IN THE UPPER TRIBUNAL **Case No.** CPC/1675/2015
ADMINISTRATIVE APPEALS CHAMBER

1. This is an appeal by the Claimant, brought with my permission, against a decision of a First-tier Tribunal sitting at Chesterfield on 26 January 2015. For the reasons referred to below that decision was in my judgment wrong in law and I set it aside. In exercise of the power contained in s.12 of the Tribunals, Courts and Enforcement Act 2007 I make the findings of fact set out below and re-make the First-tier Tribunal's decision as follows:

> **The Claimant's appeal against the Secretary of State's decision made on 26 March 2014 is allowed, but to the extent only that, of the sum of £2896.73 overpaid to the Claimant by way of state pension credit, the sum of £2741.72 is recoverable from him .**

2. The Claimant is a man now aged 77, who, according to the Secretary of State's written submission to the First-tier Tribunal, has been in receipt of state pension credit with effect from 16 June 2008.

3. It appears that the Claimant may first have been awarded attendance allowance from 21 November 2011 (see para. 3 of the Secretary of State's submission to the First-tier Tribunal).

4. The somewhat scanty information in evidence shows that by at any rate June 2013 (see p.33) the Claimant's wife, who is about the same age as he is, was in receipt of the highest rate of the care component and the higher rate of the mobility component of disability living allowance. (I infer that she must have been in receipt of DLA from before her 65th birthday, as otherwise her award would have been of AA, rather than DLA, and she would therefore not have been entitled to any mobility element).

5. By at any rate June 2013 the Claimant was claiming SPC in respect of both himself and his wife, and the calculation of their weekly "applicable amount" for guarantee credit purposes comprised the couples' personal allowance of £222.05, the severe disability premium (couple's rate) of £119.00, the carer premium of £33.30, and net weekly housing costs (in respect of interest on their mortgage) of £15.75, totalling £423.40 per week. (See p.33). Their income (disregarding AA and DLA) totalled £319.37 per week.

6. It would appear, from what is before me, that it would not have been until the Claimant's award of AA from November 2011 that they became entitled to the severe disability premium, although if that was the case I am not sure why they were entitled to guarantee credit at all before that date.

7. It appears that the Claimant's award of AA may have been for a 2 year period ending on 20 November 2013. But it further appears (p.29) that on 13 August 2013 a decision was made superseding and removing the attendance allowance award with

effect from that date until 20 November 2013, on the ground that it was considered that the Claimant no longer fulfilled the conditions of entitlement. (p.16).

8. The information which has been put before me in this appeal, in a helpful submission by Mr Wayne Spencer on behalf of the Secretary of State, is that when the Claimant's AA award was terminated the disability living allowance computer system would have sent details of that termination to something called the New Tax Credit Gateway. I think it right then to set out the following part of para. 11 of Mr Spencer's submission:

> "Information that is transmitted through the Gateway enters a computer system called the Customer Information System. This holds basic identifying information for all individuals who have a National Insurance number and details of the benefits they have received over the last two or three years. The other benefit computer systems draw information from the Customer Information System. In particular, at the end of every day, the state pension credit computer system identifies all changes in the Customer Information System that relate to persons who are or have been receiving state pension credit. It also detects various discrepancies between the information held on the state pension credit computer system and the information recorded on other benefit systems. Overnight, the state pension credit computer system passes details of the changes and discrepancies it has found to the pension offices that are responsible for the claimants in question. In the first instance, it does this by way of a 'RIS30715' report. This is a paper report that is printed out at each pension office every morning. It lists all of the office's cases that have been picked up by grouping them into six categories. For example, section 1 of the report lists the cases on which a decision is required because of a change to a DLA/AA/PIP award, while section 2 lists the cases on which a decision is required because a DLA/AA/PIP award is reaching its end. In certain instances, new information may also be downloaded into a claimant's state pension credit records. However, no state pension credit decisions are made automatically by this process. A decision maker is always required to open the claimant's records and make an outcome decision. Moreover, no information is downloaded into a claimant's records when an award of AA is terminated. Instead, the RIS30715 report records that the award has been "disallowed". Internal Departmental guidance instructs decision makers to check the nature of the disallowance with the Attendance Allowance Unit and "ensure all extra amounts for severe disability and payments are adjusted accordingly to prevent overpayments occurring". If no decision is made, the case reappears on the RIS30715 on each of the next seven working days. After that, the system gives up."

