DECISION OF THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

The claimant's appeal to the Upper Tribunal is allowed. The decision of the Sunderland First-tier Tribunal dated 11 September 2018 involved errors on points of law and is set aside. The case is remitted to a differently constituted tribunal within the Social Entitlement Chamber of the First-tier Tribunal for reconsideration in accordance with the directions given in paragraph 28 below and any further procedural directions given by a First-tier Tribunal judge (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(i)).

REASONS FOR DECISION

1. The claimant appeals against the decision of the First-tier Tribunal of 11 September 2018 ("the FtT") with the permission of Upper Tribunal Judge Ward, granted on 5 February 2019 and limited to one ground only. The written submission on behalf of the Secretary of State dated 19 March 2019 appears rather confused, in that while in paragraph 3.4 it was agreed that the two points mentioned by Judge Ward were errors of law, it was later submitted that the FtT had not gone wrong in law on those points and the appeal was not supported. The claimant's representative in his reply dated 12 September 2018 had no comment to make. I have taken that state of confusion, and the deficiencies in the state of the documentation put before the FtT, into account in reaching my decision.

2. The scenario is a familiar and in essence a simple one, but the course of decision-making was fairly convoluted. The claimant was prior to March 2016 entitled to income-related employment and support allowance ("ESA"), in the calculation of the amount of which was included the severe disability premium ("SDP") and the carer's premium ("CP"). That was because he was in receipt of the middle rate of the care component and the higher rate of the mobility component of disability living allowance ("DLA") for the period down to 29 March 2016 and his wife was in receipt of the carer's allowance ("CA") for looking after him. It may be that the claimant's claim for personal independence payment ("PIP") from 30 March 2016 was disallowed. The claimant's wife had a continuing entitlement to the enhanced rate of both the daily living component and the mobility component of PIP. That was why the claimant qualified for the SDP, which would, because someone was receiving CA in respect of him, have been at the lower rate. (The disability premium, as applicable in income support and income-based jobseeker's allowance, does not exist in ESA and there has been nothing to suggest that there might have been qualification for the enhanced disability premium). As things stood then only one of them could qualify for CA. On the ceasing of the claimant's entitlement to DLA, his wife's entitlement to CA also came to an end, on 3 April 2016. The claimant did not notify the part of the Department dealing with his ESA of those changes.

3. Something undisclosed alerted the Department to the situation, because the claimant was apparently interviewed by a compliance officer and gave a statement on 31 August 2016.

Neither a transcript of the interview nor a copy of the claimant's statement was in the papers before the FtT, but he apparently acknowledged the changes in entitlement to DLA and CA mentioned above. By that date, the claimant himself had become entitled to CA, from 4 July 2016, for looking after his wife, but I do not know if that was mentioned in the interview.

4. A decision was apparently made on 31 August 2016 that the claimant was not entitled to SDP with effect from 26 March 2016 and was notified to the claimant. No copy of that decision was apparently available later because it was not held electronically. A further decision was apparently made on 31 October 2016 that the claimant was not entitled to the CP from 28 May 2016 and was notified to the claimant. No copy of that decision was apparently available later because it was not held electronically. The start date for that decision was correct, to take into account the eight-week "run on" of qualification for the CP after the end of the relevant entitlement to CA. There should have been an end date of 1 July 2016 as the day before the claimant's new qualification for the CP started on his becoming entitled to CA on 4 July 2016. Both of those decisions must in substance have been supersessions on the ground of relevant change of circumstances. I do not know whether either of those decisions contained any detail on what was said to be the correct amount of the claimant's entitlement to ESA after the removal of the SDP and the CP from his applicable amount from the relevant dates.

5. Then came a decision dated 19 January 2017 that is in the papers. It purported to be a supersession of the decision awarding ESA from 28 April 2012 and all subsequent decisions on the ground of relevant change of circumstances. That was inept, because such supersessions had already been carried out by the decisions of 31 August 2016 and 31 October 2016. But the decision only concluded that the claimant had received a higher rate of ESA than proper and that an overpayment was to be calculated for the period from 26 March 2016 to 26 August 2016. It therefore added nothing of substance other than an administrative instruction and can probably be ignored.

