

Neutral Citation Number: [2026] UKUT 414 (AAC)
Appeal No. UA-2025-000863-USTA and UA-2025-000864-USTA

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 Appellant in these proceedings. Failure to comply with this order may be contempt of court and could lead to a fine, imprisonment or other sanction.

This order does not prevent the use of any information or documents by any court or tribunal within subsequent proceedings in this case.

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

DLE

Appellant

- v -

The Secretary of State for Work and Pensions

Respondent

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

Representation:
Appellant: In person
Respondent: Ms C. Gratex, Decision Making and Appeals, DWP

On appeal from:
Tribunal: First-tier Tribunal (Social Entitlement Chamber)
Tribunal Case No: SC143/24/00049 and SC143/24/00051
Tribunal: Judge C. Twydell
Tribunal Venue: Southend
Decision Date: 25 November 2024

SUMMARY OF DECISION

Universal Credit (45) and Housing (45.8)

The Upper Tribunal gave guidance about the order in which the First-tier Tribunal should approach determining whether a claimant has satisfied the requirement in regulation 25(3) of the Universal Credit Regulations 2013 (the circumstances in which a claimant is to be treated as liable or not liable to make payments in respect of accommodation).

The Upper Tribunal confirmed the principles set out in ***R(H)1/03*** *continue to be relevant when considering whether a claimant's liability to make payments is on a commercial basis for the purpose of regulation 25(3)(a)(i) of the Universal Credit Regulations 2013.*

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 to consider afresh at an oral hearing.

B. The new Tribunal should not involve the legally qualified member previously involved in considering this appeal on 25 November 2024.

C. The new Tribunal must not take account of circumstances that did not apply at the relevant date of the Secretary of State's entitlement decision. Later evidence can be considered as long as it relates to the circumstances at the time of that decision: see R(DLA) 2/01 and R(DLA) 3/01.

D. The new Tribunal should make all appropriate arrangements for DLE to give his evidence, including, as required, through a language interpreter.

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.

G. Copies of this decision, the permission to appeal decision and the submissions on behalf of the Secretary of State (dated 02 April 2026) 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

1. I have made an anonymity order in this case, of my own motion. The initials "DLE" have been chosen at random and do not have any connection to the actual name of the Appellant.

Factual background

2. DLE was awarded universal credit ("UC") by the Department for Work and Pensions ("DWP") from 10 February 2020. His award included an amount of £412 (£480.02 from 10 March 2022) for the housing costs element. This related to his claim for £200 per week of rent.

3. Following a review of DLE's circumstances, on 08 July 2022, a DWP decision-maker, acting on behalf of the Secretary of State for Work and Pensions, revised (which means, changed) DLE's UC award. A revision decision generally changes an earlier decision from the date the earlier decision took effect. Here, DWP revised its decision dated 17 February 2020 verifying DLE's housing costs, with effect from 10 February 2020. The decision-maker decided that the decision made in 2020 had been made in ignorance of the material fact that DLE was not liable to make relevant payments for his accommodation. On 04 August 2022, DWP also decided that DLE had been overpaid £13,372.54 of UC, which was recoverable from him. Following mandatory reconsideration stage on 17 October 2023, DWP maintained both decisions.

4. On 30 October 2023, DLE appealed to the First-tier Tribunal. Two appeals were registered, one for DWP's entitlement decision (SC143/24/00049) and one for DWP's overpayment decision (SC143/24/00051). DLE's appeals were heard by a First-tier Tribunal ("FTT") on 25 November 2024. The FTT refused DLE's appeals. It confirmed DWP's decisions that DLE was not entitled to the housing costs element in his UC award from 10 February 2020 onwards and that he had been overpaid £13,372.54 of UC that was recoverable from him.

5. The FTT provided two decision notices, one for each appeal. In the decision notice for the entitlement appeal (SC143/24/00049), the FTT wrote: "The Appellant is not entitled to the housing element of Universal Credit during the relevant period from the start of his claim namely 10.02.2020. The overpayment of £13,372.54 is recoverable". In the decision notice for the overpayment appeal (SC143/24/00051), the FTT wrote: "*The appellant could not be treated as liable to pay rent when occupying the property [address], as he did not meet the payment conditions. He therefore did not have any housing entitlement on his Universal Credit claim in respect of the property from the onset of his claim dated 10.2.2020*".

6. The FTT provided a single Statement of Reasons for both decisions. In the Statement of Reasons, the FTT set out the following explanation of the law and of its reasoning for its decisions:

> "***The Law***
>
> *11. The Tribunal considered all relevant legislation, including the Welfare Reform Act 2012, the Universal Credit Regulations 2013, and the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013.*

12. Section. 11 of the Welfare Reform Act 2012 states an award of UC may include an amount for housing costs if the claimant is liable to make payments on the accommodation they occupy as their home. This could be in the form of rent or other housing-related costs.

13. Regulation 25(1) and (5) of the UC Regs 2013 states an award will include an amount in the Housing Cost Element for an assessment period for UC where the claimant meets:

(1) the payment condition; and
(2) the liability condition; and
(3) the occupation condition.

14. The payment condition is met if the payments in respect of the accommodation are rent payments or service charge payments.

15. The liability condition is met if the claimant has a liability to make the payments which is on a commercial basis or is treated as having a liability to make the payments and none of the exceptions apply.
16. The occupation condition is met if the claimant is treated as occupying the accommodation as their home and none of the exceptions apply.

17. Regulation 9 of Part 2 of the Decisions and Appeals Regulations states, a decision may be revised where the decision arose from official error or was made in ignorance of, or was based on a mistake as to, some material fact and as a result is more advantageous to a claimant than it would otherwise have been.

18. The Secretary of State is entitled to recover any amount of UC paid in excess of entitlement. Such recovery would be recoverable from [DLE], being the person to whom it was paid.

…

Reasons
35. The liability condition is met if the claimant has a liability to make the payments which is on a commercial basis or is treated as having a liability to make the payments and none of the exceptions apply. None of the exceptions or exemptions applied in this case.

