IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. CE/2770/20219, CE/145/2020 & CE/146/2020

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

Mr C.T.

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 6 January 2021
Decided on consideration of the papers

Representation:
Appellant: In person but assisted by his father, now his appointee
Respondent: Mr W. Spencer, DMA, Department for Work and Pensions

DECISION

The decision of the Upper Tribunal is to allow all three appeals. The decisions of the First-tier Tribunal made on 11 June 2019 under file numbers SC321/18/00281, SC321/18/00282 and SC321/18/00283 were made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007, I set those three decisions aside and remake them as follows:

> **The entitlement appeal** (SC321/18/00283) is allowed. The Respondent's decision on 8 February 2018 is revised. The Appellant had reduced entitlement to income-related employment and support allowance (IR-ESA) from 25 February 2016 (and not from 28 January 2016) as he was in receipt of an occupational pension.
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> **The overpayment appeal** (SC321/18/00281) is allowed. The Respondent's decision on 8 February 2018 is revised. The Appellant has been overpaid income-related employment and support allowance, which is recoverable from him, for the period (both dates included) from 25 February 2016 to 10 October 2017 (and not until 6 December 2017). This overpayment is recoverable as the Appellant failed to disclose the material fact that he was in receipt of an occupational pension.

This appeal is remitted to the Secretary of State to recalculate the amount of the overpayment to reflect the fact that the correct period of the overpayment runs from 25 February 2016 to 10 October 2017 (both dates included). The Secretary of State must notify the Appellant's representative of the revised calculation no later than one month after the date of the letter sending her this Decision. The Appellant is at liberty to apply to the Upper Tribunal, *solely* as to the amount of the overpayment as recalculated, within one month of the date the Secretary of State issues the fresh calculation.

The civil penalty appeal (SC321/18/00282) is allowed. The Respondent's decision on 8 February 2018 is revised. The Appellant had reasonable excuse under section 115D of the Social Security Administration Act 1992 for failing to disclose the material fact that he was in receipt of an occupational pension. Alternatively, and as a matter of discretion, a civil penalty should not be applied in the particular circumstances of this case. Either way, the civil penalty is quashed. This decision is without prejudice to the decisions on the entitlement and overpayment appeals above.

REASONS FOR DECISION

Introduction

1. This case concerns an overpayment of income-related employment and support allowance (ESA), caused by the Appellant's non-disclosure of the receipt of an occupational pension. The Appellant's appeal succeeds, but only to a rather limited extent. The 'headline decision' is that the amount of the recoverable overpayment will need to be recalculated for a slightly shorter period (being one month less at the start of the period of the overpayment and about two moths less at the end).

2. As I explained when giving permission to appeal, there were technically three appeals before the First-tier Tribunal (FTT) on 11 June 2019 to be decided. I list them here in the most logical order, as set out in the grant of permission to appeal:

> "4. The first appeal (FTT reference SC321/18/00283, UT ref CE/146/2020) was against the DWP decision that [the Appellant] had reduced entitlement to income-related ESA from 28 January 2016 because he was receiving an occupational pension. I call this the entitlement appeal.
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> 5. The second appeal (FTT reference SC321/18/00281, UT ref CE/2770/2019) was against the DWP decision that, as a result of the entitlement decision above, [the Appellant] was liable to repay £5,529.97 in overpaid income-related ESA for the period from 28/01/2016 to 06/12/2017. I call this the overpayment appeal.
>
> 6. The third appeal (FTT reference SC321/18/00282, UT ref CE/145/2020) was against the DWP decision to impose a £50 penalty because [the Appellant] had failed to disclose receipt of that pension and did so without reasonable excuse. I call this the civil penalty appeal."

3. All the page references cited in this decision are to pages in the Upper Tribunal file in CE/2770/2019 (the overpayment appeal), unless otherwise stated.

4. In reaching my decision, I have considered the detailed written arguments made by the Appellant's father, who now acts as his appointee, as well as those of Mr W. Spencer, who acts for the Secretary of State in these proceedings.

5. The arguments put on behalf of the father are not really directed to showing why it is said that the FTT went wrong in law. That is not meant as a criticism, as I appreciate that the Appellant and his father do not have a legal background. They are principally arguments about the wider issues of justice or injustice relating to the situation in which the Appellant now finds himself. Most of the arguments really belong to a complaint to the DWP or to the Ombudsman about alleged maladministration on the part of the Department.

