

[2018] AACR 16
(Secretary of State for Work and Pensions v DC (JSA))
[2017] UKUT 464

Judge Rowland
27 November 2017

CJSA/1744/2015
CJSA/1222/2016

Tribunal procedure and practice – evidence – presumption of regularity – party failing to comply with direction to provide document – whether tribunal entitled to conclude that burden of proof was not satisfied

Employment, Skills and Enterprise Scheme – whether authorisation of provider to issue notices must be in writing

The claimant failed to attend two work programme appointments (in June and August 2012) under the Employment, Skills and Enterprise scheme. The Secretary of State imposed 26-week sanctions in respect of each of the missed appointments. The claimant appealed against those decisions, stating that he was not aware of the appointments. In response to the first appeal (relating to the August appointment), the Secretary of State said that the claimant was given a notice of the appointment by hand. In response to the second appeal (relating to the June appointment), notification was by first class post. In both cases, the notice was provided by Interserve Working Futures Ltd (“Interserve”), a “provider” under the scheme. In the first appeal, the First-tier Tribunal Judge directed the Secretary of State to provide copies of all notices issued to the claimant. In the second appeal, the Judge directed a submission from the Secretary of State to confirm Interserve was a provider authorised to issue notices under the scheme. The Secretary of State did not provide copies of the notices within the time allowed. The Secretary of State confirmed that Interserve was an authorised provider, but could only provide a 2013 authorisation letter in support. The First-tier Tribunal allowed both appeals. In the first appeal, it decided that the Secretary of State had not established that the claimant had been adequately notified of the August appointment, and in the second appeal, that he had failed to establish that Interserve had the relevant authority to issue notices. The Secretary of State appealed to the Upper Tribunal, relying on the presumption of regularity to support the contention that the claimant had adequate notification and that the First-tier Tribunal erred on the authority issue.

Held, dismissing the first appeal and allowing the second appeal in part, that:

1. where, on appeal, the First-tier Tribunal directs the party who bears the burden of proof in respect of a particular matter to provide evidence as regards that matter and that party fails to provide the evidence within the time allowed, the First-tier Tribunal is entitled to consider the investigation of that matter to be at an end and, if there is no other evidence on the point, to determine the issue against the offending party simply on the ground that that party has failed to prove its case (paragraph 29);
2. the presumption of regularity is a rebuttable presumption and, as it is not unknown for documents to be issued in an unapproved form or in a form that is not reasonably intelligible to an uninitiated recipient, the First-tier Tribunal may require strict proof of a matter so that, in the first appeal, the Secretary of State had to bear the consequence of having failed to comply with the direction or to provide a satisfactory explanation for not doing so (paragraphs 32, 33 and 37);
3. whether there had been authorisation to issue notices was a question of fact and degree (*Tanks & Drums Ltd v Transport and General Workers’ Union* [1992] ICR 1) and, as regulation 18 of the Jobseeker’s Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 did not require authorisation to be in writing, the absence of a formal letter of authorisation was not determinative. Authority may be found to exist on the basis of evidence as to the conduct of those concerned, including what they have said and written over a period of time, and the First-tier Tribunal erred in law in failing to give adequate reasons for finding that Interserve had not been authorised to issue the notice of appointment (paragraphs 46 to 50).

In the second appeal, the Upper Tribunal substituted its own decision for that of the First-tier Tribunal, finding that Interserve had been authorised to issue notices but that the sanction imposed should have been for 4 weeks, rather than for 26, because the claimant had “re-complied” before it was imposed.

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

The Secretary of State was represented by Ms Zoë Leventhal of counsel, instructed by the Government Legal Department.

The claimant neither appeared nor was represented.

Decision:

The Secretary of State's appeal on file CJSJA/1744/2015 is dismissed.

The Secretary of State's appeal on file CJSJA/1222/2016 is allowed in part. The decision of the First-tier Tribunal dated 14 September 2015 is set aside and there is substituted a decision that the award of jobseeker's allowance in force in August 2013 is superseded and jobseeker's allowance is not payable from 23 August 2013 to 19 September 2013.

