

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998**

**EMPLOYMENT AND SUPPORT ALLOWANCE**

Appeal to a Social Security Commissioner  
on a question of law from a Tribunal's decision  
dated 30 March 2017

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. The decision of the appeal tribunal dated 30 March 2017 is in error of law. The error of law identified will be explained in more detail below. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.
2. I am able to exercise the power conferred on me by Article 15(8)(a)(ii) of the Social Security (Northern Ireland) Order 1998 to give the decision which I consider the appeal tribunal should have given as I can do so having made further findings of fact. The fresh findings in fact are outlined below.
3. My substituted decision is as follows:

An overpayment of income related Employment and Support Allowance (ESA) in the sum of £1,309.00 in respect of the period 5 November 2013 to 7 April 2014 has been made which is not recoverable from the appellant.

**Background**

4. In this appeal the appellant has been represented by Mr O'Farrell and the Department by Mr Clements.
5. In the Case Summary, prepared for the oral hearing of the appeal, Mr Clements set out the following factual background:

- (i) (The appellant) was in receipt of an award of Income Support (IS) on the ground of disability. This award was to be converted to an award of Employment and Support Allowance (ESA) pending a determination to certify that he had limited capability for work. An ESA decision maker determined that (the appellant) did not have limited capability for work and consequently decided that he was not entitled to ESA.
- (ii) (The appellant) appealed that decision. ESA claimants who appeal a decision that they do not have limited capability for work are treated as having limited capability for work until the appeal application has been decided. On 17 October 2012, (the appellant) was awarded income related ESA from 09.10.2012 pending the outcome of his appeal application.
- (iii) This pending appeal award of ESA included an award of a severe disability premium. (The appellant) met the conditions of entitlement to the premium at the time the pending appeal award was made (17.10.2012). One condition of entitlement to the premium is that the claimant is in receipt of the middle or highest rate of the care component of Disability Living Allowance (DLA). (The appellant) was awarded the middle rate care component of DLA for the period 04.11.2011 to 03.11.2013.
- (iv) (The appellant) ceased to be in receipt of DLA from 06.11.2013. The ESA office was not notified of the cessation of the DLA award and continued to pay (the appellant) the severe disability premium until an accuracy check on 04.04.2014 revealed to the ESA office that he was no longer in receipt of DLA.
- (v) The Department superseded (the appellant's) ESA award on 29.04.2014 and removed entitlement to the severe disability premium from 29.10.2013. This decision was incorrect as (the appellant) was still entitled to the premium from 29.10.2013 to 04.11.2013. The Department corrected this error by revising the supersession decision on 09.05.2014.
- (vi) The Department subsequently decided on 02.06.2015 that (the appellant) had been overpaid £1,309.00 in respect of the period 05.11.2013 to 07.04.2014, and that this overpayment was caused by his failure to disclose to the ESA office the material fact that he was no longer in receipt of DLA.
- (vii) (The appellant) appealed this decision on 16.06.2015. A tribunal heard his appeal on 30.03.2017 and decided that an overpayment of income related Employment and Support Allowance (ESA) totalling £1,309.00 in respect of the period 05.11.2013 to 07.04.2014 was recoverable from (the appellant).

6. To that narrative I would add that on 28 July 2017 an application for leave to appeal was received in the Appeals Service (TAS). On 18 August 2017 the application for leave to appeal was allowed by the Legally Qualified Panel Member (LQPM).

### **Proceedings before the Social Security Commissioner**

7. On 11 September 2017 the appeal was received in the Office of the Social Security Commissioners. Written observations on the appeal were received from Mr Clements on 24 October 2017. Two oral hearings of the appeal were heard on 11 October 2018 and 30 May 2019. Both representatives also provided written submissions on a specific issue identified by me.

### **Errors of law**

8. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?
9. In *R(I) 2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:

- “(i) making perverse or irrational findings on a matter or matters that were material to the outcome (‘material matters’);
- (ii) failing to give reasons or any adequate reasons for findings on material matters;
- (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
- (iv) giving weight to immaterial matters;
- (v) making a material misdirection of law on any material matter;
- (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; ...

Each of these grounds for detecting any error of law contains the word ‘material’ (or ‘immaterial’). Errors of law of which it can be said that they would have made no difference to the outcome do not matter.”

## **The appeal tribunal's reasoning**

10. In the statement of reasons for its decision, the appeal tribunal stated the following:

'It is not disputed that the Appellant was aware that his Disability Living Allowance award came to an end on 3 November 2013. The Appellant does not make the case that he informed the Department on [sic] such a fact. The main thrust of his argument is that because of the close relationship between the various branches of the Department that the knowledge of this end date for Disability Living Allowance was available to the Department. Indeed there is detailed correspondence between the Appellant and his representatives and the Department dealing with this issue.

In particular the Appellant's representative refers to the decision of the now Chief Commissioner in the case of C6/08-09 in which the Chief Commissioner notes that "there is no failure to disclose where the material fact in question is already known to the individual or office to whom, under the principal laid down in Hinchy, notification would otherwise have to be made". The question therefore for the Tribunal is whether the material fact in question (the loss of the Middle Rate Care award of Disability Living Allowance) was already known to the individual or office in question. I have carefully pursued [sic] all of the papers in this case and I can find no evidence to substantiate the view that the material fact in question was known to the relevant section of the Department ie Employment and Support Allowance. The relevant question is not whether it should have been known but whether it was known to that particular office. No such evidence has been produced by the Appellant to satisfy the Tribunal of this fact.

The Claimants have a legal duty to notify information or evidence to the Department in the manner and of the time the Department has told them to do so. This is in accordance with Regulation 32(1), (1A) and (1B) of the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987 and in accordance with the guidance outlined in Commissioners' Decisions R(IS) 9/06 and decision R(IS) 07/05. Furthermore Claimants are legally required to notify any changes of circumstances which they might reasonably be expected to know would affect their entitlement to benefit or the payment of benefit as soon as reasonably practicable

after the change occurs by giving notice of the change to the appropriate office. This requirement is in accordance with the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987. It is clear that Form ESA40 (NI) was issued to the Appellant on 17 October 2012. Although the date on this sample form in the papers is 2008 I am satisfied, on the balance of probabilities, that the same form was sent to the Appellant on 17 October 2012. Page 17 of that form specifically refers to the changes which the Appellant must report. Although Disability Living Allowance is not specifically mentioned in that Section mention is made of "benefits" and although a list is provided it is clear from the form that the list of benefits is not exhaustive. I am therefore satisfied that the Appellant was under a legal duty to notify the Department of any change in terms of his award of Disability Living Allowance. I am satisfied that he did not do so and I am further satisfied that the Employment and Support Allowance Branch of the Department did not become aware of the change until the accuracy check was made on 4 April 2014.

