ML-v-Department for Communities (ESA) [2021] NICom 47

Decision No: C5/21-22(ESA)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

EMPLOYMENT AND SUPPORT ALLOWANCE

Application by the claimant for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 2 December 2019

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal with reference LD/11470/18/51/P.

2. For the reasons I give below, I grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal.

3. Under Article 15(8)(a)(i) of the Social Security (NI) Order 1998 I give the decision that I consider the tribunal should have given without making fresh or further findings of fact. I decide that the appellant did not fail to disclose a material fact and th at the ESA overpaid to him between 28 March 2014 and 27 September 2018 is not recoverable from him.

REASONS

Background

4. This decision concerns recoverability of overpaid benefit and the effect of disclosure of a material fact in circumstances where the Department declined to accept more detailed information.

5. The appellant was awarded contribution-based employment and support allowance (ESA) from 5 November 2013 by the Department for Communities (the Department), while on sick leave from his job as a civil servant. From 19 March 2014 the appellant retired on ill-health grounds and became entitled to an occupational pension. He received his first

payment of the pension on 31 March 2014. Subsequently, on 27 September 2018, the Department superseded and revised the amount of the appellant's ESA entitlement on the basis that he was receiving the pension. The Department decided that the appellant had been overpaid ESA amounting to £15,159.20 for the period from 28 March 2014 to 27 September 2018. It further decided that £8,657.64 of that sum was recoverable from him on the basis that he had failed to disclose the material fact that he was in receipt of an occupational pension. The appellant requested a reconsideration and on 14 November 2018 the decision was reconsidered but not revised. He appealed.

6. Pending the appeal hearing, on 23 September 2019, the Department again reconsidered the decision. It revised its decision and decided that ESA paid to the appellant for the period from 28 March 2014 to 13 September 2018, amounting to £15,025.96, was recoverable from him.

7. The appeal was considered on 2 December 2019 by a tribunal consisting of a legally qualified member (LQM) sitting alone. The tribunal disallowed the appeal, finding that the sum of £15,025.96 was recoverable from the appellant. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 26 August 2020. The appellant applied to the LQM for leave to appeal to the Social Security Commissioner from the decision of the appeal tribunal. Leave to appeal was refused by the LQM in a determination issued on 26 October 2020. On 25 November 2020 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

8. The appellant submits that the tribunal erred in law on the basis that it accepted that his wife had contacted the Department to disclose the occupational pension in February 2014. Having accepted this, he submitted that it had erred by finding that he had not disclosed the pension and had an obligation to make further efforts to contact the Department when no action was taken. He submitted that his wife had made sufficient disclosure to the Department to meet his statutory obligation. He submitted that the tribunal was wrong to place expectations of particular conduct on him and his wife as former civil servants, and to determine that any disclosure was incomplete.

9. The Department was invited to make observations on the appellant's grounds. Mr Clements of Decision Making Services (DMS) responded on behalf of the Department. He accepted that the tribunal had erred in law on different grounds that related to the calculation of the overpayment. He indicated that the Department supported the application to that extent, but opposed it on the grounds advanced by the appellant. He maintained that the overpayment was lawfully recoverable by the Department.

The tribunal's decision

10. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary material before it consisting of the Department's submission, which included a copy of screen prints relating to the appellant's ESA claim, an ESA40(INF) information leaflet setting out the requirement to notify changes in circumstances to the Department, a specimen notification of award letter (pro forma M1000), further screen prints relating to the appellant's ESA claim, a copy of a decision notification dated 21 February 2014, evidence relating to a criminal investigation, information regarding the appellant's occupational pension entitlement, a copy of an interview under caution of the appellant, further screen prints and the relevant decisions. The tribunal had previous records of proceedings relating to adjourned hearings, material from the pension provider handed in by the appellant and a supplementary Departmental submission attaching further evidence and a Commissioner's decision. The appellant attended the hearing and gave oral evidence, accompanied by his wife, who also gave evidence. The Department was represented by a presenting officer.

11. The appellant's wife indicated that, due to the appellant's ill health, she had made contact with the Department by telephone on 27 February 2014 to notify the fact of the pending occupational pension award. She had previously furnished a copy of a letter from the Department to notify an award of ESA on which she had noted a telephone conversation with "Steven" in the Department, who indicated that the Department would contact the appellant directly. The appellant submitted that his obligation to make disclosure had been fulfilled by the telephone call, despite not receiving any further communication from the Department. The Department was unable to locate any record of the telephone call.

12. The tribunal found the appellant's wife to be a credible witness and accepted that she had made the telephone call as claimed and had made the note of the conversation on a Departmental letter. The tribunal found that the Department had declined to accept full disclosure of information from the appellant's wife. It found that, having been employed as civil servants themselves, the appellant and his wife should have been prompted by lack of contact from the Department to make further enquiries. It further found that the pension came into payment some three weeks after the phone call, and that the fact of its payment should have been disclosed at that date. It found that the appellant had not discharged his duty to disclose under regulation 32 of the Claims and Payments Regulations, and that £15,025.96 of the ESA overpaid by the Department was recoverable from him.

Relevant legislation

13. The principal legislation governing recoverability of overpaid benefit appears at section 69 of the Social Security Administration (NI) Act 1992 (the 1992 Act), which provides:

> **69.**—(1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure—
>
> (a) a payment has been made in respect of a benefit to which this section applies; or
>
> (b) any sum recoverable by or on behalf of the Department in connection with any such payment has not been recovered,
>
> the Department shall be entitled to recover the amount of any payment which the Department would not have made or any sum which the Department would have received but for the misrepresentation or failure to disclose.
> …
>
> (5A) Except where regulations otherwise provide, an amount shall not be recoverable under subsection (1) above … unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or has been revised under article 10 or superseded under article 11 of the Social Security (NI) Order 1998.

The requirement to disclose derives from regulation 32 of the Social Security (Claims and Payments) Regulations (NI) 1987 (the Claims and Payments Regulations). In so far as relevant, this provides:

> **32.**—(1) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner as the Department may determine and within the period applicable under regulation 17(4) of the Decisions and Appeals Regulations such information or evidence as it may require for determining whether a decision on the award of benefit should be revised under Article 10 of the 1998 Order or superseded under Article 11 of that Order.
>
> (1A) Every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner and at such times as the

Department may determine such information or evidence as it may require in connection with payment of the benefit claimed or awarded.

