[2018] AACR 20

(AB v Secretary of State for Work and Pensions (JSA)
[2018] UKUT 43 (AAC))

Judge Wright **CJSA/536/2013**
2 February 2018

Jobseeker's Allowance – whether an A4e advisor assisting a claimant under the Work Programme was "an officer of the Department for Work and Pensions" for the purposes of regulation 19(5)(d) of the Claims and Payments Regulations

The claimant made a claim for Jobseekers' Allowance (JSA) on 17 June 2012 but asked for it to be payable from 9 January 2012, the day after his previous JSA award had ended. The Secretary of State refused to "backdate" the claim to the earlier period. The claimant challenged the decision and explained that he had been offered employment as a taxi driver but this was subject to CRB (criminal records bureau) checks as the work involved driving children to and from school. It was said that his A4e adviser had (wrongly) advised him to stop claiming JSA once he had accepted the offer of the job. The job offer was later withdrawn following the CRB checks. The First-tier Tribunal dismissed the claimant's appeal and stated that the employment agency, A4e, were not part of the DWP and it was not reasonable for him to have assumed so. The claimant appealed to the Upper Tribunal.

Held, dismissing the appeal, that:

1. the test as to whether a person was an 'officer of the [DWP]' under regulation 19(5)(d) did not involve whether the claimant reasonably believed or assumed that to be the case; a test of reasonableness is found in regulation 19(4)(b) but that test only applies once the factual circumstance under regulation 19(5)(d) has arisen (paragraph 24);

2. the words 'an officer of the [DWP]' are words of limitation as it is not any information whosoever its provider that falls within regulation 19(5)(d) and can found the statutory basis for a late claim for benefit (paragraph 26);

3. if the *Carltona* principle (from *Carltona Limited v Commissioner of Works* [1943] 2 All ER 560) is embodied by regulation 19(5)(d), it can only be on the basis that the duty or power on the Secretary of State (and hence her officials within the DWP) to provide information to claimants arises by way of necessary implication from the duties imposed on the Secretary of State under the Social Security Act 1998 to decide claims for benefit; there is no express statutory power or duty on the Secretary of State to provide information. However, there is nothing in the statutory scheme that vests any statutory decision-making function in external providers such as, here, A4e. The A4e advisor was therefore not an "officer of the [DWP]" because it was no part of the functions delegated to him to make any decision on the appellant's entitlement to JSA and, by implication, nor was it any part of his delegated functions to provide information to the appellant about the conditions of entitlement to JSA including whether his existing 'claim' should remain in payment (paragraphs 36 to 38 and 40 to 43);

4. alternatively, even if the duty to provide information to claimants relevant to the conditions of entitlement to a social security benefit arises from the good and fair administration of the social security scheme as a whole (by way of analogy with paragraphs [59]-[65] of *R(Reilly and Wilson) v SSWP* [2013] UKSC 68; [2014] AC 453; [2014] AACR 9), the responsibility for that scheme and its conditions for entitlement still vests fundamentally with the Secretary of State for Work and Pensions, and nothing in the statutory provisions discussed in relation to A4e's functions can impliedly, by way of fairness or needs of good administration, vest an information function in relation to the conditions of entitlement of jobseeker's allowance, or any other social security benefit, in A4e or its employees (paragraphs 39 and 44); and

5. further alternatively, even if the approach in *CJSA/2232/2012* and/or *CJSA/610/1998* is applied, it still leads to the same conclusion that the A4e official was not acting, or to be regarded, as an officer of DWP. The legal background to the A4e official discharging the functions delegated to him under regulation 18 of the 2011 JSA Regulations would plainly be part of the factual circumstances to consider. Other considerations are also relevant. The "*My Work Programme Agreement*" document entered into by the appellant and A4e said most relevantly that the appellant was expected to "Notify your JCP advisor when you have started

work and inform them that you need to sign off benefits". This pointed to the Jobcentre Plus office as the source of information about benefits.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The claimant/appellant represented himself.

The respondent was represented by Stephen Cooper, solicitor.

The Upper Tribunal dismisses the appeal by the claimant/appellant.

The decision of the First-tier Tribunal sitting at Southampton on 17 October 2012 under reference SC203/12/01734 did not involve any error on a material point of law and is not set aside.

REASONS FOR DECISION

Introduction

1. The issue raised by this appeal, and on which it turns, is whether an employee of A4e exercising certain delegated functions on behalf of the Secretary of State for Work and Pensions under the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 SI 2011/917 ("the 2011 JSA Regs") and who gave wrong information or advice to the appellant in the first half of 2012 was in so doing an "officer of the Department for Work and Pensions" for the purposes of regulation 19(5)(d) of the Social Security (Claims and Payments) Regulations 1987 SI 1987/1968 ("the Claims and Payments Regs").

2. I have decided that issue against the appellant (the claimant). With the additional reasons given below on a secondary issue, that is sufficient for me to dismiss the appeal.

Delay

3. Before proceeding further with this decision, I must however, seek to explain why an appeal which turns on advice given (by the A4e advisor) in 2012 is only being decided by the Upper Tribunal some six years later.

4. Permission to appeal was given by me on 11 March 2013 and, after the exchange of written submission, the appeal was then the subject of an oral hearing before me in London on 11 November 2013. An issue that arose on my prompting at and after that hearing concerned the legal authority for the A4e advisor in 2012 to have been exercising any function on behalf of the Secretary of State. This was because the 2011 JSA Regs had been quashed in their entirety in the course of the litigation that had culminated in the Supreme Court's decision in *R (on the application of Reilly and another) v the Secretary of State for Work and Pensions* [2013] UKSC 68; [2014] AC 453; [2014] AACR 9. There was no 'blue pencilling' of the

offending, *ultra vires* parts of the 2011 JSA Regs so as leave the rest of those regulations in place (as per *DPP v Hutchinson* [1988] UKHL 11; [1990] 2 AC 783), even though the statutory contracting out or delegation of functions provided for by regulation 18 of those regulations was not in issue in that litigation. (Presumably the view was taken that as all the substantive functions in respect of requiring claimants to participate in the Employment, Skills and Enterprise Scheme (one of which schemes was the Work Programme) had been found *ultra vires* and of no legal effect in *Reilly*, regulation 18 fell by necessity as there was no point keeping in place a regulation that delegated to others the exercise of functions which had been found to have no legal effect.)