In his letter 2 December 2016 Mr O'Farrell, on behalf of the Appellant, makes various points in relation to the internal workings of the Department. He refers to the fact that it is arguable that preventative measures could have been taken to avert the overpayment and makes reference to the delay in communication between the Disability Living Allowance Branch of the Department and the Employment and Support Allowance Branch with regard to the removal of the Middle Rate Care Component. I have taken into account the points raised by Mr O'Farrell however these points do not affect the legal duty on the Appellant to notify the relevant office of the material fact. I am satisfied on all of the evidence that this was not done by the Appellant and did not come to the knowledge of the relevant office until the aforementioned accuracy check on 4 April 2014. The Department is entitled to recover any overpayment which would not have been paid but for this failure to disclose the material fact in accordance with the provision of Social Security Administration (Northern Ireland) Act 1992 Section 69(1) and 69(5A), Social Security (Payments on Account, Overpayments and Recovery) Regulations (Northern Ireland) 1988 – Regulation 12 and Commissioners' Decisions C5/11-12 IB, R(SB) 54/83, R1/05 (ICA)(T) and C8/06/07 (IS).'

## The grounds of appeal

11. In the application for leave to appeal which was received in the Office of the Social Security Commissioners on 11 September 2017, the appellant had relied on the following grounds of appeal:

'The substantive issue raised by my Representative, Mr Sean O'Farrell, related to Paragraph 31(ii) of Commissioner's Decision C6/08-9 (IS) which says that "there is no failure to disclose where the material fact in question is already known to the individual or office to whom, under the principle laid down in Hinchy, notification would otherwise have to be made." In their Reasons for Decision the Tribunal conclude "... I can find no evidence to substantiate the view that the material fact in question was known to the relevant section of the Department i.e. Employment and Support Allowance."

Matters before an Appeal Tribunal are decided on the balance of probabilities. On 30<sup>th</sup> March the Tribunal had, as part of the 'Documents Considered', a letter from Mr G on behalf of ESA dated 29<sup>th</sup> November 2016 and a letter from Mr O'Farrell dated 2<sup>nd</sup> December 2016. On 29<sup>th</sup> December 2016 Mr G said "As the award renewal date was known to the department since 29/11/11, it is arguable that preventative measures could have been taken to avert the overpayment." The letter by Mr O'Farrell dated 2<sup>nd</sup> December 2016 expands further on this point and highlights the fact that the evidence from Mr G contradicts the statement by Ms S, ESA Appeals, in her Addendum of 21<sup>st</sup> March 2016 that ESA would not have been aware at that time (17/10/12 – date of conversion from IB/IS to ESA) that DLA was due to end on 3/11/13.

Therefore I respectfully submit that the Tribunal sitting on 30<sup>th</sup> March erred in law by not resolving the conflict of evidence between Mr G and Ms S and, furthermore, by concluding without foundation "... I can find no evidence to substantiate the view that the material fact in question was known to the relevant section of the Department i.e. Employment and Support Allowance." Consequently, the Tribunal cannot sustain the position that The Department first became aware of the material fact until the accuracy check on 4<sup>th</sup> April 2014. As I said earlier such issues must be decided on the balance of probabilities.'

12. In the Case Summary which was prepared for the first oral hearing of the appeal, Mr O'Farrell made the following preliminary points:

'(The appellant) previously sought to rely on Paragraph 31(ii) of C6/08-09(IS) ... However in *Foster v Federal Commissioner of Taxation* (1952) CLR 606, an Australian Decision, 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 ordinary person making a statement as to the fact, already aware." In the present case, (the appellant) simply would not have known that the DLA award renewal date was already known to the Department since 29/11/2011.

Regulation 21(1A) of the Social Security (Claims and Payments) Regulations (NI) 1987 imposes a duty on a claimant to notify any changes in circumstances which they might reasonably be expected to know would affect their entitlement to benefit or the payment of benefit, as soon as reasonably practicable after the change occurs by giving notice to the appropriate Office. The Department refer to ESA40 (NI) with an issue date of 17<sup>th</sup> October 2012 (The Department's Response to the Grounds of Appeal), although the ESA40 (NI) referred to in the Appeal submission of 26<sup>th</sup> February 2016 at Tab 3 has an issue date of September 2008. However both are identical in terms of the Section 'Changes You Must Tell Us About' commencing on Page 15 and ending on Page 18. It is accepted that (the appellant's) duty to disclose the change in his DLA stems from Page 18 which states "Also tell us if you or your partner start or stop getting any pensions income, benefits or allowances. Tell us if the amount of money you or your partner are getting changes".

The Tribunal sitting on 30<sup>th</sup> March 2017 refer, in their 'Reasons' at Paragraph 2 to Regulation 32 of the Social Security (Claims and Payments) Regulations (NI) 1987 and to the issuing of an ESA40 (NI) on 17<sup>th</sup> October 2012. Therefore it is accepted that the Tribunal considered where the duty to disclose the change in the DLA came from.

Furthermore it is accepted that (the appellant), between 4<sup>th</sup> November 2013 (Cessation of DLA award) and 4<sup>th</sup> April 2014 (date of 'Accuracy Check'), did not inform ESA or any other Office of the change in his DLA.'

13. Mr O'Farrell then added a number of general grounds of appeal, summarised as follows:
- (i) The appeal tribunal was under a duty to decide, on the balance of probabilities, if the 'ESA Centre' was aware of the material fact that the appellant had ceased to be entitled to ESA from 4 November 2013.
  - (ii) At the appeal tribunal hearing, an argument had been advanced that on 17 October 2012, when the appellant was awarded IR ESA, that ESA, in order to include entitlement to the Severe Disability Premium (SDP) must have checked the status of the DLA award to determine the rate at which the care component had been awarded and for how long. Furthermore the conflict of evidence between Mr G and Ms S, referred to above, was raised.
  - (iii) The appeal tribunal was under the mistaken belief that it was necessary to produce actual evidence that the ESA Centre already knew the material fact. Rather, it was only necessary to show, on the balance of probabilities that the ESA Centre knew that the appellant ceased to be entitled to ESA from 4 November 2013 and could have been aware of that material fact on 17 October 2012 (the date of conversion) or after 4 March 2013 the date of the DLA renewal decision on 4 March 2013.
  - (iv) The Department appeared to have accepted that in the evidence from Mr G concerning the knowledge of the Department, he was referring to the Department as a whole entity as opposed to a specific benefit office.
  - (v) The DLA renewal date was known to the Department since 29 November 2011 and it was reasonable to assume that Income Support became aware of this change in circumstances and subsequently awarded entitlement to SDP. Once again, the appeal tribunal erred in law by not resolving the conflict in evidence between Mr G and Ms S.
  - (vi) The decision maker, on 17 October 2012, had full knowledge of the material fact that the award of DLA was due to expire in November 2013 and could easily have taken steps to prevent payment of SDP thereafter. The chain of causation was broken on 17 October 2012.
  - (vii) It is arguable that any disclosure from the appellant would have had no effect and, accordingly, the chain of causation was broken by two missed opportunities by the Department which had not provided any evidence as to why no preventative action was taken on each occasion.
  - (viii) Although it was accepted that the 'entitlement' decision which formed the basis of the 'recoverability' decision was properly made,



the Social Security Commissioner should not correct the defects in the 'recoverability' decision of 2 June 2015 in terms of the actual definition of the material fact.

