IN THE UPPER TRIBUNAL **Case No.** CPIP/2013/2017
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway; Judge of the Upper Tribunal

Decision: Since the decision of the First-tier Tribunal (which it made at Fox Court in London on 23 January 2017 under reference SC242/16/10054) involved the making of an error of law it is set aside. The Upper Tribunal remakes the decision in the following terms: The claimant is entitled to the standard rate of the daily living component and the standard rate of the mobility component of personal independence payment from 2 March 2015 to 20 June 2021.

REASONS FOR DECISION

1. This decision of the Upper Tribunal is brief because there is now little (if indeed there is any) meaningful dispute between the parties. It concerns the claimant's appeal to the Upper Tribunal, with my permission, from a decision of the First-tier Tribunal ("the tribunal") of 23 January 2017.

2. The claimant suffers from various health problems and first made a claim for a personal independence payment (PIP) on 24 June 2013. Initially that application was refused but on 15 May 2014, after a mandatory reconsideration, it was decided that she was entitled to the standard rate of the daily living component only from 24 June 2013 to 16 September 2016.

3. On 21 July 2015 the Secretary of State decided (or at least this was the date it was communicated to the claimant) that there was entitlement to the standard rate of the daily living component and the standard rate of the mobility component of PIP from 2 March 2015 to 20 June 2021. Since that decision interfered with the terms of the original award during its intended currency it was a supersession decision. It is not clear to me whether the supersession was carried out on the initiative of the Secretary of State or whether it stemmed from a request made by the claimant. But for the purposes of this appeal it makes no difference.

4. The claimant, although better off under the terms of the 21 July 2015 decision, sought to challenge it by way of mandatory reconsideration but, on 3 September 2015, she was informed that the decision was to be maintained. She did not subsequently mount any further challenge. However, on 1 February 2016 she successfully appealed against a decision refusing her employment and support allowance ("ESA"). It is notable that the tribunal which allowed her appeal considered her to be entitled to 15 points under activity 1 within Schedule 2 to the Employment and Support Allowance Regulations 2008 which is concerned with mobilising. Fortified by that success she put it to the Secretary of State that she should now be entitled to the enhanced rate of the mobility component of PIP rather than the standard rate. Pursuant to that she attended (not for the first time) a "face-to-face" assessment conducted by a health professional. A report of 7 June 2016 was produced. The Secretary of State then went on to decide, on 12 July 2016, that she remained entitled to the standard rate of the care component and the standard rate of the mobility component of PIP but that the period of the award would now be from 12 July 2016 to 6 June 2020. So, again, that was a supersession decision albeit that the only aspect of the previous awarding decision (the one of 21 July 2015) interfered with was the period of the award. The claimant remained dissatisfied and since an application for a mandatory reconsideration did not result in any alteration to that decision she appealed to the

tribunal, continuing to pursue the argument that she ought to have been awarded the enhanced rate of the mobility component.

3. The tribunal held an oral hearing of the appeal. It decided to uphold the Secretary of State's decision for reasons which it set out in a careful and clear statement of reasons for decision ("statement of reasons"). But it is not apparent, from what it said in that statement of reasons that it appreciated that the decision of 12 July 2016 was one to supersede the decision of 21 July 2015. It is perhaps not surprising it did not appreciate that, given that the Secretary of State's appeal submission to it did not properly set out the previous decision making history, did not offer a ground for supersession and, indeed, did not point out that the decision under appeal was a supersession decision. It is also unfortunate that the letter notifying the claimant of the terms of the decision of 12 July 2016 did not make it clear that it was a supersession decision and did not identify any grounds for supersession either. But the tribunal not having identified these issues for itself did not identify any basis for supersession either notwithstanding that it upheld what was a decision to supersede.

4. The claimant sought permission to appeal which, as indicated above, I granted. I did not consider the various points which she had herself made to be persuasive but in granting permission I said this:

> " 6. The one point which does concern me is a slightly technical one. You had a previous award of the standard rate of the daily living component and the standard rate of the mobility component of personal independence payment (PIP) from 2 March 2015 to 20 June 2021. You sought a greater award of PIP which led to the Secretary of State deciding that you remained entitled to the two standard rates but that the period was to run from 12 July 2016 to 6 June 2020. So, the new decision reduced the period of the award by one year.
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> 7. In order to alter a previous awarding decision, during the lifetime of that award, it is necessary to show grounds for superseding the earlier decision. Here, the F-tT, because it agreed with the Secretary of State, ended up changing the terms of the original award by reducing the term. It is arguable that it did not properly or at all identify any grounds for superseding the previous awarding decision. It is also arguable that it did not properly explain why it was changing the terms of the previous awarding decision albeit on a limited basis. There are some previous decisions of the Upper Tribunal which have relevance here. They are SF v SSWP (PIP) [2016] UKUT 481 (AAC); DS v SSWP (PIP) [2016] UKUT 538 (AAC) and KB v SSWP (PIP) [2016] UKUT 0537 (AAC). I have attached copies of those decision to your copy of this grant of permission so that you may consider them if you wish."

