Neutral Citation Number: [2026] UKUT 294 (AAC)

Appeal No. UA-2025-000912-ESA

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

RULE 14 ORDER: It is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the Respondent in these proceedings. *Failure to comply with this order may be contempt of court and could lead to a fine, imprisonment or other sanction.*

Between:

Secretary of State for Work and Pensions

Appellant

- v -

SPL

Respondent

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

Representation:

Appellant: Mr John Cook, Durham Welfare Rights
Respondent: Ms Jessica Coleman, Decision Making and Appeals, DWP

On appeal from:

Tribunal: First-Tier Tribunal (Social Security and Child Support)
Judge/Panel: Judge J R Findlay
Tribunal Case No: SC292/21/00065
Digital Case No: 1618-3280-0151-5599
Tribunal Venue: Durham Justice Centre
Hearing Date: 6 February 2025

SUMMARY OF DECISION

Judicial summary

The Secretary of State decided that the claimant was subject to the recovery of an overpayment of income-related employment and support allowance ('ESA') for a 3-year period ending in August 2020. The First-tier Tribunal decided that the Secretary of State had not discharged the burden of showing that a supersession decision had been made (before the overpayment decision) and duly notified to the claimant. The Upper Tribunal dismissed the Secretary of State's further appeal. Section 71(5A) of the Social Security Administration Act 1992 and *LL v Secretary of State for Work and Pensions* [2013] UKUT 208 (AAC) considered.

KEYWORD NAME (Keyword Number)

30.9 Reviews, revisions and supersessions – Supersession – General
27.8 Recovery of Overpayments – Other
40.32 Income-Related Employment and Support Allowance

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

The decision of the Upper Tribunal is to dismiss the Secretary of State's appeal. The decision of the First-tier Tribunal did not involve any material error of law (section 11 of the Tribunals, Courts and Enforcement Act 2007).

REASONS FOR DECISION

The parties to this appeal

1. The Appellant in this case is the Secretary of State for Work and Pensions. To avoid any confusion caused by the parties' different roles at the two levels of appellate tribunals, I refer to the Appellant in this Upper Tribunal decision as 'the Secretary of State'.

2. This decision is subject to a rule 14 anonymity order, under which the Respondent is known as 'SPL' (not their true initials). In this decision I refer to the Respondent simply as 'the claimant'.

A brief chronology

3. The case has a somewhat protracted history. For present purposes a short outline of the chronology will suffice. In January 2021 the Secretary of State decided that the claimant was subject to the recovery of an overpayment of

income-related employment and support allowance ('ESA') for a period between August 2017 and August 2020. In March 2022 the First-tier Tribunal ('FTT') dismissed the claimant's appeal against that decision. In January 2024 Upper Tribunal Judge Mitchell allowed the claimant's further appeal against the decision of the March 2022 FTT (under case reference UA-2022-001126-ESA) and directed a rehearing of the claimant's original appeal before a fresh tribunal. In February 2025 the FTT allowed that remitted appeal, finding in its Decision Notice that "There is no recoverable overpayment. The [Secretary of State] had not discharged the burden of proof". The Secretary of State now appeals to the Upper Tribunal.

The relevant legislation and case law

4. Section 71(5A) of the Social Security Administration Act 1992 provides that:

> (5A) Except where regulations otherwise provide, an amount shall not be recoverable under subsection (1) or under regulations under subsection (4) unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or has been revised under section 9 or superseded under section 10 of the Social Security Act 1998.

