IN THE UPPER TRIBUNAL **Appeal Nos: CJSA/3205/2014**
CJSA/3206/2014

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 Hatton Cross on 16 August 2013 under references SC173/13/01423 and SC173/13/01422 both involved an error on a material point of law and are set aside.

The Upper Tribunal is not in a position to re-decide the appeals. It therefore refers the appeals to be decided afresh by a completely differently constituted First-tier Tribunal and in accordance with the Directions set out below.

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

DIRECTIONS

Subject to any later Directions by a District Tribunal Judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The new hearing will be at an oral hearing.

(2) If the appellant has any further evidence that he wishes to put before the tribunal which is relevant to either of the decisions under appeal (dated 13 May 2013 and 15 May 2013) this should be sent to the First-tier Tribunal's office in Sutton within one month of the date this decision is issued.

(3) The First-tier Tribunal should have regard to the points made below and is bound by the law as stated below.

Representation: The appellant did not appear and was not represented.

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

REASONS FOR DECISIONS

Introduction

1. These two appeals were heard by me at the same time as the appeals in *MH –v- SSWP* (JSA) [2016] UKUT 0199 (AAC), and much of what I held to be the law in *MH* applies equally on these appeals.

2. The appeals arise from decisions made by the Secretary of State for Work and Pensions on 13 May 2013 and 15 May 2013 in respect of alleged failures by the appellant to attend, without good reason, mandatory work activity on, respectively, 23 April 2013 and 8 April 2013. These dates are important because they mean that the decisions were made under the Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013 (the "2013 Regulations") and after the Jobseekers (Back to Work Schemes) Act 2013 (the "2013 Act") had come into force. They are not therefore decisions made under the Jobseeker's Allowance (Employment, Skills and Enterprise Schemes) Regulations 2011 ("the 2011 Regs"), nor do they turn, save tangentially, on the 2011 Regs being declared *ultra vires* by the Court of Appeal on 12 February 2013 and the legislation (the 2013 Act) and further litigation that followed the Court of Appeal's judgment.

Legal background

3. By way of background and to explain some of the above, the litigation that included the Court of Appeal's decision referred to above 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.

4. 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*.

5. However, 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); that is, they came into effect on 12 February 2013. The 2013 Regulations are prospective in their effect only.

6. Subsequent to this Parliament passed 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. Given the date of the Secretary of State decisions under appeal in these appeals and the fact that they were (rightly) made

under the 2013 Regs, the 2013 Act has no bearing on either of these two appeals[1].

Factual background

7. The first decision of the Secretary of State under appeal was dated 13 May 2013 and related to the appellant's failure to attend an appointment with *Ixion* (the Work Programme provider). This appointment, or mandatory activity notice, was issued to the appellant by *Ixion* on 16 April 2013. It required him to attend an appointment on 23 April 2013 at 9.30am. The second decision of the Secretary of State was dated 15 May 2013 and related to the appellant's failure to attend an earlier appointment with *Ixion* on 8 April 2013 at 9.30am. This appointment was issued to the appellant on 3 April 2013. Both appointments were, of course, issued to the appellant after the 2013 Regs had come into effect. The 2013 Regs 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".
>
> **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;

[1] The appellant is a party in four other cases before the Upper Tribunal (CJSA/629/2013, CJSA/911/2013, CJSA/912/2013 and CJSA/2495/2015). All these cases involve Secretary of State sanction decisions made in 2012 under the 2011 Regs and which turn on the retrospective effect of the 2013. These four cases (all applications for permission to appeal by the Secretary of State from decisions of the First-tier Tribunal that had found in the appellant's favour (in the first three cases relying on the High Court's decision in *Reilly and Wilson*)) remain stayed at the Upper Tribunal until Mr Bevan has exhausted his attempt to appeal the Court of Appeal's decision of 28 April 2016 in *SSWP –v- Jeffrey and Bevan* [2016] EWCA Civ 413 to the Supreme Court. The effect of the Court of Appeal's decision is that the 2013 Act is fully retrospective and therefore acts to render valid the 2011 Regulations and the notices served under those regulations even for claimants (as in the four stayed cases concerning this appellant) who had made appeals before the 2013 Act had come into effect.