6. On 6 April 2017 the overpayment recoverability decision (the decision the subject of the present appeal) was made (page 25). It was that the sum of £1360.70 paid in respect of the period from 26 March 206 to 26 August 2016 was recoverable from the claimant under section 71 of the Social Security Administration Act 1992. The failure to disclose relied on was the failure to disclose that the claimant's rate of DLA had changed. The decision made no reference to the decision under which the overpayment arose (although the notification letter mentioned an earlier letter of 31 August 2016) and neither document contained any indication of how the amount of £1360.70 had been worked out.

7. The claimant sought mandatory reconsideration. The decision on 11 May 2017 was to refuse to revise the decision of 19 January 2017. The explanation contained this significant new point:

> "Arrears due to customer due to the cessation of CA being paid to [his wife] are not to be offset against the overpayment as this is an advantageous change of circumstances and there is one month time limit for notification."

8. Finally, there was a revision of the decision of 6 April 2017 on 9 June 2017 (still under the mandatory reconsideration banner) on the ground that the earlier decision had failed to take into account the overpayment of CP for the five weeks from 28 May 2016 to 1 July 2016, to increase the amount of the overpayment found to be recoverable to £1533.70. At last, there was an attempt to provide a calculation of the weekly amounts of the overpayment said to have been incurred (page 39), but with figures that are difficult to understand or substantiate. The weekly amount overpaid was said to be £61.85 in the weeks in which there was qualification for the CP and £96.45 in the weeks in which there was not. The incorrect amount actually paid in all the weeks in question was said to be £208.00 and the correct amounts £146.15 and £111.55 respectively. There are at least two problems with those figures. First, it looks as though benefit rates from 2015/16 and not 2016/17 have been used. If the weekly overpayment for the periods with CP qualification was meant to equal the lower rate of the SDP, that was £64.30 in 2016/17 and £61.85 in 2015/16. Similarly, if the incorrect amount was meant to represent the total of the personal allowance for a couple, the SDP and the CA, I cannot make that come to £208.00 on either 2015/16 or 2016/17 rates (although I immediately acknowledge that my arithmetic may well have gone awry). The second problem is that before March 2016 the amount of the claimant's wife's CA (£62.10 at 2015/16 rates, £64.60 at 2016/17 rates) would have counted in full as income to be set against his applicable amount in the income-relation calculation. There appears to have been no allowance for that in the figures on page 39 in calculating either the alleged incorrect amount of payment or the alleged correct rate. That had the result of obscuring the problem identified in the decision of 11 May 2017, of whether an underpayment in the sense of that deduction of income having continued to be applied for weeks in which CA was not being received should have been taken into account in calculating the recoverable overpayment. I come back to that problem below. For the moment it is enough to note that, although the claimant's representative did not challenge the calculation of the overpayment in the appeal to the FtT, the calculation put forward certainly required a good deal of further explanation before it could be substantiated.

9. The claimant then appealed. The appeal was regarded as against the decisions of 31 August 2016 and 21 October 2016 and the overpayment recoverability decision of 6 April 2017 as revised on 9 June 2017. Only the latter decision was in substantial dispute before the FtT and is raised in the appeal to the Upper Tribunal. The initial grounds of appeal asserted generally that the overpayment was not recoverable and that there had not been an offset as required by regulation 13 of the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988. Following directions given after an adjourned FtT hearing on 20 December 2017, the claimant's representative, Ashenden Subramanian of Sunderland City Council's Welfare Rights Service, lodged these brief written grounds of appeal dated 22 December 2017:

> "When a decision is made about DLA it results in notification automatically being sent to ESA via a Work Available Report (WAR) (see attached example). It is therefore submitted that the overpayment occurred as the result of an error by the department as it did not use this information to initiate a supersession/review of [the claimant's] award of ESA breaking the chain of causation under s.71 of SSAA 1992 (see R(SB) 15/87,

> CIS/159/1990, CSIS/7/1994 and *GJ v SSWP (IS)* [2010] UKUT 107 (AAC)) resulting in the overpayment not being recoverable from the claimant."

