Appeal Nos. UA-2022-000292-ESA
UA-2022-000293-ESA

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

WS

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Church

Decision date: 28 March 2023
Decided on consideration of the papers

DECISION

The decision of the Upper Tribunal is to dismiss the appeal reference UA-2022-000292-ESA in relation to First-tier Tribunal reference number SC263/19/00712.
The decision of the First-tier Tribunal made on 20 May 2021 under reference number SC263/19/00712 involved no material error of law. It is confirmed.

The decision of the Upper Tribunal is to refuse the appeal reference UA-2022-000293-ESA in relation to First-tier Tribunal reference number SC263/19/00715.
The decision of the First-tier Tribunal made on 20 May 2021 under reference number SC263/19/00715 involved no material error of law and is confirmed.

REASONS FOR DECISION

Introduction

1. This appeal relates to a decision made by the First-tier Tribunal on 20 May 2021. The First-tier Tribunal confirmed the Secretary of State's decisions to the effect

that certain payments of contributory Employment and Support Allowance (**"ESA(C)"**) made to the Appellant (whom I will refer to as the **"Claimant"**) between 24 March 2018 and 20 July 2018 represented an overpayment because he had started to receive his occupational pension and so was no longer entitled to ESA(C). The First-tier Tribunal confirmed the Secretary of State's decision that the Appellant was under a duty to report relevant changes in circumstances to the Secretary of State, that he failed to inform the Secretary of State of the date when his pension would come into payment, and that this failure caused the overpayment, which was therefore recoverable from the Claimant.

2. While two separate appeals appear to have been registered with the Upper Tribunal in error, the Claimant has made it clear that he does not dispute the entitlement decision or the finding that he received an overpayment of ESA(C) in the amount of £1,242.70, but only seeks to challenge the First-tier Tribunal's decision that the amount overpaid was recoverable from him. I shall therefore refer to the "appeal" in the singular, by which I mean the appeal in respect of the decision on recoverability.
3. The appeal raises the issues of:
   3.1. when factual information as to the date on which the Claimant's occupational pension was put into payment became known by the relevant office within the Department for Work and Pensions to whom disclosure was due;
   3.2. whether, in the light of the answer to 3.1 above there could be said to be a "failure to disclose" by the Claimant;
   3.3. whether, in the light of the answer to 3.2 above, any such failure caused the overpayment to the Claimant; and
   3.4. adequacy of reasons.
4. My decision, in summary, is that the decisions of the First-tier Tribunal involved no material error of law and those decisions are confirmed.

Why there was no oral hearing of this appeal

5. The Respondent (whom I shall refer to as the **"Secretary of State"**) didn't ask for an oral hearing of the appeal. The Claimant's position was more nuanced. I took account of the parties' views, but given the clear and full written submissions I decided that no oral hearing was necessary and that the interests of justice would best be served by my determining the appeal on the papers without further delay.

Relevant background

6. It is common ground between the parties that the Claimant made a telephone claim for ESA(C) on 27 February 2018, and that during that call he informed the Secretary of State of the fact that he was going to receive an occupational pension, and that he would receive monthly payments of £1,046.63 under that pension.
7. There was a conflict of evidence on the question of whether during that telephone call the Claimant was given a contact telephone number and told he needed to call that number immediately he started receiving his pension to report that fact to the Secretary of State. The First-tier Tribunal found as a fact that the Claimant was told during the telephone call on 27 February 2018 that he needed to report the commencement date of his pension and was provided with a contact

telephone number to call to do so (see paragraph [3] of the First-tier Tribunal's Decision Notice).

8. A decision maker for the Secretary of State decided on 12 March 2018 that the Claimant was entitled to ESA(C) from 5 March 2018.
9. At some point, the Secretary of State became aware that the Claimant's occupational pension had come into payment from 25 February 2018 and that the first payment was made to him on 29 March 2018.
10. A decision maker for the Secretary of State decided on 14 August 2018 that the award of ESA(C) should be superseded due to the change in circumstances (i.e. the Claimant's occupational pension being put into payment) and that his entitlement to benefit therefore ended on 20 July 2018 That entitlement decision was revised on 10 October 2018 to take effect from 24 March 2018 (the **"Entitlement Decision"**).
11. On 10 October 2018 a decision maker for the Secretary of State decided that an overpayment of ESA(C) of £1242.70 for the period 24 March 2018 to 20 July 2018 had been made (the **"Overpayment Decision"**) and that this sum was recoverable from the Claimant because he had failed to disclose the material fact of his pension coming into payment in a timely manner (the **"Recoverability Decision"**).
12. The Claimant went through the mandatory reconsideration process, but the decisions weren't changed. The Claimant then appealed the Overpayment Decision and the Recoverability Decision to the First-tier Tribunal.
13. The First-tier Tribunal, in a decision dated 20 May 2021, refused those appeals and confirmed the Secretary of State's decisions. As explained above, the Claimant does not pursue the appeal against the Overpayment Decision in these Upper Tribunal proceedings.

