether or not a person is capable of "work related activity". If he is, he is part of the work-related activity group ("WRAG") and will receive a lower rate of the state benefit called "employment support allowance" ("ESA") than those claimants who have only limited capability to perform such activity and, significantly, a member of the WRAG may be required to undertake certain activities as a condition of continuing to be entitled to the full amount of ESA payable to a claimant in that group.

[3] Claimants who have only limited capability to perform work related activity are referred to as being members of the "support group" (Welfare Reform Act 2007 sec 24(4) ("the 2007 Act")).

Work Related Activity

[4] "Work related activity" is "activity which makes it more likely that the claimant will obtain or remain in work or be able to do so" (see: sections 24(1) and 13(7) of the 2007 Act). Regulations provide what, in practical terms, a claimant who is found to have capability for work related activity may be required to do, namely, to take part in "one or more work-focused interviews", provided it is reasonable, having regard to the

circumstances of the individual, to impose that requirement (see: The Employment and Support Allowance (Work -Related Activity) Regulations 2011 ("the 2011 Regulations") paragraph 3(1), (2) and (4)). These and other provisions in force at the relevant time seem to reflect an intention to identify whether a person has potential for engagement in the labour market and the means whereby any such potential may be unlocked rather than restricting the assessments carried out for benefits purposes to the measurement of levels of incapacity. Put broadly, the provisions indicate the intention of achieving an outcome whereby those who might have such potential will be placed in the WRAG and thus subject to such requirements to attend interviews designed to help them into the labour market as are reasonable, even although it is accepted that, at that point, they do not have capability for work.

The Support Group

[5] Members of the support group cannot be required to perform work related activity. They may speak to a personal adviser if they wish to do so but that is not obligatory. The continuation of their ESA at the full "support group" rate is not conditional on anything being done by them. It seems to follow that the provisions envisage that the support group will consist of persons of whom it cannot realistically be said that they might have potential to engage in the labour market.

Capability for Work or Limited Capability for Work

[6] Whether or not a claimant's capability for work is limited has to be determined under and in terms of part 5 of the Employment and Support Allowance Regulations 2008 ("the 2008 Regulations") which were made in exercise of the powers conferred by various provisions in the 2007 Act. They have been amended on more than one occasion since then. The version which applies to the present case is as amended by the Employment and Support (Limited Capability for Work and Limited Capability for Work- related Activity) (Amendment) Regulations 2011. Paragraph 19 of the 2008 Regulations provides that a person has limited capability for work if, by adding up points that are listed in column (3) of Schedule 2 against any "descriptor" listed in that schedule, he obtains 15 points whether singly or by a combination of descriptors, as follows:

"19 Determination of limited capability for work

(1) For the purposes of Part 1 of the Act, whether a claimant's capability for work is limited by the claimant's physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require the claimant to work is to be determined on the basis of a limited capability for work assessment of the claimant in accordance with this Part.

(2) The limited capability for work assessment is an assessment of the extent to which a claimant who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in Schedule 2 or is incapable by reason of such disease or bodily or mental disablement of performing those activities.

(3) Subject to paragraph (6), for the purposes of Part 1 of the Act a claimant has limited capability for work if, by adding the points listed in column (3) of Schedule 2 against any descriptor listed in that Schedule, the claimant obtains a total score of at least-

(a) 15 points whether singly or by a combination of descriptors specified in Part 1 of that Schedule;

(b) 15 points whether singly or by a combination of descriptors specified in Part 2 of that Schedule; or

(c) 15 points by a combination of descriptors specified in Parts 1 and 2 of that Schedule."

The assessment of a claimant's mental, cognitive and intellectual functions, for the purpose of paragraph 19, is covered by Part 2 of Schedule 2 and includes:

"[SCHEDULE 2 ASSESSMENT OF WHETHER A CLAIMANT HAS LIMITED CAPABILITY FOR WORK]

Part 2

Mental. Cognitive, and intellectual function assessment

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

WRAG or Support Group?

