

UPPER TRIBUNAL CASE NOS: CE/1600, 1601 and 1602/2018

**DECISION OF THE UPPER TRIBUNAL  
(ADMINISTRATIVE APPEALS CHAMBER)**

As the decisions of the First-tier Tribunal (made on 14 February 2018 at Rochdale under references SC947/17/00779, 00780 and 00781) involved the making of an error in point of law, they are SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the cases are REMITTED to the tribunal for rehearing by a different judge.

**DIRECTIONS:**

The tribunal must undertake a complete reconsideration of the issues that are raised by the appeals and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration in accordance with my analysis of the law.

**REASONS FOR DECISION**

**A. How the overpayment happened**

1. The claimant has been receiving an employment and support allowance since 26 July 2013. His entitlement was calculated on the basis that he qualified for the severe disability premium. He ceased to qualify when his award of disability living allowance came to an end, but the Secretary of State continued to pay the employment and support allowance at the previous rate by mistake. When that mistake came to light, the decision-maker made three decisions:

- a decision reducing the claimant's entitlement retrospectively: *CE/1600/2018*;
- a decision that the claimant was liable for the overpayment on the ground that he had failed to disclose that he was no longer receiving a disability living allowance: *CE/1601/2018*;
- a decision imposing a civil penalty: *CE/1602/2018*.

**B. The appeal to the First-tier Tribunal**

2. On appeal, the First-tier Tribunal decided that the claimant was not liable to repay the overpayment and that no civil penalty should be imposed. The judge found that the claimant was not under a duty to report that his disability living allowance award had come to an end. These are the key paragraphs in the judge's reasons:

10. Leaflet ES40JP was provided in the appeal papers. Under the heading "Changes you must tell us about" [81], there are 12 bullet points which relate to changes in circumstances. There is no information within the leaflet which would indicate to an appellant that the cessation of his or her

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disability living allowance need to be notified to the respondent. There is, however, a generic catch all which relates to whether or not an appellant is uncertain about changes to his circumstances.

11. I find that the leaflet does not assist the respondent. The leaflet fails to refer to the sort of change in circumstances that the respondent is now relying on.

**C. The appeal to the Upper Tribunal**

3. The tribunal gave the Secretary of State permission to appeal. The claimant has not responded to the appeal, so I am giving this decision without the benefit of any argument on his behalf. I understand from the judge that this issue has arisen in a number of cases and that a decision of the Upper Tribunal would clarify the law. The value of my decision is obviously reduced by the lack of any argument on one side, but there are other cases currently before the Upper Tribunal that raise the same issue.

**D. Why the claimant was under a duty to report when his disability living allowance stopped**

4. A claimant cannot be liable for failing to report something to the Department for Work and Pensions unless there was a duty to report. The Secretary of State identified the source of the duty as the leaflet ESA40 04/13. This is not the number used by the judge in paragraph 10 of the written reasons, but it is the document that is in the papers.

5. The judge was right that nowhere in the leaflet is there any express instruction to report if an award of disability living allowance stops. The judge was also right that the leaflet advises claimants: 'If you are not sure if we need to know something, tell us anyway.'

6. More importantly, the leaflet gives the instruction to report 'Any changes to do with pension income, benefits and allowances'. It goes on: 'By "benefits" we mean things like' and then lists a number of benefits including income support and jobseeker's allowance. Finally, there is this paragraph:

'Also tell us if you or your partner start or stop getting any pension income, benefits or allowances. Tell us if the amount of money you or your partner are getting changes.'

Those passages taken together were sufficient to impose a duty on the claimant to report when his disability living allowance stopped. The final paragraph on its own would be sufficient for that purpose.

**E. Why did the Secretary of State not supersede the employment and support allowance decision when disability living allowance came to an end?**

7. The normal procedure when an award of disability living allowance comes to an end is for a work available report, a WAR, to be sent automatically to the employment and support allowance decision-maker. This allows the employment and support allowance decision to be superseded without the need for the claimant to report the change of circumstances.

8. The Secretary of State's representative has explained why that did not happen in this case. The reason is that there was no expiry date for the disability living allowance on the system, which would trigger the WAR. The representative explained: 'the most likely cause being human error or the system removing the expiry date because of some change on the system.'

9. I accept the Secretary of State's submission that a claimant's failure to report need not be the only cause of an overpayment. It is sufficient if it is one of the causes: see the decision of the Court of Appeal in *Duggan v Chief Adjudication Officer*, reported as the appendix to *R(SB) 13/89*. So even if there had been some failure by the Secretary of State, that would not alter the claimant's liability.

**F. Why I have directed a rehearing**

10. The tribunal misdirected itself that the claimant was not under a duty to report, so I have to set aside its decision. The Secretary of State's representative has suggested that a rehearing is not necessary. I do not accept that. Having found that the claimant was not under a duty to report, the judge said that it was not necessary to deal with any other issue. That included the claimant's case that he had reported the change by telephone. There was a contemporaneous written record saying the opposite, but he disputed its accuracy. That issue needs to be resolved at a hearing.

**Signed on original  
on 20 November 2018**

**Edward Jacobs  
Upper Tribunal Judge**