9. I should perhaps say, however, that Mr Spencer prefaced his explanation with the following:

> "Unfortunately, it seems there is no single Departmental information technology expert who knows about the whole of the relevant process, and no single Departmental guide that provides comprehensive information about it. However, having spoken to a number of experts, and consulted several sets of guidance published on the Department's intranet site, I can offer the following summary. If the Judge considers this insufficient, I should be grateful if he would issue directions as to the evidence he requires."

10. When the Claimant's award of AA ceased, on 13 August 2013, the effect was that he ceased to be entitled, in the calculation of his "applicable amount" for

guarantee credit purposes, to either the couple's or the single person's amount in respect of the severe disability element. That meant that he ceased to be entitled to guarantee credit. However, no action was taken by the relevant office of the Pension Service pursuant to the notification which it would or ought to have received, by way of an RIS30715 report, that the Claimant's AA award had terminated.

11. The Secretary of State's submission to the First-tier Tribunal stated:

> "On 24 February 2014 the decision maker at the appropriate office that paid state pension credit first became aware of the fact that a change of circumstances had occurred following a telephone call made by him where he confirmed that his Attendance Allowance had ceased."
>
> On 26 February 2014 a decision maker reassessed his state pension credit to take into account the fact that his attendance allowance (a qualifying benefit for an Extra Amount for Severe Disability an element of State Pension Credit) had ceased with effect from 13 August 2013."

12. That submission might suggest that the Claimant belatedly telephoned the Pension Service on 24 February 2014 simply in order to notify the ending of the AA award in August 2013. However, it appears that the position as regards notification is somewhat more complicated than that. The position has been clarified somewhat by two further submissions from Mr Spencer, made pursuant to my Directions. I find the relevant facts to be as follows.

13. According to the Claimant he telephoned the Pension Service in January 2014 in order to tell them that he had moved house and no longer had a mortgage. That meant that he was no longer entitled to the £15.75 housing costs in respect of mortgage interest (see para. 5 above). In the Claimant's words in a letter dated 23 October 2014 (p.58):

> "I really thought that Pension Credit and Attendance Allowance were 2 benefits dealt with by 2 different departments, and if one was cancelled then the other would still continue, until this was explained and made clear only recently.
>
> It was only when I rang Pension Credit in January 2014 to inform them that I didn't think that we qualified any more for Housing Benefit (due to just having moved house and being able to pay off our mortgage) that all this came to light. It was only when they told me that I should have notified them last August that my Attendance Allowance had stopped. (If they knew this already, then why the need for me to inform them also? I don't understand). When I had stopped receiving Attendance Allowance in August 2013, I didn't think to inform Pension Credit as (I have mentioned before) I thought they were 2 separate issues, nothing to do with each other."

(It is clear that in referring to 'Housing Benefit' he is referring to the housing costs element in the applicable amount for guarantee credit, not to housing benefit properly so called).

14. In fact, it appears, and on the basis of what is stated at p.230 I so find, that the first communication from the Claimant to the Pension Service was not a

telephone conversation in January 2014 but a letter received on 27 January 2014 notifying them of his change of address. Then on 17 February 2014 the Claimant and his wife telephoned the Pension Service and notified them that he had paid his mortgage off (p.230).