> (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.
>
> **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)).

8. 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).

9. 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 2 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. A copy of a standard template WP05(C) appears on page 2 of each appeal bundle. *Ixion* then issued the appellant with the two appointment letters referred to above in April 2013.

10. As I read his letters of appeal and the other relevant documents he completed, the appellant has never raised any issue about not receiving the WP05(C) or the 3 and 16 April 2013 appointment letters.

11. In his 4 May 2013 answer to the jobcentre's letter of 3 May 2013 asking him for his reasons for not attending the appointment on 23 April 2013, the appellant raised no issue about not having received the appointment letter or not having been referred onto the Work Programme. He said that, in addition to the reasons he had given in earlier appeals against sanction decisions made in 2012, "I refuse to have anything further to do with your Work Programme provider, Ixion, because its Finance Director lied about me on a police witness statement form and its Kingston Quality manager also lied in court on 24th April this year (perjury) about the money Ixion owed me for a fare refund". Copies of letters the appellant attached to this reply referred to earlier interactions he had had with *Ixion* in 2011 and 2012 and listed complaints about, inter alia, *Ixion's* bullying, its failure to pay the appellant's train fares to its Wimbledon office (the appellant said in this 2011 letter that he did not want to attend any further meetings in Wimbledon unless he was paid his train fares in advance), and its "lies" about refunding travel costs. The letter of appeal against the 13 May 2013 decision referred to the

above as the appellant's "good reason" for not attending the 23 April 2013 appointment.

12. Similar reasons were advanced by the appellant in respect of his non-attendance at the 8 April 2013 appointment with *Ixion*. In his 12 April 2013 answer to the jobcentre's letter of 10 April 2013 asking him for his reasons for not attending the appointment on 8 April 2013, the appellant raised no issue about not having received the appointment letter or not having been referred onto the Work Programme. Instead he said that his "reasons for not attending this corrupt company's meetings are exactly the same as before. They have not changed". In a letter attached to, or provided at the same time as, these reasons the appellant again set out that his contention had always been that Ixion had lied to him about refunding his fares, had lied to the Jobcentre about the appellant not having provided reasons for his non-attendances, and had verbally abused him. He also said that two *Ixion* staff had lied in signed statements (and he attached the same letters as referred to in paragraph 11 above). His appeal against the 15 May 2013 decision was in the exact same terms (in fact it was the same letter) as that against the 13 May 2013 decision.

13. Given the reasons he did advance for appealing, on the face of his two appeals to the First-tier Tribunal here in issue the appellant was not raising any issue about not having been properly referred to the Work Programme or not having been notified of either of the appointments with *Ixion* in April 2013. In fact his reasons for not attending were expressed as reasons for *refusing* to attend, language which on its face is not consistent with not being under notice of an obligation to attend.

14. It seems to me therefore that the new First-tier Tribunal to which these appeals are being remitted may take as its starting point that the appellant did get the WP05(C) on or about 20 February 2013 and he did then receive both appointment letters. I add two caveats to this starting point.

(i) First, the appellant has yet to attend a hearing of these two appeals before the First-tier Tribunal. Despite what I have said above, he may wish to raise at the new hearing issues about his not having in fact received the WP05(C) or the appointment letters. He will, of course, need to explain why he did not raise these points before and present persuasive evidence showing why he did not receive one or more of these documents.

(ii) The second caveat relates to the first and concerns a point raised by the appellant in these Upper Tribunal proceedings in which he appears to dispute having received the WP05 (see pages 230 and 232 of CJSA/3205/2014 (SC/173/13/01423), in letters dated 4 June 2015 and 3 June 2013. I tend to agree with the Secretary of State in his submission of 26 January 2016 that the appellant appears here to be referring to the original June 2011 WP05 and not the WP05(C) issued to him between 13 and 17 February 2013. If, however, this is to misunderstand the correspondence of 4 June 2015 and 3 June 2013 then that may be a matter that the appellant will wish to raise at the fresh hearing of these two appeals[2].

