IN THE UPPER TRIBUNAL **Appeal No. CSUC/494/2017**
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge A I Poole QC

The decision of the Upper Tribunal **is to allow the appeal.** The decision of the First-tier Tribunal at Glasgow dated 18 July 2017 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the directions at the end of this decision.

REASONS FOR DECISION

1. This is a case about universal credit ("**UC**") and the application of sanctions to claimants. The short point arising is that tribunals deciding certain sanctions cases should consider not just the issue of good reason for failing to comply with a requirement, but also whether that requirement was validly imposed in the first place. Requirements are only validly imposed if the claimant has been notified of the substance of the particular requirement and the consequences of the failure to comply with it.

2. The appellant (the "**claimant**") failed to attend an appointment with his adviser on 12 January 2017. The Secretary of State for Work and Pensions ("**SSWP**") decided on 1 February 2017 to apply a sanction to him. The sanction had the effect that the claimant's payments of UC were reduced. On 18 July 2017 the First-tier Tribunal (the "**tribunal**") upheld the decision of the SSWP. The following relevant facts were found by the tribunal, at paragraphs 14 and 16 of its statement of reasons for decision.

> The claimant claimed UC from 11 September 2015.
>
> The claimant was placed in the All Work-Related Requirement Conditionality Group.
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> The claimant signed and agreed the appropriate Claimant Commitment on 27 October 2016.
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> The Claimant Commitment included a requirement to attend and take part in appointments with the advisor when required.
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> The Claimant Commitment includes information as to what might happen if without a good reason there is a failure to comply.
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> The claimant was required to attend an appointment with his advisor at the Universal Credit Office at Bridgeton on 12 January 2017 at 11am.
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> The claimant did not attend the appointment.
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> The claimant did not attend the appointment as he thought it was on 13 January 2017.
>
> The claimant had been notified of the appointment.

These findings show the general background against which this case was decided (although below I return to certain aspects of the first and third findings which were unsupported by the evidence).

3. At first instance, the claimant was unrepresented. The only issue he raised was whether he had good reason for failing to attend his appointment. The tribunal noted that he had given two different explanations for non-attendance, misreading the card on which his appointment was recorded, and ill health. The tribunal found that the explanation of misreading the card was more likely, but did not amount to good reason for not attending, so upheld the sanction decision. The claimant did not raise, and nor did the tribunal address, the issue of whether the requirement leading to the sanction had been validly imposed in the first place.

4. Limited permission to appeal was granted by an Upper Tribunal Judge on 12 January 2018. Permission was not granted in respect of the issues raised by the claimant in his application for leave to appeal, which focused on whether or not he had good reason for his failure to attend. Permission was instead granted on a question of general significance of whether a work-focused interview requirement had been validly imposed in the first place. Questions were raised as to whether the standard form of claimant commitment in the papers could impose a work-focused interview requirement, and if not, what evidence was needed if the requirement was imposed with each appointment. Helpful written submissions were received from both parties, and both parties were ably represented at an oral hearing. In the reasons for my decision below I set out the applicable law, then apply it.

Applicable law

Statutory provisions

5. Under Section 27(2) of the Welfare Reform Act 2012 (the "2012 Act"), it is a sanctionable failure if a claimant:

(a) fails for no good reason to comply with a work-related requirement;

(b) fails for no good reason to comply with a requirement under Section 23.

Sanctions are therefore related to failure to comply with 'requirements', which can be 'work-related' or Section 23 requirements. Where there has been a sanctionable failure, the amount of UC is reduced in accordance with Regulations (Section 27(1) and (4)). The relevant regulations are the Universal Credit Regulations 2013 (the "**UC Regulations**").

6. On the wording of Section 27(2)(a) of the 2012 Act, a sanction will only lawfully be applied if there has been a failure to comply with a work-related requirement. It follows from this wording that a condition precedent for application of a sanction is that the claimant was subject to a work-related requirement. The definition of work-related requirement can be found in Section 13(1) of the 2012 Act which provides:

> (1) This Chapter provides for the Secretary of State to impose work-related requirements with which claimants must comply for the purposes of this Part.
>
> (2) In this Part "work-related requirement" means—
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> (a) a work-focused interview requirement (see section 15);
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> (b) a work preparation requirement (see section 16);
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> (c) a work search requirement (see section 17);

(d) a work availability requirement (see section 18).

7. On the wording of Section 27(2)(b) of the 2012 Act, a sanction may lawfully be applied only if there has been a failure to comply with a Section 23 requirement. Section 23 is entitled "Connected requirements". The parts of Section 23 relevant to this appeal are:

> (1) The Secretary of State may require a claimant to participate in an interview for any purpose relating to—
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> (a) the imposition of a work-related requirement on the claimant;
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> (b) verifying the claimant's compliance with a work-related requirement;
>
> (c) assisting the claimant to comply with a work-related requirement.
>
> (2) The Secretary of State may specify how, when and where such an interview is to take place.