[7] Whether or not a claimant who does not have capability for work is in the WRAG or in the support group has to be determined under and in terms of regulations 34 and 35, and Schedule 3. Unlike the approach where the issue is capability for work, point scoring is not required. A claimant is to be found to have limited capability for work related activity if any one of the descriptors set out in Schedule 3 applies to them:

" 34 Determination of limited capability for work-related activity

(1) For the purposes of Part 1 of the Act, where, by reason of a claimant's physical or mental condition, at least one of the descriptors set out in Schedule 3 applies to the claimant, the claimant's capability for work-related activity will be limited and the limitation will be such that it is not reasonable to require that claimant to undertake such activity.

(2) 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.

...

35 Certain claimants to be treated as having limited capability for work-related activity

(2) A claimant who does not have limited capability for work-related activity as determined in accordance with regulation 34(1) is to be treated as having limited capability for work-related activity if-

(a) the claimant suffers from some specific disease or bodily or mental disablement; and

(b) by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity.

...

...

SCHEDULE 3

ASSESSMENT OF WHETHER A CLAIMANT HAS LIMITED CAPABILITY FOR WORK RELATED ACTIVITY

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

The other descriptors in Schedule 3 include: "8.....At least once a week experiences: (a) loss of control leading to extensive evacuation of the bowel and/or voiding of the bladder", and "12.....Cannot cope with any change..... to the extent that day to day life cannot be managed."

[8] The importance of the work related activity requirement imposed on a member of the WRAG being "reasonable" is highlighted by the wording of regulation 34(1) which, in effect, deems it to be unreasonable to require a person to carry out such an activity if any one of the descriptors referred to applies, without further enquiry about that matter. That has now changed; the regulation has been amended so as to provide that it cannot be concluded that a person has limited capability for work related activity (and is, accordingly, in the support group) unless the particular limitation in fact shows that it would not be reasonable to make such a requirement (see: Social Security (Miscellaneous Amendments) (No. 3) (Regulations) 2013/2536 regs 13(17)(a)(i)(ii) and (iii)) but that was not the position when the respondent's claim was determined.

The Issues

[9] The principal issue is whether or not regulation 34(2) applies to descriptor 13 and, if it does, what is the meaning of the combined effect of regulations 34(1) and (2)? The appellant submits that regulation 34(2) does not apply in the case of descriptor 13; he says that it cannot have been intended to apply to a descriptor which requires that the person "always" experiences the difficulty in question.

[10] Separately, did the FTT err in their approach to regulation 35(2)?

Background

[11] On 12 January 2012, the respondent's father completed, on his behalf, a questionnaire that had been sent by the appellant. The respondent was, at that time, in receipt of ESA. A letter from his GP dated 4 January 2012 stated that the respondent suffered from anxiety and depression which had caused him to lead a very reclusive existence. It stated that he had been to the surgery on 20 December 2011 and had made complaints to his GP of having very low mood and low motivation, of having a short attention span and having difficulty sleeping. His GP also reported that the respondent suffered from regular migraine headaches. He was prescribed a new anti-depressant medication because a previous one had not agreed with him and he had stopped taking it. The GP referred to him being an infrequent attender at the surgery and to the respondent frequently becoming "quite paranoid" when having to deal with people outside his "safe zone".

[12] There was, accordingly, information available to the effect that the respondent had been able to attend his GP, tell him about his symptoms and his experience of a previous anti-depressant drug. There was, however, no information about the respondent having had or being able to have any contact with anyone else.

[13] Jackie Butcher, a nurse who is an "Approved Disability Analyst" (referred to below as the "HCP") provided a report dated 23 January 2012. In it she concluded, without further elaboration, that:

"The available evidence does not suggest the client cannot engage in any social contact due to difficulty relating to others, or to their own significant distress, due to cognitive impairment or mental disorder."

[14] The appellant accepted that the respondent did not have capability for work but considered that he fell within the WRAG, not the support group. The respondent was, accordingly, assessed as being entitled to continuing ESA but without the support element that would also have been payable had it been determined that his capability for work related activity was limited.

[15] The respondent appealed and was reassessed on behalf of the appellant. The reassessment, dated 30 March 2012, found:

"All relevant evidence taken into account at scrutiny. No further evidence supplied with appeal. HCP opinion is that customer does not meet criteria for Support Group. Decision remains unchanged. Appeal to proceed."

A further report was provided by the respondent's GP, dated 29 June 2012. In it, the GP's statements included:

"In my opinion, Kevin is unfit for work for reasons of chronic mental ill health and I believe he ought to be eligible for the support group of ESA rather than the working group.