REASONS FOR DECISION

1. These are appeals, brought by the Secretary of State with my permission, against decisions of the First-tier Tribunal dated 17 October 2014 and 14 September 2015 allowing appeals by the claimant against decisions made by the Secretary of State on 12 August 2013 and 19 August 2013 to the effect that jobseeker's allowance was not payable respectively from 16 August 2013 to 13 February 2014 and from 23 August 2013 to 20 February 2014 because the claimant had failed to participate in the Work Programme on 21 August 2012 and 27 June 2012. Since submitting his appeals to the First-tier Tribunal, the claimant has taken no part in these proceedings at all. They have taken on a life of their own.

Background

2. The Work Programme was a scheme that fell within the definition of "the Employment, Skills and Enterprise Scheme" in regulation 2(1) of the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 (SI 2011/917) ("the ESE Regulations"). By regulations 3 and 4 of those Regulations, the Secretary of State could select a claimant for participation in the Scheme and, by giving the claimant a notice in writing that complied with regulation 4(2), could require the claimant to participate in the Scheme. By regulation 6, a failure to comply with any requirement notified under regulation 4 was to be regarded as a failure to participate in the Scheme. Regulation 18 provided that any function under, *inter alia*, regulation 4 could be "exercised by, or by employees of, such person (if any) as may be authorised by the Secretary of State"

3. Regulation 8 made provision for the consequences that were to flow from a failure to participate in a scheme in a case where "good cause" was not shown in accordance with regulation 7. It was made under section 17A of the Jobseeker's Act 1995 and provided –

"8.—(1) Where the Secretary of State determines that a claimant ("C") has failed to participate in the Scheme, and C has not shown good cause for the failure in accordance with regulation 7, the appropriate consequence for the purpose of section 17A of the Act is as follows.

(2) In the case of a jobseeker's allowance other than a joint-claim allowance, the appropriate consequence is that C's allowance is not payable for the period specified in paragraphs (4) to (7) ("the specified period").

(3) In the case of a joint-claim jobseeker's allowance, the appropriate consequence is that C is to be treated as subject to sanctions for the purposes of section 20A (denial or reduction of a joint-claim jobseeker's allowance) of the Act for the specified period.

(4) The period is 2 weeks in a case which does not fall within paragraph (5), (6) or (7).

(5) The period is 4 weeks where—

(a) on a previous occasion the Secretary of State determined that C's jobseeker's allowance was not payable or was payable at a lower rate because C failed without good cause to participate in the Scheme ("the first determination"), and

(b) a subsequent determination is made no more than 12 months after the date on which C's jobseeker's allowance was not payable or was payable at a lower rate following the first determination.

(6) Subject to paragraph (7), the period is 26 weeks where—

(a) on two or more previous occasions the Secretary of State determined that C's jobseeker's allowance was not payable or was payable at a lower rate because C failed without good cause to participate in the Scheme, and

(b) a subsequent determination is made no more than 12 months after the date on which C's jobseeker's allowance was not payable or was payable at a lower rate following the most recent previous determination.

(7) Where paragraph (6) applies but the Secretary of State is satisfied that C has re-complied in accordance with paragraph (8), the period is either—

(a) 4 weeks, or

(b) 4 weeks plus a period which ends with the last day of the benefit week in which C re-complies,

whichever is longer.

(8) C will be taken to have re-complied where, on the same day as or before or after the date on which the Secretary of State determines that C has failed to participate in the Scheme, C complies with—

(a) the requirement as to participation in the Scheme to which the determination relates, or

(b) such other requirement as to participation as may be made by the Secretary of State and notified to C in accordance with regulation 4.

