IN THE UPPER TRIBUNAL **Appeal No: CJSA/2601/2012**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Watford on 28 February 2012 under reference SC028/11/00324 involved an error on a material point of law and is set aside.

However, the Upper Tribunal remakes the decision to the same effect and therefore overall this appeal does not benefit the appellant. The Upper Tribunal gives the decision the First-tier Tribunal ought to have given. The Upper Tribunal's decision is to dismiss the claimant's appeal from the Secretary of State's decision of 4 July 2011, with the result that jobseeker's allowance is not payable to the appellant from 5 July 2011 to 3 October 2011 (both dates included). This is because the appellant failed, without good cause, to participate in mandatory work activity.

This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

Representation: The appellant was not represented nor did he attend the hearing of this appeal, but he provided detailed written submissions throughout the proceedings.

Ms Zoë Leventhal, instructed by the Government Legal Service, represented the Secretary of State for Work and Pensions

REASONS FOR DECISION

Introduction

1. This appeal arises from a decision made by the Secretary of State for Work and Pensions as far back as on 4 July 2011 in which she found that the appellant had failed to participate, without good cause, in the

mandatory work activity scheme starting in his case on 6 June 2011. As a result, his jobseeker's allowance (JSA) was sanctioned (i.e. made not payable to him) for the inclusive period 5 July 2011 to 3 October 2011 (both dates included).

2. The First-tier Tribunal disallowed the appellant's appeal against this decision on 28 February 2012 ("the tribunal"). It found that the claimant did not have good cause for failing to participate in the mandatory work activity scheme on 6 June 2011. The mandatory work activity took the form of a work placement at a Cancer Research shop as a retail assistant arranged through Seetec. (It was not disputed that the appellant had been notified of the work placement.)

3. I need to address three main issues in this decision. First, whether the tribunal erred in law and its decision set aside. If the tribunal's decision is set aside, as in my view it should, then it is agreed that I ought to redecide the first instance appeal rather than remitting the appeal to be redecided by another First-tier Tribunal. It is in coming to my decision on the first instance appeal against the 4 July 2011 decision of the respondent that the other two issues arise. The first of these (and so the second issue overall) is what is meant by <u>failure to participate</u> in the context of the mandatory work activity scheme. The second of the further two issues is whether on the evidence the appellant failed to participate in the mandatory work activity scheme on 6 June 2011. There are then some further arguments I need to address.

<u>Delay</u>

4. Before proceeding further with this decision, I must, however, seek to explain why an appeal which turns on a work placement in June 2011 is only being decided by the Upper Tribunal some seven years later.

5. Permission to appeal was given by Upper Tribunal Judge Wikeley in February 2013. He did so, in summary because he considered it arguable that the tribunal:

(a) may have failed to deal adequately with the conflicting evidence on whether the appellant had sworn and, if he had sworn, whether that had been against a Seetec staff member or staff at the Cancer Research shop;
(b) may not have done enough to resolve other conflicts of evidence, in particular in relation to when and whether the appellant was in the cubicle asleep; and
(c) in deciding that there had been a "failure to participate" on the part of the appellant because of his behaviour, may have failed to explore satisfactorily what it was the appellant had been asked to do between his arrival at the Cancer Research shop and being asked to leave.

6. The Secretary of State sought extra time in which to make her submissions on the appeal in response to Judge Wikeley's grant of permission to appeal as she wished to seek legal advice on "failure to participate". She then filed submissions on the appeal on 31 May 2013. The appellant filed detailed 'holding' submissions towards the end of July 2013 and his submissions in reply by mid-October 2013.

7. Judge Wikeley then issued further directions on the appeal in November 2013 in which, inter alia, he asked whether the Supreme Court's decision in *R(on the application of Reilly and another) –v– the Secretary of State for Work and Pensions* [2013] UKSC 68; [2014] AC 453; [2014] AACR 9 ("*Reilly and Wilson*") had any effect on the appeal. A particular concern Judge Wikeley had was whether what has become known as the "prior information requirement", arising from the Supreme Court's decision in *Reilly and Wilson,* might have a bearing on this appeal.

8. The appeal was then transferred to me as the lead judge in this chamber with responsibility for *Reilly and Wilson* related cases. For reasons that need not be explained in any detail, the effect of subsequent appeal cases related to *Reilly and Wilson* meant that

further substantive consideration of this appeal was stayed until the end of 2016. The appeal was then subject of an oral hearing before me in March 2017. Following the oral hearing further written submissions were provided by both parties, primarily on the issue of whether the appellant on the evidence had failed to participate in mandatory work activity scheme on 6 June 2011. Those submissions included the provision of a typed transcript of a telephone conversation between the appellant and an employee of Seetec (Mr Hill) which had taken place a little while after 6 June 2011. The papers on the appeal now amount to over 400 pages.

9. I am afraid that the very extensive delay that has since arisen in deciding this appeal is entirely down to me. I wish to apologise to the parties for the inconvenience that further delay will have caused them.

Background in more detail

10. The evidence which was before the tribunal started with a letter issued by Seetec to the appellant on 26 May 2011. That letter notified the appellant that he had been referred from Jobcentre Plus to the Mandatory Work Activity Programme. The letter told the appellant that the mandatory work activity consisted of a four-week work placement at Cancer Research at an address in Hertfordshire. The placement was to start at 10am on 6 June 2011 and continue for four weeks between 10am and 5pm from Monday to Friday each week. The letter further told the appellant that he was to be employed as a "Retail Assistant".

11. The letter then explained that Mandatory Work Activity was aimed at "JSA customers to help them gain a better understanding of the discipline and focus that is required for work by attending on time, carrying out specific tasks and working under supervision". It continued:

> "During your time on the placement you will be expected to adhere to both Seetec's and the Placement Providers policies and procedures, including complaints and grievance procedure, codes of conduct, dress codes, health and safety policies, equal opportunities policies and any others that apply. Failure to adhere to these may result in your being

> asked to leave the placement, which could lead to a sanction of your benefits. Copies of these are available from Seetec and/or the placement provider."

12. Under a heading "**What happens if I don't start or fail to attend my Placement?**" the letter set out that it was a condition of the appellant getting jobseeker's allowance that he had to start the placement and continue to attend it. If he did not start the placement, failed to attend it once started throughout the four-week period, or was dismissed from the placement or did not carry out the activities he was asked to do whilst on the placement, his case would be referred to a decision maker in Jobcentre Plus. If he did not have a good reason for any of the above breaches that did occur, the letter told him that he would receive a sanction on his JSA of a loss of benefit of 13 weeks for a "first offence".

13. The letter concluded by advising the appellant that once he had completed the four weeks of mandatory work activity on the placement, he would be referred back to his local Jobcentre for further support.

14. The next piece of evidence before the tribunal was a "MWA 1 Mandatory Work Activity DMA Referral Form". This set out the appellant's details and that he was due to attend the placement at 10am on 6 June 2011, but said that he had "failed to participate" on that date. The form said that he had failed to participate not because he had given up the placement or had had failed to attend, but because he had "Lost a place on MWA through Misconduct". The "Reason For Dismissal through Misconduct" box on the form said:

> "Customer turned up for his placement but placement provider asked him to leave as he was swearing at staff and complaining about the programme. He then proceeded to sit on a chair on the premises and went to sleep."

15. There is then a "CI Notes for [the appellant]" form in the appeal bundle. It shows three unsuccessful attempts to make "MWA Initial Contact" with the appellant on 26 May 2011, all apparently by phone.

An entry for 27 May 2011 notes contact from the appellant in which he is recorded as being unhappy about his placement but is told "we didn't have much choice", and he is recorded as going to contact his jobcentre advisor. The next relevant entry on this form is at 10:52am on 6 June 2011 in the form of a "MWA Follow Up Call", the notes to which read "have been informed that [the appellant] did turn up for placement but will not been (sic) staying as he is not suitable. Will have to get in touch with sue dowding h&s to find out [the] reason why he is not suitable". An entry later the same day under "MWA Sanction doubt raised", records in the notes "This client turned at his placement this morning swearing at staff, saying this is a waste of time. Sat in chair and fell asleep, hence sanction".

16. The appellant submitted detailed written grounds of appeal on 4 August 2011 against the sanction decision that had by then been made. The grounds are not necessarily easy to follow, but their gist appears to have been:

(i) as the allegation was that he had lost his place due to misconduct and failure to participate was in the context of his placement starting at 10am on 6 June 2011, no behaviour before 10am on that date could possibly constitute grounds for his having failed to participate;

(ii) therefore any "supposed heinous misconduct" on his part would need to have taken place after 10am that day and before he was told by the Seetec employee (Mr Hill), at around 10.20am on the same day, that he was no longer required to attend the placement;

(iii) his behaviour up until 10.20am had been "innocuous, since it consisted primarily just sitting waiting for [Mr Hill's] arrival";

(iv) Mr Hill had made no mention of any unacceptable behaviour by the appellant.

The appellant also made points about the steps needed to properly begin a placement. (It is noteworthy, for reasons which will become

apparent, that he did not then raise any issue about having been selected by the respondent to participate in the mandatory work activity scheme under regulation 3 of the Jobseeker's Allowance (Mandatory Work Activity Scheme) Regulations 2011.) His point here appears to have been that he could not have "started" on the placement until he had been met by Mr Hill at the placement. As this did not occur until 10.20am or thereabouts, he could not have failed to participate in a placement that had not begun.