15. The analysis set out below proceeds on the basis that the appellant did receive the WP05(C) and the 3 and 16 April appointment letters. As in my view the WP05(C) replaced the WP05, the appellant's non-receipt of the latter does not affect these appeals. If, on the other hand, on remission it is accepted that the appellant did not in fact receive either the WP05(C) or the appointment letter relevant to either appeal, the First-tier Tribunal will have to asses for itself, guided by what is said below and what was said in *SSWP –v TJ and others* [2015] UKUT 56 (AAC), whether what the appellant in fact received constituted adequate notice.

[2] If, on the other hand, the appellant's dispute about receipt of notices only relates to the WP05, that would support the perspective that he is not arguing on either of these appeals that he did not receive the WP05(C) or the April 2013 appointment letters.

16. Reverting then to the factual background, the appeals were heard together and dismissed by the First-tier Tribunal on 16 August 2013 ("the tribunal"). The appeals were heard and decided in the appellant's absence, even though he had requested a hearing at which he could attend to argue his reasons for not attending either appointment. The tribunal found that the appellant did not have good reason for not participating in either of the appointments. The appellant then asked for the decisions to be set aside because he said he had not been notified of the hearing. A District Tribunal Judge of the First-tier Tribunal however refused to set aside the tribunal's decisions.

17. I then gave the appellant permission to appeal both in respect of the tribunal's decision(s) of 16 August 2013 and the later refusal to set aside decision.

Errors of law and valid notification

Errors of law

18. It is agreed the tribunal erred in law in the decisions it came to on 16 August 2013 and in consequence that both of its decisions must be set aside and remitted to another wholly differently constituted First-tier Tribunal to be decided again.

19. The first material error of law concerns the tribunal's decision to proceed and decide the two appeals in the appellant's absence. Given the tribunal's view that substantiation was required of the appellant's allegations of impropriety, and given the strength and nature of the appellant's complaints, I do not consider the tribunal addressed adequately in its reasoning *why* it was in "the interests of justice" (per rule 31(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008) to proceed and decide the appeals in the absence of the appellant[3].

[3] Given this, it is unnecessary to decide whether the refusal to set aside decision was also vitiated by material error of law. In my judgment it is very arguable that it was as the DTJ focused only on whether the appellant had been sent notice of the hearing rather than on the

20. The second material error of law concerns the tribunal not rationally directing itself on the evidence and the test for 'good reason'. In my judgment at the very least the tribunal needed to explain better than it did why it was rational to conclude (as the tribunal seemed to) that perjury, lies, threats and improper conduct (even if true) do not constitute good reasons for non–compliance. As I asked when I gave permission to appeal, if none of this could amount to 'good reason', what then could? Of course it may be that what the tribunal meant was that it did not accept the appellant's claims of perjury and improper conduct on the part of *Ixion*. But what it said was:

> "Whilst the appellant accuses one or more officers of the DWP and Ixion of 'perjury', the Tribunal does not consider that that constitutes a good reason for non-compliance. The appropriate course of behaviour would be to notify police and not to fail to attend an interview.
>
> The Appellant accuses staff at Ixion and/or the DWP of lies, threats and improper conduct towards him. Even if the allegations were to be true, the Tribunal found that it does not constitute a good reason for non-compliance with appointments.....the appropriate remedy is to pursue a grievance under the relevant complaints procedures."

Valid Notifications

21. Turning then to the WP05(C) and the appointment letters, 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. Subject to any issue about whether the appellant in fact received these notices/letters, the First-tier Tribunal to which these appeals are remitted should proceed on the basis that adequate notice was given. (The remaining issue will then be whether the appellant had good reason for not attending the appointments.)

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fact that he was not present at the hearing and therefore whether it was in the interests of justice to set aside the decisions of the First-tier Tribunal because he was not present.

