THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE JUDGE OF THE UPPER TRIBUNAL

The decision of the First-tier Tribunal given at Glasgow on 6 August 2018 was made in error of law. The appeal is allowed to the limited extent set out below. Under Section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 I set the decision aside and remake it as follows:

> **"The claimant has been overpaid income related employment and support allowance for the period 26 July 2014 to 29 September 2017 in the amount calculated in accordance with the direction made below. That amount is recoverable by the Secretary of State for Work and Pensions".**

The Secretary of State for Work and Pensions is DIRECTED to prepare a detailed recalculation of the overpayments recoverable from the claimant for the period between 26 July 2014 to 29 September 2017, and to intimate it to the claimant. The recalculation should take into account payments from the claimant's Nestle pension from the time it came into payment. The recalculation should take into account payments from the claimant's Saint-Gobain UK pension from the time of the annual increase to it in or about April 2016 until 29 September 2017. I grant liberty to apply to the Upper Tribunal if any issues arise in relation to the arithmetical correctness of the recalculation.

REASONS FOR DECISION

Background and summary

1. This is an appeal about employment and support allowance ("**ESA**"), and in particular the level of overpayments which the Secretary of State for Work and Pensions ("**SSWP**") is entitled to recover from the appellant (the "**claimant**"). The overpayments arose because the claimant was receiving two occupational pensions, one from Nestle and one from Saint-Gobain UK ("**St Gobain**"). These had not been taken account when the claimant's income related ESA entitlement was calculated by the SSWP.

2. The issue which arises in this appeal concerns only the St Gobain pension. The claimant disclosed she was receiving the St Gobain pension in 2015, but the SSWP failed to act on that information. However, after that there were annual increases to the St Gobain pension in 2016 and 2017. The claimant did not disclose those increases either. Can the SSWP recover the full amount of overpaid ESA attributable to payments not having been taken into

account from the St Gobain occupational pension after it increased? Or is the claimant correct to argue that the SSWP is restricted to recovery of an amount equivalent only to the annual increases, rather than the full amount of the St Gobain pension?

3. The answer depends on the application of Section 71(1) of the Social Security Administration Act 1992 (the "**1992 Act**"). I have decided that the SSWP is entitled to recover the amount of ESA payments which she would not have made had the claimant disclosed the increases in the St Gobain pension. On the facts of this case, the recoverable payment is the difference between the ESA the claimant received, and what she would have received had her ESA payments taken into account the full St Gobain pension after the annual increase in 2016. Recovery is not restricted only to the overpayment referable to the amount of the increase in occupational pension.

4. My decision ultimately confirms the decision of the First-tier Tribunal (the "**tribunal**") save in one respect. Under Section 71(2) of the 1992 Act, the recoverable amount, and the period during which that amount was paid to the person concerned, must be specified. In this case, the SSWP's decision is a composite decision covering both occupational pensions, and in its reconsidered form specifies a period between 26 July 2014 and 29 September 2017 during which an overpayment of £2492.23 was made. It is not in dispute that there was a failure to disclose the Nestle pension. Payments made in respect of the Nestle pension between the specified dates fall to be taken into account when calculating the overpayment recoverable from the claimant. However, the tribunal's decision in respect of the St Gobain pension is that the period during which recoverable amounts were paid to the claimant runs from April 2016 to 29 September 2017. This is a different period from the period covered by the composite overpayment decision. The tribunal's reasons do not explain what the recoverable amount covers, and in particular whether it properly reflects that payments of the St Gobain pension between 26 July 2014 and 25 March 2016 should not be taken into account when calculating the recoverable amount. This is an error of law on the part of the tribunal. I have decided that the most appropriate way of resolving this issue is to set aside and re-make the decision, and direct the SSWP to produce a detailed recalculation. That recalculation should be intimated to the claimant. I grant liberty to apply to the Upper Tribunal if there are any issues which arise about the arithmetical correctness of that recalculation.

Procedural history

5. On 12 February 2018 the SSWP made a decision there had been overpayments of ESA which were recoverable from the claimant. (The overpayment decision followed a decision on 7 February 2018 to supersede an earlier ESA entitlement decision). On mandatory reconsideration of the overpayments decision, the recoverable amount was reduced, although the period covered remained the same. However, the claimant remained liable

for some of the overpayments of ESA identified by the SSWP, and so she appealed to the tribunal.

6. On 6 August 2018, the tribunal found that the overpayments resulting from the failure to disclose the Nestle pension were recoverable, because the claimant had disclosed this pension late, after it had gone into payment. In relation to the St Gobain pension, the tribunal found that the overpayment attributable to the period between 2 June 2015 and 25 March 2016 was not recoverable, as the claimant had disclosed the existence of the St Gobain pension to the SSWP on or about 2 June 2015. However, overpayments which were attributable to the period after March 2016 up to 29 September 2017 were recoverable, because there had been a failure to disclose increases in the St Gobain pension from time to time when they occurred.

