



Neutral Citation Number: [2026] UKUT 384 (AAC)

Appeal No. UA-2024-001308-ESA

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

The Secretary of State for Work and Pensions

Appellant

- v -

Ms M Cotter

Respondent

Before: Upper Tribunal Judge Price

Decided on consideration of the papers

Representation:

Appellant: Lauren Foody, DWP

Respondent: Mr James M Hawes, Bradford & Airedale Citizens Advice and Law Centre

On appeal from:

Tribunal: First Tier (Social Entitlement Chamber)

Tribunal Case No: SC240/22/00554

Tribunal Venue: Bradford

Decision Date: 2 November 2023

SUMMARY

40. Employment Support Allowance (40.33 other)

27 Recovery of overpayments (27.1 Amount recoverable, 27.3 Failure to disclose)

This case concerned whether an overpayment of Employment and Support Allowance (ESA) paid to the respondent, could be recovered by the Secretary of State.

The respondent had received Incapacity Benefit (IB) from 2005 and was also receiving an occupational pension. She did not inform the Department for Work and Pensions (DWP) about that pension until December 2018. Because the pension should have been taken into account when calculating her benefit entitlement, both her IB and, later, her ESA were overpaid.

The First-tier Tribunal found that the IB overpayment was recoverable from April 2007 onwards because MC had been sent a form requiring her to report changes affecting her benefit. However, it decided that the ESA overpayment, covering the period from November 2011 to December 2018, was not recoverable because it was not satisfied that MC had been adequately informed of any duty to disclose the pension in connection with her ESA claim.

The Secretary of State appealed.

The Upper Tribunal allowed the appeal. It held that the First-tier Tribunal had made an error of law in its interpretation of the recovery provisions in section 71 of the Social Security Administration Act 1992. The Upper Tribunal explained that a recoverable overpayment can arise where a person has failed to disclose a material fact, even if the original duty to disclose arose in relation to a different benefit. What mattered was whether the failure to disclose caused the later overpayment.

The Upper Tribunal found that the First-tier Tribunal had wrongly treated the ESA overpayment as requiring a separate disclosure duty specific to ESA. It also failed properly to consider the significance of its own finding that MC had been aware, since 2007, of an obligation to report changes relating to her occupational pension. That finding was relevant when deciding whether she could reasonably have been expected to know she should report the same information while receiving ESA.

The decision of the First-tier Tribunal was set aside. The case was remitted for the First-tier Tribunal to determine the amount of ESA overpayment.

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 allow the appeal. The decision of the First-tier Tribunal made on 2 November 2023 under reference number SC240/22/00554 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. The appeal is remitted to a freshly constituted First-tier Tribunal.
2. The sole issue for determination is, how much was overpayment of ESA from 09 November 2011 to 04 December 2018.
3. The parties shall be at liberty to adduce further evidence and make further submissions relevant to the issue identified in paragraph 2 above.
4. Following determination of the issue identified in paragraph 2, the First-tier Tribunal shall re-make the decision in light of its findings on that issue.

5. The parties are to notify the FTT in writing at the earliest opportunity, if the overpayment amount has been agreed in light of the decision of the UT in this appeal. Upon any such notification the First-tier Tribunal shall then give appropriate directions for the disposal of the appeal.

Introduction

1. This is an appeal, brought by the Secretary of State for Work and Pensions (SSWP), with permission granted by the Upper Tribunal, against a decision of the First Tier Tribunal (FtT) dated 2 November 2023. The SSWP appealed to the Upper Tribunal (UT) on 3 September 2024. Permission was granted by Upper Tribunal Judge Fitzpatrick on 20 November 2024.
2. On 2 November 2023, the FtT made decisions in 4 linked appeals:
 - a. Incapacity benefit (IB) entitlement – Appeal ref: SC240/22/00383,
 - b. IB Overpayment – Appeal ref: SC240/22/00552
 - c. Employment and Support Allowance (ESA) entitlement – Appeal ref: SC240/22/00553
 - d. ESA Overpayment – Appeal ref: SC240/22/00554
3. This appeal only concerns the FtT’s decision regarding the overpayment of ESA (SC240/22/00554).

