IN THE UPPER TRIBUNAL **Appeal Nos: CJSA/3093/2014**
CJSA/3094/2014

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeals of the appellant.

The decisions of the First-tier Tribunal sitting at Watford on 29 October 2013 under references SC028/13/01582 and SC028/13/01583 both involved an error on a material point of law and are set aside.

The Upper Tribunal gives the decisions the First-tier Tribunal ought to have given. On the first appeal, against the Secretary of State's decision of 8 March 2013, the decision is that jobseeker's allowance remains payable to the appellant for the periods from 22 February 2013 to 21 March 2013 (both dates included). On the second appeal, against the Secretary of State's decision of 22 March 2013, the decision is that jobseeker's allowance is not payable for the four week period from 8 March 2013 to 5 April 2013.

These decisions are made under section 12(1), 12 (2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

Representation: The appellant represented himself.

Ms Zoë Leventhal, instructed by the Government Legal Service, represented the Secretary of State for Work and Pensions

REASONS FOR DECISIONS

1. These two appeals concern the sanctions that may be applied to claimants of jobseeker's allowance (sometimes referred to hereafter as "JSA") for failure, without good reason, to participate in what is termed the 'Work Programme' in cases that span (the first appeal), or are otherwise affected by (the second appeal) the Jobseeker's Allowance (Employment, Skills and Enterprise Schemes) Regulations 2011 ("the 2011 Regs") being declared *ultra vires* by the Court of Appeal on 12 February 2013 and the Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013 (the "2013 Regulations") coming into effect at 6.45pm on 12 February 2013.

2. The background to the appeals is the litigation that ended with the Supreme Court's decision in *R(Reilly and Wilson) –v- Secretary of State for Work and Pensions* [2013] UKSC 68; [2014] AC 453 ("*Reilly and Wilson*"). That litigation concerned the lawfulness of programmes under the Employment, Skills and Enterprise Scheme, or "work for your benefit schemes", that applied to people claiming jobseeker's allowance ("JSA"). Regulations purportedly made under section 17A of the Jobseekers Act 1995 – the 2011 Regs – provided, inter alia, by regulation 4 that where a JSA claimant had been selected to participate in one of the schemes he had to be provided with a notice specifying certain matters. If a claimant without good cause did not participate in a scheme he had lawfully been required to participate in, JSA would not be payable to him (i.e. would be sanctioned) for a period of time of 2, 4 or 26 weeks.

3. The High Court held in *Reilly and Wilson* that the standard form notices used by the Secretary of State did not comply with the requirements of regulation 4 and were invalid. As a result there was no lawful basis for the sanctions imposed on Ms Reilly and Mr Wilson (they not having lawfully been required to participate in any schemes).

On appeal, the Court of Appeal went further and on 12 February 2013 held that the whole of the 2011 Regs were *ultra vires* the Jobseekers Act 1995; that is, they had not been properly made under section 17A of that Act. The Supreme Court in *Reilly and Wilson*, in effect, upheld the Court of Appeal's decision on the 2011 Regs being *ultra vires*.

4. However, and most importantly for these two appeals, on the day of the Court of Appeal's judgment the 2013 Regs had replaced the 2011 Regs. The 2013 Regs came into effect at 6.45pm on the day of the Court of Appeal's judgment (see regulation 1 of the 2013 Regulations). The 2013 Regulations are prospective in their effect only.

5. Subsequent to this Parliament passed the Jobseekers (Back to Work Schemes) Act 2013 (the "2013 Act"). This was passed and came into force on 26 March 2013. It is under the 2013 Act that Parliament has sought to address the Court of Appeal's judgment retrospectively. For reasons which I explain below, the 2013 Act has no bearing on either of these two appeals. Indeed the *Reilly and Wilson* litigation only has one, tangential (albeit important) effect on these appeals. This concerns the first appeal and is because the notice requiring him to attend appointment on the Work Programme under the 2011 Regs, and which it was said the appellant had failed to comply with, was issued to him on 12 February 2013.