22. As I said in *MH*, 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* were not disputed 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 April 2013 appointment letters 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*.

23. Applying these principles to the WP05(C) and the two relevant April 2013 appointment letters, I can identify no material breach of the requirements of regulation 5(2) of the 2013 Regs.

24. I accept the Secretary of State's argument that the concerns I had raised when giving permission to appeal 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 jobseekers 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).

25. 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.

26. 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 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 2 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 Regs 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 2 June 2011 'selection' decision.

27. 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.

28. 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 2 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.

29. 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 <u>first</u> referred you to the Work Programme we gave/sent you a letter in which we told you about the requirement to participate……..I am <u>now</u> writing to inform you ……..that when you take part in the Work Programme, you are <u>now</u> 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.

30. I revert then to the issue of the WP05(C) and the 3 and 16 April 2013 appointment letters 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 later 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 appointment letters. 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 letters from *Ixion* give appointments of 23 April and 8 April 2013, both 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 letters. 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 set out the specific appointments (both described as "**Your first Work Programme appointment**"), what it was for (to discuss what *Ixion* could do to help the appellant find work) and a map to help to attend the interview and the information that *Ixion* would refund the travel costs of attending the appointment. 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 on the dates in issue. If he had attended the appointments and further requirements for participation had been identified at the appointments, this 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 five 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 letters. 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 letters 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 WP05(C) and the appointment letter plainly met regulation 5(2)(e).

31. 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 appointment letters of 16 April 2013 and 3 April 2013, and, subject to any live issue about the appellant not in fact having received any of these notices, the First-tier Tribunal is directed to find the same.

32. I should comment on one final argument that the appellant may have relied on in relation to the validity of the notices. This was his reliance on his other appeals before the First-tier Tribunal having been successful on the basis of the invalidity of notices under the 2011 Regs and those regulations then having been declared *ultras vires*. The short answer to this argument, if it is being made, is that the 2011 Regs had been replaced by the 2013 Regs by 13 February 2013 and it is the 2013 Regs alone which apply to these appeals, and the findings of invalidity in respect of the 2011 Regs are therefore legally irrelevant to these appeals.

Delegated authority

33. At one point the appellant had referred to his success before the First-tier Tribunal in another appeal (now subject of proceedings before the

Upper Tribunal under reference CJSA/2495/2015), and suggested his success there might read across to these appeals. It does not. As the Secretary of State points out (page 207 of CJSA/3205/2014, at paragraph 19), District Tribunal Judge Poynter allowed that appeal because the Secretary of State's authority for *Ixion* to act on his behalf evidenced in that appeal **was** the authority for *Ixion* to act under the 2013 Regs and therefore did not evidence their authority to act under the 2011 Regs. On that uncontested evidence, however, there can be no argument on these appeals that *Ixion* was not authorised to act under the 2013 Regs: that precise authority was evidenced in the appeal before Judge Poynter.

Repayment of sanctioned JSA

34. The last point I need to address is the Secretary of State's claim, which is disputed by the appellant, that due to an administrative error the sanctioned JSA in CJSA/3206/2014 (SC/173/13/01422) has been repaid to the appellant (that is, the 4 week sanction from 5 April 2013 to 2 May 2013). The Secretary of State argued that this rendered this appeal academic. It may in one sense, if it was accepted by the appellant that it had been repaid. But issues of payment are not matters for the First-tier Tribunal. Its concern on the remitted appeal will be whether as a matter of law either of the two sanction periods was applicable. Moreover, if it was to be found that the four week sanction ought not to have been applied (e.g. because the First-tier Tribunal finds the appellant had good reason for not attending the 8 April 2013 appointment with Ixion), that would affect the 13 week period of the sanction under the appeal in respect of the failure to attend the appointment on 23 April 2013: per regulation 69A(1) of the Jobseeker's Allowance Regulations 1996. Neither appeal is therefore rendered academic, even if the money sanctioned under one has been repaid.

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

Dated 26th July 2016