IN THE UPPER TRIBUNAL **Appeal No: CJSA/1122/2016**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the Secretary of State.

The decision of the First-tier Tribunal sitting at Birmingham on 2 December 2015 under reference SC045/13/06176 involved an error on a material point of law and is set aside.

The Upper Tribunal gives the decision the First-tier Tribunal ought to have given. The Upper Tribunal's decision is to dismiss the claimant's appeal to the First-tier Tribunal from the Secretary of State's decision of 8 August 2013, with the result that jobseeker's allowance is not payable to the claimant from 9 August 2013 to 22 August 2013.

This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

1. This appeal concerns a sanction decision made by the Secretary of State on 8 August 2013 that jobseeker's allowance was not payable to the claimant (the respondent on this appeal) from the 9th to the 22nd of August 2013 because she had failed, without good cause, to participate in the Employment, Skills and Enterprise Scheme of the Work Programme on 7 August 2012.

2. In giving the Secretary of State permission to appeal back in June 2016 I said the following:

> "1. Consideration of this application for permission to appeal was stayed (that is, held up) to await the Court of Appeal's decision in what

I will call *Reilly (No 2) and TJ and others*. That appeal was decided by the Court of Appeal on 29 April 2016 with the neutral citation number [2016] EWCA Civ 413…….Even though there may still be a further appeal, it appears desirable to deal with the issues in the present case now and so I lift the stay on this case.

2. (The relevance of the Court of Appeal's decision in *Reilly (No 2) and TJ and others* may, however, be limited as the sanction decision of the Secretary of State appealed by [the claimant] was dated 8 August 2013 and so came after the date the Jobseekers (Back to Work Schemes) Act 2013 came into effect on 29 March 2013.)

3. I give permission to appeal because I consider that the Secretary of State's grounds of appeal have a realistic prospect of establishing that the First-tier Tribunal's decision was erroneous in law and should be set aside.

4. The sole basis upon which the First-tier Tribunal found in [the claimant's] favour was because the appeal bundle did not contain a copy of the actual notice which was sent to [the claimant] referring her to the Work Programme (such a notice is commonly referred to as a "WP05")

5. It is arguable, however, that this was not an issue raised by the appeal and so did not fall to be decided on the appeal. The essence of [the claimant's] appeal was that she had never missed any appointment that she had been allocated. It is arguable that [the claimant] was not therefore raising any issue as to whether she had been referred to the Work Programme in the first place. Indeed, her reference to the work programme provider – Enable - in her appeal and her assertion that she had not missed any appointments (with them) arguably may be said to show an acceptance on [her] part that she had been put on the Work Programme.

6. Section 12(8)(a) of the Social Security Act 1998 provides that in a deciding an appeal the First-tier Tribunal "need not consider any issue that is not raised by the appeal". In other words, it need only decide the substance of the issue or issues raised by the appeal. It is arguable that whether [the claimant] had been referred to the Work Programme, or perhaps more accurately whether there was sufficient evidence of this issue, was not an issue raised by the appeal and did not need to be decided by the First-tier Tribunal. Section 12(8)(b) of the Social Security Act 1998 does not, however, say that a First-tier Tribunal should *only* decide the issues raised by the appeal. It gives a discretion to the First-tier Tribunal to decide an issue not raised by the appeal. But in so doing the tribunal needs to act fairly, both to the appellant and the Secretary of State, so that the party affected by the issue not raised by the appeal has an adequate opportunity to address it.

7. Related to the provision in section 12(8)(b) of the Social Security Act 1998, rule 24 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 deals with the Secretary of State's response to an appeal, and by rule 24(4)(b)

requires the Secretary of State to provide with the response "copies of all documents relevant to the case……." (my underlining added for emphasis). Plainly what is 'relevant' is related to the issues raised by the appeal.

8. Given this, it seems to me arguable that the First-tier Tribunal erred in law in treating the issue of [the claimant's] referral to the Work Programme as an issue raised by the appeal. Alternatively, it is arguable that the tribunal erred in law in not adequately explaining why it was an issue on the appeal. Linked to this may be a separate point about whether the First-tier Tribunal adequately explained why evidence of the actual WP05 issued to [the appellant] was needed, even if it was an issue raised by the appeal, given the evidence in the appeal response and the documents on pages 1-6, which may arguably be said to have sufficiently evidenced that [the claimant] had been referred to Work Programme.

9. Further and in the alternative, it is arguable that the First-tier Tribunal erred in law in not providing the Secretary of State with a fair opportunity to address the above issue and provide copies of the actual WP05.

10. The comments of Upper Tribunal Judge Rowland in *SSWP –v-HS* (JSA) UKUT 272 (AAC) may be of relevance. In that case the evidence the First-tier Tribunal found had not been provided by the Secretary of State was evidence showing that the external work programme provider had been authorised by the Secretary of State at the relevant date. Judge Rowland allowed the Secretary of State's appeal against the First-tier Tribunal's decision and in so doing said (at paragraph 19):

> "As to the First-tier Tribunal's decision to hold against the Secretary of State the fact that he had not provided evidence that Barnardo's had the relevant delegated powers, it erred in law in doing so without giving the Secretary of State notice of the point because the Secretary of State had plainly not considered it necessary to provide that evidence in his response to the appeal and, in my judgment, was entitled to take that view. I do not doubt that a claimant or the First-tier Tribunal may require the Secretary of State to provide evidence to prove that a provider had the relevant powers, but it does not follow that the Secretary of State is obliged to provide such evidence in every case if he is properly able to assert in his response that the body that issued the relevant notice had the power to do so and nobody challenges the assertion. There is a presumption of regularity, because it would be extremely unusual for a body to be issuing notices under the 2011 Regulations without it had having been given proper authority to do so, and it would be disproportionate to require production of this evidence in all cases."

11. Properly construed it is arguable that the only issue [the claimant] raised on her appeal was whether she had received the notification of the appointment on 7 August 2012 (because, as she put

> it, she had attended all appointments she had been allocated). If this was the issue raised by the appeal then it is very arguable that the First-tier Tribunal failed to address it in its findings of fact and reasons for its decision. For example, no finding is made as to whether the appointment letter was, on the balance of probabilities, received by [the claimant]. In order to have decided that issue arguably the First-tier Tribunal ought to have addressed the evidence on page 2 (which arguably shows that the appointment letter was issued by the work programme provider by first class post on 27 July 2012 to the correct address for [the claimant] as at that date), as well as paragraph 23 on page 1I of the appeal response to the First-tier Tribunal).
>
> 12. If this appeal by the Secretary of State to the Upper Tribunal were to be successful, it will be necessary to give a decision on the claimant's original appeal to the First-tier Tribunal as the First-tier Tribunal did not adequately address the claimant's ground of appeal. Unless there is a dispute of fact and the claimant wants an oral hearing to address that issue of fact (which would be arranged locally more easily before the First-tier Tribunal), it may be preferable for the Upper Tribunal to give a final decision on the claimant's original appeal. Accordingly, if the claimant wants to add anything about her original appeal against the sanction decision, she should include it in her response to this appeal. She should also say whether she wants her original appeal to be decided by the First-tier Tribunal or by the Upper Tribunal and, in particular, whether she wants a hearing at which she can put her case in person.