15. On 17 February 2014 a decision was made superseding the award of state pension credit with effect from 13 January 2014 in order (i) to remove the housing costs element of £15.75 per week, owing to the fact that the mortgage had been paid off and (ii) to reduce the severe disability premium from the couple's rate to the single person's rate, an additional reduction of £59.50 per week. The effect of that decision was to reduce state pension credit entitlement from £126.92 per week to £51.67 per week, with effect from 13 January 2014. The reduction to the single person's rate of the severe disability premium, rather than the complete removal of that premium, was on any view wrong, as the cessation of the Claimant's award of AA, which can have been the only reason for it, should have resulted in the complete removal of the severe disability premium.

16. The only possible source, on 17 February 2014, of the Pension Office's apparent knowledge that AA had terminated can have been the information available via RIS 30715 reports. The AA Unit has confirmed (p.233) that it did not inform the Pension Service that AA had ceased, and there was no mention in telephone conversations of AA having ceased until 24 February 2014 (p.230).

17. On 26 February 2014 a further supersession decision was made, in effect replacing that of 17 February 2014, which (i) removed the housing costs element with effect from 13 January 2014 and (ii) entirely removed entitlement to severe disability premium with effect from 18 August 2013. It was not until this decision, therefore, that the entire element of severe disability premium was removed, and with effect from the correct date. On 26 March 2014 a further decision was made that the sum of £2896.73 in respect of pension credit had been overpaid in respect of the period 19 August 2013 to 2 March 2014, of which £2845.06 was recoverable from the Claimant on the ground that he had failed to disclose that his AA entitlement had ceased (p.26).

18. The Claimant does not dispute the decision of 26 February 2014 superseding his pension credit entitlement with effect from 18 August 2013, but appealed against the decision that the overpayment was recoverable. His grounds of appeal were essentially (i) that he had not appreciated that there was a link between the award of AA and entitlement to pension credit and (ii) that in any event the DWP should have notified the Pension Service that AA had ceased. He said that he had not claimed the severe disability element – it had been awarded "automatically" – and therefore it should have been removed automatically as well.

19. The First-tier Tribunal, following an oral hearing of the appeal at which the Claimant appeared and was represented by a representative from the CAB, and the Secretary of State was represented by a Presenting Officer, dismissed the appeal.

20. At the hearing before the First-tier Tribunal on 26 January 2015 the Caimant's representative produced a copy of a letter dated 22 October 2014 from the DWP to a

welfare rights officer in Truro, which was a response to a freedom of information request for information as to "what internal processes are in place to communicate across DWP paying benefits if entitlement to DLA has ended." The information set out in that letter is less detailed, in relation to information going to state pension credit offices, than that which has since been provided by Mr Spencer in his submission, and I shall therefore not set it out.

21. The Secretary of State's representative at the hearing was obviously in the difficult position of having to try to deal with that information on the spot. Para. 10 of the First-tier Tribunal's Statement of Reasons stated the following:

> "The Presenting Officer said the Pension Service did not know of the change of circumstances despite the interface. She said it worked like this; the Pension Service did random scans, they do not sweep the data every day. She went further and said she did not believe there was a direct exchange of data between the Pension Service and DLA. More generally she said that the two departments were separate offices and one office did not know everything the other office was doing. She relied on **Hinchy**."

22. The kernel of the First-tier Tribunal's reasoning is in paras. 12 and 13 of its reasons:

> "12. In this case I heard evidence from the Department about data sweeps. The evidence being that the interface, such as it is, does not mean that the Pension Service will automatically know what it has been sent from DLA "over" the interface. It only knows if a sweep has been made and that information has been picked up. I do not think in those circumstances that (and here I follow **Hinchy**) a claimant can make assumptions about the existence of infallible channels of communication between one office and another. The duty of the appellant is to comply with the "simple instruction in the leaflet INF4 and report any changes of circumstances."
>
> 13. I am fortified in reaching this conclusion by the case of **SSWP v SS (SPC) [2013] UKUT 272:** whether and when a chain of causation is broken is a question of fact but a failure to respond immediately to information arising from a generalised matching service scan will not necessarily result in a breach of the chain of causation. All the more so in a case like this where I cannot find that the chain of causation has been broken when I have no evidence before me that a sweep of the data has been undertaken by the Pension Service and details of [the Claimant's] AA having stopped has been picked up. In the absence of evidence that there was actual knowledge in the relevant office, actual knowledge which should have been acted upon I am unable to find that the overpayment has been caused by the Pension Service."