5. The concern I had was that as, arguably, the sole basis for A4e exercising *any* function under the 2011 JSA Regs had never existed as a matter of law on the quashing of those regulations, that would make any argument that the A4e official who advised the appellant in 2012 had been doing so as an officer of the Department for Work and Pensions more difficult, if not impossible, to sustain. Arguably the adviser would have had no basis in law to act for the Secretary of State for Work and Pensions in any respect.

6. The above litigation was not the end of the matter, however, because further litigation then ensued about whether the Jobseekers (Back to Work Schemes) Act 2013 ("the 2013 Act"), which had been introduced by the Government to retrospectively treat the 2011 JSA Regs as if they had always been lawfully made (i.e. to reverse the *ultra vires* holding of the Court of Appeal and the Supreme Court in the *Reilly* litigation), was fully retrospective. That further litigation led to the resolution of this appeal being held up again (i.e. stayed) until that litigation had concluded. It did so with the Court of Appeal's decision in what I will call *Reilly (No 2) and TJ and others* [2016] EWCA Civ 413; [2016] 3 WLR 1641, which concluded that the 2013 Act was fully retrospective. The effect of this was that regulation 18 of the 2011 JSA Regs had been validly in force to delegate functions under those regulations to, inter alia, the A4e official who had advised the appellant in 2012. As I said in directions on this appeal in February of last year, the situation was therefore back to where it had been before I had raised the issue of *Reilly* and the validity of regulation 18 of the 2011 JSA Regs at the hearing in November 2013. Further submissions were then made by both parties to the appeal, in part to enable them to refresh any arguments they had previously made.

7. The delay since those submissions closed has been down to my mistake. That mistake was to place this appeal with other appeals that were awaiting any action the Secretary of State was to take to address the declaration of incompatibility made by the Court of Appeal in *Reilly (No2)* under section 4 of the Human Rights Act 1998 in respect of the 2013 Act. That such action was to be taken only became apparent towards the end of last year. This in turn led to the stayed cases being put before me and, together with the appellant's letter of 10 January 2018, led me to realise it had been wrongly stayed in this block of cases. Put shortly, the reason this appeal had been incorrectly stayed was because the declaration of incompatibility only affected claimants who had had their jobseeker's allowance sanctioned for failures in respect of the Work Programme under the 2011 JSA Regs and who had appealed against the sanction decision before the 2013 Act had come into effect. Although the validity of regulation 18 of the 2011 JSA Regs was linked to the *Reilly (No.2) and TJ* litigation, the issue in this appeal has nothing to do with any sanction imposed as a consequence of alleged failures under the 2011 JSA Regs. Those regulations have but a tangential, albeit important, relevance to this appeal. The critical issue on this appeal is the scope and meaning of regulation 19(5)(d) of the Claims and Payments Regulations.

8. I wish to apologise to the parties, and especially the appellant, for the further delay caused by my wrongly having further stayed the appeal until the beginning of this year.

Relevant factual background

9. I can take this relatively shortly given the narrow factual compass of the critical issue on this appeal.

10. It is not now disputed that the appellant contacted Jobcentre Plus on 17 June 2012 and made a claim for jobseeker's allowance ("JSA") effective from that date. In his customer statement of 2 July 2012, he asked to claim JSA from 9 January 2012[1]. This was the day after his previous JSA award had ended. He said that his delay in making the claim in June 2012 was because:

> "I was already on JSA but came off as I was supposed to start work. However, I could not start until I had CRB checks done. These have taken this long to come back and now I find I am not eligible"

The claim for JSA to be 'backdated' for this earlier period was refused.

11. In challenging that decision, the appellant set out that he had been offered employment with a taxi firm in the New Forest, probably sometime in May 2012, but had to go through CRB (criminal records bureau) checks as the work involved driving children to and from school. His A4e adviser, he said, had read out the following conditions of his Jobseeker's Agreement:

> "We will stop your [JSA] if you turn down work or training, or leave it without a good reason. This could happen if you:
>
> - turn down an offer of work or training**….**
> - don't accept a job or training offer…."

The appellant continued in these written representations:

> "I was advised NOT to turn down the work offered and to accept the job and continue looking for work whilst my CRB checks went through. I was advised the CRB checks take anything up to one month to be returned.
>
> I continued to look for a job whilst waiting for the CRB checks but this seemed to take longer than expected. I had no income during this time and was being supported by my family and friends for food and basic clothing/welfare."

This written narrative does not on the face of it include any claim that the appellant was advised to stop claiming JSA once had had accepted the offer of the job with the taxi firm, however the tribunal below made a clear finding of fact that he had been so (wrongly) advised by A4e.

[1] The maximum period of 'backdating' allowed for under regulation 19(5) of the Claims and Payments Regs is 3 months: see regulation 19(4) of those regulations. The JSA claim made in June 2012 could not therefore extend back to 9 January 2012 even if regulation 19(5)(d) was satisfied.

12. In his appeal the appellant said that he had not been working and had been unable to make any claim because he was waiting for CRB checks to come through. He further said in the appeal that this meant that "I could neither start any work or make a claim".

13. The First-tier Tribunal dismissed the appeal on 17 October 2012 ("the tribunal"). As it set out in its Decision Notice of 17 October 2012, the tribunal did so on the basis that:

> "..whilst an officer of the [DWP] told him that he was obliged to accept a reasonable offer of employment and to continue seeking work until he could take up such an offer the tribunal is not satisfied that an officer of the [DWP] told him that he could not continue his claim [for JSA] whilst waiting for CRB checks to be carried out or insisted that his claim be closed at that time."