17. Prior to his appeal, the appellant had been asked by the respondent on 15 June 2011 to provide his comments on what was said to be Seetec's statement that he had been "asked to leave as you were swearing at staff and complaining about the programme, then proceeded to sit in a chair and fall asleep". The appellant responded strongly and in fine detail in his comments in reply on 20 June 2011. He said the question asked was "fundamentally flawed by a colossal factual error, such that a straightforward rational reading of it inevitably results in the quoted material evaluating to ludicrous fiction!". His objection was based on his reading of Seetec statement as meaning the alleged behaviours had occurred at Seetec's premises. He described the behaviour alleged as "outrageous and unlawful (**liable to cause a breach-of-the-peace/threatening** behaviour?) followed by downright bizarre/deranged **tress-passing** behaviour" (emphasis as in the original). He continued in his comments that the only member of Seetec's staff he had met on 6 June 2011 was Mr Hill. In these comments, the appellant described what had occurred on 6 June 2011 in these terms:

> "Very soon after our introductions, [Mr Hill] conducted me outside the Venue [i.e. the Cancer Research shop] and standing together on the pavement explained to me that my **Placement** had been **terminated at** the **request of** the 'Cancer Research' (fund-raising shop) **Venue** along the following lines as far as my recollection serves – **[Mr Hill] had been told by Trish the shop's Manager (by 'phone?) "who wasn't there" – that "they no longer needed me" and had (?) "decided to do things another way" so that I could "go home"**.
> The conversation with [Mr Hill] seemed perfectly civil and amicable as far as I am concerned……." (emphasis again as in the original)

18. Pausing at this point, I would simply observe (a) that the "at Seetec" point could just as easily have been read as a mistake, with the allegations referring instead to what was alleged to have occurred at the Cancer Research shop, and (b) on the basis of the telephone conversation between the appellant and Mr Hill three days earlier on 17 June 2011 (the transcript of which, as I have said, is before me), the appellant's description in his comments of 20 June 2011 of what occurred between him and Mr Hill on 6 June 2011 and his focus on the "at Seetec" point are at best misleading and at worst disingenuous.

19. I say this because that telephone transcript shows that Mr Hill had informed the appellant in that telephone call that the allegation was about swearing at a lady in the Cancer Research shop the week or so before the placement was due to start. Further, the appellant admits in the course of that telephone conversation that he had gone into a changing room at the Cancer Research shop, kicked his shoes off, shut his eyes and folded his arms. In addition, Mr Hill tells the appellant during the telephone conversation that in his (Mr Hill's) view the appellant had been quite agitated outside the Cancer Research shop on 6 June 2011. It is therefore clear in my judgment that at the time of making the above comments on 20 June 2011 the appellant was fully aware that the allegations against him all concerned actions he was said to have undertaken in the Cancer Research shop and not "at Seetec". (Indeed, he refers to the respondent's request for comments letter of 15 June 2011 in the telephone conversation with Mr Hill on 17 June 2011.) His comments of 20 June 2011 were therefore almost entirely obfuscatory.

20. It is also difficult to square the information provided to the appellant by Mr Hill, and his admissions in that telephone conversations, with his later appeal grounds, especially the grounds that his behaviour on the day had been 'innocuous' and, perhaps even more so, his claim that Mr Hill had made no mention of any unacceptable behaviour on the appellant's part.

21. It is important to emphasise that this transcript of the telephone call of 17 June 2011 was not before the tribunal when it came to its decision. It cannot therefore have erred in law in not having had regard to this transcript in coming to its decision, and I do not rely on the transcript for this purpose. I introduce the transcript evidence at this point, however, as it is relevant evidence for the purposes of redeciding the first instance appeal and arises at this point in the narrative (albeit it was unknown to the tribunal).

22. The appellant's comments of 20 June 2011 led the respondent on 13 September 2011 to seek to clarify with Seetec whether the allegations of swearing and falling asleep in the changing room chair occurred at Seetec's premises or at the Cancer Research shop. Seetec in an unsigned reply made on or about 15 September 2011 stated that the appellant had sworn at a Seetec member of staff on 6 June 2011 at around 10.40am but had fallen asleep at the Cancer Research shop for 5-10 minutes around 10.25am on 6 June 2011.

23. In a written submission to the tribunal dated 21 October 2011 the appellant spoke of the allegations as amounting to an "'assassination' of my character" and being defamatory. He said his account of what had occurred on 6 June 2011 was the only authentically first-hand account. He asked the First-tier Tribunal to obtain evidence from all relevant witnesses, including himself, in the form of "fully detailed on-the-record accounts of events and decisions made".

24. The appellant attached to this submission what he described as his response to the respondent's case on the appeal. In this document he argued that he had been improperly referred to the mandatory work activity programme. He argued that had he had the opportunity to discuss his placement before it began he would have raised the chronic discomfort he suffered in both his feet. He said that it was because of this problem that he had visited the Cancer Research shop on 27 May 2011 to identify what working as a "Retail Assistant" would require of him. The appellant's view after this visit was that the placement was

inappropriate. The appellant in the response then detailed the steps he had taken to raise this issue with the respondent before the placement began.

25. In the same document the appellant addressed the allegations set out in paragraph 22 above. He denied he had ever sworn at Mr Hill on 6 June 2011, and said he was in the local library by 10.40am. He also vehemently denied that he had fallen asleep at the Cancer Research shop and had been nudged awake by the shop manager. Notwithstanding his clear admission to Mr Hill in the telephone call on 17 June 2011 that he had gone into the changing room, taken off his shoes, closed his eyes and folded his arms, in this response he claimed the allegation was a "complete invention". He asked for it to be explained how Cancer Research had "provided the opportunity for slumber". And he asked for numerous further and better particulars about the allegations.

26. Also before the tribunal was an email dated 13 December 2011 from Mr Hill to Mr Reynolds, the Regional Operations Manager for Seetec. The email set out the following about the appellant's placement at the Cancer Research shop. Mr Hill explained that he was the Seetec employee who was to conduct the initial induction of the appellant to the shop. He had phoned the shop the Friday before 6 June 2011 to explain this. During this phone call Mr Hill had been asked by the assistant manager of the shop whether he knew what the appellant looked like "as they had had a visit from a gent ranting and raving about being "**forced by the job centre to come and work in this place**" and he wanted a full run down of the work he was expected to undertake". The gentleman had said to one member of staff in the shop "**well, you're rather rotund aren't you**". The assistant manager had reminded Mr Hill that the shop took on people to work in it who were vulnerable (e.g. people with learning difficulties and those who may have been in bullying and abusive relationships), and for this reason they could not accept anyone who would cause unrest in the shop. At that stage,

having made enquires, Mr Hill (wrongly, as it turned out) advised the assistant manager that the 'gent' had not been the appellant.

27. The email then moved to address events on 6 June 2011. Mr Hill said he had been 10 minutes late in attending. The appellant was already present at the shop. The assistant manager asked to speak to Mr Hill separately and told him that the appellant was the 'ranting and raving gent' who had come to the shop a week or so before. She also, according to the email, had told Mr Hill that while waiting for Mr Hill the appellant had "whinged constantly and asked her if he would be expected to do '**all this menial crap and stand around all day like an idiot all day**'"[1]. The email records that the assistant manager said that the appellant had asked if he could sit and wait for Mr Hill as he had a back complaint. He was offered the small changing adjacent to the sales point, whereupon, the manager said, the appellant had sat down, took off his shoes, crossed his arms, shut his eyes and went to sleep. The assistant manager had told Mr Hill that had the appellant come in on 6 June 2011 and paid some interest in the shop she would have given him a chance but there was "no way on earth she could possibly subject her staff members to [the appellant]".

28. Mr Hill concluded the email by saying he had told the appellant outside the shop that the assistant manager was unhappy with the appellant's attitude, his appearance and the comments he had previously made to a member of staff. The email records Mr Hill's recollection that the appellant had said to him at this point that the staff member "was a big lady, and so what". It would seem the email was written by Mr Hill to Mr Reynolds as the latter was dealing with an enquiry by the appellant's Member of Parliament about the basis of the respondent's sanction decision in issue on this appeal.

[1] This evidence, it is to be noted, contrasts with what Mr Hill had said in the telephone conversation with the appellant on 17 June 2011. In that call Mr Hill's focus was on what had occurred the week or so before 6 June 2011 in the Cancer research shop. Indeed, during that telephone conversation Mr Hill appears to consider it wrong that the appellant was alleged to have been swearing at staff on 6 June 2011.

29. Save for the transcript of the telephone call of 17 June 2011, the above was the extent of the documentary evidence before the tribunal. The appellant attended before the tribunal and gave evidence. In his evidence the appellant said that he had gone to the Cancer Research shop at around 9.45am on 6 June 2011. He met the deputy manager. After that manager had gone to telephone Mr Hill, the appellant had noticed the changing cubicle and after a few minutes had gone to sit down inside it. He said he had then removed one of his shoes and had closed the cubicle curtain and his eyes for a while. He opened the curtain about 15 minutes later and asked if Mr Hill had arrived. The deputy manager told the appellant Mr Hill was due to arrive in the next 5 minutes, at about 10.05am, and she asked the appellant to wait outside the shop for him. As Mr Hill was not outside, the appellant returned to the shop (contrary to the deputy manager's instruction) and returned to the changing cubicle to sit down. He then needed the toilet so left the shop to go to the public toilet. On his return at about 10.15am he met Mr Hill at the shop. The deputy manager spoke to Mr Hill after which he took the appellant outside. The appellant's evidence to the tribunal as to what he was told by Mr Hill outside the shop essentially accords with his evidence set out at the end of paragraph 17 above. Beyond this, no enquiry was made by the tribunal at the hearing about the allegation of 'swearing', nor was any enquiry made of the appellant's prior visit to the Cancer Research shop.