- (ix) The comments of Commissioner Stockman in paragraph 23 of his decision in *BMcE-v-Department for Communities (PC)* ([2017] NICom 34, C2/17-18(PC)) were relevant to the issues arising in the instant appeal.
14. In his Case Summary, Mr Clements made the following submissions, in response to Mr O'Farrell's submission concerning the failure by the appeal tribunal to resolve a conflict in evidence between the Departmental officials Mr G and Ms S:

'My interpretation of Mr G's statement is that it is an acknowledgement that better internal communication within the Department could have prevented the overpayment. The DLA office knew the material fact that (the appellant's) entitlement to DLA would cease from 04.11.2013, and it could have alerted ESA to this fact. Adding weight to this interpretation is the fact that DLA made its fixed term award on 29.11.2011, the date cited by Mr G. ESA did not convert (the appellant's) IS award until October 2012, so it is highly unlikely that the ESA office had knowledge of the DLA award since 29.11.2011. I submit that reading in "ESA" where Mr G says "the Department" is a misinterpretation of Mr G's statement. The tribunal did not err in law by not considering a contradiction in the evidence because there is no contradiction in the evidence.'

15. Mr Clements then made the following more general submissions:

'... to the best of my knowledge the procedure with regard to checking whether premiums should be paid on a converted award is as follows:

Staff converting an IS award to an ESA award checked a system called the Customer Information System (CIS), which displayed a record of all benefits the claimant was in receipt of. The CIS system, if updated correctly, would have displayed the period of (the appellant's) DLA award, and so the staff member who checked the system should have seen the end date of the DLA award. This means that the excerpt from Ms S's submission highlighted by Mr O'Farrell is probably incorrect. I cannot confirm whether procedure was correctly followed in this case (the contradictory evidence I encountered suggests that it may not have been followed in every case), but I accept it is

arguable that on the balance of probabilities ESA knew the fixed period of (the appellant's) DLA award.

This raises the question whether knowledge that (the appellant) had been awarded DLA until 03.11.2013 would also constitute knowledge of the material fact that (the appellant) would no longer be in receipt of DLA from 06.11.2013.

If the Commissioner decides that the ESA office knew the material fact then I submit that the overpayment is not recoverable from (the appellant). I had argued in my observations that it would still be recoverable from him as he did not know that the ESA office knew the material fact, but I now resile from that argument. I find Chief Commissioner Mullan's statement in *C6/08-09 (IS)* that "*there is no failure to disclose where the material fact in question is already known to the individual or office to whom, under the principle laid down in Hinchy, notification would otherwise have to be made*" to be compelling. (The appellant) failed to discharge his duty to disclose the material fact, but that is not necessarily the same as failing to disclose the material fact. If the Department did know the material fact then disclosure could no longer be made, as the common meaning of "disclose" is "to reveal", and one cannot reveal a fact to a party who already knows the fact. If it was not possible for (the appellant) to disclose the fact, then it follows that he could not fail to disclose the fact either.

Nonetheless, I submit that the Department did not have knowledge of the material fact. One reason for this is simply that DLA claimants are sometimes paid beyond the end of their award period. If a claimant's award expires in the middle of a benefit week, DLA continue to pay the claimant until the end of that benefit week. As per paragraph 6 of Schedule 4 to the Employment and Support Allowance Regulations (Northern Ireland) 2008, it is being "in receipt of" the DLA care component that is a condition of entitlement to a severe disability premium. Therefore, the material fact is not that (the appellant) ceased to be entitled to DLA from 04.11.2013, but rather that he ceased to be in receipt of DLA from 06.11.2013. This distinction is especially relevant in (the appellant's) case, as it means that he is entitled to the severe disability premium for the period from 29.10.2013 to 04.11.2013.

ESA may have had knowledge that his DLA award was scheduled to cease from 04.11.2013. If so, it would have

needed to make further investigations in order to find out the date on which payment of DLA was due to cease. There is no evidence that these investigations were made, nor was it procedure to carry out these investigations. The procedure was instead to create a 'case control' for the end date of the award period, which would mean that on 04.11.2013 a report would be generated to alert ESA staff to check (the appellant's) DLA award. I do not know if ESA failed to set a case control in this case, or if it was set and staff did not act on the generated report. The Department would be at fault in either case, and its negligence would be a cause of the overpayment. Nonetheless, (the appellant's) failure to disclose the material fact would be another cause of the overpayment and, in applying the principle established in *Duggan v. Chief Adjudication Officer*, the overpayment is still recoverable from him.

The other reason why I submit that the ESA office did not have knowledge of the material fact is that, even if ESA had knowledge in October 2012 that (the appellant) had been awarded DLA until 03.11.2013, it did not know as a fact that (the appellant) would no longer be in receipt of DLA following the end of the award period. For example, DLA renewal claims are frequently successful, and a successful renewal claim would have prolonged the period during which he was in receipt of DLA. It could also have been the case that his award would be terminated before the end of the award period; if for example he had reported to DLA during the course of the award period that his medical condition had substantially improved. ESA may have had knowledge in October 2012 of when the award period was supposed to end, but this was subject to change.

I would argue that knowledge in October 2012 that the DLA award period was due to cease from 04.11.2013 is not the same as actual knowledge of the material fact that (the appellant) would no longer be in receipt of DLA following the cessation of that award period, because of the potential of a change of circumstance to prolong or prematurely terminate his entitlement to DLA. If (the appellant) had actually contacted ESA in October 2012 to notify the officer that his entitlement to DLA would cease from 04.11.2013, I would not consider the notification to be a full and effective disclosure of the material fact for the same reasons as outlined above.'

**The potential applicability of *Secretary of State for Work and Pensions v AT* ([2013] UKUT 382 (AAC) ('AT'))**

16. As was noted above I asked both Mr Clements and Mr O'Farrell to make submissions on a specific issue, namely, the potential applicability of the decision of Upper Tribunal Judge Jacobs in *AT*. Mr O'Farrell made the following submissions:

'The Tribunal sitting on 30<sup>th</sup> March 2017 refer, in their 'Reasons' at Paragraph 2, to Regulation 32 of the Social Security (Claims and Payments) Regulations (NI) 1987 and to the issuing of an ESA40 (NI) on 17<sup>th</sup> October 2012. Therefore it is accepted that the Tribunal considered where the duty to disclose the change in the DLA came from. Therefore I would agree with Commissioner Edward Jacobs in *SSWP v AT* (2018) UKUT 392 (AAC) that the ESA40 is the source of the duty under Regulation 32(1A) of the Social Security (Claims and Payments) Regulations (NI) 1987.

...

The difficulty with *SSWP v AT* (2018) UKUT 392 (AAC), as acknowledged by Commissioner Jacobs, is that he gave his decision without the benefit of any argument on behalf of the claimant and the value of the decision is obviously reduced by the lack of any argument on one side.'

17. Mr Clements stated the following in response:

'In my case summary of 27.09.2018 I argued that even if it is found that the ESA office had knowledge of when (the appellant's) award of DLA was due to end, the overpayment is recoverable from him even though the Department's negligence would be a cause of the overpayment. (The appellant's) failure to disclose the material fact was another cause of the overpayment and the principle established in the *Duggan* decision applies.

However, I made this argument on the basis that that the overpayment was caused by (the appellant's) failure to disclose the material fact that he ceased to be in receipt of DLA from 06.11.2013. The payment of a severe disability premium is concerned with the receipt of DLA. If a DLA award ends in the middle of a DLA benefit week, the claimant continues to receive payments until the end of that benefit week. Therefore in practice DLA claimants often continue to receive payment of DLA for several days after the award ceases, and this can mean that the

award of DLA ceases in one ESA benefit week but the payment of DLA doesn't cease until the next ESA benefit week. This was indeed the case for (the appellant).