6. The appellant had six appeals heard and decided by the First-tier Tribunal on 29 October 2013 ("the tribunal"). He was unsuccessful in all six appeals before the tribunal. On 4 September 2014 I refused him permission to appeal to the Upper Tribunal from four of the decisions made by the tribunal on 29 October 2013. I did so as I was satisfied that none of those four decisions gave rise to any issues arising from *Reilly and Wilson*, the 2013 Act or the 2011 Regs. This was because in three of the cases the decisions were plainly made under the 2013 Regs and so had nothing to do with the *vires* challenges in *Reilly and Wilson* and the reach of the 2013 Act, and in the other case the decision was

about not actively seeking work and so equally had nothing to do with the 2011 Regs. My detailed reasons for refusing permission to appeal were as follows. (I set these out only to provide context, and contrast, to the two appeals I am here deciding.)

> *"CJSA/2942/2014*
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> The issue on this appeal was whether [the appellant] was actively seeking work in the two week period from 26 April 2013 to 9 May 2013. The legal test is uncomplicated. What had to be considered was what steps [the appellant] had taken to find work in that two week period and whether in the judgment of the tribunal those steps amounted to [the appellant] actively seeking work. In the light of the evidence before it, in my judgment the First-tier Tribunal was entitled to make the findings which it did on the evidence before it, its conclusions are sustainable, and it has explained adequately, why the appeal did not succeed. Permission to appeal is therefore refused because it is not arguable with a realistic prospect of success that the First-tier Tribunal erred materially in law in its decision.
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> The statement of reasons shows clearly that the First-tier Tribunal took account of all relevant evidence including that put forward by [the appellant]. It specifically dealt with the email evidence from St Catherine's Care Home, which it rightly noted in any event was but one instance of work seeking. Moreover, the tribunal has explained adequately why it did not find credible [the appellant's] list of jobs he had allegedly applied for in the relevant period (especially given his background as someone who had once worked for the then Benefits Agency). It was the tribunal's task to assess the evidence and [the appellant's] credibility, and I can find no legal error in the way it did this.
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> Given the relatively simple task the tribunal had to carry out and the fact that [the appellant] had a hearing and was able to put his case to the tribunal, I can find no merit in his extensive grounds of appeal alleging breach of Article 6 of the ECHR, breach of the Equality Act 2010 and his lack of an effective remedy. The fact that [the appellant] obtained a remedy he does not like does not render it ineffective. Likewise, losing an appeal does not of itself show bias on the part of the tribunal (if that were the case then no appeal could ever be properly decided as the losing party would always have been subject to a biased decision), and there is nothing else to get close to suggesting Judge Ward was motivated by actual bias against [the appellant] when she decided this appeal.
> *CJSA/3098/2014*
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> This application concerns a sanction placed on the payment of JSA to [the appellant] for the period from 21 June 2013 to 19 September 2013 because he had failed without good reason to take part in the work programme having been notified to do so on 22 April 2013. This last date is important as it falls after the [2013 Regs] came into effect, which was on 12 February 2013. *Reilly and Wilson* and whether the 2013 Act properly acts to validate notices made under the 2011 Regs