30. The appeal was dismissed. The essence of the tribunal's reason was that Cancer Research were likely to have acted responsibly and the reason Seetec removed the appellant from the placement was his misbehaviour. That misbehaviour included the appellant not engaging properly in work activity but instead withdrawing to the changing room at the shop and falling asleep. In so doing, the tribunal rejected the appellant's argument that his participation could not have begun until Mr Hill had attended to introduce him. The Seetec letter of 26 May 2011 was clear that mandatory work activity began at the shop at 10am on 6 June 2011. The tribunal seemingly also relied on the misbehaviour

as including the appellant complaining about the work and swearing at Mr Hill. It accepted that the shop refused to allow the appellant to stay at the premises because he had used offensive language and retired to the changing area shortly after arrival.

Relevant law

31. The key legal provision in play in this appeal is the Jobseeker's Allowance (Mandatory Work Activity Scheme) Regulations 2011 ("the MWA Regs"). They came into force in April 2011. So far as is relevant to this appeal, the MWA Regs provided at the material time as follows:

> **"Interpretation**
> **2.**—(1) In these Regulations……
> "the Mandatory Work Activity Scheme" means a scheme within section 17A (schemes for assisting persons to obtain employment: "work for your benefit" schemes etc.) of the Act known by that name and provided pursuant to arrangements made by the Secretary of State that is designed to provide work or work-related activity for up to 30 hours per week over a period of four consecutive weeks with a view to assisting claimants to improve their prospects of obtaining employment;
> "the Scheme" means the Mandatory Work Activity Scheme….
> (2) For the purpose of these Regulations, where a written notice is given by sending it by post is taken to have been received on the second working day after posting.
> **Selection for participation in the Scheme**
> **3.**—(1) The Secretary of State may select a claimant who is aged at least 18 for participation in the Scheme.
> (2) Only a claimant who is required to meet the jobseeking conditions may be required to participate in the Scheme.
> **Requirement to participate and notification**
> **4.**—(1) Subject to regulation 5, a claimant ("C") selected under regulation 3 is required to participate in the Scheme where the Secretary of State gives C a notice in writing complying with paragraph (2).
> (2) The notice must specify—
> (a) that C is required to participate in the Scheme;
> (b) the day on which C's participation will start;
> (c) that C's participation will be for four weeks;
> (d) details of what C is required to do by way of participation in the Scheme;
> (e) that the requirement to participate in the Scheme will continue until C is given notice by the Secretary of State that C's participation is no longer required, or C's award of jobseeker's allowance terminates, whichever is earlier;
> (f) information about the consequences of failing to participate in the Scheme.

(3) Any changes made to the requirements mentioned in paragraph (2)(d) after the date on which C's participation starts must be notified to C in writing.

Circumstances in which requirement to participate in the Scheme ceases to apply

5.—(1) A requirement to participate in the Scheme ceases to apply to a claimant ("C") if—

(a) the Secretary of State gives C notice in writing that C is no longer required to participate in the Scheme, or

(b) C's award of jobseeker's allowance terminates, whichever is earlier.

(2) The requirement ceases to apply on the day specified in the notice.

Failure to participate in the Scheme

6. A claimant ("C") is to be regarded as having failed to participate in the Scheme in accordance with these Regulations where C fails to comply with any requirement notified under regulation 4.

Good cause

7.—(1) A claimant ("C") who fails to participate in the Scheme must show good cause for that failure within 5 working days of the date on which the Secretary of State notifies C of the failure.

(2) The Secretary of State must determine whether C has failed to participate in the Scheme and, if so, whether C has shown good cause for that failure.

(3) In deciding whether C has shown good cause for the failure, the Secretary of State must take account of all the circumstances of the case, including in particular C's physical or mental health or condition.

Consequences of failure to participate in the Scheme

8.—(1) Where the Secretary of State determines that a claimant ("C") has failed to participate in the Scheme, and C has not shown good cause for the failure in accordance with regulation 7, the appropriate consequence for the purpose of section 17A of the Act is as follows.

(2) In the case of a jobseeker's allowance other than a joint-claim allowance, the appropriate consequence is that C's allowance is not payable for the period specified in paragraph (4) or (5) ("the specified period")……

(4) The period is 13 weeks in a case which does not fall within paragraph (5)……

Contracting out certain functions in relation to the Scheme

20.—(1) Any functions of the Secretary of State specified in paragraph (2) may be exercised by, or by employees of, such person (if any) as may be authorised by the Secretary of State.

(2) The functions are any function under—

(a) regulation 4 (requirement to participate and notification);

(b) regulation 5(1)(a) (notice that requirement to participate ceases)."

32. The MWA Regs were made under section 17A of the Jobseekers Act 1995. At the relevant time this section provided, so far as is material, as follows:

> "**17A** (1) Regulations may make provision for or in connection with imposing on claimants in prescribed circumstances a requirement to participate in schemes of any prescribed description that are designed to assist them to obtain employment.

> (2) Regulations under this section may, in particular, require participants to undertake work, or work-related activity, during any prescribed period with a view to improving their prospects of obtaining employment.
> (3) In sub-section (2) "work-related activity", in relation to any person, means activity which makes it more likely that the person will obtain or remain in work or be able to do so……..
>
> (5) Regulations under this section may, in particular, make provision—
> (a)for notifying participants of the requirement to participate in a scheme within subsection (1)……
>
> (d)for securing that the appropriate consequence follows if a participant has failed to comply with the regulations and it is not shown, within a prescribed period, that the participant had good cause for the failure…".

33. Unlike in *Reilly and Wilson*, the MWA Regs were held not to be *ultra vires* section 17A of the Jobseekers Act 1995 by the Court of Appeal in in *Smith –v- SSWP* [2015] EWCA Civ 229. That decision is binding on me and I therefore say no more about any argument (ventured tentatively at best by the appellant) as to the *vires* of the MWA Regs.

34. The Jobseekers (Back to Work Schemes) Act 2013 ("the 2013 Act") provides by section 1, so far as is material to this appeal, as follows:

> "**1**(7) A notice given for the purposes of regulation 4(1) of the Mandatory Work Activity Scheme Regulations is to be treated as a notice that complied with regulation 4(2)(d) (details of what a person is required to do by way of participation in scheme) if it referred to—
> (a) the Mandatory Work Activity Scheme, or
> (b) a placement described as Mandatory Work Activity.
> (8) A notice given for the purposes of regulation 4(1) of the Mandatory Work Activity Scheme Regulations is to be treated as a notice that complied with regulation 4(2)(f) (information about the consequences of failing to participate) if it described an effect on payments of jobseeker's allowance as a consequence or possible consequence of not participating in the scheme or placement.
> (9) Regulation 4(3) of the Mandatory Work Activity Scheme Regulations is to be treated as if at all times—
> (a) it required the person in question to be notified only if the changes in the requirements mentioned in regulation 4(2)(d) were such that the details relating to those requirements specified in—
> (i) a notice given to the person under regulation 4(1), or
> (ii) a notice given to the person under regulation 4(3) on an earlier occasion, were no longer accurate, and
> (b) it required the person to be notified only of such changes as made the details inaccurate….

> (15) In this section…..
> "the Mandatory Work Activity Scheme Regulations" means the Jobseeker's Allowance (Mandatory Work Activity Scheme) Regulations 2011 (S.I. 2011/688)."

35. The effect of the Court of Appeal's decision in *Reilly & others v Secretary of State for Work and Pensions* [2016] EWCA Civ 413; [2017] QB 657 ("*Reilly No.2*") is that the 2013 Act is fully retrospective.

36. (The declaration of incompatibility upheld by the Court of Appeal in *Reilly No.2* in respect of the 2013 Act and the Secretary of State's current steps to introduce a Remedial Order under section 10 of the Human Rights Act 1998 to remove that incompatibility cannot assist the appellant on this appeal. This is for two reasons. The first reason is because the appellant's rights under Article 6 of the European Convention on Human Rights were not breached by the 2013 Act as that Act did not seek to take away the benefit of a binding High Court decision in favour of the appellant (or any other appellants) in respect of the MWA Regs. The *Smith* litigation referred to above at all stages found against the (MWA Regs) claimant; unlike the litigation in *Reilly and Wilson*, which found in favour of the claimants. It was the removal of the claimant favourable *Reilly and Wilson* court decisions by the 2013 Act that offended against Article 6 and was the foundation of the declaration of incompatibility in *Reilly No. 2*. The second reason is because even if, contrary to the first reason, the declaration of incompatibility in *Reilly No.2* might have some relevance to the MWA Regs and this appeal, a declaration of incompatibility cannot affect the continuing validity of the 2013 Act: see section 4(6) of the Human Rights Act 1998.)

Discussion and conclusions

Did the First-tier Tribunal err in law?

37. I am satisfied that it did. Its reasoning on its face proceeded on the basis that one material aspect of the appellant's wrongful behaviour was his swearing at the Seetec employee (i.e. Mr Hill) on 6 June 2011. However, as Judge Wikeley pointed out when giving permission to appeal, neither the appellant's evidence nor the email evidence of Mr Hill suggested that the appellant swore at Mr Hill: the "menial crap" language was, according to Mr Hill, used by the appellant to the assistant manager. (The transcript of the 17 June 2011 telephone call between the appellant and Mr Hill was not before the tribunal, but it too does not support any swearing or offensive language being directed at Mr Hill (or any other Seetec employee) by the appellant.)

38. It may be that the tribunal's reasoning on this particular point was immaterial to the outcome because on one reading of its reasons any language used by the appellant to Mr Hill on 6 June came after his placement at the Cancer Research shop had ceased. However, the difficulty with this analysis is that it is unclear from the tribunal's reasoning whether this was its perspective.