Consequently the fact that (the appellant's) award of DLA was due to cease from 04.11.2013 is not, in itself, the relevant fact. An assumption that payment of DLA would cease on the same date that the award of DLA ended would not have resulted in the Department making a correct supersession decision, instead (the appellant) would actually have been *underpaid* ESA for the week 29.10.2013 to 04.11.2013.

The ESA office therefore did not know the material fact and, while it may have had knowledge which would have led it to obtain knowledge of the material fact had further investigations been carried out, I submit there is a failure to disclose by (the appellant) given that the relevant office of the Department did not have actual knowledge of the material fact.

Judge Jacobs did not draw a distinction in *SSWP v AT* between the cessation of a DLA award and cessation of payment of DLA. However I would submit that, if it is found by the Commissioner that the ESA office did know the material fact in the instant case, then the overpayment may not be recoverable from (the appellant). I argue this for two reasons: (1) depending on the interpretation of "disclose" in the context of section 69(1) of the Social Security Administration (Northern Ireland) Act 1992, (the appellant) may not have failed to disclose the material fact, and (2) even if he has failed to disclose the material fact, it cannot be shown that the overpayment was in consequence of his failure to disclose if the benefit paying office already had knowledge of the material fact.'

18. Mr Clements went on to make submissions on the correct interpretation of 'disclose' in the context of section 69(1) of the Social Security Administration (Northern Ireland) Act 1992 ('the 1992 Act'), as amended, and I return to that issue below.

19. A further response was received from Mr O'Farrell which was as follows:

'One of the key issues pertaining to the case is whether the expiry date of the DLA award or the cessation of payment of DLA is the material fact. There is no dispute that the DLA award expired on 3.11.13 (not entitled from 4.11.13) and the final payment was on 6.11.13. When (the appellant) was awarded DLA on 29.11.11 the 'Award

Letter' would have told him the start and end dates of that award, i.e. 4.11.11 to 3.11.13. When the DLA Renewal Form was issued 4-5 months prior to the expiry date the 'Cover Letter' would have given the end date as 3.11.13. Therefore, if (the appellant) were to have reported anything, it would have been along the lines of 'My DLA finished on 3.11.13' because that would have been the only date he knew.

The payment of DLA received by (the appellant) on 6.11.13 paid him from 9.10.13 to 5.11.13, i.e. four weeks in arrears. For (the appellant) to have known that the payment received on 6.11.13 was his final payment he would need to have waited until 4.12.13 to be able to say 'My last payment of DLA was on 6.11.13 because, at 6.11.13, he simply would not have known this was his final payment. If the cessation of payment of DLA is deemed to be the material fact then the earliest date (the appellant) could have reported this would have been 4.12.13.

Furthermore, if the cessation of payment of DLA is deemed to be the material fact, then this potentially gives rise to an irrational situation. If, for example, DLA was paid in error for six months beyond the expiry date and (the appellant) asked ESA for payment of the Severe Disability Premium (SDP) on the basis that DLA payments were being made he would almost certainly be told that there is no entitlement to the SDP because there is no entitlement to DLA. Therefore entitlement to the SDP has to be linked to entitlement to DLA.

For clarity I can confirm that I am not saying (the appellant) should have been awarded ESA for a fixed period but rather that the ESA Centre failed to set a 'Case Control' to coincide with the expiry date of the DLA award or a 'Case Control' was set but not acted upon. From a practical perspective I would have thought, if a WAR had been generated, it would have included the expiry date of the DLA award as it would render the notification rather meaningless for there not to be an expiry date. I cannot envisage that a WAR would include the date of the last DLA payment.

I do accept that the length of a DLA award, for a variety of reasons, is subject to change and knowledge of a particular end date 11 months in advance may not be the same as the actual end date, although, for the overwhelming vast majority of cases, both will ultimately turn out to be one and the same. However, if a 'Case

Control' has been set and a WAR is generated in the event of DLA Branch revising the 'original' Decision then ESA would have knowledge of the material fact, i.e. the expiry date of the DLA award. Applying such an approach, in a hypothetical sense, payment of the SDP would have stopped in or around November 2013 and, had the DLA award ended sooner, i.e. within the 11 months, then ESA Centre, provided a WAR was generated, would have stopped payment of the SDP on the earlier date. I recognize of course that this is the perfect case scenario but, in the worst case scenario, any overpayment would only be from the date of the revision to November 2013, i.e. effectively limiting or, in a sense, controlling the period of the overpayment, a type of damage limitation. However, ultimately, at the outset, The Department have no choice but to approach the situation taking into account the initial date known to them and hope, if that date should change, they will be notified accordingly, whether than notification emanates from the customer or through The Department's own internal 'systems'.

### **The decision making process giving rise to the appeal**

20. In his Case Summary, Mr Clements made the following submissions on the quality of the decision-making process giving rise to the appeal:

The tribunal erred by incorrectly identifying the material fact which (the appellant) failed to disclose as being the cessation of (the appellant's) entitlement to DLA from 04.11.2013. It stated: "*Following an accuracy check on 4 April 2014 it was discovered that the Appellant's award of Middle Rate Care Component of Disability Living Allowance had ceased on 4 November 2013. In view of this change of circumstances the Department superseded the Appellant's award of Income Related Employment and Support Allowance on 9 May 2014 disallowing entitlement from that date.*"

As noted above, it is the receipt of DLA which is relevant to whether a claimant is entitled to a severe disability premium. Payment ceased on 06.11.2013. It is this change of circumstances which caused the supersession of (the appellant's) award, and not the cessation of entitlement on 04.11.2013.

However, I do not think that this error had a material difference on the outcome and so I submit that it does not vitiate the tribunal's decision. If anything, the material fact being the cessation of payment adds weight to the overpayment being recoverable from (the appellant), as his argument is that he could not disclose the material fact because the ESA office already had knowledge of when his entitlement to DLA would cease. If the cessation of entitlement is not the material fact which caused (the

appellant) to no longer be entitled to the premium, then the overpayment is recoverable from (the appellant) whether or not ESA knew about it.

The tribunal found that the ESA office did not have knowledge of the material fact. I agree with the tribunal, albeit only because it misidentified the material fact. I have accepted that on the balance of probabilities the ESA office may have known that (the appellant's) entitlement to DLA was due to cease from 04.11.2013. The tribunal took the opposite view, but I feel that this was a reasonable finding of fact based on the evidence before it. Ms S advised in her submission that ESA staff would not have known that fact, and I believe it was reasonable for the tribunal to accept her evidence. I do not consider its finding to be perverse or irrational, and so it is not an error in law.

In my observations I noted that the tribunal had carried out an investigation concerning the 29.04.2014 supersession decision (as revised on 09.05.2014) but did not make any further investigations following the Department's submission of 03.01.2017, even though the Department had failed to provide evidence proving that the decision had been made in the submission. However, the secondary evidence provided at Tab 14 is certainly indicative that the 29.04.2014 supersession was carried out as stated by the Department, and that it was revised on 09.05.2014. In accordance with the principle outlined in the GB Commissioner decision *CS/S/332/02*, I am of the view that the tribunal did not err in law by accepting the secondary evidence provided by the Department as evidence that the supersession decision was made.