7. Permission to appeal to the Upper Tribunal was granted on 1 February 2019. The SSWP has not requested an oral hearing. The claimant initially did not request an oral hearing. However, in an email dated 18 April 2019 responding to the submission for the SSWP, the claimant's representative criticises the SSWP for not engaging with the claimant's core argument and says "…I would request an oral hearing. However in so doing I recognise that the argument involves a relatively short point which might not be open to much more elaboration at an oral hearing". Having considered the papers, given the clear findings by the tribunal and the short point raised by this appeal, I am satisfied that I can determine the case fairly on the papers, having regard in particular to the overriding objective in Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and in particular Rule 2(2)(a) and (e) (proportionality and avoidance of delay so far as compatible with proper consideration of the issues).

Governing law

8. Under Section 71(1) of the 1992 Act:

   > "Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure
   > (a) a payment has been made in respect of a benefit to which this section applies; or
   > (b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered
   > the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose".

9. Under the Social Security (Claims and Payments) Regulations 1987 (the "**1987 Regulations**"), Regulation 32(1A) provides:

   > "Every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner and at such times as the Secretary of State may determine such

information or evidence as the Secretary of State may require in connection with payment of the benefit claimed or awarded".

10. The effect of Regulation 32(1A) of the 1987 Regulations is to place claimants under a duty to provide information or evidence which the SSWP requires. If the SSWP has placed the claimant under an obligation to disclose information, and the claimant fails to comply with this obligation, one of the preconditions for recovery of an overpayment under Section 71 of the 1992 Act (failure to disclose) may be satisfied.

The tribunal's findings

11. In this case it was found as fact by the tribunal that the claimant received a letter which stated:

    > "You are required to immediately report any change in your circumstances to us, or the circumstances of your partner if you have one".

    The tribunal also found as fact that the claimant received from time to time copies of Form ESA 40. Form ESA 40 is an information sheet about ESA. It has a section headed "Changes you must tell us about", which includes this wording:

    > "Also tell us if you or your partner start or stop getting any pension income, benefits or allowances. Tell us if the amount of money you or your partner are getting changes".

    Another section has this heading in bold "Any changes to do with pension income, benefits and allowance". It states:

    > "Some pension incomes, benefits, capital or savings can affect the amount of ESA that you get. By "pension income" we mean: occupational pension….."

    A further page is headed "Other changes" and includes the words "Any changes to do with you or your partner" and says:

    > "You must also tell us if you or your partner….get a pension or your pension changes".

    Later in the information sheet it says:

    > "While you are getting Employment and Support Allowance you must tell us straight away if any or your circumstances change. If you are not sure if we need to know something, tell us anyway…"

    The tribunal found, on the basis of the wording of the letter and the forms ESA40, there was clear and unambiguous notice of a duty to disclose changes of circumstances.

12. The tribunal then found:

    > "After she had reported the existence of the St Gobain pension, she then failed to report the increases in the rate payable. Had she reported the increases as they occurred, the respondent would have had the opportunity to recalculate her entitlement to income based ESA. This did not happen and I hold that as a consequence of her

> failure to report an increase in the rate of pension the appellant then received an overpayment of ESA to which she was not entitled".

The tribunal accepted that, had the St Gobain pension stayed at the same rate, there would have been no duty to disclose and any resulting overpayments would have been irrecoverable. It then found:

> "I hold however that the [claimant] cannot continue to benefit from the [SSWP's] error indefinitely and irrespective of changes in circumstances. There is no question that the respondent was "on the hook" by failure to act on information received but the situation was reversed when the [claimant's] circumstances changed and she failed in her duty to report the change".

13. The tribunal went on to confirm the SSWP's decision in its form after mandatory reconsideration. The SSWP's decision had proceeded the basis that the full amount of St Gobain pension payments should be taken into account, and not only value of the increases.

The arguments of the parties

14. In summary, the claimant argues that Section 71(1) of the 1992 Act refers to failure to disclose a "material fact". It follows that the SSWP is only allowed to recover amounts which would not have been received if a "material fact" had been disclosed. The material fact in this case is the change in circumstances, being the increase in the pension, and not the existence of the St Gobain pension itself. Caselaw exists that there is no obligation to repeat disclosures to the same person to whom there has already been disclosure (*R(SB)* 15/87 at paragraph 26, and CIS/3529/2008/[2009] UKUT 52 at paragraphs 18-19). Given that the claimant had disclosed the existence of the St Gobain pension, she had no obligation to repeat that disclosure. It was unreasonable to expect her to disclose such small changes in pension after that. Either she should not have to repay overpaid amounts between 26 March 2016 and 10 November 2017 at all, or at the most only any amount equivalent to the undisclosed annual increases.

15. The SSWP does not support the appeal. She argues that the annual increase, even if small in amount, constitutes a change to the pension and should therefore have been disclosed. The tribunal did not err in law in its findings.

Discussion

16. Section 71(1) of the 1992 Act governs recovery of the overpayments in this case and contains a number of different elements. I paraphrase the requirements of Section 71(1) as follows, as it applies to this case. First the tribunal had to decide if there was a failure to disclose a material fact. Second, it had to decide whether in consequence of that failure a payment of

ESA had been made. Third, the tribunal had to decide what amount was recoverable by the SSWP. These are three different stages with different statutory wording governing them.