(1B) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall notify the Department of any change of circumstances which he might reasonably be expected to know might affect—

(a) the continuance of entitlement to benefit; or

(b) the payment of the benefit,

as soon as reasonably practicable after the change occurs by giving notice of the change to the appropriate office—

(i) in writing or by telephone (unless the Department determines in any particular case that notice must be in writing or may be given otherwise than in writing or by telephone); or

(ii) in writing if in any class of case it requires written notice (unless it determines in any particular case to accept notice given otherwise than in writing).

Leave to appeal

14. An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the party who wishes to bring an appeal must first obtain leave to appeal.

15. Leave to appeal is a filter mechanism. It ensures that only appellants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.

16. An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.

17. Mr Clements for the Department has accepted that the tribunal erred in law on grounds relating to the entitlement decision in the case. He referred to the decision of Chief Commissioner Mullan in *SL v. Department for Social Development* [2010] NI Com 67, submitting that the tribunal had not based

its entitlement decision on sufficient evidence. He submitted that procedural errors had occurred in relation to the entitlement decision and the tribunal's obligation to ensure that section 69(5A) of the 1992 Act had been complied with. He commented:

> "As the tribunal in this case was not in possession of evidence that the supersession decision specified the amount of ESA that the applicant is entitled to for the period 25 April 2014 to 27 September 2018, which makes up the bulk of the overpayment period, I do not know how it has reached the conclusion that section 69(5A) was satisfied. I submit that the tribunal has erred in point of law by making this finding without sufficient evidence".

18. Nevertheless, while acknowledging that relevant case law placed an onus on the Department to make further investigation when partial disclosure had been made, Mr Clements submitted that it was not certain that the telephone call by the appellant's wife had fulfilled the duty to disclose.

19. I acknowledge the concession of Mr Clements in relation to the entitlement decision, and I further consider that certain submissions of the appellant on overpayment recoverability are arguable. I therefore grant leave to appeal.

Direction to the Department

20. Considering it necessary to enable the question at issue in these proceedings to be determined, I directed the respondent to make written observations addressing the following questions:

> (i) In general, does the Department accept that a claimant may meet the obligation under regulation 32 of the Social Security (Claims and Payments) Regulations (NI) 1987 to make disclosure of a material fact to the Department by authorising a third party, such as the appellant's wife in this case, to disclose that material fact?
>
> (ii) It is not clear to the Commissioner how the ESA entitlement of the appellant was calculated and therefore whether the ESA award included an element in respect of the appellant's wife. In any event, was the appellant's wife either a "beneficiary" or "a person … on whose behalf sums by way of benefit are receivable" for the purposes of the duty under regulation 32 and therefore a person having her own personal duty to disclose distinct from that of the appellant?
> (iii) Does the Department accept that a telephone call was made by the appellant's wife to the Department on 27

February 2014, notifying the fact that the appellant would soon be receiving an occupational pension?

(iv) If not, does the Department dispute that the tribunal was legally entitled to make a finding, on the basis of the evidence before it including oral evidence, that a telephone call was made by the appellant's wife to the Department on 27 February 2014, notifying the fact that the appellant would soon be receiving an occupational pension?

(v) If such a telephone call was made on 27 February 2014, on what administrative or legal basis would the Department have declined the disclosure made by the appellant's wife and have required direct communication from the appellant?

(vi) If the fact of a pending occupational pension award was disclosed by the appellant's wife on 27 February 2014, what administrative action should the Department have taken at that date?

(vii) If disclosure of the pending occupational pension award was made by the appellant's wife, and the appellant therefore knew that the Department was aware of his occupational pension, what ongoing duty to disclose would remain on the appellant under regulation 32(1A) of the Claims and Payments Regulations?

(viii) Does the personal experience of the appellant as a former civil servant give rise to any additional duty to disclose, or affect the nature of the general duty under regulation 32(1A) of the Claims and Payments Regulations?

(ix) If disclosure had already been made under regulation 32(1A), what additional duty to disclose, if any, might arise under regulation 32(1B) of the Claims and Payments Regulations and what was the relevant change of circumstances if so?

(x) In particular, did the fact of actual payment of the occupational pension give rise to any new duty to disclose, bearing in mind the inquisitorial nature of social security adjudication as discussed in *Kerr v Department for Social Development* [2004] UKHL 23, or did any relevant change of circumstances occur?

(xi) Does the personal experience of the appellant as a former civil servant give rise to any additional duty to disclose, or affect the nature of the general duty under

regulation 32(1B) of the Claims and Payments Regulations?

21. Mr Clements duly responded in writing and his responses were developed further at hearing. The appellant made further submissions of material in response to Mr Clement and in support of his case. In light of my analysis of the legal issues, not all of the responses are relevant and I do not intend to address some of them further. In so far as they are relevant, I will indicate the Department's response to particular queries in the context of the submissions made at the hearing of the appeal, along with the appellant's response.

Hearing and submissions

22. I held an oral hearing of the appeal. The appellant attended and made submissions, accompanied by his wife. The Department was represented by Mr Clements. I am grateful to each of them for their assistance.

23. At my request, Mr Clements clarified the concession previously advanced. On behalf of the Department he accepted that the tribunal had not indicated what evidence was before it to calculate the overpayment in the case and that it had not evidently relied on any evidence of the actual payments of benefit made. He indicated that there was a working out of the overpayment figure in the tribunal papers at Tab 11, based on the original overpayment and indicating the amount previously judged non-recoverable. However, the tribunal had not referred to those figures to arrive at the overpayment figure and its reasoning was therefore unclear. He submitted that, while this was an error of law, I could nevertheless correct the error myself, and he maintained that in this context the overpayment was still recoverable.

24. At the beginning of the hearing, the appellant applied to admit new evidence. He submitted that he had evidence that the Department had been told twice that he was a civil servant paying into an occupational pension – firstly in his application for ESA in 2009 and secondly upon his application in 2013 on form ESA1. He submitted that the Department was informed three times of his ill health retirement and impending pension. This was in his ESA50 form of December 2013, in a related GP letter and in the phone call to ESA in February 2014. He submitted that he was placed into the support group on the date of his retirement and argued that this was not coincidental, but directly linked to the information he had supplied.

25. The appellant's main submission in the case, however, remained that he had made disclosure of the fact that he was to receive an occupational pension by way of his wife's phone call to the Department. The appellant observed that the tribunal had accepted that the Department was contacted by his wife in a timely manner with full pension details at hand. He submitted that this complied with the requirements of relevant

legislation. He submitted that the staff member of the Department who took the telephone call did not fulfil their duties and that this was the cause of the overpayment.