14. What this wording in the Decision Notice does not reveal is that there were two actors involved in providing information to the appellant at the relevant time in 2012. The tribunal's reasoning explains this as follows:

> "**Findings of Fact**
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> 6. The Appellant had previously been receiving JSA to 8th January 2012 and had applied through an agency, A4E, for a job as a taxi driver in the New Forest area with a firm who had a contract to carry disabled school children. The firm offered him a job but required a CRB check to be carried out before he could start. His adviser at A4E advised him to accept the offer and to stop signing on as unemployed in view of it, and he repeated that advice when [the appellant] told him that he had to wait for a CRB check. [The appellant] therefore discontinued his claim for JSA; on the last occasion when he signed on he mentioned to the lady at the Jobcentre what A4E and the potential employer had said and she confirmed that he "had to accept a reasonable job offer". Although [the appellant] went on to say in his evidence to the Tribunal "She said I am not entitled; she said I had to still do job search", it is unlikely that an officer of the Department had told him he was not entitled to JSA if he was not working and much more likely that what she actually said was that he was not entitled while waiting to take up a job offer unless he continued his job search **…...**
>
> 8. The Tribunal finds that the Appellant's reasons for not claiming JSA from 09/01/12 to 16/06/12 were that he had accepted an offer for work conditional on a CRB check and was advised by his employment agency that in those circumstances he could no longer claim and had to terminate his claim. The Tribunal finds that although he was advised by an officer of the Department that he could no longer claim whilst waiting to take up an offer of employment unless he continued his job search, the Tribunal is not satisfied that he was given information by the Department which led him to believe that a claim would not succeed or that he could not reasonably have been excepted to claim earlier than 17/06/2012.
>
> **Law and Reasons**
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> 11. The Tribunal is satisfied that [the appellant] unfortunately relied on advice given to him by the representative of his employment agency, A4E. They are not a similar agency to the CAB and the advice was not given in writing. Although [the appellant]

says that he was told the agency were authorised to deal with the DWP and had access to their records and that it was not explained to him that they were not part of the Department, it was not reasonable for him to have assumed that they were or that they were giving advice on behalf of the Department. It was reasonable for him to check the position with the jobcentre. He did not do so until after he had given notice that he would be discontinuing his claim and on the last occasion when he signed on. The officer confirmed that he was under an obligation to take up a reasonable [offer of employment], that he could not normally claim JSA whilst waiting to do so and that he could not claim without continuing his job search. In spite of what [the appellant] now says, the Tribunal is not satisfied on the balance of probabilities that she[2] gave him information which led him to believe that a claim for benefit would not succeed if he continued to be available for work and was actively seeking it or that he could not reasonably have been expected to make his claim earlier than 17/06/12."

Relevant statutory schemes

15. The relevant parts of regulation 19 of the Claims and Payments Regs provide as follow.

"19.-(4)……, in the case of a claim for income support, jobseeker's allowance, working families' tax credit or disabled persons' tax credit, where the claim is not made within the time specified for that benefit in Schedule 4, the prescribed time for claiming the benefit shall be extended, subject to a maximum extension of three months, to the date on which the claim is made, where–

(a) any one or more of the circumstances specified in paragraph (5) applies or has applied to the claimant; and

(b) **as a result of that circumstance or those circumstances the claimant could not reasonably have been expected to make the claim earlier**.

(5) The circumstances referred to in paragraph (4) are–

(a) the claimant has difficulty communicating because–
(i) he has learning, language or literacy difficulties; or
(ii) he is deaf or blind,
and it was not reasonably practicable for the claimant to obtain assistance from another person to make his claim;

(b) except in the case of a claim for jobseeker's allowance, the claimant was ill or disabled, and it was not reasonably practicable for the claimant to obtain assistance from another person to make his claim;

(c) the claimant was caring for a person who is ill or disabled, and it was not reasonably practicable for the claimant to obtain assistance from another person to make his claim;

[2] The "she" here can only be a reference to the officer of the DWP at the Jobcentre as the A4e adviser was a man.

(d) **the claimant was given information by an officer of the Department for Work and Pensions** or in a case to which regulation 4A applies, a representative of a relevant authority or of the Board **which led the claimant to believe that a claim for benefit would not succeed**;
(e) the claimant was given written advice by a solicitor or other professional adviser, a medical practitioner, a local authority, or a person working in a Citizens Advice Bureau or a similar advice agency, which led the claimant to believe that a claim for benefit would not succeed;

(f) the claimant or his partner was given written information about his income or capital by his employer or former employer, or by a bank or building society, which led the claimant to believe that a claim for benefit would not succeed;

(g) the claimant was required to deal with a domestic emergency affecting him and it was not reasonably practicable for him to obtain assistance from another person to make his claim; or

(h) the claimant was prevented by adverse weather conditions from attending the appropriate office."

16. Regulation 19 of the Claims and Payments Regs has been in this form since April 1997. Prior to then the more open textured text of having "good cause" for not having claimed in time applied, together with a more generous maximum period for 'backdating'. The power to make regulation 19 arises from section 5(1) of the Social Security Administration Act 1992 and its terms that:

"5(1) Regulations may provide (a) for requiring a claim for a benefit to which this section applies to be made by such person, in such manner and within such time as may be prescribed; (b) for treating such a claim made in such circumstances as may be prescribed as having been made at such earlier or later than that at which it is made as may be prescribed".

17. The other relevant statutory provisions are those related to the 2011 JSA Regs. These were made under section 17A of the Jobseekers Act 1995, which provided at the relevant time, insofar as is material, as follows:

"17A (1) Regulations may make provision for or in connection with imposing on claimants in prescribed circumstances a requirement to participate in schemes of any prescribed description that are designed to assist them to obtain employment.

(2) Regulations under this section may, in particular, require participants to undertake work, or work-related activity, during any prescribed period with a view to improving their prospects of obtaining employment…..

(4) Regulations under this section may not require a person to participate in a scheme unless the person would (apart from the regulations) be required to meet the jobseeking conditions.

