Neutral Citation Number: [2026] UKUT 243 (AAC)
Appeal No. UA-2025-001864-CA

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

Stephen Mark Parkinson

Appellant

- and -

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Nicholas Paines KC

Decided on the papers

On appeal from:

Tribunal:	First-tier Tribunal (Social Entitlement Chamber)
Tribunal member:	Judge J Birbeck
Tribunal Case No:	SC164/22/00074
Tribunal Venue:	Workington
Decision Date:	20 March 2025

DECISION

The decision of the Upper Tribunal is to allow the appeal.

The decision of the First-tier Tribunal made on 22 April 2025 under case number SC308/24/00284 was made in error of law.

Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007, that decision is set aside and replaced by a decision that no amount of carer's allowance is recoverable from the appellant.

SUMMARY OF DECISION

KEYWORD NAME (Keyword Number)
Carer's allowance - (50.1)
Recovery of overpayments - failure to disclose (27.3)

The claimant claimed carer's allowance in 2009 and disclosed earnings above the earnings limit. He was awarded carer's allowance in error. He was required pursuant to regulation 32 of the Social Security (Claims and Payments) Regulations 1987 to notify increases in his earnings. His earnings increased in 2011 and annually thereafter. The claimant did not notify the Department of the increases. In 2020 the Department discovered the overpayment following a random check and issued a recovery decision. The First-tier Tribunal held that payments made prior to the unnotified increase in the claimant's earnings were not recoverable but that payments subsequent to the first increase were recoverable as the claimant had failed to disclose the material fact of his increased earnings.

I have held that the overpayments are not recoverable. The claimant had failed to disclose the fact of the increases, but had previously disclosed the fact of his having a level of earnings exceeding the earnings limit. The fact of the further increased earnings was not objectively a material fact in the light of the facts already known to the Secretary of State. Further, the continuing payments were not made in consequence of the non-disclosure but were made in consequence of the original error, which the claimant's silence left uncorrected.

***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.*]**

REASONS FOR DECISION

1. I allow this appeal. The First-tier Tribunal ("FTT") made an error of law and its decision should be set aside. I make the decision that the First-tier Tribunal ought to have made, which is that there was no recoverable overpayment of carer's allowance to the claimant.

2. I accept the First-tier Tribunal's findings of fact as set out in paragraphs 1 to 16 of the Statement of Reasons for its decision. In short, Mrs Parkinson, the claimant's wife, became ill in 2009. As a result, Mr Parkinson claimed carer's allowance ("CA") in July 2009. By mistake, the claim form initially set out details of Mrs Parkinson's income in the space for his own, but this error was almost immediately corrected as a result of the DWP issuing a further information enquiry form. Mr Parkinson returned that form on 7 September 2009, giving details of his own income, which was over £300 per week, well above the earnings limit for carer's allowance of £95 per week.

3. Nevertheless, on that date Mr Parkinson was awarded CA with effect from 29 June 2009. Payment of CA continued until 2020. In February of that year the DWP made a random check of Mr Parkinson's earnings on HMRC's real time information system, which contains details of earnings reported to HMRC for employees whose pay is paid with deduction of tax under the PAYE system. They also obtained copy payslips from Mr Parkinson himself. In short, the evidence showed that Mr Parkison's earnings had exceeded the CA earnings limit throughout the period that he had received CA. His award of CA was terminated and in due course a recoverable overpayment of over £49,000 was calculated. The DWP accepted that payments prior to 4 April 2010 were not recoverable as they resulted from the Department's error in

awarding the allowance despite the evidence of Mr Parkinson's income which they had in September 2009.

4. Mr Parkinson appealed. The First-tier Tribunal decided in October 2023 that there had been a recoverable overpayment to Mr Parkinson, but that decision was set aside by the Upper Tribunal in October 2024 and the case was remitted to the First-tier Tribunal to be reconsidered by a different judge. The case then came before Judge Birbeck in March 2025. The first judge's decision was on a different basis from Judge Birbeck's decision and I do not need to say anything more about that earlier decision.

5. Judge Birbeck decided that there was a recoverable overpayment of CA to Mr Parkinson in respect of the period from 5 April 2011 onwards, which the judge directed the DWP to calculate. She found that the overpayment in respect of the period prior to that date was attributable to the Department's error in awarding the allowance originally, but the overpayment from that date onwards was due to Mr Parkinson's failure to disclose that the level of his earnings had increased. Mr Parkinson's earnings did not go up in 2010, but they did in 2011 and subsequently.