5. In *LL v Secretary of State for Work and Pensions* [2013] UKUT 208 (AAC) Judge Fordham QC (as he then was) set out a helpful analysis of section 71(5A):

> *Section 71(5A) analysed*
>
> 6. In my judgment, the correct analysis in law is as follows. I shall focus on supersession, because that is the relevant feature of section 71(5A) in the present case.
>
> (1) Section 71(5A) of the 1992 Act imposes an important requirement that the recoverability of overpaid benefit depends on there having been a proper and valid (supersession) entitlement decision. This imposes a discipline which has two legal consequences: one of which is internal; the other external.
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> (2) The internal consequence is that, before payment is recoverable, the Secretary of State must have made an entitlement decision (supersession) under section 10 of the Social Security Act 1998: "a decision made by the Secretary of State". The Secretary of State will need to show, by reference to a documentary record, that such a decision was made.
>
> (3) The external consequence is that, before payment is recoverable, the Secretary of State must have notified the entitlement decision. That is because (a) this is an appealable decision of which written notice is statutorily required (regulation 28(1)(a) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999) and (b) there is a general constitutional principle linking legal validity of a decision to its notification (see *Anufrijeva*'s case).

(4) Both of these steps – the taking and notification of a supersession decision – must have been taken before the recoverability decision is taken under section 71 of the 1992 Act. That is the meaning and effect of section 71(5A). But it is also supported by section 12(8)(b) of the 1998 Act, because when a tribunal comes to consider the legality of any section 71 decision under appeal, supersession (making and notification) would need to be "circumstances … obtaining at the time when the decision appealed against was made".

(5) This analysis is not undermined by the provisions which deal with the effective date for a supersession decision. Those provisions have a different function. There is a distinction between (a) a valid supersession decision and (b) its effective date. The statutory scheme makes detailed provision as to the effective date for supersession decisions. That means the date from which they take effect in law. The starting-point is that a supersession decision "shall take effect from the date on which it is made" (section 10(5) of the 1998 Act). But regulations can provide for a different date (section 10(6)), so that certain non-advantageous decisions based on a change of circumstances "shall take effect … from the date of the change" (regulation 7(2)(c)(v) of the 1999 Regulations). Those provisions are important because a supersession decision is changing an existing benefits entitlement, and where the Regulations permit may do so retrospectively (as when they take effect from the date of the relevant change of circumstances).

(6) In giving section 71(5A) of the 1992 Act a proper (as well as a practical and effective) application, it must be possible to ask, at the date of the section 71 recoverability decision: has section 71(5A) been complied with? The answer cannot depend on some future step which will then, once it is taken, have a retrospective effective past date. That demonstrates that the 'effective date' provisions do not hold the answer to the question whether there has been a valid supersession decision, for the purposes of section 71(5A).

(7) The crucial question is therefore whether there has been a properly made and notified supersession decision (under section 10 of the 1998 Act) by the time of the recoverability decision (under section 71 of the 1992 Act). If not, section 71(5A) is not satisfied. This is not a mere 'procedural defect' which a tribunal could later 'correct'.

(8) A properly notified supersession decision means a written notice, which must be clear. It must clearly describe the supersession decision, as a "decision against which [an] appeal lies" (regulation 28 of the 1999 Regulations). That means a person receiving the notice would clearly understand from it that they were being notified of that decision and could appeal that decision.

6. Upper Tribunal Judge Brewer adopted and summarised this analysis in *AS v Secretary of State for Work and Pensions* [2025] UKUT 249 (AAC) as follows:

Notification as a Precondition for Recovery

> 50. It is a principle both of statutory construction and constitutional fairness that recovery of overpayments cannot occur without due process. Section 71(5A) of the 1992 Act imposes two mandatory preconditions before recovery of overpayment: first, there must have been a revised or superseded entitlement decision; second, the claimant must have been notified of that decision.
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> 51. Two separate rights of appeal follow: first a right of appeal arises against the revised entitlement decision which crystallises on notification of a substantive decision under section 12(1) and (2) of the 1998 Act. Second, a further and separate right of appeal arises against the decision(s) to recover overpayments under section 71 of the 1992 Act (see section 12(4) of the 1998 Act).
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> 52. The Supreme Court in *CPAG v Secretary of State for Work and Pensions* [2010] UKSC 54 is authoritative as to the rigorous requirements to which the Secretary of State is held. Lord Brown at paragraph [6] observed that until a benefit award is formally corrected, it remains payable, regardless of any internal departmental view to the contrary. Recovery is not permissible until the award is lawfully varied or reversed.

