

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

EMPLOYMENT AND SUPPORT ALLOWANCE

Application by the claimant for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 8 September 2016

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal with reference LD/1243/16/51/P.
2. For the reasons I give below, I grant leave to appeal. I allow the appeal and set aside the decision of the appeal tribunal. I make the decision that the tribunal should have made. I find that ESA in the sum of £6000.09, while overpaid, is not recoverable from the appellant.

REASONS

Background

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.
5. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone on 8 September 2016. The tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 21 November 2016. The appellant applied to the LQM for leave to appeal from the decision of the appeal tribunal. Leave to appeal was refused by a determination issued on 14 December 2016. On 9 January 2017 the appellant applied for leave to appeal from a Social Security Commissioner.

Grounds

6. The appellant submits that the tribunal has erred in law by holding that he had failed to disclose a material fact. This was on the basis that the Department already knew the material fact in issue – namely that his entitlement to the middle rate care component of DLA was due to end from 7 September 2012 - and that he could not fail to disclose it in these circumstances. He further submitted that the Department's failure to act on the information it possessed broke the chain of causation necessary to establish recoverable overpayment.
7. The Department was invited to make observations on the appellant's grounds. Mr McGrath of Decision Making Services (DMS) responded on behalf of the Department. He submitted that the tribunal had not erred in law as alleged and indicated that the Department did not support the application.

The tribunal's decision

8. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary material before it consisting of the Department's submission and a representative's submission. The appellant did not attend the hearing of his appeal but was represented by Mr O'Farrell of Citizens Advice.

9. The tribunal found that during the period when the appellant was entitled to ESA he had been in receipt of DLA. In consequence, he was entitled to the severe disability premium in his ESA. The tribunal found that the appellant was issued an ESA40 (NI) leaflet. This leaflet instructed him to inform the Department if there were changes to any of a number of listed circumstances, including changes to benefits he might be receiving. The tribunal found that the appellant was informed on 17 July 2012 by the section of the Department administering DLA that his entitlement would cease from 7 September 2012. The tribunal found that the section of the Department administering ESA did not become aware of this until 20 August 2014, when a report on a Departmental computer system notified ESA of the change in the appellant's DLA award. Regulation 32 of the Claims and Payments Regulations placed on obligation on the appellant to notify changes in circumstances. There was no evidence to suggest that the appellant had informed the section of the Department administering ESA that his DLA had ended. In consequence, the appellant had been overpaid ESA amounting to £6000.90 and this was recoverable from him.
10. The appellant had argued at the tribunal hearing that the section of the Department administering ESA knew that the appellant was receiving DLA and ought to have been aware of the DLA expiry date. However, the tribunal found, following the decision of the House of Lords in *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16, that the appellant was not entitled to rely on the Department's systems or practices as satisfying the primary obligation to notify the Department of changes in circumstances. It disallowed the appeal.

Relevant legislation

11. The legislation governing recoverability of overpaid benefit appears principally at section 69(1) of the Social Security Administration (NI) Act 1992, which provides:

69.—(1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure—

(b) any sum recoverable by or on behalf of the Department in connection with any such payment has not been recovered,

(a) a payment has been made in respect of a benefit to which this section applies; or

the Department shall be entitled to recover the amount of any payment which the Department would not have made or any sum which the

Department would have received but for the misrepresentation or failure to disclose.

12. The requirement to disclose is connected to regulation 32 of the Social Security (Claims and Payments) Regulations (NI) 1987 (the Claims and Payments Regulations). In so far as relevant, this provides:

32.—(1) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner as the Department may determine and within the period applicable under regulation 17(4) of the Decisions and Appeals Regulations such information or evidence as it may require for determining whether a decision on the award of benefit should be revised under Article 10 of the 1998 Order or superseded under Article 11 of that Order.

(1A) Every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner and at such times as the Department may determine such information or evidence as it may require in connection with payment of the benefit claimed or awarded.