Background facts

4. The following table sets out the key dates in this appeal.

Date	Event
13 July 2005	MC is in receipt of IB
28 November 2005	MC is in receipt of occupational pension (para 10.3 of the statement of reasons of the FtT decision under appeal)
16 April 2007	BF140 form sent to MC
16 April 2007- 8 November 2011	Overpayment of IB.
24 October 2011	Conversion of IB to ESA
09 November 2011	MC is in receipt of ESA
09 November 2011 to 04 December 2018	Overpayment of ESA
4 December 2018	MC notifies SSWP of receipt of her occupational pension

5. The case concerned MC who had been in receipt of Incapacity Benefit ('IB') from 13 July 2005. On 24 October 2011, the Secretary of State began the conversion of MC's benefit from IB to Employment Support Allowance ('ESA') and awarded MC ESA from 09 November 2011 onwards.

6. Before the FtT it was agreed that there had been an overpayment of £27,244.64 paid in the period from 09 November 2011 to 04 December 2018 of ESA. The overpayment was because MC had received an occupational pension. The SSWP argued that she was entitled to recover this amount from MC. It was not agreed that this was recoverable.
7. It was agreed that:
 - a. MC was in receipt of an occupational pension from 28 November 2005. This was index-linked and the amount received, therefore changed each year.
 - b. She did not notify the SSWP about that until 3 December 2018.
 - c. Had she notified the SSWP, that would have affected her entitlement to both IB and ESA.
 - d. She was sent and received a BF140 form sometime between January to April 2007.
 - e. In response, she did not notify the SSWP of receipt of her occupational pension.
8. On 3 December 2018, MC completed form ESA3 as part of a special exercise in which she disclosed her occupational pension. On 6 December 2018 the SSWP received the ESA3 but failed to act on it. On 11 March 2020, MC attended an interview under caution where she explained she did not realise that the SSWP did not know about her pension.

Legal framework

9. The following legislation applied to MC's claim for ESA:

10. Section 71 of the Social Security Administration Act 1992 provides,

'(1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure

*(a) a payment has been made in respect of a benefit to which this section applies;
(b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered, the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose.*

(2) Where any such determination as is referred to in subsection (1) above is made, the person making the determination shall in the case of the Secretary of State or the First-tier Tribunal and may in the case of the Upper Tribunal or a court

- (a) *determine whether any, and if so what, amount is recoverable under that subsection by the Secretary of State, and*
- (b) *specify the period during which that amount was paid to the person concerned.*

(3) *An amount recoverable under subsection (1) above is in all cases recoverable from the person who misrepresented the fact or failed to disclose it’.*

11. Regulation 32(1A) of the Social Security (Claims and Payments) Regulations 1987 provides, *‘Every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall 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’*. This is a specific disclosure duty.
12. Regulation 32 (1B) placed a duty on the Appellant to notify the SSWP of changes of circumstances, which the Appellant might reasonably be expected to know might affect the continuance of entitlement to benefit or the payment thereof. This is a general disclosure duty.
13. In *TM v Secretary of State for Work and Pensions (ESA)* [2015] UKUT 109 (AAC), UTJ Rowland held that ‘Section 71(1) of the 1992 Act provides that an overpayment may be recovered from “any person” who has caused the overpayment through a failure to disclose a material fact. I entirely accept that the claimant’s duty to disclose his capital while he was entitled to income support arose out of his being entitled to income support, but there is nothing in the legislation to suggest that an overpayment of employment and support allowance is not recoverable if the overpayment of that benefit can be shown to be the result of a breach of a duty of disclosure arising out of entitlement to a different benefit’. In that case, if ‘the claimant had not been entitled to income support, he would not have become entitled to income-related employment and support allowance and so a failure to disclose capital while entitled to income support could plainly cause an overpayment of employment and support allowance’ (paragraph 7). The Upper Tribunal concluded ‘As long as there was a duty to make the disclosure and the failure to disclose the material facts has caused the overpayment, it does not matter that the duty of disclosure arose in respect of a different benefit from the one in respect of which it is submitted that the overpayment is recoverable’ (paragraph 7).

