DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Watford First-tier Tribunal dated 7 September 2017 under file reference SC304/17/00925 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is able to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

> *The Appellant's appeal is allowed.*
>
> *The Secretary of State's decision of 14 February 2017 is revised.*
>
> *The Appellant had good reason for failing to attend or participate in a consultation with a health care professional on 6 February 2017 in relation to his claim for personal independence payment (PIP). Furthermore, the Appellant is entitled to the enhanced rate of both the daily living and the mobility components of PIP for the period from 1 March 2017 to 4 January 2018.*

This decision is given under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

The background to this appeal

1. The Appellant ('the claimant') suffers from several significantly disabling medical conditions including severe epilepsy, severe depression and anxiety as well as daily faecal incontinence (and uses a colostomy bag). He was previously entitled to the highest rate of the care component and the lower rate of the mobility component of disability living allowance (DLA). The claimant's DLA award was in payment only until 28 February 2017. This was because of the knock-on effect of a negative determination on his claim to personal independence payment (PIP).

2. Subsequently, however, in early 2018, the claimant made a further and this time successful claim for PIP. As a result, and after the tribunal decision now under appeal, he was awarded the enhanced rate of both PIP components for the fixed period from 5 January 2018 through to 22 January 2021.

What this appeal is about

3. It follows that in practical terms this appeal is about the claimant's entitlement, if any, to PIP for the closed period from 1 March 2017 (being the first day after his DLA award ended) until 4 January 2018 (being the last day before the new PIP award started).

4. The original decision that the claimant was not entitled to PIP as from 1 March 2017 was based on his failure to attend a consultation with a health care professional (HCP) on 6 February 2017. Both the DWP decision maker and the First-tier Tribunal (FTT) decided that the claimant had not shown good reason for that failure.

5. The Secretary of State's representative now accepts that the claimant (i) has in fact shown good reason for his failure to attend the consultation on 6 February 2017; and furthermore (ii) is entitled to the enhanced rate of both PIP components as from 1 March 2017 (through to 4 January 2018). On that basis it would be sufficient to dispose of this appeal by consent and without reasons. However, I am giving reasons as the claimant has asked for a retrospective award of the higher rate of the DLA mobility component. In addition, this appeal also raises a further question about the terms of a standard Atos letter notifying PIP claimants about their HCP appointment. The issue is whether it is sufficiently clear from such a stock letter that the claimant is *required* to attend such an appointment.

A summary of the Upper Tribunal's decision

6. The claimant's appeal to the Upper Tribunal is allowed. The decision by the Watford First-tier Tribunal, dated 7 September 2017, which dismissed his appeal against the DWP decision of 14 February 2017, involves an error of law and is set aside. Accordingly, that FTT decision is of no effect. A re-hearing of the appeal before a fresh FTT is not necessary in the circumstances. I therefore both (a) allow the claimant's appeal to the Upper Tribunal; and (b) re-make the decision that the FTT should have made and in the terms as set out at paragraph 39 below. The re-made decision is that the claimant (i) had good reason for not attending the HCP consultation on 6 February 2017; and (ii) is entitled to the enhanced rate of both PIP components as from 1 March 2017 through to 4 January 2018.

The First-tier Tribunal's decision

7. The FTT's summary of the bare facts is comprehensive and does not seem to be disputed (other than in respect of what appears to be a typographical error in the penultimate sentence of paragraph 3, now corrected in the extract below):

> "3. The appellant was invited to attend an assessment on 26th January 2017, the letter of invitation was sent on 12th January 2017 and a text reminder was sent on 23rd January 2017. The appellant telephoned on 23rd January 2017 to state that he could not attend, and another appointment was booked for 6th February 2017. A reminder was sent by text on 3rd February 2017 and on 6th February 2017 the appellant telephoned to say that he would be [able] to attend. The appellant failed to attend the appointment.
>
> 4. A negative determination was made on 14th February 2017 as the appellant had failed to attend two assessment appointments; he requested a reconsideration which took place on 13th March 2017. At the reconsideration it was considered that no good cause had been provided for his non-attendance; the appellant was put back onto the PIP journey as the evidence suggested he was willing to comply with the PIP procedures. In his appeal form, dated 27th March 2017, the appellant stated that he was unable to attend on 6th February 2017 due to an epileptic fit which required an overnight stay in hospital; he stated that medical evidence was due and would be enclosed, but no such medial evidence was enclosed."