3. This appeal, amongst a number of others, then became further held up by issues arising out of a possible further appeal to the Supreme Court from *Reilly (No2) and TJ and others* and then, once no such appeal was made, whether any remedial steps taken by the Government to address the declaration of incompatibility upheld by the Court of Appeal in *Reilly (No 2)* might affect this case. However, the need for any continuing stay of this appeal was lifted by me in January of 2018, when I observed as follows:

> "1. Since I gave the Secretary of State permission to appeal, further consideration of this appeal has been stayed (that is, delayed), primarily on the Secretary of State's request for a long time, first, to see if any appeal against what I will call *Reilly (No 2) and TJ and others* [2016] EWCA Civ 413; [2016] 3 WLR 1641 was to be taken to the Supreme Court (no appeal was made), second to await the action the Secretary of State was to take to address the declaration of incompatibility made by the Court of Appeal in *Reilly (No2)* under section 4 of the Human Rights Act 1998 in respect of the Jobseekers Back to Work Schemes Act 2013, and third to await the Upper Tribunal's decision in the *Castledine* cases.

> 2. As I understand it, the Secretary of State has now indicated that the action he is to take, or may have already taken, to address the said declaration of incompatibility is to make a Remedial Order in Council under section 10 of the Human Rights Act 1998. This Remedial Order amends, or will amend, the Jobseekers Back to Work Schemes Act 2013 so as to ensure that that Act does not apply to people who made appeals to the First-tier Tribunal *before* that Act came into effect on 26 March 2013 against sanction decisions that had been made under the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 ("the 2011 Regs").
>
> 3. However, as has now been revealed, these remedial steps do not have any relevance to this appeal because the relevant sanction decision and the appeal against it were both not made until after the date the Jobseekers (Back to Work Schemes) Act 2013 came into effect on 26 March 2013. So the remedial action taken to meet the Court of Appeal's declaration of incompatibility cannot assist [the claimant].
>
> 4. On the other hand, the decision in the *Castledine* cases has been made in *SSWP v DC* (JSA) [2017] UKUT 464 (AAC), and what is said by Upper Tribunal Judge Rowland in that decision may have some relevance to the WP05 not having been put before the First-tier Tribunal by the Secretary of State by the time that tribunal made its decision on 2 December 2015.
>
> 5. In the above circumstances, it is no longer necessary for this appeal to remain stayed, and it is appropriate on lifting the stay to invite further submissions from the parties, starting with the Secretary of State, on (a) the decision in *DC* and its relevance to this appeal, (b) the issues raised when I gave permission to appeal and (c) any other matters the parties may consider to be relevant."

4. The Secretary of State then filed further submissions on the appeal but the claimant did not. The claimant in fact has taken no active part in these Upper Tribunal proceeding since their inception.

5. Although irrelevant for the reasons given in paragraph 3 of my observations of January 2018, the Remedial Order action referred to in paragraph 2 of those observations has still to reach completion. The Upper Tribunal has a number of appeals before it which will be affected once the Remedial Order under section 10(2) of the Human Rights Act 1998 has become law.

6. However, entirely as my error (which I cannot now explain), and much to my embarrassment, notwithstanding the plain effect of paragraph 3 of my January 2018 observations, I then put this appeal to one side (and a number of others like it) to await the Remedial Order being made, even though waiting for that event was and is of no relevance to this appeal. In effect, I simply misfiled this appeal as one which was dependent on the Remedial Order. It was only towards the end of last year when an enquiry was made of me about why this appeal remained undecided that I realised my error. I can only apologise unreservedly to the parties for the unnecessary and extensive further delay to which my error has led.

7. The sole reasoned basis for the First-tier Tribunal allowing the claimant's appeal to it was as follows.

> "In his (sic) appeal the appellant said she had not missed any appointments.
>
> The bundle did not contain a copy of a notice to the appellant referring her to the Work Programme. There is a copy of a notification of the requirement to attend the appointment on 7 August 2012, but this does not satisfy the requirements of the…regulations. In these circumstances I cannot be satisfied that the appellant was properly notified of the requirement to participate in the Work Programme, as required by the….legislation. The preconditions for the imposition of a valid sanction are therefore not met."

8. I should for completeness add that the same judge in refusing the Secretary of State permission to appeal said the following:

> The 2013 Regulations set out a number of criteria that must be met in order for a sanction decision to be made. A significant one of those is that the appellant was validly notified of the need to take part in the Work Programme, under reg 5. It is therefore necessary for the Secretary of State, in an appeal against a sanction, to satisfy the tribunal that the conditions for the imposition of a sanction are met. The tribunal was not satisfied by the evidence provided of the valid notification. Given the considerable litigation regarding the notification requirements, it is reasonable for a tribunal to wish to satisfy itself on this point. Given the punitive nature of the sanctions regime it is reasonable for a tribunal to construe the sanctions legislation strictly (see *DL v SSWP* (JSA) [2013] UKUT 295).

> The Respondent argues that the tribunal should have adjourned to enable such evidence to be provided. Rule 24 Tribunal (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 requires the Secretary of State to provide copies of all relevant documents with the response. The Secretary of State's own failure to comply with the procedure rules is not a sufficient ground for the tribunal to be required to adjourn, to enable the Secretary of State to remedy his failure. The Secretary of State has to satisfy the tribunal of the correctness of his case. If he fails to do, by not providing relevant evidence as he is required to do, then he can hardly complain if the tribunal is not satisfied by his case.
>
> The respondent further argues that the notification of the requirement to take part in the work programme can consist of two documents, one of which is a WP05. While that proposition is clearly correct, it is indisputable in this case the Secretary of State failed to provide a copy of the WP05. The tribunal was not satisfied on the evidence before it that such a letter had been sent to the appellant."