8. In this case the claimant was in the 'all work-related requirements' group (Section 22). Among other things, he was subject to a work-focused interview requirement. Section 15 of the 2012 Act provides:

> (1) In this Part a *"work-focused interview requirement"* is a requirement that a claimant participate in one or more work-focused interviews as specified by the Secretary of State.
>
> (2) A work-focused interview is an interview for prescribed purposes relating to work or work preparation.
>
> (3) The purposes which may be prescribed under subsection (2) include in particular that of making it more likely in the opinion of the Secretary of State that the claimant will obtain paid work (or more paid work or better-paid work).
>
> (4) The Secretary of State may specify how, when and where a work-focused interview is to take place.

9. There is further detail about the purposes of a Section 15 work-focused interview set out in Regulation 93 of the 2013 Regulations (under the powers in Section 15(2)):

> The purposes of a work-focused interview are any or all of the following—
> (a) assessing the claimant's prospects for remaining in or obtaining paid work;
> (b) assisting or encouraging the claimant to remain in or obtain paid work;
> (c) identifying activities that the claimant may undertake that will make remaining in or obtaining paid work more likely;
> (d) identifying training, educational or rehabilitation opportunities for the claimant which may make it more likely that the claimant will remain in or obtain paid work or be able to do so;
> (e) identifying current or future work opportunities for the claimant that are relevant to the claimant's needs and abilities;
> (f) ascertaining whether a claimant is in gainful self-employment or meets the conditions in regulation 63 (start-up period).

10. There are therefore at least two different forms of interview to which a claimant may be called under the 2012 Act. One is an interview under Section 23 of the 2012 Act. There are three purposes of such an interview; imposing a work-related requirement, verifying compliance, and assisting the claimant to comply with a work-related requirement. The other is a work-focused interview under Section 15, for purposes in Regulation 93 of the UC Regulations set out in the previous paragraph. The difference appears to be that Section 15 is more focused on actual work or getting

into it, whereas Section 23 is more setting UC work-related requirements, and monitoring or assisting compliance.

11. Section 24 is entitled "Imposition of requirements". This covers imposition both of 'connected requirements' under Section 23, and work-related requirements under provisions earlier in the 2012 Act. Section 24 gives regulation making powers in relation to imposition of requirements, but also provides:

> (3) Where the Secretary of State may impose a requirement under this Part, or specify any action to be taken in relation to such a requirement, the Secretary of State may revoke or change what has been imposed or specified.
>
> (4) Notification of a requirement imposed under this Part (or any change to or revocation of such a requirement) is, if not included in the claimant commitment, to be in such manner as the Secretary of State may determine.

Section 24(4) on its wording therefore contemplates that requirements may be contained in a claimant commitment, or outwith a claimant commitment. However, it is implicit in Section 24(4) that the requirement should have been notified.

12. What a 'claimant commitment' is can be seen in Section 14 of the 2012 Act which provides:

> (1) A claimant commitment is a record of a claimant's responsibilities in relation to an award of universal credit.
>
> (2) A claimant commitment is to be prepared by the Secretary of State and may be reviewed and updated as the Secretary of State thinks fit.
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> (3) A claimant commitment is to be in such form as the Secretary of State thinks fit.
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> (4) A claimant commitment is to include—
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> (a) a record of the requirements that the claimant must comply with under this Part (or such of them as the Secretary of State considers it appropriate to include),
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> (b) any prescribed information, and
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> (c) any other information the Secretary of State considers it appropriate to include.
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> (5) For the purposes of this Part a claimant accepts a claimant commitment if, and only if, the claimant accepts the most up-to-date version of it in such manner as may be prescribed.

Three things are worth noting. A claimant commitment is to include 'a record' of requirements that the claimant must comply with (Section 14(4)(a)). This suggests that a requirement may be imposed by something other than the claimant commitment, but may be recorded in the claimant commitment, consistently with Section 24(4). Second, because of the words in parentheses at the end of Section 14(4)(a), it is clear that the claimant commitment need not contain all requirements to which the claimant is subject, if the Secretary of State does not consider it appropriate for those to be included. Again, the inference is that requirements can be imposed in places other than a claimant commitment. Third, a claimant commitment does not of itself attract a sanction. A claimant will have to have accepted a claimant commitment to be entitled to UC at all (Section 4(1)(e) of the 2012 Act). But sanctions under Section 27 are linked to failures to perform "requirements", which may or may not be recorded in a claimant commitment.

13. Regulations 15 and 16 of the UC Regulations contain further provisions on acceptance of a claimant commitment. Regulation 15(4) provides:

> A person must accept a claimant commitment by one of the following methods, as specified by the Secretary of State –
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> (a) electronically;
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> (b) by telephone;
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> (c) in writing.