The Secretary of State lodged a copy of a specimen ESA40 (April 2012) leaflet as directed, which suggests that the FtT thought there might be an issue as to whether the claimant was under a legal duty to inform the Secretary of State of the termination of his entitlement to DLA and of his wife's entitlement to CA. The Secretary of State's supplementary submission rejected the argument for the claimant around the WAR on the basis that even if the ESA authorities had failed to action a WAR, the causal link between the claimant's failure to disclose and the overpayment was not broken, because timely disclosure would have prompted the authorities to act sooner than they did.

10. At the hearing on 11 September 2018, Mr Subramanian argued in particular that the words used in the ESA40 leaflet were ambiguous, in that although the leaflet instructed claimants to tell the Department straight away if "any of your circumstances change" and about "any changes to do with pension income, benefits and allowances" and if the claimant or partner started or stopped getting any pension income, benefits or allowances or if the amount of money received changed, the section saying that by benefits the Department "meant things like" did not mention DLA, PIP or CA. According to the statement of reasons (the handwritten record of proceedings is impossible to make out in most places) the presenting officer who attended for the Secretary of State maintained that the ESA40 was sufficiently clear to impose a duty under regulation 32(1A) of the Social Security (Claims and Payments) Regulations 1987 and, although unable to comment on whether a WAR had actually been sent to the ESA section, that in accordance with the written submission there was no break in the chain of causation even if one had been sent.

11. The FtT refused the appeal and stated on the decision notice that the decision of 6 April 2017 was confirmed. The notice continued that the amount of £1360.70 was recoverable from the claimant. That of course was the amount mentioned in the decision as made on 6 April, not the amount mentioned in that decision as revised on 9 June 2017 (£1533.70). The statement of reasons referred to the decision that the claimant ceased to be entitled to the CP for the period from 28 May 2016 to 1 July 2016, but still described the decision under appeal and the amount of the overpayment involved as on the decision notice.

12. The FtT decided that the claimant was put under a regulation 32(1A) obligation to notify changes in his and his wife's entitlements by the terms of the ESA40 leaflet (there apparently not being any dispute that the claimant had received one), saying in paragraph 10 of the statement of reasons, after noting that the claimant had been in receipt of benefit for a number of years:

> "Such guidance relating to awards of benefit are not an easy read for many claimants but the words used so far as changes are concerned indicate that the claimant is required to tell the Department that either the claimant or his or her partner starts or stops getting any benefits and on that basis the Tribunal found that the wording of this document

> although not the easiest read was not ambiguous such that an appellant would be so confused by it that it required some form of interpretation before he felt obliged to act or needed to act on it."

13. On the causation issue, the FtT said in paragraph 11 that it:

> "was not persuaded or impressed by the argument that the WAR would itself negate any obligation by an appellant to [notify] under Regulation 32(1A). The Tribunal found that the appellant was under an obligation under Regulation 32(1A) and that the notification or requirement was not an ambiguous one and the Tribunal found that [the] appellant had failed to make disclosure. The Tribunal in making that finding did not find for the appellant's argument that there had been a breaking of the chain of causation but rather the overpayment was a direct result of the appellant's failure to notify and accordingly and on that basis the Tribunal found that the overpayment was recoverable from the appellant."

14. The statement said nothing about the point raised in the initial grounds of appeal about the proper application of regulation 13 of the Overpayments Regulations.

15. Mr Subramanian's application on behalf of the claimant for permission to appeal contained six bullet points. The first, after a reference to R(IS) 9/06 that I do not think particularly helped him, was that the FtT had accepted that the ESA40 was ambiguous but simply held that because the claimant had been in receipt of benefits for years he should have notified the Department. Bullet point 2 was that the FtT had not properly considered regulation 32(1B) of the Claims and Payments Regulations. Points 3 – 5 were in essence that the FtT had failed adequately to explain why the WAR did not break the chain of causation. Point 6 referred to CDLA/1834/2004, a decision cited to the FtT as dealing with ambiguity of instructions.