8. The FTT went on to note that the claimant had failed to attend two further HCP appointments. Focussing on the two original missed consultations, the FTT further found that the claimant had not given any reason for the failure to attend on 26 January 2017 and had failed to produce any supporting evidence for the failure to attend on 6 February 2017. In those circumstances the FTT concluded that the claimant had not shown good reason for failing to attend the appointment on 6 February 2017.

Bringing the story up to date

9. The FTT held its hearing on 7 September 2017. On 5 January 2018 the claimant made a new telephone claim for PIP. The decision-maker on the new claim had three pieces of evidence: the claimant's new PIP questionnaire, a new HCP report dated 23 January 2018 (based on an appointment the claimant did attend) and a detailed letter from the claimant's consultant neurologist dated (by coincidence) 7 September 2017. The letter reported the claimant had a diagnosis of pharmacoresistant focal epilepsy, and so uncontrolled by anti-epileptic medication, with seizures arising unpredictably and without warning, leaving him "confused, disoriented and drowsy and… therefore in a position of significant vulnerability". Based on all that evidence a decision maker on 22 February 2018 concluded that the claimant scored 12 points each for both daily living and mobility. The daily living descriptors were those for preparing food 1c (2 points), washing and bathing 4c (2 points) and managing toilet needs or incontinence 5f (8 points), while mobility descriptor planning and following journeys 1f (12 points) also applied. As a result, the claimant was awarded the enhanced rate of both PIP components from 5 January 2018 to 22 January 2021.

Why the First-tier Tribunal erred in law

10. The FTT erred in law because it did not have sight of the HCP appointment letter sent to the claimant in respect of the consultation arranged for 6 February 2017. It was not enough that the claimant was aware of the appointment and had received the letter. In short, as a general rule the letter should be produced in order for the FTT to be satisfied that attendance at the consultation was a requirement and that a failure to attend had consequences: see further Upper Tribunal Judge Mesher's two decisions in *OM v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 458 (AAC) (at paragraph 18) and *MB v Secretary of State for Work and Pensions (PIP)* [2018] UKUT 213 (AAC) (at paragraphs 6 and 7). The decision of Upper Tribunal Judge Rowland in *Secretary of State for Work and Pensions v DC (JSA)* [2017] UKUT 464 (AAC); [2018] AACR 16, albeit decided in the context of the imposition of a sanction for failing to participate in a JSA 'Work Programme' scheme, is also in point.

11. It is only fair to the FTT to point out that Judge Mesher's two decisions were not published until after the FTT sat to hear the present appeal, so the tribunal's error of law was in that sense inadvertent. However, given that error of law, I allow the claimant's appeal and set aside the FTT's decision.

The disposal of the Upper Tribunal appeal

12. I agree with Mr R J Whitaker, the Secretary of State's representative in these proceedings, that it is right for me to re-make the FTT's decision under appeal rather than send it back for a new hearing before a fresh tribunal. A new FTT will be no better placed than me in making the decision. There is ample evidence on file, especially with the detailed material relating to the new PIP claim and award. A remittal to a new FTT would also add unnecessarily to delay (and to the claimant's stress and anxiety) in resolving this appeal and is wholly disproportionate. I therefore propose to re-make the Tribunal's decision under appeal.

13. Putting to one side for a moment the issue of the terms of the letter notifying the claimant about the HCP appointment, there are two issues to address. The first is whether the claimant has shown good reason for his failure to attend the consultation on 6 February 2017 and the second is whether he is entitled to PIP as from 1 March 2017. As already noted, Mr Whitaker concedes the appeal should succeed on both those points. I agree for the following reasons.