(5) Regulations under this section may, in particular, make provision—

(a) for notifying participants of the requirement to participate in a scheme within subsection (1);

(b) for securing that participants are not required to meet the jobseeking conditions or are not required to meet such of those conditions as are specified in the regulations;

(c) for suspending any jobseeker's agreement to which a person is a party for any period during which the person is a participant;

(d) for securing that the appropriate consequence follows if a participant has failed to comply with the regulations and it is not shown, within a prescribed period, that the participant had good cause for the failure…"

18. Section 17B of the Jobseekers Act 1995 in effect provided the legislative authority for the Secretary of State to use external agencies such as A4e in the delivery of "Work for you benefit" schemes. This provided, again as relevant, as follows:

"Section 17A: supplemental

(1) For the purposes of, or in connection with, any scheme within section 17A (1) the Secretary of State may—

(a) make arrangements (whether or not with other persons) for the provision of facilities;

(b) provide support (by whatever means) for arrangements made by other persons for the provision of facilities;

(c) make payments (by way of fees, grants, loans or otherwise) to persons undertaking the provision of facilities under arrangements within paragraph (a) or (b);

(d) make payments (by way of grants, loans or otherwise) to persons participating in the scheme;

(e) make payments in respect of incidental expenses.

19. The 2011 JSA Regs were made, inter alia, under these section 17A (and section 17B powers) and provided, so far as is relevant at the time of the advice from the A4e official to the appellant in early 2012, as follows:

"3. The Secretary of State may select a claimant for participation in the Scheme.

4. **(1)……, a claimant ("C") selected under regulation 3 is required to participate in the Scheme where the Secretary of State gives C a notice in writing complying with paragraph (2).**

(2) The notice must specify—

(a) that C is required to participate in the Scheme;

(b) the day on which C's participation will start;

(c) details of what C is required to do by way of participation in the Scheme;

(d) that the requirement to participate in the Scheme will continue until C is given notice by the Secretary of State that C's participation is no longer required, or C's award of jobseeker's allowance terminates, whichever is earlier;

(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 C's participation starts must be notified to C in writing.

5.—(1) Where a claimant ("C") is—

(a) subject to a requirement to participate in the Scheme, and

(b) while C is subject to such a requirement, the Jobseeker's Allowance Regulations apply so that C is not required to meet the jobseeking conditions. C's requirement to participate in the Scheme is suspended for the period during which C is not required to meet the jobseeking conditions.

(**2) A requirement to participate in the Scheme ceases to apply to a claimant ("C") if—**

(a) the Secretary of State gives C notice in writing that C is no longer required to participate in the Scheme, or

(b) C's award of jobseeker's allowance terminates,

whichever is earlier.

(3) Where paragraph (2)(a) applies, the requirement ceases to apply on the day specified in the notice.

……

6. A claimant who fails to comply with any requirement notified under regulation 4 is to be regarded as having failed to participate in the Scheme.

7. (1) A claimant ("C") who fails to participate in the Scheme must show good cause for that failure within 5 working days of the date on which the Secretary of State notifies C of the failure.

(2) The Secretary of State must determine whether C has failed to participate in the Scheme and, if so, whether C has shown good cause for the failure.

(3) In deciding whether C has shown good cause for the failure, the Secretary of State must take account of all the circumstances of the case, including in particular C's physical or mental health or condition.

8. (1) Where the Secretary of State determines that a claimant ("C") has failed to participate in the Scheme, and C has not shown good cause for the failure in accordance with regulation 7, the appropriate consequence for the purpose of section 17A of the Act is as follows.

(2) In the case of a jobseeker's allowance other than a joint-claim allowance, the appropriate consequence is that C's allowance is not payable for the period specified in paragraphs (4) to (7) ("the specified period").

(3) In the case of a joint-claim jobseeker's allowance, the appropriate consequence is that C is to be treated as subject to sanctions for the purposes of section 20A (denial or reduction of a joint-claim jobseeker's allowance) of the Act for the specified period.

(4) The period is 2 weeks in a case which does not fall within paragraph (5), (6) or (7).

(5) The period is 4 weeks where—

(a) on a previous occasion the Secretary of State determined that C's jobseeker's allowance was not payable or was payable at a lower rate because C failed without good cause to participate in the Scheme ("the first determination"), and

(b) a subsequent determination is made no more than 12 months after the date on which C's jobseeker's allowance was not payable or was payable at a lower rate following the first determination.

(6) Subject to paragraph (7), the period is 26 weeks where—

(a) on two or more previous occasions the Secretary of State determined that C's jobseeker's allowance was not payable or was payable at a lower rate because C failed without good cause to participate in the Scheme, and

(b) a subsequent determination is made no more than 12 months after the date on which C's jobseeker's allowance was not payable or was payable at a lower rate following the most recent previous determination**……**

(8) **C will be taken to have re-complied where, after the date on which the Secretary of State determines that C has failed to participate in the Scheme, C complies with**—

(a) the requirement as to participation in the Scheme to which the determination relates, or

(b) **such other requirement as to participation as may be made by the Secretary of State and notified to C in accordance with regulation 4**……

(10) Paragraphs (4) to (7) are subject to paragraph (11).

(11) **Where the Secretary of State notifies C during the specified period that C is no longer required to participate in the Scheme, the specified period terminates at the end of—**

(a) one week beginning with the date of the notice, or

(b) the benefit week in which the requirement to participate ceases to apply, whichever is later.

.....

18.—(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 4 (requirement to participate and notification);

(b) regulation 5(2)(a) (notice that requirement to participate ceases); and

(c) regulation 8(8)(b) and 8(11) (requirements and notice after failures)."

(I have highlighted in bold for the ease of identification those functions under the 2011 JSA Regs which may have been exercised by A4e under regulation 18.)

Discussion and Conclusion

Secondary issue

20. I can clear this issue out of the way first, before tackling the more substantial issue of whether within the context of the statutory schemes set out above, the A4e official was, in giving (wrong) advice or information to the appellant in early 2012, an officer of the Department for Work and Pensions.

21. This, what I have termed 'secondary issue', arises from a concern I raised when giving the appellant permission to appeal. I put the concern this way when I gave permission to appeal.