9. I dealt in paragraph [9] of *ODS v Secretary of State for Work and Pensions* (UC) [2019] UKUT 192 (AAC) with the difficulties that arise from First-tier Tribunal judges commenting in the decision refusing permission to appeal about why the decision under challenge had been made. That said, some of what the District Tribunal Judge (DTJ) who decided this appeal said in his refusal of permission to appeal decision was about the error law merits of the grounds of appeal put forward by the Secretary of State; though some of what the DTJ said did trespass into why the decision on the appeal had been made (see the last sentence quoted in paragraph 8 above). I nevertheless make the following observations about what the DTJ said when refusing permission to appeal.

   (i) First, the regulations in issue on the appeal are the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 (the "ESE Regs"), not regulations from 2013. (The Jobseekers Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013 came into effect, and replaced the ESE Regs, on 12 February 2013. The relevant events in this appeal, however, arose before 12 February 2013.)

Further, regulation 5 of the ESE Regs had nothing to do with notification of the need to take part in Work Programme.

(ii) Second, no explanation is provided for why as a matter of law the Secretary of State was required to satisfy the First-tier Tribunal in all sanction appeals that **all** the conditions for a claimant being lawfully sanctioned, including referring the claimant to the relevant work programme scheme in the first place, were made out on the evidence. The function of the First-tier Tribunal on an appeal is to decide all "issues raised by the appeal": per section 12(8)(a) of the Social Security Act 1998.

(iii) Third, I do not find it either accurate or helpful when assessing whether an issue is raised by an appeal to frame matters in terms of whether it was "reasonable for the tribunal to wish to satisfy itself of a point". If an issue is raised by an appeal then the First-tier Tribunal is required to decide it (i.e. satisfy itself about it). Whether it is 'reasonable' to do so is irrelevant, and moreover is misleading insofar as it implies that certain matters may fall to be decided by the tribunal even if not raised by the appeal if the tribunal considers it is reasonable for it to rule on it. If an issue is not raised by the appeal then the First-tier Tribunal has a discretion as to whether it should consider that issue, but that discretion must be exercised consciously and judicially, and reasons given to explain the exercise of the discretion: per paragraphs 93 and 94 of *R(IB)2/04*. I do not consider it assists here to seek to gloss this discretionary stage with a test of reasonableness, even if that is what the DTJ was seeking to explain what he had done. The two are not necessarily the same.

(iv) Fourth, the language of it being reasonable for the tribunal to wish to satisfy itself of a point may suggest that the tribunal wished to be satisfied about a matter which either was not in issue between the parties or at least was not understood by the

tribunal and parties to be in issue between the parties. If this was the case, however, (and the Secretary of State's appeal response provided to the First-tier Tribunal clearly and expressly proceeded on the basis "there is no dispute that [the claimant] was referred to the Work Programme" (see paragraph 10 on page 1G)) on the face of it an issue would arise about whether it was fair to bring that point into consideration on the appeal without giving the parties an opportunity to address it.

(v) Fifth, the authority which *DL v SSWP* provides needs to be understood and properly identified. The relevant part of DL is found at paragraphs [12] to [14] of that decision:

> "**So why did the First-tier Tribunal err in law in this one appeal?**
> 12. The JSA sanction was imposed under the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 (SI 2011/917). Regulation 7(1) provides as follows:
>
> > "Good cause
> > 7.—(1) A claimant ("C") who fails to participate in the Scheme must show good cause for that failure within 5 working days of the date on which the Secretary of State notifies C of the failure."
>
> 13. Ms Thackray, for the Secretary of State, concedes that in this particular appeal the Appellant was not given the full five days in which to respond. She therefore accepts that the sanction was invalid and that the FTT erred in law in upholding this particular penalty.
>
> 14. In my view that concession was correctly made. The Appellant may have been late in providing his explanation, and he may not have had a satisfactory reason for failing to attend the Ingeus appointment, but the DWP decision maker had "jumped the gun" by imposing the sanction before the time given for responding had elapsed. Given the relevant legislation involves a financial penalty, it should be construed strictly. In this particular case the proper procedure was not followed and the sanction was wrongly imposed." (my underling added for emphasis)

The underlined words show that *DL* is only authority for the ESE Regs being construed strictly. However, this appeal did not turn on the correct construction of the ESE Regs. *DL* is

not saying anything about how the Secretary of State should meet her obligations under rule 24 of the Tribunal (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the TPR") on JSA sanction appeals.

(vi) Sixth, and last, the DTJ's concluding sentence about not being satisfied on the evidence before it that the WP05 had been sent to the claimant is, in my judgment, a different basis for the decision from that set out by the First-tier Tribunal in its reasons for decision. The emphasis in those reasons is on a lack of proper notification under regulation 4(2) of the ESE Regs because of the absence of the WP05 from the appeal bundle rather than the WP05 never having been sent in the first place.

10. In her appeal to the First-tier Tribunal the claimant had put her case as follows.

> "I am presently being sanctioned due to my non-attendance at Enable on the 7/8/12.
>
> I have never missed any appointments that I have been allocated and I feel that due to the 12 month lapse since my alleged indiscretion I should be given the benefit of the doubt.
>
> Please restore my benefits pending appeal."

The above represents the sum total of the claimant's case. She had made no representations to the Secretary of State before the sanction decision was made on 8 August 2013, even though she had been asked to do so, and made no further case to the First-tier Tribunal (which decided the appeal on the papers). And as I have already noted, the claimant has made no contributions to these Upper Tribunal proceedings.

11. I think it worth emphasising at this point that there is nothing in the claimant's grounds of appeal set out above which explicitly raised an issue about whether she had been referred (properly or at all) to the Work Programme in the first place. On the face of it, the claimant's case was no more than that she had never missed any appointments that she had been allocated, which statement carries with it the implication that the claimant's case on appeal was that she had not been notified of the relevant appointment for 7 August 2012. That is and was the essence of her case, and is and was the issue she raised on her appeal. In addition, the claimant's language, if anything, would seem to support her not taking any issue about her having been referred to the Work Programme (save for her being aware of the specific appointment) and very arguably evidenced an acceptance on her part that she had been properly required to attend such appointments in the past. In other words, far from raising an issue about whether she had been referred to the Work Programme (at all or properly), the claimant appeared to accept that she had been properly put on the Work Programme. Given the terms of her appeal grounds, I therefore struggle to find any rational basis on which those grounds could be said to raise as an issue on the appeal whether the claimant had been properly referred to the Work Programme.