7. So, in a nutshell, and in the broadest of broad terms, an overpayment decision has to be preceded by an entitlement decision that both (a) revises or supersedes the original award of benefit and (b) is notified to the claimant.

The Secretary of State's original decision(s)

8. The FTT bundle in the instant appeal included what was described as a 'Record of Decision(s)' in respect of the overpayment decision dated 13 January 2021. This stated that "as a result of the decision dated 13/01/2020" (almost certainly a typo for '13/01/2021', as the FTT later acknowledged) "an overpayment of Employment and Support Allowance (Income Related) has been made from 31/08/2017 to 05/08/2020 (both dates included)". The Record of Decision continued by stating that on 4 September 2017 the claimant "failed to disclose the material fact that there was a change to the members of their household. As a consequence, Employment and Support Allowance (Income Related) amounting to £9904.35 from 31/08/2017 to 05/08/2020 (both dates included) was paid which would not have been paid but for the failure to disclose."

9. I interpose here that, as will become apparent, although the FTT bundle included a copy of the overpayment decision, the bundle did not include a copy of the corresponding prior entitlement decision effecting a revision or supersession. The significance of this lies in section 71(5A) of the Social Security Administration Act 1992, discussed above.

10. On 31 March 2021 the Secretary of State issued the claimant with a mandatory reconsideration notice, which did not change the overpayment decision. This notice stated as follows (with no changes made to the original syntax):

> <u>**Mandatory Reconsideration Employment and Support Allowance Income Related ESA(IR) Overpayment**</u>

> On 13/01/21 a decision was made that you had been overpaid Employment and Support Allowance Income Related ESA(IR) from 31/08/17 to 05/08/20 (both dates included) amounting to £9904.35 because you didn't tell the office that paid your benefit straightaway that you had a change to members of your household. Which meant you were no longer entitled to the Severe Disability Premium (SDP) element of your ESA(IR).

The February 2025 First-tier Tribunal's decision now under appeal

11. The February 2025 FTT summarised its decision with admirable crispness in paragraph 1 of its Statement of Reasons (at this juncture, of course, the Secretary of State was the Respondent):

> 1. The appeal is allowed. The decision made by the respondent on 13/01/21 is set aside. The respondent has not discharged the burden of proof to show that a valid supersession decision was made and issued and, accordingly, there is no recoverable overpayment.

12. After dealing with other introductory matters, the FTT summarised the parties' respective cases in relatively short order:

> 5. Section 3 of the response (page C) stated that the actual copy of the decision could not be reproduced as it was not held electronically. The response stated that the decision under appeal was that [the claimant] had been overpaid Employment and Support Allowance (Income Related) totalling £9,904.35 for the period from 31/08/17 to 05/08/20 due to her failure to disclose that she had a change to the members of her household. As a result of the failure to disclose the amount of £9,904.35 is recoverable from her.
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> 6. [The claimant] appealed on the grounds that she disagrees with the decision that there is a recoverable overpayment and the civil penalty of £50.00. She submitted that she notified the respondent when her daughter moved out of her house.

13. The FTT then allowed the claimant's appeal, making the following findings of fact and giving the following reasoning:

> 7. S.71(5A) of the Social Security Administration Act 1992 requires, with limited exceptions, that a decision awarding benefit must be revised under s.9 or superseded under s.10 of the Social Security Act 1998. This supersession or revision decision is referred to as the entitlement decision. This requirement is fundamental to recovery under s.71(1) and the absence of an entitlement decision renders an overpayment decision of no effect.
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> 8. I find on the basis of the evidence available that the respondent has not discharged the burden of proof in showing that a valid supersession decision was made and issued as required.
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> 9. The respondent made a decision on 13/1/21 (page 63 and 64) which stated that as a result of the decision dated 13/01/20 an overpayment of

£9,904.35 was recoverable for the period from 31/8/17 to 5/8/20 (both dates included) which was paid which would not have been paid but for the failure to disclose.