36. The tenancy was not on a commercial basis for the following reasons: -

i)The tenancy commenced on 1.10.19, although no first payment date was inserted in the tenancy agreement. Further, no deposit was paid by [DLE]. He was obliged to pay council tax and all utilities including water and sewerage. However, when asked for a copy of his water bill, [DLE] stated he did not have it, adding he did not pay for it, despite the tenancy agreement obliging him to do so.

ii) In his final declaration, dated 10.02.20, [DLE] provided the same email address for himself and the landlord. Further, when the respondent made enquiries about the landlord, his address was on an industrial estate which had various businesses but did not contain businesses linked to rental property or real estate. Further, the landlord could not be traced.

iii) [DLE] occupied part of the property as his home. He occupied one room and had use of communal facilities (kitchen and bathroom) plus use of a separate storage room which he used as a kitchen, which were all on the first floor. However, the property had two front doors and four bedrooms. Other people occupied the lower floor and although they accessed the property by a separate front door, they had access to the same communal kitchen, living room and bathroom on the first floor. Mr [DLE] accepted there were, on occasion, people sleeping downstairs in the property, on the same side where he occupied his room and that they had access to the communal bathroom (via the kitchen) and the living room.

iii)[sic] [DLE] stated he was aware other people occupied the property but did not know them. However, he did confirm he knew [name] and that she occupied the property for some of the time he was there. However, searchlight records obtained by the respondent confirmed she occupied the property from 03/11/2014 to 28/04/2023. This information was clearly a change of circumstances, but [DLE] did not notify the respondent of the same.

iv) [DLE] produced a council tax bill dated 14.3.22 for the year 2022/2023. It is addressed to [DLE] and provides him with a 25% discount for living at the property as a single person. However, on his own admission [name] was also occupying the property and he did not notify the respondent of this change of circumstances.

v) [DLE] produced a rent book showing payments by him of £200 per week commencing 6.3.22 to 3.7.22. All payments are stated as received in cash. There is no evidence of any earlier payments or of any other payments made by [DLE]. However, the housing cost element of [DLE]'s UC was only £480.02. Further, there is no evidence of income earned by [DLE] during his occupancy of the property and it is therefore unlikely he would have been able to meet the liability of £200 per week on his own in such circumstances.

37. None of the exceptions or exemptions apply.

38. [DLE] signed the declaration on his UC claim. Therefore, he knew he was liable to inform of any changes and/or provide information that was incomplete.

39. Based on the aforementioned, [DLE] does not meet the legal requirements for the housing element of UC and is not therefore entitled to the same on the property from the onset of his UC claim made on 10.2.20. The supersession was correct in law. The overpayment of £13,372.54 for the period 10.2020 to 9.6.22 is recoverable from [DLE]."

The Upper Tribunal decision granting permission to appeal

7. On 19 February 2026, I held a video hearing of DLE's applications for permission to appeal. DLE took part and spoke with me via a Latvian interpreter. It was helpful to speak with him. On 20 February 2026, I granted DLE permission to appeal, on the basis that the following appeal grounds were arguable with a realistic prospect of success.

8. Failing to provide adequate reasons for its decision about the entitlement appeal SC143/24/00049: In the decision notice for the entitlement appeal the FTT wrote that DLE was not entitled to the housing element of UC during the relevant period, stating he did not satisfy the legal criteria during the relevant period. In the decision notice for the overpayment appeal (SC143/24/00051), the FTT provided additional reasoning, stating DLE could not be treated as liable to pay rent when occupying the property "as he did not meet the payment conditions" (paragraph 3).

9. It was arguable the FTT's decision notice for the overpayment appeal (reference ending 00051) explained the FTT's reasoning about the entitlement appeal. It explained why the FTT decided DLE was not entitled to UC, which was not required to resolve whether the overpayment was recoverable. The extra reasoning the FTT provided therefore appeared to explain the FTT's position about the entitlement appeal.

10. Assuming the FTT's Decision Notice for the overpayment appeal explained its decision about the entitlement appeal the FTT appeared to decide that DLE did not meet the payment condition for the housing costs element set out in regulation 25(2) and (5) of the Universal Credit Regulations 2013 ("the UC Regulations 2013"). The FTT did not, however, address in its Statement of Reasons whether DLE met the payment condition or not, including whether he in fact made payments that could be considered to fall within Schedule 1 to the UC Regulations 2013. Instead, the FTT's reasoning appeared to address the liability condition set out in regulation 25(3) and (5) of those regulations.

11. Furthermore, DWP's Responses to the appeals confirmed that DWP was satisfied DLE met the payment and occupation conditions for the property (page G of the Responses to the appeals). Whether DLE met the payment condition was therefore not in issue between the parties and the FTT had not explained why or how it consciously exercised its discretion under section 12(8)(a) of the Social Security Act 1998 to consider that issue further.

12. It was therefore arguable the FTT made an error of law by failing to explain the decision it made about DLE's entitlement to the housing costs element, which it had incorrectly set out in the Decision Notice for the overpayment appeal. The Statement of Reasons appeared to explain a different decision from the one the FTT reached about the entitlement appeal on 25 November 2024.

13. It was also arguable that the FTT may have made a procedural error capable of causing unfairness in proceedings, by providing its decision about the entitlement appeal under the appeal reference for the overpayment appeal and doing the same for its decision about the overpayment appeal.

14. Misdirecting itself in law about the test it had to apply in relation to the entitlement appeal: at paragraphs 35 to 37 of its Statement of Reasons, the FTT set out its reasoning about what it had described as the liability condition in regulation 25(3) and (5) of the Universal Credit Regulations 2013 ("UC Regulations 2013").

15. The legal requirement for including housing costs in an UC award is that a claimant must have a liability to make payments in respect of the accommodation they occupy as their home (section 11(1) of the Welfare Reform Act 2012- "the 2012 Act"). Regulation 25(3) of the UC Regulations 2013 provides:

> (3) The circumstances of the liability to make the payments must be such that-
>
> (a) the claimant (or either joint claimant)-
>
> (i) has a liability to make the payments which is on a commercial basis, or
>
> (ii) is treated under part 1 of Schedule 2 as having a liability to make the payments; and
>
> (b) none of the provisions in Part 2 of that Schedule applies to treat the claimant (or either joint claimant) as not being liable to make the payments.

16. It appeared from the requirements of section 11(1) of the 2012 Act and the structure of regulation 25(3) of the UC Regulations 2013 that they require the Secretary of State or the FTT to decide:

(a) **first,** whether a claimant has a liability to make payments and if so, whether it is on a commercial basis;

(b) **second**, if the claimant has no liability to make payments, whether he should be treated as having a liability to make the payments;

(c) **third**, if the claimant does have a liability to make payments, and this is on a commercial basis, whether any of the provisions in Part 2 of Schedule 2 to the UC Regulations 2013 mean the claimant should be treated as not being liable to make the payments.