> are irrelevant. Many of [the appellant's] grounds in this case (and the other two below) fail to grasp this important point of distinction.
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> [The appellant] did not dispute that he had not participated in the work programme he had been notified to attend under the 22 April 2013 notice. His argument was that he had good reason(s) for not attending. However, that was classically a judgment for the First-tier Tribunal to make on the facts, it having heard from [the appellant] on his reason for not attending, and that in my judgment is precisely what the tribunal has done here.
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> Nor can I find any proper basis for the allegation that the sanctions imposed were for a malign (i.e. improper) reason. The Secretary of State's submission at paragraph 24 on pages 1K to 1O provides a plausible and reasoned basis for [the appellant] having no good reason. Further and in any event it was for the independent First-tier Tribunal to decide if [the appellant] had a good reason, and it concluded he did not. The bias argument fails for the same reasons given in CJSA/2942/2014.
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> In the light of the evidence before it, in my judgment the First-tier Tribunal was entitled to make the findings which it did on the evidence before it, its conclusions are sustainable, and it has explained adequately, why the appeal did not succeed. Permission to appeal is therefore refused because it is not arguable with a realistic prospect of success that the First-tier Tribunal erred materially in law in its decision.
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> *CJSA/3100/2014 and CJSA/3102/2014*
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> The exact same issues arise in these two applications as arises in CJSA/3098/2014 and permission to appeal is refused for the same reasons. In CJSA/3100/2014 the notification letter was sent to [the appellant] on 12 March 2o13....; in CJSA/3102/2014 it was sent on 9 April 2013..... Both dates are <u>after</u> the 2013 Regs had come into effect and I can find no legal error in the way in which those 2013 regulations were applied on the facts to [the appellant's] appeals."

For completeness, I refused to set aside these refusals of permission to appeal on 25 September 2014.

7. The appellant also has three other cases before the Upper Tribunal arising out of decisions which have found he failed to participate in the Work Programme with his jobseeker's allowance being sanctioned (i.e. made not payable) as a result. These have the Upper Tribunal (AAC) references CJSA/1399/2013, CJSA/1400/2013 and CJSA/1401/2013, and concern decisions made by the First-tier Tribunal on 15 January 2013 in respect of 'sanction' decisions made by the respondent in either

2011 or 2012 under the 2011 Regs. As a result of the on-going effects of the post *Reilly and Wilson* litigation, and in particular whether the 2013 Act is entirely retrospective (the appeal from Upper Tribunal's decisions which decided it was not – *SSWP –v- TJ and others* [2015] UKUT 56 (AAC) – remains to be decided by the Court of Appeal), the determination of these three applications for permission to appeal remains stayed.

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8. The Secretary of State concedes the first appeal. His reasons for so doing turn on the relevant notice having been issued on 12 February 2013. That was the day of the Court of Appeal's judgment quashing the 2011 Regs. It is accepted that that judgment had effect from the very first part of that day, just past midnight on 12 February 2013. As the 2013 Regs did not come into effect until 6.45pm on that day, the Secretary of State argues, in favour of the appellant, that the notice requiring the appellant to attend an appointment should not have been issued on 12 February 2013 (it being conceded that it had to have been issued during office hours on that day and so between 12.01am and 6.44pm). Why the notice ought not to have been issued was not explained initially. On prompting from myself – and in particular why the 2013 Act did not act to validate the 12 February 2013 notice as being valid under the 2011 Regs, as the respondent was arguing (and continues to argue) in *TJ* – the Secretary of State explained more fully the basis for his conceding the first appeal should be allowed. The reasoning was as follows (which I take from the Secretary of State's further submissions of 30 April 2015):

   (i) as at 00.01am on 12 February 2013, in the absence of any valid regulations there was no legal basis for the Secretary of State or any of his mandated providers to require anyone to participate in the Work Programme;
   (ii) as a result, on 12 February 2013 the DWP contacted key providers immediately to inform them that as matters stood they

had no delegated authority to issue 'mandatory activity notices' (this includes the appointment letter issued to the appellant by *Reed in Partnership* on 12 February 2013);

(iii) this was confirmed in writing on 13 February 2013 when the DWP wrote to all Work Programme providers in the light of the Court of Appeal's judgment in *Reilly and Wilson* explaining in clear terms "providers ceased to have the authority to mandate participants to take part in activities" until the 2013 Regs came into force;

(iv) accordingly, having specifically withdrawn the authority by which providers issued mandatory activity notices for that day, the respondent did not seek to argue that as a matter of law the 2013 Act retrospectively provided both the *vires* and the relevant delegated authority for providers to issue mandatory activity notices on 12 February 2013, bearing in mind the need to act fairly. In short, the Secretary of State's position was that as at 12 February 2013 he had in fact revoked the authorisation in place for *Reed in Partnership* to issue the notice it did to the appellant on 12 February 2013 and the 2013 did not alter this fact.