16. Judge Ward when giving permission to appeal expressly limited that permission to the first bullet point, although he did also "note" at the end that the decision appeared to have overlooked that the decision of 6 April 2017 had been revised on 9 June 2017 to increase the amount recoverable by £173. On the first bullet point the judge said this:

> "While it is patently inaccurate to suggest that the FtT 'simply' held that the appellant had been in receipt of benefits for years, I do consider it is arguable as an error of law, with a realistic prospect of success, that (a) the FtT's consideration of ESA40 was tainted by introducing that factor, with others, into its consideration, when it should have been applying an objective test; and (b) that it failed to engage sufficiently with the content and language of ESA40."

17. As already mentioned, the representative of the Secretary of State, in the submission dated 19 March 2019 started by saying that those two points "equated" to an error of law. However, in paragraphs 3.7 to 3.9 it was submitted, with reference to the decision of Judge Jacobs in *Secretary of State for Work and Pensions v AT (ESA)* [2018] UKUT 392 (AAC), that

the FtT had taken the right approach and that if there had been any assumption that the claimant would automatically know that he had to disclose because of his years on benefit that was an immaterial error that was not an error of law. The appeal was then not supported. There was thus a degree of incoherence or confusion in the Secretary of State's position, that may I think have contributed to Mr Subramanian's not putting any further comments forward.

Discussion

18. I do not think that there is anything in Judge Ward's point (a). While I agree that in considering whether a particular document includes a requirement by the Secretary of State to furnish information or evidence within regulation 32(1A) of the Claims and Payments Regulations an objective approach to the meaning of the document must be taken, rather than one varying according to the experience of the particular claimant, in my view all that the FtT was doing in its reference to the claimant having been in receipt of benefit for a number of years was indicating a much increased probability that copies of ESA40 leaflets would have been received with annual up-rating letters. It was not suggesting that that had any influence on the meaning to be given to the terms of the leaflet.

19. On Judge Ward's point (b), the decision in *AT* contains a very positive conclusion that the tribunal in that case erred in law in finding that an ESA40 leaflet in apparently identical terms to that in the present case (although a 2013 print and not a 2102 print) did not require claimants qualifying for SDP to report the ending of entitlement to DLA. Judge Jacobs' firm view was that the general instructions, and in particular the instruction to notify the Department if the claimant or partner started to or stopped getting any pension income, benefits or allowances, were sufficient to impose a duty on claimants to report those changes. Plainly then, the FtT here could not be said to have reached a conclusion that it was not entitled to reach or to have applied a wrong test. But did it adequately explain its conclusion? *AT* had not been decided in September 2018, so was not available for reference. To explain why the argument for the claimant was rejected, the FtT needed to engage with the details of that argument. I am just persuaded that there was a failure to do that such as to make the reasons given for decision inadequate. There was no mention in the explanation given in paragraph 10 of the statement of reasons of the effect of the limited list of examples of benefits on page 17 of the leaflet or of the general need for some interpretation (a term taken from CDLA/1823/2004, the decision relied on by Mr Subramanian) in other aspects of the leaflet. The very number of general requirements would tend to focus claimants on specific examples given. And if the general requirements in the leaflet were taken literally by claimants the Department would be swamped by mounds of irrelevant information that it did not want, such as information that some benefit receipt of which was irrelevant to ESA had started or stopped or that the amount of some other benefit (which amount did not affect the amount of ESA) had changed on up-rating or that the amount of capital (below the limits at which that amount had any effect) had changed. Claimants were thus being asked to perform some interpretative task in deciding what in the real world needed to be notified and what did not. Some assessment of the balance between those factors and the force of the general requirement to notify the starting or stopping of some benefit, especially for claimants qualifying for SDP who perhaps might reasonably be expected to know of the significance of DLA and CA, was needed and was absent from the statement of reasons. That is

an error of law justifying setting the FtT's decision aside.