17. It appeared from the wording of Parts 1 and 2 of Schedule 2 to the UC Regulations 2013, that these provisions treat a claimant as having a liability to make payments, or as not having a liability to make payments. There is a regulation-making power dealing with treating a person as having, or not having, such a liability, in section 11(3)(b) of the 2012 Act.

18. It appeared that part of what is being assessed in section 11(1) of the 2012 Act is whether a claimant has, as a matter of fact and law, a liability to make payments. It is unclear from the wording of section 11(1) and regulation 25(3) that the provision in regulation 25(3)(a)(i) acts to treat a claimant as liable to make payments (of rent in relation to a property they are occupying). Instead, regulation 25(3)(a)(i) appears to involve a two-part assessment, where:

(a) the first part is: does the person have a liability to make payments; and

(b) the second is: if the person does have that liability, is it on a commercial basis?

19. It was arguable that the FTT had not addressed whether DLE had a liability to make payments for his occupation of his accommodation. At least some of the evidence the FTT relied on in paragraph 36 of its Statement of Reasons appeared to relate to its assessment whether DLE had a liability to make payments at all, and not about whether they were made on a commercial basis. Furthermore, the FTT did not appear to have evidence before it that addressed whether a liability of £200 per week represented a commercial rate for the property that DWP accepted DLE occupied.

20. In these circumstances, the FTT's wording in the Statement of Reasons that: "*The tenancy was not on a commercial basis for the following reasons*" indicates it may have misdirected itself in law by failing to address the first part of the test in regulation 25(3)(a)(i), before addressing the second part of that test. Alternatively, the FTT may have failed to provide an adequate explanation for this part of its decision about the entitlement appeal.

21. Failing to address adequately relevant evidence in the appeal or to resolve conflicts in that evidence: in circumstances where the FTT had placed reliance on evidence that appeared to relate to whether there was genuinely a tenancy agreement between DLE and his stated landlord, it might have failed to address the following evidence which was arguably relevant to what it needed to address:

22. DLE had produced evidence that the landlord had brought possession proceedings against him in respect of the property in August 2022, obtaining a possession order in March 2023 (Addition A, pages 1 to 7 of FTT bundle). While this evidence post-dated DWP's decision, it was potentially relevant to whether there was a genuine agreement between DLE and his landlord to occupy the property that required the court to make an order before it could be brought to an end. The FTT had not explained what it had made of this evidence.

23. The FTT wrote in its Statement of Reasons that when DWP made enquiries about the landlord, his address was on an industrial estate, and he could not be traced. The industrial estate address appears on the final page of the tenancy agreement about where the landlord could be served notices. The audio record of the FTT hearing records the DWP Presenting Officer confirming that DWP had not attempted to contact DLE's landlord via the address or telephone details on page 11 of the appeal bundle (the UC claim). The possession order DLE had provided gave the same postal address for his landlord as in his UC claim (again, not the address where DWP made its enquiries).

24. I also indicated that I considered clarifying the effect of section 11 of the 2012 Act and regulation 25 of, and Schedule 2 to, the UC Regulations 2013, represented a good reason to give DLE permission to appeal. I considered the FTT might benefit from guidance about how these provisions work.

25. I directed the Secretary of State to address, in particular:

    (a) The preliminary analysis I had given of how the requirements in section 11(1) of the 2012 Act and regulation 25 of, and Schedule 2 to, the UC Regulations 2013 might operate, and how the FTT should address them; and

    (b) Which regulation-making power it used to make regulation 25(3)(a)(i) of the UC Regulations 2013. I directed this because it was not clear it could be made using the regulation-making powers in section 11 of the 2012 Act, but I acknowledged the Secretary of State might have relied on supplementary regulation-making powers contained elsewhere.

The relevant legislation

26. Section 11 of the Welfare Reform Act 2012 ("the 2012 Act") provides:

> "(1) The calculation of an award of universal credit is to include an amount in respect of any liability of a claimant to make payments in respect of the accommodation they occupy as their home.
>
> (2) …[repealed]

(3) Regulations may make provision as to—

(a) what is meant by payments in respect of accommodation for the purposes of this section;

(b) circumstances in which a claimant is to be treated as liable or not liable to make such payments;

(c) circumstances in which a claimant is to be treated as occupying or not occupying accommodation as their home (and, in particular, for temporary absences to be disregarded).

(d) circumstances in which land used for the purposes of any accommodation is to be treated as included in the accommodation.

(4) Regulations are to provide for the determination or calculation of any amount to be included under this section.

(5) Regulations may—

(a) provide for exceptions to subsection (1);

(b) provide for inclusion of an amount under this section in the calculation of an award of universal credit—

(i) to end at a prescribed time, or

(ii) not to start until a prescribed time."

27. Regulation 25 of the Universal Credit Regulations 2013 ("the UC Regulations 2013") provides:

The housing costs element

25.—(1) Paragraphs (2) to (4) specify for the purposes of section 11 of the Act (award of universal credit to include an amount in respect of any liability of a claimant to make payments in respect of the accommodation they occupy as their home)—

(a) what is meant by payments in respect of accommodation (see paragraph (2));

(b) the circumstances in which a claimant is to be treated as liable or not liable to make such payments (see paragraph (3));

(c) the circumstances in which a claimant is to be treated as occupying or not occupying accommodation and in which land used for the purposes of any accommodation is to be treated as included in the accommodation (see paragraph (4)).

(2) The payments in respect of accommodation must be—

(a) payments within the meaning of paragraph 2 of Schedule 1 ("rent payments");

(b) [omitted];.

(c) payments within the meaning of paragraph 7 of that Schedule ("service charge payments").

(3) The circumstances of the liability to make the payments must be such that—

(a) the claimant (or either joint claimant)—

(i) has a liability to make the payments which is on a commercial basis, or

(ii) is treated under Part 1 of Schedule 2 as having a liability to make the payments; and

(b) none of the provisions in Part 2 of that Schedule applies to treat the claimant (or either joint claimant) as not being liable to make the payments.

(4) The circumstances in which the accommodation is occupied must be such that—

(a) the claimant is treated under Part 1 of Schedule 3 as occupying the accommodation as their home (including any land used for the purposes of the accommodation which is treated under that Part as included in the accommodation); and

(b) none of the provisions in Part 2 of that Schedule applies to treat the claimant as not occupying that accommodation.

(5) References in these Regulations—

(a) to the housing costs element are to the amount to be included in a claimant's award under section 11 of the Act;

(b) to a claimant who meets the payment condition, the liability condition or the occupation condition are, respectively, to any claimant in whose case the requirements of paragraph (2), (3) or (4) are met (and any reference to a claimant who meets all of the conditions specified in this regulation is to be read accordingly).”