14. As to the first issue, there is still no evidence of an overnight hospital admission on the date in question. However, there is now ample evidence of the severity and

significantly disabling and daily effects of the claimant's various medical conditions. The consultant neurologist's original letter explained that the claimant's "seizures are strongly precipitated by stressful circumstances". A further letter from his consultant confirmed that "his seizures arise frequently and unpredictably" and "are disruptive with respect to activities of daily living and negatively impact on [his] ability to attend appointments" (letter dated 7 November 2018). Bearing in mind regulation 10 of the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377), I accept that on balance the claimant has shown good reason for not attending the appointment on 6 February 2017.

15. As to the second matter, given all the evidence now available, that negative determination should be replaced by a PIP outcome decision. This new PIP outcome decision is made as if the Upper Tribunal is in the shoes of the decision maker on the day the negative determination was originally made. As good reason has been shown, and so the negative determination has ceased to exist (and is replaced with an award of PIP), it follows that DLA is reinstated for 28 days following the date of the negative determination and the PIP award is backdated to begin on the next day (the 29th day after the date of the negative determination). In practice 14 days of DLA will already have already been paid following the initial negative determination; therefore, only a further 14 days can be paid, resulting in a total of 28 days of DLA being paid (see Memo ADM 24-18 entitled *PIP Negative Determinations – Effect of UT decision*, paragraph 15). PIP is then accordingly payable from 1 March 2017 – see further the Personal Independence Payment (Transitional Provisions) Regulations 2013 (SI 2013/387), regulations 8, 9(2), 11 and 13(2) and 17(2)(b)).

16. The evidence suggests that there has been no significant change in the effects of the claimant's medical conditions over the material period. As such, that PIP outcome decision should be on the same terms as the new award, namely that the claimant is entitled to the enhanced rate of both PIP components. This is because, adopting the findings of the most recent HCP report, he scores 12 points for daily living descriptors 1c (2 points), 4c (2 points) and 5f (8 points) as well as 12 points for mobility descriptor 1f. The substituted award runs from 1 March 2017 to 4 January 2018 and as such "fills the gap" between the end of the previous DLA award and the start of the subsequent new PIP award made in early 2018.

17. The claimant, however, in his reply to Mr Whitaker's response to the appeal, argues that he should be entitled to the *higher* rate of the DLA mobility component from the date his original DLA claim started in 2002 or 2003 (it will be recalled that he was previously awarded the highest rate care component and the lower rate mobility component of DLA). He gives two reasons for this claim. The first is that he now receives the higher rate PIP mobility component. The second is that "I have been and was wheelchair bound from when my original DLA claim started".

18. Neither of these arguments is persuasive. As to the former, the qualifying criteria for the top rate mobility components in DLA and PIP are not the same. As to the latter, his original 2016 PIP claim form made no reference to wheelchair use, just that his ability to move around "varies". His consultant's letters make no reference to wheelchair use. The 2018 HCP report notes "has a walking stick for indoors" but makes no reference to wheelchair use. It adds "although he has back pain and sciatica he has no specialist input and … informal observations showed no restrictions". The HCP concluded the claimant could stand and move more than 200 metres, either aided or unaided. It may well be that the claimant uses and has used a wheelchair from time to time but there is no meaningful evidence to support a claim of entitlement to the higher rate mobility component of DLA.

19. There is a more fundamental problem. This is an appeal against a decision on entitlement to PIP. There is no evidence of any request for a revision, supersession or appeal in relation to the claimant's entitlement to DLA during the currency of that award. For all these reasons I refuse the claimant's request that there be a retrospective award of the higher rate of the DLA mobility component.

Does the Atos letter impose a requirement?