The tribunal misidentified the date of the supersession decision. It stated that the Department superseded (the appellant's) ESA award on 09.05.2014. In fact, the supersession decision was made on 29.04.2014 and this decision was revised on 09.05.2014. The Department's submission of 26.02.2016 said that the supersession decision was on 09.05.2014, and its further submissions were not of great help to the tribunal in clearing up the confusion. The tribunal did make a direction to the Department to clarify the supersession date, and while the response of 03.01.2017 did correctly identify the supersession as taking place on 29.04.2014 it did not mention the revision of 09.05.2014. It would have been difficult for the tribunal to ascertain the correct dates of the supersession and revision decisions from the Department's submissions. In any case I think the tribunal made sufficient investigations to be satisfied that a supersession decision was made in accordance with regulation 69(5A) of the Social Security Administration Act (Northern Ireland) 1992. While it misidentified the date of the supersession decision, I do not believe the mistake is sufficient to vitiate its decision.

The overpayment decision of 02.06.2015 states that on 05.11.2013 (the appellant) "failed to disclose the material fact that his DLA award was ending". There are at least two flaws (possibly three) in this decision. (The appellant) was in receipt of DLA on 05.11.2013; the first date that



he was no longer in receipt of DLA was 06.11.2013. He therefore could not disclose (or fail to disclose) the material fact until 06.11.2013. The decision also says that the overpayment was made as a result of “the decision dated 12.04.2014”. This is incorrect, as the decision made on 12.04.2014 seems to have been a decision to suspend payment of the ESA award. (The appellant’s) ESA award was superseded on 29.04.2014, and this supersession decision was revised on 09.05.2014. Furthermore, it is ambiguous to me what the decision maker meant by saying that the DLA award “was ending”; this could be interpreted as either the end of entitlement to DLA or the end of payment of the DLA award. I respectfully ask the Commissioner to correct the defects in this decision.’

21. I have noted that Mr O’Farrell, in his Case Summary, has accepted that the ‘entitlement’ decision which formed the basis of the ‘recoverability’ decision was properly made, but has submitted that I should not correct the defects in what he describes as the ‘recoverability’ decision of 2 June 2015 in terms of the actual definition of the material fact.
22. The general duty of the appeal tribunal in an appeal such as this was summarised by me in the now much-quoted paragraph 53 of my decision in *C6/08-09(IB)*:

‘53. In essence, the appeal tribunal will have to identify two decisions. The first is a decision which alters previous decision(s) awarding entitlement to benefit – that can be described as the entitlement or section 69(5A) decision. The second is a decision that overpaid benefit is recoverable – that can be described as the recovery or section 69(1) decision.’

23. The errors in the decision-making process are many and manifest. The appeal tribunal was led by what the Department told it about both the entitlement and recovery decisions. As was noted by Mr Clements, the appeal tribunal was, initially, alert to potential problems with a Departmental decision of 29 April 2014, as revised on 9 April 2014, and adjourned the second oral hearing of the appeal to obtain an additional submission about this and significant other aspects of the decision-making process. A further submission dated 3 January 2017 was subsequently received but the appeal tribunal, in the statement of reasons for its decision, did not address the validity of the entitlement decision in any degree of detail.
24. Further, the appeal tribunal did not question the accuracy of the recovery decision of 2 June 2015, a copy of which was available to the tribunal, as Tab No 5. As has been conceded by Mr Clements, the substance of that decision, set out as the statement that ‘... on 5/11/2013, or as soon as practicable after, (the appellant) failed to disclose the material fact that his DLA award was ending ...’ is problematic. Mr Clements is correct to note that, as of 5 November 2013, the appellant was not under a duty to

say anything about his entitlement to DLA, because, as of that date, he remained entitled to that benefit. The duty imposed on a claimant by regulation 32(1A) of the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987, as amended, ('the 1987 Regulations') is to notify any changes of circumstances which the claimant might reasonably be expected to know would affect their entitlement to benefit, as soon as practicable after the change occurs. There was no notifiable change on 5 November 2013.

25. I have also observed, as did Mr Clements, that the entitlement decision cited as underlying the recovery decision of 2 June 2015, is stated to have been a Departmental decision of 12 April 2014. The status of the decision of 12 April 2014 is unclear and was removed in time from what was to become the accepted entitlement decision.
26. Mr Clements asks that the failures by the appeal tribunal to be more rigorous in identifying errors and omissions in the Departmental decision-making process are set aside, and I am asked to make the necessary amendments to correct the relevant mistakes. It is the case that Social Security Commissioners have been prepared to undertake such a remedial tasks where decision-making errors are what might be described as 'technical' in nature and not material to the validity of the outcome decision. I am of the view, however, that where, as in the instant case, the burden of proof is on the Department, where a significant amount of asserted overpayment of benefit is sought to be recovered, where there are myriad errors and, to repeat, where all of these errors eventually went unnoticed and unremarked by the appeal tribunal, thereby calling into question its compliance with the general duties described above, a degree of reluctance might be called for in seeking to do the Department's job for it.
27. I say all of that against the background that I have also found below that the decision of the appeal tribunal was in error of law on the basis of how it addressed a substantive issue raised by the appeal concerning the true material fact which, it is submitted, the appellant had failed to disclose. Given that the appeal tribunal, in error, adopted and confirmed the Department's approach to that issue, that also goes to the accuracy of the decision-making process.
28. I am reminded that in the decision of the Tribunal of Commissioners in Great Britain in *R(IB) 2/04* is clear authority for the proposition that where an appeal tribunal identifies defects in a decision which purports to change the effect of a previous decision (e.g. failure to use the terms 'revise' or supersede', failure to indicate that a previous decision is being revised or superseded, failure to identify the previous decision being revised or superseded, failure to specify the ground for revision or supersession, or reliance on the wrong ground for revision or supersession), the appeal tribunal has the jurisdiction to remedy those defects and make the decision which the Department ought to have made.

29. The power to remedy defects is limited, however. The Tribunal of Commissioners in Great Britain in *R(IB) 2/04* recognised, at paragraph 72, that:

‘... there may be some decisions made by the Secretary of State which have so little coherence or connection to legal powers that they do not amount to decisions ... at all.’

30. These exceptional cases could not be subjected to the newly identified remedying powers.
31. In light of all of this, I gave serious consideration to declaring that the decision-making process in this case fell into the category described by the Tribunal of Commissioners in paragraph 72 of *R(IB) 2/04*. Further, I contemplated that in light of the errors in the Departmental decision-making process, and the appeal tribunal’s failure to identify those failings, the appropriate disposal would be to remit the decision to the Department for the purpose of giving consideration to remedial action. This appeal has been outstanding for some time and the appellant is entitled to a final determination on the issues which he has raised. On that basis, I have gone on to address the substantive questions which arise.

**What was the material fact which the appellant was required to disclose?**

32. As was noted above, Mr Clements submits that the material fact which the appellant was required to disclose was that he ceased to be paid DLA on 6 November 2013. His primary basis for that submission is the qualifying condition for entitlement to the ESA SDP. In his submissions, Mr Clements makes reference to the qualifying condition being found in paragraph 6 of Schedule 4 to the Employment and Support Allowance Regulations (Northern Ireland) 2008, (‘the 2008 Regulations’) which provides, so far as it is relevant to the instant case:

‘(1) The condition in respect of a severe disability premium is that the claimant is a severely disabled person.