39. The finding that the appellant swore at Mr Hill came before the tribunal's statement that "Having viewed the evidence in the round, I accept Seetec's report that the shop refused to allow the Appellant to stay at their [premises] because he had used offensive language and had retired to the changing area shortly after his arrival. I am satisfied that his behaviour amounted to failure to participate in a mandatory work activity scheme.". If the 'offensive language' referred to here is not the swearing at Mr Hill, there is no finding by the tribunal as to any other offensive language. The earlier paragraph seven in the tribunal's statement of reasons falls under a heading "Findings" and refers to the evidence on the MWA1 form (see paragraph 14 above) of the placement provider having asked the appellant to leave as he was swearing at [its] staff. However, that paragraph ends with the tribunal recording the appellant's denial of

this (and other) allegations, and nowhere else is the swearing at the shop staff addressed or found to be true or not.

40. I am satisfied therefore that the tribunal's decision needs to be set aside for material error of law because of its failure to make clear findings of fact, backed up by adequate reasoning, on who swore at (or used offensive language directed towards) whom. As I have noted above, it appears that this issue was not investigated by the tribunal at the hearing.

41. Having set aside the tribunal's decision on the above ground, there is no need for me to decide whether it erred in law in any other respect. Such other possible errors are addressed in the issues I address when redeciding the first instance appeal. The parties are agreed that I am as well placed to decide the first instance appeal as the First-tier Tribunal and do not seek remittal to a First-tier Tribunal. They have provided me with further argument and evidence on the issue of whether the appellant "failed to participate" in mandatory work activity on 6 June 2011, as well argument and evidence on other issues. Before turning to decide all those issues on the facts, I must first consider what in law constitutes "failure to participate".

Failure to participate

42. A 'failure' connotes a breach of an obligation or requirement which has been imposed on a person: see, albeit in another context, *B -v- SSWP* [2005] EWCA Civ 929; [2005] 1 WLR 3796, (reported as *R(IS)9/06*). The requirements and what is meant in terms of "failure to participate" are set out in regulations 4(2) and 6 of the MWA Regs respectively. The imposition of such requirements and sanctions for failure to comply with such requirements are expressly authorised by section 17(1) and (5)(d) of the Jobseekers Act 1995.

43. Regulations 6 of the MWA Regs states that a claimant is to be regarded as having "failed to participate" in the mandatory work activity scheme where the claimant fails to comply with any requirement notified under regulation 4. It thus defines for the purposes of the MWA Regs what is constituted in 'failing to participate': it is breach of a requirement notified under regulation 4.

44. The notified requirements in regulation 4 of the MWA Regs which a claimant may fail to comply with are those, or at least are most obviously those, set out in regulation 4(2)(b) (specification of the day (which must include time) when participation will start), 4(2)(c) (that participation will then last four weeks), and 4(2)(d) (specification of the details of what the claimant is required to do by way of participation in the mandatory work activity scheme). I focus on these legal provisions as it is not apparent to me on what basis a claimant may be said to have failed to comply with the notice that he or she is required to participate in the scheme (regulation 4(2)(a)) separate from the requirements that then follow in regulation 4(2)(b)-(d). It may, I suppose, be arguable that a claimant who receives the notice and immediately contacts the provider and/or the respondent to say that he will never go on any mandatory work activity scheme may be said to be in breach of the requirement to participate *simpliciter*. However, it may also arguable that the language of 'fails to comply with a requirement' sits uneasily with a situation where a claimant has not yet in fact been required to 'do' anything.

45. Taking first the requirement in regulation 4(2)(b), if a claimant fails to attend at the time and on the day on which he has been notified his participation is to start, that can constitute a failure to participate for which good cause may need to be shown within five working days under regulation 7 of the MWA Regs: see to similar effect *R(JSA) 2/06*. Considerations of *de minimis* may be relevant if, for example, the claimant is 2 minutes late due to the only mode of public transport having broken down: see to similar effect paragraph 19 of *SA -v- SSWP*

(JSA) [2015] UKUT 0454 (AAC). However, that is not this case and I would wish to hear argument on this point before ruling on it definitively. The counter argument would be that in the context of the definition of the mandatory work activity scheme in regulation 2(1) of the MWA Regs and its purpose as described in the 29 May 2011 letter to the appellant (inter alia, "to help [claimants of jobseeker's allowance] gain a better understanding of the discipline and focus that is required for work by attending on time…"), turning up late, even by only a few minutes, may amount to a failure to comply with regulation 4(2)(b) and thus amount to a "failure to participate"; the claimant's 'defence' then having to fall under good cause. Such a counter argument would arguably run contrary to *SA*.

46. Similar considerations arguably apply to regulation 4(2)(c). The relevant breach is in respect of any requirement notified under regulation 4 of the MWA Regs. If the notification sets out, as here, that the claimant is required to attend the work activity for four weeks until a given date and time, if the claimant does not attend for all of that period or fails to attend during the times on one of the days he has been notified he is required to attend at the placement, he will arguably have failed to comply with the four-week attendance requirement and thus have failed to participate. This, again, may be subject to *de minimis* arguments. It may also be subject to arguments concerning oral variation or waiver of the notified dates and times for which the four-week attendance is required (e.g. where there is cogent evidence that the mandatory work activity provider allowed the claimant time off during the day to attend the dentist). Again, however, that is not this case. The appellant attended at or before 10am on 6 June 2011 at the Cancer Research and it has not been argued that the actionable breach was his failure to remain on the mandatory work activity for the notified four -week period.

47. A breach will also occur if a claimant fails to comply with any of the notified details of what he is required to do by way of participation in the mandatory work activity scheme: per regulation 4(2)(d) of the MWA Regs. It is that provision which lies at the heart of this appeal.

48. The Supreme Court in *Reilly and Wilson* was of the view, in paragraph [55] of its decision, that the equivalent of regulation 4(2)(d) of the MWA Regs before it was not met in the following circumstances:

> "The letter of 16 November 2011 merely informed Mr Wilson that he had to perform "any activities" requested of him by Ingeus, without giving him any idea of the likely nature of the tasks, the hours of work, or the place or places of work. It seems to us, therefore, that the letter failed to give Mr Wilson "details of what [he was] required to do by way of participation". Again, it is necessary to balance practicality, in the form of the need of the Secretary of State and his agents for flexibility, against the need to comply with the statutory requirement, which was plainly included to ensure that the recipient of any such letter should have some idea of where he or she stood. A requirement as general and unspecific as one which stipulates that the recipient must "complete any activities that Ingeus asks you to do", coupled with the information that the course will last about six months falls some way short of what is required by the words of regulation 4(2)(c), even bearing in mind the need for practicality."

49. One of the (retrospective) effects of the 2013 Act was to reverse this judicial holding. Section 1(7) of the 2013 Act treats as legally valid under regulation 4(2)(d) of the MWA Regs a notice which simply "referred to the Mandatory Work Activity Scheme or a placement described as Mandatory Work Activity". The three-judge panel of the Upper Tribunal in *SSWP -v- TJ and others* (JSA) [2015] UKUT 56 (AAC) discussed, at paragraph 183 of that decision, a potentially curious result of this deeming in a context where <u>in fact</u> the notice only referred to the scheme in issue or a placement under it and said nothing else. The issue, in short, was, given the generality of such an anodyne notice, how a claimant could be found in breach of it at all (albeit the 2013 Act would constitute it as a valid notice).

50. However, the effect of section 1(7) of the 2013 Act is not to treat all notices as if they only referred to the Mandatory Work Activity Scheme or a placement under that scheme. Its deeming is limited to holding as valid any notices which in fact were limited in this way in their wording. Put another way, the 2013 Act is only needed if the Secretary of State did not in fact give the claimant adequate notice under regulation 4(2)(d) of the MWA Regs.

51. Following my decision in *AM -v- SSWP* (CJSA/4599/2014), and guided (a) by the need for practicality recognised by the Supreme Court in *Reilly and Wilson*, and (b) the view of the three-judge panel at paragraph 192 of *TJ* that the critical issue is whether "the claimant has been notified in writing in substance of the requirements to participate and not the form (one or two notices) in which that written notification takes place", I am satisfied that the Seetec letter of 26 May 2011 (see paragraphs 10-13 above) alone was an adequate notice under regulation 4(2)(d) of the MWA Regs detailing what the appellant was required to do to participate in the Mandatory Work Activity Scheme. The letter set that the appellant was to be employed as a retail assistant at Cancer Research at a specified address for four weeks from Monday to Friday between 10am and 5pm. The job tile "Retail Assistant" itself indicates that the appellant would be assisting in selling, almost certainly in a shop setting, and under instruction from others. But the letter went on to say the activity was intended to enable the appellant to gain a better understanding of the discipline and focus of work by attending on time, carrying out specific tasks and working under supervision. The further reference to, inter alia 'policies and procedures', 'codes of conduct' and dress codes advised the reasonable reader of the letter, in my judgment, that certain standards would need to be adhered to while working as a Retail Assistant, with further detail of those policies and codes being made available on request.

52. What then may be constituted in failing to comply with any of the details of what was required by way of participation under regulations 4(2)(d) and 6 of the MWA Regs? In other words, what is meant by "failure to participate" in this context? As regulation 6 makes sets out, it is a failure to comply with an obligation or requirement notified under (here) regulation 4(2)(d). But what that obligation is in any individual case will depend upon a reasonable reading of what the notice on the facts required the person to do. There is, as the Supreme Court recognised in *Reilly and Wilson*, a legitimate need for such "work for your benefit" schemes to have a practical application. The "do anything you are told by the provider to do" notice was insufficiently detailed in Mr Wilson's case in *Reilly and Wilson*. But equally, in my judgment, codifying in the notice in minute detail each and every task the claimant will be required to do on each minute of each day over the four-week period would be impractical and require pages after page of information. A judgment in the end has to be formed on the evidence, including particularly the notice(s) issued to the claimant, as to what he or she is required/obliged to do whilst on the placement. That ultimately is an issue of fact.