9. I am content to adopt this concession and it forms the sole basis of my allowing this appeal. It is common ground that if there was no lawful basis for the appellant being issued with the 12 February 2013 notice, he cannot then have failed to meet any requirement of that notice and therefore no sanction could have been imposed under the first decision. In these circumstances, I need not say anything about any other grounds of appeal.

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10. The allowing of the first appeal has a knock-on effect on the second appeal, regardless of any other arguments that might arise in the second appeal. This is because if, as is now agreed and I have decided, no sanction was applicable on the first appeal, then the length of the sanction on the second appeal has to be reduced from thirteen weeks to

four weeks. This follows from the terms of regulation 69A(1) of the Jobseeker's Allowance Regulations 1996 and is not disputed.

11. This, however, is the only point on which I can find in the appellant's favour on the second appeal.

12. The mandatory activity notice in issue on the second appeal was issued to the appellant by *Reed in Partnership* on 4 March 2013. This required him to attend an appointment on 11 March 2013 at 9.30am. This was, of course, issued to the appellant after the 2013 Regs had come into effect. These provided materially as follows:

> "**Selection for participation in a Scheme**
> **4.**—(1) The Secretary of State may select a claimant for participation in a scheme described in regulation 3.
> (2) The scheme in which the claimant is selected to participate is referred to in these Regulations as "the Scheme".
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> **Requirement to participate and notification**
> **5.**—(1) Subject to regulation 6, a claimant selected under regulation 4 is required to participate in the Scheme where the Secretary of State gives the claimant a notice in writing complying with paragraph (2).
> (2) The notice must specify—
> (a) that the claimant is required to participate in the Scheme;
> (b) the day on which the claimant's participation will start;
> (c) details of what the claimant is required to do by way of participation in the Scheme;
> (d) that the requirement to participate in the Scheme will continue until the claimant is given notice by the Secretary of State that the claimant's participation is no longer required, or the claimant's award of jobseeker's allowance terminates, whichever is earlier; and
> (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 the claimant's participation starts must be notified to the claimant in writing.
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> **Contracting out certain functions**
> **17.**—(1) Any function of the Secretary of State specified in paragraph (2) may be exercised by, or by employees of, such person (if any) as may be authorised by the Secretary of State.
> (2) The functions are any function under—
> (a) regulation 5 (requirement to participate and notification); and
> (b) regulation 6(3)(a) (notice that requirement to participate ceases)."

The 'Work Programme' is one of the specified schemes described in regulation 3 of the 2013 Regs (at regulation 3(8)).

13. The 2013 Regs therefore require two conditions to be fulfilled before a claimant may be required to participate in the Work Programme such that their failure to participate may lead to a sanction on the JSA payable to them.

    (i) First, the claimant has to be selected to participate in the Work Programme: per regulation 4(1) of the 2013 Regs. This can only be done by the Secretary of State or his officials because the delegation provided for in regulation 17(2) of the 2013 Regs does not extend to regulation 4.

    (ii) Second, the claimant is given a notice conforming with regulation 5(2) of the 2013 Regs. This can be done either by the Secretary of State (or his officials) or a duly authorised external work provider: per regulation 17(2).

14. In order to comply with regulation 4(1) of the 2013 Regs, and to take account of the Court of Appeal's quashing of the 2011 Regs in *Reilly and Wilson*, the appellant, like a number of other claimants, was sent what the Secretary of State calls a 'curing letter' or WP05(C) by the jobcentre acting on the Secretary of State's behalf sometime between 13 and 17 February 2013. This was intended to replace the WP05 form issued to the appellant on or about 9 June 2011. (An example of a WP05 is given in the appendix to the Upper Tribunal's decision in *TJ*.). The WP05(C) was "taken to have been received" on 20 February 2013 under regulation 2(2) of the 2013 Regs. *Reed in Partnership* then issued him with the appointment letter on 4 March 2013.