28. Part 1 of Schedule 2 to the UC Regulations 2013 sets out circumstances in which claimants are treated as liable to make payments in respect of their accommodation. These include, for example, where the person with the liability is a child or qualifying young person for whom the claimant is responsible, or the claimant is claiming as a single person but the other member of their couple has the liability (paragraph 1). The circumstances also include where someone else is liable to pay but that person is not doing so and other specific conditions are met (paragraph 2). The circumstances also include where payments are waived because the claimant is undertaking repair work (paragraph 3), or where there are rent-free periods given the meaning in paragraph 7(4) of Schedule 4 (paragraph 4).

29. Part 2 of Schedule 2 to the UC Regulations 2013 sets out circumstances in which the claimant will be treated as not liable to make payments in respect of their accommodation. These include where the liability to make payments is to a close relative (paragraph 5). They include where the liability to make payments is to a company whose owners or directors include the claimant or other specified people (paragraph 6) or to a trust where the trustees or beneficiaries are those people (paragraph 7). The circumstances also include where the Secretary of State is satisfied the liability to make the payments was contrived in order to secure the inclusion of the housing costs element in a UC award, or to increase it (paragraph 10).

The parties' submissions

30. Ms Gratex represents the Secretary of State for Work and Pensions ("SSWP") in the appeal to the Upper Tribunal. She has provided helpful written submissions dated 02 April 2026. Ms Gratex supports the appeal on the basis the FTT has made material errors of law, summarised further below, and invites me to remit it to a new Tribunal to decide.

31. Having seen the submissions made on behalf of the SSWP, DLE indicated he did not wish to make further submissions of his own.

32. Ms Gratex has also provided submissions on behalf of the SSWP about how the relevant law should work for the housing costs element of UC. Since these explain, at least in part, the Secretary of State's position about why he considers the FTT made material errors of law, I set them out first.

(a) The SSWP's submissions about the relevant law

33. Ms Gratex cites section 11 of the 2012 Act as set out at paragraph 26 above. She submits that under the powers in section 11(3) of the 2012 Act, regulation 25(2) to (4) of, and Schedules 1, 2, and 3 to, the UC Regulations 2013 make provision for when a claimant meets respectively the payment, liability, and occupation conditions (see regulation 25(5)(b)).

34. Ms Gratex submits regulation 25(3)(a) and (b) (set out at paragraph 27 above), are relevant to these appeals.

(b) The legislative powers used to make regulation 25(3)(a)(i) of the UC Regulations 2013

35. Ms Gratex submits that the SSWP used the regulation-making powers in section 11(3)(b) of the 2012 Act when making the whole of regulation 25(3), including 25(3)(a)(i) of the UC Regulations 2013.

36. Ms Gratex submits that a claimant who does not satisfy the condition in regulation 25(3)(a)(i) of the UC Regulations 2013 will be treated as not liable even though they have a liability to make relevant payments, and this is how they fall within the specific wording of the regulation making power in section 11(3)(b).

37. Ms Gratex submits that for additional context, UC was introduced to replace, among other means-tested benefits, housing benefit (section 33(1)(d) of the 2012 Act). Housing Benefit was established by section 130 of the Social Security Contributions and Benefits Act 1992 ("the SSCBA"), which provides that:

> "(1) A person is entitled to housing benefit if—
>
> (a) he is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home;…"

34. Ms Gratex submits that section 137(2)(j) of the SSCBA provides regulation-making powers: "for treating any person who is liable to make payments in respect of a dwelling as if he were not so liable". She states those regulation-making powers were used to make regulation 9 of the Housing Benefit Regulations 2006 (circumstances in which a person is to be treated as not liable to make payments in respect of a dwelling). Ms Gratex highlights sub-paragraph (1)(a) of regulation 9, which provides:

> "(1) A person who is liable to make payments in respect of a dwelling shall be treated as if he were not so liable where—
>
> (a) the tenancy or other agreement pursuant to which he occupies the dwelling is not on a commercial basis;…"

38. Ms Gratex submits that regulation 25(3)(a)(i) of the UC Regulations 2013 is therefore intended to capture the same test as in regulation 9(1)(a) of the Housing Benefit Regulations 2006, but avoiding the double negative created by the combination of regulation 9(1) and (a). She argues that the reframing used in regulation 25(3)(a)(i) therefore simplifies the language of the legislation.

(c) The SSWP's position on how Tribunals should approach appeals where the liability condition is at issue

39. Ms Gratex submits that regulation 25(3) of the UC Regulations requires the following to be established to satisfy the liability condition:

    (a) whether the claimant has a liability to make relevant payments (section 11(1) of the 2012 Act);

    (b) if so, whether the claimant is treated as not liable under any of the provisions in Part 2 of Schedule 2 (regulation 25(3)(b) of the UC Regulations 2013);

    (c) if nothing in Part 2 of Schedule 2 to the UC Regulations 2013 applies, whether the liability is on a commercial basis. This is because if it is not on a commercial basis, the claimant would again be treated as not liable to make payments - see regulation 25(3)(a)(i));

    (d) if the claimant does not have a liability to make relevant payments, whether the claimant is treated as liable to make them under any of the provisions in Part 1 of Schedule 2 (regulation 25(3)(a)(ii)).

40. Ms Gratex submits that applying the ordering in paragraph 39 above represents the most natural way in which to assess the liability condition. She observes that the "treated as liable" conditions in Part 1 of Schedule 2 to the UC Regulations 2013, in particular, only need to be considered where a claimant is not, in fact, liable to make payments.

41. Ms Gratex observes that DWP decision-makers and First-tier Tribunals would be entitled to treat the steps in paragraph 39(a) and (c) above as two parts of the same test, based on the Social Security Commissioner decision in ***R(H) 3/03*** (paragraph 9 of that decision). Ms Gratex submits, however, that it is implicit that the question of whether the liability to make relevant payments is on a commercial basis can only arise where the claimant does have such a liability. Here she cites paragraph 19 of the Social Security Commissioner's decision in ***R(H) 1/03***.

42. Ms Gratex submits that on the facts of DLE's FTT appeals, only (a) and (c) of the matters in paragraph 39 above were in issue. She submits that the FTT first needed to be satisfied that DLE had a liability to make relevant payments, and secondly that the liability was on a commercial basis (***R(H) 3/03*** at paragraph 23).