It follows from the fact that acceptance can be by telephone and electronically, not just in writing, that a signed copy of the claimant commitment is not a prerequisite to the claimant commitment having been accepted and notified.

Legal principles

14. The system of UC involves an element of conditionality for claimants receiving money from public funds, and sanctions are part of that system. If a claimant can fairly be said to know they are supposed to do something they have properly been required to do, and what the consequences of non-compliance are, but they still fail to do it for no good reason, then the intention of the legislation is that a sanction should be applied. Nevertheless, tribunals should scrutinise UC sanctions decisions with care, and the legal provisions imposing them should be strictly construed. As the Upper Tribunal Judge said in *RR v SSWP* (UC) [2017] UKUT 459 (AAC) at paragraph 45:

> "…tribunals must always bear in mind that the UC sanctions regime involves a financial penalty, and so the provisions should be strictly construed (see by analogy *DL v Secretary of State for Work and Pensions (JSA)* [2013] UKUT 295 (AAC) at paragraph 14). Putting the matter another way, I subsequently suggested that "there is an argument in sanctions cases that the claimant should be given the benefit of any doubt that may reasonably arise" (*CS v Secretary of State for Work and Pensions (JSA)* [2015] UKUT 61 (AAC) at paragraph 19). I do not suggest that in the present case there is any need to give the Appellant the benefit of the doubt. However, especially with the increased severity of the UC sanctions regime, as compared with the previous arrangements, tribunals need to scrutinise sanctions decisions with considerable care".

'Benefit of the doubt' in this passage is not to be read as imposing any standard of proof other than the civil standard of balance of probabilities. It is simply that, because the sanctions regime may have severe consequences for claimants, tribunals will look carefully at sanctions decisions. In sanctions cases, it is for the SSWP to establish that a requirement has been imposed and there has been a failure to comply. If the SSWP shows these things, the claimant will only avoid a sanction being applied if they demonstrate good reason for failure to comply.

15. Sanctions may arise under various sections of the 2012 Act. The terms of the decision letter in this case disclose that the SSWP was applying Section 27 in conjunction with Section 15 (page 43). The result is that the decision under challenge was made under Section 27(2)(a) of the 2012 Act, set out in paragraph 6 above. The decision therefore concerns a failure to comply with a work-related requirement, rather than a Section 23 'connected requirements' interview (which would be sanctionable under Section 27(2)(b)). Section 27(2)(a) when broken down requires that: (i) there must have been a work-related requirement to which the claimant was subject; (ii) there must have been a failure to comply with that requirement; (iii) that failure was for no good reason. In passing, I observe that it has been found that 'for no good reason' means the same as having 'good cause' for doing or not doing something, and it means the same as 'without good reason' (*S v SSWP* (UC) [2017] UKUT 477 (AAC)

(CUC/1653/2016) paragraphs 54-57). It is a matter for the judgement of the tribunal, on the evaluation of the evidence before it, whether any failure was for no good reason.

16. This appeal is concerned with the first condition for imposition of a sanction in Section 27(2)(a). There must be a work-related requirement to which the claimant is subject. A work-related requirement must therefore have been "imposed" by the SSWP, using the wording of Section 24. As explained above, the work-related requirement may be in a claimant commitment, or imposed in some other way (Section 14(4)). While the requirement must have been notified, notification to a claimant is in such manner that the SSWP may determine (Section 24(4)). Where the requirement in issue is a work-focused interview, Section 15(4) expressly gives the SSWP discretion to "specify how, when and where a work-focused interview is to take place" (there is similar provision in Section 23(3) for 'connected requirement' interviews). There is a comparative absence of formality compared with some earlier schemes (cp *DH v SSWP* [2016] UKUT 0355 considering the detail required in Regulation 5(3) of the Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013)). The motivation for this absence of detail appears to be to allow flexibility in the scheme, so that what a claimant is required to do and how they are told is tailored to the needs of the particular claimant, and can be altered as appropriate on an ongoing basis and as circumstances change. The value of some flexibility in social security schemes has been recognised by courts and tribunals (e.g. *R (Reilly) v SSWP* [2014] AC 453 at paragraph 55, *SSWP v TJ* (JSA) [2015] UKUT 56 AAC at paragraph 184). The flexibility in Sections 14(4), 15(4), 23(2) and 24(4) means that interviews can be fixed on an ongoing basis without having to re-execute the claimant commitment each time a new interview is arranged. In practice, what appears to happen, at least as far as imposition of a requirement to attend work-focused interviews is concerned, is that there is a claimant commitment which contains a general obligation, then appointments are intimated on an ongoing basis, sometimes by being fixed at a face to face interview and entered into a standard form appointment card containing information about sanctions. In the words of *SP v SSWP* [2018] UKUT 227 (AAC), proper intimation of an appointment may make specific a general work-focused interview requirement in a claimant commitment.

