IN THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Appeal No. UA-2021-001803-ESA
UA-2021-000859-ESA
(previously CE/771/2021
CE/824/2021)

On Appeal from the First-tier Tribunal (Social Entitlement Chamber) SC944/20/00633 & SC944/20/00634

BETWEEN

Appellant MW

and

Respondent THE SECRETARY OF STATE FOR WORK AND PENSIONS

BEFORE UPPER TRIBUNAL JUDGE WEST

Decided on consideration of the papers: 24 February 2023

DECISION

The stay on the proceedings is lifted.

The decision of the First-tier Tribunal sitting at Liverpool on 10 March 2021 under file reference SC944/20/00633 (the overpayment decision) does not involve an error on a point of law. The appeal against that decision is dismissed.

The decision of the First-tier Tribunal sitting at Liverpool on 10 March 2021 under file reference SC944/20/00634 (the civil penalty decision) involves an error on a point of

law. The appeal against that decision is allowed. The decision in that case is remade. The claimant is not liable to a civil penalty of £50.

This decision is made under sections 11 and 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Introduction

1. This is an appeal, with the permission of Upper Tribunal Judge Rowley, against the decision of the First-tier Tribunal sitting at Liverpool on 10 March 2021.

2. I shall refer to the appellant hereafter as "the claimant". The respondent is the Secretary of State for Work and Pensions. I shall refer to him hereafter as "the Secretary of State". I shall refer to the tribunal which sat on 10 March 2021 as "the Tribunal".

3. The claimant appealed against the decision of 26 November 2019 that he had been overpaid employment and support allowance ("ESA") totalling £17,854.75 for the period from and including 26 February 2014 to and including 13 August 2019 which was recoverable from him. On the same day a further decision was made to impose a civil penalty of £50.00. The decisions were based on the claimant's failure to notify the Secretary of State that his adult daughter had moved in with him on 27 February 2014, which meant that he was no longer entitled to a severe disability premium ("SDP") on his ESA. The decisions were reconsidered on 14 January 2020, but not revised.

4. The matter came before the Tribunal on 10 March 2021 when the claimant appeared by telephone and gave oral evidence. A presenting officer was also present. The appeals against the overpayment and civil penalty appeals were refused, as was a further appeal against the separate decision that the claimant was no longer entitled to SDP.

The Statement Of Reasons

5. So far as material, in its statement of reasons the Tribunal stated that

> "1. The appeal was heard as a telephone hearing attended by the Appellant and his representative. Three decisions were in issue. The first related to an entitlement decision that the Appellant's ESA (Income Related) (IR) should not contain the severe disability premium (SDP) from 26.02.2014 because his daughter had then begun to live with him. The second was that there had been an overpayment of £17804.75 ESA (IR) for the period 26.02.2014 to 13.08.2019 which was recoverable from pursuant to section 71 Social Security Administration Act 1992 and the third that he should pay a civil penalty under section 115D Administration Act 1992. The Tribunal disallowed each appeal. This statement covers all the appeals.
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> 2. It was common ground that the Appellant had been in receipt of Incapacity Benefit. This was converted to ESA (IR) from 18.09.2013 and the Appellant had been placed in the Support Group from 18.09.2013. After the award had been made the Appellant's adult daughter returned to live with him. For the purpose of these appeals this was said to have happened on 27.02.2014 although there is also evidence from the letters the Appellant sent to the Local Authority that she returned earlier on 11.11.2013.
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> 3. The tribunal is satisfied that the return of his daughter to live with the Appellant meant that he was no longer entitled to the SDP. The conditions for the SDP are set out in para 6(1) of Schedule 4 to the ESA Regulations 2008. This is because his daughter is treated as a non-dependant and she did not herself have an award of DLA or PIP to exempt her from being treated as a non-dependant nor were there any other circumstances to mean that she was not to be treated as a non-dependant. It was not claimed, for example, that his daughter had returned to care for the Appellant.
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> 4. The tribunal was satisfied that from 27.02.2014 there were grounds to supersede the award of ESA (IR) based on the change of circumstances when his daughter returned to live with him so that entitlement to the SDP ceased from 26.02.2014. His daughter remained living with the Appellant throughout the period covered by the overpayment. The Appellant told the Tribunal that his daughter has since left and the SDP has been restored to the Appellant.

5. The tribunal decided that the overpayment was recoverable because the Appellant had failed to disclose the material fact that his daughter had returned to live with him. The Tribunal was satisfied that the appellant was under a duty to disclose this fact. The DWP records show that a leaflet ESA 40 was issued to him on 29.01.2014 and 28.01.2015. There is a copy at pages 37-61 of appeal ref 00633.The Appellant was asked about this and said that he could not remember whether he had received them. The tribunal considered that it was more likely than not that the ESA 40s were issued as stated even though the Appellant was unable to say whether he had received them or not. The events he was being asked to recall happened in 2014 and 2015.

6. On page 16 of the ESA 40 is an instruction to report if you "have someone come to live in your house". In addition the appellant has always maintained that he knew he had to report that his daughter had begun to live with him. The Tribunal considered that he was under a duty to report the change of circumstances under Reg 32(IA) Claims and Payments Regulations 1987 and Reg 32(1B). The tribunal concluded that he failed to disclose and that duty was imposed by Reg 32(IA) and 32(1B).

7. The main issue was whether he had disclosed or whether DWP knew anyway which would absolve him of the duty to disclose. The Appellant's representative had referred in particular to the recent decision of a Commissioner in Northern Ireland in *SK v Dept for Communities (ESA)* C9/20-21 (ESA) in support of the argument that any overpayment was in fact caused by the Secretary of State and not the Appellant.

8. The Appellant told the tribunal that he had telephoned the DWP to let them know his daughter had moved in. He could not remember when the call took place. He only made the one call. The DWP has no record of any contact from the Appellant by phone between 21.08.2013 and 10.09.2019: see page 62 of 00633.

9. The Appellant has produced written evidence to show that he did notify the local authority (LA) that his daughter had returned to live with him and the LA records show two telephone calls were made by the appellant to the local authority on 17.11.2014 and 26.11.2014 to tell them that his daughter was starting work.

10. The letters he wrote related solely to his rent and council tax. The letter dated 29.10.2013 does not ask the council to notify DWP on his behalf and the Appellant confirmed that he

had not been told by the Council that they would be notifying DWP on his behalf. The Representative has produced a copy of an inquest report from a coroner relating to DWP and CAPITA in an unrelated case and drew the attention of the tribunal to para 5.2 relating to the record of telephone calls being brief and inaccurate. From that the argument was that DWP had failed to record the call made by the Appellant.

11. The tribunal accepts that no system is infallible. In this case the appellant cannot remember when he phoned the DWP. DWP has no record of any call until 10.09.2019. Then the Appellant said his daughter had moved in February 2014. The call of 10.09.2019 was clearly noted. The Appellant did remember making a call to DWP on the day he was visited on 26.11.2019 and after the visit had taken place. That call has also been recorded — see page 61 as saying that the Appellant "must have advised us too. Would have called ESAe to advise, almost certainly from the same mobile number." The system for recording calls did therefore work on 10.09.2019 and 26.11.2019.

12. The only record of any phone calls around the time of his daughter returning is on the information provided by the LA. These calls occurred in November 2014. The fact that there is no record of a call in either November 2013 or February 2014 is not, on the balance of probabilities, proof that a call was made which DWP failed to note. That is a possible explanation but the tribunal finds it unlikely. The appellant remembers being telephoned when his Incapacity Benefit was transferred over to ESA and he remembers the call he made in September 2019 which gave rise to the issues being considered in the present appeal. On balance the tribunal considers that the appellant is mistaken when he says that he phoned the DWP and in fact the calls were made to the LA. It is the calls to the LA which the appellant has remembered. The tribunal does not accept that telling the LA discharges the duty to tell DWP.

13. The Appellant also argued that when he was visited on 26.11.2019 the visiting officer knew his daughter was at home and gave the dates she had lived there which shows that the DWP must have been told otherwise they would not have those dates. The tribunal notes that the DWP says that it became aware of the dates on 10.09.2019 when the Appellant had phoned them to query why he had not received his ESA payments. The tribunal believes that the visiting officer was aware of the dates because of the call on 10.09.2019 and not any earlier record.

14. The Appellant's daughter was on ESA when she returned to live with the Appellant. It has not been possible to find out what she may have said to DWP about her own claim for ESA or when she said it because that evidence is not available. The Response states that the claim by the appellant for ESA and his daughter for ESA would not be linked because they lived at the same address. DWP say that each claim is dealt with by NI number. Claims are not linked because of any family relationship or linked by address.

15. Information therefore that the daughter had returned to his address would not be notice to DWP on the appellant's claim that his daughter had moved in for the purposes of his SDP award. Clearly DWP will be aware that DWP is paying ESA to the daughter as well as to the Appellant. DWP will also be aware of any address notified by the daughter. The argument seems to be that because DWP administers ESA to everybody DWP will know about all ESA decisions and knows that both the appellant and his daughter are getting ESA and both live at the same address.

16. In *SK* in Northern Ireland it was accepted that the award of DLA to the claimant had been notified to the section dealing with ESA and also when the award stopped so that the Dept should have been aware that the conditions for receipt of the SDP had come to an end. That is a different situation to the one in this appeal where the appellant and his daughter were each entitled to ESA.

17. The tribunal does not accept that notice by the appellant's daughter that she had returned to live with the appellant was notice to DWP on the appellant's claim to ESA that a non-dependant was now living with him. The representative has also referred to the ATLAS system set up by CAPITA showing that the Council Tax Dept had told the Housing Benefit Dept that the appellant's daughter had moved in with effect from 11.11.2013. From this the representative argues that this was notice to DWP to the same effect so that DWP knew of the change of circumstances anyway and the appellant could not fail to disclose to DWP what DWP knew anyway. The fault for the overpayment is therefore that of DWP.

18. In the further submission (or response) received on 11.01.2021 (page 78 of 00134) the Secretary of State explains that the ATLAS computer system is not owned by DWP and "local Authorities that use ATLAS are not obliged to release information they hold to the Dept." There is nothing to suggest that the LA did notify DWP when the Appellant's daughter returned to live with him.

19. The evidence of the DWP systems provided to the tribunal does not support a view that a change to the ESA address for the daughter (given either to DWP, if it was, or to the LA in connection with council tax, rent and housing benefit) is notice of a change of circumstances on the claim for ESA by the father that his daughter is now living there so that the father is no longer entitled to the SDP. There was nothing to suggest that the appellant knew, in relation to his own claim for ESA, that DWP knew that his daughter was now living with him for the purposes of his entitlement to SDP. The tribunal has found as a fact that the appellant did not tell DWP himself. He told the council but that is not telling DWP.

