Neutral Citation Number: [2025] UKUT 132 (AAC)

Appeal No. UA-2023-001896-ESA

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

LB

Appellant

- v -

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Butler
Decided on consideration of the papers

Representation:
Appellant: Not represented
Respondent: Egle Smith and R J Whitaker, Decision Making and Appeals (DMA) Leeds

On appeal from:
Tribunal: First-tier Tribunal (Social Entitlement Chamber)
Tribunal Case No: SC246/23/00205
Digital Case No.: 1673-0247-8842-2958
Tribunal Venue: Wakefield Civil Justice Centre
Decision Date: 11 July 2023

SUMMARY OF DECISION

40.31 Contributory ESA, 34.2 Tribunal procedure (fair hearing)

The Upper Tribunal allowed LB's appeal on the basis of several material errors of law.

The First-tier Tribunal (Social Entitlement Chamber) uses a computer appeals system called Judicial Case Manager ("JCM"). This provides a digital decision notice tool for generating Decision Notices.

At the time of the Tribunal's decision about LB, where used for employment and support allowance ("ESA") appeals, the digital decision notice tool in JCM automatically wrote references to the Employment and Support Allowance Regulations

2008 into Decision Notices. It would do so even if the appeal in question was about new style ESA (where the applicable regulations are the Employment and Support Allowance Regulations 2013 instead). The JCM tool would not allow a Tribunal to amend the automatically generated Decision Notice to remove incorrect references to the 2008 regulations.

The Upper Tribunal decided that the fact the First-tier Tribunal issued a Decision Notice generated by JCM that referred to the incorrect ESA regulations for LB, did not, of itself, amount to a material error of law.

However, where a First-tier Tribunal deciding a new style ESA appeal refers in its Statement of Reasons to the incorrect set of ESA regulations, it risks making an error of law by materially misdirecting itself in law.

The Upper Tribunal recommends that when explaining its decision about a new style ESA appeal, a First-tier Tribunal takes appropriate steps to demonstrate that it has actually applied the correct regulations in practice.

The Upper Tribunal also recommends that DWP clarifies in its Responses to ESA appeals whether the appeal in question relates to new style ESA.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

As the decision of the First-tier Tribunal involved the making of an error of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the First-tier Tribunal for rehearing by a fresh tribunal.

DIRECTIONS

A. The case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.

B. The new tribunal should not involve any of the panel members previously involved in considering this appeal on 11 July 2023.

C. The new tribunal must not take account of circumstances that were not obtaining at the times the (then) Secretary of State made his decision on 24 November 2022 about whether LB had, or should be treated as having, limited capability for work: see section 12(8)(b) of the Social Security Act 1998 and *R(IB) 2/04* at paragraph 188. Later evidence is admissible, provided it relates to the circumstances at the time of the decision: see *R(DLA) 2/01* and *R(DLA) 3/01*.

D. When listing this appeal for determination before the new tribunal, the First-tier Tribunal is asked to note the following:

(i) LB's submissions to the Upper Tribunal state he wanted a face-to-face hearing of his appeal but it was listed for telephone hearing instead, which proved unsatisfactory; and

(ii) This appeal should not be listed for hearing and determination until after the Upper Tribunal issues and publishes its decisions in appeals UA-2024-000177-USTA (*SSWP v SC*) and UA-2024-000528-HB (*MJ v (1) London Borough of Bromley and (2) SSWP*).

E. If the parties have any further written evidence to put before the tribunal, this should be sent to the relevant HMCTS regional tribunal office within one month of the issue of this decision.

F. The tribunal hearing the remitted appeal is not bound in any way by the decision of the previous First-tier Tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome from the previous tribunal.

G. Copies of this decision, the permission to appeal decision, and the submissions on behalf of both parties shall be added to the bundle to be placed before the First-tier Tribunal hearing the remitted appeal.

These Directions may be supplemented by later directions by a tribunal judge, registrar, or case worker, in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

What this appeal is about

1. This appeal is about whether the First-tier Tribunal ("FTT") deciding LB's appeal about capability for work for the purpose of his new style employment and support allowance claim made one or more material errors of law in reaching its decision about that appeal.