> "In addition, it may be arguable that the First-tier Tribunal erred in law in giving confusing reasoning as to the role of the Jobcentre official in that, contrary to what is said elsewhere in the statement of reasons, in paragraph 11 of the statement it seems the tribunal took the view that the Jobcentre official **did** advise [the appellant] that he could not normally claim JSA whilst waiting to take up a reasonable offer of work."

The focus of my concern was on the sentence from paragraph 11 of the tribunal's statement of reasons: "The officer confirmed that he was under an obligation to take up a reasonable [offer of employment], that <u>he could not normally claim JSA whilst waiting to do so</u> and that he

could not claim without continuing his job search". I have added the underlining to emphasise the words of concern.

22. This issue has not really featured to a great extent on the arguments on the appeal. However, on reflection, and in agreement with the Secretary of State, I do not consider the tribunal committed any material error of law in the way it expressed itself in paragraph 11 of its statement of reasons. That paragraph has to be read with the rest of the tribunal's reasoning and fact-finding, particularly that which have I set out in paragraph 14 above. In particular, the use of the word "normally" by the tribunal has to be read in the context of the tribunal's finding of fact that what the Jobcentre official had in fact said to the appellant was that "he was not entitled while waiting to take up a job offer *unless* he continued his job search" (my italics added for emphasis). Thus, what I take the tribunal to have meant by "normally" in paragraph 11 of its reasoning was the situation where on accepting a job offer people cease looking elsewhere for work.

Main issue - A4e official – officer of the DWP

23. This therefore leaves the key issue on the appeal. It was undisputed before me that the information or advice the A4e official gave to the appellant in early 2012 was wrong in that it told the appellant that he had no option but to cease claiming jobseeker's allowance once he had taken up the offer of employment as a taxi driver but was waiting for the necessary clearance to be able to carry out that job. For the reasons canvassed above in respect of the Jobcentre Plus official, the correct information or advice would have been that the appellant could have remained entitled to jobseeker's allowance if he continued to show that he was available for and actively seeking work.

24. The tribunal would appear not to have considered whether the A4e official was an officer of the DWP for the purposes of regulation 19(5)(d) of the Claims and Payments Regs. The tribunal instead seems to have rejected the A4e official having been an adviser giving written advice under regulation 19(5)(e) of the same regulations (which is not challenged on this appeal and would seem plainly to be correct) and then introduced a test of reasonableness in respect of the appellant's assumption that the A4e official was an officer of the DWP. I do not see on what basis regulation 19(5)(d) introduces such a test of reasonableness. The relevant test under regulation 19(5)(d) was, and is, whether the wrong or misleading information was in fact given by an officer of the DWP. The test of reasonableness under regulation 19(4)(b) only applies *if* the factual circumstance under 19(5)(d) has arisen. A test of reasonableness cannot as a matter of the proper construction of regulation 19(4) and (5) turn the factual question of whether the information giver was an officer of the DWP into whether the claimant reasonably considered the information giver was such an officer.

25. Be that as it may, the tribunal will only have committed a material error of law in the decision to which it came if on analysis the A4e official in giving the above wrong information was doing so as an officer of the DWP. In my judgment, he was not. My reasons for so concluding are as follows.

26. Even taking the correct starting point as being the view in paragraph 14 of *R(IS)3/01* that "the words of regulation 19(5)(d) are not to be given any artificially restricted meaning", the words "an officer of the [DWP]" are plainly intended as being words of limitation. It is not any information whosoever its provider may be that can found an identified reason which may provide a statutory excuse for a late claim for benefit. The information has to be given by an officer of the DWP.

27. In *R 1/01 (IS)(T)*, a Tribunal of Commissioner in Northern Ireland concluded that the limitation was such in the similar legislation they were considering that it could not even extend to a New Deal adviser as that person was not an "officer of the Department for Social Development" but was instead an officer of the "Department of Higher and Further Education, Training and Employment". (By contrast, at the time the relevant legislation in Great Britain (i.e. regulation 19(5)(d)) covered information given by an officer of the Department of Social Security or of the Department for Education and Employment, and so potentially could have covered a New Deal adviser.)

28. However, in *CIS/610/1998* Mr Commissioner Williams (as he then was) concluded that a security guard employed at the local (then) DSS office "could as a matter of law be considered an officer of the Department [of Social Security] on the ordinary meaning of [the term officer]". The Commissioner reasoned as follows:

> "9. First, was this security guard "an officer" of the Department of Social Security? This is clearly general language and would therefore cover, for example, the Department's press officers and telephone advisers. But does it cover a sub-contracted security guard? "Officer" is not used here in the technical senses of someone of a superior rank in a military or similar force, or individual grades in the Home Civil Service, or those working directly as employees in the Department of Social Security rather than for its executive agencies or others, nor in the sense that a Minister of State is an officer of the Department but not an employee. <u>It means someone carrying out public functions for the Department</u>. A security guard may not in all cases come within that description, but on the facts this security guard could have done so. Whether he did is, however, a question of fact.
>
> 10. According to the record of proceedings, he was organising the queuing of claimants, was wearing a jacket with "Benefits Agency" on the back, and was logging people into an official log book and collecting documents. He was giving advice to claimants, or at least to this claimant. In other words, his appearance, his location, his actions, and his words may all have reasonably suggested that he had authority to do what he was doing, and that it was reasonable for a claimant to ask him for help. If that authority was not actual, then it is arguable that on the facts the guard was acting in a way that suggested to third parties that he was authorised to act. The issue is whether the representation by conduct of the Department was sufficiently clear and unequivocal in this situation to satisfy the tests for apparent authority of an agent. The tribunal found that this was not so, simply because, without explanation, the guard was "not to be considered to be an officer of the Department". In my view, on the facts recorded in the record of proceedings and not challenged at any point in the case papers, the guard could as a matter of law be considered an officer of the Department in the ordinary meaning of that term, and the tribunal erred in law in not considering the issue adequately." (my underlining added for emphasis)

29. I have some misgivings about aspects of this reasoning, or at least the language in which it is expressed. The language of "someone carrying out public functions for the Department" may arguably be too imprecise and lead into difficulty if it allows any sub-contractor to be clothed with the putative title of "officer". What, for example, of persons employed by a private cleaning firm who are placed with a DWP office to carry out on site

cleaning of public office areas? On one analysis they may be said to be carrying out public functions, yet nothing in their contracts of employment with their employer or the employer's public service contact with the DWP is likely to suggest they have any information giving function in respect of the DWP's statutory functions of determining entitlement to benefit.