12. I should add that I do not consider the above to be surprising. Most claimants are unlikely to be troubled about the more general act of being referred to the Work Programme at the stage where no specific obligations have been placed on them. See to similar effect, albeit in the different context of the need for 'prior information', paragraph [175] of the Court of Appeal's judgment in *Reilly (No) 2 and TJ and others* [2016] EWCA Civ 413; [2017] QB 657; [2017] AACR 14:

> "Having said all that, we are bound to say that we find it hard to see that the application of the prior information duty at the moment of referral to the Work Programme is likely to be an important issue in the real world. Given its open-textured nature, JSA claimants are unlikely to object to referral as such. Any problems are likely to arise

> only when, following referral, particular requirements are made of claimants which they believe are unreasonable or inappropriate and which may lead to sanctions if they fail to comply. It is at that stage that they may need to be able to make representations and will need sufficient information to be able to do so meaningfully."

13. I have already referred, in paragraph 9(iv) above, in this context to perhaps the key aspect of the Secretary of State's written response to the appeal grounds of the appellant. The appeal response proceeded on the basis that the appellant did not dispute that she had been referred to the Work Programme or that she had failed to attend the appointment on 7 August 2012. It then went on to address whether the appellant had shown good cause for not attending the appointment and also, following the appeal grounds, the merits of the appellant's claim that she had not received the appointment letter. The response pointed in this last respect to the evidence in the appeal bundle about the appointment letter having been issued on 27 July 2012 by first class post to the claimant's then address.

14. These aspects of the appeal – good cause and receipt of the appointment letter – were not addressed at all by the First-tier Tribunal. That is because it took the view that the appeal stood to be decided, and could fairly be decided, on the basis that "the preconditions for the imposition of a valid sanction" arose on the appeal but had not been met. Those preconditions were not met because <u>the bundle did not contain a copy</u> of a notice referring the claimant to the Work Programme (i.e. the WP05) and "[i]n these circumstances" the tribunal could not be satisfied that "the [claimant] was properly notified of the requirement to participate in the Work Programme". I now turn to whether the First-tier Tribunal was right to so conclude.

15. Before doing so, however, I should say that I do not accept that any part of the tribunal's reasoning turned in any clear sense on the First-tier Tribunal finding that the WP05 had not been sent to the claimant (as claimed in the refusal of permission to appeal), or indeed that the

appointment letter had not been sent. (If either was the tribunal's reasoning then it was so opaque as to render the reasoning and fact-finding on this issue materially deficient, and would itself amount to a material error of law.) In my judgment, the better reading of the First-tier Tribunal's reasoning was that the absence of a copy of a WP05 from the appeal bundle was the stated the circumstance that meant the precondition of *proper* notification (as opposed to notification at all) of the requirement to participate in the Work Programme could not be met, because the appointment letter alone was not sufficient.

16. If the First-tier Tribunal concluded that no WP05 had ever been sent to the claimant then it could and should have stated that clearly in its fact-finding and reasoning. However, had it done so then its reasoning in my view would have been vulnerable to criticism not only on the "raised on the appeal" point on which this appeal succeeds but also, if necessary, on points concerning the failure of the First-tier Tribunal to address the evidence which was before it that on its face might have given rise to a presumption that proper referral through the issuing of a WP05 to claimant had taken place. I have in mind here why the Work Programme provider would have been inviting the claimant to a further appointment if the Secretary of State had never properly placed her on the Work Programme in the first place: see the discussion of "inherent probabilities" and the "presumption of regularity" in paragraphs [17] and [19] of *SSWP v HS* and paragraph [36] of *SSWP v DC* set out further below.

17. As I have already said, the relevant regulations in play on this appeal were the ESE Regs. These provided, in so far as relevant, as follows.

> "2(2) For the purpose of these regulations, where a written notice is given by sending it by post it is taken to have been received on the second working day after posting.
>
> 3. The Secretary of State may select a claimant for participation in the Scheme.

> 4. (1)……, a claimant ("C") selected under regulation 3 is required to participate in the Scheme where the Secretary of State gives C a notice in writing complying with paragraph (2).
>
> (2) The notice must specify—
>
> (a)that C is required to participate in the Scheme;
>
> (b)the day on which C's participation will start;
>
> (c)details of what C is required to do by way of participation in the Scheme;
>
> (d)that the requirement to participate in the Scheme will continue until C is given notice by the Secretary of State that C's participation is no longer required, or C's award of jobseeker's allowance terminates, whichever is earlier;
>
> (e)information about the consequences of failing to participate in the Scheme.
>
> (3) Any changes made to the requirements mentioned in paragraph (2)(c) after the date on which C's participation starts must be notified to C in writing.
>
> 6. A claimant who fails to comply with any requirement notified under regulation 4 is to be regarded as having failed to participate in the Scheme.
>
> 7. (1) A claimant ("C") who fails to participate in the Scheme must show good cause for that failure within 5 working days of the date on which the Secretary of State notifies C of the failure.
>
> (2) The Secretary of State must determine whether C has failed to participate in the Scheme and, if so, whether C has shown good cause for the failure.
>
> (3) In deciding whether C has shown good cause for the failure, the Secretary of State must take account of all the circumstances of the case, including in particular C's physical or mental health or condition.

18. The correct starting point for analysis of whether adequate notice was provided to any claimant under these regulations was provided by the three-judge panel's decision in *SSWP v TJ and others* (JSA) [2015] UKUT (AAC) 56 (the following aspects of the decision in *TJ* were not challenged in the further appeal to the Court of Appeal). First, the requirement for adequate notice may be satisfied by considering the WP05 and, here, the letter notifying the claimant of the appointment of 7 August 2012 (such letter being dated 27 July 2012 – see page 4) together: see paragraphs 181-187 of *TJ*. Second, the critical issue is whether "the claimant has been notified in writing in substance of the requirements to participate and not the form (one or two notices) in which that written notification takes place": paragraph 192 of *TJ*.

19. However, that is only the starting point. This is because in this appeal the Jobseekers (Back to Work Schemes) Act 2013 (the 2013 Act) applied as both the Secretary of State's decision of 8 August 2013 and, more importantly, the claimant's appeal of 22 August 2013 against that decision to the First-tier Tribunal fell *after* the date that Act came into effect. (The breach of Article 6 of the European Convention on Human Rights found by the High Court and upheld by the Court of Appeal in *Reilly (No 2)* only applies where an appeal was in fact made before the 2013 Act came into effect on 26 March 2013 (as it was the effect that Act had on existing appeals that wrongly interfered with those appellants Article 6 rights): see paragraphs [31(1)] and [83] of *Reilly (No. 2)*.)