23. Mr Spencer's submission in this appeal submits as follows:

> "12. The RIS30715 reports from the time when the claimant's attendance allowance was terminated have not survived. There is also nothing in the claimant's attendance allowance records that sheds light on whether the attendance allowance computer system actually transmitted details of the termination to the Gateway. It seems reasonable to make a presumption of regularity and assume that what should have happened did in fact happen, and thus proceed on the basis that (starting with

> the day after the attendance allowance decision was made) the claimant's pension office received eight consecutive daily RIS30715 reports that included a notification that the claimant's attendance allowance had been "disallowed."
>
> 13. In my submission, it is clear that the tribunal was not provided with a full and accurate picture of the relevant computer processes, with the result that its findings of fact about these are inaccurate (see page 71 at para. 12). In general, the Upper Tribunal cannot disturb a First-tier Tribunal's findings of fact. However, I submit that in this instance the tribunal has inadvertently made a mistake as to uncontroverted facts in the circumstances identified in *E and R v Secretary of State for the Home Department* [2004] EWCA Civ 49 as giving rise to an error of law (see CDLA/3057/2014 at paras. 11-14, and CG/2780/2012 at para. 24)."

24. I would agree with that submission. It is clear that the First-tier Tribunal was misled (wholly unintentionally, I am sure) by what the Presenting Officer said at the hearing, and did not have a proper understanding of how the computer interface works.

25. Mr Spencer goes on to submit, however, that it was not a material error of law because the outcome would have been the same even on a proper understanding of the process. However, in my view it would be unsatisfactory to leave on foot a decision which has been arrived at on the basis of a potentially important misunderstanding as to the information which was in the relevant Pension Service office, in the form of the RIS30715 reports. In my judgment the First-tier Tribunal's decision must be set aside as wrong in law on that ground.

26. In my observations at the time of giving procedural directions in this appeal, I stated my provisional view that, if the First-tier Tribunal's decision fell to be set aside, it would be appropriate, rather than remitting the case for redetermination by a fresh First-tier Tribunal, for the Upper Tribunal to remake the First-tier Tribunal's decision. I remain of that view, and in the preceding paragraphs of this decision I have already made some of the necessary findings of fact.

27. Section 71(1) of the Social Security Administration Act 1992 provides as follows:

> "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) ……
>
> 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 not have received but for the misrepresentation of failure to disclose."

Failure to disclose

28. The Secretary of State's uncontroverted evidence to the First-tier Tribunal was that the Claimant was issued on numerous occasions with booklet INF4(PC), of which the version published in April 2009 was in evidence. This included, under the heading "Changes you must tell us about", the following:

> "**Benefits, allowances or tax credits**
> Tell us if you or your partner start to get any social security benefits, allowances or tax credits.
>
> If you or your partner are already getting any of these, you must tell us if there are any changes to them.
>
> Please tell us if anyone caring for you is awarded Carer's Allowance."

29. A sentence in bold earlier in the booklet says: **"If you are not sure if you have to tell us about a change, tell us anyway."**

30. As to the method of notification to be adopted, the booklet says:

> **"How to tell us about changes**
> You can tell us about a change of circumstances for you or your partner
> - by phone
> - by filling in a Pension Credit reply slip, if you have one
> - by writing to us
>
> Our phone number and address are at the top of the letter that we sent you with this booklet."