In my opinion he should be classed under criteria 12, 13 and 14 of chapter 10 of the work capability assessment. He is in my opinion unable to cope with change, with social engagement, and unable to engage in appropriate behaviour with people due to his mental health problems."

The GP's reference to "criteria" 12, 13 and 14 appears to be a reference to the list of activities in Schedule 3. It is not possible to tell whether the GP considered the terms of the descriptors.

First- tier Tribunal ("FTT")

[16] The FTT found that no descriptor from Schedule 3 to the 2008 Regulations applied and that the respondent, accordingly, fell within the WRAG. Regarding activity and descriptor 13 of Schedule 3, they said:

"6. In relation to activity 13, coping with social engagement due to cognitive impairment or mental disorder, the tribunal had to be satisfied that engagement in social contact is always precluded due to difficulty relating to others or significant distress experienced by the individual. Clearly this cannot apply. He was able to cope with the HCP, he was able to cope with attending at the hearing before the tribunal which lasted 15 minutes. He is able to attend his GP. It therefore cannot be said that engagement in social contact is always precluded."

[17] The respondent gave evidence before the FTT and the written record of his evidence ran to two pages.

[18] The FTT were in error in referring to the respondent as having been able to cope with the HCP; she did not assess him in person. The assessment was a "desktop" one. The appellant accepts that, for that reason alone, there requires to be a remit.

[19] Regarding paragraph 35 of the 2008 Regulations, the FTT said:

"The tribunal considered Regulation 35 but were not satisfied that this applied. They were of the opinion that he should be able to cope with a work related interview at the Jobcentre. He does not meet the requirements of Regulation 35 as there is no substantial risk."

The Upper Tribunal ("UT")

[20] The respondent appealed to the UT. His appeal was successful. The UT observed that construing paragraph 34 of the 2008 Regulations was not easy. They confined their considerations to the terms of those regulations and dictionary definitions. They did not take any account of the wider statutory context. They considered descriptor 16 of Schedule 2 and concluded that because a distinction was drawn between engagement with someone unfamiliar being "always precluded" and, for a lower score, engagement with someone unfamiliar not being possible "for the majority of the time", it followed that "majority of the time" as used in regulation 34(2) showed that it was an easier test to satisfy than "always". At paragraphs 13 - 14 of their written reasons, they concluded:

"13. Notwithstanding, regulation 34(2) must be given some content in its application to activity 13 of Schedule 3 if that is at all possible without a strained construction. In the Concise Oxford Dictionary, "always" is defined thus:

"**1** at all times; on all occasions (*they are always late*).

2 whatever the circumstances (*I can always sleep on the floor*).

3 repeatedly; often (*they are always complaining*)."

Reference to other dictionaries reveals a similar pattern; there is a primary meaning of "every time" and a more limited, secondary meaning of "repeatedly, persistent".

14. Therefore, in order to make use of regulation 34(2), but mindful of the distinction in activity 16 of Schedule 2 between "always" and "for the majority of the time" I conclude that "always precluded", as used in activity 13 of Schedule 3, and likewise as used in activity of Schedule 2, is not an all or nothing test; rather, it means "repeatedly" or "persistent" or "often". A "majority" may be constituted by events which happen only on 50.1% of the possible occasions, but a greater frequency is required by the use of the word "always". It is a question of degree, but a fact finding tribunal is eminently suited to applying these subtle nuances of difference in a common sense way. It suffices to say in the present case that because a claimant attends one tribunal hearing, and his GP accepts that he comes to the surgery very occasionally, does not *necessarily* entail the conclusion, as the tribunal clearly considered that it did, that it "cannot be said that engagement in social contact is always precluded.""

[21] The appeal to the UT did not include any ground based on paragraph 35 of the Regulations but they, nonetheless, considered whether or not there was an error of law in the FTT's approach and concluded that there was. The FTT had applied too narrow a test. Standing the decision of the Court of Appeal in *Charlton* v *Secretary of State for Work and Pensions [2009] EWCA Civ 42* at paragraph 34, they should have considered the respondent's ability to cope with the work related activity not only in the context of being able to cope with an interview at the Jobcentre but also in the context of his journey to and from any such interview.