20. At [32] of the leading authority of the House of Lords in *Hinchy v SSWP* [2005] UKHL 16 Lord Hoffman said "the claimant is not concerned or entitled to make assumptions about the internal administrative arrangements of the Department. In particular [he] is not entitled to assume the existence of infallible channels of communication between one office and another. [his] duty is to comply with what the Tribunal called the simple instruction in the order book."

21. The Secretary of State has set out in a supplementary submission or response received on 11.01.2021 (page 78 of 00134) why the decision of the Commissioner in Northern Ireland in *SK v Department of Communities* should be distinguished. This refers in part to the question of work available reports (WAR). The DWP states that a WAR would not be generated when someone moves into a claimant's household. This tribunal does not have any detailed knowledge of how information is shared within the DWP and has no reason to say that the DWP evidence on this issue is wrong. In any event the dictum in [32] of *Hinchy* states that a claimant is not entitled to make assumptions about the intemal administrative arrangements of the Dept.

22. That submission also refers to the decision of the Upper Tribunal in Great Britain in *GK v SSWP* [2009] UKUT 98 where it stresses that the duty to disclose information by a claimant is only ruled out if the claimant knows that the Dept already knows that information.

23. The appellant thought when he was visited on 26.11.2019 that the Dept already knew because the visiting officer knew the dates his daughter had been living with the appellant. The tribunal is satisfied, however, that the source of that information was a telephone call on 10.09.2019 and not at any earlier point. Although the Appellant knew the Dept knew from 10.09.2019

> he did not know that the Dept knew at any earlier point and this tribunal has found as a fact that the Dept did not know in relation to the Appellant's ESA award that the appellant had anyone living with him until 10.09.2019.
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> 24. The tribunal was satisfied that the award of ESA had been superseded correctly for a change of circumstances so that there was no entitlement to the SDP from 26.02.2014 to 13.08.2019. That caused an overpayment of ESA amounting to £17,804.75 (this figure had not been disputed) which is recoverable under section 71 Administration Act 1992 because the appellant had failed to disclose the material fact to DWP that his daughter was now living with him.
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> 25. Finally the tribunal accepted that a civil penalty was applicable under s115D(2) [of the Social Security] Administration Act 1992 because of the failure by the appellant to comply with the duty to disclose the change of circumstances when it occurred. The tribunal has decided that there was no disclosure by the Appellant and that he was required to do so and he has not provided a reasonable excuse for that failure."

The Grounds Of Appeal

6. On 13 April 2021 the District Tribunal Judge refused permission to appeal. The claimant applied to the Upper Tribunal for permission to appeal on 13 May 2021. The grounds of appeal were that

> "ESA Overpayment appeal …
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> a) The claimant knew that the relevant office knew that his daughter resided at his address as she was also claiming ESA. The tribunal erred by relying upon the House of Lords decision in *Hinchy v SSWP (2005) UKHL 16* and citing Lord Hoffman's comments regarding a claimant not being entitled to *"assume the existence of infallible channels of communication between one office and another".* This case is distinguishable from *Hinchy* as [the claimant] was aware that the ESA award was being paid by the same DWP office. He therefore made no assumption about channels of communication between different DWP offices.
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> Conversely, I submit that the tribunal erred by distinguishing the Northern Ireland decision of *SK v Dept for Communities (ESA) C9/20-21* on the facts. Commissioner Stockman stated

at para 63 that *"..the appellant could not fail to disclose a material fact that his DLA award had changed, since the Department already knew this material fact, and the appellant was entitled to assume, on the basis of contemporary standards of computer systems, that it knew the material fact in issue".* In the present case [the claimant] knew his daughter was claiming ESA from the same address as his own and he was entitled to assume, on the basis of contemporary standards of computer systems, that it therefore knew the material fact in issue.

b) The appellant could not fail to disclose a material fact that his daughter had moved in with him since the Department already knew this material fact. The ordinary definition of the word 'disclose' is to make known information hitherto unknown but in this case the information was already known by the DWP and the appellant knew that this information was already known to them. He could only **notify** the ESA office that his daughter was living with him but could not **disclose** as they were already aware of the fact. UTJ Wright held in *LH v SSWP (RP)* [2017] UKUT 0249 (AAC) that

> "…to be entitled as a matter of law to recover the benefit overpaid in this appeal the Secretary of State had to show, ignoring misrepresentation which does not arise on this case, that there had been a "failure to disclose" a material fact. If any failure to notify or furnish information did not amount to a failure to disclose then I cannot see any escape from the conclusion that in those circumstances section 71(1) provides no legal authority for the overpayment to be recovered. This conclusion is supported in my view by the Supreme Court's decision in *R(CPAG) v SSWP* [2010] UKSC 54; [2011] 2 AC15, in which it held that section 71(1) (or some other specific statutory provision) provides an exclusive code for recovery, and so if section 71(1) is not met the Secretary of State cannot seek recovery of the overpaid sum" (para 63).

c) The tribunal have applied an incorrect legal test when at para 19 of the Statement of Reasons it is stated "*There was nothing to suggest that the appellant knew, in relation to his own claim for ESA, that DWP knew that his daughter was now living with him for the purposes of his entitlement to SDP*". [The claimant] wasn't required to know the DWP knew the fact that his daughter was now living with him **for the purposes of his entitlement to SDP** (my emphasis added). He did know that the DWP knew his daughter was living with him as he was aware she was also claiming ESA whilst at his address and

both ESA claims were dealt with by the same office, as would be usual for two people claiming the same benefit at the same address.

d) The tribunal were satisfied that [he] had been provided with a clear and unambiguous instruction to report his change of circumstance, as it was accepted that he had been issued with an ESA40 leaflet on two occasions on 29/01/14 and 28/01/15. A copy of the said ESA40 leaflet with the instruction in it appears in the bundle at page 37. I submit however that this evidence does not support the facts found, as on closer examination, the ESA40 leaflet indicates a publication date of 04/14 in the bottom right hand corner of the document where it states 'ESA40 04/14'. It would therefore have been impossible for [him] to have been sent this document on 29/01/14. If no ESA40 was issued to the appellant on 29/01/14, the tribunal cannot rely on any failure to disclose by him under regulation 32(1) of the Claims and Payments Regulations, as he could not have known what matters he was expected to disclose to the Department

Civil Penalty appeal …

a) The tribunal has failed to explain why it did not find [the claimant's] excuse reasonable. No findings of fact have been found as to why the tribunal thought it not reasonable for [him] to believe that he didn't have to disclose the fact his daughter was living with him due to the same ESA office paying her benefit as well as his. Furthermore, no findings of fact were made about mitigating circumstances.

b) The tribunal have also failed to explain why the discretion not to impose a civil penalty in this case was not exercised. UTJ Wikeley highlighted in *CT v SSWP (ESA)* [2021] UKUT 6 (AAC) (para 26) that the decision to impose a civil penalty is a discretionary one as indicated by the statutory wording of S.115D Social Security Administration Act. He goes on to state

> "..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" (para 32).

The Grant Of Permission To Appeal

7. On 1 July 2021 Upper Tribunal Judge Rowley acceded to the claimant's application and granted him permission to appeal in relation to the overpayment and civil penalty appeals. There was no appeal in relation to the entitlement to SDP. She made directions for the provision of further submissions by both parties.

The Secretary Of State's Submission

8. On 23 August 2021 the Secretary of State provided submissions, but did not support the appeal. So far as material, the Secretary of State stated that

> "Overpayment Appeal …
>
> Disclosure
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> 5. The Judge has suggested, on the authority of *R(SB) 15/87*, that: "There will not be a 'disclosure' of information to a person if the person is already aware of that information" (page 251, paragraph l). She then asks: "Was it open to the tribunal to find that the department was not already aware that the appellant's daughter had begun to live with him."
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> 6. In my respectful submission, *R(SB) 15/87* is not authority for the proposition that, for the purposes of the overpayment recovery provision in section 71(1) of the Social Security Administration Act, there can be no disclosure to a person who is already aware of the information in question. In *R(SB) 15/87* the Tribunal of Commissioners said at [19]:
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> > "In *Foster v Federal Commissioner of Taxation* (1951) 82 CLR 606, an Australian decision cited to us by Mr. Powell, Latham CJ said at pages 614 and 615 –
> >
> > 'In my opinion it is not possible, according to the ordinary use of language, to 'disclose' to a person a fact of which he is, to the knowledge of the person making a statement as to the fact, already aware. There is a difference between 'disclosing' a fact and stating a fact. Disclosure consists in the statement of a fact by way of disclosure so as to reveal; or make apparent that which (so far as the 'discloser' knows) was previously unknown to the person to whom the statement was made. Thus....the failure of the [plaintiff] to repeat to the Commissioner what he already knew did not constitute a failure to disclose material facts'" (my emphasis).

7. At (25] the Commissioners stated: "We respectfully agree with Latham CJ's opinion that disclosure consists in the statement of a fact so as to reveal that which so far as the discloser knows was previously unknown to the person to whom the statement was made." What follows is, I submit, an examination of what a person must do, in a social security context, in order to 'reveal' a fact, and what does and does not follow if and when a fact has been 'revealed' in accordance with the Commissioners ' stipulations.

8. The Commissioners began their examination of these issues by considering to whom disclosure must be made. They concluded at [26] that "the obligation is to disclose to a member or members of the staff of an office of the Department handling the transaction giving rise to the expenditure." They added: "once disclosure had been made to a particular person there can be no question of his being under any obligation to repeat that disclosure to the same person."

9. The Commissioners next considered how the obligation to disclose to a member or members of the staff of an office of the Department handling the transaction giving rise to the expenditure is to fulfilled. They held at [28]:

> "We accept that a claimant cannot be expected to identify the precise person or persons who have the handling of his claim. His duty is best fulfilled by disclosure to the local office where his claim is being handled either in the claim form or otherwise in terms that make sufficient reference to his claim to enable the matter disclosed to be referred to the proper person."

The Commissioners then construed the 'continuing obligation to disclose' posited in *R(SB) 54/83* as being confined to cases where a disclosure had been made to the wrong person or the wrong place but in circumstances in which further disclosure is not reasonably to be expected of him. If the claimant subsequently becomes (or should have become) aware that the information has not been transmitted to the proper person or place, he then comes under a renewed obligation to make a disclosure to the right person and place.

10. Finally, the Commissioners considered by whom the disclosure should be made, finding at [29] that:

> "the person upon whom the onus of disclosure is placed must be the claimant. In our judgment disclosure must be

> made, in connection with the claimant's own benefit, by the claimant himself or, on his behalf, by someone else. In this context we would consider that disclosure could fall within the ambit of having been made 'on behalf of the claimant' if someone else were to give information concerning the claimant in the course of some entirely separate transaction (for example, in connection with the informant's own claim for benefit), provided that:-
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> (a) the information was given to the relevant benefit office;
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> (b) the claimant was aware that the information had been so given;
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> (c) in the circumstances it was reasonable for the claimant to believe that it was unnecessary for him to take any action himself."