20. Section 1 of the 2013 Act provides, so far as is relevant, as follows.

> "**Regulations and notices requiring participation in a scheme**
> 1.-(1) The 2011 Regulations are to be treated for all purposes as regulations that were made under section 17A of the Jobseekers Act 1995 and other provisions specified in the preamble to the 2011 Regulations and that came into force on the day specified in the 2011 Regulations.
> (2) The Employment, Skills and Enterprise Scheme mentioned in the 2011 Regulations is to be treated as having been, until the coming into force of the 2013 Regulations, a scheme within section 17A(1) of the Jobseekers Act 1995.
> (3) The following are to be treated as having been, until the coming into force of the 2013 Regulations, programmes of activities that are part of the Employment, Skills and Enterprise Scheme—
> (a) the programmes described in regulation 3(2) to (8) of the 2013 Regulations, and
> (b) the programme known as the Community Action Programme,
> and references to the scheme are to be read accordingly.
> (4) A notice given for the purposes of regulation 4(1) of the 2011 Regulations (requirement to participate and notification) is to be treated as a notice that complied with regulation 4(2)(c) (details of what a person is required to do by way of participation in scheme) if it referred to—
> (a) the Employment, Skills and Enterprise Scheme, or
> (b) a programme of activities treated under subsection (3) as part of the scheme.
> (5) A notice given for the purposes of regulation 4(1) of the 2011 Regulations is to be treated as a notice that complied with regulation

> 4(2)(e) (information about the consequences of failing to participate) if it described an effect on payments of jobseeker's allowance as a consequence or possible consequence of not participating in the scheme or a programme of activities.
> (6) Regulation 4(3) of the 2011 Regulations (notice of changes in what a person is required to do by way of participation in scheme) is to be treated as if at all times—
> (a) it required the person in question to be notified only if the changes in the requirements mentioned in regulation 4(2)(c) were such that the details relating to those requirements specified in—
> (i) a notice given to the person under regulation 4(1), or
> (ii) a notice given to the person under regulation 4(3) on an earlier occasion, were no longer accurate, and
> (b) it required the person to be notified only of such changes as made the details inaccurate.....
>
> (15) In this section—
> "the 2011 Regulations" means the provisions known as the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011....."

21. I will proceed on the basis that the First-tier Tribunal was correct in its conclusion that the letter about the appointment on 7 August 2012 on its own did not constitute adequate notice under regulation 4(2) of the ESE Regs, though the tribunal did not provide any reasoning to explain this conclusion. The contrary has not been argued. Even with the 'curing' or 'sanitising' effects of the 2013 Act in place the appointment letter at least very arguably fell foul of regulation 4(2)(c) of the ESE Regs even when read with section 1(4)(a) of the 2013 Act.

22. It is true that the First-tier Tribunal did not have the WPO5 form, referring the claimant to the Work Programme, before it when it came to its decision on 2 December 2015. However, as I have already touched on, the (limited) reasoning of the First-tier Tribunal was not put in terms that the WPO5 form had not been issued to the claimant,. The tribunal's concern was the lack of evidence about the content of the WP05 and, consequently, whether the claimant had been properly referred to the Work Programme. This, however, immediately throws the focus onto why evidence of the contents of the WP05 was needed

for the First-tier Tribunal properly to discharge its functions in order to decide the appeal before it?

23. In terms of the correct legal analysis, in my judgment the answer to this question can only have been, following section 12(8)(a) of the Social Security Act 1998, because the First-tier Tribunal considered that the issue of the claimant's proper referral to the Work Programme and thus the contents of the WP05 arose as an issue on the appeal. With the greatest of respect to the First-tier Tribunal, I do not see the basis for that being the case (and, as I have said, the First-tier Tribunal gave no reasons to explain why it was an issue on the appeal).

24. I should add that in my judgment there is nothing in the First-tier Tribunal's reasoning to suggest that it took the view that the proper referral to the Work Programme was *not* an issue raised by the appeal but it had, as an exercise of its discretion, brought that issue into the issues to be decided on the appeal. Even though the language the presiding DTJ used when refusing permission to appeal - "reasonable to satisfy itself of a point" – might provide some support for such an analysis, the actual language used by the First-tier Tribunal in its reasons of the "preconditions for the imposition of a valid sanction are therefore not met" point strongly to that tribunal considering that sight of the WP05 (as a precondition) was an issue raised by the appeal. (Even if this last analysis is wrong, however, the bringing into consideration a matter not in issue on the appeal in a case decided, as here, in the absence of the parties would have required the First-tier Tribunal to turn its mind to whether fairness required it to give the parties an opportunity to address this matter. That did not occur here either.)

25. The Court of Appeal in *Hooper v SSWP* [2007] EWCA Civ 495; *(R(IB)4/07)* considered the scope of section 12(8)(a) of the Social Security Act 1998 and said this:

24…… Section 12(8)(a) of 1998 Act provides that an appeal tribunal "need not consider any issue that is not raised by the appeal". It is clear that the effect of section 12(8)(a) is that the appeal tribunal may inquire into any issue not raised by the appeal, but is not obliged to do so.

25. What is meant by "an issue raised by the appeal"? In addressing this question, it is necessary to keep in mind that, as is common ground, the process before the tribunal is inquisitorial and not adversarial: see the comments at paras 14, 56 and 61 in *Kerr v Department for Social Development* [2004] UKHL 23, [2004] 1 WLR 1372 in an analogous context. It seems that this question has not been the subject of decision by this court, but it was considered by the Northern Ireland Court of Appeal in *Mongan v Department of Social Development* [2005] NICA 16 reported as R4/01 (IS). That decision was concerned with the meaning of article 13(8)(a) of the Social Security (Northern Ireland) Order 1998 which is identical to section 12(8)(a) of the 1998 Act. The court gave valuable guidance as to what is meant by "an issue raised by the appeal". It is desirable that I should set it out in full:

> "[14] The terms of article 13(8)(a) of the 1998 Order make it clear that issues not raised by an appeal need not be considered by an appeal tribunal. The use of the phrase "raised by the appeal" should be noted. The use of these words would tend to suggest that the tribunal would not be absolved of the duty to consider relevant issues simply because they have been neglected by the appellant or her legal representatives and that it has a role to identify what issues are at stake on the appeal even if they have not been clearly or expressly articulated by the appellant. Such an approach would chime well with the inquisitorial nature of the proceedings before the tribunal.
>
> [15] It is now well established that appeal tribunal proceedings are inquisitorial in nature – see, for example the recent Decision of a Tribunal of Social Security Commissioners [in *R(IB)2/04*]. Mr McAlister relied on this decision, however, to support his contention that the tribunal was not required to consider matters that had not been raised by the parties to the proceedings. In that case it was held that 'raised by the appeal' should be interpreted to mean "actually raised at or before the hearing by one of the parties." In so far as the decision suggests that an appeal tribunal would not be competent to inquire into a matter that arose on an appeal simply because it was not expressly argued by one of the parties to the appeal, we could not agree with it. It appears to us that the plain meaning of the words of the statute, taken together with the inquisitorial nature of the appeal hearing, demand a more proactive approach. If, for instance, it appeared to the tribunal from the evidence presented to it that an appellant might be entitled to a lower level of benefit than that claimed, its inquisitorial role would require a proper investigation of that possible entitlement.