Introduction

20. In directions on this appeal I posed the question whether it was sufficiently clear that the Atos letter involved the imposition of a legal requirement on a claimant to attend a HCP consultation. On one level the point is now academic, given the Secretary of State's concessions on the facts. However, I received detailed written submissions on the point from Mr Whitaker on behalf of the Secretary of State and consider it appropriate to make the following observations. I stress that the analysis that follows is not part of the formal *ratio* (or legal basis) of this decision. I also have no evidence as to whether this particular format of letter is still in use by Atos (or whether the other contractor Capita uses the same or similar wording).

The legislation

21. The starting point is section 80(4)(c) of the Welfare Reform Act 2012. This is an enabling power permitting regulations to make provision for "requiring a person to participate in such a consultation, with a person approved by the Secretary of State, as may be determined under the regulations (and to attend for the consultation at a place, date and time determined under the regulations)". Regulations may also make provision for a negative determination to be treated as made "if a person fails without a good reason to comply with a requirement imposed under subsection (4)" (see section 80(5)(a)).

22. The material paragraphs of regulation 9 of the 2013 Regulations read as follows:

> "**Claimant may be called for a consultation to determine whether the claimant has limited or severely limited ability to carry out activities**
>
> **9.**—(1) Where it falls to be determined whether C has limited ability or severely limited ability to carry out daily living activities or mobility activities, C may be required to do either or both of the following —
>
> (a) attend for and participate in a consultation in person;
>
> (b) participate in a consultation by telephone.
>
> (2) Subject to paragraph (3), where C fails without good reason to attend for or participate in a consultation referred to in paragraph (1), a negative determination must be made.
>
> (3) Paragraph (2) does not apply unless —
>
> (a) written notice of the date, time and, where applicable, place for, the consultation is sent to C at least 7 days in advance; or
>
> (b) C agrees, whether in writing or otherwise, to accept a shorter period of notice of those matters."

The case law

23. In *OM v SSWP (PIP)* Judge Mesher held as follows:

> 18. … It must be the case that for a requirement to lead to the consequence prescribed in regulation 9 in accordance with the powers granted in section 80(4)(c) of the Welfare Reform Act 2012 it must be a requirement to attend and participate in a consultation at a particular date, time and place. Further, the requirement must be communicated as a requirement to the claimant… the definition of consultation as a consultation with a person approved by the

> Secretary of State must imply a limitation that the requirement must be imposed either by such a person or by an organisation with which such a person is associated for the purposes of carrying out consultations, or by or on behalf of the Secretary of State. No doubt, if Atos has been contracted by the Secretary of State to supply such services in the area concerned, they can exercise the regulation 9 power. On the element of requirement, something worded as a request rather than a creation of a legal obligation may not count (see the House of Lords in *Secretary of State for Social Security and another v Remilien* [1998] 1 All E.R. 129, R(I) 13/98). A question arises whether it is sufficient on appeal merely to provide evidence of the date on which a letter had been sent by Atos, to whom and at what address, and of the date of the appointment given in the letter, without providing a copy of the specific letter or at least a copy of the standard letter in use at the time with something to indicate that that was the form used in the particular case. Only then could a tribunal be satisfied that the claimant had been required to attend and participate (see R(S) 1/87, paragraph 12(1), where it was said that notices of a similar kind were to be strictly construed). The severe consequences of a failure to attend and participate would support such a strict construction. In my provisional view (provisional because the point has not been covered in any submissions) it is in general necessary to provide at least a copy of a standard letter with something to indicate that that was the form sent to the claimant …"

24. That provisional view, of course, was subsequently affirmed by Judge Mesher in *MB v SSWP (PIP)* in the light of *SSWP v DC (JSA)*. As was noted in *OM v SSWP (PIP)*, official letters that seek to impose legal requirements should have "the necessary degree of insistence or compulsion", as Mr Commissioner Mesher (as he then was) put it in *Remilien v Secretary of State for Social Security* [1998] 1 All ER 129, reported as R(IS) 13/98. The need for the imposition of any mandatory requirement to be unambiguous was reasserted (albeit in a different context) by the Court of Appeal in *Hooper v Secretary of State for Work and Pensions* [2007] EWCA Civ 495, reported as R(IB) 4/07, where Dyson LJ held as follows:

> "56. … Read in the context of the factsheet as a whole, I do not consider that the words 'you should tell the office… before you start work' and 'you should fill in an application form before you do any permitted work' are the language of clear and unambiguous mandatory requirement. The consequences for a claimant of not complying with a requirement in accordance with regulation 32(1) can be very serious. That is why in my view, if the Secretary of State wishes to impose a requirement on claimants within the meaning of regulation 32(1), it is incumbent on him to make it absolutely clear that this is what he is doing. There should be no room for doubt in the mind of a sensible layperson as to whether the SSWP is imposing a mandatory requirement or not."

25. Finally, one of the issues for the Supreme Court in *R (on the application of Reilly and Wilson) v Secretary of State for Work and Pensions* [2013] UKSC 68; [2014] AACR 9; [2014] 1 AC 453 concerned the interpretation and application of the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations (SI 2011/917) ("the 2011 Regulations"). Regulation 4 of the 2011 Regulations stated as follows:

> "(1) Subject to regulation 5, 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 …;
> (e) information about the consequences of failing to participate in the Scheme …."

26. At paragraph 24 of its judgment, the Supreme Court explained how one of the claimants, Mr Wilson, received a letter in November 2011 in the following terms about the Community Action programme (or CAP):

> "At your interview today, your adviser explained that you had to take part in the [CAP] from 16/11/11. Ingeus will be in touch with you shortly to arrange this. The [CAP] will involve doing up to six months of near fulltime work experience, with some additional weekly job search support The [CAP] is an employment programme established in law under the [2011 Regulations]. To keep getting Jobseeker's Allowance, you will need to take part in the [CAP] until you are told otherwise or your award of jobseeker's allowance comes to an end; and complete any activities that Ingeus asks you to do.
>
> If you don't take part in the [CAP], under the [2011 Regulations] your jobseeker's allowance may be stopped for up to 26 weeks. You could also lose your National Insurance credits."

27. The Supreme Court held as follows:

> "54. In relation to Mr Wilson, there is a dispute which falls to be determined, namely whether the letter of 16 November 2011, quoted in para 24 above, complied with regulation 4(2)(c) and regulation 4(2)(e). In agreement with Foskett J, the Court of Appeal held that it did not satisfy the latter provision, but they also found that it did not satisfy regulation 4(2)(c).
>
> 55. In our opinion, there was a failure to comply with regulation 4(2)(c). The letter of 16 November 2011 merely informed Mr Wilson that he had to perform "any activities" requested of him by Ingeus, without giving him any idea of the likely nature of the tasks, the hours of work, or the place or places of work. It seems to us, therefore, that the letter failed to give Mr Wilson "details of what [he was] required to do by way of participation". Again, it is necessary to balance practicality, in the form of the need of the Secretary of State and his agents for flexibility, against the need to comply with the statutory requirement, which was plainly included to ensure that the recipient of any such letter should have some idea of where he or she stood. A requirement as general and unspecific as one which stipulates that the recipient must "complete any activities that Ingeus asks you to do", coupled with the information that the course will last about six months falls some way short of what is required by the words of regulation 4(2)(c), even bearing in mind the need for practicality.
>
> 56. The alleged breach of regulation 4(2)(e) is rather different in nature, and we have concluded that it is not made out. It arises from the fact that the letter of 16 November 2011 states that Mr Wilson would lose his benefits for "up to 26 weeks" if he did not participate in the CAP. The true position was that he risked losing his jobseeker's allowance for two weeks initially, and thereafter for a period of 26 weeks, which could potentially be continued on a "rolling" basis – see regulation 8(4) and (6) of the 2011 Regulations, set out in para 14 above. We see some force in Ms Lieven's criticisms of the letter, but the question is whether they are sufficient to provide additional grounds for holding the notice invalid. The crucial