6. However, the Upper Tribunal is an inquisitorial jurisdiction. This means that Upper Tribunal judges will scrutinise FTT decisions of their own initiative to see whether it may be arguable that the FTT went wrong in law in some material way. In my reasons for giving permission to appeal on 26 June 2020 (pp.314-318), I suggested several ways in which the FTT may have potentially erred.

7. In his helpful submission to the Upper Tribunal on these three appeals, made on behalf of the Secretary of State, Mr Spencer argues that the FTT went wrong in part in its decision on the entitlement appeal and the overpayment appeal, but not in relation to the civil penalty appeal. He explains why, and requests that I allow the first two appeals but dismiss the final appeal. In addition, he suggests that I re-make the first two decisions under appeal as regards entitlement and overpayment. The net effect would be a relatively short reduction in the overall period of the overpayment.

8. I agree with Mr Spencer in relation to the entitlement and overpayment appeals. My reasons follow. I deal later with the main arguments advanced on the Appellant's behalf by his father. The case will now have to go back to the Secretary of State's representative for the revised amount of the recoverable overpayment to be recalculated in the light of my findings.

9. However, I disagree with Mr Spencer in relation to the civil penalty appeal. He suggests that I dismiss that appeal. For the reasons I give later, I disagree. I allow the civil penalty appeal and re-make the decision in question so as to quash the imposition of the £50 penalty.

The entitlement appeal

10. I start with the entitlement appeal. When I gave permission to appeal, I had this to say about the entitlement appeal, a view formed on the basis of a provisional review of the case papers:

> "11. There is relatively little analysis of the entitlement appeal in the FTT's SoR [statement of reasons]. Similarly, the Appellant's grounds of appeal are understandably focussed more on the overpayment appeal than on the ESA entitlement issue. On a provisional review of the file, it is difficult to see an effective answer to the DWP's decision on the entitlement question. The simple fact is that under the law receipt of an occupational pension counts in full to reduce entitlement to income-related ESA, although there is a £85 p.w. allowance that applies for contribution-based

> ESA. The fact that the Appellant and his father may not have properly understood how the admittedly complex benefits system works is no defence. So, on the face of it at least, there may be little mileage in an appeal on the entitlement issue."

11. However, I identified a problem with the dates relied upon in the FTT's entitlement decision:

> "12. There is, however, at least one point that justifies a grant of permission on the entitlement appeal. This relates to the start date for the receipt of the occupational pension. The pension took the form of an annuity, at a gross rate of £247.06 per month. It was a fixed rate with no provision for annual upratings. Entitlement commenced from 1 February 2016 so that the first payment was received on 1 March 2016. … On its face the SoR appears to contain an error in that it makes a specific finding of fact (at paragraph [8], on the second page, when that number is by mistake used a second time in the SoR) that the pension came into payment in December 2016 and yet it upholds a decision to supersede the ESA assessment with effect from February 2016 (see SoR at paragraph [2]) and an overpayment based on that supersession."

12. I suggested this error over the correct date the pension came into payment may have been due to a typographical error. Mr Spencer has an alternative explanation for the mistake over the date:

> "I suspect that this date was transcribed because the person who drafted the statement (probably the Compliance Officer) took the earliest date of payment on the Schedule provided by the Partnership Annuity Service Centre at page [138], and overlooked the continuation of the schedule on the following page [139]."

13. On reflection, and having reviewed the file further, I agree with Mr Spencer that that is the most likely explanation for the error having been made. But whatever the reason, there was an obvious inconsistency in the FTT decision. On the one hand it said the pension started in payment in December 2016. On the other hand it upheld a decision to the effect that the overpayment period began on 28 January 2016. Those two findings cannot both be right. In fact, it is clear that the first pension payment was made on 1 March 2016 (see p.139).

14. This raises a further but separate point, namely the correct start date for the change in the Appellant's entitlement to ESA, once the pension was in payment. I dealt with this issue at paragraphs 24 and 25 of the reasons for my grant of permission (pp.317-318).