(9) The specified period begins—

- (a) where, in accordance with regulation 26A(1) of the Social Security (Claims and Payments) Regulations 1987, C's jobseeker's allowance is paid otherwise than fortnightly in arrears, on the day following the end of the last benefit week in respect of which that allowance was paid, and
- (b) in any other case, on the first day of the benefit week following the date on which C's jobseeker's allowance is determined not to be payable or to be payable at a lower rate.

(10) Paragraphs (4) to (7) are subject to paragraph (11).

(11) Where the Secretary of State notifies C during the specified period that C is no longer required to participate in the Scheme, the specified period terminates at the end of—

- (a) one week beginning with the date of the notice, or
- (b) the benefit week in which the requirement to participate ceases to apply,

whichever is later.

(12) In this regulation “benefit week” has the same meaning as in regulation 1(3) of the Jobseeker's Allowance Regulations.”

Although, regulations 7 and 8 were revoked on 22 October 2012, the Secretary of State submits, and I accept, that the revocation is not effective where the failure to participate was before that date.”

4. In *R.(Reilly) v Secretary of State for Work and Pensions* [2013] UKSC 68; [2014] A.C. 453; [2014] AACR 9, the Supreme Court upheld a decision of the Court of Appeal insofar as it had decided that the ESE Regulations were *ultra vires*. However, Parliament had already intervened to reverse the Court of Appeal's decision by passing the Jobseekers (Back to Work Schemes) Act 2013, which received Royal Assent on 26 March 2013. That Act retrospectively validated the ESE Regulations and, expressly, the Scheme and the programmes of activities that were part of it, notices that had been issued under regulation 4 and penalties that had been imposed for failing to participate in the Scheme or to comply with the Regulations. In *R.(Reilly) v Secretary of State for Work and Pensions (No.2)* [2016] EWCA Civ 413; [2017] Q.B. 657; [2017] AACR 14, the Court of Appeal held that that the Act was incompatible with the European Convention on Human Rights insofar as it applied to claimants who had lodged appeals before the Act came into force. However, in the cases before me, sanctions were not imposed until the 2013 Act was in force even though the alleged failures to participate in the Scheme had been long before then.

5. A feature of the Work Programme was that it was delivered by a range of organisations outside the Department for Work and Pensions, known as “providers”. “Prime providers” were under contract to the Department and other providers were sub-contractors of the prime providers.

6. If the Department decided to refer a claimant to the Work Programme, it issued the claimant by hand a notice to that effect (a “WP05”). The provider could then issue a claimant with a letter requiring attendance at a specific appointment. If participation was mandatory, such an appointment letter was also known as a Mandatory Activity Notification (“MAN”). A WP05, by itself or read with a letter issued by a provider, would usually amount to a notice complying with regulation 4(2) of the ESE Regulations and a further letter from a provider would then usually amount to notice of a change of requirements under regulation 4(3) (see *Secretary of State for Work and Pensions v TJ (JSA)* [2015] UKUT 56 (AAC) at [176] to [187], reversed by the Court of Appeal in *Reilly (No.2)* but not on this point). A provider needed to be authorised under regulation 18 if it was to issue notices under regulation 4.

7. If the claimant failed to attend the appointment without what appeared to the provider to be a satisfactory explanation, the provider informed the Department on a specific form (a “WP08”). The Department would then investigate and might, in the name of the Secretary of State, impose a sanction in the form of a decision that jobseeker’s allowance was not payable, or possibly in the case of joint claimants was payable at a reduced rate, for the appropriate period specified by regulation 8 of the ESE Regulations. The 26-week sanctions imposed in both these cases overlapped by all but a week at either end, but that was the effect of regulation 8(9) which fixed the starting date of the period of the sanction by reference to the date of the decision imposing it.