(1B) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall notify the Department of any change of circumstances which he might reasonably be expected to know might affect—

(a) the continuance of entitlement to benefit;
or

(b) the payment of the benefit,

as soon as reasonably practicable after the change occurs by giving notice of the change to the appropriate office—

(i) in writing or by telephone (unless the Department determines in any particular case that notice must be in writing or may be given otherwise than in writing or by telephone); or

(ii) in writing if in any class of case it requires written notice (unless it determines in any particular case to accept notice given otherwise than in writing).

Hearing and submissions

13. I held an oral hearing of the application. The appellant was represented by Mr O'Farrell of Citizens Advice. The Department was represented by Mr McGrath of DMS. I am grateful to the representatives for their assistance.
14. At hearing, Mr O'Farrell relied upon paragraph 31(ii) of C6/08-09(IS), where it was stated by Chief Commissioner Mullan 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 been necessary".
15. Mr O'Farrell's submission was essentially that, when awarding SDP, the ESA decision maker was aware of the appellant's award of DLA, and of the level and duration of the award. He submitted that a "b/f" (brought forward) reminder would have been placed on the Department's computer system to prevent payment of the SDP beyond the date of the DLA expiry or that the SDP should have been awarded for a closed period, rather than an indefinite period. He argued that the accepted failure to disclose by the appellant was not the sole cause of the overpayment and that the chain of causation was broken (relying on *GJ v Secretary of State for Work and Pensions* [2010] UKUT 107).
16. Mr McGrath for the Department submitted simply that the appellant had an obligation under regulation 32 of the Claims and Payments Regulations to disclose, but had failed to disclose, that the rate of DLA he was receiving had changed. Because benefit had been overpaid in consequence, the Department had a right to recover the overpayment. Mr McGrath relied on the accepted fact that the appellant had not informed the Department when the Department changed the rate of his DLA.
17. Mr McGrath acknowledged Mr O'Farrell's argument that the Department's ESA decision maker contributed to the overpayment when awarding SDP submitting that it appeared that it was not noted that DLA was due to expire on 7 September 2012. However, he relied on *Duggan v Chief Adjudication Officer* (reported as *R(SB)13/89*), submitting that this action was not the sole cause of the overpayment.
18. At hearing, Mr O'Farrell sought to explain the relevant Departmental systems in more detail. He referred to correspondence from the ESA customer services team dated 8 August 2016, issued in response to his enquiries. This explained that the Customer Information System (CIS) was a database containing a record for all individuals issued with a national insurance number, giving an overview of a claimant's "business" with the Department of Work and Pensions (in Great Britain) or the Department over the last few years. When a telephone claim was made, the telephone operator would normally "pull" information from the CIS

system and check that information with the claimant. It was explained in the correspondence that if a DLA award was due to be revised within 6 months, a “b/f” – that is, a “brought forward” prompt to take some specific action - would be set on the system, appearing as an electronic notification to review the relevant claim on the “legacy system” (the system for the relevant benefit). It was submitted that, if there was a change of circumstances, the ESA maintenance processing team would receive a “daily broadcast” for the majority of cases. DLA would also issue clerical notifications to ESA via a scanned document in a separate IT system. Mr O’Farrell accepted that he could not prove absolutely that the ESA decision maker had the relevant information about the end date of the DLA award at all times, but submitted that it was more likely than not on the balance of probabilities.

