IN THE UPPER TRIBUNAL **Appeal No. UA-2023-000032 DLA**
[2024] UKUT 327 (AAC)

ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First Tier Tribunal (Social Entitlement Chamber)

Between:

SS

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Deputy Upper Tribunal Judge Hocking

Decision date: 9 October 2024

Decided on consideration of the papers

Representation: written submissions only

Appellant: In person
Respondent:, Egle Smith Department of Work and Pensions

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal (Social Entitlement Chamber) made on 7 June 2022 under number SC247/19/00029 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal ("FtT") for reconsideration at an oral hearing.**

2. **It must be heard by an entirely differently constituted panel.**

3. **The FtT must conduct a complete rehearing of the issues that are raised by the appeal and, subject to the FtT's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration. While the FtT will need to address the grounds on which I have set aside**

the decision, it should not limit itself to these but must consider all aspects of the case, both fact and law, entirely afresh.

4. **If the appellant has any further written evidence to put before the FtT they must send it to the FtT regional office within one month of the date of issue of this decision. Any such further evidence must relate to circumstances as they were at the date of the original decision of the Secretary of State that is under appeal, ie 30 November 2018**

5. **The new FtT is not bound by the decision of the previous FtT. Depending on the findings of fact it makes, the new FtT may reach the same or a different conclusion to the previous FtT. The fact that this appeal has succeeded on a point of law carries no implication as to the likely outcome of the rehearing, which is entirely a matter for the FtT to which this case is remitted.**

6. **These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the FtT.**

REASONS FOR DECISION

Summary

1. The appellant's appeal to the Upper Tribunal succeeds. There is to be a fresh hearing of the original PIP appeal before a new FtT.

Background

2. The Appellant claimed and was in receipt of Disability Living Allowance DLA from not later than 2007 until 26 October 2016 (from which date he began to receive a Personal Independence Payment). On 30 November 2018, the Secretary of State determined that the Appellant was not entitled to DLA between 5 November 2014 and 26 October 2016, and that the sum of £8141.85 was recoverable from him in that regard, as well as two decisions relating to the claim for PIP with which I am not concerned.

3. On 6-7 June 2022 the FtT considered and dismissed the Appellant's appeal from all of those decisions

4. On 22 December 2022 the Appellant appealed to the Upper Tribunal, and after an oral hearing on 28 March 2024 was given limited permission to appeal by Upper

Tribunal Judge Ward on 10 May 2024. That permission related to the date as from which the Appellant was no longer entitled to DLA only.

5. On 21 June 2024 the Secretary of State invited the Upper Tribunal to allow the appeal.

6. This makes it unnecessary to set out the history of the case in any more detail or to analyse the whole of the evidence or arguments in detail. I need only deal with the reason why I am setting aside the FtT's decision.

Reasons

7. The appellant was given permission to appeal on one ground. Upper Tribunal Judge Ward said:

> "…*the ground concerns the law applicable to a supersession for change of circumstances and specifically , the date from which a supersession takes effect. … [The appeal ground] is based on the decision in SM v SSWP [2021] UKUT 119 (AAC). I respectfully agree with Judge Poynter as to the importance of the safeguard provided by regulation 7(2)(c)(ii) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999, even if, with respect, I might not have been quite so prescriptive as to what compliance with that provision requires. Nonetheless, if the decision represents good law, it is realistically arguable that it was not followed in all respects. In any event, Mr SS appears to have a realistic argument that the FtT's reasons were inadequate to show compliance with the Regulation. In particular, although the DWP at p 254 of file SC247/19/00111 put forward the argument that courses start in September and by taking 31/10/2014 as the date, that allowed Mr SS sufficient time to realise the improvement in his condition reflected in his college attendance, the FtT does not appear to indicate whether it accepted that argument or indeed any other argument for the 31/10/2014 date chosen.!*

8. Regulation 7(2)(c)(ii) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 is in these terms:

> "(2*) Where a decision under section 10 is made on the ground that there has been, or it is anticipated that there will be, a relevant change of circumstances since the decision had effect or, in the case of an advance award, since the decision was made , the decision under section 10 shall take effect–*
>
> *(c) where the decision is not advantageous to the claimant–*
>
> *(ii) in the case of a disability benefit decision, … (whether before or after the decision), where the Secretary of State is satisfied that in relation to a disability determination embodied in*