Grounds of appeal

14. Ms Turner, on behalf of the Claimant, argued that the First-tier Tribunal had erred in law because it failed to make a finding of fact as to the date when the Secretary of State became aware that the Claimant's occupational pension was in payment, it failed in its inquisitorial role by not seeking more evidence on the question of when the Secretary of State first became aware of the pension coming into payment, and it failed adequately to explain its decision-making in relation to the issue of causation between the lack of notification by the Claimant of the start date of payments under his occupational pension and the making of the overpayment by the Secretary of State.

The permission stage

15. District Tribunal Judge Pearson refused permission to appeal on 10 January 2022 on the basis that the grounds of appeal did not raise a point of law or error and the First-tier Tribunal was entitled to conclude as it did on the facts and evidence before it.
16. The Claimant renewed his application to the Upper Tribunal, and the matter came before me. I was persuaded that the grounds put forward were arguable with a realistic prospect of success and that, if the First-tier Tribunal did err in the way suggested, such error could well have been material in the sense that the outcome might have been different. I gave permission to appeal and invited

submissions on the appeal and views on whether to hold an oral hearing of the substantive appeal.

Submissions

Claimant's submissions

17. Ms Turner, on behalf of the Claimant, says that there was evidence before the First-tier Tribunal indicating that, contrary to the Secretary of State's position that he only became aware of the Claimant's pension coming into payment on 14 August 2018, the "appropriate office" had been in possession of the relevant information about the Claimant's occupational pension being in payment before that date.
18. The evidence relied upon is the "RTI scan" that the Secretary of State received from HMRC, a printout from which was included in the appeal bundle.
19. Ms Turner submits that the date on which the "appropriate office" came to be in possession of the information is highly relevant because from the date on which the "appropriate office" had knowledge of the "material fact" of the Claimant receiving his pension, that information could no longer be "disclosed" to him, because "disclosure" implies that the information provided is not already known to the recipient. Ms Turner relies on the Upper Tribunal's decision in *LH v SSWP (RP)* [2017] UKUT 0249 (AAC).
20. Ms Turner submits that the First-tier Tribunal erred in law by failing to make a finding of fact as to when the "appropriate office" became aware of the Claimant's pension being put into payment, and failing to analyse the chain of causation between the Claimant's omission to notify the "appropriate office" of the start date for his pension and the making of the overpayment.

Secretary of State's submissions

21. Ms Tosta, on behalf of the Secretary of State, gave an explanation of the Department for Work and Pensions' internal administrative practices in relation to the information it receives from HMRC by way of the "RTI" scan:

> "In response to the appellant's argument that the DWP office knew about the pension before the 14/8/2018, the way the RTI scan works is that the compliance team input specific rules into the system i.e. earnings and the system compares the data held by HMRC to our data. A scan is then run from the system (the date that the scan is run is at the top of the page). In this case the date of the scan is the 14/8/2018 as can be seen at page 25 of the bundle. The scan doesn't become live for DWP (RTI doesn't become live) until a member of the team reviews and starts working on it, once they start working through the scan, the team member must investigate the earnings and income further as some income is classed as disregarded for entitlement purposes."

22. Ms Tosta maintains that the point at which the Secretary of State can be said to have knowledge of the relevant change in circumstances is not when it received the data feed from HMRC, but rather when a member of the team ran a scan and examined the data and reconciled it with the department's own data, and that this date was 14 August 2018. As such, the chain of causation from the Claimant's

failure to notify the change in his circumstances to the making of the overpayment by the Secretary of State was unbroken, and the overpayment was recoverable.

The statutory framework

23. I set out below the statutory framework relevant to the duty of a claimant to make notifications to the Secretary of State, and the circumstances in which an overpayment of benefit may be recoverable from a claimant. I do not set out any of the legislation relevant to entitlement to ESA(C), as entitlement is not in issue in this appeal.
24. Regulation 32 of the Social Security (Claims and Payments) Regulations 1987 (the **"Claims and Payments Regulations"**) sets out the duty to notify the Secretary of State of relevant changes of circumstances:

> "32.-(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 Secretary of State may determine such information or evidence as the Secretary of State 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 Secretary of State 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 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 Secretary of State 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 a case he requires written notice (unless he requires in any particular case to accept notice given otherwise than in writing."