Findings of the FtT

14. The Appeal against the overpayment decision was heard before the FtT on 2 November 2023 and a statement of reasons was provided on 25 April 2024.

15. The FtT found the IB overpayment was recoverable but for a reduced period of 16 April 2007 to 8 November 2011. This was on the basis that the SSWP could only show on the evidence, before the FtT, that she had placed MC under a duty to notify the DWP of her occupational pension from April 2007, and not from any earlier date. The SSWP does not challenge that decision by way of appeal.
16. The FtT held that after 16 April 2007 MC failed to disclose a relevant change in her circumstances, namely that she received an occupational pension. As a consequence, Incapacity Benefit amounting to £16,295.90 from 16 April 2007 to 8 November 2011 was paid which would not have been paid but for the failure to disclose. Accordingly, the FtT found the overpayment to be recoverable from MC.
17. The reason the payment in this period was deemed recoverable, was that a duty to disclose the receipt of the occupational pension arose because a form known as a BF140 was sent to MC by the DWP. The FtT concluded, the wording of the BF 140 form was such that it 'placed an obligation upon the Appellant to notify changes of the level of her Occupational Pension' (paragraph 10.5 of the statement of reasons).
18. The FtT then decided that an overpayment of ESA for the period 9 November 2011- 4 December 2018 was not recoverable. This was because there was no duty to disclose, as MC had not been adequately informed of her disclosure responsibilities in relation to her claim for ESA.
19. In respect of the specific disclosure duty under section 32 (1A) in respect of the ESA, the FtT rejected the argument that 'as BF140's had been issued (in relation to the IB claim) it was reasonable to assume the Appellant was aware that the receipt of her Occupational Pension and any annual changes should be notified to the DWP'. The FtT considered that this was in relation to a different benefit. The FtT 'found that without the documentary evidence that a disclosure obligation was notified to MC the Respondent had failed to satisfy the onus placed upon him' (paragraph 11.4 of the statement of reasons).
20. The SSWP also argued that MC had been informed in a ESA40 leaflet about the duty to disclose. They suggested the ESA40 leaflet was sent to MC each year with an annual uprating letter. The FtT concluded "there did not appear to be any uprating letter issued in 2014 and the Presenting Officer confirmed at the hearing that the DWP cannot guarantee that after 2015 that the ESA40 leaflets did actually go out" (paragraph 11.3 of the statement of reasons). Given the lack of documentary evidence to show that MC received the ESA40 and what it said, the FtT did not accept that this imposed a duty of disclosure upon MC.

21. In respect of regulation 32 (IB), the duty the FtT referred to as a 'second duty', the FtT found there was no overpayment of ESA. The FtT determined that the duty under regulation 32 (1B) had a subjective and objective element (paragraph 10.8 of the statement of reasons). They then drew a conclusion that was based on the same reasons they formed for finding that there was no duty on MC to disclose the receipt of her occupational pension prior to 15 April 2007 in respect of IB.
22. Specifically, the FtT considered that there was no general duty to disclose, as MC did not realise she had to disclose because:
- a. When the Appellant telephoned the DWP to query the amount of IB, she was informed that the payments were correct as she has paid enough National Insurance Contributions. There was no indication that receipt of an Occupational Pension would have any impact' (paragraph 10.8 of the statement of reasons).
 - b. 'I found the Appellant cannot reasonably be expected to know that something might affect her claim to benefit unless the Respondent has made it clear what sort of changes might do so' (paragraph 10.8 of the statement of reasons).
 - c. The FtT accepted the Appellant's evidence was that she did not believe that her pension was relevant to her IB (paragraph 10.1 of the statement of reasons).

Permission to appeal (UT)

23. The SSWP applied to the FtT for permission to appeal on 31 May 2024. This was refused on 3 July 2024. On 3 September 2024 the SSWP appealed to the UT. UTJ Fitzpatrick gave permission on 20 November 2024.

