THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL JUDGE

Before: A J GAMBLE

Attendances:

For the Appellant: (Claimant) The claimant was not present. She was represented by Mr S Macaulay, Welfare Benefit Adviser, Citizens Advice and Rights, Fife.

For the Respondent: (Secretary of State for Work and Pensions) Mr C Pirie, Advocate, instructed by Ms C Anderson, Solicitor, of the Office to the Solicitor to the Advocate General for Scotland accompanied by Mr C White, Solicitor, DWP Legal and Ms F Dunn, DWP.

The appeal is allowed.

The decision of the Kirkcaldy First-tier Tribunal of 21 September 2016 is set aside.

That decision is remade as follows:

The case is remitted to the Secretary of State for an investigation of the claimant's relevant circumstances and for the amount of her entitlement to employment support allowance to be calculated from 21 October 2014 onwards.

REASONS FOR DECISION

1. This is an appeal by the claimant, brought with the permission of District Tribunal Judge Walker, against the decision of the Kirkcaldy First-tier Tribunal of 21 September 2016.

2. The claimant is a forty two year old woman. She was in receipt of incapacity benefit from 14 April 2001 until 14 March 2014. By virtue of a decision maker's decision dated 11 February 2014 her entitlement to incapacity benefit was converted to one to employment and support allowance from 15 March 2014. That decision placed her in the support group.

3. On 9 March 2016 the claimant requested backdating of her entitlement to income related employment and support allowance from 15 March 2014. She had not previously claimed the income related element of employment and support allowance although she had been given an opportunity to do so by the department on 26 February 2014. On 3 April 2016 a decision maker refused the claimant's request. That decision was reconsidered but not revised by another decision maker on 9 June 2016. The claimant then appealed. However the tribunal, by their decision under appeal in these proceedings, confirmed the decision maker's decision of 3 April 2016.

4. On 28 June 2017, Upper Tribunal Judge May QC directed an oral hearing. That hearing took place before me on 6 December 2017 when representation was as narrated above. The claimant did not attend. However Mr Macaulay had no objection to me proceeding in the claimant's absence. I did so. I am grateful to Mr Macaulay and Mr Pirie for their contributions to the debate.

5. There was considerable convergence between the positions taken up by each of the parties in their written and oral submissions. The only significant issue on which they differed was the start date for calculation of arrears of employment and support allowance due to the claimant. Mr Macaulay contended for 15 March 2014 whereas Mr Pirie submitted that 21 October 2014 was the appropriate date. Mr Macaulay and Mr Pirie were in agreement that the tribunal's decision should be set aside and that I should dispose of this appeal by substituting a decision remitting the case to the Secretary of State for investigation and the calculation of those arrears.

6. I fully accept that the period of just over seven months of potential entitlement to arrears at issue in this appeal is of very considerable financial importance to the claimant.

7. However, after careful consideration, I accept the written and oral submissions made on behalf of the Secretary of State and the analysis of the case presented in them.

8. It was the duty of the decision maker, acting on behalf of the Secretary of State, when making the conversion decision of 11 February 2014 in respect of the claimant under regulation 5(1) of the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No.2) Regulations 2010 to make that conversion decision in accordance with those regulations. Regulation 5(3) of those regulations required the issue to claimants of a "Notice of a Conversion Decision" specifying the amount of employment and support allowance to which they were entitled. Finally, regulation 8(1)(a) required a decision maker, acting on behalf of the Secretary of State, "to determine in accordance with part 1 of the 2007 Act and the 2008 Regulations the amount (if any) of an employment and support allowance to which the notified person would be entitled if on a claim made by that person –

> (a) It had been determined that the person was entitled to an award of an employment and support allowance;"

In my opinion, regulation 8(1)(a) has the effect of equating the situation of a conversion claimant to employment and support allowance to that of a fresh claimant to that allowance. Further, in my view, that effect is of very considerable importance in the determination of this appeal.

9. The decision of this tribunal in *L.H. v Secretary of State for Work and Pensions* [2015] AACR 14, made by Judge Rowland on 21 October 2014, established the following propositions. Firstly, employment and support allowance is a single benefit, albeit one with two elements, contributions based and income related. Secondly, it is thus not necessary that a separate claim be made for the income related element. Thirdly, certainly in the absence of waiver by a claimant the department should calculate entitlement to employment and support allowance when a claim to that benefit is made taking full account of both elements even if no separate claim is made to the income related element. *L.H.* did not relate to a conversion case. Rather it related to a fresh claim. Understandably Mr Macaulay strongly emphasised that point. However, as I stress in paragraph 8 above, the effect of regulation 8(1)(a) is to place a conversion case on exactly the same footing as a fresh claim.

10. In the light of *L.H.*, **but not otherwise**, it was the duty of the Secretary of State to assess the claimant's entitlement to employment and support allowance as a whole with effect from 15 March 2014 even if she had not responded to the departmental request for her to make what amounted to a separate claim for the income related element made on 26 February 2014. See paragraph 3 above. By effectively insisting on a separate claim to the income related element being made the Secretary of State erred in law. Accordingly the tribunal also erred in law in confirming the decision maker's decision of 3 April 2016 made on behalf of the Secretary of State. I do not accept Mr Macaulay's argument that the Secretary of State erred in law simply by virtue of a failure to apply regulation 8(1)(a) read along with regulation 5(1) and (3), referred to in paragraph 8 above. Rather he erred in law having regard to those provisions read in the light of the legal propositions established by Judge Rowland's decision in *L.H.* I am strengthened in that view by the decision of Upper Tribunal Judge Wright in *DJ v Secretary of State for Work and Pensions* ESA [2015] UKUT 0342 (AAC). That case, like this one, related to a claimant whose entitlement to employment and support allowance was the result of conversion from a previous incapacity benefit entitlement. However, in applying the view that employment support allowance is a single benefit, albeit with two elements and that a separate claim for each element need not be made Upper Tribunal Judge Wright refers to *L.H.* on two occasions in paragraph 25 of the above decision.