43. Ms Gratex submits that the test of whether there was a liability to make payments is laid out in paragraph 11 of ***R(IS) 11/98***, which applied and adopted the views in the earlier decision of ***CIS/574/1991***:

> "…*the essential matters for determining whether or not the arrangement in question [shows] a liability to make [relevant] payments are:*

(a) there must be an obligation to make payments derived from a recognised source of law e.g. contract;

(b) the obligation to make the payments must be in respect of the occupation of the premises and not e.g. for food and clothing;

(c) the power to bring the licence to an end must be referable to a breach of the condition to make the payment under the contractual licence and not to some other matter."

44. Ms Gratex submits that if the Tribunal is satisfied that the claimant is liable to make relevant payments, it would then need to consider whether the liability is on a commercial basis. She argues that the correct approach to that issue is laid out in ***R(H) 1/03*** and that it remains applicable to the housing costs element of UC.

45. In ***R(H)1/03***, Mr Commissioner Jacobs (as he then was) set out earlier case law, proceeded to summarise the principles and then set out the approach to be taken. Although Ms Gratex only quotes paragraphs 21 and 22 of ***R(H)1/03*** specifically, it is convenient to set out here what Mr Commissioner Jacobs wrote at paragraphs 15 to 19 of his decision, which Ms Gratex submits are relevant to FTTs when considering regulation 25(3)(a)(i):

"***The principles that emerge from the authorities***

15. There is limited scope for analysis of the words "on a commercial basis". The authorities have milked most of what can be said, although history may prove me wrong in believing that there is little more that can usefully be added. The following principles emerge. They cover the policy, interpretation and application of the provision.

16. As to the general policy of the provision:

16.1. The purpose of the provision is to prevent abuse of the housing benefit scheme. It excludes from entitlement a category of cases which by their very nature are capable of being an abuse of the housing benefit scheme.

16.2. It must be construed and applied consistently with that purpose. But decision-makers must take great care not to exclude claimants whose arrangements are both genuine and necessary.

16.3. The provision excludes the truly personal arrangement that is presented as a legal agreement or liability.

16.4. The burden is not on the claimant to show that the arrangement was on a commercial basis.

17. As to the interpretation of the provision:

17.1. "Commercial" is an ordinary English word that does not need to be defined.

17.2. Whether an arrangement is not on a commercial basis is a question of fact.

17.3. It is necessary to consider not only the amount payable for the dwelling, but all the terms of the arrangement.

18. As to the application of the provision:

18.1. Bad faith is not a necessary ingredient.

18.2. The whole nature of the arrangement must be considered. That includes all the terms and the whole relationship between the parties so far as it concerns the occupation of the dwelling.

18.3. The amount payable is not the only consideration.

18.4. An arrangement may still not be on a commercial basis despite the presence of a financial element that is more than minimal.

18.5. A long-term stable relationship between the parties does not necessarily show there was not a commercial basis. Nor does friendship.

18.6. The test that must be applied is one of dominant purpose of the arrangement. The issue is: is the tribunal satisfied on the balance of probabilities that the principal basis on which the arrangement was made was not a commercial one?

18.7. In appropriate circumstances, it is necessary to consider: (a) the owner's need for rent; (b) the claimant's need for accommodation; and (c) the history of previous arrangements between the parties.

The proper approach for tribunals

Distinction between regulation 6 and regulation 7 issues

19. Regulation 7 presupposes that there is a genuine legal liability to make payments in respect of the dwelling. If there is no liability, there is no entitlement by virtue of regulation 6. A case under regulation 7 must be considered on that basis. It must start with the fact that there is an arrangement that creates a legal liability for payment.

Investigation of the facts

21. Whether or not an arrangement is on a commercial basis is, in the useful phrase of Jessel MR in Erichsen v. Last (1881) 8 Queen's Bench Division 414 at page 416, 'a compound fact made up of a variety of things.' The proper approach to that type of fact is to begin by finding the constituent facts. The tribunal must begin with an investigation into all aspects of the arrangement on which the claim is based. The authorities indicate in general terms the subject matter for the inquiry. They also give some more detailed suggestions that may be relevant in particular types of case. Having made its inquiry, the tribunal must make and record findings of constituent fact on all relevant matters. Those findings provide the foundation for a finding on the compound fact: was the arrangement on a commercial basis?

Analysis

22. The tribunal must analyse the constituent facts of the case as a composite whole. The significance of each factor cannot be considered in isolation. Each must be considered in the context of all the others. An overall view must be taken."

46. Ms Gratex submits that in appeals where a UC award has been revised to remove the housing costs element, it is generally for the SSWP to establish on the balance of probabilities that the necessary grounds for revision were made out. She submits this is also set out in paragraphs 14 to 16 of ***R(H) 3/03***, (although what is said there is subject to the comments Baroness Hale made in her judgment in paragraphs 62 to 63 of ***Kerr v. Department for Social Development*** [2004] UKHL 23).

(d) The SSWP's submissions about material errors of law by the FTT

47. Misdirection in law about what it had to address: Ms Gratex submits it is unclear what decision the FTT ultimately made. It recorded in its decision notice for the overpayment appeal (SC143/24/00051) that DLE "*could not be treated as liable to pay rent*" (the condition in regulation 25(3) of the UC Regulations 2013 because "he did not meet the payment conditions, which is a condition in regulation 25(2) instead. Ms Gratex submits the FTT confused two separate issues, one of which - namely the payment condition - was not obviously in issue in the appeal.

48. Ms Gratex also submits that while paragraph 17 of the FTT's Statement of Reasons referred correctly to a revision decision using regulation 9 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013, the FTT referred elsewhere to DWP's decision being a supersession decision, which is a different kind of change decision and is made applying different legislation.

49. Ms Gratex argues that the FTT's confusion was, in part, due to DWP having referred to supersessions in paragraph 4.8 of its Response to the FTT bundle by stating its determination "*effectively superseded the entitlement decision made on 17/02/2020*". Ms Gratex submits, however, that by failing to correct what DWP had stated inaccurately, the FTT gave the impression it had not adequately considered the law relevant to the decisions under appeal. Ms Gratex argues this may also explain why the FTT referred in paragraph 36 iii) and iv) of its Statement of Reasons to DLE failing to notify DWP of a change of circumstances. She submits that a failure to report a change of circumstances is relevant to a supersession decision, not a revision decision.