15. Mr Spencer deals with this point as follows (footnote omitted):

> "4. I agree with the Judge's summary (at pages 317-8, paragraph 25) of the legislation that governs the date on which the first annuity payment fell to be taken into account (and hence the date from which the claimant's award had to be superseded). Ultimately, the date from which the claimant's entitlement had to be reduced was the first day of the benefit week in which the first annuity payment was due to be paid to him. In my submission, this 'due date' was the date on which the payment was legally due to the paid to the claimant under the terms of the annuity (cf.

> CG/2750/1998 at [8] on an analogous provision in the Social Security Benefit (Computation of Earnings) Regulations 1996; copy enclosed). That the period in respect of which a payment is payable is irrelevant to the date on which it is treated as paid is, I submit, made clear by *Owen v Chief Adjudication Officer* (reported as R(IS) 8/99). … Accordingly, if it is presumed that the payments to [the Appellant] were made when they ought to have been paid, the tribunal should have superseded the claimant's award from the first day of the benefit week that included 1 March 2016 (i.e. from 25 February 2016)."

16. In short, the DWP decided that the start date for the reduced amount of ESA to which the Appellant was entitled (following receipt of the occupational pension payments) was 28 January 2016. The FTT confirmed that start date. As a matter of law, the DWP and the FTT were both wrong. The Appellant's reduced entitlement to ESA began with effect from 25 February 2016, i.e. about a month later, being the first day of the Appellant's benefit week that included 1 March 2016. I duly find as such and re-make the entitlement decision to that effect. The result is that the amount of the overpayment will need to be recalculated by the Secretary of State, as one month has now been "lopped off" the start of the period. As we shall see, there will also need to be a recalculation based on the correct end date for the overpayment period.

17. I also conclude there are no other legal errors in the FTT's approach to the entitlement appeal. I now turn to consider the overpayment appeal.

The overpayment appeal

18. I agree with Mr Spencer that in principle the duty to make disclosure, as imposed by regulation 32(1A) of the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968), is open-ended and not time limited, subject to the types of qualifications Mr Spencer mentions in his submission. However, the real issue in the present appeal is, as Mr Spencer identifies, "whether information received by the Secretary of State after the claimant has failed to disclose serves to break the *causal link* between that initial failure to disclose and the ongoing overpayment" (p.321). Mr Spencer helpfully refers to case law authorities such as Judge Mark's decision in *Secretary of State for Work and Pensions (SSWP) v SS (SPC)* [2013] UKUT 272 (AAC) and Judge Turnbull's decision in *BD v SSWP* [2016] UKUT 162 (AAC).

19. Having reviewed those authorities, Mr Spencer concludes as follows (p.322):

> "10. In brief, I submit that the receipt of the schedule of payments from the Partnership Annuity Service Centre did serve to break the causal link. This was not a case in which the Secretary of State required additional information from the claimant before he could properly supersede the award. He already had everything he needed, and nothing the claimant could say at the compliance interview would make any difference at all to the decision that was made. In effect, the interview was not about whether the award should be superseded, but rather concerned the recoverability of the overpayment and the claimant's liability to criminal prosecution. For all practical purposes, from the point the letter from the Partnership Annuity Service Centre was received, there was nothing the claimant could do to bring the overpayment to an end. There was nothing he could

add to the evidence already held. The matter was wholly out of his hands. As Judge Mark said about the case before him in *Secretary of State for Work and Pensions v SS* (SPC) at [11]:

> "It is plain that the pay slips contained sufficient information to enable the pension credit office to stop the pension credit payments immediately and that as a matter of common sense it was that failure to do so which led to the payments continuing (see *GJ v Secretary of State* [2010] UKUT 107 (AAC))."

20. The logic of Mr Spencer's argument is that the period of the overpayment ended when the DWP received the letter from the Partnership Annuity Service Centre, which is dated 3 October 2017 (p.138). We do not know the precise date on which the letter was received by the DWP. It is fair and reasonable to assume it was sent by second class post. On that basis, I conclude that the period of the overpayment ended on 10 October 2017. After that date, it was the DWP's failure to make the necessary adjustments to the Appellant's ESA payments which led to the continuing overpayment. In the light of Mr Spencer's concession, I accordingly conclude that the overpayment period ended on 10 October 2017 and not on 6 December 2017. In consequence, a period of just under two months must be "lopped off" the end of the overpayment period, necessitating a further recalculation of the amount of the overpayment.