6. The tribunal's decision was based on the fact that the original letter notifying Mr Parkinson of the award of carer's allowance, and subsequent letters notifying him of uprating of the rate of the allowance, contained wording instructing him to report certain changes of circumstances. There are specimens of these letters in the FTT file; each of them contains lists of "important changes you must tell us about", including "if you have already told us that you are working, you must tell us if your earnings go up". These requirements were included in the letters in exercise of the Secretary of State's power under regulation 32(1A) of the Social Security (Claims and Payments) Regulations 1987 to require a recipient of benefit to "furnish in such manner and at such times as the Secretary of State may determine such information or evidence as the Secretary of State may require in connection with payment of the benefit claimed or awarded". It is not disputed that Mr Parkinson did not provide any information about increases in his earnings and was therefore in breach of his obligations under regulation 32.

7. Mr Parkinson appeals against the tribunal's decision with permission to appeal given by Judge Wikeley and with the assistance of Mr Christopher Nichol of Citizens Advice Copeland, who represented him before the FTT. The Secretary of State does not support the appeal and submits that the tribunal did not err in law.

8. The preconditions for the Secretary of State recovering an overpayment of CA are set out in section 71(1) of the Social Security Administration Act 1992. So far as relevant to this case they are first that

> whether fraudulently or otherwise, any person has … failed to disclose any material fact and in consequence of the … failure a payment has been made in respect of a benefit to which this section applies.

9. Secondly, where that is the case, the Secretary of State is

> entitled to recover the amount of any payment which he would not have made but for the misrepresentation or failure to disclose.

10. Mr Nichol accepts that Mr Parkinson was in breach of his obligations under regulation 32 of the Regulations in failing to notify the DWP of the increases in his earnings, and that if he had done so the Department would have stopped paying CA to him. But Mr Nichol submits that, on a proper application of the terms of section 71,

as explained in the authorities, Mr Parkinson did not fail to disclose a material fact, and that the continuing payments were not made in consequence of such a failure. Mr Nichol emphasises that the cause of the overpayments in this case was the Department's failure to act upon the information supplied in 2009, which told the Department that Mr Parkinson was not eligible for CA because his income was over the earnings limit. Information about subsequent increases in his earnings would have reminded the DWP that Mr Parkinson's earnings were over that limit, which they knew already; it would not have told them anything else that was relevant, because the new level of earnings did not change the position that the Department already knew about.

11. Mr Nichol emphasises that there are two conditions in section 71(1): first, that the overpayment was made "in consequence of" a failure to disclose a material fact, and secondly that the payment being recovered would not have been paid "but for" the failure to disclose. He submits that the continued payment of CA was not caused by Mr Parkinson not supplying information about his increases in earnings, given that the Department knew all along that his earnings were above the earnings limit. The First-tier Tribunal rejected that argument. For the reasons I shall give below, I have concluded that the argument is substantially correct and that the decision of the FTT involved an error of law. Since the relevant facts are sufficiently established, and the issue is one of substantive law, I consider that I should make the decision that the First-tier Tribunal ought to have made. I shall review the tribunal's reasoning after I have set out my understanding of the law.

12. The Secretary of State does not support the appeal. His representative submits that each increase in Mr Parkinson's earnings amounted to separate change of circumstances which he was obliged to disclose. She relies on *LB v SSWP (ESA)* [2019] UKUT 178 (AAC) which I shall consider at the end of my decision. She also cites, as does Mr Nichol, the decision of Judge Turnbull in *BD v SSWP* [2016 UKUT 162 (AAC) in which the Juge held that section 71 imposes a twofold test for causation, with the effect that though an overpayment would not have been paid but for a non-disclosure, it might not as a matter of common sense have been paid in consequence of a non-disclosure but as a result of some other cause such as carelessness within the DWP. She submits that disclosure of Mr Parkinson's pay increases would have prompted a review of his entitlement and prevented the subsequent overpayments.

13. I have not found the issues in this appeal easy to determine. Causation is a difficult area of the law. I have found it helpful to consider in turn each of the relevant elements of section 71(1). I start with the concepts of "fail", "disclose" and "material fact" before turning to the two causation elements of "in consequence of" the failure and "but for" the failure.

14. The caselaw establishes that the non-provision of information is only a failure within the meaning of section 71(1) if it is a breach of a legal duty, and that the source of the duty in cases such as the present is an information requirement pursuant to regulation 32(1): see in particular *R(IS) 9/06*. As I shall go on to explain, the fact that a non-disclosure is contrary to such a requirement does not automatically satisfy the requirements of section 71, but it is a necessary prerequisite to recoverability of an overpayment.

15. The requirement in this case was in the terms "you must tell us if your earnings go up"; Mr Parkinson could therefore have satisfied his regulation 32 obligation by making the bald statement "my earnings have increased"; he was not obliged by the words of the letters to tell the Secretary of State what the level of his earnings was.