20. That is to apply a very rigorous standard indeed to the FtT, but I am fortified in my conclusion by the equivocal stance of the Secretary of State. I am also fortified in my conclusion that the error of law justifies setting aside the FtT's decision by the plain error in identifying the nature of the decision under appeal and in deciding that only £1360.70 was recoverable from the claimant (a matter that I do not think Judge Ward intended to exclude from consideration by limiting his grant of permission). It may seem perverse to rely on an error on its face in the claimant's favour to support the allowing of his appeal to the Upper Tribunal, but the claimant has an interest in having the proper basis identified for any future action by the Secretary of State to recover the amount of the overpayment. I suspect that the Department might simply ignore the difference in the figures if the decision of the FtT stood, but that would not be satisfactory. I think the matter goes beyond anything that could be remedied by a correction under rule 36 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, so can only be dealt with by a setting aside of the FtT's decision.

21. Having decided that the FtT's decision must be set aside on consideration only of matters within the scope of the limited permission to appeal, in my judgment I may look at other issues in deciding whether to substitute a decision on the appeal or to refer the case for rehearing by a new tribunal. There are three issues that can only properly be determined after the parties have had the opportunity to give them further consideration and to put forward additional submissions (and evidence, as necessary). That requires that the case be remitted for rehearing by a new tribunal. I shall deal with the issues only briefly, since the new tribunal will have to examine them afresh.

22. In my view, the FtT's conclusion on the causation point, or at least the explanation given for it, was flawed. There was no reference in the statement of reasons to the decisions specifically relied on in Mr Subramanian's grounds of appeal dated 22 December 2017 (paragraph 9 above) and in particular *GJ*. The effect of that and a subsequent decision by the same judge was helpfully and authoritatively summarised by Judge Turnbull in *BD v Secretary of State for Work and Pensions (SPC)* [2016] UKUT 162 (AAC):

> "36. It seems to me that the outcome of that reasoning, which I broadly accept, is really that section 71 in effect sets out a two-fold test for causation. First, it requires that the overpayment of benefit should have been made "in consequence of the misrepresentation or failure to disclose". Secondly, the Secretary of State is only entitled to recover the amount of any payments "which he would not have made … but for the misrepresentation or failure to disclose".
>
> 37. That second test, sometimes referred to in causation cases in other areas of the law as the 'but for' test, raises a simple question of fact, namely whether, on a balance of probability, the overpayment would have been avoided if the correct disclosure had been made. The first, however, imposes a test, to be answered in a common sense way in the light of all the relevant circumstances of the particular case, as to whether the chain of causation is broken. For the avoidance of doubt, the chain may be held to have been

> broken even though the 'but for' test is satisfied. For example, a decision maker or tribunal may be satisfied that although a superseding decision would in fact have been made if proper disclosure had been made by the claimant, so that the overpayment would in fact have been avoided, it is nevertheless right, as a matter of common sense, to regard the cause of the overpayment as being only some cause (e.g. the Department's own carelessness) other than the claimant's original misrepresentation or non-disclosure."

23. In the present case, it seems to me that the FtT only applied the first test, the 'but for' test, and did not consider the second test as explained in *GJ* and *BD*. There was therefore at the least a failure of adequate explanation for the rejection of the contentions made for the claimant. But even though it is for the Secretary of State to establish causation (paragraph 38 of *BD*), it is only in narrowly identified circumstances that the second test will not be met. The other cause must in common sense be the sole cause of the overpayment, so that the claimant's misrepresentation or failure to disclose is not even a contributory cause. That is illustrated by the outcome of *BD* itself. That was another case where a system of automatic notification of the cessation of a relevant benefit (attendance allowance) to the state pension credit office was said to be in existence. There was no evidence as to whether notifications were or were not sent in the particular case. Judge Turnbull agreed with the Secretary of State's representative that in those circumstances it should be assumed that the state pension credit office did receive the reports in question (paragraph 39). The judge accepted the submission for the Secretary of State that the most likely explanation for the failure to act on the reports and adjust the amount of pension credit payable was that the office did not have enough staff to cope with the volume of such reports and therefore gave priority to notifications coming directly from claimants. He held that in those circumstances the claimant's failure to disclose the cessation of his attendance allowance remained *a* cause of the overpayment, so that the overpayment was recoverable. Thus, in the present case, although there is no evidence as to why the ESA office did not act on the WAR on the assumption that one was received, there was still very much an open question whether that absence of action was to be regarded as the sole cause of the overpayment. But that was a question that needed to be addressed specifically by the FtT and was not. It needs to be addressed by a new tribunal after both parties have had the opportunity to consider it further.