Factual background

2. In early 2022, LB claimed employment and support allowance ("ESA") on the basis that he was not capable of work. He identified health difficulties with a right ankle injury, osteoarthritis and asthma (EA50 questionnaire dated 10 June 2022). LB's right ankle injury related to a broken ankle with complications (accident date: 15 June 2021).

3. LB's claim was for what is called a "*new style*" employment and support allowance. This reflects the fact that:

(a) LB was living in an area where universal credit ("UC") was the relevant income-related benefit for claimants of working age; and

(b) LB had made / been credited with sufficient national insurance contributions to be eligible to claim ESA based on the contributions he had made while in work or self-employment.

4. As LB's claim was for new style ESA, the applicable regulations for determining his entitlement to ESA were the Employment and Support Allowance Regulations 2013 ("the ESA regulations 2013").

5. While it was preparing to carry out a limited capability for work assessment ("LCWA") about LB, DB treated him on a temporary basis as having limited capability for work. This was because LB had provided evidence of limited capability for work in the form of fit notes from his GP.

6. DWP called LB for a medical examination as part of the LCWA, to determine whether he had, or fell to be treated as having, limited capability for work. On 10 November 2022, LB underwent a telephone assessment with a healthcare professional who gave advice to DWP. The healthcare professional advised that LB did not score at least 15 points in relation to the activities set out at Schedule 2 to the 2013 regulations. The healthcare professional advised that LB therefore did not have limited capability for work.

7. The healthcare professional also advised that LB did not satisfy the test described as "Exceptional Circumstances" on page 12 of the ESA85 report (page 41 of appeal bundle). This related to regulation 25(2)(b) of the ESA regulations 2013. Regulation 25 allows a claimant who does not score 15 points under Schedule 2 to the regulations, to be treated as having limited capability for work in exceptional circumstances. Regulation 25(2)(b) addresses where the person has some specific disease, or bodily / mental disablement meaning there would be substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work.

8. On 24 November 2022, a DWP decision-maker accepted the healthcare professional's recommendation. The decision-maker decided that LB did not score the 15 points needed to have limited capability for work and also did not satisfy the exceptional circumstances test for being treated as having limited capability for work instead. The DWP decision-maker superseded (changed) the earlier decision treating LB as having limited capability for work, from 24 November 2022 onwards.

9. Having been through the mandatory reconsideration process, LB appealed to the First-tier Tribunal on 11 January 2023. His appeal was decided following a telephone hearing on 11 July 2023. The First-tier Tribunal ("FTT") agreed with DWP's assessment that LB did not score any of the point-scoring descriptors in Schedule 2 to the ESA regulations 2013. The FTT also decided that LB should

not be treated as having limited capability for work. The FTT therefore refused LB's appeal and confirmed DWP's decision.

Permission to appeal

10. On 12 April 2024, I granted LB permission to appeal to the Upper Tribunal. A summary of the grounds on which I granted permission is:

    (a) Whether the FTT applied the correct legal tests when deciding LB's appeal: I considered it arguable that

        (i) the FTT failed to explain how it had analysed the test of exceptional circumstances in paragraph 26 of its Statement of Reasons. Elsewhere the FTT had referred to LB being capable of performing a range of work, but this was arguably not the correct legal test (which was about whether there was a substantial risk). The FTT also included an incomplete sentence at the end of paragraph 26 of its Statement of Reasons that stated: "*The Tribunal could find no evidence*". It was unclear what the FTT meant by this;

        (ii) Having listened to the audio record of proceedings of the hearing, it appeared the medically qualified tribunal member ("MQTM") focused a substantial portion of her questions on exploring activities relating to whether LB should be treated as having limited capability for work-related activity, rather than whether he should be treated as having limited capability for work; and

        (iii) It appeared the relevant regulations for LB were the ESA regulations 2013. However, the FTT's Decision Notice and Statement of Reasons referred to the Employment and Support Allowance Regulations 2008 ("the ESA regulations 2008") instead. In the online appeals system, First-tier Tribunals are required to use a digital decision tool that, for ESA, writes in automatic references to the ESA regulations 2008. However, the FTT did not identify the ESA regulations 2013 in its decision and Statement of Reasons. It was therefore unclear whether the FTT decided LB's appeal under the legislation that applied to him;