The practical effect of this distinction is not great: a statement to the effect "my earnings have increased to £400" would have immediately told the reader that Mr Parkinson's earnings exceeded the earnings limit, but a mere statement that the earnings had increased would most probably have led to the Secretary of State making further enquiries. But since Mr Parkinson could only "fail" to disclose what he had been required to disclose, it is potentially relevant to whether the information that he failed to disclose was as to a "material fact"; in other words, whether the mere fact of the increase, as opposed to the new level of his earnings, was such a fact.

16. As to the meaning of "disclose", Mr Nichol correctly relies on the decision in *R(SB) 15/87* which establishes at [25] and [26] that "disclosure consists in the statement of a fact so as to reveal that which so far as the discloser knows was previously unknown to the person to whom the statement was made" and that "once disclosure has been made to a particular person there can be no question of [the discloser] being under any obligation to repeat that disclosure to the same person". The relevance of this is that the fact that Mr Parkinson's income exceeded the earnings limit for CA was a fact already known to the Secretary of State and Mr Parkinson's omission to say so again could not be a failure to disclose that fact.

17. The fact of the increase in earnings, even further above the earnings limit, was not a fact known to the Secretary of State, and I have already concluded that the failure to inform the DWP of the increase was a breach of Mr Parkinson's regulation 32 duty. That leaves open the question of whether the non-disclosure was of a "material fact".

18. There does not appear to be much discussion in the authorities of what constitutes a "material fact" for the purposes of section 71. The tribunal referred to *R(IS) 7/94* (*Jones v Chef Adjudication Officer).* In that case Evans LJ accepted a submission that material "means relevant to the calculation of benefit and therefore is limited to factors which affect the amount of benefit which the claimant is entitled to receive". He held that a declaration that "I have correctly reported any facts which could affect the amount of my payment" was not a misrepresentation as to the facts relevant to the claimant's entitlement but only as to whether they had been reported; it was not therefore a material misrepresentation. The other members of the Court disagreed; Stuart Smith LJ said that the statement was as to a material fact "since unless the statement is true the claimant is not entitled to the amount of benefit claimed". Dillon LJ concurred with Stuart Smith LJ in dismissing the appeal, but without expressly commenting on the meaning of "material".

19. In *R(IS) 9/06* a Tribunal of Commissioners held that "material" means "objectively material to the decision of the Secretary of State to make an award of benefit", confirming that the test is objective and does not depend on the perception of a claimant. Materiality is not confined to decisions upon awards of benefit; in the FTT Judge Birbeck neatly encapsulated the test as whether the fact is "material to the Secretary of State in determining entitlement to benefit".

20. In some cases the fact of an increase in another source of income may be material to the decision to award benefit. For example it may take a CA claimant's earnings from below £95 per week to above £95 or more per week, with the consequence that they cease to be eligible. Or it may affect the level of an award, as in *LB v SSWP* [2019] UKUT 178 (AAC), on which the Secretary of State relies and which I discuss below. But in circumstances where such an increase leaves the claimant in the same position as to eligibility, I find it difficult to describe the fact of the increase as objectively material to the decision on entitlement.

21. After citing *R(IS) 7/94* Judge Birbeck reasoned that “the level of the claimant’s income is clearly material to the Secretary of State in deterining entitlement to Carers Allowance”. That statement is undoubtedly correct, but it raises the two questions (a) whether Mr Parkinson had “failed” to disclose the new level of his income in breach of a requirement under regulation 32 as well as (b) whether either the fact of the increase or the new level of income was a material fact in circumstances where the Secretary of State already knew (albeit had overlooked) the fact that Mr Parkinson’s income already exceeded the earnings limit for carer's allowance.

22. As to question (a), my preferred answer is that Mr Parkinson had not been required to disclose the level of his new earnings. I am fortified in that by the approach of the Court of Appeal to vaguely worded instructions in *R(IB) 4/07* (*Hooper v SSWP*) at paragraph 56, influenced by their acknowledgement of the severity of the possible consequences of a breach of regulation 32. But in case I am wrong on that I shall also consider whether the new level of Mr Parkinson’s earnings was a “material” fact.

23. Plainly the Secretary of State did not know about the pay increase or the new level of Mr Parkinson’s earnings (a point of distinction from *LH v SSWP (RP)* [2017] UKUT 249 (AAC)*,* where the relevant section of the DWP did know that the claimant's wife’s pension had been uprated). So the question is whether either of these things was a material fact in circumstances where the Department already knew that Mr Parkinson's earnings already exceed the income threshold.

24. I am forced to the conclusion that these things were not material facts in those circumstances. The test is objective, and must I think have regard to all the circumstances. Facts that are objectively material in some circumstances, even in the majority of circumstances, may not be material in others.