25. By regulation 2(1) of the Claims and Payments Regulations, "'appropriate office" means an office of the Department for Work and Pensions...".
26. The Social Security Administration Act 1992 (the **"1992 Act"**) deals with the circumstances in which a payment of benefit may be recoverable from a claimant. Section 71 of the 1992 Act provides:

> "(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 -
>
> (a) a payment has been made in respect of a benefit to which this section applies; or
>
> (b) any sum recoverable by or on behalf of the Secretary of State in connexion with any such payment has not been recovered,
>
> the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose."

27. ESA(C) is a benefit covered by section 71.
28. The expression "failure to disclose" is not defined in the 1992 Act.

Was it an error of law for the First-tier Tribunal not to make a finding of fact as to the date when the Secretary of State first had knowledge that the Claimant's occupational pension was in payment?

29. The First-tier Tribunal made clear findings of fact that the Claimant did not inform the Secretary of State about the date when his occupational payment came into payment ("On the balance of probabilities, although [the Claimant] did disclose information, he did not crucially disclose the date the payment began", see paragraph 3 of the Decision Notice), and that he was informed that he needed to do so immediately he became aware of it. While there was a conflict of evidence on these two issues, the First-tier Tribunal's findings were clearly within the range of reasonable options open to it on the evidence, and it gave an adequate explanation of how it assessed the conflicting evidence and why it preferred the Secretary of State's evidence over the Claimant's (see paragraph [3] of the Decision Notice and paragraphs [18] and [19] of the Statement of Reasons).
30. The Claimant's case is that the First-tier Tribunal therefore had to make a finding as to when the Secretary of State came into possession of the information about the Claimant's pension coming into payment.
31. The First-tier Tribunal did not address, either in its Decision Notice or in its Statement of Reasons, the subject of the data sharing between HMRC and the Department for Work and Pensions. However, there was evidence before it that showed the existence of that arrangement. With that in mind, and reading the First-tier Tribunal's Decision Notice and Statement of Reasons together and as a whole, we must decide whether it is possible to ascertain what the First-tier Tribunal made of it.
32. The First-tier Tribunal made a finding of fact that:

    > "On 14/08/18, the respondent received information which indicated that [the Claimant] had started to receive his occupational pension from Nissan from 29/03/18" (see paragraph [7] of the Statement of Reasons).

33. It went on to decide:

    > "Having concluded that [the Claimant] was told to inform the respondent of the date the pension payment was put into payment, I find that he failed to report a change in circumstances (that is, that the pension was now in payment). For this reason the overpayment occurred and the respondent is entitled to recover the said overpayment. Further, it was a material fact which he had failed to disclose and as a result the payments were made when, as he accepts, there was no entitlement" (see paragraph [19] of the Statement of Reasons).

34. The First-tier Tribunal's reasons would certainly have been improved by an express finding as to the date when the relevant information first came to be known by the Secretary of State, but it is adequately clear from what the First-tier Tribunal says, and from what it doesn't say, that it didn't find that the existence of the information sharing arrangement between HMRC and the Department for Work and Pension meant that the Secretary of State had knowledge of everything in the data feed in "real time". Had it thought this, it would not have given the explanation that it did in paragraph [19] of the Statement of Reasons (quoted in paragraph [33] above) about the series of events that resulted in the overpayment being made. It is also adequately clear, albeit implicit, that the First-tier Tribunal

accepted the Secretary of State's case that he became aware of the Claimant's pension being put into payment only on 14 August 2018, and not before. Given that the First-tier Tribunal appears to have taken a careful and thorough approach to the appeals before it, it is unlikely that it would have overlooked the evidence about the data sharing. It is more likely that it was not persuaded that it had the significance which Ms Turner seeks to place on it.

35. The standard to which a tribunal's reasons are to be held is one of adequacy, and not of perfection. A tribunal is not obliged to record every argument put to it or to recite every piece of evidence. Its obligation is to explain, with adequate clarity, what decision it reached and why.
36. For these reasons I am not persuaded that the First-tier Tribunal's failure to make an express finding of fact as to the date on which the Secretary of State first had knowledge of the Claimant's occupational pension coming into payment amounted to an error of law, and I am not persuaded that the lack of express discussion of the HMRC data sharing arrangement rendered its reasons inadequate.

Did the First-tier Tribunal fail in its inquisitorial role by not seeking further evidence as to when the Secretary of State first became aware that the Claimant's pension had come into payment?