[22] In these circumstances, the UT set aside the decision of the FTT and remitted the respondent's appeal to a freshly constituted FTT, for a re - hearing, the UT not being in position to remake the decision as further findings of fact were required.

Charlton* v *The Secretary of State for Work and Pensions

[23] In *Charlton*, the Court of Appeal interpreted regulation 27(b) of the Social Security (Incapacity for Work) (General) Regulations 1995. It provided, in terms which were similar to regulation 35(2) of the 2008

Regulations, for circumstances where "there would be substantial risk to the mental or physical health of any person if he were found to be capable of work". Moses LJ (with whom Lloyd LJ and Pill LJ agreed) said that that risk would require to be assessed by reference to whatever work the claimant was found to be capable of and, at paragraph 34, added:

"34. Regulation 27(b) may be satisfied where the very finding of capability might create a substantial risk to a claimant's health or to that of others, for example when a claimant suffering from anxiety or depression might suffer a significant deterioration on being told that the benefit claimed was being refused. Apart from that, probably rare, situation, the determination must be made in the context of the journey to or from work or in the workplace itself."

The Court of Appeal, applying, it would seem, a common sense approach, thus cautioned that it was not enough to focus on only one aspect of the work envisaged; everything that would be involved required to be considered when assessing risk.

The Appeal:

Submissions for the Appellant

[24] The appellant does not seek to challenge the UT's decision to remit the respondent's appeal to a freshly constituted FTT to be considered of new. He does, however, take issue with the basis in law on which the UT made the remit. In particular, as was submitted by counsel, he submits that the UT erred in law by applying regulation 34(2) to descriptor 13 of Schedule 3; a proper purposive construction entailed that its effect was restricted to those descriptors which, in terms, do not specify the frequency with which they must occur for them to apply to a claimant. The specification of "majority of the time" in regulation 34(2) could not apply to descriptor 13; "always" meant "always". If it did not then the descriptor would be stripped of its intended meaning.

[25] Counsel submitted that the legislative intention was, at least in part, to ensure that those who are capable of entering work are given assistance to do so; if there was a possibility of a person going into the workplace then they should be placed in the WRAG. That was the purpose of the work related interviews. He accepted that the regulations had to be read as a whole. In this case that meant, before applying the "majority" qualification in regulation 34(2), the terms of the descriptors themselves ought to be considered. When, in the case of descriptor 13 that was done, then it was demonstrated that the "majority of the time" phrase could have no application to it. Regarding the UT's reliance on descriptor 16 of Schedule 2, if they were right to look to it for guidance then the threshold for the distinction between "majority" and "always" must be "at all times".

[26] He submitted that, if the scheme of the regulations was considered as a whole, a suitably nuanced approach was achieved by applying the appellant's interpretation. The relevant interview need not take place at the Job Centre; it could be carried out on the telephone and something might be identified that would be a first footstep into the workplace. Claimants would not, under the regulations, be required to do something that would be unreasonable to ask of them.

[27] In all these circumstances, the UT had, he submitted, erred in interpreting "always" as meaning "repeatedly", "persistent" or "often". He accepted that the appellant's interpretation created a high hurdle for claimants but it was one which had to be surmounted if they were to be entitled to the maximum form of ESA.

[28] Regarding regulation 35, counsel submitted that the UT were wrong to have concluded that the FTT had applied too narrow a test. The FTT's decision fell to be read as implicitly recognising that the respondent would require to travel to and from the interview in addition to being at the interview itself. *Charlton* may not have been expressly referred to but the FTT's approach could be seen as being in accordance with it.

Submissions for the Respondent

[29] Counsel submitted that the UT had not erred in its interpretation of regulation 34(2). Had Parliament intended to exclude activity and descriptor 13 from its ambit, it would have been drafted differently; that would have been a simple matter. To apply the descriptor without the modifying effect of regulation 34(2) would be to ignore its specific terms and render it virtually impossible for a claimant to whom it applied to avoid being placed in the WRAG. In practical terms, on the appellant's approach, a claim based on the application of descriptor 13 would never succeed. If, for instance, such a claimant instructed representation for a tribunal hearing, the fact of that representation would deprive him of the availability of descriptor 13. That single instance of engagement with his representative would, if the appellant was correct, preclude reliance on descriptor 13.