> issue is not so much one of contractual construction of the letter: it is whether Mr Wilson was (or perhaps whether a reasonable person in Mr Wilson's position would have been) significantly prejudiced or misled by the terms of the letter so far as any sanction was concerned.
>
> 57. Regulation 4(2)(e) required the notice to contain "information about the consequences of failing to participate", but it did not specify how detailed the information needed to be. If the letter had warned Mr Wilson in general terms that failing to participate might result in loss of benefit, we think that it would have been sufficient. The letter was more specific, in that it said that he risked losing "up to 26 weeks" loss of benefit, which was the maximum on any one occasion. This would have made it plain to Mr Wilson that he could face a lengthy period of loss of benefit if he failed to participate. Whether the issue is to be judged from the perspective of Mr Wilson or of a reasonable person in his position, we are not persuaded that the imperfections of the warning were sufficiently misleading or prejudicial that the letter should be held invalid on that account."

28. It is against this legislative and case law background that the appointment letter in the present case must be construed.

The Atos stock letter

29. The first three paragraphs of the stock Atos letter read as follows (emphasis in bold as in the original):

> "Dear [Claimant]
>
> Atos Health care conducts assessments for Personal Independence Payment on behalf of the Department for Work and Pensions (DWP). Your claim has recently been referred to us.
>
> We have arranged an appointment for you to see a qualified Health Professional. This will help them to understand how your condition or disability affects you in your daily life. Your appointment details are shown below…
>
> **It is important that you attend this appointment**. **If you fail to attend without good reason the decision maker at the Department for Work and Pensions is likely to disallow your claim. If you can't attend please contact our Customer Service Centre straightaway on** [phone number to be inserted]."

30. The letter then continues to make several other points, including giving a DWP number "if you would like more information about why you need to attend a consultation". The enclosed guidance note or explanatory leaflet adds that "most people are also asked to attend a face-to-face consultation with a Health Professional".

Secretary of State's submissions

31. Mr Whitaker, for the Secretary of State, submits that in accordance with general principles of fairness the Atos letter clearly states what is required of the claimant and what the consequences are should the claimant not follow the required steps. As such he argues it complies with the provisions of regulation 9(2) of the 2013 Regulations. He further contends as follows:

> "The letters are addressed to persons with a disability, many of whom will be vulnerable. It is necessary to strike a balance between clear communication which stresses the need to attend the assessment, and the likely consequences of failure to attend, but without frightening claimants into being so fearful of punitive action

> that they will attempt to attend an appointment even if the nature of their health condition or disability makes this difficult or impossible. We contend that the letters strike this balance. They stress the importance of attending and the potential consequences of not attending. It is correct to say that the DWP is likely to refuse the claim, The DWP does not automatically refuse a claim as is evidenced in this case. This is in recognition of the fact that there may be many reasons why the claimant may be unable to attend and we want to give the claimant every opportunity to attend the assessment.
>
> I submit that a layperson, reading the above bolded text, would understand the significant information that a failure to attend at that appointment would likely result in the loss of their benefit, and they would know how to respond accordingly should they be unable to attend."

32. In his written submission Mr Whitaker further expressly relied upon the Supreme Court's decision in paragraph 57 of *Reilly and Wilson*.

The Upper Tribunal's analysis

33. What the Atos letter says is plainly a question of fact which either the FTT or the Upper Tribunal may determine. However, the legal effect of those words must ultimately be a question of law, which is a matter on which the Upper Tribunal can express a view (albeit that it is not strictly necessary as part of the *ratio* of this decision).

34. I am not persuaded that the letter imposes a mandatory legal requirement as such. The key passage is that in bold (see paragraph 29 above). The first sentence is that "**It is important that you attend this appointment".** This by itself plainly fails the test as laid down in the case law. It says no more than that attendance at the appointment is desirable, or even highly recommended, but not *required* in mandatory terms. It is no more than a message that you "should" attend, and as such lacks the necessary element of compulsion identified in *Hooper v Secretary of State for Work and Pensions* so as to constitute a requirement.