17. There is no statutory requirement that notification of a work-related requirement to a claimant must be in some sort of letter or formal written notice, or contain prescribed content. Section 24(4) gives the SSWP a discretion as to the manner of notification. In principle this could be by telephone, in a face to face meeting, by text or other electronic means, as well as by recording in a written document sent to the claimant such as a letter or claimant commitment. Modern methods of communication may be used. This position is in keeping with other provisions of UC legislation, for example the move to electronically submitted claims for UC (Regulation 8 of the Universal Credit (Claims and Payments) Regulations 2013), and the provisions for acceptance of a claimant commitment in Regulation 15(4) of the 2012 Act, which specify methods not only of writing, but also electronically or by telephone.

18. However, the flexibility given to the SSWP by the provisions of the UC legislation is subject to control. These controls are partly contained in provisions in the legislation governing UC (e.g. Regulations 99 and 113 which concern work search and work availability requirements and higher level sanctions respectively, neither of which are applicable in this case on the facts), but also arise from general legal principles. Public law principles of fairness apply to ensure that sanctions are only lawful where the claimant has been given adequate notice of the work-related requirement, and also the

consequences of failure to comply with it. Tribunals are entitled to consider whether adequate notification was given, and whether a particular means of communication satisfied the requirement of notification (*R(Reilly) v SSWP* [2014] AC 453 at paras 55 and 64 to 75; *R (Reilly 2) v SSWP* [2016] EWCA Civ 413). None of this will be a surprise to the SSWP, because the Department of Work and Pensions has "Guidance for Decision Makers" and paragraph K1151 expressly recognises the existence of these public law principles in what it terms the 'prior information requirement'. It explains that each claimant's responsibilities and the consequences of not meeting them should be set out clearly in understandable terms at the stage of specification of particular actions or activities, so that claimants can make informed and meaningful representations. It stresses that the prior information requirement should be approached on an individual case by case basis as claimants vary considerably. It concludes:

> "In the interests of fairness, therefore, [claimants] should be in no doubt of what is expected of them and the consequences of failing to comply with any requirement and be able to make meaningful representations to a decision maker before a decision is made".

19. Accordingly, for a failure to be sanctionable, the SSWP must be able to show that there has been proper notification of the requirement and the consequences of non-compliance (*RR v SSWP* (UC) [2017] UKUT 459 (AAC) at paragraph 45). In other words, the flip side of flexibility is that the SSWP must be able to evidence that a requirement was in fact imposed. The more informal the means of communication to a claimant, the more efficient the SSWP's recording systems will need to be in recording what has happened. It is expected that the SSWP will produce to the tribunal copies of the claimant commitment and any appointment letters, records of telephone or electronic communications, and internal electronic records, evidencing the imposition of any work-related requirement and consequences of non-compliance to the claimant (*SSWP v DC* (JSA) [2017] UKUT 464 (AAC) at paragraph 36). Paragraph K1171 of the DWP's Guidance for Decision Makers says this:

> "Whatever is required of a claimant in their responsibilities, the Secretary of State has to be able to produce evidence to support that the claimant was adequately informed of the specific requirement if a sanction is to be imposed…All parts of the notifications process should be recorded in departmental systems and copies made available for the judiciary in the event of an appeal. This can be
>
> 1. A copy of a formal written notification or
> 2. A screen print of departmental system records showing details of a telephone conversation, face to face interview, text or email message."

Paragraph K1181 is about participating in an interview and says, among other things:

> "However the claimant is notified, a copy must be available as evidence and must show details of the specific appointment (i.e. the date, time and place) and that the claimant was aware of the consequences of failing to comply".

If the SSWP produces only records showing a date of a requirement to attend an appointment, and no documents showing the wording actually used, this may be insufficient to show that a claimant has been required to attend and participate rather than merely requested (*MB v SSWP* [2018] UKUT 213 paragraphs 5 and 7). Further, if the SSWP wishes to rely on the presumption of regularity, the tribunal will expect to see proof of what is done in the normal course. It is also to be expected, given the variety of ways in which the SSWP might communicate work-related requirements, that

the SSWP will choose a means of notification to the claimant which is capable of being reasonably understood by the particular claimant concerned.

20. If in issue, whether adequate notice of a work-related requirement has been given depends on scrutiny of the particular circumstances of any case. In principle, notice to a claimant may be given by a combination of communications read together: for example an appropriately worded claimant commitment read together with notification of a later appointment. This is the effect of earlier cases relating to jobseekers' allowance (*DH v SSWP* [2016] UKUT 0355 at paras 22 and 30, following *SSWP v TJ and others* [2015] UKUT 56 at paragraphs 179 to 192 (not overruled on this point by the Court of Appeal)), and I see no good reason why similar principles should not apply to UC. The critical issue is whether the claimant has been notified of the substance of the work-related requirement and consequences of non-compliance. If the claimant disputes adequate notification, unless the SSWP is able to evidence proper notification, the SSWP will not discharge the burden on her to show that the requirement was actually imposed (*RR v SSWP* (UC) [2017] UKUT 459 paragraph 45). If that burden is not discharged, an appeal against application of a sanction will succeed without the tribunal having to consider good reason.