(2) For the purposes of sub-paragraph (1), a claimant is to be treated as being a severely disabled person if, and only if—

(a) in the case of a single claimant, a lone parent, a person who has no partner and who is responsible for and a member of the same household as a young person, or a claimant who is treated as having no partner in consequence of sub-paragraph (3)—

- (i) the claimant is in receipt of armed forces independence payment, the care component, the daily living component or attendance allowance;
- (ii) subject to sub-paragraph (4), the claimant has no non-dependants aged 18 or over normally residing with the claimant or with whom the claimant is normally residing; and no person is entitled to, and in receipt of, a carer's allowance or has an award of universal credit which includes the carer element in respect of caring for the claimant;'

33. Paragraph 6(9) provides:

'(9) In this paragraph—

...

"the care component" means the care component of disability living allowance at the highest or middle rate prescribed in accordance with section 72(3) of the Contributions and Benefits Act.'

34. It is also important to note paragraph 10 of Schedule 4 which provides that:

'10. For the purposes of this Part of this Schedule, a person is to be regarded as being in receipt of any benefit if, and only if, it is paid in respect of the person and is to be so regarded only for any period in respect of which that benefit is paid.'

35. As was noted above, Mr Clements adds that in the instant case an interpretation of 'in receipt of' as 'being paid' ESA SDP has important consequences for the disclosure required of the appellant and for the period over which the appellant was entitled to ESA SDP.

36. In *R(IS) 10/94*, the Commissioner in Great Britain was dealing with an appeal which raised a question of construction of paragraph 13 of Schedule 2 to the Income Support (General) Regulations 1987 ("the 1987 GB Regulations"), in Great Britain which made provision for the payment of disability premiums and severe disability premiums respectively as elements of income support. The appellant was, at the material time, a lone parent in receipt of income support who had living with her a severely disabled child under the age of 16 in respect of whom she was paid attendance allowance and mobility allowance.

37. Paragraph 13 of Schedule 2 to the 1987 GB Regulations, which, so far as was material in the case, provided:

**'Severe disability premium**

13. (1) The condition is that the claimant is a severely disabled person.
- (2) For the purposes of sub-paragraph (1), a claimant shall be treated as being a severely disabled person if, and only if –
- (a) in the case of a single claimant or a lone parent –
- (i) he is in receipt of attendance allowance, ...'

38. The sole question at issue was whether the appellant was 'in receipt of attendance allowance' for the purposes of paragraph 13(2)(a)(i), it being accepted that she satisfied all other conditions of entitlement. It was not in dispute that the appellant was entitled to an attendance allowance 'in respect of a child who satisfies or is treated as having satisfied' the prescribed conditions under section 35(1) of the Social Security Act 1975 ('the 1975 GB Act'), as modified by regulation 6(2)(a) of the Social Security (Attendance Allowance) (No. 2) Regulations 1975 ('the 1975 GB Regulations'), and that under the provisions of regulation 6(4) the claimant was 'the person who in any given case shall be entitled to an attendance allowance in respect of a child'.
39. On behalf of the appellant it was argued that she was treated as being the severely disabled person because she satisfied the condition that she was in receipt of attendance allowance. As the words 'in receipt' were not defined they fell to be given their ordinary everyday meaning. On that basis the person who was 'in receipt' of an attendance allowance could reasonably be interpreted as being the person who was actually receiving the payment of the award.
40. On behalf of the Adjudication Officer it was argued that that section 35(1) of the 1975 GB Act, as amended, stressed the entitlement of attendance allowance "in respect of a child". The payment of attendance allowance was not for the appellant but in respect of her child. The contention that 'in receipt of' applied to the appellant and not to the child created an absurdity. It confused payment with entitlement. The appellant was merely the payee of an award in respect of the child's needs. The interpretation advanced on behalf of the appellant would have far reaching results. For example, an appointee appointed by the Secretary of State on behalf of a person incapable of administering his affairs would be entitled to receive a premium in his own right. Such an interpretation defeated the intention of Parliament to assist the person with a specific

need. Further, the intention of paragraph 13 was to award a premium to a person who was severely disabled. To consider awarding the premium to a person who was manifestly not a disabled person but a parent, receiving attendance allowance in respect of a child, was clearly absurd.

41. The absurdity continued when the asserted interpretation of 'in receipt of' in paragraph 13 was also applied to paragraph 14 of Schedule 2 to the 1987 GB Regulations. Paragraph 14 of Schedule 2 referred to a child being 'in receipt of' attendance allowance as a condition for entitlement to another premium - the disabled child premium. Consequently if 'in receipt of' was not given the plain meaning in paragraph 13 there was nothing to support the view that it should be given the plain meaning in paragraph 14. Attendance allowance was not paid to the child but to the person responsible for the child, in the relevant case the parent. If the meaning of 'in receipt of' applied to paragraph 13 it also applied to paragraph 14, with the result that no disabled child premium could ever be awarded for a disabled child because the parent and not the child would be 'in receipt of' attendance allowance. To make 'in receipt of' apply to the parent for the purposes of paragraph 13 would contradict the meaning of the same phrase in paragraph 14.
42. Mrs Commissioner Heggs rejected the arguments advanced on behalf of the appellant and accepted those submitted on behalf of the Adjudication Officer. In paragraph 14 she stated:

'14. Under the provisions relating to attendance allowance set out above a child cannot be in receipt of attendance allowance in the sense of receiving the payment of the award. The child's parent is entitled to the benefit in respect of the child and receives payment of it. Accordingly I take it for the purposes of paragraph 14 that "in receipt of attendance of attendance allowance" must mean that the child satisfies the conditions of entitlement. To construe those words otherwise would mean that no disabled child premium could ever be awarded because the parent and not the child would be "in receipt of attendance allowance". Paragraph 13 contains the additional conditions for the payment of severe disability premium and uses the same words "in receipt of attendance allowance" but in relation to the claimant. The conditions for premiums laid down in the various paragraphs of Schedule 2 must be construed as a whole. The claimant cannot "blow hot and cold" by seeking in effect to rely on one meaning of the words "in receipt of attendance allowance" in paragraph 14 and a wholly different and contradictory meaning in paragraph 13. Either the child is in receipt of attendance allowance and the claimant satisfies paragraph 14 or the claimant is in receipt of attendance allowance and satisfies paragraph 13. Both cannot be the case. I hold that the words "the

claimant .. is in receipt of .. attendance allowance .. in paragraph 13 are to be construed in the same sense which provides paragraph 14 with the meaning, that the **claimant** satisfies the condition of entitlement.'

43. The decision of Mrs Commissioner Heggs was upheld by the Court of Appeal of England and Wales (also reported as *R(IS) 10/94*).
44. In the instant case, I noted, above, the importance of paragraph 10 of Schedule 4 to the 2008 Regulations. In *R(IS) 10/94*, it was observed that Paragraph 14B of Part III of Schedule 2 was introduced to the 1987 GB Regulations, with effect from 9 April 1990. Paragraph 14B is in identical terms to paragraph 10 of the 2008 Regulations. In paragraph 15 of *R(IS) 10/94*, Mrs Commissioner Heggs noted that:

'15. Finally in my view the purpose of paragraph 14B of Schedule 2 is to make it clear that a person is only in receipt of a benefit when he is, the same person "in respect" of whom that benefit is paid.'