26. The appellant submitted that the tribunal was not correct to place weight on his experience as a civil servant to give rise to a continuing duty of disclosure and that the past civil service background of the appellant and his wife was irrelevant to the applicability of the statutory duty in the particular case. He submitted that, as all material facts about the amount and date of payment were within the appellant's wife's knowledge and had been offered to the Department, no further duty of disclosure arose when actual pension payments commenced.

The telephone call and the Department's recording system

27. The Department disputed at the tribunal hearing that the telephone call from the appellant's wife had been made as claimed. However, the tribunal had accepted the account of the appellant's wife that she had made a telephone call to the Department on 27 February 2014 and accepted that she had contemporaneously made the handwritten note on a Departmental letter dated 21 February 2014. In this context, I asked whether the Department continued to dispute that a telephone call was made to the Department on 27 February 2014 and/or whether it accepted that the tribunal was entitled to reach this conclusion.

28. Mr Clements outlined that no record of the call was to be found in the Department's records. He observed that the computer system used by ESA to record both outgoing and incoming calls – the Customer Account Management (CAM) system – automatically creates a record of calls. The system, at least as it was on 27 February 2014, retained an audio recording of the call for 14 months. After this point, the recording would have been deleted from the system. However, the system would continue to show that a telephone call was made at the time and date on which it was made – i.e. if an incoming call to ESA is made on 27 February 2014, then an entry would be automatically made on the CAM system which shows, in perpetuity, that an incoming call was made on 27 February 2014. Any manual notes added by ESA staff made in respect of that call will also permanently remain on the system.

29. Mr Clements noted that there was no entry on the CAM system that an incoming call was made in respect of the appellant's award on 27 February 2014. The Department's officers who made submissions to the tribunal highlighted that it is not possible for an entry on the CAM system to be deleted. They also noted that "all available clerical and electronic records" were checked for details of the call and that no record of it was found.

30. However, he now accepted that there was a significant possibility that the telephone call was made by the appellant's wife and was not recorded on the CAM system. He referred to internal guidance for ESA staff where the

"claimant" telephones to disclose a change of circumstances. He noted that there was no equivalent guidance for where a third party telephones to disclose a change of circumstances, but presumed that the procedure should not be significantly different. The guidance is as set out below:

> *If the claimant telephones the ESA Centre with a change of circumstances, take the following action:*
>
> *1. Complete the Handle Inbound Call Smartscript with claimant where the Reason for Contact is captured;*
>
> *2. Search for claimant. On the return of details back from CIS, a Contact History Record is automatically logged against the claimant;*
>
> *3. Ask the Security Questions and on success, user is taken to the Contact History view where contact record can be viewed …*

31. He observed that the guidance continues on for a while, but the point he wished to highlight was that the "Contact History Record" on the CAM system is only created during step 2 of the process. Therefore if the staff member terminates the call during step 1 (i.e. while establishing the reason for the contact), the call is not automatically logged on the CAM system. On a reading of the appellant's wife's note of the call, he accepted that it was quite conceivable that the call was terminated during step 1 of the process.

32. He stated that this would not explain why the ESA officer taking the call did not make a manual note of the call on the CAM system (or make a handwritten note of the call), as he would have been expected to do in line with the Department's procedures, but considered it possible that either he mistakenly thought that the call had been automatically recorded on the CAM system or simply that he was negligent in his duties.

33. He observed further possible explanations why the call, if made, cannot be found on the CAM system. It was possible, for example, that the staff member made a keying error when searching for the claimant's profile on the CAM system, e.g. by typing in his national insurance number incorrectly. If so, this might have led to the entry of the call being associated with the wrong claimant's profile. It was also possible that the CAM system malfunctioned in some manner. Finally, if the appellant's wife called a number used by ESA staff who do not normally take telephone calls from the public (e.g. a decision maker) then the call would not automatically be recorded on the CAM system.

34. While emphasising that he did not consider any of these latter three potential explanations to be particularly likely, he considered that there was a significant possibility that one of the potential explanations outlined

above applied in this case. Given the balance of probabilities, he did not dispute the tribunal's finding that the appellant's wife telephoned ESA on 27 February 2014 and that during this call she notified ESA that the appellant would be receiving an occupational pension.

The Department's basis for declining disclosure

35. I asked, if a telephone call was made on 27 February 2014, on what administrative or legal basis would the Department have declined the disclosure offered by the appellant's wife and have required direct communication from the appellant. Mr Clements indicated that he had made enquiries concerning the administrative basis for declining the disclosure made by the appellant's wife. The answer he received from the Department's Guidance Centre was as follows:

> "*in general, from a data protection point of view, we can't take information from a third party without the claimant being present, because the caller might not necessarily be who they say they are, which is why security questions have to be answered correctly – but it would certainly be in order to call the claimant back on the number held on the system The exceptions are of course appointees etc. and whoever notifies the Department of a claimant's death, and these are recorded on PDCS and available in CIS (Searchlight), CAM, and now CAM Lite*."

36. He noted that the approach taken by the ESA office is not to accept any attempted disclosure of a change of circumstances made by a third party via telephone unless the claimant is also present and answers security questions correctly. However, he stated that, to the best of his knowledge, there was no legal basis and no acceptable administrative basis to decline the disclosure made by the appellant's wife.

37. He observed that she did not request the appellant's data and there was no need to disclose the appellant's data to her in order for the Department to accept disclosure of his occupational pension. It was not in breach of the Data Protection Act 1998 or any other data protection legislation in operation at that time for the Department to receive information about a claimant from a third party without the claimant being present. He noted that, for example, many benefit fraud investigations were prompted by information received from a third party without the claimant in question being present.

38. He accepted that there was a necessity for the Department to verify a change of circumstances notified by a third party in many cases, but this did not mean that the Department cannot act upon any information from a third party concerning a change of circumstances without the claimant being present to answer security questions.

What should the Department have done with the information?

39. I asked Mr Clements, if the fact of a pending occupational pension award was disclosed by the appellant's wife on 27 February 2014, what administrative action should the Department have taken at that date. Mr Clements replied that the officer receiving the call should have made a note on the appropriate computer system that an ESA officer should contact the appellant, both in order to verify the information provided by his wife and to obtain further relevant details about the pension.