[30] Counsel added that since social contact was not specifically defined, the background of reasonableness was of particular importance. Overall, it could be seen that what was meant was that the descriptor required to apply for the majority of the time on the majority of occasions.

[31] Regarding regulation 35, the UT had not erred. The FTT could be seen to have restricted its considerations to the interview itself without considering the journeys that would be required.

Discussion and Decision

[32] The essential question is: what did Parliament mean by the term "always precluded", as used in descriptor 13 of Schedule 3 to the 2008 Regulations? As is well understood, the answer to such a question is not necessarily to be found by adopting a literal interpretation. If the interpretation exercise is confined to a consideration of the precise wording employed, the outcome may be one which frustrates Parliamentary intention, namely, such intention as can, objectively and in context, reasonably be imputed to Parliament in respect of the words used. That is why, where the meaning of a provision such as the present one is challenged, it is important to consider it in the context of the statute as a whole or where, as here, it is part of a wider statutory scheme, in that context.

[33] In this case, I consider that that means that descriptor 13 of Schedule 3 to the 2008 Regulations requires to be considered not only in the context of those regulations but in the context of the other legislative provisions to which I have already referred. The intention which I consider to be disclosed by that legislative scheme, when viewed objectively, is to place within the WRAG those persons who might have potential for engagement in the labour market provided it is reasonable to require them to perform work related activity which would, under the current legislation, involve them taking part in one or more work focused interviews. The descriptors in Schedule 3, when read together with regulation 34(1) appear to be intended to identify where the claimant's personal circumstances can be deemed to negative either the existence of such potential or the reasonableness of the work related activity requirement, or both. However, regulation 34(2), which is a substantive provision, must also be taken into account when considering the meaning and effect of the schedule 3 provisions. It has a moderating influence; to avoid being included in the WRAG, claimants need not show that they fall within a descriptor all the time, every minute, twenty four hours of every day.

[34] It was, very properly, recognised on behalf of the appellant that, to succeed in his interpretation of descriptor 13, regulation 34(2) had to be disapplied. Although expressed as relating to all the descriptors in Schedule 3, it had to be read as, in fact, not applying to descriptor 13 at all.

[35] To ignore, in the course of an interpretative exercise, the entirety of a legislative provision would, whilst not unheard of be very unusual indeed. I am unable to identify anything which would justify, in effect, ignoring the terms of regulation 34(2) and thus depriving descriptor 13 or any other part of the Schedule 3 descriptors - such as descriptor 8, in relation to which similar questions could arise - of their moderating influence. I am satisfied that, when these provisions are considered in the context of the whole statutory scheme, "always", as used in descriptor 13 of Schedule 3 cannot have been intended to mean "always" in the

sense of the claimant never, at any time, whatever the circumstances, being able to engage in "social contact".

[36] I would not, however, be minded to adopt the UT's interpretation, given the extent to which it is somewhat loose and indefinite and, importantly, was not based on a consideration of the wider statutory scheme.

[37] A purposive construction is called for. Whilst slavish application of the literal meaning of "always" might appear to place a claimant in the WRAG unless he can bring himself within the description to which I refer at the end of paragraph 36 above, I consider that that would not make sense in the overall statutory context and would tend to undermine its underlying purpose. I consider that descriptor 13 must apply if a claimant suffers from a mental disorder which has the consequence that, for the majority of the time, he cannot engage in social contact. That construction properly embraces regulation 34(1), 34(2) and the terms of descriptor 13 and accords with their evident intention. Such a person is not likely to have labour market potential and, moreover, if, for the majority of the time, that person cannot engage in social contact, requiring participation in a work focused interview would be not only unreasonable but pointless. Further, that construction avoids the fact finder being necessarily driven to the absurd conclusion that descriptor 13 is not satisfied if, for instance, on a single occasion, a claimant has given instructions to a representative for the purposes of a tribunal hearing. The question of whether or not a person is wholly precluded from engagement in social contact for the majority of the time is one of fact having regard to the statutory provisions as understood by the guidance we have sought to provide. That question is not answered by the application of any precise mathematical approach but by the fact finding tribunal having regard to the evidence in the particular case of the effects of the claimant's condition in a realistic way whilst bearing in mind the purpose of the legislation.