17. On the first two of these stages, the tribunal made clear findings of a failure to disclose a material fact, and that a payment of ESA had been made in consequence of that material fact. It did not err in law in finding the documentation provided to the claimant placed the claimant under a clear and unambiguous obligation to report changes in the amount of her St Gobain occupational pension, and that was a material fact. An obligation had been placed on her by Regulation 32(1A) of the 1987 Regulations, taken with the letter and information leaflets. It is (unsurprisingly) not argued in this appeal that an increase in payments from an occupational pension was not a material fact. The tribunal also made clear findings on the second stage: "as a consequence of her failure to report an increase in the rate of pension the [claimant] then received a payment of ESA to which she was not entitled".

18. After being so satisfied, the tribunal then had to decide what the amount recoverable was. In doing so it had to apply the wording of the last part of Section 71(1):

> "the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose".

Again paraphrasing, the question for the decision maker is: "What is the amount of the payment which would not have been made if there had been disclosure?" This is essentially a question of causation (*R(SB)* 21/82 at paragraph 18, *HT v SSWP* CE/2686/2017 at paragraphs 28-29). The answer will turn on the facts of a particular case. The tribunal had to ask itself what, on the balance of probabilities, would have happened in the case before it if the claimant had disclosed what she was supposed to.

19. The tribunal in the present case addressed this issue of causation as follows:

> "Had she reported the increases as they occurred, the respondent would have had the opportunity to recalculate her entitlement to income based ESA".

It then proceeded to uphold a recoverable amount which took into account the full amount of pension payments after the increases, after explaining that the claimant could not benefit from the respondent's error indefinitely and irrespective of changes in circumstances.

20. The decision must be read as a whole. Not only did the tribunal specifically find that there would have been an opportunity to recalculate entitlement had increases been reported, but it also found that the claimant could not benefit indefinitely from the SSWP's initial failure to take into account the St Gobain

pension, and based the recoverable amount on the full pension payments and not just the increases. From the tribunal's findings read as a whole, it is evident it considered that the natural consequence of the claimant reporting would have been that the calculation would have been looked at in the light of the new information about the St Gobain pension. This would have alerted the decision maker to that pension not having been taken into account, when it should have been. The causal consequence was that the whole amount of the St Gobain pension would then have been taken into account and less ESA would have been paid. Applying the wording of Section 71(1) of the 1992 Act, the payments which the SSWP would not have made are the additional amounts of ESA the claimant received after the time of the increases, because her occupational pension from St Gobain had not been taken into account.

21. I reject the argument that the amount recoverable by the SSWP is limited only to the particular 'material fact' that was not properly disclosed, being in this case the increase in the St Gobain pension only and not the pension itself. The wording of the part of Section 71(1) which deals with the amount recoverable is not restricted in that way. The wording specifies that the amount recoverable is the amount of any payment which the SSWP would not have made but for the failure to disclose. The focus is on what would have happened if there had been disclosure of the material fact. This will depend on the facts of a particular case, and there are a variety of possibilities. The wording in Section 71(1) does not cap the recoverable amount by some notional value of the undisclosed or misrepresented material fact. Section 71(1) has application to many different benefits, some of which may be calculated on the basis of statutory formulae, and it cannot be assumed that in all cases there is a direct correlation between the nominal value of an undisclosed material fact with the amount of overpayment. I also reject the argument that in interpreting Section 71(1) in this way I am undermining earlier cases establishing that there is no obligation to repeat disclosures once made. The obligation on the claimant in question was to report changes in the amount of occupational pension. That is not the same as reporting that the St Gobain occupational pension had come into payment, which she had already reported. She was not therefore being asked to repeat a disclosure she had already made. Rather she was being asked to report something else, which was that her St Gobain pension had gone up. Finally, I reject the argument faintly made at an earlier stage of this appeal that it is unreasonable to expect claimants to disclose small changes. In *R(IS*) 9/06/*B v SSWP* [2005] EWCA Civ 929 the Court of Appeal confirmed that reasonableness is not part of the Section 71(1) test (paragraphs 40 and 41). This is a case about an occupational pension, not a state pension, and so I distinguish *LH v SSWP* [2017] UKUT 249. The claimant had been told in terms in the Form ESA 40 to report changes in her occupational pension and she had a duty to do so, even if increases were modest, and even if the failure to disclose was due to forgetfulness (*R(SB)* 21/82 at paragraph 4).

Conclusions

22. I therefore find that the tribunal correctly applied the statutory test under Section 71(1) of the 1992 Act. I am unpersuaded by the claimant's grounds of appeal.

23. However, as explained in paragraph 4 above, it is not clear that the amount of the recoverable payment suggested by the tribunal at paragraph 3 was correct, in the light of the tribunal's ultimate findings. The tribunal has not addressed how it arrived at the amount of the recoverable overpayment in its reasons, and I find that in the circumstances and having regard to Section 71(2) of the 1992 Act that was an error of law. I have decided that the most appropriate way of dealing with this point is as set out in the decision at the outset of this appeal, as further explained in paragraph 4 above.

(Signed)
A I Poole QC
Judge of the Upper Tribunal
Date: 23 May 2019