10. The respondent has not produced a copy of any decision dated 13/01/20. It is likely that this is a typo error and the respondent was referring to the overpayment decision dated 13/01/21.

11. Section 4 (page D) paragraph 12 of the response states that: "On 9/10/20 a decision was made considering the past period and found that [the claimant] was not entitled to the SDP from 31/08/17 because [their daughter] moved back into the Household and [their daughter] did not receive PIP." The response states that on 09/10/20 a benefit decision was issued removing SDP and reference is made to pages 55 and 56.

12. Page 55 records that a payment of £97.80 was made to [the claimant] on 09/10/20. Page 56 is headed "enquiry letters issued." There are two entries of events on 09/10/20 recorded on page 56 as follows:

09/10/20 10076313 M3000 CHANGE OF CIRCS

09/10/20 49088503 M3000 CHANGE OF CIRCS

13. The letter dated 13/1/21 (pages 57 to 62) is the overpayment letter. It refers to the respondent writing to [the claimant] on 9/10/20 about a change to her award of ESA.

14. Page 17 is a record of notepad entries and does not record any decision made on 9/10/20.

15. Mrs Futers [the presenting officer] confirmed to me that the only decision within the bundle was the overpayment decision. She was unable to identify in the bundle a copy of a supersession decision and invited me to find that page 56 was confirmation of the issuing of a supersession decision.

16. Although there is no copy of the supersession decision within the bundle I considered whether the entries on page 56 could be evidence of a supersession decision being issued. In considering this I have borne in mind that I have the power to remedy defects in decisions where the defects are not so serious as to render the decision in issue wholly incoherent. I have borne in mind that there must be something which can properly be regarded as a decision, a document which has so little coherence or connection to the legal powers of the decision maker cannot properly be regarded as a decision.

17. Mrs Futers was unable to tell me what the terms of the M3000 CHANGE OF CIRCS letter would have been that was issued on 09/10/20. I am unable to find on the basis of the information available what the terms were of the letter was that was issued on 09/10/20. Accordingly, I am unable to find on the basis of the information available that a valid supersession decision was made and issued. In reaching my decision I have taken into account that 2 letters identified as M3000 CHANGE OF CIRCS were issued on 4/8/20

> (page 23), and 3 letters identified as M3000 CHANGE OF CIRCS were issued on 10/05/16, 31/3/16 and on 31/7/15 (page 24). In addition the copy of the letter dated 4/8/20 which appears at page 21 is a letter of enquiry and not notification of any change of circumstances.
>
> 18. The respondent has not discharged the onus of proof in showing that a valid supersession decision was made and issued to [the claimant].
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> 19. I have considered whether I should adjourn to seek further information from the respondent but have decided that it is not proportionate to do so taking into account how long this appeal has been outstanding and the time available to the respondent to prepare and present the case.
>
> 20. The absence of an entitlement decision renders the overpayment decision of no effect. There is no recoverable overpayment and, therefore no civil penalty can be imposed.

14. The District Tribunal Judge granted the Secretary of State’s application for permission to appeal to the Upper Tribunal.

The Secretary of State’s appeal to the Upper Tribunal

15. The Secretary of State’s notice of appeal set out his grounds of appeal as follows:

> 2. The appeal was allowed by Judge Findlay on the basis that a valid revision or supersession was not completed, therefore S71(5A) of the Social Security Administration Act 1992 had not been satisfied.
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> 3. In order for a decision to count as a revision or supersession, only two things must have happened:
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> > a. The claimant’s entitlement must have been changed. The new entitlement must be quantified (or the claimant found not to be entitled).
> >
> > b. The new decision has to be notified to the customer. A decision that has not been notified has no legal effect.
>
> 4. There are no formal requirements for a revision or supersession decision to be in writing. If a new decision changes the previous award from the start, it can properly be taken to be a revision. If it changes it from a later date, it is a supersession. It is sufficient that the decision maker has gone through "the mental processes" required for a revision or supersession (see *Secretary of State for Work & Pensions v JM (SPC)* [2013] UKUT 72 (AAC) [page 3, (9 and 10]).
>
> 5. In the appeal bundle, it has been confirmed that a supersession decision was made on 09/10/2020. On this date, a decision was made that [the claimant] was not entitled to SDP from 31/08/2017 due to a change in the members of her household [OP bundle, page D (11)]. This paragraph refers to page 55 of the bundle, where there is a screen print of the system from 09/10/2020 showing a reduced amount and at page 56 showing the change of circumstances codes.