50. Failing to explain why it consciously exercised its discretion to consider something not in issue between the parties: Ms Gratex submits that while DWP's initial revision decision had suggested DWP disputed DLE satisfying the conditions in regulation 25(2) to (4) of the UC Regulations 2013, by the time of the FTT appeal hearing, DWP's case was primarily that it was "not satisfied [DLE] meets the liability condition, as the tenancy itself is questionable" (DWP submission, page G of FTT bundle). Although DWP had not explicitly stated it, its contention was therefore that the contradictory evidence DLE provided in response to its review showed there was no liability for DLE to make payments at all, rather than that a liability existed, but was not on a commercial basis. Ms Gratex observes that despite it no longer being in issue whether DLE had a liability on a commercial basis, the FTT proceeded in its Statement of Reasons to find that the liability condition was not met because: "*the tenancy was not on a commercial basis*". Ms Gratex submits this also conflicted with what the FTT had written in its Decision Notice about the overpayment appeal (which appeared to explain its entitlement appeal decision).

51. Adequacy of reasoning for its decision the tenancy was not on a commercial basis: Ms Gratex submits that to the extent the FTT was entitled to consider this issue, it is unclear how the reasons it provided at paragraph 36 of the Statement of Reasons related to the commercial nature of the arrangement, nor how the FTT viewed those factors as a compound whole, having in mind the test laid out in ***R(H)1/03***. Ms Gratex submits the FT fell into the error identified in ***R(H)3/03*** of failing to make clear the basis on which it decided DLE's appeals.

52. Taking into account potentially relevant evidence (the possession proceedings evidence): Ms Gratex submits that DLE had produced evidence that his landlord

had brought possession proceedings against him, leading to the court making a possession order. She submits that even though this evidence post-dated DWP's decision dated 08 July 2022 and raised considerations under section 12(8)(b) of the Social Security Act 1998, it was potentially relevant because it may have shed light on the circumstances at the time of DWPs entitlement decision.

53. One of the grounds on which I granted DLE permission to appeal was that the FTT might have made an error of law by setting out the substance of its decision about entitlement in the overpayment appeal decision notice. Ms Gratex submits that the FTT appears to have merged its reasoning on both appeals, leading to some confusion. She argues, however, that it was correct for the FTT to focus its decisions and reasons on DLE's appeal against the entitlement decision. This is because all overpayments of UC underpinned by a valid revision or supersession decision are recoverable (section 71ZB(1)(a) of the Social Security Administration Act 1992). Here, I understand Ms Gratex to be arguing that while the FTT's approach caused some confusion, it did not amount to a material error of law.

Why there was no oral hearing of this appeal

54. Neither party requested an oral hearing of this appeal. I took their preferences into account. I decided the interests of justice did not require an oral hearing. The parties are agreed that the FTT made material errors of law. It is not necessary to have an oral hearing in order to determine that issue. Holding an oral hearing would delay matters, without being required in order to resolve them. I therefore determined the appeal on the papers. It was proportionate to do so.

55. There has been a delay in being able to make a decision in this matter, for which I apologise to the parties. It was necessary to devote additional time to considering the issues involved, but I apologise for the inconvenience caused.

The approach to take when considering entitlement to the housing costs element under regulation 25 of the UC Regulations 2013

56. I have considered the approach Ms Gratex argues should apply in an appeal where there is a dispute about whether the appellant meets the liability condition in section 11(1) of the 2012 Act.

57. Section 11(1) of the 2012 Act sets out a requirement to have a liability to make payments in respect of the accommodation the claimant occupies as their home. It does so indirectly, by explaining that the calculation of a UC award is to include an amount in respect of that liability. Section 11(3)(b) allows regulations to provide for circumstances in which a claimant is to be treated as liable or not liable to make payments. Section 11(5)(a) allows regulations to provide for exceptions to section 11(1).

58. Regulation 25(3) specifies, for the purpose of section 11 of the 2012 Act the circumstances in which a claimant is to be treated as liable or not liable to make payments in respect of accommodation (see regulation 25(1)(b)). This is the liability condition, as explained by regulation 25(5)(b).

59. Regulation 25(3) then sets out the following requirements for the liability condition:

    (a) the claimant must have a liability to make the payments which is on a commercial basis (regulation 25(3)(a)(i));

    (b) alternatively, they must be treated under Part 1 of Schedule 2 to the UC Regulations as having that liability (regulation 25(3)(a)(ii)); and

(c) in either (a) or (b), none of the provisions in Part 2 of Schedule 2 apply to treat the claimant as not being liable to make the payments.

60. The approach I set out when granting permission to appeal started with the entitlement condition in the 2012 Act (section 11(1)) and then tracked the order in which regulation 25(3)(a) and (b) of the UC Regulations 2013 are laid out.

61. Ms Gratex submits a different ordering is the most natural, in particular, because it is only necessary to resort to considering whether a claimant can be treated as having the liability to make payments (Part 1 of Schedule 2), if they do not in fact have a liability to make payments.

62. Ms Gratex also submits that it is necessary to determine whether a claimant who does not have a liability to make payments can be treated as having one, before deciding whether they have a liability to make payments on a commercial basis. She refers to the following paragraph of Mr Commissioner Jacobs' reasoning in ***R(H)1/03***, which concerned regulations 6 and 7 of the Housing Benefit (General) Regulations 1987 ("the HB Regulations 1987"). Regulation 6 set out circumstances in which a person could be treated as having a liability to make payments. Regulation 7 set out circumstances in which they would be treated as not having that liability, including where the tenancy was other than on a commercial basis:

> *"19. Regulation 7 presupposes that there is a genuine legal liability to make payments in respect of the dwelling. If there is no liability, there is no entitlement by virtue of regulation 6. A case under regulation 7 must be considered on that basis. It must start with the fact that there is an arrangement that creates a legal liability for payment."*

63. Regulation 6 is not directly equivalent to the provisions in Part 1 of Schedule 2 to the UC Regulations 2013 that treat a person as having a liability to make payments. This is because regulation 6(1)(a) of the HB Regulations 1987 sets out: "*the person who is liable to make those payments*". This does not appear to be a treated as provision, but rather a record that the person who is factually liable to make the payments satisfies the requirement of having the liability to make them. The other circumstances set out in regulation 6 more naturally cover people who do not actually have a liability to make payments, but it has been decided they should be treated as having them - for example, a partner of the person who has the actual liability to make the payment, or someone who is making them despite having no liability because the liable person is not making them.

64. Regulation 7 of the HB Regulations 1987 then lists categories of claimants who, despite satisfying one of the grounds in regulation 6 to "be treated as having a liability to make payments", should not be treated as having that liability. This included where the claimant had a tenancy or other agreement in respect of the accommodation, but it was not on a commercial basis (regulation 7(2)(ii)).