Discussion

21. In this case, the tribunal did not consider the issue of whether the work-related requirement to attend a work-focused interview had been validly imposed in the first place, and I consider this to be an error of law. This is not to say that tribunals must, in every sanctions case, expressly consider whether a sanction has been validly imposed. Where a claimant is represented, and there is no dispute that they have been notified of the substance of the work-related requirement and consequences of non-compliance, then the matter may not be in issue and need not be considered under Section 12(8)(a) of the Social Security Act 1998. However, in this case there were two features which meant the tribunal should have exercised its inquisitorial powers, and considered whether a requirement had been validly imposed, even though the claimant did not expressly raise the matter before it. The first was that the claimant was unrepresented. The second was that the papers contained obvious inconsistencies about what had been notified to the claimant and when, discussed below, which should have alerted the tribunal to the need to consider whether a work-related requirement to attend a work-focused interview had actually been imposed.

22. As discussed above, in principle a sanctionable requirement could be imposed in a claimant commitment, outwith the claimant commitment, or by a combination of a claimant commitment and later communications (Sections 14 and 24 of the 2012 Act, *DH v SSWP* [2016] UKUT 0355 at paras 22 and 30, *SSWP v TJ and others* [2015] UKUT 56 at paragraphs 179 to 192). In this case, the SSWP relied on a claimant commitment produced in the papers, together with verbal notification of an appointment on 12 January 2017 at a previous appointment. I consider both in turn.

<u>The claimant commitment</u>

23. The SSWP's position (p4) was that the claimant had signed and agreed his current claimant commitment on 27 October 2016. Echoing this, the tribunal found in fact that the claimant "signed and agreed the appropriate claimant commitment on 27 October 2016". But this is a finding unsupported by the actual evidence before the tribunal. The only claimant commitment that was before the tribunal (p37) is not signed, despite the finding in fact, nor is it dated. Acceptance of a claimant commitment can be by telephone or electronically under Regulation 15(4) of the UC

Regulations, so it was not necessarily fatal that the claimant commitment was unsigned. But in the absence of a signature the SSWP had to produce other evidence of its notification. It did not do so. Further, it is evident on the face of the claimant commitment that was before the tribunal that it must have been drafted before 20 September 2016, and even if accepted by the claimant it is improbable that this was as late as 27 October 2016 (the date of the claimant commitment relied on by the SSWP). This is because on page 5 it lists a specific action which must be taken "by 20 September 2016". The SSWP had therefore not produced evidence showing which claimant commitment the claimant had agreed, and what requirements might have been notified to him in it. In all these circumstances the papers before the tribunal raised clear issues about the SSWP's stated position. This should have alerted the tribunal to the need to consider whether the requirement had been validly imposed in the first place.

24. Accordingly, on the state of the evidence which was before the tribunal when it heard the case, statements in the only claimant commitment before the tribunal could not be relied on, either alone or in conjunction with later appointments, as a basis for imposition of a work-related requirement. It was an error of law for the tribunal to have proceeded on the basis that a claimant commitment signed by the claimant on 27 October imposed a work-related requirement to attend a work-focused interview.

25. In the permission to appeal, a wider point of principle is raised by the Upper Tribunal Judge who granted permission, about whether the form of claimant commitment used in 2016 could ever have imposed a work-related requirement to participate in a work-focused interview. On the facts of this case, because the SSWP has not shown that the requirements in the claimant commitment were notified to the claimant at all, it is not strictly necessary to decide that matter. But given the views of that Upper Tribunal Judge, replicated in large part in the annotations to the UC legislation in the latest edition of Social Security Legislation 2018/2019 Volume V, I make the following comments.

26. Claimant commitments are 'living documents' in the sense that they are tailored to a particular claimant. The undated and unsigned version in the papers before the tribunal in this case notes the claimant's name and national insurance number, and on page 5 has an entry in 'specific actions I will take' which would not be of general application. Replacement claimant commitments may be agreed as time goes by, with revised content. However, parts of these documents may use standard form wording also appearing in other claimant commitments. The following wording appeared in the claimant commitment in the papers:

> "I will also…attend and take part in appointments with my adviser when required".

This is followed by wording which says:

> "If, without good reason, I don't do all these things, my Universal Credit payments will be cut by £10.40 for each day until I: …arrange a new appointment as long as I attend that appointment. Once I've done this my payment will be cut by £10.40 a day for a further period of up to 28 days".