19. Mr McGrath sought to explain the computer system a little more fully. He referred to the ESA “work available reports” (WAR) which were daily system notifications to the branch indicating that particular cases required action. These would be printed out every morning and would be allocated to staff by a supervisor. In particular cases where no action had been taken, the JSAPS computer system would set a case control which would inhibit payment until a claim had been reassessed. Mr O’Farrell had suggested that, since ESA continued in payment, no control had been set. However, Mr McGrath pointed out that the present case was not a fresh claim. Rather, the previous IS award had been “migrated” to ESA following conversion. The consequence of this was that IS would have been migrated with the premiums already in payment. On the information known to him, Mr McGrath disputed the proposition advanced by Mr O’Farrell that the ESA decision maker would have been aware of the end date of the DLA award. Mr O’Farrell was not in a position to gainsay this version of the facts, but submitted that it was generally unsatisfactory if that is what happened, as no case controls would have been in place.
20. Following the hearing I gave further directions to the Department for the purpose of clarifying the facts of the case and, in particular, whether the factual premise on which Mr O’Farrell advanced his case was arguably correct.
21. I asked what information the staff administering the ESA award would have held or had access to, concerning the rate and duration of the appellant’s award of disability living allowance at 25 April 2012. The response from ESA was that, on uprating the benefit in April 2012, ESA staff would have had access to the rate of DLA awarded from April. However, I was informed that they would require a prompt from the system in order to be aware of a later change.
22. I asked what case controls or other administrative safeguards would the staff administering the ESA award have had in place in order to alert them to the prospective expiry of the DLA award or of the details of its

renewal as and from 7 September 2012. The response from ESA was that:

“‘User set’ case control’s [sic] set to check a DLA end date are not an interface from another benefit system and clear upon maturity. It does not provoke manual intervention to the system. If a claim has been deleted and rebuilt, or is being worked on at the time of maturity the case control clears and so cannot be relied upon...”

23. I was further told that:

“When a change to DLA is registered on DLA’s system it interfaces with CIS, which in turn interfaces with ESA’s system. ‘System set’ case controls do require manual intervention. However downloads from CIS to JSAPS will be rejected by the system if the case is clerical awaiting rebuild or an event has been registered whilst on-going maintenance is being done on a claim. On reviewing the case a download was received in July 2012 relating to ‘other benefits’. If DLA downloads early with periods but does not include the award rate the process is to remove the download from the system to allow payments to continue. CIS should then re-download in September when new award is confirmed. This second download did not happen. There was a further download in March 2013 and more than likely relates to the new award uprating. The DLA award should have been checked at this point for any error in the system”.

24. Mr O’Farrell addressed further enquiries to eight matters including:

(i) what information the staff administering the ESA claim had on 25 April 2012 concerning the rate and duration of the DLA award;

(ii) whether the conversion from IS to ESA was conducted without checking entitlement;

(iii) what case controls would have been set in place to alert staff administering the ESA award to the prospective expiry of the DLA award;

(iv) why there was no record of an electronic notification of the DLA award being given to the ESA staff in July 2012;

(v) whether there was a difference between case control settings between Great Britain and Northern Ireland, since he understood that case controls should have

inhibited payment following e-mail correspondence referring to JSAPS setting case control S272 in particular circumstances;

(vi) why a “b/f” (brought forward) was not set on the system;

(vii) what appreciation did the decision maker in ESA have to the link between entitlement to severe disability premium and DLA;

(viii) whether the appellant’s file was accessed at any time between 25 April 2012 and 20 August 2014 and for what purpose.

25. In response to my direction and to Mr O’Farrell’s further enquiries, more material was advanced by Mr McGrath.
26. Mr McGrath’s informant indicated that the Department was unable to state what information would have been before the team migrating IS awards to ESA as it is no longer available, and that “on some cases” a DLA end date would not have been held. What shared characteristic those “some cases” might have had is not articulated.
27. Mr McGrath’s informant indicated that it was “difficult to say” what case controls or other safeguards the staff administering ESA might have had in place in order to alert them to the prospective expiry of the DLA award. However, it was indicated that, if a DLA end date was held, a case control would normally be set for ESA staff to follow up on, and that the particular case should have been checked upon uprating in April 2013. It was stated that the case controls may not have been input and that it also seemed that uprating each year was not done correctly.
28. In response to Mr McGrath’s own follow-on enquiries, his informant indicated his or her assumption that the IS system held no end date for the appellant’s DLA award, as they should have entered an end date, but that it was uncertain what information was available back in 2012.
29. In response to Mr McGrath’s query as to how likely it was that an end date was not held, the informant replied simply that some DLA awards have end dates and at other times they are open awards. However, this was not a case here of an “open” or indefinite award. It was accepted that the processor should have set up a case control or “put an end date in for SDP”. It was further accepted that upon annual uprating, the appellant’s DLA was uprated without checking the award.
30. One thing that emerged was that the Department could not verify that a case control was set in the case, as this “drops off” after its maturity date, whether or not action has been taken. It was also established that the