40. He submitted that the Department should have subsequently contacted the appellant by way of a telephone call, a letter (perhaps accompanied by an appropriate form), or both. The appellant should have been advised at that time to notify the Department when his occupational pension went into payment. In addition, if it became known to the Department when the pension provider had indicated the pension was payable from (18 March 2014 per the pension provider's letter of 26 February 2014), then a case control should have been set and, if this had been done, the ESA office would have been alerted on 18 March 2014 to make enquiries into whether the pension had gone into payment. In that event, the Department should have considered suspending payment of the appellant's benefit until such enquiries revealed whether or not a supersession of the appellant's award was appropriate.

Ongoing obligations to disclose

41. I next asked Mr Clements, if it had been found that disclosure of the pending occupational pension award was made by the claimant's wife, and the appellant therefore knew that the Department was aware of his occupational pension, what ongoing duty to disclose would remain on the appellant under regulation 32(1A) of the Claims and Payments Regulations.

42. Mr Clements responded that the ESA40(NI) form issued to the appellant on 5 November 2013 gave the instruction to *"… tell us if you or your partner … get a pension*" and in the section of the form titled "*Changes you must tell us about*", to tell the Department of "*Any changes to do with pension income … by 'pension income' we mean … occupational pension*." He submitted that on the best available evidence, the appellant's wife did not disclose the amount of income or the date from which the income would be paid from, reasoning that, if so, then the appellant did not comply with the latter instruction (or, at best, only partially complied with it). He also submitted that the appellant did not fully comply with the first instruction, particularly if the appellant's wife did not notify the Department the date on which the pension was due to begin from. He submitted that the extent of the information that the appellant's wife gave to the Department before she was told that the Department "couldn't speak to her about the pension" was not clear. He submitted that it was not evident from the note of her

call that she actually told the Department anything more than that there was an occupational pension going into payment "next month".

43. Relying on paragraph 7 of the Department's submission to the tribunal dated 24 September 2019, Mr Clements submitted that on 27 February 2014 "*neither [the appellant], nor his wife, were in possession of the relevant facts in order to satisfy disclosure of the material facts. By [the appellant's] own admission the correspondence states that the pension was payable from 19-March-2014 and amounting to £11,007.96 per annum (£917.33 per month). Per the payment record provided by [the appellant's] pension provider, it is shown that the first payment was not made until 31-Mar-2014 and amounted to £924.87.*"

44. I asked, as found by the tribunal, whether the personal experience of the appellant as a former civil servant gave rise to any additional duty to disclose, or affected the nature of the general duty under regulation 32(1A) of the Claims and Payments Regulations. Mr Clements generally submitted that a claimant's knowledge or personal experience may be relevant to determining questions of reasonableness and whether that claimant has met a duty to disclose imposed by regulation 32(1A). However, he indicated disagreement with the implication of the tribunal's finding that it was less reasonable for the appellant, as a former civil servant, to believe it was unnecessary to take further action in comparison to other claimants who were not formerly civil servants. He suggested that the situation may be different if the appellant was a former civil servant with extensive experience of working in social security adjudication. However, he did not accept that it was reasonable for the appellant to make assumptions that he had met his duty to disclose under regulation 32(1A) and that no further action was necessary on his part, former civil servant or not.

45. I then asked, if disclosure had already been made under regulation 32(1A), what additional duty to disclose, if any, might arise under regulation 32(1B) of the Claims and Payments Regulations and what was the relevant change of circumstances if so. Mr Clements submitted that there would be no additional duty to disclose under regulation 32(1B). He referred to Commissioner Jacobs's dictum at paragraph 28 of the decision *CDLA/2328/2006, when he said*:

> *"If the Secretary of State has issued an instruction to the claimant or to claimants generally, that will found a duty under paragraph (1A) and there should be no need to rely on paragraph (1B). There may be circumstances in which the Secretary of State could not rely on paragraph (1A) and could only rely on the instructions under paragraph (1B), but I have not been able to imagine one."*

46. Mr Clements indicated that he also had been unable to imagine such circumstances, and submitted that they do not apply in the present case at least.

Inquisitorial nature of social security adjudication

47. I asked Mr Clements whether the actual payment of the occupational pension gave rise to any new duty to disclose, bearing in mind the inquisitorial nature of social security adjudication as discussed in *Kerr v Department for Social Development* [2004] UKHL 23. Mr Clements submitted that the actual payment of the occupational pension was itself a relevant change of circumstances which the appellant was instructed to disclose. He submitted that the only "changes to do with pension income" disclosed to the Department by the appellant's wife was that the appellant would be in receipt of an unknown amount of pension income from an indeterminate date. Even bearing in mind the inquisitorial nature of social security adjudication, Mr Clements submitted that this cannot amount to disclosure of "changes to do with pension income" as instructed in the ESA40(NI).

48. Mr Clements noted that in two cases I had decided - *BMcE v Department for Communities* [2017] NI Com 34 and *JJ v Department for Communities* [2020] NI Com 70 - in the context of the differently worded instructions given in the INF4(PC) form, disclosure may, at least under certain circumstances, be made in advance without an additional requirement to notify the Department of the details of the income from that occupational pension. However, he submitted that the present case could be distinguished from *BMcE* and *JJ* due to the additional instruction in the ESA40(NI) form to disclose "changes to do with pension income". In the other cases, the claimants only received an instruction in the INF4(PC) form to "Tell us if you or your partner start to … receive any personal or work related pensions" (*BMcE)* and "Tell us if you start to receive an occupational pension" (*JJ*).

49. With respect to the inquisitorial nature of decision making in this context, Mr Clements noted that in the recent Upper Tribunal decision *PPE v Secretary of State for Work and Pensions (ESA)* [2020] UKUT 59 (AAC), it was observed at paragraph 66 that:

> *"66. Kerr was a case about the information a claimant was required to provide at the outset of a claim. In Hinchy (see paragraphs 42 to 45 above) similar principles were extended to the requirements for existing claimants to keep the Secretary of State informed."*

50. In *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16, Baroness Hale stated at paragraph 49:

> *"The issue in this appeal is whether in the circumstances the respondent failed to disclose any material fact to the Secretary of State for the purpose of section 71 of the Social Security Administration Act 1992 in consequence of which he made a payment which he would not have made but for that failure. The size and complexity of the system is relevant to that issue in at least three ways. First, if the specialist judiciary who do understand the system and the people it serves have established consistent principles, the generalist courts should respect those principles unless they can clearly be shown to be wrong in law. Second, there is nothing intrinsically wrong in relying on the claimant to give the Secretary of State the information he requires to make his decisions, provided that this is information which the claimant has and that the Secretary of State has made his requirements plain. Nor is it intrinsically wrong to include in these requirements information which is already known in one part of the system but not in the part that needs to know it to make the decision in question. (It is different, of course, if the claimant does not know and cannot reasonably be expected to know but the Department does and can: see Kerr v Department for Social Development [2004] UKHL 23, [2004] 1 WLR 1372 [now reported as R 1/04 (SF)].). In an ideal world, administrative systems might be so efficient that any official in one office might at a few clicks of a mouse be able to retrieve all the information about a particular claimant held everywhere else in the system. But many would find such efficiency sinister. It is certainly not yet with us. Third, however, the way in which claimants and others are required to give their information should reflect the respective knowledge and expertise of those who administer the system, on the one hand, and of the claimants who have to deal with it, on the other. The fact-finding process is a co-operative effort in which both have a part to play."*

51. Mr Clements accepted that Baroness Hale's third point applies to this case, and to all cases where a claimant is under a duty to disclose a change of circumstances to the Department.