30. The analysis in *CIS/610/1998* also does not address where else in the statutory social security schemes the term "officer of the Department" was being used at the relevant time, or has since been used. I accept that the analogy may be somewhat weak, however at the time with which the decision in *CIS/610/1998* was concerned the test for "official error" under regulation 99(2) and (3) of the Housing Benefit (General) Regulations 1987 SI 1987/1971 (which formed part of the test for whether an overpayment of housing benefit was recoverable) was in terms that an "overpayment caused by official error" included:

> "an overpayment caused by a mistake made by the appropriate authority or by an officer or person acting for that authority or by an officer of the Department of Social Security or the Department of Employment acting as such."

31. If the legislature had sought to cast the net on what may be an arguably wider basis to alleviate claimants from the consequences of what may be considered broadly as mistakes made by (albeit defined) government officials, that might arguably suggest that the singular wording of "officer" used in regulation 19(5)(d) to somewhat similar effect (i.e. to insulate or relieve claimants from mistakes made in the information provided to them) was and is to be given a narrower construction.

32. The answer to the concerns I have expressed about this decision may lie in the second quoted paragraph from *CIS/610/1998* and its consideration of all the facts as recorded as part of the process of determining whether the security guard could (but need not in fact) have been considered as a matter of law as an officer of the Department. It is perhaps surprising that the decision does not address the terms under which the security guard was employed as a useful field for enquiry. However, that may well have been subsumed in the issues it was considered the new tribunal might need to investigate in order to determine whether the security guard had actual or apparent authority to act on behalf the Department as one of its officers giving information related to claims for benefit.

33. Mr Cooper, for the Secretary of State, said in oral argument that he was not sure if *CIS/610/1998* had been correctly decided and it had not had the *Carltona* principle argued out in it. As will be seen below, Mr Commissioner Williams (by then Upper Tribunal Judge Williams) revisited the scope of regulation 19(5)(d) in the context of *Carltona*, and in the context of alleged wrong advice given by an official of an external Work Programme provider agency like A4e, in *CJSA/2232/2012*, and concluded it did not apply to that official.

34. The *Carltona* principle comes from the case *Carltona Ltd –v- Commissioner of Works* [1943] 2 All ER 560. In short it means that where a civil servant makes a decision in the name of his or her government minister, often a Secretary of State where the statute has vested the decision-making power in the Secretary of State, the civil servant acts, and is entitled to act, in the name of the minister. More fully, Lord Greene MR said this in *Carltona*: at 563

> "In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever

> personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."

35. The *Carltona* principle was subject to a helpful explanation by Lord Reed in *R(Bourgass) –v- Secretary of State for Justice* [2015] UKSC 54; [2016] AC 384, where having set out the above quote from *Carltona* Lord Reed continued (at paragraphs 49-52):

> "The *Carltona* principle, as it has become known, is not one of agency as understood in private law. Nor is it strictly one of delegation, since a delegate would normally be understood as someone who exercises the powers delegated to him in his own name. Rather, the principle is that a decision made on behalf of a minister by one of his officials is constitutionally the decision of the minister himself. As Jenkins J stated in *Lewisham Borough Council v Roberts* [1949] 2 KB 608, 629, when rejecting an argument that the principle was one of delegation:
>
> > "I think this contention is based on a misconception of the relationship between a minister and the officials in his department. A minister must perforce, from the necessity of the case, act through his departmental officials, and where as in the Defence Regulations now under consideration functions are expressed to be committed to a minister, those functions must, as a matter of necessary implication, be exercisable by the minister either personally or through his departmental officials; and acts done in exercise of those functions are equally acts of the minister whether they are done by him personally, or through his departmental officials, as in practice, except in matters of the very first importance, they almost invariably would be done. No question of agency or delegation ... seems to me to arise at all."
>
> An official in a government department is in a different constitutional position from the holder of a statutory office. The official is a servant of the Crown in a department of state established under the prerogative powers of the Crown, for which the political head of the department is constitutionally responsible. The holder of a statutory office, on the other hand, is an independent office-holder exercising powers vested in him personally by virtue of his office. He is himself constitutionally responsible for the manner in which he discharges his office. The *Carltona* principle cannot therefore apply to him when he is acting in that capacity.

> It is possible that a departmental official may also be assigned specific statutory duties. In that situation, it was accepted in *R v Secretary of State for the Home Department, Ex p Oladehinde* [1991] 1 AC 254 that the official remained able to exercise the powers of the Secretary of State in accordance with the *Carltona* principle.
>
> It is also possible that the performance of statutory ministerial functions by officials, or by particular officials, may be inconsistent with the intention of Parliament as evinced by the relevant provisions. In such circumstances, the operation of the *Carltona* principle will be impliedly excluded or limited: *Oladehinde* at p 303. Furthermore, the authorisation of officials to perform particular ministerial functions must in any event be consistent with common law requirements of rationality and fairness: see, for example, *Oladehinde* at pp 281-282 per Lord Donaldson of Lymington MR (in the Court of Appeal), and at pp 300 and 303 per Lord Griffiths."

36. It was Mr Cooper's argument that on the basis of *Carltona* the Secretary of State was responsible for the actions of his civil servants employed within his own Department (i.e. the DWP) and that regulation 19(5) embodies the *Carltona* principle. In short, if I understood the argument correctly, the regulation embodied, but importantly was limited to, the principle that the Secretary of State for Work and Pensions was responsible for her actions, and thus the actions of her officials (i.e. officers of the DWP), which were properly related to the exercise of her statutory functions of deciding claims for social security benefits, and had to be construed (narrowly) on that basis. It was for this reason that the *Carltona* principle does not extend to the actions of others who enter into contracts with the Secretary of State for Work and Pensions but are not civil servants.