    (b) Whether the FTT gave LB an adequate opportunity to answer its questions at the hearing: the audio recording identified some instances where the MQTM asked a question and LB asked her to repeat it or clarify it. Instead of doing so, the MQTM asked LB a question about a new issue. This approach arguably would have left LB unclear about what he was being asked and unable to give his evidence;

    (c) Addressing LB's argument that he was due to have an operation on his right foot on 05 December 2022: the FTT did not address this argument in its Statement of Reasons. Regulation 21 of the ESA regulations 2013 provides for a person to be treated as having limited capability for work on a day when

they are a hospital inpatient and on a day when recovering from that treatment. The FTT had not addressed this provision; and

(d) Potential wider legal issue: The appeal raised a broader question about whether LB's circumstances allowed DWP to defer making a decision about whether he had limited capability for work, given DWP knew about his imminent operation, or to supersede (change) LB's entitlement to ESA on the basis that although he had failed the LCWA, LB would shortly satisfy regulation 21 of the ESA regulations 2013 and therefore fall to be treated as having limited capability for work.

Legal Framework

11. The following regulations in the ESA regulations 2013 are relevant to this appeal:

21. Hospital patients

21.—(1) A claimant is to be treated as having limited capability for work on any day on which that claimant is undergoing medical or other treatment as a patient in a hospital or similar institution, or on any day which is a day of recovery from that treatment.

(2) The circumstances in which a claimant is to be regarded as undergoing treatment falling within paragraph (1) include where the claimant is attending a residential programme of rehabilitation for the treatment of drug or alcohol addiction.

(3) For the purposes of this regulation, a claimant is to be regarded as undergoing treatment as a patient in a hospital or similar institution only if that claimant has been advised by a health care professional to stay for a period of 24 hours or longer following medical or other treatment.

(4) For the purposes of this regulation, "day of recovery" means a day on which a claimant is recovering from treatment as a patient in a hospital or similar institution as referred to in paragraph (1) and the Secretary of State is satisfied that the claimant should be treated as having limited capability for work on that day.

25. Exceptional circumstances

25.—(1) A claimant who does not have limited capability for work as determined in accordance with the limited capability for work assessment is to be treated as having limited capability for work if paragraph (2) applies to the claimant.

(2) Subject to paragraph (3), this paragraph applies if—

(a) the claimant is suffering from a life-threatening disease in relation to which—

(i) there is medical evidence that the disease is uncontrollable, or uncontrolled, by a recognised therapeutic procedure; and

(ii) in the case of a disease that is uncontrolled, there is a reasonable cause for it not to be controlled by a recognised therapeutic procedure; or

(b) the claimant suffers from some specific disease or bodily or mental disablement and, by reason of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work.

(3) [and remainder of regulation 25 are not relevant to this appeal]

Deciding whether or not to stay LB's appeal

12. The Upper Tribunal will imminently determine two appeals raising an issue similar, but not identical, to the appeal ground described at paragraph 10(d) above. Those appeals were heard on 17 April 2025 and are being dealt with together. They are: UA-2024-000177-USTA (*SSWP v SC*) and UA-2024-000528-HB (*MJ v (1) London Borough of Bromley and (2) SSWP*).

13. In February 2025, I asked LB and the Secretary of State to make submissions about whether they wanted to wait for the outcome of the appeals described at paragraph 12 above, or for me to proceed with determining LB's appeal on the basis of the other appeal grounds where the Secretary of State supports his appeal.

14. The parties provided submissions in March 2025. I am grateful for their responses. The Secretary of State asked me to proceed with deciding LB's appeal. LB indicated he was open to all the options I put forward. He commented that he thought his appeal was a separate issue from the other two cases and of no real relevance. I took this to mean that LB did not object to the option of me deciding his appeal now.

15. In deciding LB's appeal to the Upper Tribunal, I therefore do not need to address further the appeal ground described at paragraph 10(d) above and I have not done so.

The Secretary of State's position about LB's appeal

16. In a helpful submission from Egle Smith dated 13 June 2024, the Secretary of State supported LB's appeal to the Upper Tribunal on the basis of the grounds set out at paragraph 10(a)(i), (b), and (c) above.