52. Mr Clements noted that in *JJ v Department for Communities* (PC) [2020] NI Com 70, the claimant telephoned the Department on two occasions to notify it that he was due to receive an occupational pension. He did not disclose the date he would receive the pension income from, nor did he disclose the amount of pension income, as these details were not known to him at the time. He did not notify the Department that he had started to receive payment of pension income until 15 months after he started to receive the pension income. Equally, the Department did not make any

further enquiries concerning the occupational pension after the claimant had notified the appropriate office that he was due to receive an occupational pension.

53. He observed that, as the Commissioner in that case, I had found that the Department's failure to pursue the information it needed in order to determine the claimant's entitlement to benefit meant that it had not played its part in the context of the inquisitorial nature of social security adjudication. I determined that, in the circumstances, the claimant could reasonably conclude that he had met his obligation to disclose. As such, the overpayment of benefit was not recoverable from him as he had not failed to disclose a material fact.

54. Mr Clements submitted that the present case can further be distinguished from *JJ* in that the nature of the contact made by the appellant's wife could not mean that the appellant was justified in concluding that he had met his obligation to disclose. The appellant knew that the Department had "declined the disclosure" made by his wife, as I had put it in my direction above, and that an officer of the Department had informed his wife that she could not make the disclosure. In these circumstances, Mr Clements submitted that the appellant could not reasonably conclude that he had met this obligation to disclose and that no further action was necessary. He did not dispute that the Department failed to make the necessary enquiries following the appellant's wife's notification that an occupational pension would go into payment. However, he submitted that in this case both parties have failed, albeit to differing extents, to play their part in the fact-finding process.

55. Mr Clements submitted, following the decision of a Tribunal of Commissioners in Great Britain in *R(SB) 15/87* (at paragraph 29), that a claimant may meet an obligation to disclose under regulation 32 by authorising a third party to make disclosure of a material fact on his or her behalf, provided that all of the following conditions are met:

> (a) The information is given in connection with the claimant's benefit entitlement and in compliance with any instructions given by the Department;
>
> (b) The claimant is aware that the information has been provided; and
>
> (c) In the circumstances it is reasonable for the claimant to believe it is unnecessary to take further action.

56. He submitted that it was not reasonable for the appellant to assume that no further action was required following his wife's call and that the third condition in *R(SB) 15/87* concerning third party disclosure had not been met. Therefore, in the particular circumstances of this case, the attempted

disclosure by a third party was insufficient to relieve the appellant of his obligation to disclose under regulation 32(1A).

57. He further submitted that there would be two causes for the overpayment: the appellant's failure to disclose and the Department's failure to take appropriate action in response to his wife's telephone call. In the light of the decision in *Duggan v Chief Adjudication Officer* (reported in the appendix to *R(SB) 13/89)* as one cause of the overpayment was the appellant's failure to disclose a material fact, he submitted that the overpayment was recoverable from the appellant under section 69(1) of the Social Security Administration (NI) Act 1992.

58. The appellant for his part submitted that the disclosure made by his wife met the statutory duty placed on him. He relied on *JJ v DfC* on the ground that he had similarly made disclosure that the Department did not follow up. He submitted further that the tribunal had erred in law by placing an additional onus on his as a former civil servant, when he knew nothing about the adjudication side of benefits. He submitted that he had no knowledge of the effect of receiving an occupational pension on his ESA entitlement.

Assessment

59. At the hearing before me, the appellant sought to introduce further facts and evidence, submitting that the Department knew, from a variety of elements of his ESA claim and documents given in support of it, that he was to receive an occupational pension. However, I did not find that material helpful, since it had not been before the tribunal that decided the appeal and therefore the tribunal could not be faulted as a matter of law for failing to address it. Further, it was not entirely persuasive of the point the appellant sought to draw from it, as it was indirect evidence that did not refer expressly to the pension.

60. For example, the appellant submitted that the fact that he was placed in the ESA support group on the exact date of his medical retirement revealed knowledge on the part of the Department. However, I accept the submission of Mr Clements that the fact that the appellant was placed in the ESA support group on the exact date of his retirement was entirely coincidental. Being placed in the support group would have been dependent on meeting the criteria established in Schedule 3 of the Employment and Support Allowance Regulations (NI) 2008, and not by retirement on medical grounds. While I admit the evidence, I do not find it helpful in resolving this appeal.

61. It seems to me that a much stronger case can be made by the appellant based on the acceptance by the tribunal that actual disclosure of the occupational pension was made on his behalf, and at his direction, by his wife. The Department disputed that a telephone call was made prior to the tribunal's decision and therefore did not accept that there had been any

disclosure of the occupational pension. However, it does not now seek to go behind the tribunal's finding of fact that the call was made. Indeed, Mr Clements has arrived at an analysis that explains, in the particular circumstances, the apparent inconsistency with the Department's telephone system records. That means that what is really at issue in the present proceedings is the effect of that telephone call to the Department, whether it amounted to sufficient disclosure as a matter of law and whether the tribunal was correct in finding that it did not.

The duty to disclose in social security law

62. The legal position regarding the requirement to disclose a change in material facts to the Department can be summarised simply. In *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16, Lord Hoffmann and Baroness Hale held that the source of the duty to disclose a material fact (for the purposes of the Great Britain equivalent of section 69 of the 1992 Act) arose from regulation 32 of the Claims and Payments Regulations. At paragraph 54, Baroness Hale said:

> "54. What is the source and content of that duty? One obvious source (although there may be others to which our attention has not been drawn) are the regulations under which claimants and others may be required to furnish information to the Secretary of State. The vires for such regulations are contained in section 5 of the 1992 Act (quoted by my noble and learned friend, Lord Hoffmann, in paragraph 17 earlier). The relevant regulation at the time was regulation 32(1) of the Social Security (Claims and Payments) Regulations 1987 (quoted by Lord Hoffmann, in paragraph 19). The beneficiary "shall furnish in such manner and at such times as the Secretary of State…may determine such certificates and other documents and such information or facts affecting the right to benefit or to its receipt as the Secretary of State…may require…, and in particular shall notify the Secretary of State…of any change of circumstances which he might reasonably be expected to know might affect the right to benefit, . . ."".