21. I therefore also allow the Appellant's appeal to the Upper Tribunal in relation to the overpayment decision. The decision of the First-tier Tribunal involves a legal error. For that reason, I set aside the Tribunal's decision and re-make it in the modified terms as set out above. This leaves the civil penalty appeal.

The civil penalty appeal

22. The last of the three decisions under appeal is the FTT's decision to confirm the imposition of a civil penalty in the standard sum of £50. So far as the civil penalty appeal is concerned, I had this to say when giving permission to appeal (p.315):

> "10. The FTT dealt with this issue at paragraph [27] of the Statement of Reasons (SoR). This appears to have been dealt with very much as an afterthought in the SoR. I have no hesitation in giving permission to appeal on this point. It is plainly arguable that the FTT did not show how it exercised its discretion about the imposition of a penalty, given any mitigating circumstances that may have been applicable (e.g. the Appellant's ill-health) – see *VT v Secretary of State for Work & Pensions (SSWP)* [2016] UKUT 178 (AAC); [2016] AACR 42)."

23. However, in fairness to the FTT, I should say that the FTT provided rather more by way of reasoning on this aspect of the case in the decision notice itself (at p.89 of file CE/145/2020). Even so, that reasoning was exclusively focussed on the issue of whether the Appellant had reasonable excuse, and did not touch on the broader issue of the exercise of the discretion under section 115D.

24. Mr Spencer's very candid submission on this aspect of the case is as follows (p.323):

> "11. The Judge has suggested that the tribunal failed to exercise the statutory discretion as to whether a civil penalty should ultimately be imposed on a person in respect of whom the tests in section 115D of the Social Security Administration Act 1992 are satisfied (page 315, paragraph 10). I agree that the tribunal has erred in law in this way, but it is the Secretary of State's submission that this is not a material error. The Judge has referred to "mitigating circumstances." The Secretary of State's position, however, is that there is only *one* mitigating factor that falls to be considered, and that is the *amount* of the overpayment. What is more, the Secretary of State considers that the question of whether the amount of an overpayment warrants a civil penalty must be determined by strict reference to DWP's 'small overpayment' (or 'SMOP') threshold. This is amount below which the Secretary of State does not consider it economic to recover overpayments. It currently stands at £65.01. In effect, then, the Secretary of State considers that where section 115D is met, a civil penalty is appropriate for *all* overpayments that it is viable for DWP to recover. Unfortunately, I am not in a position to offer any arguments in support of this view. I have never been provided with any by the officials who have established this policy, and I am unable to think of any myself."

25. Mr Spencer accordingly invites me to dismiss the appeal relating to the civil penalty.

26. The relevant legislation is contained in section 115D of the Social Security Administration Act 1992 (as amended by the Welfare Reform Act 2012). The material provisions read as follows (with my emphasis added):

> "115D.–(1) A penalty of a prescribed amount **may** be imposed on a person by the appropriate authority where –
>
> (a) the person, **without reasonable excuse**, fails to provide information or evidence in accordance with requirements imposed on the person by the appropriate authority in connection with a claim for, or an award of, a relevant social security benefit,
>
> (b) the failure results in the making of an overpayment, and
>
> (c) the person has not been charged with an offence or cautioned, or been given a notice under section 115A, in respect of the overpayment.
>
> (2) A penalty of a prescribed amount **may** be imposed on a person by the appropriate authority where –
>
> (a) the person, **without reasonable excuse**, fails to notify the appropriate authority of a relevant change of circumstances in accordance with requirements imposed on the person under relevant social security legislation,
>
> (b) the failure results in the making of an overpayment, and
>
> (c) the person has not been charged with an offence or cautioned, or been given a notice under section 115A, in respect of the overpayment."

27. Unsurprisingly, a "relevant change of circumstances" for the purpose of section 115D(2) is defined as meaning "a change of circumstances which affects any entitlement of the person to any benefit or other payment or advantage under any provision of the relevant social security legislation" (see section 115D(6)).

28. There are two passages in Upper Tribunal Judge Rowland's decision in *VT v Secretary of State for Work & Pensions (SSWP)* which are worthy of special note in this context. The first shows that there is both an objective and a subjective aspect to the concept of what amounts to a "reasonable excuse":

> "11. The Secretary of State submits that the First-tier Tribunal did err in law because it overlooked the words "without reasonable excuse", which appear in both subsection (1)(a) and subsection (2)(a). He further submits, and I agree, that whether a person has a reasonable excuse raises the question whether what he or she did (or did not do) was a reasonable thing for a responsible person, conscious of, and intending to comply with, his or her obligations regarding benefit but having the experience and other relevant attributes of the person in question and placed in the situation in which that person found himself or herself at the relevant time, to do (or not to do)."