11. The Commissioners added:

> "casual or incidental disclosure by some other person (in the present case E, for example) of information regarding the claimant will not discharge the duty of disclosure."

'E' was a daughter in respect of whom the claimant was receiving an increase as part of his supplementary benefit. She had left school and claimed supplementary benefit in her own right. In effect, in my submission, the Commissioners are saying that the statement that she had left school that she made on her claim for supplementary benefit was not sufficient to 'reveal' this fact in relation to her father's supplementary benefit (even though the statement would have been made to the same benefit office), it not being made on his behalf. Another example of incidental non-disclosure appears in [31], where the Commissioners found that information about another child of the appellant ('S') given by the claimant's wife when she returned her child benefit order book did not constitute a disclosure by or for her husband because (amongst other things) "information about S was apparently given, by the claimant's wife, solely in connection with S."

12. Thus, under the analysis in *R(SB) 15/87*, there could, in my submission, [only] be disclosure of the fact that the claimant's daughter had begun to live with him if and only if (a) information about this matter was given to the relevant benefit office otherwise than by way of merely incidental disclosure and (b)

the claimant was aware that the information had been so given and (c) it was reasonable for him to believe that it was unnecessary for him to take any action himself. I would stress that it is not correct to consider in this connection what the department knew. As Lord Hoffmann explained in *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16 (reported as *R(IS) 7/05*) at [21]:

> "The practicalities of administration to which I have referred mean that such a policy would be seriously undermined by treating the person to whom disclosure must be made as the Secretary of State, as a constitutional entity, and then deeming the Secretary of State to know everything known to all officials of the Department or even, more modestly, all decisions taken in his name by officials of the Department. The Commissioners have therefore consistently rejected attempts to introduce a theoretical or constitutional dimension into the question of whether disclosure has been made for the purposes of section 71. They have accepted that the notion of a failure to disclose connotes an obligation to disclose. They have found this obligation either in regulation 32 or, by implication, in section 71 itself. But they have rejected the submission that disclosure must be to 'the Secretary of State', whatever that may involve. Instead, they have concentrated upon what the claimant has done to convey the information to the official who makes the actual decision about the amount of his benefit."

13. Turning to the question the Judge has posed, I submit that the tribunal was entitled to conclude that the conditions for a disclosure given in *R(SB) 15/87* were not satisfied. Even if the appellant was aware that his daughter had claimed ESA for herself from his address, and she had mentioned him in the course of her claim, I submit it would have been open to the tribunal to dismiss this as an instance of the 'incidental disclosure' that *R(SB) 15/87* requires to be disregarded. I have enclosed a copy of the section of the 2011 version of the ESA claim form in which the appellant would have been mentioned by his daughter. As far as relevant, this merely asks for the name, title and relationship to the claimant of the "head of the household." In my submission, it is far from perverse to regard this information, which makes no reference at all to any benefits that the head of the household is receiving, as having being given solely in connection with her own claim for benefit, and therefore as incidental disclosure (in terms of the case considered in *R(SB) 15/87*, it was analogous to the disclosure that E made when she claimed supplementary benefit in her

own right). In my submission, this is sufficient to dispose of the question of whether the information given by the daughter precluded a disclosure by the appellant himself. *R(SB) 15/87* requires a disclosure to be made by or on behalf of the claimant himself, and found that an incidental disclosure by another person does not amount to this. What the claimant knew about such a non-disclosure is irrelevant.

The relevant systems of communication

14. The Judge has asked whether the tribunal was provided with a full and accurate description of the systems of communication between the part of the office administering the appellant's daughter's ESA and the part of the office administering the appellant's own ESA (page 251, paragraph 2). In my submission, the answer is yes. In paragraph 21 of its Statement of Reasons (page 151) the tribunal refers to a supplementary submission by the Secretary of State as stating that no 'work action report' would have been generated for the appellant when his daughter claimed ESA from his address. This supplementary submission was evidently added to the bundle for the appeal against the entitlement decision, which is not now under appeal. However, I have obtained a copy of the supplementary submission from the office in Chesterfield that prepared it, and this is enclosed. The submission unambiguously states: "In this case no notification to [the claimant's] ESA team would be generated by the fact of [his daughter] moving in to his house." In *AS v Secretary of State for Work and Pensions (CA)* [2015] UKUT 0592 (AAC), [2016] AACR 22 Judge Wright held at that what a submission writer says (in that case about departmental procedures) is itself evidence on which a tribunal can properly rely. I submit, therefore, that the tribunal had before it evidence that showed that there was no system of electronic communication between the two parts of the office that would have been triggered by the daughter's claim. I further submit that it was fully entitled to accept that evidence, not least because there was no evidence to contradict it.

15. In any event, I have enclosed a copy of an email message of 5 August 2021 from a DWP colleague who has expert knowledge of DWP's ESA procedures. This states:

> "Customer records on the ESA system (JSAPS) do not interface with another customer records when a change of circumstances is reported.
>
> Additionally, the operational instructions do not direct ESA staff administering a claim to use information received

> from anyone other than the customer/appointee or acting body to investigate or revise another person's award of benefit."

In my submission, this confirms that the officers and computer systems administering the daughter's ESA would have communicated nothing at all about her claim to the officers and computer systems administering the appellant's ESA.

The assumptions the claimant was entitled to make

16. The Judge has asked whether the tribunal erred in rejecting the claimant's contention that he was entitled to assume that effective channels of communication existed between the two parts of the office (page 251, paragraph 3). In my submission, the tribunal did not so err. As no such channel of communication in fact exists for the circumstances in question, any assumption that it did exist would necessarily be based on incorrect or inadequate evidence and hence would be unfounded and speculative. In my submission, this is an example of an unreasonable belief. I would further suggest that it cannot be the case that the Secretary of State's right to recover an overpayment of public funds depends on the baseless and self-serving fantasies a layperson happens to form about complex matters of technology, finance and public administration that lie far outside his knowledge and competence.

> 17. In any event, because there was only incidental disclosure, the question of what the claimant knew or inferred is immaterial. The merely incidental can never amount to disclosure on behalf of the claimant, as *R(SB) 15/87* requires. Its fatal inadequacy is not improved by any knowledge or assumptions by the claimant.

Hinchy and different offices

18. The Judge has asked whether the tribunal erred in law by following *Hinchy* (page 251, paragraph 4). The appellant's representative argues that *Hinchy* can be distinguished because in the instant case "[the claimant] was aware that the ESA was being paid by the same ESA office. He therefore made no assumptions about channels of communication between different offices" (page 204, paragraph (a)). In my submission, *Hinchy* is not as narrow as the representative suggests. At [23] Lord Hoffmann notes in his summary of previous decisions by the Commissioners that:

> "Disclosure, then, must be made to the relevant official and not to the Secretary of State as an abstract entity. What assumptions can be made about what the relevant official already knows? The Commissioners have on the whole resisted arguments that the relevant official must be assumed to know, or that the claimant is entitled to assume that he knows, anything about his other benefit entitlements which cannot be described as common knowledge. It is not for the claimant to form views about what may go on behind the scenes in the Social Security or other benefit offices. His duty is to comply with the instructions in the order book."

19. In his later explanation of why the Court of Appeal was wrong to depart from these well-established principles, he added:

> "31. Carnwath LJ, after citing the memorandum which I have quoted about the way the benefit system is administered, said at [42]:
>
> > 'I do not think that it affects the legal analysis in any way. The claimant is not concerned with the internal administrative arrangements of the department.'
>
> 32. I quite agree. The claimant is not concerned or entitled to make any assumptions about the internal administrative arrangements of the Department. In particular, she is not entitled to assume the existence of infallible channels of communication between one office and another. Her duty is to comply with what the Tribunal called the 'simple instruction' in the order book. It seems to me, however, that this proposition of Carnwath LJ completely undermines the reasoning of Aldous LJ, based upon what Miss Hinchy was entitled to assume about what would amount to 'maladministration', with which Camwath LJ said he agreed. For my part, I would approve the principles stated by the Commissioners in *R(SB) 15/87* and *CG/4494/1999*. The duty of the claimant is the duty imposed by regulation 32 or implied by section 71 to make disclosure to the person or office identified to the claimant as the decisionmaker. The latter is not deemed to know anything which he did not actually know."

20. In my submission, Lord Hoffmann's statement that "It is not for the claimant to form views about what may go on behind the scenes in the Social Security or other benefit offices" and "The claimant is not concerned or entitled to make any assumptions about the internal administrative arrangements of the

Department" are broad and clear. He is not just rejecting a reliance on assumptions concerning the practices of benefit offices other than the claimant's own.

Hinchy and modern computerization

21. The Judge has asked whether *Hinchy* has been overtaken by developments in computer technology (page 252, paragraph 5). In my submission, the answer is no. The relevant factual basis of *Hinchy* is stated at [16]:

> "The result is that officials administering one benefit may or may not know from internal sources about the other benefits which the claimant is receiving. Whether they do or not depends upon the departmental or inter-departmental information systems in place and the efficiency with which they operate."

In my submission, the evidence in the instant case that shows that details of the daughter's ESA claim were not communicated to the officials and computer systems administering the appellant's ESA makes clear that the factual situation remains unchanged today. Advances in information technology have not led to the position that all information held by one benefit computer system (or for one person) is automatically transmitted to any and all other computer systems or individual records that are or may be affected by it. In my submission, these simple facts of the matter cannot be ignored in favour of science fiction speculations about what is supposedly now possible in the field of public administration.

SK v Department for Communities (ESA) [2020] NICom 73 (C9/20-21(ESA))

22. The Judge has asked whether this recent decision by Northern Ireland Social Security Commissioner Stockman should be followed in Great Britain (page 252, paragraph 6). In my submission, the answer is no. When transposed to Great Britain, the factual assumptions it makes about how the social security computer system operates are just wrong.

23. I submit that there is also a second reason why *SK v Department for Communities (ESA)* should not be followed. In *R(SB) 15/87* the Commissioners held at [29] that "disclosure must be made, in connection with the claimant's own benefit, by the claimant himself or, on his behalf, by someone else." The Commissioners went on to say:

> "we have deliberately refrained from the use of the word 'agency' in connection with information given by some third party as, in our judgment, that would import an unnecessary legal complication into what we consider to be essentially a simple question of fact."

Nonetheless, in order to give the notion of a person providing information 'on behalf of the claimant' some meaning, I submit that there must be an element of delegation from the claimant to the third party. At the very least, in my submission, there must have been some form of the informal delegation that is well known and well used in the world of social security (cf. *CIS/538/98* at [39]-[42]; copy enclosed). Needless to say, intra-departmental communications of the type postulated by Mr. Commissioner Stockman are not preceded by any form of delegation by the claimant, and are not in any sense done 'on behalf of the claimant. As such, they cannot in themselves constitute sufficient disclosure under the principles propounded in *R(SB) 15/87*.