31. In his original grounds of appeal against the First-tier Tribunal's decision (pp. 72-3), the Claimant said

> "In April 2011, I was granted Pension Credit WITHOUT Attendance Allowance, but this CONTRADICTS what the DWP say, i.e. "you can't have one without the other". Therefore when my Attendance Allowance I was receiving at the time ceased to be paid on 13 August 2013, I was naturally under the impression that the department who stopped it would be aware that they had done so, so why would I need to inform them?
>
> Also, having been granted one WITHOUT the other, I thought this would not affect my Pension Credit, so I did not think it had to be reported. I read the instructions as meaning "to report any additional income from any other source", certainly not "to report any stoppage of payments" as one would expect them to know when they had stopped any payments due to expecting the information to be recorded on file, or by a central computer for all departments to see.
>
> At the time I wasn't aware I had done anything wrong, but on reflection I realise the instructions and wording on the DWP leaflet is the cause of this oversight as it is so ambiguous, and certainly the meaning is not clear to the general public."

In his UT1 Form he added:

> "The SWP do know what we receive as they send us letters to say when any adjustments are made to the benefits, but then on the other hand they appear not to know when they have stopped a payment!! It doesn't make sense and needs an urgent review to simplify and make clearer the rules so we can understand them."

32. However, the statement in the booklet that "if you or your partner are already getting any of these [i.e. benefits, allowances etc], you must tell us if there are any changes to them" is clear, and (leaving to one side for the moment the Claimant's contention that he believed that the Service would already know about the cessation of AA) clearly did require the Claimant to notify the Pension Service of the cessation of an award of benefit. As Mr Spencer rightly submits, on the face of it that gave rise to an obligation to do so under reg. 32(1A) of the Social Security (Claims and Payments) Regulations 1987, and therefore resulted in a "failure to disclose" for the purposes of s.71.

33. As Mr Spencer further submits, however, it has been held that there will not be a failure to "disclose" if the claimant knows that there is no point in telling the authority about the relevant fact because he knows that the authority is already aware of it. I refer, in particular, to the reasoning of Upper Tribunal Judge Mark in *GJ v SSWP (IS)* [2010] UKUT 107 (AAC) at paras. 18 to 26.

34. As noted above, the Claimant has contended that he assumed that there was no need to tell the Pension Service about the cessation of AA because he assumed that they would already know about it. The Claimant suggests that he was in receipt of pension credit before his award of AA, which appears to be correct, although no details of the calculation of awards prior to June 2013 are in the papers. I would assume that, in the absence of entitlement to the severe disability premium prior to the award of AA, he was entitled only to savings credit, and not to guarantee credit (see the figures on p.22). It may well be, as the Claimant may be suggesting, that when AA was awarded his award of pension credit was reviewed without him having to notify the Pension Service of the award. However, even if all that was the case, the Claimant cannot in my judgment assert that he knew, with a sufficient degree of certainty, that the Pension Service would be made aware of the cessation of AA. The most that he can say is that he assumed that the Pension Service was aware of that, but that is not in my judgment sufficient to enable him to say that there was no failure to disclose for the purpose of s.71.

Causation

35. Mr Spencer has referred me to the helpful analyses of the position as regards causation in the reasoning of Judge Mark in *GJ v SSWP* (cited above) and in *SSWP v SS (SPC)* [2013] UKUT 0272 (AAC).

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."

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.

39. There is no evidence in the present case as to whether the computer system in the Pension Service office did as it was supposed to do and issued the RIS30715 reports. However, Mr Spencer accepts, in my judgment rightly, that in the absence of evidence I should assume that it did and that "the claimant's pension office received eight consecutive daily RIS30715 reports that included a notification that the claimant's attendance allowance had been disallowed."