17. The appeal ground at paragraph 10(a)(i): the FTT addressed exceptional circumstances at paragraphs 26 to 28 of its Statement of Reasons. The Secretary of State considers the FTT failed to explain its reasoning adequately in these

paragraphs, including failing to explain why it decided there was no substantial risk if LB were found not to have limited capability for work.

18. The appeal ground at paragraph 10(b): The Secretary of State's position is that the hearing recording confirms that LB asked repeatedly, during the hearing, for questions to be repeated, but on several occasions, the Tribunal member would move on to the next question instead of repeating the one they had just asked. The Secretary of State's representative argues that FTT failed to meet the requirements in the overriding objective (rule 2 of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008 – "the 2008 Rules") to deal with cases fairly and justly by ensuring, so far as possible, the claimant could fully participate in the proceedings. This was because LB was not given the opportunity to answer all the questions the FTT asked him.

19. The appeal ground at paragraph 10(c): The Secretary of State's position is that while paragraphs 16 and 17 the Statement of Reasons reiterates LB's position on the effect of his planned operation, the FTT did not analyse that position. The Secretary of State's representative argues this means the FTT's reasons were inadequate.

20. In terms of paragraph 10(a)(iii) above, the Secretary of State made submissions that the FTT made an error of law in terms of referring to the incorrect ESA regulations in its Statement of Reasons. However, the Secretary of State's representative argues that this error was immaterial because the FTT applied the equivalent tests in the ESA regulations 2008, and the wording of these is almost identical to the ESA regulations 2013.

21. The Secretary of State's representative invites the Upper Tribunal to set aside the FTT's decision as containing material errors of law in terms of paragraph 10(a)(i), (b) and (c) above, and to remit it to a new FTT to decide.

LB's position

22. LB made submissions that his main priority at the time of his ESA claim was to get his ankle mended so he would be employable. LB argued that at the time of his (ESA) assessment, he wasn't in that state. He referred to his employer trying a phased return but that it failed because of the problems with his right ankle.

23. In his submissions, LB requested an oral hearing. He wrote that this was because in the FTT phone hearing, he could not always hear properly what was said in the Tribunal and on several occasions, he had to ask for a question to be repeated as he could not properly hear what had been said. LB stated he did request an oral hearing but got a phone one instead. He considered an oral hearing would be better for him to put his points across. I take LB's reference to an oral hearing to be to having his appeal heard face-to-face at a Tribunal venue.

24. In his most recent submissions received on 24 March 2025, LB also stated that when the FTT hearing took place, he thought he had different numbered papers to the rest of the people present, for example, when asked to go to a specific

page of the bundle, he wasn't reading the same text. LB stated this confused him because he could not keep up with what was being discussed in the hearing. LB stated that if he had been given an oral (face-to-face) hearing, this could have been resolved more efficiently.

25. LB also wrote that he was struggling at points to hear and understand what had been said to him, because of this he was not given the opportunity to answer the said questions, so these points were dismissed, and the hearing moved on to the next question, which in his opinion was unfair. LB stated that the judge did ask him at the end of the hearing if he would like to answer the questions he did not hear and could not answer. LB stated that by this point he was feeling too overwhelmed by the way that the hearing went and as a result, thought his points (or the lack of them) weren't heard or valued.

Why there was no oral hearing of this appeal

26. The Secretary of State's representative did not request an oral hearing. LB had requested an oral hearing, as described at paragraph 23 above. However, I consider that the point LB was making is about how his appeal to the First-tier Tribunal should be resolved. Having taken account of LB's preference, I considered the appeal file. I decided the interests of justice did not require an oral hearing because there was a substantial level of agreement between the parties about errors of law by the FTT. I therefore determined the appeal on the papers. It was proportionate to do so.

27. There has been a delay in being able to decide this appeal, linked to the question of whether to stay it pending the outcome of the appeals mentioned at paragraph 12 above. I apologise to the parties for that delay and its impact on being able to decide LB's appeal to the Upper Tribunal.

My decision

28. At the permission stage, I only needed to be persuaded that it was arguable with a realistic (as opposed to fanciful) prospect of success that the FTT had made an error of law in a way that was material.

29. At this substantive stage, I need to be satisfied on the balance of probabilities that the FTT did make an error or errors of law that were material.