11. The consequence of the approach which I have taken in paragraphs 9 – 10 above is that I require to consider the applicability to this case of section 27 of the Social Security Act 1998. In particular, I need to determine whether that provision fixes the commencement date of any backdating to which the claimant is entitled at 21 October 2014, the date of *L.H.,* as Mr Pirie contended.

12. Section 27, so far is relevant to this appeal reads as follows:

> "**Restrictions on entitlement to benefit in certain cases of error**
>
> 27. – (1) Subject to subsection (2) below, this section applies where –
>
> (a) the effect of the determination, whenever made, of an appeal to the Upper Tribunal ("the relevant determination") is that the adjudicating authority's decision out of which the appeal arose was erroneous in point of law; and
>
> (b) after the date of the relevant determination a decision falls to be made by the Secretary of State in accordance with that determination (or would, apart from this section, fall to be so made) –
>
> (ii) as to whether to revise, under section 9 above, a decision as to a person's entitlement to benefit; or
>
> (iii) on an application made under section 10 above for a decision as to a person's entitlement to benefit to be superseded.

(3) In so far as the decision relates to a person's entitlement to a benefit in respect of –

(a) a period before the date of the relevant determination;

(b) it shall be made as if the adjudicating authority's decision had been found by [3the Upper Tribunal] not to have been erroneous in point of law"

(6) It is immaterial for the purposes of subsection (1) above –

(b) Where such a decision as is mentioned in paragraph (b)(ii) or (iii) falls to be made on an application under section 9 or (as the case may be) 10 above, whether the application was made before or after that date.

(7) In this section –

"Adjudicating and Authority" means -

(a) the Secretary of State;

"benefit" means –

(de) an employment and support allowance;

13. The effect of section 27, which he describes as "a complex provision" is well expressed by Lord Justice Underhill in paragraph 103 of *R (Riley) v Work and Pensions Secretary (No.2)* [2017] QB 657:

> "In bare outline, and at the risk of some oversimplification, it's effect is that, where the Upper Tribunal or a court considering an appeal relating to a claim under Social Security legislation holds that a provision of such legislation has a different effect from that on the basis of which the DWP had proceeded previously, the law as thereby established will for most purposes take effect only from the date of that decision: in other words, the usual rule that the decision of the court establishes what the law has always been does not apply."

14. Mr Pirie's submission was that section 27(3) imposes a mandatory requirement. It does not confer a discretionary power. It falls to be applied by the Secretary of State in any case where the terms of section 27(1) are fulfilled. That is so even if it was not applied by him in similar cases, thus answering Mr Macaulay's concern that cases like this one have sometimes been determined without reference to section 27. Putting the matter in colloquial terms Mr Pirie submitted that if the terms of section 27(1) are met then the Secretary of State is entitled to pull section 27(3) like a rabbit out of a hat. I accept Mr Pirie's submissions.

15. The key point therefore is whether section 27(3) applies in this case. That has to be determined by reference to the terms of section 27(1). I am persuaded that those terms are fulfilled and that therefore section 27(3) does apply to the present appeal.

Firstly, the effect of the determination made by the Upper Tribunal in *L.H.* was that the decision of the Secretary of State, an adjudicating authority, out of which that appeal arose was erroneous in point of law. That is made very clear by paragraph 25 of *L.H.* Mr Macaulay's attempt to suggest the contrary was frankly unsustainable. Paragraph 25 explicitly identifies the error of law made not only by the First-tier Tribunal but also by the Secretary of State in *L.H.* Secondly, the decision of the Secretary of State in the instant case in regard to a revision or supersession of the decision maker's decision of 11 February 2014 fell, for the reasons explained in paragraphs 8 – 10 above, to be taken in accordance with the decision in *L.H.* had it not been for the provisions of section 27. Consequently I hold that section 27(3) does apply to this case. Therefore this case falls to be decided as if the Secretary of State's decision discussed in *L.H.* had been held not to have been erroneous in point of law, although it was actually so held, as I have just stressed, in paragraph 25 of that decision. In practical terms, the effect is that the backdating exercise to be carried out in the claimant's case will commence from 21 October 2014 and not 15 March 2014.

16. I revert to the matters discussed in paragraph 5 above. I hold that the tribunal's decision was erroneous in law by confirming the decision maker's decision of 3 April 2016 to refuse to either revise or supersede the decision maker's decision of 11 February 2014. I exercise my discretion in the claimant's favour and set the tribunal's decision aside. I substitute my own decision, standing in the shoes of the First-tier Tribunal, that the case should be remitted to the Secretary of State for a detailed investigation of the claimant's relevant circumstances and a decision on her full entitlement to employment support allowance. That decision can be made either by way of revision of the decision maker's decision of 11 February 2014 for "official error" under section 9(1) of the Social Security Act 1998 and Regulation 3(5)(a) of the Decisions and Appeals Regulations 1999 or by way of supersession of that decision for error of law under section 10(1)(a) of the 1998 Act and regulation 6(2)(b) of the regulations. In either case that decision can determine the claimant's entitlement only from 21 October 2014. That is so in the case of a revision having regard to the definition of "official error" in regulation 1 of those regulations and in the case of a supersession having regard to regulation 7(6) of those regulations. Either of those provisions apply for the reasons given in detail in paragraphs 12 – 15 above.

17. Thus the claimant's appeal to a degree succeeds. The case is remitted to the Secretary of State to proceed in accordance with this decision.

(Signed)
A J GAMBLE
Judge of the Upper Tribunal
Date: 18 January 2018