> 6. I submit that a valid supersession was completed and notified to the claimant in the letter issued on 09/10/2020.

Discussion

16. The starting point must be to identify the reason why the FTT allowed the claimant's appeal. The FTT began by correctly directing itself that section 71(5A) of the Social Security Administration Act 1992 required that no recovery could take place under section 71(1) unless a revision or supersession decision had been made so as to reduce the amount of benefit awarded, thereby creating the overpayment (Statement of Reasons at [7]).

17. In the next paragraph, the FTT summarised its finding that "on the basis of the evidence available that the respondent has not discharged the burden of proof in showing that *a valid decision was made <u>and issued</u>* as required" (Statement of Reasons at [8]; emphasis added). In doing so, the FTT was acknowledging both the internal and external consequences of a valid supersession decision as confirmed by *LL v SSWP* [2013] UKUT 208 (AAC) (see above).

18. Having anticipated its conclusion, the FTT then explained how it had arrived at that outcome. Thus, the FTT reviewed the evidence as to whether a supersession decision had been both made and notified (Statement of Reasons at [11]-[15]). In doing so, the FTT observed that the presenting officer had accepted that the trial bundle did not include a copy of the supersession decision. However, the FTT did not leave the matter there. Rather, the FTT considered whether other entries in the FTT bundle were capable of proving that a supersession decision had not just been made but had also been issued. In doing so, the Judge noted that the presenting officer could not give evidence about the terms of any "M3000 CHANGE OF CIRCS" letter said to have been issued on 9 October 2020 and that another "M3000 CHANGE OF CIRCS" that had been produced was not a decision letter at all (Statement of Reasons at [16]-[17]).

19. In that context Mr Cook from Durham Welfare Rights, who acts for the claimant in these proceedings, makes the following submission:

> At §18 the FtT then returns to its conclusion that "[t]he respondent has not discharged the onus of proof in showing that a valid supersession decision was made and issued to [the claimant]". It is submitted that given the only reasoning in between §8 and the repetition of the same point at §18 is as to why there was insufficient evidence that any supersession had been notified then the finding of the FtT and what it meant by its conclusion that the supersession was not "made and issued" was really that it had not been issued. The FtT does not give findings or reasons for why there was no proof a supersession was made (simply noting no copy was in the bundle). Thus the fairest and correct reading of the FtT is it was using "made and issued" as a shorthand for what Fordham J in *LL v SSWP* calls the internal and external consequences of s.71(5A) but that it was saying that these had not been met due to a failure to meet the external consequence (notification).

20. The Secretary of State's case, in essence, is that the FTT misdirected itself on the issue as to whether a supersession decision had been properly made.

However, I agree with Mr Cook's analysis, for the reasons that he gives. The focus of the FTT's findings and reasoning was whether a supersession decision had been properly notified to the claimant. The FTT's conclusion that the Secretary of State had failed to establish proper notification of the supersession decision was one that was open to the Judge on the evidence before her. The decision not to adjourn to allow the Secretary of State to get his house in order was a decision that was well within the band of reasonable case management decisions. There is simply no prospect of a challenge to the FTT's findings based on irrationality or perversity succeeding. The reality is that the Secretary of State is seeking to re-argue the factual merits of the case.

Conclusion

21. I conclude that the decision of the First-tier Tribunal does not involve any material error of law. I therefore refuse the Secretary of State's appeal (section 11 of the Tribunals, Courts and Enforcement Act 2007). My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised by the Judge for issue on 3 August 2026