37. One immediate difficulty in the application of *Carltona* is that the function in issue under regulation 19(5)(d) of the Claims and Payments Regs – that is, giving information related to benefit entitlement - does not arise from any duty or power expressly imposed on the Secretary of State by the corpus of social security legislation under which she and her officials operate. If the *Carltona* thesis is 'embodied' by regulation 19(5)(d), as the Secretary of State has argued in this appeal, it can only be on the basis that the duty or power on the Secretary of State, and hence her officials within the DWP, to provide information to claimants arises by way of necessary implication from the Secretary of State's duties imposed on her by the Social Security Act 1998 (and its predecessors) to decide claims for benefit.

38. Section 8(1) of the Social Security Act 1998 sets out that "it shall be for the Secretary of State to…decide any claim for a relevant benefit…and…to make any decision that falls to be made under or by virtue of a relevant enactment". Although this may on one reading only seem to identify who is to make the decision and not whether that person is under a duty to do so, on the basis of paragraphs 72-74 of *R(H)3/05* such a duty must in my judgment be implied. If the Secretary of State's *Carltona* argument in this appeal is correct, it arguably has to do so on the basis that the decision on the claim for the benefit brings the machinery for making claims, including late claims, under section 5(1) of the Social Security Administration Act 1992 and regulation 19 of the Claims and Payments Regs within what is to be decided on the claim, and arguably therefore by necessary implication is the source of the duty or power on the Secretary of State to provide (correct) information to claimants about benefit entitlement.

39. An additional or alternative argument may be that the source of the Secretary of State's duty or power to provide correct information about social security benefits arises by necessary implication from the proper and fair administration of the social security benefits system as a whole: see by analogy paragraphs 59-65 of *R (Reilly and Wilson) –v- SSWP* [2013] UKSC 68; [2014] AC 453; [2014] AACR 9. That might then bring in wider legislative considerations than simply in whom the decision making functions vest under the social security legislation.

40. If the first argument is correct then it is inescapable that the A4e advisor was not an officer of the DWP when he gave the appellant the wrong information/advice in early 2012. This is because no decision making function under section 8 of the Social Security Act 1998 was or could have been delegated to an A4e official under sections 17A and 17B of Jobseekers Act 1995 or regulation 18 of the 2011 JSA Regs, either in respect of the sanctioning of jobseeker's allowance for sanctionable failures in respect of the Work Programme, or the ending of entitlement to JSA when a 'claim' is no longer made in respect of it, or the 'backdating' of a new claim for JSA.

41. There is nothing either express or implied in the phrase "provision of facilities" in section 17B of the Jobseekers Act 1995, or anywhere else in that section, that vests any decision making function in external agencies such as A4e. Moreover, the 2011 JSA Regs make clear that the "securing that the appropriate consequence follows if a participant has failed to comply with the regulations" comes about by way of a decision by the Secretary of State (and, per *Carltona*, her officials within the DWP) and not by an external provider of services such as A4e: see regulations 7 and 8 of the 2011 JSA Regs set out in paragraph 19 above. Regulation 7(2) of those regulations, when read with regulation 18, makes it clear that it is for the Secretary of State, and <u>not</u> (here) A4e, to decide (a) whether a claimant has failed to participate in the scheme and (b) issues of good cause if there has been such a failure. It is also important to note that even the prior consideration of whether there has *prima facie* been a failure to participate in the scheme vests by virtue of regulation 6 and 7(1) of the 2011 JSA Regs in the Secretary of State and not the external agency; although no doubt that agency will provide evidence to the Secretary of State about alleged breaches of regulation 4.

42. By way of contrast, the only functions which may be exercised by the external provider or its employees instead of the Secretary of State are, broadly speaking, functions concerned with the requirements for giving notice about (a) when the scheme will start and end, (b) what the claimant will be required to do so as to participate in the scheme, and (c) the consequences of his or her failing to participate. That is plain from the limited delegation provided for in regulation 18 of the 2011 JSA Regs.

43. There is therefore nothing in the statutory scheme which vests any statutory decision making function in external provider agencies such as, here, A4e. On the first argument, as I have described it above, that leads to the conclusion the A4e advisor was not an "officer of the [DWP]" because it was no part of the functions delegated to him to make any decision on the appellant's entitlement to JSA and, by implication, nor was it any part of his delegated functions to provide information to the appellant about the conditions of entitlement to JSA including whether his existing 'claim' should remain in payment.

44. Even if the alternative argument suggested in paragraph 39 above applies, I do not consider it can assist the appellant. This is because in my judgment even if the duty or power to provide information to claimants relevant to the conditions of entitlement to social security

benefit arises from the good and fair administration of the social security scheme as a whole, the responsibility for that scheme and its conditions of entitlement still vests fundamentally in the Secretary of State for Work and Pensions, and I can identify nothing in the statutory provisions discussed above in relation to A4e's functions that impliedly, by way of fairness or the needs of good administration, vests an information giving function in relation to the conditions of entitlement to jobseeker's allowance, or any other social security benefit, in A4e or its employees.

45. It is noteworthy that in all the cases referred to in paragraphs 60-62 of the Supreme Court's decision in *Reilly*, as well as *Reilly* itself, the concern was with the government providing information, and the underpinning constitutional principle was that statute law (and, I would add, by extension statutory schemes) should be made known by the government. The limited functions delegated to A4e under regulation 18 of the 2011 JSA Regs are in my judgment too ancillary to, and divorced from, issues of benefit entitlement to impose any information giving function in respect of those entitlements on A4e under the *Carltona* principle. As stated above, the functions delegated by the Secretary of State to A4e were limited to informing and advising the appellant about his participation in the Work Programme and had nothing to do with informing him about his entitlement to JSA.

46. The Secretary of State would appear to have developed a somewhat different argument based on *Carltona* before Upper Tribunal Judge Williams in *CJSA/2232/2012*. The argument seems to have been that regulation 19(5)(d) of the Claims and Payments Regs was an exception to *Carltona*, rather than embodying it (as was argued before me), and with a seeming acceptance (contrary to the arguments I have set out above) that external agency officials such as those employed by A4e may be "involved in the social security decision making process".