35. I accept that the next sentence in the emboldened passage is, on the face of it, in stronger terms – "**If you fail to attend without good reason the decision maker at the Department for Work and Pensions is likely to disallow your claim.**" But this statement is also not without difficulty, for two reasons. First, the statement does not accurately reflect the true legal position. Regulation 9(2) of the 2013 Regulations provides that "where C fails without good reason to attend for or participate in a consultation referred to in paragraph (1), a negative determination **must** be made" (emphasis added). If it is (only) "likely" that the DWP decision-maker will disallow the claim, that presupposes that there will be cases where there is a non-attendance without good reason but where no disallowance follows. If so, it is difficult to see how the request to attend can be a mandatory requirement. Secondly, it is unclear how an indication of the possible (or even likely) consequences of not undertaking a particular course of action be used to create, or rather retro-fit, a requirement to attend in the first place.

36. Mr Whitaker advances several arguments in support of his central claim that the letter does impose a mandatory requirement. He argues that the letter strikes the right balance between clear communication (of the need to attend and the consequences of not attending) and not frightening claimants into struggling to attend when they should not risk doing so. There are two responses to that. The first is that the letter can also explain about how to go about changing an appointment. The second is that "there is no reason why the Secretary of State should have felt inhibited from using the clear

and unambiguous word 'must' in the present context. The context is not one which demanded politeness at the expense of clarity" (*Hooper v Secretary of State for Work and Pensions* at paragraph [57] *per* Dyson LJ). Mr Whitaker also notes that the PIP claim form includes the pre-printed statement "**If we ask you to go to a face-to-face consultation, you must attend, or we can't decide if you're able to get PIP**". However, this is buried on p.36 of a 40-page claim form which is returned to the Department some weeks (or even months) before the appointment letter is sent. That letter should be sufficiently clear as a stand-alone document given the potential implications of being found not to have good reason for failing to attend.

37. Mr Whitaker also relies on the Supreme Court's judgment in *R (on the application of Reilly and Wilson) v Secretary of State for Work and Pensions* and, in particular, the passage at paragraph 57 (see paragraph 27 above). I am not persuaded this assist his argument. The issue there was whether the letter complied with the terms of regulation 4(1)(e) of the 2011 Regulations, i.e. did it contain "information about the consequences of failing to participate" – so the question was about the explanatory content of the letter, and not about whether it imposed a mandatory requirement to attend in the first place. The weight of the case law on that point (cf. *Remilien v Secretary of State for Social Security* and *Hooper v Secretary of State for Work and Pensions*) is against Mr Whitaker.

38. I recognise that the Atos appointment letter must be read as a whole. But the emboldened passage represents the high point of the Secretary of State's contention that the letter imposes a legal requirement. For the reasons already given I do not consider that this is "the language of clear and unambiguous mandatory requirement" (as required by *Hooper v Secretary of State for Work and Pensions*). It needed to be clear and unambiguous about the mandatory nature of the requirement, e.g.: "**You must attend this appointment. If you fail to attend without good reason the decision maker at the Department for Work and Pensions will disallow your claim**."

Conclusion

39. The decision of the First-tier Tribunal involved an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). I also re-make the tribunal's decision (section 12(2)(b)(ii)) in the terms set out below.

> *The Appellant's appeal is allowed.*
>
> *The Secretary of State's decision of 14 February 2017 is revised.*
>
> *The Appellant had good reason for failing to attend or participate in a consultation with a health care professional on 6 February 2017 in relation to his claim for personal independence payment (PIP). Furthermore, the Appellant is entitled to the enhanced rate of both the daily living and the mobility components of PIP for the period from 1 March 2017 to 4 January 2018.*

Signed on the original
on 3 December 2019

Nicholas Wikeley
Judge of the Upper Tribunal