63. This principle has been applied in this jurisdiction in relation to the subsequently amended version of the direct equivalent of the GB regulations. Thus, in *TT v DSD* [2016] NI Com 38, I said:

> "17. It is settled law that the question of failure to disclose, for the purpose of section 69 of the 1992 Act, is linked to the obligations placed on a claimant by regulation 32 of the Claims and Payments Regulations. These include an obligation to furnish information or evidence which the Department might require for determining whether a decision should be revised or superseded (arising from

> regulation 32(1)), an obligation to furnish information or evidence as the Department may require in connection with payment of the benefit claimed or awarded (arising from regulation 32(1A)) and a distinct obligation to notify the Department of any change of circumstances which the claimant might reasonably be expected to know might affect the continuance of entitlement to benefit (arising from regulation 32(1B)) (see *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16 at paragraphs 32, 40 and 54) …"

The circumstances of the present case

64. It is evident from the case papers that the appellant was receiving contributory ESA. The Department has not retained the record of the original decision awarding ESA, but it is accepted that the appellant was sent a pro forma M1000 letter notifying him of his award and an ESA40(NI) information leaflet in the form in use from April 2013. At page 15, under the heading "Changes you must tell us about", is an instruction:

> "While you are getting Employment and Support Allowance you must tell us straight away if any of your circumstances change. If you are not sure if we need to know something, tell us anyway …"

65. On page 16 is an instruction:

> "You must tell us if you or your partner … get a pension or your pension changes".

66. On page 17, a further instruction appears under the same general heading, with a sub-heading "Any changes to do with pension income, benefits and allowances", reading:

> "Some pension incomes, benefits, capital or savings can affect the amount of Employment and Support Allowance that you get.
>
> By "Pension income" we mean:
> - occupational pension …
>
> If you have not already told us about any pension income, benefits of allowances you or your partner get, please tell us straight away…".

67. Subsequently, the appellant was found by his employers to be permanently incapable of his usual occupation and he elected to retire early on medical grounds. He was entitled to an occupational pension, having paid into a civil service pension scheme during his working life. He

received a letter dated 26 February 2014 indicating that pension scheme benefits had been authorised by the Principal Civil Service Pension Scheme (NI) upon ill health retirement on 18 March 2014. The letter enclosed a Statement of Benefits which indicated a commencement date and the amount of the annual pension (at Tab 21a in the tribunal papers).

68. The tribunal accepted that the appellant's wife rang the Department on 27 February 2014 on the basis of her oral evidence to the tribunal. She told the tribunal that she had written a note of the conversation on a letter from ESA received by the appellant on 21 February 2014. The ESA letter had the relevant Departmental telephone number set out on it. I observe that it would have been natural behaviour to have referred to the letter to obtain the relevant telephone number for the ESA Centre and then, having that letter in front of her, to have written on it. The appellant's wife recorded:

> "t/c to ESA to let them know that pension going into payment next mth – spoke to Steven who said they will contact [the appellant] directly as they couldn't speak to me about it – [appellant's wife] 27/2/14".

69. The context of the conversation is that the appellant was ill and had authorised his wife to ring the Department on his behalf. The Departmental official indicated that he could not discuss the case with her. However, she was given to understand that there would be follow up contact. It seems to me that this raises questions about whether disclosure had been made in accordance with the statutory duty and Departmental instructions.

The delegation of the duty to disclose

70. There are formal systems in social security administration for appointment of a person to act on behalf of people who are themselves incapable of acting. The appellant did not fall into this category. However, he sought to meet his responsibility to make disclosure by asking his wife to act for him informally. In response to my query as to whether a claimant could meet the statutory obligation to make disclosure through a third party, Mr Clements referred me to *R(SB)15/87* – a decision of a Great Britain Social Security Tribunal of Commissioners. He accepted that a claimant may meet an obligation to disclose under regulation 32 by authorising a third party to make disclosure of a material fact on his or her behalf, provided that all of the following conditions are met:

> (a) The information is given in connection with the claimant's benefit entitlement and in compliance with any instructions given by the Department;
>
> (b) The claimant is aware that the information has been provided; and

(c) In the circumstances it is reasonable for the claimant to believe it is unnecessary to take further action.

71. While I understand how Mr Clements has drawn those principles from R(SB)15/87, I consider that the context qualifies their applicability. Specifically, that case involved a parent claiming supplementary benefit (SB) for a dependent child. When she left school and claimed SB in her own right the father did not make any disclosure, but a submission was made that the child's claim amounted to disclosure of the facts. The Commissioners said:

> "29. We turn now to the question by whom the disclosure should be made. On this issue we are firmly of the opinion that, although section 20 uses the words "any person", in order to give efficacy to the section—and without straining the meaning of the words or departing from the principles of statutory interpretation we have accepted—, where the expenditure in question has taken the form of benefit payable to a claimant, the person upon whom the onus of disclosure is placed must be the claimant. In our judgment disclosure must be made, in connection with the claimant's own benefit, by the claimant himself or, on his behalf, by someone else. In this context we would consider that disclosure could fall within the ambit of having been made "on behalf" of the claimant if someone else were to give information concerning the claimant in the course of some entirely separate transaction (for example, in connection with the informant's own claim for benefit), provided that:—
>
> (a) the information was given to the relevant benefit office;
>
> (b) the claimant was aware that the information had been so given;
> (c) in the circumstances it was reasonable for the claimant to believe that it was unnecessary for him to take any action himself.
>
> Whether or not a claimant has made disclosure will therefore be a question of fact to be decided upon the evidence before the tribunal, and we have deliberately refrained from the use of the word "agency" in connection with information given by some third party as, in our judgment, that would import an unnecessary legal complication into what we consider to be essentially a simple question of fact. Neither would it be helpful for us to attempt to give examples of situations which might arise; suffice it to say that we are clearly of the opinion that casual

> or incidental disclosure by some other person (in the present case E, for example) of information regarding the claimant will not discharge the duty of disclosure".