47. As can be seen, however, that different argument did not assist the claimant in that appeal and for similar reasons, even if correct, cannot assist the appellant in this appeal. The argument and Judge Williams' conclusion upon it were set out in paragraphs 23-28 of *CJSA/2232/2012* as follows:

> "23 Turning to paragraph (5)(d), Mr Cooper argued that this was a rule that should be regarded as an exception to the general rules about decisions in social security matters. The general principle on which the social security system works is the well-known principle of public law called the *Carltona* principle (after the decision of the Court of Appeal in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560. See also the decision in *Point of Ayr Collieries Ltd v Lloyd George* [1943] 2 All ER 546). The decisions and actions of an official working under the authority of a government minister are in law the actions of the minister. So, unless different provisions are made, all actions and decisions about social security entitlements are actions of the Secretary of State. Regulation 19(5)(d) is a limited exception to this principle in recognising the role of an individual. But, he submitted, it must be confined to that context and not read too widely. It does not cover all actions taken by third parties because they are involved in the social security decision-making process.
>
> 24 This case, he submitted, is within the principle of civil law that deals with actions or decisions of those giving advice to a claimant. It is the principle of liability for negligent misstatement arising from the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller* [1964] AC 465, a decision of the House of Lords. Under this

principle someone who causes loss to another person by negligent misstatement may be made liable in damages to the victim. This principle was clearly applied to public authorities, which are responsible for the negligent misstatements of their officials, in *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223. In principle, any allegation that someone has lost benefit because of a careless statement by another should seek a remedy through an action for negligence in the civil courts. That applies both to public officials and to others. Regulation 19(5)(d) is an exception to that rule.

25 The current form of regulation 19 dates back to a rewrite of the regulation in 1997, when the period for which backdating could be allowed was reduced to the current period of 3 months. I agree with Mr Cooper that the effect of regulation 19(5)(d) is to provide a limited additional public remedy to some cases of misstatement by an official. The question remains whether someone acting for a commercial organisation to which a claimant is directed by someone in a Jobcentre can be regarded as "an officer of the Department for Work and Pensions".

26 Mr Cooper pointed out that one answer to this is given by the letter received by the appellant and any similarly placed claimant. The relevant terms of the letter given to the appellant both in April 2010 and (I find) in July 2010 state:

> "You should report to …
>
> If you cannot attend for any reason or if you stop claiming Jobseekers Allowance please contact the Jobcentre immediately"

The letter then gives contact details. This, he submitted, emphasised that a claimant should go back to the Jobcentre before taking any action about jobseeker's allowance. If that happened, then any decision would be one taken by an officer of the Department for Work and Pensions after hearing from the claimant.

27 Applying that to this case, I agree with Mr Cooper that an official of an independent company or organisation such as those to which the appellant was referred in this case is not within the control of the Secretary of State and its employees or staff are not acting as "an officer of the Department" when giving advice to a claimant. The practical solution is that the claimant should, as advised, go back to the Jobcentre and get advice there. The remedy for any material loss caused by negligent misstatement by such an employee or staff member is a civil action for damages against the body responsible for that employee or staff member.

28 So any action by staff at the agencies named by the appellant is not relevant to regulation 19(5)(d) in this case."

48. As is evident from the above reasoning, as in the security guard case in *CIS/610/1998*, the Secretary of State's argument in *CJSA/2232/2012* still depended on answering whether the employee acting for the external work provider agency could be regarded as an "officer of the [DWP]". On the evidence Judge Williams held, contrary to the security guard in the other case, that he could not be so regarded.

49. I would be inclined to the view that the test or tests set out in paragraphs 36-39 above may provide the better and more legally sound analysis for establishing whether a person is an "officer of the [DWP]". However, even if the *CJSA/2232/2012* and/or *CIS/610/1998* approach is applied, it still in my judgment leads to the same conclusion that the A4e official was not acting, or to be regarded, as an officer of the DWP.

50. The legal background to the A4e official discharging the functions delegated to him under regulation 18 of the 2011 JSA Regs would plainly be part of the factual circumstances to consider when deciding whether he was acting as an officer of the DWP or had the authority to do so. However, as in *CJSA/2232/2012*, other considerations are also relevant.

51. The appellant took me to a number of documents he said were relevant and, he argued, showed that the A4e advisor was acting as an officer of the DWP when he wrongly advised the appellant in early 2012. I do not consider that to be the case. In fact, if anything they point the other way.

52. Perhaps of most importance was the "*My Work Programme Agreement*" entered into by the appellant with A4e in September 2011. This said that A4e would "support and challenge you to become ready for work and into employment" and "show you why you are better off in work rather than remaining dependent on benefits". Once the value laden language around 'dependency' is cut through, these statements in my judgment tell the reader little about what A4e would actually do under the agreement. Moreover, even if the "better off in work" than on benefits phrasing might be able to be construed as indicating an expertise held by A4e on the entitlement conditions for social security benefits which it would exercise under the agreement (which seems to me implausible), there is a strong contraindication in the part of the agreement covering what was expected of the appellant. This says most relevantly that the appellant was expected to "Notify your JCP advisor when you have started work and inform them that you need to sign off benefits" and "Tell your A4e advisor and JCP office of any change of circumstances". The former condition the appellant was expected to meet seems in my judgment to point in particular to the Jobcentre Plus office as the source of information about benefits.

53. The rest of the surrounding documents do not advance matters in favour of the appellant. The DWP Provider Guidance statement that "DWP fund external organisations to deliver programmes that are designed to assist unemployed people gain and remain in employment" says nothing about whether those organisations can give information to unemployed people under the funded programmes about the conditions of entitlement to benefits. Nor does "*A4e's Minimum Service Levels for the Work Programme*", which the Secretary of State put before me, set out any agreement for A4e to provide benefits advice.

Conclusion

54. It is for all of these reasons that the tribunal's decision dated 17 October 2012 is not set aside and its decision stands.