15. The appellant has never raised any issue about receiving the original WP05, or more particularly the WP05(C) or the 4 March 2013 appointment letter. In answer to the jobcentre's letter of 12 March

2013 asking him for his reasons for not attending the appointment the previous day, he raised no issue about not having received the appointment letter or not having been referred onto the Work Programme. Given the appellant's history of challenging earlier such sanction decisions, had this been one of his grounds then it would reasonably have been expected that he would have raised it. In fact his reasons for not attending have consistently been expressed as reasons for *refusing* to attend, language which is not consistent with not being under notice of an obligation to attend.

16. At the hearing before me the appellant provided the Upper Tribunal and Ms Leventhal with a speaking note of his arguments on both appeals. It was in my judgment noteworthy that even though Ms Leventhal's argument for the Secretary of State as far back as 30 April 2015 had raised the issue of the appellant not contesting receipt of any of the above notices, the appellant in his speaking note took no point on this. It is fair to say that the appellant's written style is somewhat turgid and prone to legalese, refers quite often and sometimes randomly to other cases he is litigating, and on account can be difficult to follow. But even taking account of this, the speaking note raises no issue about receipt of any of the above notices. Indeed at one stage it appears to say the opposite with the appellant saying that under this appeal "improvised letters were sent to fewer Claimants to include [the appellant] all to pursue unlawful aim at all cost….".

17. The appellant did provide at the oral hearing before me a copy of a letter sent to him by the jobcentre on 9 November 2015 which referred to the jobcentre possibly not having given him notice of a sanction decision from 21 May 2012. This, however, is about a different decision to either of the decisions in these appeals; it is about a decision and not a notice requiring the appellant to participate in the scheme; and in any event the appellant relied on the letter as showing, he said, by way of linkage that the Secretary of State refused to notify him that he had been selected for the Work Programme and was acting through

improper motives in so doing. Even at this stage it is not alleged that notices were not received by the appellant.

18. Further, in his reply before me the appellant referred to his written arguments on pages 296-305 of CJSA/3093/2014. Those written arguments do address, and on a paragraph by paragraph basis, the Secretary of State's skeleton argument of 30 April 2015, but they are entirely silent in respect of the specific contention made about the appellant not having challenged receipt of the WP05, WP05(C) and 4 March 2013 appointment letter. Indeed all the appellant's reply written argument does refer to is the need for the Secretary of State to have kept copies of the WP05 and WP05(C) issued to the appellant, but in a context where no argument is made that he did not receive either of them. That to me is empty legal formalism.

19. The appellant further argued that even if he did not raise receipt of the WP05(C) before the tribunal, it was still a matter to be raised by the Upper Tribunal. I do not see why that is so, especially in a context where the very next argument the appellant made was that the WP05(C) was unlawful in any event and so he obviously did not need to respond to it.

20. I am also mindful that the tribunal in its statement of reasons stated that the appellant "does not dispute that he failed to participate in the Work Programme but argues that he had good reason for his failure to do so". That is consistent with the substance of the arguments the appellant has made. I have set aside the tribunal's decisions because in the light of the concession since made by the Secretary of State there was no lawful basis for the Secretary of State's decision in the first appeal (for the reasons given above) and therefore the decision on the second appeal was wrong as to the period of the sanction. Save for these setting aside grounds, for the reasons given below I do not consider the tribunal erred in law in the decision it came and I would not have given the appellant permission to appeal on any his grounds of appeal . In

that context, and for the reasons given in paragraphs 15-19 above, I proceed on the basis, and find if necessary on the balance of probabilities, that the appellant received the WP05, WP05(C) and the 4 March 2013 appointment letter.