> *or necessary to the disability benefit decision, … the claimant or payee failed to notify an appropriate office of a change of circumstances which regulations under the Administration Act required him to notify, and the claimant or payee, as the case may be, knew or could reasonably have been expected to know that the change of circumstances should have been notified,*
>
> > *(aa) from the date on which the claimant or payee, as the case may be, ought to have notified the change of circumstances, or*
> > *(bb) if more than one change has taken place between the date from which the decision to be superseded took effect and the date of the superseding decision, from the date on which the first change ought to have been notified,"*

9. Supporting the appeal, the Secretary of State says this:

> *18. In the case of SM v Secretary of State for Work and Pensions (DLA) [2021] UKUT 119 (AAC), specifically paras 9 to 21, Judge Poynter provides a detailed rationale as to what the FTT should detail within their rationale when reaching conclusions on effective dates when a disadvantageous change in circumstances has been identified. Whilst the FTT in this case has been very thorough in detailing the evidence they considered with regard to entitlement for DLA (and PIP), the only rationale to be found with regard to the effective dates however is within para 44 of the SOR:*
>
> > *"i. The Appellant is not entitled to DLA for the period 05/11/2014 to 25/10/2016. Whilst there had been some discussion in the hearing about that date being earlier, the Respondent's papers had initially been prepared on the basis that it was the 2014 date and of course that is the date from which he accepted criminal liability. Mr Hawkins therefore accepted, very reasonably, that 05/11/2014 would be an appropriate date. We agree on the evidence and the way it has been presented that that is a fair date when the Tribunal can be satisfied the Appellant was not entitled to DLA" (p315, UT Bundle).*
>
> *19. The reasons as detailed in our previous submission for the effective date chosen to which the FTT have referred:*
>
> > *"I have chosen this date as the information held shows he started in college sometime in 2014. Although his exact start of enrolment date is not known it is considered he must have known he had the*

> *capability to manage. Colleges normally start sometime in September so I have allowed the rest of this month and all of the following month for Mr SS to realise his walking has significantly improved compared to his claim and to notify the department." (p154, FTT Bundle).*

> *20. Whilst it seems that the FTT have agreed with our findings, without a more detailed analysis it is difficult to confirm whether they have applied the same criteria and regulations or have chosen other points of law to support their conclusions for the effective date chosen. It is equally problematic to conclude one way or another whether should a more clear assessment was available, whether the outcome of the case would be materially affected.*

10. While I agree that this appeal must be allowed, the question of what reasoning is required from an FtT before Regulation 7(2)(c)(ii) requires further consideration

11. In *SM v SSWP* [2021] UKUT 119 (AAC) Judge Poynter said this about supersession and Regulation 7(2)(c)(ii)

> 11 [Identifying the effective date of a superseding decision] "*is particularly important in a DLA case because there are special rules, which—as I said in the analogous context of revision in RH v Secretary of State for Work and Pensions (DLA) [2015] UKUT 453 (AAC) at [3]—have the effect that "the law does not allow the Secretary of State to change an award of DLA retrospectively (i.e., so as to create an overpayment) without observing certain safeguards for the claimant. "In my judgment, it was necessary for the Tribunal to address those rules expressly in its written statement of reasons, but it did not do so.*
>
> *12. As a general rule, where:*
>
> > *(a) a DLA decision is superseded on the basis that there has been a relevant change of circumstances since the original decision had effect (i.e., under regulation 6(2)(c) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999) ("the 1999 Regulations"); and*
> >
> > *(b) the superseding decision is not advantageous to the claimant; and*
> >
> > *(c) the change in circumstances relates to one of the disability conditions,*
>
> *the effective date is the date the superseding decision is made (i.e., under section 10(5) of the Social Security Act 1998).*

13. *In plain—or, at least, plainer—English, that means that, if general rule applies, the superseding decision in this case takes effect from 16 March 2018, the date of the "entitlement" decision, rather than 9 September 2012, and there is therefore no overpayment.*

14. *There is an exception to that rule. If the Tribunal considered that the exception applied, it had power to set an effective date before 16 March 2018. However, to do so it was necessary for the written statement of reasons to address the point expressly and to set out the findings of fact and reasoning that supported its decision that the case fell within the exception*

15. *The exception is set out in regulation 7(1)(b) and (2)(c)(ii) of the 1999 Regulations.*

[extract from regulations omitted]