5. It appears that, shortly after I had granted permission, the claimant obtained advice and representation from an organisation called 'South West London Law Centres'.

6. In granting permission I directed submissions from the parties. Ms S Kiley, by now acting on behalf of the Secretary of State in connection with this appeal to the Upper Tribunal, provided a helpful submission in which she argued that the tribunal had erred through failing to identify grounds for supersession and through failing to explain why it was reaching a different outcome (albeit only in the context of the period of the award) from that which had been reached when the previous awarding decision had been made. It is implicit from what she says that she took the view that I should set aside the decision of the tribunal. But she did not express a view as to whether I should remit for a rehearing or should remake the decision myself. Ms L Williams of South West London Law Centres replied on behalf of the claimant. She said that she was in agreement with Ms Kiley's view. She invited me to remake the decision in the Upper Tribunal on the basis that the claimant should be entitled to the standard

rate of both components "and that the period run until 20/06/2021". So, the claimant is no longer seeking to assert entitlement to the enhanced rate of the mobility component in these proceedings but is simply arguing for the restoration of the terms of the previous award.

7. In these circumstances I do set aside the tribunal's decision in consequence of its (entirely understandable in the circumstances) failure to appreciate that it was dealing with a supersession decision and its consequent failure to identify any grounds for supersession and to explain why it was reaching a decision which had, albeit in only one respect, a different outcome to that reached when the previous awarding decision was made (see *SF v SSWP (PIP)* [2016] UKUT 0481 (AAC).

8. I have decided, having set aside the tribunal's decision, to remake the decision myself. That is because the Secretary of State has not invited me to do otherwise; because the claimant, through her representative, has invited me to do so; because there does not now appear to be any disagreement between the parties as to the appropriateness of an award of the two standard rates; and because I am of the view that I am able to justly do so in the particular circumstances of this case.

9. As to remaking then, the Secretary of State did not, when explaining his decision of 12 July 2016, offer any ground for supersession. No such ground was offered in the Secretary of State's submission to the tribunal for the purposes of the appeal before it. Indeed, no such ground has ever been offered. I fully appreciate that there is an obvious potentially applicable ground for supersession as contained in regulation 26(1)(a) of the Universal Credit, Personal Independence Payment, Jobseekers Allowance and Employment Support Allowance (Decision and Appeals) Regulations 2013 ("the D and A Regulations"). That is because, having obtained a report from a health professional since the previous awarding decision had been made, it can properly be said that the Secretary of State has received medical evidence from an HCP or other approved person. There is also another possible ground which is "a relevant change of circumstances" within regulation 23(1)(a) of the D and A Regulations. It would have been lawful for the tribunal to have identified a ground for itself and, indeed, that is an option available to me in remaking the decision. However, I have decided not to exercise discretion in that respect. That is because the Secretary of State could quite easily have identified an appropriate ground but has failed to do so and has not offered any explanation as to why the period of the award should be reduced. Additionally and in any event, it seems to me very likely that even if I were to, for example, identify the ground as being the one within regulation 26(1)(a), (there not being any obvious indication of a relevant change of circumstances on the evidence), and to supersede, I would in all probability arrive at the same ultimate outcome anyway.

10. I have decided then that grounds for supersession have not been identified; I have decided to decline to identify such grounds for myself and I have concluded that the terms of the decision of 21 July 2015 are to be reinstated. In truth, as I hinted at above, I do not really detect any meaningful dispute between the parties as to the appropriateness of this outcome. This has the single practical effect of meaning that the award extends to 20 June 2021 as opposed to 6 June 2020.

11. The above disposes of this appeal.

12. I would just briefly like to make some further comment. There had been a number of previous decisions in this case as I have identified above. It seems to me it would have been very helpful to the tribunal if the submission on the appeal to it had set out, in clear steps, the previous adjudication history. It would also have been helpful if it had been stated in the submission that the decision under appeal was a supersession decision and if it had been said what ground or grounds for supersession were relied upon. I appreciate that the persons who are tasked with preparing such submissions might well be under a degree of work pressure. I do not wish to criticise unnecessarily or unfairly. But that sort of information is really of a quite basic nature and the First-tier Tribunal, which itself often works under considerable pressure, is entitled to have that sort of information clearly spelt out to it. Indeed, had such been made clear it seems to me most unlikely that the tribunal would have fallen into error at all and, therefore, most unlikely that it would have been necessary for the Upper Tribunal to grant permission and decide the appeal. So, taking an overall view, a little more time spent on the submission might well have saved much more time further down the line. This submission (indeed I have to say in common with a number of others I have seen recently in PIP cases) did fall below what can be regarded as an acceptable standard. I would simply express the hope that improvements might be made in the future even if that means the provision of further resources to that end.

13. Finally, I would wish to thank each representative for their helpful, sensible and practical approach.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated **8 December 2017**