21. As for the inter-relationship between the WP05, WP05(C) and the appointment letter, I accept the Secretary of State's arguments that they did provide the appellant with adequate notice under the 2013 Regs. No real argument was made to the contrary. The correct starting point for analysis of whether adequate notice was provided to the appellant is provided by the three-judge panel's decision in *TJ* (the following aspects of the decision in *TJ* are not under challenge in the further appeal to the Court of Appeal).

    (i) First the requirement for adequate notice may be satisfied by considering, here, the WP05(C) and the 4 March 2013 appointment letter together: see paragraphs 181-187 of *TJ*.

    (ii) 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*.

22. Applying these principles to the WP05(C) and the 4 March 2013 appointment letter, I can identify no material breach of the requirements of regulation 5(2) of the 2013 Regs.

23. I accept the Secretary of State's argument that the concerns I had raised in an earlier direction about the WP05(C) *revising* the earlier WP05 were misplaced. Ignoring the effect of the 2013 Act, the quashing of the whole of the 2011 Regs on the ground of *ultra vires* by the Court of Appeal meant that there were no regulations under which the Secretary of State could even select a claimant to participate in the Work Programme: section 17A of the Jobseekers Act 1995 requiring

regulations to be made to cover all the stages of requiring claimants to participate in the Work Programme. It was thus a tenable, if not the correct, view (and one which arguably informed the passing of the 2013 Act), that there had never been any legal basis for any decision made by the Secretary of State under the 2011 Regs to select jobseeker's allowance claimants for participation in the Work Programme; that is, the WP05 ceased to have any legal effect. Hence the need for the WP05(C).

24. I do not consider, however, that the WP05(C) needed to ignore the language used in the WP05. The language used in the Secretary of State's written appeal response to the tribunal (but not, notably, in the WP05(C)) was perhaps clumsy by using the words 'revised notices', but that is all it is.

25. I leave to one side, as it was not the subject of argument before me, whether the previous 'selection' decision under regulation 3 of the 2011 Regs and as evidenced by the WP05 was, or needed to be, revised under section 9 of the Social Security Act 1998 (SSA 1998). I merely observe that by section 8(1)(c) of the SSA 1998 it is for the Secretary of State to make any decision that falls to be made under or by virtue of a relevant enactment (which includes the Jobseekers Act 1995) and that any decision under section 8 may be revised subject to conditions as to time or specified grounds: per section 9 of the SSA 1998. The time for revising the 9 June 2011 'selection' decision on 'any ground' having elapsed, the most obvious specified grounds for revision – in regulation 3 the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (the "DMA Regs") – were (a) official error (per regulation 3(5)(a)), or (b) a decision that JSA was reduced in accordance with section 19A of the Jobseekers Act 1999 (regulation 3(6)). However, as to (a), 'official error' excludes any error of law which is shown to have been an error by a subsequent decision of a court (regulation 1(3) of the DMA Regs); and as to (b), the 'selection' decision of 9 June 2011 under regulation 3 of the 2011 did not of itself lead to

any reduction in JSA. There does not therefore appear to be any specified ground for a section 9 revision of the 9 June 2011 'selection' decision.

26. A partial answer to this particular issue may be that the mechanism for ending participation in the Work Programme was provided by regulation 5(2) of the 2011 Regs and is provided in regulation 6(3) of the 2013 Regs. That, however, does not deal with challenging the selection decision as the requirement to participate is separate from, though it follows on from, the selection decision. The basis upon which the selection decision under regulation 3 of the 2011 Regs could have been challenged under the statutory adjudicatory framework is thus unclear.

27. This would only be of any consequence, however, if it can reasonably be construed that, despite the Court of Appeal quashing of the 2011 Regs (including the regulation 3 selection power in those regulations), the Secretary of State continued to rely on his original selection decision of 9 June 2011 and had not given any consideration under regulation 4(1) of the 2013 Regs as to whether the appellant should be reselected. In my judgment that argument fails on the face of the WP05(C). I accept the Secretary of State's argument that properly construed the WP05(C) was a new or replacement notice informing claimants of the new legal powers under which they were *now* being required to participate in the Work Programme.