37. The Claimant's representative raises the question whether it was incumbent on the First-tier Tribunal, given its inquisitorial jurisdiction, to seek further evidence on when the Secretary of State first became aware of the Claimant's pension coming into payment. As I have said above, the First-tier Tribunal found as a fact that the Claimant did not inform the Secretary of State of his pension coming into payment. The only evidence before it which indicated that the Secretary of State might have received information from another source about the pension coming into payment was the printout of the information relating to the "RTI" feed. Given what I say in paragraphs [38] to [41] below about the "RTI" feed, I am not persuaded that the evidence that the Secretary of State had access to the feed required the First-tier Tribunal, in exercise of its inquisitorial jurisdiction, to seek further evidence on that matter. I am satisfied that it was entitled to make the findings that it did based on the evidence before it.

Given the evidence of the existence of information sharing by way of the "RTI" data feed, was it an error of law for the First-tier Tribunal not to fix the Secretary of State with knowledge of the commencement of the Claimant's pension?

38. Although the information sharing between HMRC and the Department for Work and Pensions is described as "RTI" or "real time information", that doesn't mean that the First-tier Tribunal was obliged to find that the Secretary of State had knowledge of the information shared with HMRC on a "real time" basis. Even if the information is transmitted electronically on a "real time" basis, when that information becomes "known" to the Secretary of State depends on how the systems work and how they are operated.
39. While it does not appear that the First-tier Tribunal had a great deal of evidence on these topics (the explanation summarised in paragraph 38 above having been provided in the Secretary of State's submissions on this appeal rather than the

appeal before the First-tier Tribunal), the fact remains that the Secretary of State reaches decisions on benefit matters through human decision makers, and not by having his computer system simply apply an algorithm to a data feed and "push" a decision outcome to a decision maker, or indeed a claimant. Information in the RTI data feed being *available* to the Secretary of State (or to a relevant officer at an appropriate office) is not the same thing as it being *known* to them. To be "known" the data must not be merely available, but must have been accessed and, to some degree, analysed, by a human being, who then decides what to do with the information so gleaned.

40. There was no evidence before the First-tier Tribunal to suggest that any scan of the RTI feed had been conducted at any time before 14 August 2018. As such, I am by no means persuaded that the First-tier Tribunal erred by failing to find that the Secretary of State had knowledge of the commencement of the Claimant's pension payments prior to that date.
41. Given all of this, the First-tier Tribunal was entitled to come to the conclusion that the Claimant remained under an obligation to disclose the commencement of his pension, but failed to do so.

Did the First-tier Tribunal err in its decision making on the issue of causation of the overpayment?

42. Judge Turnbull in *BD v SSWP* [2016] UKUT 0162 (AAC) provided the following helpful summary of the analyses of the position as regards causation in the reasoning of Judge Mark in *GJ v SSWP* [2010] UKUT 107 (AAC) and in *SSWP v SS (SPC)* [2013] UKUT 0272:

> "36. It seems to me that the outcome of that reasoning, which I broadly accept, is really that Section 71 in effect sets out a two-fold test for causation. First, it requires that the overpayment of benefit should have been made "in consequence of the misrepresentation or failure to disclose". Secondly, the Secretary of State is only entitled to recover the amount of any payments "which he would not have made ....but for the misrepresentation or failure to disclose."
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> 37. That second test, sometimes referred to in causation cases in other areas of the law as the "but for" test, raises a simple question of fact, namely whether, on a balance of probability, the overpayment would have been avoided if the correct disclosure had been made. The first, however, imposes a test, to be answered in a common sense way in the light of the all the relevant circumstances of the particular case, as to whether the chain of causation is broken. For the avoidance of doubt, the chain may be held to have been broken even though the "but for" test is satisfied. For example, a decision maker or tribunal may be satisfied that although a superseding decision would in fact have been made if proper disclosure had been made by the claimant, so that the overpayment would in fact have been avoided, it is nevertheless right, as a matter of common sense, to regard the cause of the overpayment as being only some cause (e.g. the Department's own carelessness) other than the claimant's original misrepresentation or non-disclosure.

> 38. The burden of establishing causation is on the Secretary of State, and he must therefore advance sufficient evidence to show that the two tests are satisfied."