The facts of the two cases

8. The claimant was awarded jobseeker’s allowance from 1 March 2011. He was referred to the Work Programme on 17 May 2012 and subsequently required to keep a number of appointments. He did not do so on several occasions during the summer of 2012. Sanctions were imposed with the effect that jobseeker’s allowance was not payable to the claimant from 20 July 2012 to 2 August 2012, from 27 July 2012 to 23 August 2012 and from 5 October 2012 to 4 April 2013. There were no appeals in respect of those sanctions. However, in three cases, 26-week sanctions for failure to attend appointments in the summer of 2012 were not imposed until August 2013, the delay presumably being due to the *Reilly* litigation. Two of those cases are before me. The third (relating to a sanction imposed on the same day, and for the same period, as the sanction in the second case before me) has not reached the Upper Tribunal, apparently because the Secretary of State, whose decision was overturned by the First-tier Tribunal, neglected to ask for a statement of the First-tier Tribunal’s reasons for its decision.

9. In the first case before me (on file CJSA/1744/2015), the sanction was imposed on 12 August 2013 on the ground that the claimant had failed to participate in the Scheme because he had failed without explanation to attend an appointment on 21 August 2012 that he had been required to attend by virtue of a MAN issued on 14 August 2012 by a provider called Interserve Working Futures Ltd (“Interserve”), which was a subcontractor of Serco Ltd. The Secretary of State had not received a reply to a request for an explanation for the non-attendance.

10. However, in his letter of appeal, the claimant said –

“After doing some investigation I now know that this sanction has been done due to missing several phone calls from Interserve.

I may have been having phone issues around this time, and may have missed or not even got these calls. These dates fell between 06/07/12 – 07/08/12. This [is] now over a year ago. I know there’s been some recent court ruling about imposing sanctions which has caused this delay but with respect that’s not my fault. If I would have [sic] aware at the time, I wouldn’t have let this happen. I did start with Interserve around 20/08/12 and I haven’t missed an interview to date.

I’m currently volunteering 4 hours per week and have recently passed my level 1 youth worker. Having this sanction in place will affect my future volunteering and will have a serious impact on financial situation.”

11. In his response to the appeal, the Secretary of State pointed out that the WP08 said that the notice of 14 August 2012 had been in the form of a letter that had been handed to the claimant. (Regulation 4, of course, required the notice to be in writing rather than by telephone.) He also asked that the appeal be stayed to await the outcome of litigation that eventually concluded with *Reilly (No.2)*. Both parties consented to a decision being made without an oral hearing.

12. The second case before me (on file CJSA/1222/2016) is actually concerned with an earlier missed appointment although the sanction was imposed a week later than the one in the first case, being imposed on 19 August 2013 on the ground that the claimant had failed to participate in the Scheme because he had failed without explanation to attend an appointment on 27 June 2012 that he had been required to attend by virtue of a MAN issued on 21 June 2012 by Interserve. The Secretary of State had again not received a reply to a request for an explanation for the non-attendance. The claimant’s letter of appeal was in exactly the same terms as in the first case. In his response to the appeal, the Secretary of State pointed out that the WP08 said that the notice of 21 June 2012 had been in the form of a letter that had been sent to the claimant by first class post. He asked that the appeal in this case also be stayed. Again, both parties consented to a decision being made without an oral hearing and, again, the claimant has taken no further part in the proceedings.

13. On 26 February 2014, the requests for stays were initially refused by the First-tier Tribunal but, on 21 April 2014, stays were imposed by a different judge in these two cases and in the third case, to await the decision of the Upper Tribunal in *TJ*. However, the first case was then separated from the other two and the stay was lifted after only three months, possibly because a copy of the relevant appointment letter had not been included with the Secretary of State’s response to the appeal in that case but had in the other two cases which remained stayed until *TJ* had been decided in the Upper Tribunal. The stays were effectively lifted in each case when a third judge issued directions.

The directions and decision of the First-tier Tribunal in the first case

14. In the first case, the further directions, which were issued on 29 July 2014 and sent to the parties on the following day, required the Secretary of State to provide within 28 days “copies of all notices issued to the Appellant ... including but not limited to the letter of instruction dated 14.08.2012 issued by Interserve Working Futures together with a copy of the receipt signed by [the Appellant].” The Secretary of State was warned “that in the event of failure to comply strictly with [that direction] it is likely the Tribunal will draw inferences adverse to the Respondent’s case”. Time for compliance was subsequently extended until 9 October 2014.