25. One cannot avoid noticing that the utility to the Secretary of State of being notified either of the increase in Mr Parkinson’s earnings or the new level would not have been that it told the DWP anything that the Department needed to learn in order to calculate a correct award; it would purely have been that it would be likely to awaken the Department to a fact that it already knew, i.e. that the earnings exceeded the earnings limit. The precise extent of the excess was not material to the entitlement decision.

26. If I am right in that, then this precondition of recoverability was not satisfied. But for completeness I shall deal with the issues of causation embraced in the “in consequence” test and the “but for” test. The application of the “but for” test is straightforward, but the application of the “in consequence test is not.

27. As regards the “but for” test, Mr Nichol correctly acknowledged that the test was satisfied, on the basis that, if the Department had learned of the fact of Mr Parkinson's increase in earnings, that would most probably have led it upon a train of enquiry that would have alerted it to the fact that Mr Parkinson had never been entitled to CA. That process would have taken a period of time and payment would not have stopped immediately upon the notification being received. Findings would need to be made as when they would have stopped.

28. As regards the “in consequence” test, Mr Nichol applied the concept of breaking the chain of causation, but in a different context from that in which it is normally applied. More commonly, the first event is that a claimant misrepresents or fails to disclose a material fact and as a result an award is made or continued on a mistaken factual basis. In such a case it is readily concluded that the resulting overpayments occur in consequence of the misrepresentation or failure to disclose, but the issue can arise as

to whether the chain of causation is broken as a result of a later event, usually the receipt by, or availability to, the DWP of the correct information from another source such as HMRC. The issue than is whether, and if so at what point, the overpayments can no longer be said to be in consequence of the original misrepresentation or failure.

29. In the present case the events are the other way around. CA was awarded and payments put in train as a result of the failure to have regard to the information that Mr Parkinson initially provided. Mr Parkinson did what was necessary to provide the DWP with the correct information and the sole cause of payments was the Department's overlooking the information. In this case the "in consequence" test falls to be applied to the later event (or non-event), Mr Parkinson's omitting to notify the DWP of his increase in earnings. Mr Nichol submits in effect that the omission did not cause the continuing overpayments, but merely left in place a situation in which the Department continued to act in accordance with its original error.

30. If one asks the question whether the omission "caused" the continuing overpayments, the answer seems to me to be "no": the cause remained the original error and Mr Parkinson's silence did not cause the further payments but left their original cause in place. If one asks the question whether the continuing overpayments were "in consequence of" his silence, the answer seems to me to be the same. The continuing payments were not the consequence of his silence but a continuing consequence of the original error.

31. Before concluding this decision I must deal with *LB v SSWP (ESA)* [2019] UKUT 178 (AAC), on which the Secretary of State's submission to the Upper Tribunal relies. In that case a claimant for employment and support allowance was in receipt of two occupational pensions. It is not clear whether she was in receipt of them at the outset or only subsequently. Receipt of them should have led to a pound for pound reduction in in her ESA entitlement. One of the pensions she did not disclose to the Secretary of State at all, and it does not have to be considered further. The other she did disclose in June 2015, but the Secretary of State failed to act on the information. The First-tier Tribunal found that the overpayment of ESA in the period immediately following her disclosure of it was not recoverable, as it was attributable to the Secretary of State's failure to act upon her disclosure. But the pension increased annually and she did not report the increases. The FTT found that overpayments subsequent to her failure to notify the 2016 and 2017 increases were recoverable since they resulted from her failure to report the increases, and the Upper Tribunal agreed.

32. The issue then arose as to the quantum of recoverable overpayment. The claimant argued that it should be limited to the amount of ESA that ought to have been set off against the unreported increase in the pension, rather than the element of the that should have been, but was not, set off against the amount of the pension that had been disclosed in 2015.

33. Upper Tribunal Judge Poole QC rejected that argument, noting at [17] that it was not disputed that the increase in the pension was a material fact. The judge then turned at [18] to the "but for" test in section 71 and confirmed the conclusion that the amount that would not have been paid but for the non-disclosure was the whole of the overpayment.

34. I respectfully agree with Judge Poole's conclusion on the facts of that case. The fact of the undisclosed pension increase was a material fact in that case since, unlike in the present case, it altered the claimant's entitlement. The instalments paid after

the increase were, at least as to the part corresponding to the unreported pension increase, paid in consequence of the non-disclosure. When it came to computing the amount of the overpayment, the “but for” test fell to be applied. At that stage the conclusion was the same as in the present case - that, had the increased amount been disclosed, the Department would have offset the full amount of the pension, including that part that it had failed to offset in the periods prior to the undisclosed increase.

35. For all these reasons, I allow the appeal in the terms set out above.

Nicholas Paines KC
Judge of the Upper Tribunal

Authorised for issue on 11th June 2026