29. The second passage shows that while there is no discretion over the precise amount of the civil penalty (see paragraph 14 of the decision in *VT*), if one is to be imposed, there is a discretion as to the decision on whether to impose a penalty in the first place. This is conceptually distinct from the prior question as to whether the Appellant acted "without reasonable excuse":

> "13. There is also a further question as to whether the use of the word "may" in both subsection (1) and subsection (2) of section 115D of the Administration Act confers a broad discretion as to whether a penalty should be imposed even if the claimant does not have a reasonable excuse for the non-disclosure. The Secretary of State initially argued that it does not and that, if it is found that the conditions of either subsection are satisfied, a penalty has to be imposed. The authority cited for that submission was *The Commissioners for Her Majesty's Revenue and Customs v Hok Ltd* [2012] UKUT 363 (TCC), decided under the Taxes Management Act 1970, section 100 of which provides that an officer "may make a determination imposing a penalty". However, the Secretary of State now concedes that in section 115D of the Administration Act the word "may" should be given its ordinary meaning connoting the existence of a discretion. I agree. Section 100 of the 1970 Act has to be read in the context of specific provisions providing for an automatic liability and limiting the powers of the First-tier Tribunal on an appeal (see sections 98(2) and 100B(2)(a)). However, in section 115D of the Administration Act, it is quite reasonable that there should be a discretion as to whether to impose a penalty. Social security claimants often have low incomes and find it difficult enough to repay an overpayment without a penalty being added and there are cases where, although a claimant is partly to blame for an overpayment and does not have a reasonable excuse for failing to provide information or notifying a change of circumstances, nonetheless the Department has also acted (or failed to act) in a way that has contributed to the overpayment being made. In such a case it might be

> considered that to impose a penalty on the claimant when none is imposed on the Department is both unfair and also unlikely to encourage the Department to avoid overpayments..."

30. In the light of that analysis, I cannot accept Mr Spencer's submission on behalf of the Secretary of State that the only mitigating factor which can come into play is the amount of the overpayment in question. Such a narrow and restrictive reading of section 115D is inconsistent with the terms of the statute and the related Upper Tribunal case law authority.

31. I am satisfied the FTT in this case erred in law by failing to explore these issues. I therefore allow the civil penalty appeal. I re-make the decision so as to quash the civil penalty. I do that on two alternative bases. In the first place, given the Appellant's well-documented health and other circumstances, I am inclined to the view that, notwithstanding the failure to disclose, he had a "reasonable excuse". In that context I note that the Appellant has suffered from heroin addiction for many years, has experienced long periods of homelessness and now has severe renal and associated problems.

32. These findings about the recoverability of the overpayment and the non-imposition of a civil penalty are not (as they may appear) mutually contradictory. This is because the test under section 71 of the Social Security Administration Act 1992 for the recovery of overpayments is more objective in nature than that under section 115D. If I am wrong about the issue of reasonable excuse, I consider as a matter of discretion, given the Appellant's very difficult and challenging personal circumstances as outlined above, that the civil penalty should not be imposed under section 115D.

The arguments advanced on behalf of the Appellant

33. Finally, I need to address the main arguments advanced by the Appellant's father, which I have not found to be persuasive.

34. First, the Appellant's father denies having made the phone call to the DWP in June 2015, seeking information about the effect of his son taking the occupational pension (see record at p.27). The short answer is that the identity of the caller was not legally relevant. A benefit claimant's duty is to report changes in circumstances, not to carry out their own research, decide if a particular type of income is taken into account for benefit purposes and on that basis decide whether or not to report the change to the DWP. The bottom line is that the change in the present case should have been reported; it was then for the DWP to decide what to make of the information.

35. Second, the Appellant's father points to the fact that end of year P60s were issued to the Appellant in respect of the occupational pension payments. It is certainly true that information about pensions may make its way from the pension provider to HMRC and thence to the DWP, as part of its data matching arrangements. This typically takes much longer to process than the layperson thinks. But the point remains that the primary duty is on the claimant to make effective disclosure direct to the DWP and not to rely on such second-hand official data matching arrangements.