15. No reply or request for more time having been received, the judge decided on 17 October 2014 that the Respondent had “failed to co-operate with HMC&TS [sic] and failed to reply to directions issued on 30.07.2014” and allowed the claimant’s appeal, saying on the decision notice –

“5. The Tribunal made inferences based on this failure and found:

- a. The Respondent has not established that the Appellant had been adequately notified of the appointment missed.
- b. The Appellant cannot fail to participate in an appointment of which he was unaware.
- c. There was no basis on which a sanction could be imposed.”

That decision notice was not sent to the parties until 17 November 2014. Meanwhile, a response from the Secretary of State to its Directions had been received by the First-tier Tribunal on 23 October 2014, providing copies of various notices issued to the claimant and asking again for a stay. The copies of notices provided did not include a copy of the notice issued on 14 August 2012. Although the Secretary of State had got the case numbers of the three appeals muddled up and wrongly thought that the date of the particular letter mentioned in the Direction was a typing error, it now appears that the relevant notice was in fact not provided on 23 October 2013 only because the Secretary of State was unable at the time to obtain a copy from Interserve.

16. Upon receipt of the decision notice, the Secretary of State applied for a statement of reasons. The statement set out the history and said –

“8. Before the Appellant can be said to have failed to attend the Respondent must establish that:

- a. The appellant was sent a letter requiring attendance.
- b. The letter set out the time, place and venue of the appointment clearly.
- c. That the Appellant was advised what he/she would be required to do and any documents he/she was required to bring.

9. The notice has to be sufficient to enable the Appellant to clearly understand what was required. The Appellant cannot be expected to comply where instructions are ambiguous.
10. The authority to require a claimant to attend on a course or at an interview is given to the Respondent. If the notice to attend was given by a 3rd party service provider the Respondent must establish that the service provider had delegated responsibility.
11. ...
12. The Respondent has failed to co-operate and has failed to supply:
 - a. A copy of the instructing letter.
 - b. Evidence of receipt.
13. In the absence of a copy of the above the Tribunal found:
 - a. The Respondent had failed to establish that the Appellant had been appropriately notified as above. It is insufficient to state merely that a letter was sent. It is incumbent on the Respondent to show that the letter gave the Appellant sufficient information to enable him/her to comply.
 - b. The Respondent has further failed to establish that the service provider was duly authorised and given delegated powers to issue instructions and require attendance.
14. It is not sufficient for the Respondent to state a letter has been sent. It is incumbent on the decision maker to satisfy themselves as to the contents of the letter and that it gave sufficient information to enable the Appellant to comply. This letter should have been included in the appeal bundle. It is not even clear that the decision maker saw the instructing letter and satisfied themselves.
15. The Tribunal accordingly found the Appellant had not been appropriately notified. In the absence of appropriate notification, the Appellant cannot be said to have failed to comply.”

The directions and decision of the First-tier Tribunal in the second case

17. In the second case, the same judge issued directions on 6 July 2015, thereby effectively lifting the stay. In this case, the Secretary of State had provided a copy of the appointment letter with his response to the appeal and the directions sent to the parties on 14 July 2015 raised only the question whether Interserve had been authorised to issue such a letter. They were in the following terms –

- “1. The Respondent will within 28 days of issue of these directions to them provide a further submission dealing specifically with the following points:
 - a. Confirm that the service provider was delegated powers to issue instruction letters to the Appellant and if so when given and by whom.

2. The Respondent is warned that in the event of failure to comply strictly with direction 1 above it is likely the Tribunal will draw inferences adverse to the Respondent's case."

18. On 23 July 2015, the First-tier Tribunal received from the Secretary of State a submission in response to those directions, saying –

“Under a Direction Notice the Tribunal Judge has requested confirmation that the service provider was delegated powers to issue instruction letters to the Appellant and if so when given and by whom.