65. Seen in this context, it appears that regulations 6 and 7 of the HB Regulations 1987 adopted the following structure:

(a) whether the claimant has a liability to make relevant payments (regulation 6(1)(a));

(b) if not, whether the claimant can be treated as liable to make relevant payments (regulation 6(1)(b) to (d) and (2) to (3)); and

(c) assuming either (a) or (b) above are met, whether the claimant should be treated as not having a liability, including because the tenancy or agreement is not on a commercial basis (regulation 7).

66. Section 11(1) of the 2012 Act and regulation 25(3) of the UC Regulations 2013 use a different structure because they separate out having a liability (section 11(1) and the first part of regulation 25(3)(a)(i)) from being treated as having it (Part 1 of Schedule 2). They then apply an overarching requirement for all these cases that the claimant is not treated as not being liable to make the payments under Part 2 of Schedule 2.

67. I do not fully agree with the ordering Ms Gratex has suggested (summarised at paragraph 39 above). I consider the most appropriate order in which to approach the liability condition in regulation 25 of the UC Regulations 2013 is the following.

68. The FTT should first determine whether the claimant is in fact legally liable to make the relevant payments. If the claimant is so liable, it must determine whether that liability is on a commercial basis for the purposes of regulation 25(3)(a)(i).

69. Although the evidence relevant to these questions may overlap, the FTT will need to make clear whether it has found that no legal liability existed or that a legal liability existed but was not on a commercial basis.

70. If the claimant is not in fact liable, the FTT must consider whether Part 1 of Schedule 2 to the UC Regulations treats the claimant as liable.

71. If either regulation 25(3)(a)(i) or (ii) is satisfied, the FTT must finally consider whether any provision in Part 2 of Schedule 2 treats the claimant as not liable.

72. On the wording and structure of regulation 25(3)(a), the commerciality requirement in subparagraph (a)(i) is attached to a claimant who has an actual liability. It does not appear to be an additional requirement imposed by regulation 25(3)(a)(ii) on a claimant who is treated as liable under Part 1 of Schedule 2.

73. It is unnecessary in these appeals to determine whether commercial considerations may nevertheless be relevant to the application of any particular provision in Part 1 of Schedule 2 (the treating as having a liability provisions). I have not received submissions on that wider question.

The regulation-making power(s) used to make regulation 25(3)(a)(i) of the UC Regulations 2013

74. Although I had questions about this when granting permission to appeal, Ms Gratex's submissions have confirmed that the relevant regulation making power is in section 11(3)(b), and there is an equivalent regulation-making power (section 137(2)(i) of the Social Security Contributions and Benefits Act 1992) which was used to deal with the commerciality of tenancy or arrangement. This therefore does not require further consideration.

My decision

75. 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. At this substantive stage, I need to be satisfied that the FTT made one or more errors of law that were material.

76. Having considered the matters set out above, including the arguments put forward for the SSWP, I am satisfied that the FTT made material errors of law in deciding DLE's appeals, largely for the reasons set out by Ms Gratex.

77. The first error of law is that, read as a whole, the Statement of Reasons does not explain the decision notice for appeal SC143/24/00051, which set out the FTT's decision about the entitlement appeal SC143/24/00049. In its decision notice, the FTT stated that DLE did not meet the payment conditions. The expression 'payment condition' is defined by regulation 25(5)(b) as referring to the requirements in regulation 25(2). The FTT reflected that meaning in paragraphs 13 and 14 of its later Statement of Reasons and did not, at that stage, correct what it had written in the decision notice or indicate it meant to refer to something else in it. I am therefore satisfied that the FTT was using the expression to refer to the requirements that the payments fall within regulation 25(2) of the UC Regulations 2013, namely the need for the claimant to make rent payments or service charge payments.

78. However, the FTT's Statement of Reasons went on to explain that it decided DLE's entitlement appeal on the basis that he did not meet the liability condition (meaning regulation 25(3)) because his tenancy was not on a commercial basis. None of the FTT's reasoning was addressed to the payment condition in regulation 25(2). The Statement of Reasons therefore explains a different decision to the one the FTT made for appeal SC143/24/00051 (which I am satisfied addressed the substance of entitlement appeal SC143/24/00049).

79. The second error of law is that the FTT misdirected itself in law about the entitlement decision DWP had made and whether this was a revision decision or a supersession decision. DWP decided that it had made a material mistake of fact in deciding DLE had a liability to make payments for his accommodation and changed his entitlement to the housing costs element from the date it was first awarded. I agree with Ms Gratex that this was a revision decision made under section 9 of the Social Security Act 1998 using the ground in regulation 9 of the Universal Credit etc. (Decisions and Appeals) Regulations 2013. I also agree with Ms Gratex that the burden was on DWP to demonstrate that on the balance of probabilities, the necessary grounds for revision were made out This is consistent with the statutory finality conferred on benefit decisions by section 17 of the Social Security Act 1998.

80. While paragraph 17 of the FTT's Statement of Reasons refers correctly to the ground for revision under regulation 9 of the Universal Credit etc. (Decisions and Appeals) Regulations 2013, parts of the FTT's reasoning related to DLE's circumstances having changed because other people had started to occupy the property, but DLE failing to report this to DWP (second paragraph 36(iii) and paragraph 36(iv) of Statement of Reasons). This reasoning was not relevant to whether the UC entitlement decision should be revised but instead related to whether it could be superseded.

81. A supersession decision for a change of circumstances would have taken effect at a different later date to a revision decision. This was relevant both to the effective date of DWP's entitlement decision and the amount of the UC overpayment that would arise. The FTT referred again to DLE's duty to report changes, at paragraph 38. It stated at paragraph 39 that the supersession (by DWP) was correct in law. In these circumstances, I am satisfied the FTT misdirected itself in law by failing to address DWP's revision decision, and instead treating it as a supersession decision, which required different legal and factual grounds to be established.

82. The third error of law is that the FTT failed to provide adequate reasons for why it decided the tenancy was not on a commercial basis. I agree with Ms Gratex that the reasons the FTT provided at paragraph 36 of the Statement of Reasons do not obviously relate to whether there the arrangement was commercial nature in the arrangement DLE had with his landlord. The FTT did not explain how the matters it identified bore on the commerciality of the arrangement or how they were assessed in accordance with the approach in ***R(H)1/03***, quoted at paragraph 45 above.