45. Paragraph 14B of Schedule 2 to the 1987 GB Regulations has the effect of removing the absurdity referred to in the arguments put on behalf of the Adjudication Officer to Mrs Commissioner Heggs that the counter interpretation advanced on behalf of the appellant could lead to an appointee appointed by the Secretary of State on behalf of a person incapable of administering his affairs being entitled to receive a premium in his own right. It did, however, reinforce, the proper interpretation of the phrase 'in receipt of' in paragraph 13 of Schedule 2 to the 1987 GB Regulations.
46. I am satisfied, therefore, that the phrase 'in receipt of' in paragraph 6(2)(a)(i) of Schedule 4 to the 2008 Regulations equates to 'satisfies the conditions of entitlement to'. Accordingly, I am equally assured that the material fact which the appellant was obliged to disclose was that he no longer satisfied the conditions of entitlement to DLA from 4 November 2013. I make a finding to that effect. Further, I am satisfied that the appeal tribunal, in confirming the erroneous decision of the Department on this issue, erred in law.

#### **A return to *C6/08-09 (IS)***

47. In paragraphs 24 to 30 of my decision in *C6/08-09 (IS)*, I reviewed the jurisprudence which was relevant to regulation 32 of the 1987 Regulations. In paragraph 31, I stated:

'31. In my view, these appellate authorities support, in unequivocal terms, the following principles, namely that:

- (i) the duty to disclose is best fulfilled by a personal disclosure to the officer or office administering the benefit at issue;
- (ii) there is no failure to disclose where the material fact in question is already known to the individual or office to whom, under the principle laid down in *Hinchy*, notification would otherwise have to be made;
- (iii) there is nothing wrong in imposing a requirement on a claimant to provide information which is already known in one part of the system but not in that part of the system which needs to know it;
- (iv) a claimant is not entitled to assume that because one office of the Department has been provided with relevant information, the duty to disclose that information to another office within the system has been fulfilled;
- (v) there is no requirement for any separate notification to individual staff within a single office, or requirement for the idea of a single office of the Department having to be notionally sub-divided and treated artificially and contrary to the fact as more than one office, by virtue of the particular tasks the individuals within it happen from time to time to be engaged on.'

48. In the instant case, both Mr Clements and Mr O'Farrell have sought clarification on what I set out in sub-paragraph (ii) of paragraph 31. The context for that re-examination is a potential gloss on the principle through the application of the decision in *Foster v Federal Commissioner of Taxation* ((1952) CLR 606 ('*Foster*')). Mr Clements has made reference to different guidance in the Decision Maker's Guides in Great Britain and Northern Ireland, noting that in paragraph 09238 of the DMG in Great Britain, the reference to disclose is defined as:

'... "to reveal" a material fact which, as far as the claimant (i.e. the discloser) knows is unknown to the person who is owed the disclosure.'

49. Mr Clements noted that the parallel guidance in paragraph 9238 of the DMG in Northern Ireland reflects what was said in sub-paragraph (ii) of paragraph 31 of *C6/08-09 (IS)*, and there is no reference to the knowledge of the claimant that the material fact is unknown to the person who is 'owed the disclosure'.



50. As was noted above, Mr O'Farrell resiled from his previous reliance on sub-paragraph (ii) of paragraph 31 of *C6/08-09(IS)*. The basis for his resilement was the principle in *Foster* and an acceptance that '... in the present case, (the appellant) simply would not have known that the DLA award renewal date was already known to the Department since 29/11/2011'.
51. In *BMcE-v-Department for Communities (PC)* ([2017] NICom 34, *C2/17-18(PC)* ('*BMcE*')), Commissioner Stockman said the following, at paragraph 24:
- '... In this context the tribunal stated that "it is clear the Department already knew of the advent of the Appellant's non-State pension, and there can be no question of subsequent failure to disclose to someone something that – plainly – is already known". The latter statement by the tribunal is a reference to the decision of the Tribunal of Great Britain Social Security Commissioners in *R(SB)15/87*, where it was 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*).'
52. Commissioner Stockman added that in *BR v Department for Social Development* ([2012] NI Com 315, ('*BR*')), he had determined that on the facts of that case, '... the appellant could not reasonably claim that, to his knowledge, the Department was aware of these facts.' It is arguable, however, that the Commissioner was accepting the validity of the principle in *Foster* and the inherent requirement that, for the principle to apply, the person obliged to make the fact disclosure, knows that the person to whom the disclosure is to be made, is already aware of it.
53. I am of the view that there is no reason to alter what I said in sub-paragraph (ii) of paragraph 31 of *C6/08-09(IS)* on the basis of the acceptance of the principle in *Foster* by the Tribunal of Commissioners in *R(SB) 15/87*. It is arguable that the discussion of the *Foster* was in the context of the conclusion by the Tribunal of Commissioners in paragraph 20 of their decision that:
- '... we reject the submissions that disclosure to any member of the staff of the Department at large constitutes disclosure to the Secretary of State ... and that further disclosure thereafter is impossible.'
54. That context is in keeping with what was said in sub-paragraph (ii) of paragraph 31 of *C6/08-09(IS)*. Further, the wider principles in *R(SB)15/87* are concerned with how the duty to disclose is best fulfilled.

Finally, the principle was derived from what was said by Commissioner Howell in paragraph 21 of his decision in *CIS/1887/2002* and he did not seek to add the further annotation asserted to arise from *Foster*.

**Was the appellant under a duty to disclose what is now accepted to be the material fact?**

55. As was noted above, Mr O'Farrell has accepted that (i) the appellant's duty to disclose to the Department that his entitlement to DLA had ceased stems from an instruction set out in a 'Form ESA40 (NI)' issued to the appellant, (ii) the appeal tribunal had considered the source of the duty to disclose the change in the DLA entitlement and (iii) between 4 November 2013 and 4 April 2014 the appellant did not inform ESA or any other office of the material fact.
56. I have to consider, however, whether the office which was administering the appellant's entitlement to ESA, including the SDP, was aware of the relevant fact, thereby triggering the principle in sub-paragraph (ii) of paragraph 31 of *C6/08-09 (IS)*.
57. In paragraph 23 of his decision in *BMcE*, Commissioner Stockman said the following:

'23. *Hinchy*, while of course a binding precedent, is an unsatisfactory decision in many ways, leading to the situation where the Department - which has significant investigatory powers to access private information held by third parties - is deemed not to know the information it holds on its own computer systems. The House of Lords in *Hinchy*, with the honourable exception of Lord Scott, turned a blind eye to the consequences of maladministration and deficient operational practices on the part of the Department. As a result, there has been little evident change in the Department's approach to avoiding overpayments of benefit in the intervening years. This has understandably led tribunals to take a sympathetic view of honest claimants who strive to make full disclosure of their circumstances against a background of complex benefit rules which they do not understand.'