The service provider in this case is Interserve Working Futures Ltd who are an approved Sub-Contractor for Serco Limited.

DWP no longer hold the letter for Serco Ltd (and therefore Interserve) for the time scale requested.

A copy of the letter, issued by authority of the Secretary of State for Work and Pensions, on 14 February 2013 authorising Serco Ltd and its sub-contractors to exercise any functions of the Secretary of State specified in the letter is provided.

This letter refers to the contract between Serco Ltd and the Secretary of State dated 30 June 2011. Annex 3 of this letter lists Interserve Working Futures Ltd as an approved sub-contractor.”

The functions specified in the letter of 14 February 2013 were functions under the Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013 (SI 2013/276) and the Employment and Support Allowance (Work-related Activity) Regulations 2011 (SI 2011/1349), rather than under the ESE Regulations, the letter presumably having been written due to the coming into force of the 2013 Regulations at 6.45 pm on 12 February 2013 (the day on which the Court of Appeal's decision in *Reilly* had been handed down).

19. On 14 September 2015, the judge allowed the claimant's appeal on the ground that the Secretary of State had failed to establish on the balance of probability that the service provider had had authority to issue the instruction letter to the claimant. The reasons given on the decision notice were –

“3. The Respondent has supplied no evidence that at the date of the issue of the letter of instruction the service provider was authorised to issue instruction letters. The only evidence supplied post-dates the date of failure to comply. Although this refers to an earlier contract no copy of that contract is produced and [it] cannot be produced. No evidence is therefore available as to the scope of any delegated powers given in that contract.”

The Secretary of State asked for a statement of reasons, which did not add anything material to what had been said in the decision notice, although it did correct an apparent confusion in the notice between the contract and the letter of authorisation.

The appeals to the Upper Tribunal

20. In separate applications, both of which were out of time, the Secretary of State applied for permission to appeal against the two decisions. The First-tier Tribunal refused to extend time in either case, but I admitted renewed applications and also gave permission to appeal in both cases, because they appeared to raise important issues as to the approach to be taken where the Secretary of State did not produce evidence for which the First-tier Tribunal had asked. Both cases have been stayed informally for various periods to await the appeal to the Court of Appeal in *TJ*, which was heard with *Reilly (No.2)*, and then a possible appeal to the Supreme Court that did not materialise. I apologise for further delay there has been since then.

21. In the course of the proceedings, the Secretary of State has provided further evidence, to which I will refer below. However, as the Secretary of State accepts, the first question that arises in each case is whether the First-tier Tribunal erred in its approach to the case in the light of the evidence before it at the time it made its decision.

22. In the first case before me, the Secretary of State appeals on two grounds, as he must because the First-tier Tribunal gave two separate reasons for allowing the claimant's appeal. The first is that the First-tier Tribunal wrongly drew an adverse inference against the Secretary of State from his failure to comply with the direction to provide a copy of the appointment letter issued to the claimant. The second is that the First-tier Tribunal acted unfairly in finding that Interserve had not been authorised to issue such an appointment letter, because the Secretary of State had not been given an opportunity to make a submission on that issue.

23. In the second case before me, the Secretary of State submits that the First-tier Tribunal erred in law in taking too narrow a view of what could amount to authorisation under regulation 18 of the ESE Regulations, with the consequence that it erred in finding that there was no evidence of authorisation before it merely because the Secretary of State had been unable to produce a copy of a letter of authorisation or, alternatively, it failed to give adequate reasons for its finding that Interserve had not been authorised to exercise functions under the ESE Regulations.

The first case – discussion

24. In relation to the question whether the First-tier Tribunal wrongly drew an adverse inference against the Secretary of State from his failure to comply with the direction to provide a copy of the appointment letter issued to the claimant, the Secretary of State refers to *Secretary of State for Work and Pensions v HS (JSA)* [2016] UKUT 272 (AAC); [2017] AACR 29, where I considered the circumstances in which adverse inferences might be drawn, and submits that the First-tier Tribunal failed to consider the presumption of regularity.