83. As explained above, the FTT appears to have relied on changes in DLE's circumstances by the landlord having other people also live in the accommodation. It is not clear that this is relevant to an assessment of the commerciality of the arrangements between DLE and his stated landlord. The FTT did not have any evidence before it about the "going rate" for equivalent properties to the one DLE was occupying, including what, if any, difference it would make if they were properties in multiple occupation, as opposed to a tenancy that gave DLE exclusive possession of the property. The introduction of other people into the property was something that the FTT clearly took into account (apparently by way of a ground for supersession) but it did not explain adequately how that was relevant to assessing the commerciality of the arrangement between DLE and his stated landlord at the outset.

84. Furthermore, a number of the matters the FTT relied on, including the introduction of other people into the property when DLE had a tenancy stated to give him exclusive possession, are arguably more relevant to whether the liability to make payments was contrived, set out in paragraph 10 of Schedule 2 to the UC Regulations 2013. Paragraph 10 of Schedule 2 provides:

> "10-(1) A claimant is to be treated as not liable to make payments where the Secretary of State is satisfied that the liability to make the payments was contrived in order to secure the inclusion of the housing costs element in an award of universal credit or to increase the amount of that element.
>
> (2) Sub-paragraph (1) does not apply if the claimant is treated as not liable to make the payments under any of the preceding provisions of this Part of this Schedule."

85. The FTT did not, however, rely on paragraph 10 of Schedule 2 as part of its decision about DLE's entitlement to the housing costs element. Neither its decision notices nor the Statement of Reasons refer to the FTT deciding that DLE satisfied paragraph 10 of Schedule 2 to the UC Regulations 2013.

86. Nor did the FTT explain adequately how it viewed the relevant factors as a compound whole, having in mind the test laid out in ***R(H)1/03***. As the Upper Tribunal confirmed in ***Warwick District Council v SSWP & CH*** [2020] UKUT 240 (AAC), ***R(H)1/03*** was, and remains the leading authority on how to approach the issue of commerciality. This is as true for considering commerciality within regulation 25(3)(a)(i) of the UC Regulations 2013, as for the relevant housing benefit provisions.

87. The reasoning that the FTT included in paragraph 36 of its Statement of Reasons, which it stated was the basis for deciding the tenancy was not on a commercial basis, was therefore inadequate to explain its decision that DLE's was not entitled to the housing costs element from 10 February 2020.

88. The fourth error of law is that the FTT failed to take into account potentially relevant evidence and failed to adequately reconcile conflicts in evidence when making its decision. The potentially relevant evidence was the evidence DLE had produced from the possession proceedings in March 2023. I agree with Ms Gratex that while this evidence post-dated DWP's entitlement decision dated 08 July 2022, it was potentially relevant to what was the true position between DLE and his landlord in 2020. It was also arguably relevant to the matters the FTT found relevant to its decision (albeit that it stated they indicated the arrangement was not a commercial one rather than that the liability was contrived). If the FTT decided that it could not take this evidence into account because it represented circumstances after the date of DWP's entitlement decision (section 12(8)(b) Social Security Act 1998), it has failed to explain this at all in its Statement of Reasons.

89. The FTT failed to reconcile conflicts in evidence because it had been given two addresses for the landlord, one in the UC claim form at page 11 (and in the possession order the landlord had obtained in March 2023) and a different address in the tenancy agreement. The address given for the landlord in the tenancy agreement was introduced with: "*The landlord notifies the tenant that the tenant may serve notices (including notices in proceedings) on the landlord at the following address: Office at [named address]"*. Before granting DLE permission to appeal, I listened to the audio recording of the FTT appeal hearing on 25 November 2024. This confirms the FTT Judge asked the DWP presenting officer whether DWP had made any attempt to contact the landlord at the address given on page 11. The presenting officer replied: "*Not that I can see from the response, I am not advised of any attempt to do that*".

90. There was clearly a conflict in the evidence provided to the FTT about the correct address for DLE's landlord. A possible explanation was that the address given in the UC claim (page 11 of FTT bundle) was the home address and the address on the tenancy agreement was an office address. The FTT has not, however, addressed this conflict in its Statement of Reasons, including the fact that the possession proceedings gave the landlord's address used in the UC claim in 2020.

91. In ***R(DLA) 2/01***, Mr Commissioner Jacobs (as he then was) explained the position about taking evidence into account under the predecessor to section 12(8)(b):

> *"9…The only evidence that is relevant is evidence that relates to the period over which the tribunal has jurisdiction. However, it is the time to which the evidence relates that is significant, not the date when the evidence was written or given. It does not limit the tribunal to the evidence that was before the officer who made the decision. It does not limit the tribunal to evidence that was in existence at that date. If evidence is written or given after the date of the decision under appeal, the tribunal must determine the time to which it relates. If it relates to the relevant period, it is admissible. If it relates to a later time, it is not admissible."*

92. Again, the FTT did not explain whether it had considered the evidence of the stated landlord's address in possession proceedings might be relevant to DWP's statement that the landlord could not be traced. The possession proceedings evidence might represent evidence that came into existence after DWP's decision that related to what the landlord's address was at the time of DLE's UC claim (and thereby show DWP had not traced the landlord's home address).

93. I am satisfied the four errors of law identified above are material, because had the FTT not made them, it might have reached a different conclusion about DLE's entitlement to the housing costs element. Had it done so, this might also have changed the FTT's decision that there was an overpayment of £13,372.54 of UC that was recoverable from DLE.

Conclusion, including disposal

94. 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 25 November 2024 under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Section 12(2)(b) requires me to either remit the cases to the First-tier Tribunal with directions for its reconsideration or to remake the FTT's decisions.

95. Ms Gratex invited me to remit the appeals to a new First-tier Tribunal. DLE does not argue otherwise. I am satisfied that I should remit the appeals for determination by a new First-tier Tribunal. The FTT has failed to explore the evidence adequately and make adequate factual findings. The First-tier Tribunal is the primary tribunal of fact and best placed to deal with this.

96. I therefore remit DLE's entitlement and overpayment appeals for rehearing before a new First-tier Tribunal. It will make a fresh decision about DLE's entitlement to the housing costs element of UC and any recoverable overpayment of UC from him.

97. Although I have set aside the FTT's decision dated 25 November 2024, I do not make any findings, or express any view, about whether DLE should be entitled to the housing costs element within his UC award with effect from 10 February 2020. The next Tribunal will need to hear evidence, make its own findings of fact, and provide its reasoning for the decision it reaches.

Judith Butler
Upper Tribunal Judge

Authorised for issue: 24 October 2026