30. I am satisfied, on the balance of probabilities, that the FTT made a material error of law in relation to the appeal grounds set out at paragraph 10(a)(i), (b) and (c) above, and summarised at paragraphs 17 to 19 above.

31. I wish to deal in more detail with the grounds set out at paragraph 10(a)(iii) and (b) above. I do so below.

Appeal ground at paragraph 10(b): procedural irregularity during the hearing

32. This relates to the occasions during the hearing when the MQTM asked LB a question, and LB replied by asking the MQTM to repeat or clarify their question. Rather than do so, the MQTM moved on to ask LB a question about a different issue instead. I have listened to the audio recording again. This difficulty came

up on several occasions during the hearing, including while exploring when LB gave up his gardening work, whether he was given medical advice to keep walking or moving and whether he was using a walking aid in November 2022 (such as crutches or a stick).

33. The audio recording confirms that at one point LB explained he was trying to answer the questions, but the discussion was moving on without allowing him to do so. LB told the MQTM he was finding this confusing. Despite this, the MQTM did not return to the question LB said he wanted to answer. When LB pointed this out, the MQTM again moved on to asking LB a different question instead. The MQTM explained that the FTT must ask questions about specific activities, and this might seem a bit strange or daft, but this is what the law required the FTT to do. This did not, however, address LB's request – to be allowed to answer a question he had been asked.

34. The hearing recording confirms that LB explained again that he had not been able to answer one of the MQTM's questions. In response, the MQTM moved on to ask a question in a new area. On these occasions, the MQTM did not appear to acknowledge that LB could not hear the questions or was trying to answer an earlier question.

35. I know that limited capability for work appeals frequently involve covering a lot of ground in a short period of time and an FTT needs to manage its time effectively. It is also possible that LB and MQTM were talking at cross purposes because each of them could not hear the other person properly. What comes across from the audio recording, however, is that LB did not appear to have been heard, acknowledged, and listened to by the Tribunal.

36. Dealing fairly and justly with LB's case included ensuring he could participate fully in the proceedings. This is qualified by "*so far as practicable*" in rule 2(2)(c) of the 2008 Rules. LB was represented by a welfare rights adviser at the hearing, who did not intervene. However, even with that fact, and with the qualification to rule 2(2)(c), ensuring LB could participate in the hearing meant that as soon as his difficulties hearing the MQTM's questions arose, the FTT needed to pause, check the members and LB could hear one another adequately, and check that he had been given the opportunity to answer the questions he wanted to address.

37. Responding quickly would also have avoided LB's sense of being overwhelmed and not being heard by the FTT (see paragraph 25 above). It can be hard to know exactly when to intervene – doing so disrupts the flow of questions and answers. However, although the judge intervened at one point to ask LB if he wanted to cover the questions he had not heard, it was too late, and he no longer felt able to take part effectively.

38. For these reasons, I have decided there was a procedural irregularity in the way in which the FTT heard and dealt with LB's appeal. I am satisfied it was both capable of affecting the fairness of the hearing, and that it did so.

Paragraph 10(a)(iii): referring to the Employment and Support Allowance Regulations 2008 in the Decision Notice and Statement of Reasons

39. In around 2021, the First-tier Tribunal (Social Entitlement Chamber) started using an online appeals system called Judicial Case Manager ("JCM"). This is also sometimes known as Core Case Data ("CCD"). The online appeals system includes a digital decision notice tool. This allows the First-tier Tribunal deciding an appeal to write in key information about their decision in relation to the appeal, and to generate automatically a Decision Notice for it.

40. The digital decision notice tool contains areas where it automatically writes text into a Decision Notice (for example, the name of the parties, and the national insurance number for the appellant). The tool includes optional areas for the Tribunal to input text, for example, the number of pages, which is then incorporated into an automatically generated sentence about the number of pages in the appeal bundle. The tool has other areas where the Tribunal is asked to choose from applicable options, which will then generate text within the Notice. Finally, the tool contains areas where the Tribunal can write in one or more sentences in the form of free text.

41. Once a Tribunal has provided wording for all the areas it must complete and has added in text for any areas where it wishes to add free text, the decision notice tool will automatically generate a Decision Notice for the appeal.