Telephone calls

24. The Judge has asked whether the tribunal were entitled on the evidence to find that there was no record of any telephone disclosure by the appellant before 10 September 2019. The Judge has referred to the 'contact history' entry for 10 September 2019 at page 62, which confirms that a call was received from the appellant on that date, However, this was not the only evidence of what was said during that call. The Secretary of State's initial response to the appeal stated that the claimant had mentioned his daughter's presence during the telephone call of 10 September 2019 (page F, paragraph 4). A Mandatory Reconsideration Notice dated 14 January 2020 also records this fact. It adds: "An IS10 form was completed with you over the telephone confirming that your daughter was living with you" (page I l). In my submission, this evidence (when taken together with the absence of any evidence of an earlier call about his daughter's move) was sufficient to permit the tribunal to make the findings of fact it did.

The correct legal test

25. The Judge has asked whether the tribunal, which referred to the claimant not being aware that DWP knew that the daughter lived with him "*for the purposes of his entitlement to the SDP*", applied the correct legal test. As I have submitted above, the daughter's statements on her claim form did not amount to disclosure on his behalf and therefore could not in any circumstances discharge his duty to disclose. If some

> information about the daughter had later been passed by one part of the office to the part that was responsible for the appellant's ESA, the question of whether this could separately constitute disclosure on behalf of the claimant may have arisen. I submit that the tribunal is simply underscoring that, in any event, this would not have assisted the appellant because he knew nothing about it.
>
> The Civil Penalty appeal …
>
> 26. In brief, I submit that the tribunal has failed properly to explain why the claimant did not reasonable excuse under the test in *VT v Secretary of State for Work and Pensions (IS)* [2016] UKUT 178 (AAC), [2016] AACR 42 at [13], and failed expressly to exercise the ultimate discretion as to whether to impose a civil penalty (*VT* at [13]. These omissions are, I submit, material errors of law."

The Claimant's Reply

9. The claimant replied to those submissions on 6 October 2021:

> "Disclosure:
>
> The disclosure made by [the claimant's] daughter was not merely 'incidental' in the manner that Mr Spencer describes in his submission. This is because she would not have mentioned him as 'head of household' or in any way on a claim form in the in the course of making her claim, as her ESA date of claim preceded the date she moved in with the appellant as evidenced by the copy of her 2013 ESA award letter at page 43. The notification would have taken place at the date [his daughter] contacted the ESA office to notify them of her change of address and of moving into her father's property. There is no reason to believe that at that point, in order to determine the correct amount of ESA continued to be paid to her, she would not also have been asked about other members of the household just as [the claimant] himself was when he called the ESA office on 10/09/19 and an IS10 was completed. It was held in *LH v SSWP (RP)* [2017] UKUT 0249 (AAC) that the meaning of 'disclose' was to reveal facts previously unknown to the DWP (referring to *R(SB)15/87*). However, the DWP clearly already knew about the ESA it was paying to the claimant's daughter, from the same office, so the criteria for disclosure as set out at para 29 in *R(SB) 15/87* appears to be satisfied in this case.

In *CIS/1887/2002* Commissioner Howell ruled that there can be no failure to disclose where the benefits in question are being handled by the same local office even where the benefits are being handled by different sections of that office.

Further pointless disclosure was not therefore required as was held in *Hinchy* (2005) UKHL 16 and *CSB/677/1986*: "A disclosure which would be thought necessary only by a literal-minded pedant (see, for example, *CSB/1246/1986*) need not be made" (para 23).

Phone calls:

It was not open to the tribunal, based on the evidence before it, to find that [the claimant] notified the DWP in the call of 10/09/19 that his daughter had moved in on 27/02/14.

The tribunal have failed to explain why the appellant would assiduously write to the Local Authority on 29/10/13 to inform them that his daughter was moving in on 11/11/13 but then apparently go on to provide a completely different date (including both month and year) to the ESA office in the call of the 10/09/19. In his submission Mr Spencer has noted that both the Mandatory Reconsideration notice and page F, para 4, of the appeal submission also make reference to this call and the fact that an IS1O form was completed with the appellant over the phone that day. However, a copy of this completed IS10 form, which may have provided further information about the precise terms of the call, was never submitted to the tribunal despite the Secretary of State's obligations under Rule 24(4) [of] the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

It should also be noted that the wording of the instruction to the DWP visiting officer (page 65) states the 27/02/14 as being the "date confirmed by customer and noted in CIS". The word 'confirmed' rather than 'informed' or 'notified' would seem to connote that the ESA office were already aware of [his daughter] living at his property as it had been noted in CIS and the date was only confirmed with [the claimant] in the call of 10/09/19.

Communications:

The colleague who has been described by Mr Spencer as someone with "expert knowledge of DWP's ESA procedures" has herself asked in the email he has supplied, dated 05/08/21, “whether information obtained from a third party/family member should be used to review an award of benefit or whether there is a reason as to why this has never been included in the OI's". If the fact that this doesn't currently happen is being questioned

internally by an officer of the DWP, someone described as an expert, then it is surely reasonable for the layperson to assume that such channels of communication may in fact exist. I submit that this rather undermines Mr Spencer's submission that such a belief would be unreasonable or baseless. The legal principles in the Northern Ireland decision of *SK v Dept for Communities (ESA)* C9/20-21 should be followed in Great Britain.

Failure of ESA40 to be issued:

I submit that a duty to disclose under S.32(1A) of the Claims and Payments Regulations can only be imposed on [the claimant] if there is evidence that he had been given a clear and unambiguous instruction that he was under such a duty (as per *B v Secretary of State for Work and Pensions* [2005] EWCA Civ 929, 20 July 2005, reported as *R(IS) 9/06*). As no ESA40 was issued to the appellant in January 2014, the DWP cannot rely on any alleged failure to disclose by him under this regulation as he did not know what matters he was obliged to disclose to the Department. Lord Hoffman stated in *Hinchy* that the appellant's "duty is to comply with what the Tribunal called the 'simple instruction' in the order book" (para 32), however in this case no 'simple instruction' was ever provided to the appellant so such a duty cannot arise. The tribunal therefore erred when stating that the appellant was under a duty imposed by S.32(1A).

UTJ Rowley has asked though if this error is material in light of the tribunal finding at para 6 that "the appellant has always maintained that he knew he had to report that his daughter had begun to live with him". Presumably this is because S.32(1B) of the Claims and Payments Regulations imposes a further duty to "notify the Secretary of State of any change of circumstances which he might reasonably be expected to know might affect [entitlement to or payment of benefit]...by giving notice of the change to the appropriate office". However, the tribunal also found as fact at para 12 that "on balance the tribunal considers the appellant is mistaken when he says that he phoned the DWP and in fact the calls were made to the LA. It is the calls to the LA which the appellant has remembered". The appellant always knew that he had to report the fact his daughter has begun to live with him only for the purposes of his LA administered benefits and indeed went on to make that disclosure, but he couldn't possibly have known that he had to report the change to the DWP as he had never been told to do so by them. Put simply, it is not reasonable to expect [the claimant] to know something which he has never been told.

> As [he] could not possibly know that he had to report that this daughter had begun to live with him for the purposes of his ESA claim and nor was it reasonable for him to be expected to know, the tribunal erred when stating that he was under a duty imposed by S.32(1B).
>
> ***Civil penalty appeal***
>
> The Secretary of State's representative supports this appeal and I therefore have no further observations to make on this matter."

10. Neither party has sought an oral hearing and I do not consider that it is necessary to hold one in order to resolve the appeal.

The Stay

11. On 20 June 2022 the Registrar directed that the claimant's appeals be stayed until the final decision in UA-2021-001261-RP or until further order. The appeal in that case was due to be heard on 6 October 2022, but on 2 September 2022 the Secretary of State sought consent to withdraw that appeal, to which the Upper Tribunal consented on 6 September 2022. The Secretary of State was reviewing other cases which were before the Upper Tribunal, in order to identify cases which raised issues related to the judgment in ***SK v Department for Communities (ESA)*** [2020] NiCom 73. He stated that, if it would assist, he could provide the Upper Tribunal with a written update on that case and on the review generally. Accordingly, on 6 September 2022 I directed that, for the time being, the stay in the claimant's proceedings should remain in force, but the Secretary of State was directed to provide the Upper Tribunal with a written update on the review of the claimant's case and on the review generally.

The Secretary Of State's Further Submission

12. In his submission dated 2 December 2022 the Secretary of State stated that

> **"Introduction and Summary**
> …
>
> 7. The purpose of this document is to update the UT following the SoS's review of the present appeals, and to respond to

certain points in the Appellant's Reply. The SoS's position in summary is:

a. Having investigated the matter, the SoS has been unable to find records proving that ESA 40 leaflets were issued with uprating letters in January 2014 or January 2015. Thus, whilst uprating letters were issued to the Appellant on 29.1.14 and 28.1.15, the SoS is unable to support the FTT's finding that ESA 40 leaflets were also therefore issued to him on those dates: Statement of Reasons ("SoR") [5] – [6] [UT/148].

b. However, the FTT made a distinct finding that the Appellant "has always maintained that he knew he had to report that his daughter had begun to live with him": SoR [6] [UT/149]. The Appellant has identified no error of law in that finding. It provides an independent basis for the FTT's conclusion that the Appellant was under a duty to disclose pursuant to reg. 32(1A) and/or reg. 32(1B) of the Claims and Payments Regulations 1987 ("C&P Regulations").

c. The FTT also found that the Appellant had failed to disclose the fact of his daughter having moved in with him. Since the Appellant has identified no error of law in that finding either, the FTT was right to find that the overpayment was recoverable under s.71 of the Social Security Administration Act 1992 ("1992 Act").

d. The FTT committed material errors of law in dismissing the appeal insofar as it related to the imposition of a Civil Penalty.

8. Accordingly, the SoS invites the UT to:

a. Dismiss the Overpayment Appeal.

b. Allow the Civil Penalty Appeal.

Overpayment Appeal: The Issues

9. Two core issues arise on the Overpayment Appeal:

a. Did the FTT err in law in holding that the Appellant was under a legal duty to disclose the fact that his daughter had moved in with him?

b. If not, did the FTT err in law in holding that the Appellant had failed to discharge that duty?

10. The SoS submits that the answers are "no" and "no". Each issue is addressed in turn.

Overpayment Appeal: Duty to Disclose

11. The FTT held that the Appellant was under a duty to disclose the fact that his daughter had moved in with him, pursuant to reg. 32(1A) and reg. 32(1B) of the C&P Regulations. There were two distinct and independent bases for that conclusion (SoR [5]-[6] [UT/148- 9]):

a. First, the FTT found that ESA 40 leaflets had been issued to the Appellant on 29.1.14 and 28.1.15. The ESA 40 contained an instruction to notify the SoS if you "have someone come to live in your house".

b. Second, the FTT found in any event that "the appellant has always maintained that he knew he had to report that his daughter had begun to live with him".