24. The second issue is the application of regulation 13 of the Overpayments Regulations. So far as I can see Mr Subramanian never withdrew that original ground of appeal from contention. It may have been assumed that it had no merit, but in my judgment the answer to it given in the explanation for the decision of 11 May 2017 (paragraph 7 above) was unsound. The decision maker was perhaps led astray by the use of the word "offset". The relevant part of regulation 13(1) is not sub-paragraph (a), but sub-paragraph (b). Regulation 13(1) is as follows:

> "(1) Subject to paragraphs (1C) and (2), in calculating an amount recoverable under section 71 of the Administration Act or under regulations under regulation 11 ("the overpayment"), the adjudicating authority must deduct—
>
> (a) any amount that has been offset under Part 3;
>
> (b) any additional amount of a benefit specified in paragraph (1A) which was not

> payable under the original, or any other, determination but which should have been determined to be payable in respect of all or part of the overpayment period to the claimant or their partner—
>
> (i) on the basis of the claim as presented to the adjudicating authority; or
>
> (ii) on the basis that any misrepresentation or failure to disclose a material fact had been remedied prior to the award being made."

Income-related ESA is listed in paragraph (1A). The exceptions in paragraphs (1C) and (2) are not relevant.

25. It will be seen that regulation 13(1)(b)(ii) requires a hypothetical approach. It requires asking what should have happened if the misrepresentation or, as in this case, failure to disclose had been remedied as soon as possible. The answer in the present case appears to be that if the claimant had disclosed the termination of his entitlement to DLA and his wife's entitlement to CA a few days after the earliest practicable date it should have resulted not only in the adjustment of his ESA applicable amount to remove the SDP and, after the eight-week run-on, the CP, but also the removal of the amount of his wife's CA from the income side of the calculation of the amount of ESA payable, resulting in an additional amount that should have been payable. On that basis, that hypothetical additional amount should have been deducted from the amount of the recoverable overpayment. Because the operation is a hypothetical one it is beside the point that any supersession for change of circumstances based on an application being regarded as made by the claimant on 31 August 2016 could only take effect from that date.

26. That issue should have been addressed by the FtT, as it arose plainly on the evidence before it, and should be addressed by a new tribunal after both parties have had the opportunity to consider it further. In particular, the Secretary of State, even if she considers that there is some flaw in my reasoning in the previous two paragraphs, should produce in advance of the rehearing directed below a calculation of the deduction that would be applicable on the basis that that reasoning is correct.

27. The third issue is that, in the light of the figures set out in paragraph 8 above, the calculation of the amounts of the incorrect payments said to have been made for the period in question and of the correct amounts, even leaving aside the issue of the deduction of amounts of CA not actually received, needed much more detailed explanation before it could be substantiated. The production of such a detailed explanation is required from the Secretary of State before the rehearing.

Conclusion and directions

28. For the reasons given above, the decision of the tribunal of 11 September 2018 must be set aside as involving errors of law. The claimant's appeal against the Secretary of State's decision of 6 April 2017 as revised on 9 June 2017 is remitted to a differently constituted First-tier Tribunal for reconsideration in accordance with the following directions. There must be a complete rehearing of the appeal on the evidence produced and submissions made to the new

tribunal, which will not be bound in any way by any findings made or conclusions expressed by the tribunal of 11 September 2018. Before the rehearing the Secretary of State is to produce the calculations and explanations required in paragraphs 26 and 27 above together with such further submissions as are considered relevant. The salaried First-tier Tribunal judge who deals with the arrangements for the rehearing may wish to set a timetable for that to be done. I need give no other directions of law beyond that for the new tribunal to apply the legal tests set out above (subject to any submissions to the contrary on the three issues discussed in paragraphs 21 to 27 above, which have not been exposed to detailed submissions in the Upper Tribunal) to the facts as it finds them. The evaluation of all the evidence will be entirely a matter for the judgment of the new tribunal. The decision on the facts in this case is still open.

(Signed on original): J Mesher
Judge of the Upper Tribunal

Date: 12 June 2019