24. The reason for granting permission was set out as follows:

'The SSWP's representative has argued the FTT was in error of law in relation to its application of s 71 of the Social Security Act 1992 and has also raised issues regarding the interpretation of reg 32 (1A) of the Social Security (Claims and Payments) Regulations 1987, in relation to its decision that an overpayment to MC was not recoverable. I consider this meets the standard for granting permission to appeal. However, it is also arguable the SSWP disagrees with the FTT's findings of fact (which is not necessarily in itself an error of law). Given the complexity of these matters and the possible issues around statutory interpretation, further consideration of these arguments is merited. I am not at this stage limiting the grant of permission to appeal specifically to these issues'.

Conclusions

25. There is no dispute that MC was overpaid both IB and contributory ESA, because both were wrongly calculated in that they did not take into account MC's occupational pension.
26. Nor is it disputed that any period of recoverable overpayment comes to an end on 6 December 2018. This is because the FtT recorded that it was not disputed that on 6 December 2018 the Appellant completed form ESA3 as part of a special exercise and she disclosed her occupational pension in that document and that on 06.12.18 the SSWP received the ESA3, but did not act upon it.

Ground 1: interpretation of reg 32 (1A) of the Social Security (Claims and Payments) Regulations 1987

27. The crux of the SSWP's argument is that because there was a duty to disclose that was not complied with in respect of the IB, the power in section 71 to recover had arisen as there was a. a failure to disclose a material fact and b. in consequence of this a payment has been made in respect of a benefit to which section 71 applies.
28. It was not disputed that there was a failure to disclose as a matter of fact prior to 6 December 2018 and that the receipt of the occupational pension was a material fact in that it would have affected the entitlement to both IB and ESA.
29. The FtT considered that no legal duty to disclose had arisen in relation to ESA. This ground of appeal appears to first require consideration of the statutory interpretation of section 71.
30. The FtT considered that there needed to be a specific failure to disclose in respect of ESA. This interpretation of section 71 and of regulation 32 was incorrect.
31. Section 71 does not contain a limitation that the requirement to disclose is in respect of the benefit which is subsequently overpaid. This is the point made by UTJ Rowland in *TM*. The FtT in this case held a duty arose to disclose in relation to IB. They also found that this duty was not complied with. The issue for the FtT to determine in respect of the ESA overpayment was therefore whether the earlier non-disclosure caused the ESA overpayment.
32. In *TM* the failure to make the disclosure in relation to the earlier benefit would have extinguished the right to that benefit and no conversion to the later benefit would have occurred. That does not apply in this case. Had the respondent made the disclosure earlier regarding her pension, it would have reduced her entitlement to IB, not extinguished it. Therefore, she would always have been converted to ESA. The issue is then, if a claimant has not disclosed something which materially

affected their entitlement to a portion of the benefit received, and they are then converted across, does the non-disclosure in respect of the first benefit still cause an over payment in respect of the second such that it is recoverable under section 71.

33. I find it does. Although the respondent would always have been converted to ESA, it would have been a level that was lower than she would otherwise have been entitled. As set out in *TM*, section 71(1) of the 1992 Act provides that an overpayment may be recovered from “any person” who has caused the overpayment through a failure to disclose a material fact.

34. Section 71 provides a power for recovery of sums paid where,

- (a) *Whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact, and*
- (b) *In consequence of the misrepresentation or failure a payment has been made in respect of a benefit to which this section applies.*

35. I find that the word ‘payment’ in this section refers to any part of a payment made in consequence of a misrepresentation or failure. In this case, it is not in dispute that a portion of the ESA would not have been paid, had the earlier omission on the part of the respondent not occurred. It follows that part of the payment to the respondent of ESA was made in consequence of her failure to disclose a material fact and therefore can be recovered. This interpretation is supported by the language of section 71 (1) (b) which provides the power not just for a payment to be recovered in full, but any payment which he would not have made or *any sum which he would have received* but for the misrepresentation or failure to disclose. The statutory language therefore envisages a circumstance where a misrepresentation, or failure to disclose, causes only part of a payment, which is recoverable. I see no difference between the circumstances, where a misrepresentation causes a payment of a benefit of which there would be entitlement, but to a lesser sum and where a misrepresentation causes a payment of benefit of which there would be entitlement, but to a lesser sum and that benefit it then converted to another benefit (automatically) and again, there would be entitlement but to a lesser sum.