Later in the claimant commitment it is said:

> "I'll phone Universal Credit in advance on 0345 600 0723 if I can't attend an appointment when I should.

> If I don't meet all the requirements set out in my Claimant Commitment, I understand that my Universal Credit payments will be cut. Cuts for failing to meet requirements are known as sanctions. The number of days a sanction lasts for will depend on:
>
> - which requirements I haven't met
> - how many times I haven't met my requirements in the previous 12 months".

The Upper Tribunal Judge granting permission considered it arguable that as important a matter as the imposition of work-related requirements should be spelled out expressly and not left to implication.

27. The claimant's representative argued that more information should have been given in the claimant commitment for a requirement to attend a work-focused interview lawfully to have been notified. It was pointed out that there are two types of interview under the 2012 Act, the work-focused interview under Section 15 (the provision relied on by the SSWP in this case in her decision letter) and the 'connected requirements' interview under Section 23. The legislation sets out different statutory purposes for each type of interview, and sanctions are dealt with in different paragraphs of Section 27. But there was no differentiation in the wording of the claimant commitment, which referred only to 'appointments'. The representative argued that Section 23 interviews were 'reviews' which were there effectively to 'police' UC – imposing work-related requirements and monitoring compliance, rather like signing on. Section 15 interviews had a different focus, which was on work and the claimant, and what needed to be done to find work or keep the claimant in it. The record of appointments lodged by the SSWP seemed to support this distinction because most appointments were 10 minute work-focused reviews, with only three (longer) appointments being work-focused interviews. While the representative did not go so far as to say that notification had to specify Section 15 or 23 and say "work-focused interview" or "connected requirement interview", he did submit that fair notice required at least some notification of the purposes of a particular interview. A lay analogy he drew was of a meeting with a school headmaster; a parent would prepare in completely different ways for a meeting about a child receiving an award and a child about to be expelled. Accordingly some intimation of what type of interview it was should have been given for there to have been fair notice, possibly by paraphrasing the statutory provisions about the purposes of the different types of meetings in Regulation 93 of the UC Regulations or Section 23 of the 2012 Act.

28. The SSWP's response was that the wording in the claimant commitment was prepared in such a way that claimants could understand it. 'Appointments' was an appropriate concept when communicating with claimants, rather than repeating statutory provisions. In the claimant commitment, the wording about appointments, and the consequences of non-attendance, was clear and imperative, indicating a requirement rather than a request. In conjunction with later intimation of the date, place and time of an interview, the claimant commitment imposed a work-related requirement. It was over-technical to require the SSWP to differentiate between the types of interview in the claimant commitment, because both Section 15 and Section 23 requirements were to do with work and involved appointments. An appointment could contain elements of both types of interview. The description of 'review' and 'interview' in the printout were just labels to reflect that some appointments were shorter than others, the review ones lasting only 10 minutes. They were not labels mapping on to Section 23 and Section 15 interviews respectively. The same levels of sanction followed from failures to attend either type of interview under Section 27 of

the 2012 Act. The context had to be taken into account. Claimants and advisors were operating within the UC system which included sanctions, and claimants knew when they were requested to attend interviews that it was obligatory. The obligation in respect of both types of interview was to turn up, and it was sufficient in these circumstances simply to give the date, time and place in conjunction with the claimant commitment.

29. In my opinion:

29.1 The UC legislation is deliberately drafted to leave a degree of flexibility for the SSWP, and permits multiple methods of communication to claimants (paragraphs 16 and 17 above). There is flexibility in the manner and means of notification. Given this legislative intention, it would be inappropriate for the Upper Tribunal to set out particular requirements for wording of notifications, or the means by which this is done.

29.2 In cases where the issue arises, the key matter for tribunals to consider is whether fair notice has been given, having regard to all of the communications between the SSWP and the claimant (paragraphs 18-20 above). What tribunals need to do is look at the evidence produced by the SSWP, in the context in which it arises, together with any evidence taken from the claimant, and ask the question; does the evidence show that the substance of the relevant requirement and consequences of non-compliance were notified to the claimant? The answer to this question will turn on the particular circumstances of a case.

29.3 There is a virtue in plain English, and in couching notifications about what a claimant has to do in terms that claimants can readily understand. The Upper Tribunal Judge who granted permission raised the issue of whether requirements should be spelled out expressly and not left to implication. In my view it is not necessary that there is reproduction of statutory wording or reference to particular section or regulation numbers, or indeed any prescribed form of wording. What is important is the substance. In this case the question was whether it could fairly be said, on the totality of the evidence, that the claimant had been notified of an obligation to attend a work-focused interview and the consequences of non-compliance.