28. Some of the language used in the WP05(C) may, I accept, be read as evidencing merely a continuation of the previous selection decision. For example, it starts "[y]ou are currently participating in the Work Programme", which although possibly true as a matter of fact was wrong as a statement of law following the Court of Appeal's decision. However the WP05(C) continues:

> "[w]hen we first referred you to the Work Programme we gave/sent you a letter in which we told you about the requirement to participate……..I am now writing to inform you ……..that when you take part in the Work Programme, you are now taking part in a scheme established by law under the [2013 Regs]…." (my underlining added for emphasis).

The underlined words in particular support, in my judgment, the argument that this letter evidenced a fresh selection decision under the regulation 4(1) of the 2013 Regs, and no discernible argument was made to the contrary before me.

29. I revert then to the issue of the WP05(C) and the 4 March 2013 appointment letter together meeting in substance the notice requirements in regulation 5(2) of the 2013 Regs. I shall take each requirement in turn.

(i) Regulation 5(2)(a) - that the appellant is required to participate in the Work Programme. The wording in the WP05(C) quoted above continues by saying the requirements under the old WPo5 remain the same. It later sets out that the appellant must continue to take part in the Work Programme. The appointment letter then tells the appellant that his "attendance is mandatory" and had earlier referred to the consequences if he failed to attend or participate in the Work Programme. Taken together these statements in my judgment plainly gave the appellant the message that he was required to participate in the Work Programme.

(ii) Regulation 5(2)(b) – specify the day on which the appellant's participation shall start. This is met in my judgment either by the WP05(C) or the 4 March 2013 appointment letter. The "you are now taking part in [the Work Programme]" passage in the former is, in my judgment, equivalent to the "From today" part of

the WPO5 which satisfied the requirement of specifying the start day in *TJ* (see paragraph 181 of *TJ*). Further or in the alternative, the appointment letter from *Reed in Partnership* gives an appointment of 11 March 2013 at 9.30am for actual participation in the Work Programme. That may be seen either as a *change* under regulation 5(3) of the 2013 Regs to the WP05(C) notice in terms of when participation shall start, or the start date itself (per paragraph 193 of *TJ*). On either basis, however, the regulation 5(2)(b) duty has been complied with in my judgment.

(iii) Regulation 5(2)(c) – details of what appellant is required to do by way of participation in the Work Programme. This is met in my view by a combination of the WP05(C) and the appointment letter. The former set out in paragraph 3 the nature of the Work Programme and the types of activities which it may involve (such as work search support and work placements). The latter sets out the specific appointment, what it was for (to discuss levels of support available through *Reed in Partnership's* services) and details as to how to attend the interview and help that might be provided in respect of the same. I cannot discern any material difference between the substance of these details and those in the WPO5 and appointment letter in the appendix to *TJ*, which were found together to meet the equivalent of regulation 5(2)(c) in paragraph 187 of *TJ*. The combined effect of the WP05(C) and appointment letter in my judgment gave the appellant details of what he was required to do by way of participation in the scheme. If he had attended the appointment and further requirements for participation had been identified at that appointment, that could have been met with a further notice setting out those further requirements under the 'change' provisions in regulation 5(3) of the 2013 Regs.

(iv) Regulation 5(2)(d) – requirement to participate in Work Programme will continue until appellant is given notice that participation is no longer required or his JSA ends, whichever is the earlier. This is manifestly met, in my judgment, by paragraph three in the WP05(C) and its statement: "You must continue to take part in the Work Programme until you are told otherwise, or until your award of jobseeker's allowance terminates, whichever is earlier". (It is noteworthy that this form of words did not appear, or at least not all the words appeared, in the WP05 in *TJ*, but even there the Upper Tribunal harboured doubts as to as to what prejudice was caused by not all the relevant words being included: see paragraphs 198-199 of *TJ*.)