36. In this case, had MC not been entitled to some IB she would not have become entitled to and been converted to payment of ESA. However, had she made the disclosure it is agreed that this would not have extinguished her entitlement to IB entirely, only reduced it. It follows that a failure to disclose income while in receipt of IB potentially caused an overpayment of the later ESA, which replaced IB.

37. Even if that is wrong and the failure to disclose must have arisen in respect of the benefit claimed, the FtT did not consider MC’s knowledge of the requirement to disclose provided by the BF140 form in relation to ESA and regulation 32 (1B).

38. The FtT rejected the argument that there was a duty placed upon MC to make the disclosure by virtue of regulation 32 (1B) in the period 09 November 2011 to 04 December 2018. The essence of the FtT's reasoning was that in this period MC did not know she was under a duty to disclose. This sits at odds with the FtT's earlier conclusion that from April 2007 onwards MC was aware she had to disclose the changes in the receipt of her occupational pension and should have done so in respect of the claim for IB. This earlier awareness was clearly a relevant factor in determining whether MC could have reasonably be expected to know that there was an obligation to disclose the same information regarding changes in her occupational pension from 2011 onwards in respect of receipt of ESA.
39. In determining the issue of whether MC should have made a disclosure due to the duty placed upon her by regulation 32 (1B), the FtT relied upon their reasoning for the period prior to 15 April 2027 in respect of the overpayment of IB.
40. In my view this was an error. The position in respect of the receipt of IB prior to 15 April 2007 and in respect of the receipt of ESA between 09 November 2011 to 04 December 2018 were not analogous in terms of MC's knowledge regarding the requirement to disclose information pertaining to income. Failure to consider this was an error of law, as it was a material factor as to whether MC ought to have reasonably known that her IB benefit may be affected by changes to the receipt of her occupational pension, and consequently whether the duty to disclose under regulation 32 (1B) had arisen.
41. For these reasons, the appeal succeeds.

Ground 2: dispute regarding the findings of fact

42. The second argument put forward by the SSWP relates to whether there was a specific duty upon MC to disclose information under regulation 32 (1A). The FtT found that the duty to disclose had not arisen as MC had not been specifically told of the duty to disclose the relevant information.
43. The issue concerns the provision of a ESA40 form to MC. The SSWP appears to have argued before the FtT that this form would have instructed MC to make a disclosure regarding the income she received from her occupational pension. The SSWP submits that they 'think the ESA40 would have been sent to MC "on the balance of probabilities"'. Yet there was no evidence to this effect before the FtT or myself. Further, the FtT had already dealt with that argument in para 11.3 of the statement of reasons and found that this form had not been sent to the client. Given the lack of evidence of the same, this conclusion comes nowhere near the level of being perverse.

44. It is helpful to quote the SSWP submission on the point: 'Although there is not a copy of the ESA40 in the bundle, the ESA40 published in 2011 states the following 'tell us if you or your partner get a pension or your pension changes'. The SSWP argues that it follows that on a balance of probabilities, an ESA40 was received by MC in 2012 and it would have contained similar wording. The SSWP further submits that 'as the claimant received clear and unambiguous instructions to report a change in circumstances, this placed them under the regulation 32(1A) obligation'.
45. This argument appears to require the UT to decide that the FtT finding that no clear instruction was given to MC to notify the DWP of her pension was either perverse or otherwise legally wrong. The basis of the submission appears to be that an inference should have been drawn that a) a particular leaflet (known as ESA40) was sent in 2012 and each year thereafter with an annual uprating letter and b) the wording that was on this form was the same as that set out on the 2011 ESA40 leaflet. Given that it is accepted by the SSWP that there is a lack of any documentary evidence to support this argument, it is totally without merit and this ground of appeal is dismissed.
46. For the reasons stated above I allow the appeal on the basis of ground 1.

Approved for issue by Louise Price

Judge of the Upper Tribunal

On 21 September 2026

(corrected on 1 October 2026 to add directions for the disposal of the appeal before the First-tier Tribunal).