42. I am aware that when LB's appeal was decided in July 2023, the digital decision notice tool automatically generated references to the ESA regulations 2008, in relation to all ESA appeals about limited capability for work and / or work-related activity. The digital decision notice tool inserted those references automatically. The Tribunal could not remove them.

43. In practical terms, it means that using JCM to generate the Decision Notice automatically for LB's appeal would inevitably refer to the ESA regulations 2008. It would do so, regardless of what the FTT wished to write into that Decision Notice, and irrespective of whether the 2008 regulations were the applicable ones for his appeal.

44. The FTT's Statement of Reasons dated 25 September 2023 also referred to the ESA regulations 2008. It did so at paragraphs 26 onwards, when dealing with exceptional circumstances. The FTT used a sub-heading of "**regulation 29/35"**. This related to regulations 29 and 35 of the ESA regulations 2008. The equivalent regulations within the ESA regulations 2013 are regulations 25 and 31.

45. I note that when providing the FTT with its written response for LB's appeal, DWP did not confirm that his appeal was about a new style ESA claim. At section 5 of the response (pages G to J of bundle), DWP referred to the tests set out specifically in the ESA regulations 2008. DWP's Response then set out at pages K to R of the bundle, Schedules 2 and 3 to the ESA regulations 2008. I consider this was an unhelpful way to refer to the relevant legislation for LB's appeal.

46. Having looked at the FTT appeal bundle, I was able to identify an implied reference to the ESA regulations 2013. It is at page 58. This sets out part 2 of the LCWA assessment at the end of DWP's internal decision dated 24 November 2022. Under the heading "*Further considerations*", it refers to several numbered regulations that relate to the ESA regulations 2013 (for example regulation 21 (hospital patients) and regulation 25 (LCW risk)). This provided a clue for the FTT about which regulations applied. I recognise that it did so in a bundle where DWP also referred several times, incorrectly, to the ESA regulations 2008.

47. In ***R (Iran) v Secretary of State for the Home Department [2005]*** EWCA Civ 982, the Court of Appeal provided a summary of errors of law. The Court of Appeal confirmed it is an error of law to make a material misdirection of law on any material matter (paragraph 9v) of decision).

48. Applying this to the circumstances described at paragraphs 40 to 43 above, I am satisfied it was not, of itself, a material misdirection of law for the FTT to produce a Decision Notice that referred to the ESA regulations 2008 instead of the ESA regulations 2013. This was a product of what the JCM digital decision notice tool automatically builds into a Decision Notice. It was not possible for the FTT to use that tool on JCM and to remove the references to the incorrect regulations.

49. I am, however, troubled by the fact that the FTT failed to identify and address the correct ESA regulations in its Statement of Reasons dated 25 September 2023. The Secretary of State argues that this amounted to the FTT misdirecting itself in law, but not materially, because the wording of the relevant provisions in of the ESA regulations 2008 is almost identical to the equivalent parts of the ESA regulations 2013. The Secretary of State argues that it cannot be said the slight variations in wording between the regulations would have led to a different outcome, when this is considered in the context of LB's evidence.

50. This must, however, be balanced against the fact that the combination of Decision Notice and Statement of Reasons suggest the FTT was not aware it was deciding a new style ESA appeal and did not apply the ESA regulations 2013 to it. It does not seem to be controversial to state that in an appeal, the parties are entitled to expect that the Tribunal determining it has firstly identified, and secondly applied, the correct legislation.

51. In terms of the "materiality" of a misdirection in law, it is possible that a Tribunal can factually apply the correct legislation but describe or list it incorrectly in its Decision Notice and / or Statement of Reasons. In those circumstances, the Tribunal's decision will need to be scrutinised to determine whether it applied the correct legislation in practice.

52. As explained above, DWP should have set out in the appeal bundle that this was a new style ESA appeal. An obvious place to do so would have been on page A of the Bundle, in the row marked "Benefit". There are other places as well, for example, in section 4 of the response ("The facts of the case") or in section 5, when citing the applicable legislation. However, despite DWP not explaining the position, a FTT must be able to identify for itself which law applies to an appeal.

A First-tier Agency failing to state the law correctly (or not stating it at all) does not relieve an FTT of its inquisitorial duty to do so.