29.4 Unless the only evidence bearing on imposition of a requirement in a sanctions case is the claimant commitment, it is artificial to focus on the sufficiency of the precise terms of a claimant commitment. This is because requirements can be imposed in various ways, including by a combination of documents (paragraph 20 above). Indeed, in this case the SSWP does not maintain that the wording in the claimant commitment of itself imposed a work-related requirement to attend a work-focused interview on 12 January 2017. Where a claimant commitment is part of the evidence, general reference to ‘appointments’ in the claimant commitment seems to me to be a sensible shorthand way of conveying a need to attend meetings but leaving flexibility to impose requirements at a later stage under either Section 15 or Section 23 of the 2012 Act. I also consider the passages set out in paragraph 26 above about sanctions for not meeting requirements, giving detail of how payments are cut, and sanctions for not meeting requirements. So where the claimant commitment has been notified, then those requirements have to be considered in conjunction with other evidence before the tribunal bearing on communication to the claimant of requirements and consequences of non-compliance. This can include, for example, later appointment cards, texts about

appointments, and verbal communications at interview. It seems to me that when considering the efficacy of verbal communication, although the SSWP's record keeping will be key, it is permissible to take into account a regular pattern of interviews. For example, a claimant may have been asked at interview to come back for the same sort of interview two weeks later. The claimant's experience from earlier interviews may be relevant to whether they have been informed of the substance of a requirement and consequences of non-compliance. Further, while intimation of date, time and place of appointment is a necessary component of intimation, that will be insufficient of itself unless linked in some way to notification to a claimant of a requirement to attend and consequences of non-compliance. The overall point is that tribunals have to consider not only the wording of the claimant commitment, but all of the evidence bearing on whether the substance of the relevant requirement and consequences of non-compliance were notified to the claimant.

29.5 As far as the difference between Section 15 and 23 interviews is concerned, in my opinion what the sanction was imposed for will be a relevant consideration when deciding whether there was fair notice of the substance of the requirement. If a claimant was sanctioned for failing to do something they didn't realise they had to do (for example they legitimately thought they were coming to an interview only to discuss a training opportunity (Section 15 with Regulation 93(d)), but were sanctioned for failing to bring evidence of work searches with them (a Section 23 issue)), then they would have a legitimate complaint of not being told more about the type of interview they had to attend. So in some cases, for a requirement properly to have been imposed, a claimant may need to have been told the purposes of a particular interview, and not simply that there is a 'meeting' or an 'appointment'. It is therefore good practice for the SSWP to consider what type of interview a claimant is being requested to attend and its purposes, and tell the claimant this in broad terms, as well as the date, time and place of the meeting and the consequences of failing to attend. In some (but not all) cases, not having done so may result in the SSWP having failed to impose a work-related requirement.

30. What is clear from the discussion above is that in sanctions cases, much may turn on evidence led in addition to a claimant commitment about the imposition of a work-related requirement, either in conjunction with the claimant commitment, or by itself. In the present case, evidence other than the claimant commitment was crucial, because the SSWP failed to show the requirements in the claimant commitment had been notified to the claimant. It is to that evidence I now turn.

Evidence other than the claimant commitment

31. Since work-related requirements can be imposed in ways other than the claimant commitment (paragraphs 12, 16 and 20 above), other communications between the claimant and SSWP must be considered. The SSWP's submission at p4 says the appointment the claimant failed to attend on 12 January 2017 was notified to the claimant at his 'prior attendance on 1 June 2016'. The first problem is that it is evident from the sequence of dates in the papers that the claimant did not even claim UC until well after 1 June 2016, the claim effective date being 7 September 2016 (p26) and the forms signed on 13 September 2016 (p35). (This also means that the tribunal's first finding in fact, that the claimant claimed UC from 11 September 2015, is unsupported by the evidence). There is no record of a meeting on 1 June 2016. There is therefore no foundation for the SSWP's position that the claimant was notified on 1 June 2016.

The Appointment History at page 59 of the bundle is slightly more helpful to the SSWP because it shows that the claimant had attended previous appointments, including a 'work focused review' on 21 December 2016. However, there is no proof whatsoever of what was said to the claimant on 21 December 2016. The document at page 58 also does not assist as the only date on it is 11 May 2017, not 12 January 2017, and it merely records that there was a work-focused review and the claimant failed to attend. It is not notification of the substance of a requirement to attend for a work-focused interview on 12 January 2017 and the consequences of non-compliance. The presumption of regularity cannot be applied as there is no evidence of a general practice or 'script' of what claimants are told at appointments about the need to attend work-focused interviews. There is no evidence of what happened at earlier interviews. There is no appointment card filled in for the claimant in evidence. Another curiosity was that the DWP's sanction decision states that it was made under Section 15 of the 2012 Act (p43), which concerns work-focused interviews, in conjunction with Section 27. But the two computer printouts from the DWP said to evidence the failure to attend referred to a work-focused "review", not interview, although appointments attended by the claimant on September and December 2016 and April 2017 recorded on the same printout were described as work-focused "interviews" (p58-59). Although the SSWP submitted these were just labels and did not denote either Section 15 or Section 23 interviews, the fact that only a work-focused 'review' is mentioned in the record of appointments, which also covers work-focused interviews, does in my view raise an issue whether the particular work-related requirement which had not been complied with was adequately notified. Together, all of these problems indicate that the SSWP failed to show that the claimant was properly notified of the substance of the requirement to attend a work-focused interview on 12 January 2017, and the consequence of non-compliance (*RR v SSWP* (UC) [2017] UKUT 459 (AAC)), contrary to the DWP's own guidance set out above. Accordingly, on the evidence before the tribunal, a sanction for failure to attend could not lawfully be applied under Section 27 of the 2012 Act.