JSAPS computer system was accessed on 3 May 2012, 20 July 2012, 2 March 2013, and 4 February 2014. On the first two occasions no action was taken and no information was held to indicate the reason for access. On the latter two occasions, the rate of payment was altered to reflect annual uprating and the appellant being placed in the support group respectively. It appeared that, whereas the award rate should be checked on CIS or the DLA systems, due to user error the DLA rate was amended without making appropriate checks.

31. After the hearing, I became aware that the same issue arose in a case before the Chief Social Security Commissioner on file C21/17-18 (ESA), in which the appellant was also represented by Mr O'Farrell. I stayed the proceedings pending the decision in that case, which was recently promulgated as *PMcL v Department for Communities* [2020] NI Com 20. I acknowledge that, in consequence of this and in consequence of a sickness absence of my own, this decision has taken considerably longer than normal to determine and I apologise for the delay. The parties were duly invited to make submissions in the light of *PMcL v DfC*. Mr O'Farrell and Mr Clements, now for the Department, each made further submissions.
32. Mr O'Farrell submitted that, on migrating the award of IS to an award of ESA, on the balance of probabilities the Department would have checked the appellant's DLA award. He submitted that it would not otherwise be possible to verify that SDP was payable. On this basis, he submitted that those administering ESA were aware that there was a prospective change of circumstances pending with the termination date for the appellant's DLA award.
33. Mr O'Farrell submitted that in *PMcL v DfC* Chief Commissioner Mullan had found that the material fact in issue was whether the applicant satisfied the conditions of entitlement to DLA from the date of termination of the fixed term award in that case, as opposed to whether he was in receipt of DLA. The Department knew the date from which the appellant would no longer satisfy the conditions of entitlement to DLA, and therefore the material fact in issue.
34. However, Mr O'Farrell further elaborated on the issue of the tribunal's findings in relation to the instructions given by the Department to the appellant about his duties to disclose changes in circumstances. It is well established that in order to rely on Regulation 32 of the Claims and Payments Regulations, the Department needs to establish to a tribunal that it has in fact provided the appellant with the instructions that he is supposed to follow. Mr O'Farrell submitted that the tribunal had no basis in evidence for making the finding that an ESA40(NI) had been issued to the appellant. He submitted that it made irrational findings to that effect.
35. If it could not demonstrate that the appellant had been given the relevant instructions, Mr O'Farrell submitted, the Department could not rely on the

duty to disclose and any resulting failure to disclose. Mr O'Farrell addressed the various screen prints in the documents before the tribunal and submitted that these did not establish on the balance of probabilities that an ESA40(NI) was issued.

36. Mr Clements for his part accepted that it may be the case that, when converting the IS award to an ESA award, the Department "knew" the material fact that the appellant's DLA was due to expire on a scheduled date. He also accepted that it was possible that a WAR was received by ESA when the decision was made by DLA not to renew the appellant's award. However, whereas it might have been open to the tribunal to make such a finding on the balance of probabilities, its conclusion that the Department did not know the material fact was equally likely and it was not an irrational conclusion on the evidence.
37. He referred to the factual situation in *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16. There it was acknowledged that there was a high probability that in 1993 a card detailing the claimant's five-year award of DLA had been sent to the relevant IS office, but that when October 1998 came around it had been forgotten or overlooked. It was found that despite this inefficiency, the claimant's IS order book instructions created a duty to disclose. He submitted that the ESA40(NI) would give rise to a similar obligation in the present case.
38. Mr Clements also sought to distinguish the knowledge that an award of DLA was scheduled to terminate on a certain date from the knowledge that entitlement had in fact ceased. He made further technical submissions relating to the effective date of supersession in the case. However, I will not address these in the light of my more general conclusions.
39. On the issue of the ESA40(NI) Mr Clements submitted as follows: [my italics]

"The issue of the ESA40(NI)

The Commissioner issued a Direction to the Department on 25 October 2018. In this Direction he asked:

What is the evidence relied upon by the Department to establish that an ESA40 information leaflet was issued to the appellant on 25 April 2012 or at any time subsequently?