72. I consider that the general principle that Mr Clements draws from this case does not apply in the present context. It seems to me that the qualifications at (a), (b) and (c) only apply in cases where information is conveyed indirectly in the course of a separate transaction, such as an independent claim for benefit by a third party, as opposed to being communicated directly at the request of the claimant. Where disclosure was made directly at the request of the claimant, as here, the qualifications do not appear to be relevant. It seems to me that, having asked his wife directly to disclose the material fact of the occupational pension, it cannot be disputed that the disclosure was properly made on behalf of the appellant.

The effectiveness of the disclosure

73. I consider that the crux of this case lies in the issue of whether the limited disclosure made by the appellant's wife fully met the statutory duty on the appellant. Although not expressly stated, it appears that the tribunal accepted that there was communication of the fact that a pension would start "next month" in the course of the telephone call. The tribunal then focussed on the issue that the Department had not accepted detailed information from the appellant's wife, and whether the statutory obligation to make disclosure had been met in all the circumstances.

74. The Department has accepted that the procedure adopted when the appellant's wife telephoned the Department was without any legal basis. It is at the least unfortunate that, when an attempt was made to disclose of a change of material circumstances, the disclosure was evidently rebuffed because of an interpretation of Departmental rules about data protection. Those rules exist to prevent disclosure by the Department of a claimant's personal data, not to prevent the claimant – or those he authorises - making disclosure to the Department. Many fraud investigations commence due to unsolicited information about claimants being disclosed to the Department by third parties, and it does not appear likely that it would reject such information on a similar basis. Whatever the reason for the procedure followed on 27 February 2014, it appears to me that the Department itself put obstacles in the way of the appellant in meeting his legal obligation to make disclosure. Nevertheless, the fact that the appellant was to start to receive a pension was conveyed to the Department, albeit that the precise details offered were not then accepted.

75. Whereas the material fact that a pension was to come into payment was disclosed, Mr Clements submits that this was not sufficient to comply with the statutory requirement to disclose material facts. He submits that the Department did not know when it would commence and how much would be paid. For his part, the appellant submits – and it is evident from Tab

21a - that this information was in the possession of his wife at the time of the telephone and that she was ready to offer it.

76. The PCSPS(NI) letter of 26 February 2014 gives a retirement date of 18 March 2014, which is the date of commencement of the pension. The letter also detailed the amount of pension to be paid annually. Whereas only the general fact of the commencement of the pension next month was conveyed, it is evident that the appellant's wife was ready and able to offer information on the precise commencement date and relevant annual amount. The issue for analysis is whether the general fact that the pending pension award was conveyed to the Department was enough to meet the legal obligation and thereby avoid liability for overpayment recovery.

The implications of Kerr v Department for Social Development

77. In some previous decisions I have given, such as *BMcE v Department for Social Development* [2017] NI Com 34, *RM v Department for Communities* [2017] NI Com 18 and *JJ v Department for Communities* [2020] NI Com 70, I have sought to apply the principles identified by the House of Lords decision in *Kerr v Department for Social Development* [2004] UKHL 23 within overpayment recovery cases.

78. *In Kerr v. Department for Social Development* Baroness Hale stated, at paragraph 61-62, that the process of benefits adjudication is inquisitorial rather than adversarial. In determining entitlement to benefit, both the claimant and the Department must play their part. The Department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. Lord Hope had said at paragraph 15:

> *"in this situation there is no formal burden of proof on either side. The process is essentially a fact-gathering exercise, conducted largely if not entirely on paper, to which both the claimant and the Department must contribute".*

79. In the context of claims, facts which may reasonably be supposed to within the claimant's own knowledge are for the claimant to supply at each stage of the appeal. However, the claimant must be given a reasonable opportunity to supply them.

80. Benefit rules are complex and sometimes counterintuitive and cases such as *Hinchy* and *Kerr* are founded on the premise that claimants cannot be expected to know them. That is why the duty on the claimant is to respond to the instructions given by the Department and to complete forms in the manner required by the Department. However, as in *Kerr v Department for Social Development*, the claimant is entitled to expect the Department to play its part, particularly where those instructions have been complied with.

81. Thus, in *JJ v DfC*, when the claimant rang the Department twice to advise that he would be receiving a pension from his 65th birthday, I considered that the Department could not then expect the claimant to ring a third time to indicate that payment of the pension had now commenced. Similarly, when the claimant in *RM v DSD* informed the DEL adviser that his partner was due to start a new job, I considered that it was for the Department to seek the information it required about rates of pay and hours worked. In that case, at paragraph 49, I said:

> 49.… I observe that the Department issued B7 forms to the appellant when he notified the DEL adviser that he had commenced part-time self-employment in order to ascertain his level of income. This is to be expected in an inquisitorial benefits adjudication system. Once he had reported the fact that his partner was working, it would have been reasonable to expect the Department to issue similar forms to his partner. However, the Department's failure to take action cannot be attributed to the appellant. I consider that, once the Department had been placed on notice that the appellant's partner was working, it was for it to seek the appropriate information about her earnings. The appellant, who had made appropriate disclosure in compliance with his statutory obligations, cannot be blamed for the operational failings of the Department.

82. I consider more generally that *Kerr* has implications for the duty to disclose. Thus, if a claimant knows that his wife is shortly to start a job, he clearly has to tell the Department that material fact. However, he cannot be expected to know what hours or rates of pay she may be permitted before his benefit entitlement is affected. His disclosure of the fact that his wife will start a job triggers the responsibility of the Department to play its part. The Department has to issue the appropriate request for information about hours and rate of pay. It cannot in those circumstances complain that, whereas the claimant had disclosed the fact of his wife getting a job, he failed to disclose that she would be getting paid wages.

83. I consider that this is the same situation. The Department is essentially saying that, whereas the appellant disclosed that he would be getting an occupational pension from the following month, he nevertheless failed to disclose how much he would receive and at what intervals. However, it is for the Department, once the claimant has disclosed the material fact that a pension is to commence, to enquire about the details of the pension that it requires in order to assess how entitlement may be affected.

Causation

84. Mr Clements acknowledged my approach in the cases referred to above, but nevertheless sought to distinguish the present case from them. He

placed particular reliance upon *Duggan v Chief Adjudication Officer* (reported as *R(SB) 13/89*), submitting that, as only one cause of the overpayment had been the Department's failure to follow up the telephone call, and as material facts were not fully communicated, there was recoverability under section 69(1).