53. I do not, however, advocate that FTTs simply adjourn or postpone ESA appeals that do not contain a definite statement by DWP about whether the appeal is about new style ESA or not. This would not be a proportionate approach. Some appeal bundles will always contain inadequate or incomplete explanations of the applicable law by the First-tier Agency. Even if the bundle does not state a position about whether the appeal is a new style ESA appeal or not, there are a number of approaches the FTT can take to work this out, applying its inquisitorial function.

54. Firstly, in LB's appeal, there was a clue from the appeal bundle that this was an appeal under the ESA regulations 2013 (the references to regulation numbers at page 58 of bundle). Secondly, the circumstances of the appeal pointed to it likely being a new style ESA claim. These include that it was a new claim, made recently in time (likely *after* UC would have been rolled out in LB's area).

55. Finally, the FTT's Decision Notice confirmed it had a DWP Presenting Officer participating in the telephone hearing of LB's appeal. Paragraph 10 of the Statement of Reasons explains the Presenting Officer provided details about the claim that were not in the appeal bundle. The FTT could, and should, have asked the Presenting Officer to confirm the position, if it was unsure which type of ESA it was dealing with. I am aware that many ESA appeals do not involve a Presenting Officer but where they do, this provides another source of information for the FTT. A Tribunal can also ask the appellant at an oral hearing about the circumstances in which they claimed ESA.

56. On balance, I am satisfied that while the FTT misdirected itself in law, as evidenced in its Statement of Reasons, this was not material. I have reached this conclusion by considering the specific provisions that the FTT referred to (directly or impliedly) in its Statement of Reasons. I agree with the Secretary of State that the differences in wording between the specific provisions between the different sets of ESA regulations were slight. They amount to a comma and using the plural of "apply" ("applies") in one set of regulations.

57. It should not be assumed that my decision on this issue represents a statement of position generally for FTTs that fail to correctly identify whether they are deciding a new style ESA appeal or an "old style" ESA appeal. Any FTT that does not check whether it has applied the correct legislation in deciding an appeal, puts its decision at clear risk of being set aside for material misdirection in law.

58. Had the FTT referred in more detail to the ESA regulations in its Statement of Reasons, this might have resulted in a clearer indication that the FTT was materially misdirecting itself in law by applying the incorrect ESA regulations when deciding LB's appeal. The fact that the FTT did not give that detail has arguably exposed its decision to a different error of law in terms of adequacy of reasoning, including that it did not address LB's argument about becoming a hospital inpatient.

59. I encourage First-tier Tribunals deciding limited capability for work / work-related activity ESA appeals, and using the digital decision notice tool within JCM, to make clear, in any Statement of Reasons produced, that they have correctly identified the relevant applicable legislation when deciding the ESA appeal. It is also open to First-tier Tribunals to include wording in the free-text section of their JCM-generated Decision Notices to explain which ESA regulations they have actually applied to determine the appeal.

60. I strongly encourage DWP to include wording in its Response to ESA appeals to confirm whether the claim in question is a new style ESA claim. DWP should also refer to the relevant regulations for the specific ESA appeal in its Responses, for example, on the front page of the Response and sections 4 and 5.

Conclusion, including disposal

61. Having decided the FTT's decision involved material errors of law, it is appropriate to exercise my discretion to set aside the Tribunal's decision dated 11 July 2023 under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Having done so, section 12(2)(b) of that Act provides that I must either remit the case to the First-tier Tribunal with directions for their reconsideration or remake the decision.

62. Neither party has asked me to remake the FTT's decision. In any event, it is necessary for further facts to be found. The First-tier Tribunal is best placed to evaluate the evidence, including using its medical expertise, and to make appropriate findings of fact.

63. I therefore remit LB's appeal for rehearing before a new First-tier Tribunal. It will make a fresh decision about whether LB had, or fell to be treated as having, limited capability for work at 24 November 2022.

64. Although I have set aside the Tribunal's decision dated 11 July 2023, I am not making any findings, or expressing any view, about whether LB had, or should have been treated as having, limited capability for work. The next tribunal will need to hear evidence and make its own findings of fact and provide its reasoning for the decision it reaches.

Judith Butler
Judge of the Upper Tribunal

Authorised by the Judge for issue: 22 April 2025