12. Each of those findings was sufficient on its own to sustain the conclusion that the Appellant was under a duty to disclose.

13. As regards the first finding, the evidence before the FTT established that uprating letters were issued to the Appellant on 29.1.14 and 28.1.15 [UT/35]. It had always been understood within DWP that ESA 40 leaflets were issued with uprating letters sent to claimants at the time at issue in these proceedings. This was reflected in the SoS's submissions to the FTT, which stated ([UT/E §3]):

> "During the course of his award of ESA [the claimant] was issued with regular uprating notices, in particular those issued on 29 January 2014 and 28 January 2015 … Accompanying those uprating notices would have been form ESA 40 which contains instructions on what changes must be reported to the office paying the claimants benefit…"

14. However, having investigated the matter, DWP has been unable to find definitive proof to show that ESA 40 leaflets were, in fact, issued with uprating letters in January 2014 or January 2015.

15. For the avoidance of doubt the SoS is not conceding that the ESA 40 leaflets were not sent out during the relevant period. However, given the passage of time and the resulting gaps in DWP records, there is a lack of evidence to prove that they were. The evidential picture might of course change in future, if further material were to come to light, but the SoS does not seek to hold up the resolution of these proceedings.

16. In the circumstances, the SoS is unable to support the FTT's finding that ESA 40 leaflets were issued to the Appellant on 29.1.14 and 28.1.15: SoR [5] – [6] [UT/148-9]. The FTT's finding was based on a statement in the SoS's submissions which the SoS has been unable to substantiate.[1]

17. The SoS is also reviewing other similar cases, so that a common approach can be taken in respect of this issue.

18. The FTT's second finding, however, remains unimpeachable and is sufficient on its own to sustain the conclusion that the Appellant was under a duty to disclose. Since, as the FTT found, the Appellant in fact "knew he had to report that his daughter had begun to live with him", it must follow that this was a change of circumstances which he might reasonably be expected to know might affect his benefits. That is sufficient to give rise to a duty to disclose under reg. 32(1B).

19. Further and alternatively, since the Appellant in fact "knew he had to report that his daughter had begun to live with him", it must follow that he had at some point received a clear and unambiguous instruction to that effect. That is sufficient to give rise to a duty to disclose under reg. 32(1A).[2]

20. The Appellant's Reply contends that he "always knew that he had to report the fact his daughter has begun to live with him only for the purposes of his [local authority] administered benefits and indeed went on to make that disclosure" (emphasis added) [UT/301]. There are two responses to that.

21. First: the Appellant's submission places an impermissible and unjustified gloss on the FTT's finding of fact. That finding formed part of the FTT's assessment of whether the Appellant was under a duty to disclose pursuant to reg. 32(1A) and reg. 32(1B). Those provisions are concerned with notifications that must be made to the SoS, not the local authority. Thus, the FTT's finding concerned the Appellant's knowledge of the need to report relevant matters to the SoS. Any other interpretation is untenable.

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[1] In the circumstances, any issue as regards the publication date of the ESA 40 falls away: Order for Permission to Appeal [7] [UT/252]. For the avoidance of doubt, however, the SoS can confirm that the ESA 40 published in April 2013 contained the same statement as is recorded at [6] of the FTT's SoR [UT/149].

[2] For an instruction to give rise to a duty under reg. 32, it must be "clear and unambiguous": *Hooper v SSWP* [2007] EWCA Civ 495 at [48] – [58].

22. Second: insofar as the Appellant seeks to contend that the FTT's finding was incorrect, that is an impermissible challenge on the facts. Nothing in the Appellant's submissions reveals any error of law on the part of the FTT.

23. For all of these reasons – and those given in the SoS's Response – the FTT did not err in law in holding that the Appellant was under a duty to disclose the fact that his daughter had moved in with him.

Overpayment Appeal: Failure to Disclose

24. The FTT found that the Appellant did not himself notify the SoS that his daughter had moved in with him during the Overpayment Period: SoR [7] – [12], [19] [UT/149]. There is no serious challenge to that finding.[3]

25. Instead, the argument on appeal is that (Grounds of Appeal [UT/204]):

a. since the Appellant's daughter also claimed ESA during the Overpayment Period, DWP would have known that her address was the same as the Appellant's;

b. in those circumstances, there could not be any failure to disclose on the Appellant's part since the relevant facts were already known to DWP.

26. The FTT analysed this argument carefully but rejected it at SoR [14] – [23] [UT/150-1]. As explained fully in the SoS's Response, it did not commit any error of law in doing so.[4] The SoS makes the following points by way of summary.

27. First: the FTT correctly applied the leading case on this issue: *Hinchy v SSWP* [2005] 1 WLR 967. In *Hinchy*, the House of Lords held that, under the applicable legislative scheme (s.71 of the 1992 Act and reg. 32 of the C&P Regulations):

a. The onus is on the claimant to notify the relevant official (not the SoS as an abstract entity) of any change in the claimant's

[3] The Appellant has made detailed submissions about the FTT's finding as regards his phone call with DWP on 10.9.19: SoR [11] [UT/149]; Grounds of Appeal para. e) [UT/205]; SoS Response para. 24 [UT/260]; Appellant Reply [UT/300]. Those submissions constitute an impermissible challenge on the facts; they do not disclose any error of law in the FTT's finding. In any event, the Appellant's submissions do not suggest that he did in fact disclose to the SoS at any stage during the Overpayment Period that his daughter had moved in with him. The FTT found that he did not and that finding is unimpeachable.

[4] SoS Response paras. 5 – 25 [UT/254].

circumstances. The claimant's duty is the duty to make disclosure to the person or office identified as the decision-maker: [20] [23] [30] [32].

b. The claimant is not entitled to make assumptions about internal channels of communication within DWP or, in particular, to assume that those channels are infallible: [23] [32].

c. The decision-maker is not deemed to know anything which he did not actually know: [32].

28. *Hinchy* has not been doubted or overruled by the Supreme Court. It follows that the circumstances in which a claimant may be able to rely on a disclosure made by someone else in order to discharge his own duty to disclose are extremely limited. It bears emphasis that, in the present case, there is no evidence that any information provided by the Appellant's daughter in the context of her own claim for ESA was communicated to the decision-maker for the Appellant's claim or transferred to the Appellant's file.

29. Second: in *R(SB) 15/87* the Commissioners held at [29] that disclosure may be made by another person on the claimant's behalf provided: (a) the information is given to the relevant benefits office; (b) the claimant is aware that the information has been given; (c) it was reasonable in the circumstances for the claimant to believe it was unnecessary to take any action himself; and (d) disclosure by the other person was not casual or incidental. *R(SB) 15/87* was endorsed in *Hinchy*: see [20] [21] [29] [32].[5]

30. Crucially, there is no evidence that the conditions laid down in *R(SB) 15/87* were satisfied in the present case. In particular:[6]

a. There is no evidence about the office to which the Appellant's daughter may have spoken to. Nor is there any evidence as to what she may have told that office or when: SoR [14] [UT/150].

b. There is no evidence that the Appellant knew of any information being provided on his behalf or had any reasonable

[5] The Appellant implicitly accepts that the conditions in *R(SB) 15/87* are applicable, asserting that "the criteria for disclosure as set out at para 29 in *R(SB) 15/87* appears to be satisfied in this case": Appellant Reply [UT/300].

[6] Various assertions are made in the Appellant's Grounds of Appeal and Reply – e.g. as to what the Appellant knew – but they are mere assertions. There is no evidence to support them and, more importantly, there was no such evidence before the FTT.

basis for thinking it might be. Nor is there any evidence that any information was in fact provided on the Appellant's behalf.

c. There is no evidence that the Appellant believed, or that it was reasonable to believe, that it was unnecessary for him to take any action himself. On the contrary, the Appellant claimed before the FTT that he himself had notified DWP that his daughter had moved in with him – a claim that was rejected on the evidence: SoR [12] [19] [UT/149-150].

d. There is no evidence to suggest that any information provided by the Appellant's daughter concerning the Appellant was anything other than casual or incidental (i.e. information provided in relation to her own claim for ESA rather than information intended to be, and in fact, provided on the Appellant's behalf).

31. It bears emphasis that *R(SB) 15/87* involved similar facts to the present case (i.e. whether a daughter's disclosure was sufficient disclosure for the purposes of her father's benefits claim). The argument was rejected by the Commissioners in that case, as it should be in this one.

32. Third: the Appellant bases his case on the decision of a *Northern Ireland Social Security Commissioner in SK v Department of Communities* [2020] NICom 73. That case concerned a situation in which the department had itself implemented a change in the claimant's disability allowance award ("DLA"), which affected the rate of ESA to which the same claimant was entitled. The issue was whether staff dealing with the claimant's ESA were aware of the change in DLA. The Commissioner found on the evidence that, as a matter of fact, the ESA branch of the department knew of the change in circumstances in relation to the DLA award: [46] [49]. Accordingly, the claimant's appeal in respect of recovery of the overpayment was allowed since "the appellant could not fail to disclose a material fact that his DLA award had changed, since the Department already knew this material fact": [63].

33. As is immediately apparent, *SK* is distinguishable from the present case (as the FTT held at SoR [16]). In the present case, there is no evidence – and has been no finding – that the relevant decision-maker in fact knew of the change in the Appellant's circumstances (i.e. that his daughter had moved in with him). For that reason alone, *SK* is irrelevant: it does not disclose any error of law by the FTT.

34. For completeness, the Commissioner in *SK* also held that "when he received notice from the Department of the change it

was making to his DLA award, the appellant was entitled to assume that all relevant branches of the Department had received that information…it is plainly time that the factual circumstances underpinning the House of Lords decision in *Hinchy* are distinguished in order to reflect the reasonably expected standards of 21st century benefits administration" [50]. Insofar as the Commissioner thereby intended to depart from *Hinchy*, it is respectfully submitted that it was not open to him to do so. The principles articulated in *Hinchy* were based on the legislative scheme, not the prevailing facts as to departmental record systems.

35. In any event, as already explained, *SK* is plainly distinguishable. It was a case in which the department itself brought about the change in circumstances and, as a matter of fact, the ESA branch knew about the change. Even if there may be circumstances in which – contrary to *Hinchy* – a claimant is entitled to make assumptions about internal departmental communications, there was no reasonable basis for the Appellant to make any such assumptions in the present case, and there is no evidence that he actually did so.

36. For all of these reasons – and those give in the SoS's Response – the FTT did not err in law in holding that the Appellant had failed to discharge the duty to disclose the fact that his daughter had moved in with him.