43. In relation to the first test for causation, although it is clear that there may be more than one cause of the overpayment (*Duggan v Chief Adjudication Officer* reported as an annex to R(SB) 13/89), Upper Tribunal Judge Mark said the following in *SSWP v SS (SPC)* (cited above) at paragraphs [16] and [17]:

> "16. However, what is an effective cause is to be determined as a matter of common sense. Breaking the chain of causation does not mean that a situation must be arrived at where the original non-disclosure or misrepresentation was not in any way responsible for the overpayment. Even when the relevant office of the DWP has all the relevant information but fails to act promptly on it, and even where that information has been supplied late by the claimant, as a matter of strict logic the original breach of duty by the claimant remains a cause of the overpayment because had the duty been performed the overpayment would never have been made. Nevertheless, at least by that stage it is generally accepted that the failure of the DWP to act with reasonable speed breaks the chain of causation. What in my judgment is really meant by breaking the chain of causation applying the common sense required the authorities referred to by me in *GJ v Secretary of State* [2010] UKUT 107 (AAC) is that a situation has been reached where intervening factors mean that it would not be right as a matter of common sense, and in all the circumstances, to hold the claimant responsible for subsequent overpayments.
>
> 17. The answer to the factual question whether there has been a break in the chain of causation because of inaction thus depends on all the facts of the case…"

44. As Judge Mark observed in *GJ v SSWP* (cited above):

> "46. It is stated in the commentary to section 71 in Volume III of Social Security Legislation 2009/10, paragraph 1.99 that "if it can be shown that the inter-office communication system did operate (that is, there was actual rather than deemed knowledge) but was not then used to initiate any reviews, there would be a break in the chain of causation". *R(SB) 15/87, CIS/159/1990* and *CIS/7/1994* are cited in support of this proposition. It appears to me that it would be more accurate to state that in the circumstances there set out there *may* be a break in the chain of causation, particularly in the absence of any evidence to show the reasons for the inaction and how matters would have been different had the appropriate information been provided."

45. The First-tier Tribunal dealt with the issue but briefly in its Decision Notice: "… I find that [the Claimant] failed to discharge his duty to disclose and the

overpayments arising were caused by his failure. They are recoverable" (see paragraph [4] of the Decision Notice).

46. In the Statement of Reasons the First-tier Tribunal provided a brief summary of the parties' submissions on the issue of causation. The representative for the Secretary of State had said that the Secretary of State knew, by virtue of the disclosures made by the Claimant in the telephone conversation of 27 February 2018, that the Claimant was likely to start to receive payments under his occupational pension soon, but he didn't know when it would be paid and the disclosure that the Claimant would at some point soon start receiving payments under his pension did not relieve him of the obligation to inform the Secretary of State when the pension was put into payment.
47. The Claimant's case was that he couldn't have failed to "disclose" when his pension payments started because the Secretary of State already knew about them, or should have investigated the matter.
48. The division of labour that applies to the investigation of a claimant's entitlement to a social security benefit was explained by the House of Lords in *Kerr v Department for Social Development (Northern Ireland)* [2004] UKHL 23; [2004] 1 WLR 1372. Baroness Hale said (at [32]):

> "What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced."

49. In *Jeleniewicz v Secretary of State for Work and* Pensions [2008] EWCA CIF 1163, reported as an appendix to *R (IS) 3/09*, Mummery LJ held (at [30]) that this same division of labour applied to determinations of whether conditions to entitlement have ceased to be satisfied (as was the case here):

> "As Baroness Hale observed in Kerr (see above) at [62] the claimant is the person who, generally speaking, can and must supply the information needed to determine whether the conditions of entitlement have been met. A similar point was made by Lord Hope in his speak (at [16]) when he said that facts which may be reasonably within the claimant's knowledge are for the claimant to supply at each stage of the inquiry. In my judgment, this is as true in determining whether the conditions of entitlement have ceased to be satisfied as it is when determining whether the conditions have been satisfied."

50. The First-tier Tribunal found as a fact that the Claimant was told that he needed to notify the Secretary of State when he started receiving his pension, and the First-tier Tribunal did not find that the Secretary of State had knowledge of the pension coming into payment prior to 12 August 2018. On this basis I am not persuaded that the Claimant was, prior to the Secretary of State gaining actual knowledge of the payments on 12 August 2018, relieved of his obligation to notify the Secretary of State of the commencement of the payments, or that the Secretary of State

came under a duty to investigate all sources of information to which he had access (including the "RTI" data) to ascertain whether payments had started.

Decision

51. When I considered whether to grant permission to appeal I had to be satisfied only that it was arguable with a realistic prospect of success that the First-tier Tribunal might have erred materially in law. At this stage the bar is higher: for the appeal to succeed I must be satisfied that it did err materially in law.
52. For the reasons I have explained, I am satisfied that the First-tier Tribunal's decisions involved no material error of law, and they should be confirmed. I therefore dismiss these appeals.

Thomas Church
Judge of the Upper Tribunal

Authorised for issue on **28 March 2023**