58. I am of the view that there is force to these comments. In *Hinchy*, Baroness Hale had stated, at paragraph 49:

'... Second, there is nothing intrinsically wrong in relying on the claimant to give to the Secretary of State the information he requires to make his decisions, provided that this is information which the claimant has and that the Secretary of State has made his requirements plain. Nor is it intrinsically wrong to include in those

requirements information which is already known in one part of the system but not in that part that needs to know it to make the decision in question ... In an ideal world, administrative systems might be so efficient that any official in one office might at a few clicks of a mouse be able to retrieve all the information about a particular claimant held everywhere else in the system. But many would find such efficiency sinister. It is certainly not yet with us.'

59. *Hinchy* was decided by what was then the House of Lords in 2005. 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.

60. As was observed above, Mr Clements has stated that:

'Staff converting an IS award to an ESA award checked a system called the Customer Information System (CIS), which displayed a record of all benefits the claimant was in receipt of. The CIS system, if updated correctly, would have displayed the period of (the appellant's) DLA award, and so the staff member who checked the system should have seen the end date of the DLA award ... I cannot confirm whether procedure was correctly followed in this case (the contradictory evidence I encountered suggests that it may not have been followed in every case), but I accept it is arguable that on the balance of probabilities ESA knew the fixed period of (the appellant's) DLA award.'

61. I accept the concession made by Mr Clements and I also accept, on the balance of probabilities, that the ESA section did know the fixed period of the appellant's award of DLA. I make a finding of fact to that effect.

62. I would add that I also agree with Mr O'Farrell's submission that the reasoning of the appeal tribunal, manifest in its conclusion that '... I can find no evidence to substantiate the view that the material fact in question was known to the relevant section of the Department i.e. Employment and Support Allowance', was irrational in that there was a plethora of evidence before the appeal tribunal, some of which was in conflict, which addressed that very issue. In a later paragraph of the appeal tribunal's statement of reasons, the tribunal is somewhat dismissive of the

relevance of the submissions which Mr O'Farrell had made on what was a central issue for the tribunal to address.

63. Elsewhere, Mr Clements has submitted that:

'... if it is found by the Commissioner that the ESA office did know the material fact in the instant case, then the overpayment may not be recoverable from (the appellant). I argue this for two reasons: (1) depending on the interpretation of "disclose" in the context of section 69(1) of the Social Security Administration (Northern Ireland) Act 1992, (the appellant) may not have failed to disclose the material fact, and (2) even if he has failed to disclose the material fact, it cannot be shown that the overpayment was in consequence of his failure to disclose if the benefit paying office already had knowledge of the material fact.'

64. The interpretation of 'disclose' in the context of section 69(1) of the 1992 Act, which Mr Clements asserts would permit a conclusion that the appellant had not failed to disclose the material fact, is the one which I have confirmed above. For that reason, I conclude that the appellant has not failed to disclose the relevant fact that he no longer satisfied the conditions of entitlement to DLA from 4 November 2013. Once again, I make a finding to that effect.

#### **Was there a continuing duty to disclose?**

65. In *WW v HMRC (CHB)* ([2011] UKUT 11 (AAC)) ('*WW*'), Upper Tribunal Judge Ward said the following in paragraphs 29 and 30 of his decision concerning the basic principles relating to the continuing duty to disclose:

'29. However, in my judgment the claimant came under a continuing obligation to disclose. The position is summarised in Social Security Legislation 2010/11, vol.III, page 81, in a passage which was approved in CIS/14025/1996. (In the present case, references to the Department must be read as though they were to the Board (of HMRC), because of the particular allocation of responsibility for decision-taking in relation to child benefit.)

"(2) A continuing obligation to disclose will exist where a claimant (or someone acting on the claimant's behalf) has disclosed to an officer of the Department either not in local office or not in the section of that office administering the benefits. Such disclosure will initially be good disclosure provided that the claimant acted reasonably in thinking

that the information would be brought to the attention of the relevant officer. But if subsequent events suggest that the information has not reached that officer, then it might well be considered reasonable to expect a claimant to disclose again in a way more certain to ensure that the information is known to the relevant benefit section. How long it will be before a subsequent disclosure is required will vary depending on the particular facts of each case.”

66. In *TM v Secretary of State for Work and Pensions (ESA)* ([2015] UKUT 109 (AAC)), the appeal was against a decision of the Secretary of State that income-related employment and support allowance amounting to £7,311.40 had been overpaid to the appellant from 8 October 2011 to 19 October 2012. The appellant was formerly in receipt of income support and that award was converted into an award of income-related employment and support allowance with effect from 8 October 2011. The new award, however, was made in ignorance of the fact that the claimant had capital exceeding £16,000, which had not been declared while he was in receipt of income support.

67. In paragraph 13 of his decision, Upper Tribunal Judge Rowland, said the following:

‘13. It is the third ground of appeal that is supported by the Secretary of State. It had been asserted in a supplementary submission in the recoverability appeal that the decision of 20 July 2012 to re-instate the award, but at a lower rate, was based on a miscalculation of the claimant’s capital but it is unclear from the documents before me whether the Secretary of State was then fully aware of the claimant’s capital and simply made a mistake for which he is entirely to blame or whether the decision of 5 October 2012 was made in the light of further evidence as to the claimant’s capital. I agree with Ms Gigg that it is difficult to see how any overpayment arising under the award made on 20 July 2012 can be said to have been in consequence of the claimant’s failure to disclose his capital if the Secretary of State already knew about the capital then and the decision was based on a mistake for which only he was responsible, unless, perhaps, the claimant was aware that the award had been wrongly made.’

68. I am also mindful of the following comments of Baroness Hale in paragraph 57 of the decision in *Hinchy*:

‘... Third, the particular fact in issue here is within the knowledge and expertise of the Secretary of State rather than the claimant. A reasonable claimant might well think that if the local office knew enough about her disability living allowance to add on the premium at the outset it would know enough to take it off when the award expired. A reasonable claimant might well not understand the inter-action between the two benefits: in many cases where another benefit goes down, the means-tested benefit goes up. A reasonable claimant might not realise that if benefit A is lost, she will also lose some of her means-tested benefit B. In this case, removal from one category of disability living allowance led to a double loss of sums which mean a great deal to people living at the margins of subsistence.’

69. Taking advantage of what was said by Upper Tribunal Judge Wright in paragraph 49 of his decision in *LH v SSWP (RP)* ([2017] UKUT 0249 (AAC)), while the appellant might have thought to ‘notify’ the Department of his ongoing receipt of SDP, there was no legal basis for an ongoing requirement to ‘disclose’ it to the Department when the information was plainly known to it.
70. Mr Clements has not pursued the potential recovery of the overpaid benefit on the alternative basis of a continuing duty to disclose. I am of the view that he is correct not to do so. The combined failures of the Department in this case should not be laid at the door of the appellant in terms of the imposition of a requirement to repay any of the overpaid SDP.

### **Disposal**

71. The decision of the appeal tribunal dated 30 March 2017 is in error of law. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.
72. I am able to exercise the power conferred on me by Article 15(8)(a)(ii) of the Social Security (Northern Ireland) Order 1998 to give the decision which I consider the appeal tribunal should have given as I can do so having made further findings of fact. The fresh findings in fact are outlined below.
73. My substituted decision is as follows:

An overpayment of income related Employment and Support Allowance (ESA) in the sum of £1,309.00, in respect of the period 5 November 2013

to 7 April 2014, has been made which is not recoverable from the appellant.

(signed): K Mullan

Chief Commissioner

18 March 2020