Civil Penalty Appeal

37. The FTT dismissed the Civil Penalty Appeal for the reasons given at SoR [25] [UT/151]. The SoS's position remains as set out at para. 26 [UT/261] of the SoS's Response, namely the SoS agrees that the FTT committed material errors of law in (i) failing properly to explain why the Appellant did not have a reasonable excuse for the purposes of s.115D of the 1992 Act; and (ii) failing expressly to exercise the discretion as to whether a civil penalty should be imposed.

38. The SoS submits that the UT should set aside the FTT's Decision on civil penalty and decide for itself whether there is sufficient evidence to support the imposition of a penalty. Only if the proceedings are otherwise being remitted to the FTT (contrary to the SoS's submissions) would the SoS support remittal on the issue of penalty.

Conclusion

39. For the reasons given above, the SoS invites the UT to:

a. Dismiss the Overpayment Appeal.

b. Allow the Civil Penalty Appeal."

The Lifting Of The Stay

13. It is now appropriate to lift the stay imposed on 22 June 2022 and to determine the appeal. It is now almost 2 years since the decision under appeal was made and the matter should now be resolved without further delay. Each side has now made two rounds of submissions and I am satisfied that I do not need any further submissions to decide the appeal. The Secretary of State's latest submissions reiterate his position, but do not introduce any fundamentally new arguments or new authorities.

Analysis: The Overpayment Appeal

The Tribunal's Findings Of Fact

14. Before turning to the legal analysis, it is important to set out the relevant findings of fact by the Tribunal.

15. The following findings of fact are relevant in the context of this appeal:

(1) the Tribunal considered that the claimant was mistaken when he said that he telephoned the DWP; the calls were in fact made to the local authority (paragraph 12)

(2) the ATLAS computer system used by the local authority is not owned by the DWP and local authorities which use ATLAS are not obliged to release information which they hold to the DWP. There is nothing to suggest that the local authority did notify the DWP when the claimant's daughter returned to live with him (paragraph 18)

(3) the letters which the claimant wrote to the local authority related solely to his rent and council tax. He did not ask the local authority to notify the DWP on his behalf and he confirmed in evidence that he had not been told by the local authority that it would notify the DWP on his behalf (paragraph 10)

(4) informing the local authority was not informing the DWP (paragraph 19)

(5) the tribunal found that the visiting officer was aware of the dates when the claimant's daughter lived at the property because of the call on 10 September 2019 and not any earlier record (paragraph 13)

(6) it was not possible to find out what his daughter may have said to the DWP about her own claim for ESA or when she said it because that evidence is not available (paragraph 14)

(7) the claim by the claimant for ESA and his daughter's claim for ESA would not be linked because they lived at the same address. Each claim was dealt with by NI number and claims were not linked because of any family relationship or linked by address (paragraph 14)

(8) a work available report would not be generated for the claimant because another person moved into his household (paragraph 21)

(9) there was nothing to suggest that the claimant knew, in relation to his own claim for ESA, that the DWP knew that his daughter was now living with him for the purposes of his entitlement to SDP. He did not tell the DWP himself (paragraph 19).

On the evidence before it, I am satisfied that the Tribunal was entitled to make all of these findings of fact and that none of them can be impugned.

16. Although the Tribunal did not make express findings of fact to this effect, the foregoing findings of fact are consistent with the original submission of the Secretary of State to the effect that the supplementary submission in relation to the entitlement claim (which is not under appeal and which is evidence on which a tribunal can properly rely, as Upper Tribunal Judge Wright decided in ***AS***) stated that

> "In this case no notification to [the claimant's] ESA team would be generated by the fact of [his daughter] moving in to his house."

17. In other words, the Tribunal had before it evidence that showed that there was no system of electronic communication between the two parts of the office which would have been triggered by the daughter's claim. It was fully entitled to accept that evidence, not least because there was no evidence to contradict it. Moreover, as the Secretary of State also submitted, with reference to the email of 5 August 2021 from a member of the DWP who had expert knowledge of DWP's ESA procedures:

> "Customer records on the ESA system (JSAPS) do not interface with another customer records when a change of circumstances is reported.
>
> Additionally, the operational instructions do not direct ESA staff administering a claim to use information received from anyone other than the customer/appointee or acting body to investigate or revise another person's award of benefit."

18. Thus, that the DWP officers and the computer systems administering the daughter's ESA would have communicated nothing at all about her claim to the officers and computer systems administering the claimant's ESA claim.

The Duty Of Disclosure

19. The Tribunal held that the claimant was under a duty to disclose the fact that his daughter had moved in with him, pursuant to regulations 32(1A) and reg. 32(1B) of the C&P Regulations. That was on the basis that

(a) the Tribunal found that ESA 40 leaflets had been issued to the claimant on 29 January 2014 and 28 January 2015, containing the instruction to notify the Secretary of State if you “have someone come to live in your house”

(b) the Tribunal found in any event that “the appellant has always maintained that he knew he had to report that his daughter had begun to live with him”.

20. As explained in his latest submission, the Secretary of State is now unable to support the finding that ESA 40 leaflets were issued to the claimant on those dates

because that finding was based on a statement which it is not now possible to substantiate.

21. I agree, however, that the second basis for the conclusion that there was a duty of disclosure remains unimpeachable and is sufficient on its own to sustain the conclusion that the claimant was under a duty of disclosure. Since, as the Tribunal found, he in fact "knew he had to report that his daughter had begun to live with him", it must follow that that was a change of circumstances which he might reasonably be expected to know might affect his benefits. That was sufficient to give rise to a duty to disclose under regulation 32(1B).

22. The claimant sought to argue that he "always knew that he had to report the fact his daughter has begun to live with him only for the purposes of his [local authority] administered benefits and indeed went on to make that disclosure", but that submission fails on two grounds:

(a) the claimant's duty of disclosure was to the Secretary of State, not to the local authority and the Tribunal's findings of fact were made in that context. The Secretary of State rightly asserted that regulations 32(1A) and 32(1B) were concerned with notifications which must be made to him, not to the local authority. The Tribunal's findings concerned the claimant's knowledge of the need to report relevant matters to the Secretary of State and any other interpretation is wholly untenable.

(b) insofar as the claimant seeks to contend that the Tribunal's finding was incorrect, that is an attempt to relitigate the facts of the dispute.

23. I am therefore satisfied that the Tribunal did not err in law in holding that the claimant was under a duty to disclose to the Secretary of State under regulation 32(1B) the fact that his daughter had moved in with him.

Failure To Disclose

24. The Tribunal found that the claimant did not himself notify the Secretary of State that his daughter had moved in with him during the period of overpayment: there is no serious challenge to that finding

Hinchy

25. Since the decision of the House of Lords in ***Hinchy*** is of direct relevance in the determination of this appeal, it is pertinent to set out precisely what Lord Hoffmann said in his speech in that case:

> "11. … I shall summarise the effect of the earlier jurisprudence created by the decisions of the Commissioners. They have had to deal with various forms of the argument that a failure by a claimant to make disclosure to the official responsible for making an overpayment did not matter because that official already knew, or should have known, or was deemed to know, the relevant facts. It is seldom if ever possible to show that the relevant official actually knew (otherwise why should he have made the overpayment?), but it was said either that, as a matter of good administration, the necessary systems of communication to provide him with the information should have been in place, or that, as a matter of law, the information as to decisions made by other officials about other benefits was deemed to be known to the Secretary of State or the relevant decision maker. The argument does not appear to have been carried to the extent of asking for the Secretary of State to be deemed to have knowledge of all decisions made on behalf of the Crown in other departments, although it is hard to see why not, because the office of Secretary of State is in theory one and indivisible: see *Harrison v Bush* (1855) 5 E & B 344, 352 and Halsbury's Laws of England, 4th ed (1996), Vol 8(2), para 355.
>
> 12. This argument was advanced in relation to various elements of the claim under section 71 and its predecessors. In its purest form, it was said that "disclosure" to a person who already knew or was deemed to know was conceptually impossible: see *Foster v Federal Commissioner of Taxation* (1951) 82 CLR 606; *Condon v Commissioner of Taxation* [2000] FCA 1291 (Federal Court of Australia). Secondly, it was said that "failed to disclose" implies that there had been an obligation to disclose. Such an obligation exists only when it would be reasonable to expect the claimant to make disclosure. And it would not be reasonable to expect someone to disclose

facts which she could reasonably expect were already known. Or, thirdly, it was argued that if the true facts were already known, then a failure to disclose them could have no causal effect and it could not be said that, but for the failure to disclose, the Secretary of State would not have made the overpayments.

13. The Commissioners have dealt with these arguments in a practical way, first by considering how the administration of the social security system actually works and secondly, by trying to discern the policy of the statutory scheme of which section 71 forms a part.

…

16. The result is that officials administering one benefit may or may not know from internal sources about the other benefits which the claimant is receiving. Whether they do or not depends upon the departmental or inter-departmental information systems in place and the efficiency with which they operate.

17. The one person who can usually be depended upon to know all the benefits which a claimant is receiving is the claimant himself. And he is usually also in the best position to know about the benefits which are received by other people, such as his wife and children, which may affect his own entitlement. The legislative policy for dealing with this potential imbalance of information is expressed in the Administration Act and its subordinate regulations. Section 5(1) of the Administration Act confers broad rule-making powers on the Secretary of State, including the power to make regulations—

> "(h) for requiring any information or evidence needed for the determination of [a claim to income support] or of any question arising in connection with such a claim to be furnished by such person as may be prescribed in accordance with the regulations;….
>
> (j) for notice to be given of any change of circumstances affecting the continuance of entitlement to such a benefit or payment of such a benefit."

18. Pursuant to these powers, the Secretary of State has made the Social Security (Claims and Payments) Regulations 1987 (SI 1987 No 1968) as amended. Regulation 7(1) deals with the duty to provide information at the time of the claim:

> "every person who makes a claim for benefit shall furnish such certificates, documents, information and evidence in connection with the claim, or any question arising out of it, as may be required by the Secretary of State…"

19. Regulation 32 deals with the on-going duty to provide information while in receipt of benefit:

> "(1)…every beneficiary and every person by whom…sums payable by way of benefit are receivable shall furnish in such manner and at such times as the Secretary of State…may determine…such information or facts affecting the right to benefit or to its receipt as the Secretary of State…may require…and in particular shall notify the Secretary of State…of any change of circumstances which he might reasonably be expected to know might affect the right to benefit, or to its receipt, as soon as reasonably practicable after its occurrence, by giving notice in writing (unless the Secretary of State…determines in any particular case to accept notice given otherwise than in writing) of any such change to the appropriate office."