53. In the Seetec notice issued to the appellant on 26 May 2011, it described him being required to work as a Retail Assistant from 10am to 5pm each week-day. It was in my view clear from the notice that that work would involve the appellant working under supervision and instruction from others, serving members of the public, and in a work place where codes were in place about, for example, appropriate standards of conduct and dress.

54. I need not decide in this case whether the test of the requirements imposed by the notice is an objective one based on how a reasonable person would have read the notice or how the particular claimant (with his or her subjective characteristics) would reasonably have read it. I am quite satisfied in this case that the appellant, who is a man of some education and learning, on either test would in fact have read the letter

as requiring him to behave civilly to people he was working with at Cancer Research and not be offensive to them. Such an implied term of the appellant's obligations under the placement was obvious in my judgment. Indeed, the appellant's own description of the alleged (but denied) behaviours as being, for the allegation of swearing, "outrageous and unlawful [and] liable to cause a breach of the peace [and] threatening" and, for the falling asleep allegation, "downright bizarre [and] deranged trespassing", shows that he understood such an implied requirement applied.

55. I would further agree with the Secretary of State that participating as a retail assistant, having attended at the notified start time, must involve doing that which would reasonably be required of a retail assistant. Simply being present in the shop but not doing anything or not following instructions would not suffice.

56. Similar approaches have applied elsewhere. For example, in *R(U)28/55* it was held that behaviour that was "tantamount to inviting a refusal by the employer to engage [the claimant]" amounted to the claimant neglecting to avail himself of a reasonable opportunity of employment. The claimant in that case had presented himself at an interview for a job unclean and unshaven. The commissioner said: "When an insured contributor is submitted to a prospective employer for employment he is expected to present himself for any interview dressed suitably for the occasion…". It could equally be said that the claimant in that case had failed to apply for the vacancy.

57. Likewise, a refusal or failure to complete an unobjectionable application form can amount to a failure to apply. As Mr Commissioner (as he then was) Howell QC put it in *CJSA/4665/2001*:

> "where the way a claimant completes (or spoils) a job application will be so unsatisfactory and unfit to put in front of any employer as to prevent it from counting as a genuine application at all, so that he or she will have failed to apply: it is all a question of fact."

58. I note, moreover, that in *DM -v- SSWP* (JSA) [2015] UKUT 67 it was accepted (at paragraphs 10-11 and 16) that the First-tier Tribunal had been entitled to conclude on the evidence that the claimant had failed to participate in a local information session at Jobcentre Plus when he had been asked to leave the session early as he was disrupting the event. (The First-tier Tribunal's decision was set aside for other reasons.) The context in *DM* was an alleged failure to carry out a jobseeker's direction under section 19A(2)(c) and 19A(11) of the Jobseekers Act 1995, and not the MWA Regs. However, the value in the decision for present purposes lies in its recognition that although the direction said nothing expressly about behaving in a reasonable manner at the information session, such was obvious and necessarily implied into the direction so that being asked to leave the session early due to his conduct meant that the claimant had failed to participate in it.

59. It has also been held that there may be an actionable failure to submit to a medical examination for the purposes of regulation 23(2) of the Employment and Support Allowance Regulations where the person fails to cooperate with the examination process so as to thwart its purpose: *PH -v- SSWP* (ESA) [2016] UKUT 0119 (AAC) at paragraph 22. That decision is also authority for the proposition that conduct or behaviour *before* the medical examination takes place (e.g. imposing unreasonable conditions on the examination or acting in a disruptive manner in the waiting room designed to prevent the examination from going ahead) may be taken into account in deciding whether there has been a failure to submit.

60. *PH*, along with *JW -v- SSWP* (ESA) [2016] UKUT 0207 (AAC), is also authority for the view that whether the abandoning of the medical examination may be attributable to the claimant such that he or she can properly be said to have failed to submit to the examination "opens a door to a question of reasonableness". As it is put in *JW* (at paragraph 14):

> "I would add that reasonableness is not only potentially relevant to the imposition of conditions but also to general behaviour such that behaviour of, for example, a threatening or intimidating nature, on proper findings, might well amount to a failure to submit so long as the behaviour is the or a reason for the examination not proceeding. So, the tribunal had to ask itself, having made appropriate findings on the evidence, whether the claimant had behaved in an unreasonable manner or had sought to impose unreasonable conditions…….if such behaviour strays into the realm of being obstructive or if it is such as to intimidate the person tasked with conducting the examination or even possibly other support staff (excluding significant over-sensitivity on the part of such examiners or staff) then that is much more likely to found a justifiable decision concerning failure to submit. As to conditions, again it seems to me that reasonableness is the key."

It seems to me that the reasonableness spoken of in these "failure to submit" cases is akin to the term as to behaviour or conduct that ought necessarily or reasonably to be implied as one of the requirements of which the appellant in this case had been notified he had to do by way of participation in the mandatory work activity scheme

61. For all these reasons, it seems to me that conduct can be relevant to whether a person has failed to participate in the mandatory work activity scheme under regulation 6 of the MWA Regs.

62. Moreover, and contrary to the appellant's argument, I do not see why that conduct should be limited to that which occurs after the placement has in fact started. As some of the caselaw above shows, prior conduct can be taken into account. It is, moreover, a question of substance and not form. Most cases may involve conduct that occurs after the placement has begun and which leads to, or is the cause of, the placement ending prematurely. As will be seen below, part of the appellant's conduct fell into this category (the 'falling asleep' in the changing room). However, in an appropriate case prior conduct may be relevant if it is legitimately linked to the decision to ask the claimant to leave the placement.

63. Take this case. The uncontested facts are that the appellant attended at the Cancer Research shop about a week before the placement was due to start but after he had received the Seetec letter 26 May 2011 telling

him about the placement. (The appellant seeks to make an argument as to whether this visit was on a Wednesday or Friday. I agree with the Secretary of State that nothing material turns on which day of the week the visit occurred. It is uncontested that such a visit took place and nothing as to what occurred during that visit turns on the precise day of the week on which it occurred.) Even on the appellant's case his prior attendance at the shop was with a view to identifying what the placement would require. And he made that purpose known to the staff in the shop at the time. It was not, therefore, an accidental or casual visit to the shop unconnected to the placement the appellant was expected to take up. As I find below, I am satisfied on the balance of probabilities that in that context and on that prior visit the appellant (a) used offensive language to one member of staff (the "you are rather rotund aren't you" remark), and (b) used offensive language (whether or not it constituted the use of swearing) in the form of his saying either "standing around all day doing this menial crap" or "standing around all effing [or 'fucking' – see paragraph 82 below] day doing nothing". In my judgment, all of these were offensive statements which it was unreasonable for the appellant to make in that, or any reasonable, work setting.

64. I do not consider that those statements are irrelevant to whether the appellant then participated in the placement on 6 June 2011. They gave a plainly relevant context to whether the appellant would behave appropriately once the placement had begun at 10am that day. But the appellant showed no interest in the work when he turned up and maintained his disinterest and antagonism to being on the placement by removing himself to the changing room, taking off his shoes, folding his arms, and closing his eyes (and thus at the least effecting an air of being asleep). Again, this is not the behaviour to be expected of someone in a work setting, especially on the first day. The combination of the appellant's behaviour on the previous visit and his behaviour (and lack of contrition) on 6 June 2011 in my view can as a matter of

law (and does in fact) found the conclusion that he had failed to meet the notified requirements for his participation in the scheme.

65. I should add here that I reject the appellant's argument that the placement did not begin until Mr Hill attended at the Cancer Research shop at around 10.15am on 6 June 2011. I note, firstly, that even in his own appeal grounds the appellant does not ally himself entirely to this argument as he accepts elsewhere in those grounds that his "supposed heinous 'misconduct' would logically have to have taken place between 10:00 6/6/'11 and……10:15-10.20, when [Mr Hill] finally arrived at the Placement Venue". That, of course, is entirely consistent with the requirements notified to the appellant in the Seetec letter of 26 May 2011. That letter said quite clearly "Your Mandatory Work Activity Placement starts ***On: 6th June At: 10am*** [at the Cancer Research shop]". There is nothing in this letter stating that the requirement only begins to apply from the moment the Seetec employee attends to introduce the appellant to the shop staff. All the letter says is that "A Seetec Work Placement Consultant will meet you at the appointment to ensure everything is in place for your successful start on the above work placement". That does not in my judgment qualify the 10am start time.

66. But even if this argument has any merit, for the reasons I have given above it would not preclude the appellant's prior conduct (encompassing both his conduct on the previous visit to the shop and his behaviour in sitting down and appearing to fall asleep in the changing cubicle before 10.15am on 6 June 2011), counting against him either in terms of his effectively not having started the work activity or having acted in such a way as (per *R(U)28/55*) to invite the placement provider to refuse to have him on the placement and thus equate to his constructively refusing to participate in the tasks in the manner required of him.

Did the appellant in fact refuse to participate?

67. I am satisfied on the balance of probabilities on the evidence before me that the appellant on the facts refused to participate.

68. As I have already indicated, I consider the evidence shows that on the prior visit the appellant: (a) used offensive language to one member of staff (the "you are rather rotund aren't you" remark), and (b) used offensive language (whether or not it constituted the use of swearing) in the form of his saying either "standing around all day doing this menial crap" or "standing around all effing [or 'fucking'] day doing nothing". I am all also satisfied that on the day of the placement on 6 June 2011, after the required start time of the placement, the appellant took himself off to the changing cubicle in the Cancer Research shop, closed the cubicle curtain, sat down, took his shoes off, folded his arms and closed his eyes and at least appeared to fall asleep for in the region of 10-15 minutes.