Mr McGrath responded to this Direction on 14 November 2018 as follows:

"To address the first part of the Direction, there is a computer printout at tab 6 of the

Department's initial appeal response dated 19/01/16. This screen print is of the "Enquiry letters issued" screen of Mr King's Employment and Support Allowance (ESA) computer records. There is an entry on this print-out dated 25/04/12, the date that Mr King's Incapacity Benefit (IB) award was converted/ migrated to ESA, which states that an IB (IS) reassessment decision was made on the award and notified to the claimant.

What this screen print does not show unequivocally, to the untrained eye anyway, is evidence of whether an information leaflet such as ESA40 or some such similar form, as included at Appendices 2 and 2A of the initial observations furnished by Decision Making Services on 06/03/17, was issued along with this communication or at any time subsequently.

Further to this, the Department's initial appeal response does state at point 3 of the "Facts before the Decision Maker" and at "The Department's Response to the Grounds of Appeal" that an ESA40 (NI) was issued to the claimant on 25/04/12 as evidenced by the aforementioned screen prints at Tabs 3 and 6.

I can only assume from this that it is implicit, to trained ESA staff anyway, from the "M1050 IB (IS) Reassessment decision" entry dated 25/04/12, under the heading "letter type", that the ESA40 information leaflet is issued along with or as part of the M1050 notification when IB to ESA migration takes place.

As far as I can see from the paperwork however there is no further mention that ESA40 information leaflets were issued to the claimant subsequent to the one on 25/04/12. The screen print at tab 6 does refer to other communications, namely the forms/ letters M4000 and M3000 that were issued to the claimant during the course of his award.

Perhaps it is implicit in the entries advising of the issue of these forms that information leaflets are issued at the same time, as the case seems to be when the M1050 notifications are issued. We are therefore only able to assume on the balance of probability that such information leaflets were issued to the claimant during the course of his award, just as they are in every other ESA award.”

I briefly worked in ESA and can confirm that where the main computer system used by ESA – a version of the Jobseeker’s Allowance Payment System (JSAPS) – states that an “IB (IS) Reassessment Decision” has been notified to the claimant, it is generally assumed by ESA staff that an ESA40 leaflet was issued to the claimant along with the notification of the decision.

JSAPS automatically generates a notification letter when a decision is made to convert an award of Incapacity Benefit, Income Support or Severe Disablement Allowance to an award of ESA. My understanding is that ESA staff are instructed to issue the ESA40 with this notification letter as a matter of course. JSAPS only records that a notification of the decision has been issued and does not specifically record the issue of the ESA40. ESA staff can make a manual note of the issue of the ESA40 on JSAPS but rarely do so. I presume this is because it is understood by ESA staff that standard practice is for the ESA40 to be issued with the decision notification letter in conversion cases, and so manual notes only tend to be made if there is a departure from the norm i.e. if the ESA40 isn’t issued with the notification letter for some reason.

The relevant material before the tribunal was the screen print at Tab 3 (the print at Tab 6 is identical but was primarily included to show that the supersession decision was notified to the applicant) showing that the decision to convert the applicant’s award of IB to an award of ESA was notified to the applicant on 25 April 2012. As Mr McGrath has pointed out, the screen print does not directly show that an ESA40 was issued. However, as it is standard practice for an ESA40 to be issued with the notification of the awarding decision in IB conversion cases, I submit that it was reasonable for the tribunal to find that an ESA40 was issued to the applicant in the

instant case. The tribunal did not expressly investigate the matter but it may have had prior experience hearing IB conversion appeals and if so it is likely that it was aware that it is standard practice for an ESA40 to be issued with the reassessment decision notification”.