> [16] Mr McAlister suggested that even if the tribunal had a duty to consider issues not explicitly raised, this was a limited responsibility and he referred to an unreported decision C5/03-04 (IB) in which Commissioner Brown held that the tribunal was not required "to exhaustively trawl the evidence to see if there is any remote possibility of an issue being raised by it." We accept that there must be limits to the tribunal's responsibility to identify and examine issues that have not been expressly raised and we agree with the observation of Commissioner Brown. But as she said in a later passage in the same case, issues "clearly apparent from the evidence" must be considered.
>
> [17] Whether an issue is sufficiently apparent from the evidence will depend on the particular circumstances of each case. Likewise, the question of how far the tribunal must go in exploring such an issue will depend on the specific facts of the case. The more obviously relevant an issue, the greater will be the need to investigate it. An extensive inquiry into the issue will not invariably be required. Indeed, a perfunctory examination of the issue may often suffice. It appears to us, however, that where a higher rate of benefit is claimed and the facts presented to the tribunal suggest that an appellant might well be entitled to a lower rate, it will normally be necessary to examine that issue, whether or not it has been raised by the appellant or her legal representatives.
>
> [18] In carrying out their inquisitorial function, the tribunal should have regard to whether the party has the benefit of legal representation. It need hardly be said that close attention should be paid to the possibility that relevant issues might be overlooked where the appellant does not have legal representation. Where an appellant is legally represented the tribunal is entitled to look to the legal representatives for elucidation of the issues that arise. But this does not relieve them of the obligation to enquire into potentially relevant matters. A poorly represented party should not be placed at any greater disadvantage than an unrepresented party."

26. Mr Cox submits that we should adopt this guidance without qualification. Mr Chamberlain accepts the guidance with one qualification. He submits that "not raised by the appeal" means "not raised by the appellant". He says that an injunction to the tribunal that it need not consider issues not raised by the appeal would be otiose, since issues not raised by the appeal are irrelevant and should not be considered in any event. But Mr Chamberlain concedes that the tribunal should adopt a broad, generous and non-legalistic approach to deciding whether an issue has been raised by the appellant. Thus, it may be sufficient for the appellant to appeal against a decision without stating the grounds relied on, provided that he or she places before the tribunal sufficient facts for the issue to be clear.

27. Section 12(8)(a) refers to an issue raised by the appeal. I see no reason not to give the statute its plain and natural meaning. But in

> view of the way in which Mr Chamberlain suggests "raised by the appellant" should be interpreted, it seems to me that there is no real difference between "raised by the appeal" and "raised by the appellant" as interpreted by him. The starting point will always be the decision of the SSWP that the appellant is seeking to challenge. But it is clear that the fact that an issue is not identified by the appellant in his appeal notice or even during the oral argument does not mean that it is not "raised by the appeal".
>
> 28. I would endorse the valuable guidance given in *Mongan*. The essential question is whether an issue is "clearly apparent from the evidence" (para 15 in *Mongan*). Whether an issue is sufficiently apparent will depend on the particular circumstances of the case. This means that the tribunal must apply its knowledge of the law to the facts established by them, and they are not limited in their consideration of the facts by the arguments advanced by the appellant. I adopt the observations of this court in *R v Secretary of State for the Home Department ex p Robinson* [1998] 1 QB 929 at p 945 E-F in the context of appeals in asylum cases. But the tribunal is not required to investigate an issue that has not been the subject of argument by the appellant if, regardless of what facts are found, the issue would have no prospects of success."

26. Applying the test of "clearly apparent from the evidence" to this appeal, I cannot identify in the evidence before the First-tier Tribunal any clear or sufficiently apparent issue raised on that evidence about whether the claimant had been properly referred to the Work Programme. The focus of the appellant's appeal was on why she had not attended the appointment on 7 August 2012. But even outside the terms of the appeal letter, taking into account (i) the assertion in the Secretary of State's appeal response that it was not disputed that the claimant had been referred to the Work Programme, and (ii) the evidence of the Work Programme provider and Jobcentre Plus officials acting on a basis consistent with the clamant having been properly referred to the Work Programme, I struggle to see the clearly apparent evidential basis for there being an issue on the appeal about the claimant having been properly referred. Nor do I consider that the sight of the WP05 and evidence showing it had been issued is always an issue raised on a JSA sanction appeal. Such an approach inconsistent with the *HS* and *DC* cases set out in paragraphs [28] and [29] below

27. It would have been open to the First-tier Tribunal as a matter of its discretion under section 12(8)(a) of the Social Security Act 1998 to bring the WP05 into issue on the appeal even though it was not raised as an issue on the appeal, but for the reasons I have already endeavoured to give in paragraph 24 above, I do not consider that this is what the First-tier Tribunal was doing here.

28. In *SSWP v HS* (JSA) [2016] UKUT 272 (AAC); [2017] AACR 29 Upper Tribunal Judge Rowland also dealt with an appeal concerning a JSA sanction in the post-*Reilly and Wilson* arena. The appeal in *HS* arose in a context where (i) the Secretary of State had been directed to provide information (including the WP05) by the First-tier Tribunal but the First-tier Tribunal that then decided the appeal missed that that information had in fact been provided; and (ii) the same tribunal also decided the appeal against the Secretary of State on the basis of an issue about which he had not been asked to provide evidence (proof that the external work programme provider had been delegated to carry out relevant Work Programme functions). I set out the following from *HS* in order to put the crucial (for the purposes of this appeal) paragraph [19] of it in context:

> "10. On the other hand, it seems to me that the First-tier Tribunal clearly erred in law in first making its decision in ignorance of the fact that the information that it had directed the Secretary of State to provide had been provided and then relying on the fact that the Secretary of State had not provided evidence that he had not been under any duty to provide.
>
> 11. That the First-tier Tribunal was unaware that the supplementary submission had been received before it made its decision was due merely to either an administrative error or an oversight on the part of the judge, but it did give rise to an inadvertent breach of the rules of natural justice because it meant that the Secretary of State's case was not heard.
>
> 12. Even if the supplementary submission had not been received by [the date of the First-tier Tribunal's decision], the reasons given in the decision notice would have required supplementation in the full statement because they were insufficient to explain the decision by themselves. Where there has been a failure to comply with a direction to provide evidence, a tribunal may well be entitled to draw an adverse inference against the offending party; that is to say that it may infer

from the failure that the facts are not as the offending party says they are. However, it is not entitled to do so merely as a punishment. It is appropriate to draw an adverse inference only if the tribunal is satisfied that it is probable that the reason for the failure to comply with the direction is that the evidence does not exist or would harm the offending party's case. Thus a warning that an adverse inference may be drawn from a failure to comply with a direction does not necessarily have the same effect as a warning that a case will or may be struck out or that a party will or may be barred from participating in the proceedings if there is a failure to comply….

16. The fact that the drawing of an adverse inference is not a penalty and is permissible only if the tribunal is satisfied that it is probable that the reason for the failure to comply with the direction is that the evidence does not exist or would harm the offending party's case may require a tribunal drawing an adverse inference to give reasons for doing so beyond merely stating that there has been a failure to comply with a requirement to produce evidence. I say "may" rather than "must" only because in the case of, say, the person required to produce a bank statement to show that no capital is held, the *only* reasonable inference of an otherwise unexplained failure to comply may be that the bank statement would in fact show that the claimant did hold capital sufficient to disqualify the person from benefit.

17. However, in the present case there would plainly have been other realistic explanations for the failure to comply. Therefore, it would have been necessary for any adequate statement of reasons to address the "inherent probabilities" and thereby properly to explain an adverse inference had been drawn. Consideration would have had to be given to whether bureaucratic delay was a more likely explanation for the failure to comply than a deliberate attempt to cover up the truth or a simple failure to obtain the documents from the provider because in fact they did not exist. I do not doubt that an adverse inference could have been drawn in this case had the First-tier Tribunal been right in believing that the Secretary of State had not provided the relevant documents, but it would have required some reasoning.

18. This is not to minimise the importance of the Secretary of State, like any other party, complying with directions. In this case, he ought to have applied for a further extension of time. In *BPP Holdings Ltd v Commissioners for Revenue and Customs* [2016] EWCA Civ 121, the Court of Appeal has recently emphasised that directions of the First-tier Tribunal ought to be complied with in the same way as orders of the courts and that, if a Government department has difficulty in complying with a direction, it should make a proper application for the direction to be varied with reasons for the making of the application. There may, I accept, be circumstances in which the First-tier Tribunal has made it clear that, if a direction cannot be complied with in time, an application for an extension of time need not be made until there is late compliance. Absent such an indication, the Secretary of State is not entitled simply to ignore a time limit in a direction in the belief that no consequences will follow, although, of course, he may be barred under rule 8 of the 2008 Rules from taking any further part in proceedings only if the appropriate warning has been given. Nor is he

> entitled to make an unexplained application for an extension of time on the assumption that it will be granted.
>
> 19. As to the First-tier Tribunal's decision to hold against the Secretary of State the fact that he had not provided evidence that Barnardo's had the relevant delegated powers, it erred in law in doing so without giving the Secretary of State notice of the point because the Secretary of State had plainly not considered it necessary to provide that evidence in his response to the appeal and, in my judgment, was entitled to take that view. I do not doubt that a claimant or the First-tier Tribunal may require the Secretary of State to provide evidence to prove that a provider had the relevant powers, but it does not follow that the Secretary of State is obliged to provide such evidence in every case if he is properly able to assert in his response that the body that issued the relevant notice had the power to do so and nobody challenges the assertion. There is a presumption of regularity, because it would be extremely unusual for a body to be issuing notices under the 2011 Regulations without it had having been given proper authority to do so, and it would be disproportionate to require production of this evidence in all cases. Moreover, it seems undesirable from a claimant's point of view that a bundle of appeal documents should routinely be cluttered up with documents of such a technical nature. (On the other hand, the Secretary of State clearly ought to have provided a copy of the notice dated 18 December 2012, which was of central importance to the claimant's appeal, without it having been necessary for the First-tier Tribunal to direct him to do so.) Moreover, the lack of any specific direction to the Secretary of State makes it difficult to justify drawing an adverse inference against him."

The passages I have underlined from paragraph [19] in *HS* in my view can also be analysed in terms of the duty to consider issues arising on the appeal under section 12(8)(a) of the Social Security Act 1998. The equivalent, in my judgment, to the delegated powers evidence in *HS* is the WP05 evidence in this appeal. And as I read Judge Rowland's second sentence ("I do not doubt…"), it is in terms about the claimant or the First-tier Tribunal raising the external provider's delegated authority as an issue on the appeal. Moreover, *if* the First-tier Tribunal exercised its discretion under section 12(8)(a) so as to bring, per *HS*, the delegated authority into issue on the appeal or, per this appeal, the WP05, into issue, paragraph [19] of *HS* would support an argument that the First-tier Tribunal would have erred in law in not providing the Secretary of State with an opportunity to address this issue. I should add that the notice of 18 December 2012 in *HS* was the appointment

letter. The claimant in *HS* disputed she had received the appointment letter.

29. Judge Rowland returned to similar issues in *SSWP v DC* (JSA) [2017] UKUT 464 (AAC); [2018] AACR 16, where, unlike this appeal, it was the appointment letter that was missing from the bundle, but again where (non) compliance with prior directions of the First-tier Tribunal was an issue. I set out the reasoning from *DC* in some detail so as to frame what is said in its paragraph [36].