69. For the reasons I have already given above, particularly the reasons in paragraphs 62-64, those actions of the appellant meant in my judgment that he failed to participate in the mandatory work activity scheme without good cause. (Good cause has never featured as a separate issue on the appeal. The appellant's case has consistently founded on whether the alleged actions occurred and/or whether his prior actions, if proven, could be taken into account.)

70. As I am redeciding this appeal on the evidence before me, it seems to me that the best evidence of what occurred at the prior visit and on 6 June 2011 is that contained in the telephone conversation between the appellant and Mr Hill on 17 June 2011. Save for the MWA1 Referral Form dated 8 June 2011 and the CI Notes entries for 11.35am on 6 June 2011, this telephone call is the nearest in time to the alleged incidents. It is also the most detailed evidence from June 2011 and involves two of the key witnesses: Mr Hill and the appellant. And it is evident that it

was Mr Hill who liaised directly with the deputy manager at the Cancer Research shop about the alleged incidents.

71. I have already set out the evidence in the MWA1 Referral Form and the CI Notes in paragraphs 14 and 15 above. I accept that the most natural reading of that evidence is that the swearing took place on 6 June 2011 as well as the sitting in the chair and falling asleep. There is, however, a potential ambiguity at least in the language used in the MWA1 Referral Form as to whether the 'turning up at the placement' and swearing occurred on the same day as the 'falling asleep'. Moreover, there may have been an understandable misunderstanding on the part of the MWA1 Referral Form writer (who was the "Contract manager for Seetec, and so was neither Mr Hill nor the Cancer Research shop deputy manager) given it was probably uncommon for claimants to visit the mandatory work activity placement premises before their start date. I prefer, however, the evidence of Mr Hill in the telephone call of 17 June 2011 as it comes directly from him as one of the key witnesses and is more detailed.

72. It has been the appellant's case throughout that the transcript of the recording he made of the telephone call between himself and Mr Hill on 17 June 2011 would aid his case. It does, but only to the extent of satisfying me that he used offensive language to people working in the Cancer Research shop at the time of his prior visit and <u>not</u> on 6 June 2011. Other than that, it does not assist his case, and as I have already indicated in paragraph 19 above the contents of the transcript cast strong doubts on the appellant's credibility in terms of how he then sought to present the evidence on his appeal.

73. The transcript shows that the appellant rang Mr Hill after he (the appellant) had received the respondent's letter of 15 June 2011, which I have detailed in paragraph 17 above. The appellant expresses his shock and outrage at the contents of that letter and the allegation that he had been "swearing at staff….then proceeded to sit in a chair and fall asleep". Mr Hill's immediate and unprompted (and thus in my view authentic)

response is to say "Well, I'm shocked at that because that's not what I said. They've got feedback off of the shop as well. The lady said when she phoned me the following day and she said before that you'd been into the shop". The appellant then agrees he had been in the shop a week or so before. Although there is then quite a lot of back and forth in the telephone conversation and overspeaking, it is clear that Mr Hill's understanding from speaking to "the lady" in the shop was that the 'swearing' had taken place at the appellant's visit to the shop the week or so before the placement was due to start.

74. Other points are noteworthy from this telephone conversation.

(i) First, in his own description to Mr Hill of one of the women he met in the shop on his visit before 6 June 2011 the appellant describes her in the telephone conversation as "a larger woman…substantially larger both in height….", before he is interrupted by Mr Hill to be told he cannot use such language. The appellant later describes the same woman in the conversation as having large legs. Both of these unguarded comments are not inconsistent with the allegation that the appellant had told the woman she was "rather rotund". Although that phrase is not used in the telephone transcript, Mr Hill does refer to the above language as the appellant 'keeping saying things like that', which is consistent with the appellant having used the "rather rotund" remark in the shop to the woman.

(ii) Second, Mr Hill makes it plain that he had been phoned by 'Anna' (the assistant manager at the Cancer Research shop) before 6 June 2011 but after the appellant's first visit to the shop because a man had come into the shop and sworn at one of the members of staff. Later in the transcript, after the appellant had referred to having asked to see the manager at his prior visit and "obviously conveyed [to her] that I was not happy with the amount of standing up required", he is told by Mr Hill "But you said 'I suppose it's just a case of standing around all effing day doing nothing'". The

appellant's response in my view is instructive. It is not an immediate denial. It is "Ah, so they've actually quoted this? Oh, my God" (my underlining added for emphasis). I have underlined the word "quoted" because to my mind it seems an odd word to use, with its connotations of repeating or copying out that which **was** said. This impression is not lessened, despite the appellant's absolute denial that he said anything like that, by his attempts to evidence that the 'quote' was fabricated by arguing about where he would have placed the word "effing" in the sentence.

(iii) Third, the appellant says "Yeah, of course I did" to Mr Hill saying to him "But when we were in the store you did go into the changing room, kicked your shoes off, shut your eyes and fold your arms, didn't you mate?". This is clear admission by the appellant as to his conduct on 6 June 2011; an admission he later sought to deny.

(iv) Fourth, Mr Hill describes the appellant as being quite agitated at the shop on 6 June 2011 and had started off by having "a pop at" Mr Hill, which is why Mr Hill had suggested they "go somewhere" to talk.

75. I find from this evidence that (a) the appellant did act as was alleged on 6 June 2011 by sitting on the chair in the changing cubicle and taking off his shoes and appearing to fall asleep, and (b) had in the week or so prior to 6 June 2011 used offensive and obviously inappropriate language in the Cancer Research shop to members of staff. I am satisfied for the reasons given above that that language included calling one of the members of staff "rather rotund". I am satisfied also, on the balance of probabilities that the appellant either used the language of "all effing [or 'fucking' – see paragraph 82 below] day" or the "menial crap language"; the former is the more likely given the proximity to the events of the 17 June 2011 telephone call and Mr Hill's clear view in that call that the 'swearing' occurred the week or so before 6 June 2011.

Whether or not either use of language constitutes swearing under a dictionary definition, as the appellant seeks at length to argue, is in my judgment irrelevant. Swearing or not the language was offensive in any reasonable work setting.

76. None of the appellant's arguments against these factual conclusions lead me to take any different view. (He accepts, and so is not *against*, the 'appearing to fall asleep in the cubicle with shoes off' evidence.) I bear in mind his lack of credibility as evidenced by his misrepresentation or obfuscation about the evidence in the course of the appeal proceedings to the tribunal. For example, his claim in his appeal grounds that his behaviour on 6 June 2011 had been innocuous and that Mr Hill had not mentioned any unacceptable behaviour, when he must have known from his own transcript of the 17 June 2011 telephone conversation that the latter statement at least was untrue. I therefore view with considerable caution the credibility of his statements.

77. I also weigh against his statements the lack of any credible reason why the Cancer Research shop assistant manager, and indeed Mr Hill, would make things up, especially serious allegations that were very likely to have an impact on the appellant's benefit. Of course, they may have been mistaken in the recollection, but even taking account of this there is a consistent thread running through their evidence of the appellant having been offensive to staff at the shop, and their evidence about his appearing to fall asleep, shoes off, in the cubicle was eventually accepted by the appellant as true. And, I should add, the appellant has nowhere made good evidentially the argument he has from time to time made that Seetec, and perhaps even Cancer Research, had acted improperly through financial motive to seek to found a case against him.

78. I also do not view as convincing the appellant's often focussed and detailed submission on matters which are essentially irrelevant, or are at best only of tangential relevance. For example, he has argued in some detail about the need for the Upper Tribunal to "exhaustively pursue" whether the shop manager had "nudged him awake" and how she could have done so given the dimensions of the cubicle. However, he has admitted (after a while) that he was in the cubicle, with his shoes off, the curtain drawn, sitting down and appearing to be asleep. Whether he was prodded awake or not, the admitted conduct was contrary to that which the appellant had been required to do by way of participation in the scheme, for the reasons I have given above. Nor do I consider there is any merit in the criminal fraud allegation made by the appellant based on the evidence referred to in paragraph 22 being unsigned by Seetec. The lack of the signature simply goes to that evidence's weight. In any event, I have founded my decision not on the evidence in that paragraph but primarily on the evidence in the telephone transcript, and I have accepted that the appellant did not swear at Mr Hill on 6 June 2011.

79. In addition, I do not in any sense find persuasive the extensive submissions the appellant has made about whether using the word 'crap' involves swearing. Save for his final submission dealt with in paragraph 82 below, these submissions instructively shy away from any denial about the use of 'crap' but instead proceed in great detail to seek to demonstrate that the word 'crap' has a "complete absence of any abusive direct references to a person" and therefore at best could amount only to swearing <u>at the placement</u> and was not in any event seriously offensive. Why the need for this exegesis, I would ask, if no such word or words were used by the appellant?