[38] Turning to regulation 35(2), I agree that the passage quoted from the case of *Charlton* affords relevant guidance. Whilst it may be the case that the FTT did have in mind all that would be involved in attending an interview, the brevity of their explanation is such that it is not clear whether that was the case; I would expect the fresh FTT to which this case will be remitted to take account of that guidance and make it clear, in their reasons, that they have done so.

[39] I would, accordingly, uphold this appeal. The decision of the UT was to remit the respondent's appeal to a freshly constituted FTT. In the circumstances, there is no need to set aside that decision (see: Tribunals, Courts and Enforcement Act 2007 sec 14(2)(a)) albeit that the new FTT will require to make their decision on the basis of the statutory interpretation set out above, not that of the UT.

EXTRA DIVISION, INNER HOUSE,
COURT OF SESSION

Lady Smith

Lady Dorrian

Lord Clarke

[2014] CSIH 39
XA81/13

OPINION OF LADY DORRIAN

in the appeal under the Tribunals, Courts and Enforcement Act 2007, section 13

by

THE SECRETARY OF STATE FOR WORK AND PENSIONS

Appellant;

against

KEVIN BRADE

Respondent:

_____

Appellant: Webster; Solicitor to the Advocate General

Respondent: Skinner; Francis Gill & Co

1 May 2014

[40] I have had the opportunity of reading the opinions of your Ladyship in the chair and of Lord Clarke. I agree with both of them and there is nothing I can usefully add.

EXTRA DIVISION, INNER HOUSE,
COURT OF SESSION

[2014] CSIH 39
XA81/13

OPINION OF LORD CLARKE

in the appeal under the Tribunals, Courts and Enforcement Act 2007, section 13

by

THE SECRETARY OF STATE FOR WORK AND PENSIONS

Appellant;

against

KEVIN BRADE

Respondent:

_____

Appellant: Webster; Solicitor to the Advocate General

Respondent: Skinner; Francis Gill & Co

1 May 2014

[41] I agree with your Ladyship in the chair that this appeal falls to be allowed for the reasons given in your opinion and I agree also with your Ladyship as to how the case should now proceed.

[42] I would simply wish to add the following brief remarks. The position, adopted by the appellant in this appeal, as your Ladyship in the chair has noted, depended on ignoring or giving no effect to the provisions of

regulation 34(2). There was no reason advanced as to why this required to be done, save for the wording of the descriptor 13. Absent a valid reason for completely ignoring the wording of regulation 34(2), it is, in my opinion, the court's task to read the provisions together and to seek to arrive at an interpretation of those provisions which makes sense and is consistent with the overall purpose of the legislation. It is difficult to regard the drafting of these provisions as felicitous. While the wording of descriptor 13 can no more be ignored than the wording of regulation 34(2), a strictly literal approach to the wording of descriptor 13, as advanced on behalf of the appellant, requires to give way to the foregoing considerations. *cf. Bennion on Statutory Interpretation* (6th ed) at sec 361, p1053. In *Institute of Patent Agents* v *Lockwood* [1894] AC 347 at 360 Lord Herschell LC said that where there is a conflict between two statements in the same Act: "You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other." *cf.* also *R* v *Moore* [1995] 4 All ER 843 at 850. In the present case, as between regulation 34(2) and descriptor 13, regulation 34(2) is clearly a substantive provision, whereas descriptor 13 can be regarded as a subordinate provision.

[43] The descriptor in Schedule 3(13) is addressing a mental condition which has certain consequences. Such a condition may be chronic or spasmodic. It may also be short-lived. There are no doubt other descriptions which might, when all taken together, go to build up a spectrum. Taking a realistic, common sense and purposive approach to the statutory provisions, it seems to me that the combined effect of regulation 34(2) and descriptor 13 may be read to include an individual whose condition can, realistically speaking, be described as constant and continuing, in its disabling effects, for the purpose of engaging socially, while, nevertheless, recognising that there may be short intermittent breaks in that being the position. Having regard to the need, in relation to work, and work-related activity, for there to be steady and reliable engagement in social contact, evidence of episodes, however brief, and, in whatever circumstances, where some kind of social engagement may have been achieved, would not necessarily preclude the descriptor being met, particularly having regard to the qualifying words of paragraph 34(2).