85. In *Duggan*, a supplementary benefit (SB) claimant had reported that his wife was in receipt of maternity allowance. Maternity allowance payment was for a fixed duration, and an adjudication officer proactively adjusted the SB entitlement upwards when the maternity allowance was due to cease, without contacting the claimant. However, at the end of the maternity allowance period, the claimant's wife had claimed unemployment benefit in her own right, meaning that the level of SB should have been further adjusted. The claimant had submitted that the cause of the overpayment of SB was the action of the adjudication officer in changing the rate of payment, and not his failure to disclose his wife's unemployment benefit. The tribunal in that case had accepted this argument. However, May LJ in the Court of Appeal in England and Wales held that:

> "The wrong assumption by the Adjudication Officer may in certain circumstances have been a cause of the overpayment, but it does not follow that it was the sole cause. As a matter of common-sense, which questions of causation always are, if one poses the question: did the failure of the claimant to disclose the fact that his wife was in receipt of unemployment benefit have as at least one of its consequences the overpayment of the supplementary benefit?, the only reasonable answer that one can give is "yes". It is for that reason that, despite the submissions which were made by Mr. Howell, I take the view that this appeal is inarguable".

86. However, *Duggan* can clearly be distinguished from the present case on the basis that, in *Duggan*, there had been no disclosure by the claimant of his wife's unemployment benefit. The claimant sought to rely solely on the adjudication officer's actions as the cause of the overpayment. Here there had been disclosure of the fact that the claimant was shortly to receive an occupational pension. As there had been disclosure, the principle applied in *Duggan,* which is solely addressed to issues of causation in the absence of disclosure, does not have application.

Ongoing duty to disclose

87. In all the circumstances, Mr Clements submitted that any disclosure was incomplete and that the Department could still rely on the instructions in the ESA40(NI) form issued to the appellant as evidence of a failure to disclose. He sought to distinguish between the position where the appellant communicated his anticipation that he would be paid a pension

and the position after he actually received the pension payments. He relies on the wording of the ESA40(NI) at page 16 instructing him to "tell us if you … get a pension …", and the wording on page 17, "If you have not already told us about any pension income … you … get, please tell us straight away".

88. However, it seems to me that the instructions have to be addressed in context. The material fact that a pension was anticipated, and that it was due to commence in the following month, had been communicated. On a reasonable construction of the ESA40(NI) instruction at page 16, he had already told the Department about getting a pension. On a reasonable construction of the instruction at page 17, he had already told the Department that he had got a pension income.

89. I would characterise the Department's submission as construing the ESA40(NI) instructions as a series of duties. I picture these like a Russian doll – with the first shell being the requirement to disclose the fact of being awarded the pension, the second the fact that payment had actually started, the third the fact of the precise amount received, the fourth the fact of exact date of payment, and so on with diminishing degrees of materiality. Mr Clements essentially submitted that the appellant had a new and separate duty to report facts at each level. However, it seems to me that it is really only one duty. Thus, once the fact of the imminent commencement of the pension had been disclosed, the commencement of payments was not sufficiently distinct to give rise to a new duty of disclosure. I am reinforced in that interpretation by the principles of *Kerr v Department for Social Development*. I am satisfied that the telephone call from the appellant's wife met the appellant's duty to disclose the material fact that he was shortly to receive an occupational pension. What the Department chose to do with that information – or rather not do – does not alter the fact that disclosure had been made.

The tribunal's approach and regulation 32(1B)

90. Whereas the Department's case was entirely founded on regulation 32(1A) and the appellant's failure to comply with the instructions in the ESA40(NI) leaflet, the tribunal opted to pursue a different approach. While accepting that there had been disclosure, it found that the background of the appellant and his wife as civil servants should have alerted them that the disclosure had not been effective.

91. The tribunal found that they should have realised that there was an effective failure of disclosure, once the Department did not revert to them in the way that had been indicated. In this context, it gave consideration to regulation 32(1B). This is a general duty on the claimant to notify the Department of any change of circumstances which he might reasonably be expected to know might affect the continuance of entitlement to benefit or the payment of the benefit as soon as reasonably practicable after the change occurs.

92. As noted above, with reference to paragraph 28 of the decision of Commissioner Jacobs in *CDLA/2328/2006,* Mr Clements fairly accepted that there would be no additional duty to disclose arising under regulation 32(1B). The duty under both paragraphs is a duty to notify a change in circumstances. The change of circumstances was the award of the occupational pension and it is difficult to see what additional duty regulation 32(1B) might add where regulation 32(1A) already applies.

93. Mr Clements did not agree with the tribunal's finding that the professional background of the appellant and his wife gave rise to a higher level of expectation for them to contact the Department again. However, in this context, he maintained the submission that the limited information provided by the appellant's wife was insufficient to discharge him of the general duty under regulation 32(1A).

94. While the tribunal articulated its decision in terms of regulation 32(1B), I do not consider that any different duty arises under that provision than the duty discussed in terms of regulation 32(1A). The tribunal essentially reasoned that, when the Department did not revert to them, as experienced civil servants the appellant and his wife should have been aware that something had gone wrong. It considered that they were placed under a new duty to disclose. However, it seems to me that no new duty can arise in these circumstances. The duty was to notify the change of circumstances – namely that an occupational pension was due to commence. As accepted by the Tribunal of Great Britain Social Security Commissioners in R(SB)15/87 at paragraph 25, "it is not possible to "disclose" to a person a fact of which he is, to the knowledge of the person making the statement as to the fact, already aware" (approving the statement of Latham CJ in the Australian case of *Foster v Federal Commissioner of Taxation (1951) 82 CLR 606*). Once disclosure had been made in compliance with regulation 32(1A), no new duty could arise under regulation 32(1B).

95. I consider that the tribunal erred, once it accepted that the fact of the occupational pension had been disclosed, by effectively placing a new duty of disclosure on the appellant in the absence of administrative action by the Department. On the basis of the evidence accepted by the tribunal, I am satisfied that the appellant made a disclosure of material fact sufficient to comply with his statutory duty. Therefore, I find that the tribunal has erred in law by finding otherwise.

96. As I consider that the tribunal has erred in law, I allow the appeal. I set aside the decision of the appeal tribunal. Under Article 15(8)(a)(i) of the Social Security (NI) Order 1998 I give the decision that I consider the tribunal should have given without making fresh or further findings of fact. I decide that the appellant did not fail to disclose the material fact that he was due to receive an occupational pension and that the ESA overpaid to

him between 28 March 2014 and 27 September 2018 is not recoverable from him.

(signed): O Stockman

Commissioner

11 October 2021