40. Mr Spencer goes on to submit as follows:

> "In my submission, as a matter of common sense, the claimant's failure to disclose in the case now at hand remained an effective cause of the overpayment throughout the period in issue. The Secretary of State appears to have neglected a series of RIS30715 reports about the termination of the claimant's attendance allowance. In my submission, the most likely explanation for this was that the pension office that received the reports was at that time unable to cope with the volume of reports being produced by the computer interface. In such circumstances, offices in effect chose to give priority to other notifications, such as those received directly from claimants. For this reason, a notification by the claimant himself would in all probability not have met the same fate as the RIS30715 reports and would have either prevented the overpayment from arising at all or quickly brought it to an end. However, despite clear instructions to contact the office, the claimant failed to do so. In effect, the claimant chose to disregard the clear implications of the simple instructions he had been given in favour of his own understanding of what it was appropriate for him to do and what would happen within the Department. He should not have done so. As Lord Hoffmann said in *Hinchy v SSWP*:
>
> > "It is not for the claimant to form views about what may go on behind the scenes in the Social Security or other benefit offices. His duty is to comply with the instruction in the order book."
>
> The claimant's failure to take this course led directly to the overpayment, and is, I submit, straightforwardly responsible for it. Needless to say, the claimant is not *solely* responsible for the overpayment, the Department's neglect of the RIS30715 reports having played its part. However, as the Court of Session noted in *Riches v*

> *Secretary of State for Social Security* [1994] S.C 24 at 32G, it is not enough to show that the Department, "through inefficiency, negligence, or other fault had contributed to the overpayment. It would have to be shown that D.S.S. were *wholly* to blame for the overpayment: R(SB) 13/89" (my emphasis). In my submission, that cannot be shown here, for at no point was the claimant completely blameless. See also CG/662/1998 at para. 16 and CIB/735/2011 at para. 30. The overpayment, in my submission, is properly recoverable from him."

41. As regards the "but for" test, I have to be satisfied, on a balance of probability, the burden being on the Secretary of State, that even though the Pension Service neglected (as I have found) until 17 February 2014 to act on the RIS30715 reports, it would have acted if the Claimant had written or telephoned to notify them of the cessation of AA. I find that it is probable that if the Claimant had specifically notified the Pension Service, shortly after 13 August 2013, that his AA award had terminated, the Pension Service would at that stage have looked into the position and removed the SDP element completely. In my view it is reasonable to make that finding on the basis of what in fact happened in February and March 2014. In my judgment the fact that the Pension Service neglected to act on the RIS30715 reports does not indicate on a balance of probability that, had there been a specific notification by the Claimant that his AA had terminated, that notification would have been disregarded, although I accept that it is possible that it might. In my judgment the Secretary of State has therefore established that the "but for" test was satisfied.

42. As regards the first test for causation (see para. 36 above), the question is whether, as a matter of common sense, the Pension Office's failure to act on the RIS30715 reports broke the chain of causation. As Upper Tribunal Judge Mark said in *SSWP v SS (SPC)* (cited above) at para. 16:

> "What in my judgment is really meant by breaking the chain of causation applying the common sense required by the authorities referred to be me in *GJ v* SSWP 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 overpayments."

43. As a matter of common sense, was the Pension Service's failure to act on the RIS30715 reports the only cause of the continuing payment of state pension credit after 13 August 2013, or was there an additional cause, namely the Claimant's failure to notify the Pension Service that his AA had terminated? If the Claimant's failure to disclose is properly regarded as a contributing cause, then the chain of causation is not broken: *Duggan v Chief Adjudication Officer* R(SB) 13/89. In my judgment it would not be right to hold that the Pension Service's failure broke the chain of causation. I would accept that the reason for that failure is likely to have been the lack of a sufficient number of staff to follow up and act on all the RIS30715 reports. But I do not see why the Claimant's failure to perform his statutory duty to notify the cessation of AA should not be held to have remained *a* cause of the continuing overpayment of state pension credit. The only minor qualification to that is that, having regard to my findings of fact in paras. 14 to 16 above, it seems to me right to regard the chain of causation as having been broken on 17 February 2014, when the Pension Service made its first supersession decision and (incorrectly) reduced the severe disability premium to the single person's rate, rather

than removing it altogether. I therefore find that the last 3 payments of state pension credit, of £51.67 each (see p.26) are not recoverable. That reduces the recoverable amount from £2845.06 to £2741.72.

44. My decision is set out in paragraph 1 above, accordingly.

Charles Turnbull
Judge of the Upper Tribunal
4 April 2016