32. The SSWP argues that all of this is immaterial, because of the finding by the tribunal that the claimant did not attend the appointment as he thought it was on 13 January 2017 (and the claimant's later position that he did not attend due to health issues). The SSWP argues that it is implicit in the claimant's position that he knew of the appointment. I agree that it is implicit in the claimant's position that he knew of the appointment, but that does not take the SSWP far enough. A sanction can only lawfully be applied if there is proper notification of the substance of the work-related requirement (in this case some wording sufficient to convey the substance of a work-focused interview, since the SSWP's position is that the sanction was applied under Sections 15 and 27) and the consequences of the failure to comply. Mere notification of the date, time and place is insufficient for these purposes (*RR v SSWP* (UC) [2017] UKUT 459 (AAC), *MB v SSWP* [2018] UKUT 213). On the evidence that was before the tribunal, it was an error of law for it to uphold the decision to apply a sanction, when the SSWP had not shown that a sanctionable requirement had been validly imposed in the first place.

Disposal

33. I find that the errors in law by the tribunal were material, because if the work-related requirement was not properly imposed, a sanction could not lawfully have been applied. It is therefore appropriate that I allow the appeal and set the decision aside.

34. I remit the case to the First-tier Tribunal for reconsideration. The issue of whether there was valid imposition of a requirement was only expressly raised on appeal to the Upper Tribunal by the Upper Tribunal Judge granting permission. In those particular circumstances, it is fair to give the SSWP an opportunity to produce evidence of whether a sanctionable requirement was in fact imposed before a reconstituted tribunal. The SSWP produced for the hearing before the Upper Tribunal two pieces of evidence that were not before the tribunal. I cannot have regard to this new evidence when deciding this appeal, which lies only on a point of law (*SSWP v DC* (JSA) [2017] UKUT 464 paragraph 38). But the documents will be relevant evidence if produced for the reconvened tribunal, because arguably they show that the claimant may have been provided with some notification. The first new document is a DWP computer printout, which records that a claimant commitment was agreed, signed and issued face to face on 13 September 2016, and that the claimant was issued with a 'claimant pack'. The acceptance of a claimant commitment on 13 September 2016 would be consistent with the dating on the other evidence in the bundle (although the entry is not consistent with the absence of signature on the claimant commitment in the papers). If the tribunal is satisfied this meant the claimant was notified of the commitments in the claimant commitment, those commitments would be a weighty part of the evidence about whether a work-related requirement had been imposed. The second new document is a standard form document headed "Your meeting plan" (p117) which on the first page has space for entering dates, times and contacts of next meetings, and on the second page warns that missing meetings without rearranging in advance risks a sanction. According to the SSWP's submission, this is issued with the 'commitment pack', which may or may not be the same as the 'claimant pack' referred to in the newly produced computer printout. It is possible this is the standard appointment 'card' referred to in the papers (p42) in connection with the suggestion that the claimant misread it. Oral evidence from the claimant might also cast light on what he was notified. All of this evidence would have to be considered in conjunction with evidence of an accepted claimant commitment. Equally, the claimant's representative referred to new evidence about the content of a telephone call to the DWP on 13 January 2017, which may be relevant to the issue of good reason. It is fair to give both parties the opportunity to lead further evidence. It will be for the tribunal to decide, on the totality of the evidence, whether the claimant was notified of the substance of the particular requirement with which he did not comply, and the consequences of non-compliance, and if so whether he had good reason for failing to comply.

DIRECTIONS

1. **The case is to be reconsidered at an oral hearing. The members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision which has been set aside.**

2. **Parties may provide any further evidence upon which they wish to rely before the First-tier Tribunal to the relevant HMCTS office, the deadline for doing so being one month from the date of issue of this Decision. The new tribunal will be looking at the appellant's circumstances at the time that the decision under appeal was made, that is 1 February 2017. Any further evidence, to be relevant, should shed light on the position at that time.**

3. **The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. It will not be limited to the evidence and submissions before the previous tribunal. It will consider all aspects of the case entirely afresh and it may reach the same or a different conclusion to the previous tribunal.**

   These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

Signed on the original
on 8 October 2018

A I Poole QC
Judge of the Upper Tribunal