(v) Regulation 5(2)(e) - information about the consequences of failing to participate in the Work Programme. In my judgment this is clearly met by both the WP05(C) and the appointment letter. The former set out in paragraph six the level of sanctions (4 weeks and 13 weeks) and when they would be applicable if the appellant failed without good reason to participate in the Work Programme. The appointment letter used virtually identical wording. In the context of the Supreme Court's view in *Reilly and Wilson* that the phrase losing JSA for "up to 26 weeks" was sufficient notice of the consequences of failing to participate, it seems to me that the much fuller information given in WP0%(C) and the appointment letter plainly met regulation 5(2)(e).

30. For these reasons I am quite satisfied that as matter of law the appellant was lawfully and properly required to participate in the Work Programme by reason of the WP05(C) and the 4 March 2013 appointment letter.

31. The point I had raised about whether *Reed in Partnership's* delegated authority to act under regulation 17 of the 2013 Regs was sufficiently demonstrated by the evidence before the tribunal I accept has no legal

merit. It was not an issue raised by the appellant on his appeal to the tribunal and therefore the tribunal in my judgment acted perfectly lawfully in not addressing it: see section 12(8)(a) SSA 1998. Even if it were otherwise, however, the point can now go nowhere in terms of remitting the appeal to be re-decided on this issue, or my re-deciding it, given the evidence the Secretary of State has put before the Upper Tribunal on this appeal which clearly shows *Reed in Partnership's* delegated authority under 2013 Regs dating from 14 February 2013.

32. I could not discern any clear or serious argument made by the appellant on the "*prior information requirement*" (as addressed by the Supreme Court in *Reilly and Wilson* and termed in *TJ*). At highest he may be said to address this issue, albeit fleetingly, at the top of page 214 on CJSA/3094/2014 in his reply submissions. However he does not argue there about a lack of prior information provided to him by the jobcentre or *Reed in Partnership* to better enable him to exercise his role in the Work Programme (even assuming he had any 'choice'- see *TJ*), but rather focuses on the repercussions which he argues flow from alleged negative references given to him by the jobcentre after his employment with them. This thus collapses back into his primary and only real argument, namely that he had good reason for not attending the Work Programme appointment on 11 March 2013 and so no sanction was applicable. This however was an issue which was fully and properly addressed by the tribunal in its decision after a hearing at which the appellant was able to say why he considered he had good reason for not participating, and in my judgment the tribunal has rationally and adequately explained why none of his reasons for not participating were good reasons.

33. Moreover, I would not have given permission to appeal on any of the appellant's grounds. I gave permission to appeal for two reasons.

    (i) First to explore the (hopefully) unusual circumstances of one of the notices being issued on the day of the Court of Appeal's

decision but before the 2013 Regs had come into effect. This point has been resolved in the appellant's favour.

(ii) Second because at that stage the Upper Tribunal had not decided *TJ* and the arguments as to adequacy of notices might have had a relevance to the WP05(C) and appointment letter issued in the appellant's second appeal in particular. *TJ* has now been decided, the notice issues are not under further appeal, and I have applied *TJ* to the notices in the second appeal.

In all these circumstances, although formally I have set aside the tribunal's two decisions, I have no hesitation in adopting its findings and reasons as to why the appellant did not have good reason for not attending the appointment with *Reed in Partnership* on 11 March 2013. That is why a four week sanction is applicable.

34. I should comment on one final argument that the appellant made. This depended heavily on the 2011 Regs having been declared *ultras vires*. To the extent that this is relevant, it is a basis for his first appeal being allowed and no sanction being applicable. However as the 2011 Regs had been replaced by the 2013 Regs by 13 February 2013, it is the 2013 Regs alone which apply to his second appeal and the *ultra vires* finding is thus legally irrelevant to that appeal.

35. Finally, the appellant seeks his costs of 'winning' these appeals. The Upper Tribunal however has no power to award costs in social security cases: see rule 10 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 and rule 10(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 18th April 2016