80. The above covers the key aspects of the appellant's submissions on what had occurred on 6 June 2011 and his prior visit to the Cancer Research shop before the oral hearing of the appeal before me. Following that oral hearing, as I was by then considering redeciding the

first instance appeal myself, I gave extensive directions seeking clear submissions on the evidence from the parties. These directions said the following:

> "The appeal has been the subject of many submissions and arguments to date covering issues such as whether [the appellant] was properly referred to the mandatory work activity scheme, whether the "prior information requirement" was materially breached, and what as a matter of **law** constitutes "failure to participate" under JSA (Mandatory Work Activity) Regulations 2011. None of these issues need, or are, to be addressed again.
>
> However, as [the appellant] was not present at the hearing last week, it is only right and fair that I indicate to him that which I indicated to Ms Leventhal at the end of the hearing. This is that that, although I have yet to finally decide the appeal, it is *likely* that I will find that the First-tier Tribunal erred in law in failing to make sufficient findings of fact on what in fact occurred which led to the decision that [the appellant] had failed to participate in the mandatory work activity scheme. In addition, it seems likely that I will decide that the First-tier Tribunal made a finding of fact for which there was no evidence, namely that [the appellant] swore at a SEETEC member of staff. On the face of the evidence before me in the appeal bundle, that staff member could only have been Mr Hill, but his email of 13 December 2011 (pages 31-32) provides no support for this finding.
>
> If the above is what I decide, subject to my decision on the issues of law identified above, an issue is likely to arise as to how I dispose of the appeal if the First-tier Tribunal did err in law. Section 12(2) of the Tribunals, Court and Enforcement Act 2007 ("the 2007 Act) governs the procedure in this regard. If the First-tier Tribunal's failure to make sufficient findings of fact was *not* material to the decision it came to (that is, the decision would have been the same had the First-tier Tribunal properly investigated the evidence and made findings of fact on it), then I would not be required to set aside the First-tier Tribunal's decision. Section 12(2)(a) of the 2007 Act says I "may (but need not) set aside the decision of the First-tier Tribunal" if its decision involved the making of an error on a point of law. Alternatively, if the First-tier Tribunal's decision is set aside then section 12(2)(b) requires me either to remit the appeal to a new First-tier Tribunal for redetermination or remake the decision myself.
>
> What all of this may boil down to, in essence, is what view I take on the **evidence** and the **facts** about what led to the Secretary of State's decision under appeal and whether *on the evidence* [the appellant] had failed to participate in the mandatory work activity scheme. This involves different considerations from the error of law arguments both Judge Wikeley and myself have directed [the appellant] to make to date: in essence it involves asking [the appellant] to now make submissions on the **evidence** and not the **law**.
>
> [The appellant] has not to date been directed by the Upper Tribunal to address submissions to the evidence of what occurred leading up to his

being found to have failed to participate in the scheme by what are alleged to be his actions in late May 2011 up to 6 June 2011. The purpose of these directions is to allow [the appellant] to make written submissions on the relevant evidence and his alleged actions, and then to allow the Secretary of State the opportunity to respond in writing. That might enable me to decide the appeal from the Secretary of State's 4 July 2011 decision on the papers and written submission alone, if that is possible.

Both parties should make as full submissions in writing as they are able to in response to the directions below and not assume (and so leave out) that matters that can be addressed in writing can be left to an oral hearing. This is not to rule out an oral hearing; indeed the directions below positively ask for submissions from the parties as to whether an oral hearing is needed, and if so whether that hearing should be before the Upper Tribunal or a First-tier Tribunal local to [the appellant]. All I am here seeking to emphasise is that **full** written submission should be made at this stage to enable, if possible, the relevant evidential matters to be addressed and decided by me on the papers.

I wish to further emphasise that those evidential issues concern ***only*** (i) what is alleged to have occurred when [the appellant] visited the Cancer Research shop on the Wednesday the week (or so) before 6 June 2011, and (ii) what occurred at that shop on 6 June 2011.

What need not, indeed **must not**, be addressed in the further written submissions directed below is issues relating to (a) whether [the appellant] was properly referred to the MWA scheme in the first place, (b) the prior information requirement, and (c) whether [the appellant] swore at a SEETEC member of staff. The reasons submissions are not to be provided under (a) and (b) is because these have already been addressed in detail; the reason for (c) is because I accept that there is no good evidence that [the appellant] swore at any SEETEC staff member

If [the appellant] wishes to rely in any part on the audio recording he made of the telephone conversation with Mr Hill on 17 June 2011, then he **must** supply to the Upper Tribunal and the Secretary of State either (a) an accessible copy of the full audio recording, or (b) an independently compiled and authenticated written transcript of the whole audio record he holds of that conversation.

The basis of the Secretary of State's factual allegations leading to his "failure to participate" decision are set out in Mr Hill's email of 13 December 2011 (page31-32), and in the Secretary of State's submission of 31 May 2013 at paragraphs 13-23 (dealing with what it is alleged occurred on 6 June 2011) and paragraphs 25-31 (dealing with what it is alleged occurred the previous Wednesday (27 May 2011) when [the appellant] visited the Cancer Research shop) (all at pages 102-106 of the Upper Tribunal's appeal bundle).

In respect of each allegation it would assist me if [the appellant] could first address whether the allegation is factually correct or not before going on to address whether whatever he may accept did occur

> amounted to his failing to participate. (To date his submissions have not been entirely clear on what, if any, of which is alleged did in fact occur.)
>
> For example, does he accept that as a matter of fact he visited the shop on a previous Wednesday? Does he accept that on that occasion he used the words "well, you're rather rotund aren't you"? By way of further example, does he accept that on Monday 6 June 2011 he in fact used the words "all this menial crap" and/or "stand around like an idiot all day"? It would appear from Annex 1 to his application of 26 February 2017 that [the appellant] may accept that he used the phrase "menial crap", but does not accept he used it to a SEETEC member of staff (which I would accept) or that its use constituted him swearing (page 325). It may also be the case (see paragraph 3(e) of [the appellant's] observations in reply of 10 October 2013 on page 117), that he accepts that he in fact used the word "effing" at the previous (to use [the appellant's] words) "impromptu visit" to the shop, but again does not consider this usage to amount to swearing.
>
> It is of central importance to the proper resolution of this appeal that the factual allegations relied on by the Secretary of State are addressed and given a clear and straightforward answer by [the appellant]. If he disagrees with the fact of any of the allegations then he can state this, and could usefully then explain why the allegation may in fact be mistaken. It is a separate issue whether the agreed facts, or the facts as I may find them, could constitute "failing to participate", which the parties can also address. But what I do not wish to be lost in the submissions of the parties directed below is what the relevant facts were (agreed or otherwise)."

81. I was then provided with the transcript of the telephone call, which I have addressed above, and closing written submissions from the appellant and then the respondent. The appellant, as I have already touched upon, felt compelled to rely entirely on the telephone call of 17 June 2011. As I have already demonstrated above, the transcript of that telephone only assists the appellant to a very limited extent.

82. The appellant's submission in reply to the above directions does provide some clarity in that he sets out bare denials of using the words "menial crap", "effing" and "you're rather rotund, aren't you". However, he then devotes the bulk of the written submission on these points to arguing, again, an irrelevant series of hypotheticals to the effect that "menial crap" and "effing" cannot amount to swearing at staff or swearing as such. I also note that despite arguing, perhaps on this point quite plausibly, that Mr Hill's use of "effing" in the 17 June

telephone conversation might have been a polite euphemism on his part for the word "fucking" which was actually used, the appellant only says in this submission, as I read it, that he "cannot rationally accept that he literally uttered the word '"effing"'; he is silent, or at least is unclear, on whether he used the word "fucking" instead. None of this I find persuasive or convincing against the evidence I have accepted above.

83. It is for all these reasons that, on my redeciding the first instance appeal, I am satisfied on the evidence now before me that the appellant did fail to participate, without good cause, in the mandatory work activity scheme on 6 June 2011.

Other issues – 'MWA 05' letter and 'prior information'

84. I need to address two other arguments that arise on this appeal. These are:

(i) whether the appellant was properly referred to the mandatory work activity scheme in the first place, and

(ii) whether there was a material breach of what I will term the "prior information requirement".

I harbour considerable scepticism about the substantive validity of the argument the appellant makes about not having been properly referred to the mandatory work activity scheme in the first place. I say this because his actions in attending at the notified mandatory work activity at the Cancer Research shop and his subsequent arguments about what occurred during those attendances are not consonant with his having a substantive prior objection to whether he ought to have been on the scheme in the first place.

85. The argument on referral to the mandatory work activity scheme as first formulated by the appellant on 20 October 2011 was that he had been improperly referred to that scheme by an employment officer on 26 May 2011 as his first notification that he had been referred was on receipt of the Seetec letter of 26 May 2011. It therefore came as a

surprise to the appellant that he had been referred. (I note, however, the evidence below about having been referred at a telephone interview on 25 May 2011.) Further, the referral had not taken place during an "Adviser interview" – the appellant stated, "This did not happen" – and therefore he had not had the opportunity to raise concerns about being referred at all and the suitability of any particular referral. The substantive complaint thus appears to merge into the "prior information requirement" argument, which I address below.

86. I will not labour the point that this appears to have been very much an afterthought of an argument by the appellant. However, it is striking that in the immediate aftermath of 6 June 2011, and even beforehand, the appellant (who is obviously well capable of arguing his case if need be) took no issue with the act of his having been referred to mandatory work activity in the first place. He raised no complaint about being referred to the scheme in his representations up to and including his appeal of 4 August 2011, and that includes his lengthy telephone conversation with Mr Hill on 17 June 2011.