…

17. *First, it is not enough that the claimant may have been under an obligation to notify the Secretary of State of a change in his circumstances. To fall within regulation 7(2)(c)(ii), the source of the obligation has to be "regulations under the [Social Security] Administration Act [1992]". The relevant regulation is not identified in the statement; it is regulation 32 of the Social Security (Claims and Payments) Regulations 1987 ("the 1987 Regulations").*

18. *Second, because the regulation is not identified, the statement is inevitably silent as to the criteria the Tribunal applied when deciding "the date on which the claimant … ought to have notified the change of circumstances" and as to why that date should be exactly one year after the claimant's operation.*

19. *Third, it is necessary that "the claimant knew or could reasonably have been expected to know that the change of circumstances should have been notified". In the context of regulation 7(2)(c)(ii) as a whole, the word "should" in that passage means "should because regulations made under the Administration Act required it". In other words, the decision awarding the claimant DLA could only be superseded with retrospective effect it the claimant actually knew—or ought reasonably to have known— that he was under a legal obligation to notify the Secretary of State of the change.*

20. *Unless the claimant had read and understood the 1987 Regulations (which does not seem probable), knowledge of his legal obligations can only have arisen from what he had been told by others, in particular, the*

> *Secretary of State. However, the written statement of reasons contains no findings as to what information had been given to the claimant and no analysis of what he could reasonably have been expected to have known as a result of that.*

11. In common with Judge Ward I entirely agree with *SM* on the importance of Regulation 7(2)(c)(ii) and the necessity of construing the limitations in that Regulation carefully, as it is an exception to the general rule identified in *SM*. That general rule is beneficial to claimants and so should only be disapplied strictly in the circumstances where Parliament has authorised this.

12. One of the limitations applying to Regulation 7(2)(c)(ii) is that a claimant must have known, or could reasonably have been expected to know, that a change of circumstances should have been notified.

13. I also agree with *SM* that "should have been notified" must mean "was required to be notified". It would not be enough if a claimant knew or could reasonably be: expected to know that notification might be desirable, or prudent, or that it might be required in response to a direct question from the Secretary of State. They must know (or reasonably be expected to know) that they have no choice but pro-actively to notify.

14. However I do not think *SM* can be read as establishing as a requirement that a claimant must not only know (or reasonably be expected to know) that they are required to notify, but also must know that is a <u>legal</u> requirement to do so (still more if the requirement is that they must know that it is a legal requirement stemming from a particular set of regulations).

15. The essence of this element of Regulation 7(2)(c)(ii), is a claimant not doing something which they know they must do (or that they must reasonably be expected to know they must do). It can be seen why such a claimant would put themselves outside the protection enacted by Parliament. I do not consider that the Regulation requires that they must also know <u>why</u> they must do it. The requirement to notify will in fact always be a legal requirement whether a claimant knows that or not, because that is the effect of the words "*the claimant or payee failed to notify an appropriate office of a change of circumstances which regulations under the Administration Act required him to notify*" but all that is required is that they know (or should reasonably be expected to know) that they were under a requirement to notify, not the nature or origin of that requirement.

16. It is necessary for a FtT to work through the terms of Regulation 7(2)(c)(ii), analysing the evidence in each case and making reasoned findings as to each of its conditions.

17. The Tribunal did not undertake that exercise in this case. It is unclear if Regulation 7(2)(c)(ii) was considered at all. Whilst a fresh FtT must now do so, how they choose to approach that task is in the first instance a matter for their judgement. I do not believe that *SM* sought to set out a prescriptive approach to that question beyond the facts of that case. In particular, while in many cases a finding on the question of a claimant's actual or constructive knowledge may turn on what they were told by others, as was the case in *SM*, that will depend on the evidence available in each case. What a claimant has been told (or not been told) should not be considered to be a form of evidence to be privileged solely by its nature above any other relevant evidence. There may well be other forms of relevant evidence, all of which will have to be considered by the FtT and given such weight as it thinks reasonable.

18. I do not need to deal with any other error on a point of law that the FtT may have made. Any that were made will be subsumed by the rehearing.

19. I therefore conclude that the decision of the FtT involved an error of law. I allow the appeal and set aside the decision of the FtT. The case must be remitted for a re-hearing by a new FtT, in accordance with my direction above.

Judge Hocking
Deputy Judge of the Upper Tribunal
authorised for issue on 9 October 2024