36. Third, the Appellant's father argues that the DWP takes forever to answer the phone and fails to acknowledge or respond to correspondence. It is

undoubtedly true that the DWP does not always operate as a well-oiled administrative machine. I know that from both my professional and personal experience. However, the point remains that there has been no suggestion that receipt of the occupational pension was reported in a timely manner after it came into payment. The FTT had to deal with the facts as they were, and not with hypothetical difficulties in contacting the DWP.

37. Fourth, the Appellant's father contends that his son's poor health was not properly taken into account. However, as matter of law the Appellant's poor health was not relevant to either the entitlement appeal or the overpayment appeal. The decision of the Court of Appeal in *B v Secretary of State for Work and Pensions* [2005] EWCA Civ 929 (reported as *R(IS) 9/06*) demonstrates that mental incapacity is no defence to a DWP claim to recover an overpayment of benefit on the ground of a failure to disclose. However, I have taken into account the Appellant's poor health in relation to the civil penalty appeal, where it can properly be considered.

38. Fifth, the Appellant's father points out that he had offered to pay his son's required missing National Insurance contributions, but had never received a reply from the DWP. Such a payment might have had an impact on contributory benefit entitlement going forward. However, it would not have the effect of reinstating benefit for a past period and so 'undoing' a previous overpayment. Again, the FTT could only deal with the facts as they were, and not with hypothetical circumstances.

39. Sixth, and lastly, the Appellant's father suggests the DWP was being misleading about when it first became aware of the pension payments being in place. It is certainly true that the DWP submission to the FTT is less than clear on this point. However, I have taken this factor into account in my decision relating to the proper end date for the overpayment, as considered above.

Summing up

40. I therefore conclude that the decision of the First-tier Tribunal involves an error of law in respect of all three appeals. I allow the three appeals and set aside the decisions of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). I re-make the decisions on the entitlement, overpayment and civil penalty appeals as set out above at the head of this decision and as replicated below (section 12(2)(b)(ii)). My decision is also as set out above.

> **The entitlement appeal** (SC321/18/00283) is allowed. The Respondent's decision on 8 February 2018 is revised. The Appellant had reduced entitlement to income-related employment and support allowance (IR-ESA) from 25 February 2016 (and <u>not</u> from 28 January 2016) as he was in receipt of an occupational pension.
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> **The overpayment appeal** (SC321/18/00281) is allowed. The Respondent's decision on 8 February 2018 is revised. The Appellant has been overpaid income-related employment and support allowance, which is recoverable from him, for the period (both dates included) from 25 February 2016 to 10 October 2017 (and <u>not</u> until 6 December 2017). This overpayment is recoverable as the Appellant failed to disclose the material fact that he was in receipt of an occupational pension.

This appeal is remitted to the Secretary of State to recalculate the amount of the overpayment to reflect the fact that the correct period of the overpayment runs from 25 February 2016 to 10 October 2017 (both dates included). The Secretary of State must notify the Appellant's representative of the revised calculation no later than one month after the date of the letter sending her this Decision. The Appellant is at liberty to apply to the Upper Tribunal, *solely* as to the amount of the overpayment as recalculated, within one month of the date the Secretary of State issues the fresh calculation.

The civil penalty appeal (SC321/18/00282) is allowed. The Respondent's decision on 8 February 2018 is revised. The Appellant had reasonable excuse under section 115D of the Social Security Administration Act 1992 for failing to disclose the material fact that he was in receipt of an occupational pension. Alternatively, and as a matter of discretion, a civil penalty should not be applied in the particular circumstances of this case. Either way, the civil penalty is quashed. This decision is without prejudice to the decisions on the entitlement and overpayment appeals above.

41. Finally, I should mention a couple of points about the revised overpayment figure. First, the DWP has a discretion to exercise in deciding whether to recover the full amount of the overpayment. That is a discretionary decision which is not subject to appeal to the FTT. However, an organisation such as Citizens Advice may be able to offer advice on the sorts of arguments that can be made to resist full recovery. Secondly, I should explain in any event that the DWP does not usually require repayment immediately in full of any overpayment it does decide to recover. The DWP is usually willing to consider payment by way of weekly instalments, often over a lengthy period.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 6 January 2021