20. The Commissioners have treated these regulations as placing upon the claimant the primary duty to inform the relevant decision maker of the material facts, including if appropriate the amount of the other benefits which he is receiving. As the Tribunal said in *R(SB) 15/87*, at para 13:

> "It is well settled that responsibility for keeping the Department informed of any change in a claimant's circumstances rests and remains upon the claimant…"

21. The practicalities of administration to which I have referred mean that such a policy would be seriously undermined by treating the person to whom disclosure must be made as the Secretary of State, as a constitutional entity, and then deeming the Secretary of State to know everything known to all officials of the department or even, more modestly, all decisions taken in his name by officials of the department. The Commissioners have therefore consistently rejected attempts to introduce a theoretical or constitutional dimension into the question of whether disclosure has been made for the purposes of section 71. They have accepted that that the notion of a failure to disclose connotes an obligation to disclose. They have found this obligation either in regulation 32 or, by implication, in section 71 itself. But they have rejected the submission that disclosure must be to "the Secretary of State", whatever that may involve. Instead, they have concentrated upon what the

claimant has done to convey the information to the official who makes the actual decision about the amount of his benefit. In *R(SB) 15/87* the Tribunal said, at paras 26-28:

> "26 …. To whom is there this obligation to disclose? We are concerned here with breaches of the obligation which have the consequence that expenditure is incurred by the Secretary of State; and, in our view, the obligation is to disclose to a member or members of the staff of an office of the Department handling the transaction giving rise to the expenditure.
>
> ...
>
> 28 We accept that a claimant cannot be expected to identify the precise person or persons who have the handling of his claim. His duty is best fulfilled by disclosure to the local office where his claim is being handled, either in the claim form or otherwise in terms that make sufficient reference to his claim to enable the matter disclosed to be referred to the proper person….But…there can be other occasions when the duty can be fulfilled by disclosure elsewhere. This can happen, for instance, if an officer in another office of the Department of Health and Social Security or local unemployment benefit office accepts information in circumstances which make it reasonable for the claimant to think the matters disclosed will be passed on to the local office in question."

22. The theme which runs through this and similar passages is that the claimant must do what a person in his position would reasonably regard as sufficient to communicate the information to "the proper person" in the relevant office. If one regards the obligation as arising by implication from section 71 itself, then this is the kind of disclosure implied. If one regards it as arising from regulation 32, the matter is even clearer. The first part of the regulation imposes a duty to furnish "in such manner…as the Secretary of State may determine…such information or facts affecting the right to benefit or to its receipt as the Secretary of State may require". The Secretary of State has specified by the notes in the order book what information (including changes in other benefits) must be furnished and that it must be done by sending it to the office named on the cover of the book. The second part of the regulation imposes a duty "in particular" to give notice in writing of a change in circumstances to "the appropriate office".

23. Disclosure, then, must be made to the relevant official and not to the Secretary of State as an abstract entity. What assumptions can be made about what the relevant official already knows? The Commissioners have on the whole resisted arguments that the relevant official must be assumed to know, or that the claimant is entitled to assume that he knows, anything about his other benefit entitlements which cannot be described as common knowledge. It is not for the claimant to form views about what may go on behind the scenes in the Social Security or other benefit offices. His duty is to comply with the instructions in the order book. A disclosure which would be thought necessary only by a literal-minded pedant (see, for example, *CSB/1246/1986*) need not be made, but the safest course is to resolve doubts in favour of disclosure.

…

30. My Lords, I think that the Court of Appeal was wrong to overturn the decisions of the Commissioners. They have practical experience of the day-to-day working of the benefit system and I think that the principles they have devised to give effect to the legislative scheme dealing with overpayments are entitled to great respect. No doubt the Court of Appeal thought, as did Mr Commissioner Howell in *CIS 5848/99,* that in denying recovery to the Secretary of State, they would provide an additional impetus to improvement in the department's internal computer systems and thereby reduce the hardship for claimants who, through ignorance or fecklessness, omit to disclose information about other benefits and lay themselves open to repayment claims when the department's back-up systems fail. But this, in my opinion, is not a policy which is open to the courts. It is contrary to the legislative policy which remains unaltered in the current Act and regulations, namely that the primary onus of keeping the "appropriate office" informed rests upon the claimant.

31. Carnwath LJ, after citing the memorandum which I have quoted about the way the benefit system is administered, said at para 42:

> "I do not think that it affects the legal analysis in any way. The claimant is not concerned with the internal administrative arrangements of the department."

32. I quite agree. The claimant is not concerned or entitled to make any assumptions about the internal administrative arrangements of the department. In particular, she is not entitled to assume the existence of infallible channels of

> communication between one office and another. Her duty is to comply with what the Tribunal called the "simple instruction" in the order book. It seems to me, however, that this proposition of Carnwath LJ completely undermines the reasoning of Aldous LJ, based upon what Miss Hinchy was entitled to assume about what would amount to "maladministration", with which Carnwath LJ said he agreed. For my part, I would approve the principles stated by the Commissioners in *R(SB) 15/87* and *CG/4494/99*. The duty of the claimant is the duty imposed by regulation 32 or implied by section 71 to make disclosure to the person or office identified to the claimant as the decision maker. The latter is not deemed to know anything which he did not actually know."

26. In summary, officials administering one benefit may or may not know from internal sources about the other benefits which the claimant (or indeed another claimant) is receiving. Whether they do or not depends upon the departmental or inter-departmental information systems in place and the efficiency with which they operate. The one person who can usually be depended upon to know all the benefits which a claimant is receiving is the claimant himself, who is usually also in the best position to know about the benefits which are received by other people, such as his wife and children, which may affect his own entitlement. The jurisprudence has established that the relevant official is not to assumed to know, or that the claimant is not entitled to assume that he knows, anything about his other benefit entitlements which cannot be described as common knowledge. It is not for the claimant to form views about what may go on behind the scenes in the Social Security or other benefit offices. His duty is to comply with his obligations as to disclosure, whether under regulation 32(1A) or 32(1B). The claimant is not concerned or entitled to make any assumptions about the internal administrative arrangements of the department. In particular, he is not entitled to assume the existence of infallible channels of communication between one office and another. In the light of the findings of fact made by the Tribunal in this case which I have set out above, none of that assists the claimant in the present appeal.

R(SB) 15/87

27. Similarly, since the decision of the Tribunal of Commissioners was approved by the House of Lords in ***Hinchy***, it is also instructive to set out what the Commissioners said in that case:

> "29. We turn now to the question by whom the disclosure should be made. On this issue we are firmly of the opinion that, although section 20 uses the words "any person", in order to give efficacy to the section - and without straining the meaning of the words or departing from the principles of statutory interpretation we have accepted - where the expenditure in question has taken the form of benefit payable to a claimant, the person upon whom the onus of disclosure is placed must be the claimant. In our judgment disclosure must be made, in connection with the claimant's own benefit, by the claimant himself or, on his behalf, by someone else. In this context we would consider that disclosure could fall within the ambit of having been made "on behalf" of the claimant if someone else were to give information concerning the claimant in the course of some entirely separate transaction (for example, in connection with the informant's own claim for benefit), provided that:-
>
> (a) the information was given to the relevant benefit office;
>
> (b) the claimant was aware that the information had been so given;
>
> (c) in the circumstances it was reasonable for the claimant to believe that it was unnecessary for him to take any action himself.
>
> Whether or not a claimant has made disclosure will therefore be a question of fact to be decided upon the evidence before the tribunal, and we have deliberately refrained from the use of the word "agency" in connection with information given by some third party as, in our judgment, that would import an unnecessary legal complication into what we consider to be essentially a simple question of fact. Neither would it be helpful for us to attempt to give examples of situations which might arise; suffice it to say that we are clearly of the opinion that casual or incidental disclosure by some other person (in the present case E, for example) of information regarding the claimant will not discharge the duty of disclosure.
>
> …

> 31. In our judgment it was not open to the tribunal, as a matter of law, upon the evidence before them, to find that E's statement on her own behalf was sufficient disclosure of the claimant's change of circumstances. Equally, in our view, the tribunal were correct in holding that S's mother's action in handing back the child benefit book, while proper and admirably prompt in itself, did not constitute disclosure on the claimant's behalf not only, as the tribunal found, because the information had not been received by (or on behalf of) the supplementary benefit section in the local office, but also because, as we have set out above, the information about S was apparently given, by the claimant's wife, solely in connection with S."

28. Applying those principles to the present case, the onus of disclosure was on the claimant himself. Disclosure by a third party (for example, in connection with his daughter's own claim for benefit) could only be on behalf of the claimant if

> (a) the information was given to the relevant benefit office;
>
> (b) the claimant was aware that the information had been so given;
>
> (c) in the circumstances it was reasonable for the claimant to believe that it was unnecessary for him to take any action himself.

29. However, sub-condition (b) is not made out on the evidence, essentially given the findings of fact in paragraph 14 of the statement of reasons and sub-condition (c) must fail on the facts given that it cannot be demonstrated that the claimant was aware that the information had been so provided and he cannot therefore demonstrate that it was reasonable for him to believe that it was unnecessary for him to take any action himself.

SK

30. In ***SK*** Mr Commissioner Stockman summarised the facts as follows:

> "3. The appellant had previously been awarded income support (IS) by the Department for Social Development (the Department) on the basis of incapacity for work. From 17 April 2012 the IS award was converted without a claim into an award of income-related employment and support allowance (ESA) by the Department under regulations implementing Schedule 4 of

> the Welfare Reform Act (NI) 2007. At the date of conversion, the appellant was receiving the middle rate care component of disability living allowance (DLA), awarded by the Department from 7 September 2009. This had entitled him to payment of the severe disability premium (SDP) element of IS and, from the date of conversion, the SDP element of ESA.
>
> 4. On 17 July 2012 the DLA branch of the Department notified the appellant that it had decided that he was no longer entitled to the middle rate care component of DLA from 7 September 2012. However, he continued to be paid the SDP element of ESA by the Department after that date. Entitlement to SDP was conditional on the Department deciding that the appellant was entitled to DLA care component at the middle or higher rate and, therefore, it was paid in error. Almost two years later, on 20 August 2014 the Department made a decision superseding and removing the SDP from the appellant's award of ESA. On 9 December 2015 the Department decided that the appellant had been overpaid £6,000.09 of ESA for the period from 11 September 2012 to 18 August 2014 and that this was recoverable from him. The appellant appealed."