87. In later representations the appellant argues that he was not issued with an 'MWA 05' referral letter. He relies on a letter to him from Jobcentre Plus dated 19 April 2012 in which it is stated: "…we have apologised for not sending you a MWA 05 confirming your referral. We have explained that although this is part of the usual process it is the explanation of the information in the MWA 05 that is needed and is not the sending of the letter itself". For context, it appears accepted by the appellant, and in any event this much is at least clear from the evidence, that he was in fact referred to the mandatory work activity scheme during a telephone conversation. This appears to be confirmed in a prior Jobcentre Plus letter to the appellant of 9 February 2012 in which it is stated, inter alia:

> "According to our records your Personal Adviser at the time spoke to you during your interview about Work Programme and Mandatory Work Activity which may have been referred to as Service for the

> Community on 23.05.2011. During a telephone interview on 25.05.2011 you were also advised of this referral.....
>
> Following the Mandatory Work Activity Guidance you were referred to Seetec within the telephone interview on 25.05.2011 by your Personal Adviser. An explanation was given to you as to why you were being referred during this interview. The reasons given were due to you being a long-term jobseeker, giving you valuable work experience and to enable you to record something current on your CV.....
>
> Before referral was made a Case Conference was conducted with the Disability Employment Advisor and Advisory Team Manager on 25.05.2011. This was to establish eligibility and suitability for this referral and if there were any objections, circumstances or health conditions which may prevent you from taking part in this activity. There were none recorded from this meeting and this was also recorded on your Labour Market record.
>
> As you had a telephone interview on 25.05.2011 notification letter MWA 05 should have been issued on your next attendance. We have no record of this. However the Advisor who referred you to Mandatory Work Activity is experienced and confirmed that she would have explained the requirements of attendance and consequences of non-attendance to you."

88. A later submission of the Secretary of State on this appeal to the Upper Tribunal from December 2013 explained that the Labour Market records are 'wiped out' periodically to free up space to record further information. This had by then occurred to the records of the conversations and interviews referred to in the 9 February 2012 letter immediately above. However, the records do still show that an interview did take place on 23 May 2011 and referral to "MWA" (mandatory work activity) did take place on 25 May 2011.

89. In a later submission received on 8 and 9 March 2017 the appellant disclosed the relevant Labour Market records from 2011, which he had been provided with by the respondent in April 2012. I address these further below.

90. Despite an argument by the Secretary of State that the entry for 23 May 2011 on page 186 of the appeal bundle shows that an MWA 05 was issued to the appellant, I am prepared to proceed on the basis that it was not, especially given the contents of the Jobcentre Plus letters

referred to in paragraph 87 above. This appears to be confirmed by a further Jobcentre Plus letter to the appellant of 27 April 2012, which says:

> "You then ask "what impact the failure to meet this requirement had on….the outcome of my MWA placement". The answer to this is that the failure to issue you with an MWA05 had no impact on the decision. This was because the you did not fail to attend the MWA and you were not sanctioned for that reason. You were notified verbally on 25 May 2011 that you had been referred for MWA and you did attend. The sanction that was imposed on you was for misconduct whilst participating in MWA. The issue, or not, of an MWA05 was therefore irrelevant to the decision."

91. I agree with this analysis in this 27 April 2012 Jobcentre Plus letter. It explains why the failure to issue the MWA 05 on the facts of this case was not a substantive breach of the notice requirements in regulation 4 of the MWA Regs. I am satisfied that the combination of the interviews detailed in the 9 February 2012 Jobcentre Plus letter and the Seetec letter of 26 May 2011 meant that the appellant was not materially deprived of written notification of the substance of what he was required to do by way of participation in the mandatory work activity scheme or the consequences which may arise of he did not participate. Put another way, I as am satisfied that the Seetec letter of 26 May 2011 met all of the relevant notice requirements of regulation 4 of the MWA Regs.

92. I do not find anything in the detailed Labour Market records covering 23 to 25 May 2011, as latterly disclosed by the appellant, that undermines or otherwise affects this conclusion. He founds on those records as showing that in the 23 May 2011 interview, which ostensibly appeared to be about trying to agree a "Jobseeker's Agreement" with him, the officer (P Dales) "discussed" the "Work Programme" with the appellant but was unsure of details of the "Work Programme/Community Service" and so referred him to the Direct.Gov website. Whether or not this interview provided the appellant with the opportunity to raise any objections about being referred to mandatory

work activity (and I deal below with the substance of his objections) because the phrase "mandatory work activity" was not used seems to me, with respect, besides the point.

93. I say this because the next Labour Market record of a conversation or interview between the officer and the appellant is the critical one. It is from 25 May 2011 and shows that the officer told the appellant he had been referred to the "mandatory work programme". It further shows that the appellant asked the basis on which he had been selected, which he was told was because he was a long-term jobseeker, and was further told that the referral would provide him with valuable work experience. The appellant then passed on his views to the officer about having to do work experience (which did not include any reference to foot or back problems). The record is obviously not a verbatim record of all that was said as it was no doubt written up shortly afterwards, but it does show that the appellant had the opportunity to make representations about being referred.

94. It is convenient here to move to address the "prior information requirement" argument on which the appellant seeks to rely, as it is tied to the issue of whether he was properly referred to the mandatory work activity scheme.

95. The Supreme Court in *Reilly and Wilson* laid down that the Secretary of State is under a common law duty as a matter of fairness to ensure that claimants have access to sufficient information about a 'work for your benefit scheme' to which they might be referred before they are referred to enable them to make representations about its suitability. This as the Court of Appeal later put it in *Reilly No.2* is a "simple proposition about administrative fairness". The Court of Appeal in that case also valuably observed (at paragraph [175]):

> "we are bound to say that we find it hard to see that the application of the prior information [requirement] at the moment of referral to the Work Programme is likely to be an important issue in the real world. Given its open-textured nature, JSA claimants are unlikely to object to referral as such. Any problems are likely to arise only when, following

> referral, particular requirements are made of claimants which they believe are unreasonable or inappropriate and which may lead to sanctions if they fail to comply. It is at that stage that they may need to be able to make representations and will need sufficient information to be able to do so meaningfully."

96. The legal consequences of breach of the prior information requirement will depend on the facts of the individual case. As the Supreme Court explained in paragraph 75 of *Reilly and Wilson*:

> "A failure to see that a claimant was adequately informed before service of a notice under regulation 4 would be likely to, but would not necessarily, vitiate the service of the notice. That would depend on whether the failure was material. Public law is flexible in dealing with the effects of procedural failures. Ultimately the issue must be determined by reference to the justice of the particular case. If the effect of the lack of information given to a claimant materially affected him or her by removing the opportunity of making representations which could have led to a different outcome, it would normally be unjust to allow the notice to stand. If it was immaterial on the facts, justice would not require the notice to be set aside."

97. With these important legal principles in mind, I turn therefore to the substance of the appellant's case on breach of the prior information requirement by the respondent. I have addressed above how in a general sense the appellant was afforded the opportunity, as a matter of administrative or procedural fairness, to object to being referred. I do not accept his argument that because of the phrase "had been referred" in the Labour Market record for 25 May 2011, the respondent's mind was closed on the issue of whether referral was appropriate. The record does not say "You have been referred and that is the end of it", and it shows, as I have detailed, that the appellant was able to make enquires and representations to the officer.

98. It is also noteworthy that on the same day (the Labour Market record entries are unclear, to me at least, whether this was before or after the 'you have been referred to MWA' conversation with the appellant that day, though the Jobcentre Plus letter of 9 February 2012 indicates it was before referral), the referring officer had sought advice as to the

appellant's eligibility and suitability for referral to the mandatory work activity programme from a disability employment advisor and advisory team manager.

99. In any event, as the caselaw above shows, the issue is not whether there was an opportunity to make representations *before* being selected for referral under regulation 3 of the MWA Regs, but whether the appellant had such an opportunity before the regulation 4 notice was issued. The notice was issued here on 26 May 2011. As the evidence highlighted above shows, the appellant had the opportunity to make representations the day before, during the interview/conversation on 25 May 2011. There was therefore no material administrative or procedural unfairness to him at this stage.

100. Nor do I consider is there any evidence of such material unfairness, per paragraph 175 of *Reilly No.2*, after the appellant had had the 26 May 2011 notice and knew what he had to do on the mandatory work activity placement. The Seetec letter of 26 May 2011 gave him a telephone number to call if he could not attend the work placement start date. Moreover, once he had confirmed at his prior visit to the Cancer Research shop what being a "Retail Assistant" would involve him in doing, on the appellant's own evidence in his submissions of 20 October 2011 he then took the opportunity before the placement to raise his alleged problems in his feet with both the Jobcentre and Seetec. There was therefore, even on the appellant's own account, no administrative or procedural unfairness on the facts in this case.

101. Further, on the evidence relevant to May and June 2011 there is and was no merit in the claimed ill-health problems such that either the requirement to take part in the mandatory work activity ought to have been rescinded or as showing that the appellant had good cause for his failure to participate. The appellant was claiming jobseeker's allowance at the time with no good evidence of medical restrictions on the employment he was available to take-up and the disability employment advisor did not consider the appellant had any health restriction that

would inhibit him from undertaking any form of 'work experience' in May or June 2011.

102. The appellant's reference to the DP2JP form completed by the disability employment advisor on 4 November 2010 (see pages 13-14, 328, 337 and 339) does not in my judgment assist him. (I will ignore for present purposes the redactions made to the more legible copy of this form on page 339.) This is because the form was seeking evidence from the appellant's GP as to the whether the appellant had an inability to stand for prolonged periods that would affect his ability to work. There is, however, no reply from the GP in the evidence before me, and I infer from the fact that the same disability employment advisor some seven months later, on 25 May 2011, had no objection to the appellant being referred to mandatory work activity, that no reply had been forthcoming from the GP which was in any material sense supportive of the appellant.

103. I also consider it significant in this regard that the appellant has not been able to present any credible evidence to counter the respondent's case on pages 248 and 268-270 that his jobseeker's allowance "Action Plan" had no health restrictions in place on it in May or June 2011 in terms of the appellant's work place abilities.

104. It is for all these reasons that, although the First-tier Tribunal's decision has been set aside, the appellant's appeal has ultimately failed and the Secretary of State's decision of 4 July 2011 has been upheld.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 15th August 2018