Assessment

40. I accept that the appellant has established an arguable case and I grant leave to appeal.
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. The second is whether the Department, when migrating the appellant’s claim from IS to ESA had specifically notified him of his duty to provide information as required by regulation 32 of the Claims and Payments Regulations. The tribunal had accepted that the Department had issued an ESA40(NI) leaflet to him. However, the parties were divided as to whether there was sufficient evidence for the tribunal to make such a finding.
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.

52. Even if I am wrong about that, it appears to me that the submissions of Mr O'Farrell with regard to the evidence before the tribunal concerning the issuing of an ESA40(NI) to the appellant are also of considerable weight. It should be remembered that the Department had converted the appellant's IS award to an award of ESA without a claim. ESA was a new benefit and the appellant could not be assumed to be aware of its relevant conditions of entitlement.
53. It is settled law that the question of failure to disclose, for the purpose of section 69 of the 1992 Act, is linked to the obligations placed on a claimant by regulation 32 of the Claims and Payments Regulations. These include an obligation to furnish information or evidence which the Department might require for determining whether a decision should be revised or superseded (arising from regulation 32(1)).
54. The duty to disclose under regulation 32(1) relied upon in the present case derives from the instructions given to a claimant by the Department. In this case the Department relied on the premise that the appellant had been given an ESA40(NI) leaflet, and pointed to the relevant instructions on a specimen leaflet. However, in order to make a case premised on the appellant's receipt of the ESA40(NI), the Department needed to demonstrate that it had furnished the appellant with one.
55. The height of Mr McGrath's submission was that it might have been implicit to the trained eye of ESA staff that an ESA40(NI) had been issued along with an M1050 decision notice. However, there was no express evidence to this effect. He relied on the assumption that the Department's normal administrative system (although there was no specific evidence before the tribunal to clarify what this system was) functioned properly.
56. Mr Clements has indicated, based on personal experience of working in ESA, that where the system indicates that a decision has been issued, it is generally assumed by ESA staff that an ESA40(NI) has been issued with it. Similarly, he submits that it was reasonable for the tribunal to assume that it had been issued.
57. I do not accept that it was open to the tribunal to make such an assumption. There was no evidence before it of the Departmental systems relevant to issuing an ESA40(NI). A bare assertion was made in the Departmental submission to the tribunal with a reference to Tab 3 of the papers. Tab 3 included a specimen copy of the ESA40(NI) and a screen print dated 19 January 2016 showing various letters and decisions that had been issued to the appellant that made no reference to an ESA40(NI) being issued. Whereas a previous differently constituted tribunal adjourned the appeal with a request for a Departmental presenting officer to attend, no presenting officer attended the hearing and therefore there was no explanation of the evidence of when and how an ESA40(NI) was issued.

58. I consider that there is a huge difference between a tribunal accepting a bare assertion by the Department that a particular event occurred, and a tribunal determining that fact on the balance of probabilities from the evidence before it. As there was no evidence whatsoever before the tribunal to support the Department's assertion, I cannot accept that it was entitled to make the finding that an ESA40(NI) was issued.
59. Submissions have been made to me by Mr McGrath and Mr Clement which tend to clarify procedures around issuing the ESA40(NI). While Mr Clements accepts that the tribunal did not expressly investigate the matter, he submits that it may have had prior experience hearing IB conversion appeals and if so it is likely that it was aware that it is standard practice for an ESA40 to be issued with the reassessment decision notification. If that was the case, however, I would expect the tribunal to have made reference to this prior experience in its reasons.
60. It appears to me that the tribunal has based its finding that an ESA40(NI) had been issued to the appellant on no evidence. If no ESA40(NI) was issued to the appellant, the Department cannot rely on any failure to disclose by him under regulation 32(1) of the Claims and Payments Regulations, as he cannot know what matters he is expected to disclose to the Department. Therefore, I consider that the tribunal has erred in law on this ground also.
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.

(signed): O Stockman

Commissioner

22 September 2020