31. Having set out the factual background, he went on to decide that

> "41. The parties acknowledged that there were similarities between the present case and *PMcL v DfC*. Each appellant had been in receipt of income support (IS) on the basis of incapacity for work. Each had been in receipt of DLA at a rate which gave entitlement to the SDP element of IS and ESA. Each had an award of DLA for a fixed term that expired after migration of their claim from IS to ESA and the SDP continued to be paid in error in each case after the expiry of the relevant rate DLA award.
>
> 42. The parties disagreed on two issues. The first was whether the Department's knowledge of the end date of the appellant's DLA award when migrating his IS claim into an award of ESA meant that the appellant could not fail to disclose that fact, on the basis that the Department already knew it ...
>
> 43. On the first issue, on similar facts, Chief Commissioner Mullan in *PMcL v DfC* has reasoned that the Department knew the information that it said that the appellant had failed to disclose. At paragraph 59 he addressed the development in technology that has occurred since 2005, saying that:
>
> > "… What Baroness Hale asserted was 'certainly not yet with us' in terms of effective administrative systems from

> which information about an individual claimant can readily be retrieved is now likely to be the norm given, in particular, the significant advances in technology. In the instant case, Mr Clements has been forensic in attempting to uncover the details of the procedures adopted by the relevant section of the Department in circumstances such as those pertaining here. Mr O'Farrell has given me the benefit of his own detailed knowledge of the operation of the benefit system, including the potential receipt by the ESA section of a Work Availability report (WAR) from the DLA section".

44. A Tribunal of Great Britain Social Security Commissioners in *R(SB)15/87* accepted at paragraph 25 that "it is not possible to "disclose" to a person a fact of which he is, to the knowledge of the person making the statement as to the fact, already aware" (approving the statement of Latham CJ in the Australian case of *Foster v Federal Commissioner of Taxation (1951) 82 CLR 606*). In the period *Hinchy* was decided, the relevant Departmental systems for notification of DLA decisions to local benefit branches was reliant on transmission of physical cards holding information. *Hinchy* found that that such a system could not be relied on to assert that the Department generally knew particular facts of decisions that its own benefit branches had made. The question arising is whether the existence of modern computer systems can be relied on by claimants to assert that the Department in a broad sense of all relevant benefit branches knows specific information in the form of a benefit decision generated by a particular branch.

45. In this case it was submitted that, on converting the appellant's IS award to ESA, the Department would have been aware of the rate and duration of his DLA award on the balance of probabilities. The evidence in this case about the Department's computer systems was somewhat piecemeal. However, one cannot envisage a rational modern computerised system of administration of benefits, where the rate of one benefit (ESA) is conditional on entitlement to another (DLA), which does not verify the details of that other award. The evidence indicates that, in line with that expectation, the relevant computer system generated notices of DLA decisions to the ESA branch and required action by ESA officials when a DLA decision was received.

46. Moreover, there is evidence in this case that the appellant's ESA computer claim was accessed on 20 July 2012, albeit with no evidence of action being taken. I do not consider that it is coincidental that the appellant's DLA decision was issued on 17 July 2012, a few days before the relevant ESA system was

accessed on 20 July – an otherwise random date. It seems entirely likely that the reason for access to the computer system on 20 July 2012 was that the ESA staff had received a WAR computer prompt to the effect that the appellant's DLA award was changing. On the balance of probabilities it appears to me that the Departmental staff in ESA were made aware by the computer system of the change in circumstances.

47. However, referencing *R(SB)15/87*, it seems to me that, in order to discharge the obligation to disclose, the issue in these cases is not merely whether the Department knew the fact in issue, but whether the appellant knew that the Department knew it. In addressing what the claimant knew, I consider that judicial notice has to be taken of the technological revolution over the past 30 years. The benefits system is fully computerised. To the extent that Chief Commissioner Mullan is saying that in the 21st century the Department can reasonably be assumed by claimants to have knowledge of the information it inputs on its own computer systems, I agree with him.

48. There is a vast difference between the manual administrative systems that pertained in the days before computerisation and the technology available to the Department today. *Hinchy* addressed a disjointed Departmental administration in the period from 1993 to 1998 passing information about DLA awards around on pieces of card, where one branch did not know what the other was doing. The evidence in this case indicates that that system has been consigned to the past. Claimants are entitled to assume that when they receive their decision in relation to one benefit, the Department's modern computerised systems will not just have communicated the decision to them, but also to any other branches of the Departmental administration where that decision has an impact.

49. In the present case, I am satisfied that the record of access to the ESA computer system on 20 July 2012 was triggered by exactly such a communication and that the ESA branch of the Department knew of the change in circumstance in relation to the DLA award. I do not need to investigate why, when that was the case, the Departmental staff in ESA took no action. It is enough to establish on the balance of probabilities that the ESA branch of the Department knew the material facts.

50. More generally, I am also satisfied that when he received notice from the Department of the change it was making to his DLA award, the appellant was entitled to assume that all relevant branches of the Department also had received that information. I agree with the reasoning of Chief Commissioner

> Mullan in *PMcL v DfC* and support his approach. Lord Hoffman said at paragraph 32 of *Hinchy* that "the claimant is not entitled to make any assumptions about the internal administrative arrangements of the Department. In particular he is not entitled to assume the existence of infallible channels of communication between one office and another". However, it is plainly time that the factual circumstances underpinning the House of Lords decision in *Hinchy* are distinguished in order to reflect the reasonably expected standards of 21st century benefits administration.
>
> 51. I conclude that the tribunal erred in law by rejecting the submission that the Department knew the material fact that the appellant's DLA award had changed, and that he knew that it knew. The Department was the entity that had brought about the change in circumstances by its decision on DLA. The appellant learned that same information directly from the Department. By holding that the appellant was not entitled to rely on computerised Departmental systems to assume that the ESA branch of the Department knew of the decision that its DLA branch had made, and by holding that he had failed to disclose a material fact, I consider that the tribunal erred in law.
>
> …
>
> 61. I allow the appeal and I set aside the decision of the appeal tribunal.
>
> 62. As all facts are agreed in the present case, I consider that I should decide the appeal myself without making further findings of fact.
>
> 63. I allow the appeal on the basis that the appellant could not fail to disclose a material fact that his DLA award had changed, since the Department already knew this material fact, and the appellant was entitled to assume, on the basis of contemporary standards of computer systems, that it knew the material fact in issue.
>
> 64. While he has been overpaid ESA in the sum of £6000.09, this is not recoverable from the appellant."

32. It is important to note, however, that the decision in ***SK*** was dependent on three particular findings of fact which are not replicated in the present case:

> "45. … one cannot envisage a rational modern computerised system of administration of benefits, where the rate of one

> benefit (ESA) is conditional on entitlement to another (DLA), which does not verify the details of that other award. The evidence indicates that, in line with that expectation, the relevant computer system generated notices of DLA decisions to the ESA branch and required action by ESA officials when a DLA decision was received.
>
> 46. Moreover, there is evidence in this case that the appellant's ESA computer claim was accessed on 20 July 2012, albeit with no evidence of action being taken. I do not consider that it is coincidental that the appellant's DLA decision was issued on 17 July 2012, a few days before the relevant ESA system was accessed on 20 July – an otherwise random date. It seems entirely likely that the reason for access to the computer system on 20 July 2012 was that the ESA staff had received a WAR computer prompt to the effect that the appellant's DLA award was changing. On the balance of probabilities it appears to me that the Departmental staff in ESA were made aware by the computer system of the change in circumstances.
>
> …
>
> 49. In the present case, I am satisfied that the record of access to the ESA computer system on 20 July 2012 was triggered by exactly such a communication and that the ESA branch of the Department knew of the change in circumstance in relation to the DLA award. I do not need to investigate why, when that was the case, the Departmental staff in ESA took no action. It is enough to establish on the balance of probabilities that the ESA branch of the Department knew the material facts."

33. Those findings of fact led to the conclusion that

> "The Department was the entity that had brought about the change in circumstances by its decision on DLA. The appellant learned that same information directly from the Department"

and that

> " … when he received notice from the Department of the change it was making to his DLA award, the appellant was entitled to assume that all relevant branches of the Department also had received that information."

34. The factual circumstances of this case are entirely different. It seems to me, therefore, that ***SK*** falls to be distinguished on its facts and that the Tribunal was

correct to apply the decision in ***Hinchy***, which had approved the Commissioners' decision in ***R(SB) 15/87***.

35. At some point the Upper Tribunal will have to grapple with the decision in ***Hinchy*** in the light of 21st century developments in computer technology. That was very much an analogue decision relating to a paper-based system and the question which will fall for decision is how it now translates into the computerised and digital age. This case, however, is not an appropriate vehicle for essaying that decision.

36. There is nevertheless force in Mr Commissioner Stockman's comment that

> "There is a vast difference between the manual administrative systems that pertained in the days before computerisation and the technology available to the Department today. *Hinchy* addressed a disjointed Departmental administration in the period from 1993 to 1998 passing information about DLA awards around on pieces of card, where one branch did not know what the other was doing. The evidence in this case indicates that that system has been consigned to the past."

37. It is plainly time that the factual circumstances underpinning the decision in ***Hinchy*** are considered afresh in order to reflect the reasonably expected standards of 21st century benefits administration. In that context in the appropriate case it will have to be determined, on the appropriate facts, whether and to what extent a social entitlement claimant in 2023 is, or is not, entitled to make any assumptions about the internal administrative arrangements of the Department and in particular whether (a) a claimant is, or is not, entitled to assume the existence of efficacious (if not infallible) channels of communication between one office and another and (b) a claimant is, or is not, entitled to assume that when a decision is received in relation to one benefit, the Department's modern computerised systems will not just have communicated that decision to the individual claimant, but also to any other branches of the departmental administration where that decision has an impact.

38. Accordingly, I am satisfied that the Tribunal was correct to make the decision which it did in relation to the overpayment decision and that that decision betrays no error of law. The Tribunal was right to follow the decision in ***Hinchy***, which had

approved the Commissioners' decision in ***R(SB) 15/87*** and to distinguish ***SK*** on its facts.

Analysis: The Civil Penalty Appeal

39. It is common ground that the Tribunal failed properly to explain why the claimant did not have a reasonable excuse for his failure to disclose the change of circumstances and that it failed expressly to exercise the ultimate discretion as to whether to impose a civil penalty and that that decision should be set aside. What is in issue is whether to remit that decision for further rehearing or to remake the decision.

40. Given that I have dismissed the overpayment appeal, it would be wholly disproportionate to remit the question of the imposition of a £50 civil penalty for further rehearing. The correct course is to remake the decision and bring the matter to an end. On the evidence before me I am satisfied that the Secretary of State has not demonstrated that the claimant did not have a reasonable excuse for his failure to disclose the change of circumstances and has not demonstrated that he had exercised the ultimate discretion as to whether to impose a civil penalty at all. The claimant is therefore not liable to a civil penalty of £50.

Conclusion

41. The appeal against the overpayment decision under file reference SC944/20/00633 is accordingly dismissed.

42. The appeal against the civil penalty decision under file reference SC944/20/00634 is allowed. The decision in that case is remade. The claimant is not liable to a civil penalty of £50.

Mark West
Judge of the Upper Tribunal

Signed on the original on 24 February 2023