> "33. In the present case, I do not doubt that the First-tier Tribunal could quite properly have presumed that the contents of the letter were sufficiently clear to make it effective. Judges in specialist tribunals are entitled to rely on the experience they have drawn from determining other cases and may be aware of guidance given to those who administer benefits. However, it is not unknown for documents to be issued in an unapproved form or in a form that is reasonably intelligible to the sender but not to an uninitiated recipient. In adversarial litigation, a party may sometimes be "put to proof" by the other party. Where the First-tier Tribunal exercises an investigatory jurisdiction in which litigants very seldom have legal representation, it is that tribunal that may require strict proof of a matter, whether or not it has expressly been put in issue by a party.
>
> 34. It is important to consider the facts of the case in some detail. The claimant had neither denied receiving the appointment letter nor positively asserted that it was confusing and section 12(8)(a) of the Social Security Act 1998 does not require the First-tier Tribunal to consider issues not raised by the appeal. On the other hand, his grounds of appeal did not really explain his non-attendance at the appointment at all and left open the possibility that he had not in fact received the letter or that he had been confused by it. In the absence of any evidence from the claimant that he had not received the letter, receipt was adequately proved by the statements in the WP08 and the presumption that what has been sent has been received. But there was no evidence as to the contents of the letter beyond the date and time of the appointment and, the parties having consented to the appeal being decided without a hearing, there was not going to be a hearing at which the claimant's reasons for non-attendance could be further explored unless the First-tier Tribunal expressly directed one. Although it was possible that the claimant had retained the letter, given the passage of time it was plainly more probable that the Secretary of State would be able to provide a copy and he bore the burden of proving that a letter in a proper form had been issued. In those circumstances, it seems to me that the First-tier Tribunal was clearly entitled to direct the Secretary of State to provide a copy of the

> appointment letter and to decide the case on the burden of proof when he failed, without explanation, to do so.
>
> 35. Had the Secretary of State said that he had been unable to obtain a copy of the letter and so was unable to provide it to the First-tier Tribunal, he could at the same time have argued that the First-tier Tribunal should presume, in the light of that circumstance and of copies of other appointment letters from Interserve, that the appointment letter of 14 August 2012 had been adequate for its purpose. However, he did not do that or respond at all to the directions until after the time for complying with them had expired and the decision had been made.
>
> 36. I would add that I consider that the First-tier Tribunal was right to say that a copy of the appointment letter "should have been included in the appeal bundle". I do not doubt that, in principle, the Secretary of State is entitled to rely on the presumption of regularity when making initial decisions. However, the practicalities of the First-tier Tribunal exercising an investigatory jurisdiction with unrepresented litigants mean that the Secretary of State ought generally to provide, and ensure that he is able to provide, a copy of the appointment letter in every case where a claimant is appealing against a sanction imposed for not keeping an appointment. It is necessary to do so even when the existence or content of the letter has not been put in issue in the grounds of appeal because many claimants do not explain themselves fully in their grounds of appeal and so issues are liable to arise later, whether raised by the claimant at a hearing or by the First-tier Tribunal when satisfying itself for the purposes of rule 27(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) that a case can fairly be determined without a hearing. However, it does not follow that the Secretary of State necessarily breaches the duty imposed by rule 24(4)(b) of those Rules to provide to the First-tier Tribunal "copies of all documents relevant to the case in the decision maker's possession" if he fails to provide a copy of the appointment letter. Since the terms of the appointment letter had not been put in issue by the claimant in this case, I consider that the First-tier Tribunal was right to give the Secretary of State an opportunity to produce a copy of the appointment letter before determining the appeal.
>
> 37. I dare say that the First-tier Tribunal issued the directions partly because it was looking for possible grounds upon which it might fairly determine the case quickly rather than stay it as the Secretary of State had requested (which would have resulted in a delay of months or years as has since happened), but that does not alter the point that it was entitled to issue them."

30. I observe that, again, the touchstone for Judge Rowland in paragraph [36] of *DC* was, rightly in my view, whether a matter had been put in issue on the appeal. If it had not been put in issue then, as with the delegated authority evidence in *HS*, it was unfair and an error of law for

the First-tier Tribunal to decide that issue against the Secretary of State without first giving her the opportunity to address that issue. In *DC* she had been given that opportunity but had failed even so to address the issue.

31. Applying the above caselaw to this appeal, in my judgment the principle error of law made by the First-tier Tribunal was to decide the appeal against the Secretary of State on an issue that was not raised by the appeal and which it did not therefore need to decide. As a consequence, it further erred in law by not deciding the issues that were raised by the appeal (i.e. whether the claimant had received the letter of 27 July 2012 notifying her of her appointment on 7 August 2012 and/or whether she had good cause for not attending the appointment on 7 August 2012). And even if, contrary to my reading of its decision, the First-tier Tribunal properly and lawfully exercised its discretion under section 12(8)(a) of the Social Security Act 1998 so as to bring the terms of the WP05 (and even its being issued to the claimant) into issue on the appeal, in my judgment it still erred in law by acting unfairly in not providing the Secretary of State with any adequate opportunity to address an issue she was not aware was an issue on the appeal.

32. The decision of the First-tier Tribunal is therefore set aside for the reasons given above. I can see no merit in remitting the appeal to a new First-tier Tribunal to be redecided given the lack of engagement of the claimant in the appeal proceedings and the time that has passed since the events in issue on the appeal. I therefore redecide the first instance appeal myself.

33. For my own part, I do not consider any issue arises on the appeal about whether the claimant was properly 'on' the Work Programme (that is, had been properly referred to it) at the time she had been required to attend the appointment on 7 August 2012. The dispute by the claimant on her appeal was no more and no less, in my view as I read her appeal grounds, that she had not received the letter notifying her of the

appointment on 7 August 2012[1]. I turn therefore, and lastly, to decide this as the sole determinative issue on the first instance appeal.

34. I am satisfied on the balance of probabilities that the appointment letter was received by the claimant (she has no separate 'good cause' argument if it was received by her). The evidence on pages 2-4 of the appeal bundle shows that the appointment letter was issued by first class post to the claimant's then home address on 27 July 2012. In the normal course of events such a letter ought to have been received by the claimant at her address. She has provided no evidence of postal problems at her address. Moreover, her appeal was written over a year after the appointment in question (through no fault of the claimant – though she had earlier opportunities to make out her case). In all the circumstances I consider that the appointment letter was received by the claimant at her then address and she must have forgotten receiving it. I therefore uphold the Secretary of State's decision of 8 August 2013.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal
Dated 17th January 2020

[1] A copy of the form of the WP05 that would have been issued to the claimant was put before the DTJ who decided the appeal on the Secretary of State's application for permission to appeal together with evidence showing when the claimant was first referred to the Work Programme. It was because the DTJ considered that the WP05 was an issue raised by the appeal and so should have been addressed by relevant evidence going to its issuance and terms in the original appeal response, that the DTJ spoke in terms of the Secretary of State having 'failed' to meet her obligations under the relevant tribunal procedure rules when he refused permission to appeal. I do not repeat here why I consider the WP05 was not an issue raised by the appeal. In any event, insofar as it may be thought to arise, I am satisfied from the evidence now before me that the claimant was properly referred to the Work Programme when the WP05 is read with the appointment letter and mediated by the 2013 Act.)