25. At first glance, the facts of this case are indeed similar to those in *HS*, where I said –

“12. ...Where there has been a failure to comply with a direction to provide evidence, a tribunal may well be entitled to draw an adverse inference against the offending party; that is to say that it may infer from the failure that the facts are not as the offending party says they are. However, it is not entitled to do so merely as a punishment. It is appropriate to draw an adverse inference only if the tribunal is satisfied that it is probable that the reason for the failure to comply with the direction

is that the evidence does not exist or would harm the offending party's case. Thus a warning that an adverse inference may be drawn from a failure to comply with a direction does not necessarily have the same effect as a warning that a case will or may be struck out or that a party will or may be barred from participating in the proceedings if there is a failure to comply."

In referring to evidence that "does not exist", I had in mind cases where a claimant fails to produce evidence that, if he were telling the truth, would exist and could be produced. It is not always appropriate to draw an adverse inference where it is accepted that a person is unable to produce evidence. Regard has to be had to the reason, or probable reason, that the evidence cannot be produced, just as regard must be had to the probable reason for a refusal to produce evidence that does exist. Thus, as I also said in *HS*, the drawing of an adverse inference usually requires some explanation, although sometimes the reasons may be obvious and so can be inferred.

26. However, although in *HS* the judge had issued directions similar to those issued in this case and the decision notices were in similar terms in both cases, upon closer examination there are material differences. Quite apart from the judge having overlooked in *HS* the fact that the Secretary of State had provided the relevant evidence before the date of her decision, the statements of reasons in the cases were expressed differently and, in particular, the one issued in *HS* did not contain paragraphs equivalent to paragraphs 13 and 14 of the statement issued in the case now before me.

27. This is an important distinction because, notwithstanding the warning about drawing adverse inferences and the reference in the decision notice to inferences having been drawn, the First-tier Tribunal does not in fact appear in this case to have drawn an adverse inference from the failure to provide a copy of the appointment letter. The statement of reasons shows that it actually made its decision on the basis that the effect of the failure was simply that there was no evidence as to the letter's contents and that the Secretary of State suffered the disadvantage of there being no evidence because the burden of proof rested upon him and he had failed to take advantage of an adequate opportunity to produce the evidence. An adverse inference need be drawn only if there is some evidence in favour of the offending party to be overcome or if there is no other evidence at all and the *other* party needs to satisfy a burden of proof.

28. The burden of proof has a limited role in social security adjudication, which – to use the language of Baroness Hale of Richmond in *Kerr v Department for Social Development* [2004] UKHL 23; [2004] 1 W.L.R. 1372; R 1/04(SF) at [62] – involves "a co-operative process of investigation in which both the claimant and the department play their part". Lord Hope, who agreed with Baroness Hale, said in *Kerr* at [15] and [16] that there was no formal burden of proof and that there were merely "some basic principles which may be used to guide the decision where the information falls short of what is needed for a clear decision to be made one way or the other", one of which was that "it is for the party who alleges an affirmative to make good his allegation". Nonetheless, however the burden is described, it is important where there remains a lack of evidence on a particular point after the case has been investigated, because it will then determine "who should bear the consequences of the collective ignorance" (*per* Baroness Hale at [66]).

29. Where, on appeal, the First-tier Tribunal directs the party who bears the burden of proof in respect of a particular matter to provide evidence as regards that matter and that party fails to provide the evidence within the time allowed, the First-tier Tribunal is entitled to consider the investigation of that matter to be at an end and, if there is no other evidence on the point, to determine the issue against the offending party simply on the ground that that party has failed to prove its case. Indeed, the Secretary of State accepts that the First-tier Tribunal was entitled to decide the case before it on 17 October 2012 without waiting any longer for the evidence it had directed should be provided.

30. The Secretary of State's complaint relates to the First-tier Tribunal's conclusion or, at least, its reasoning. He submits that this was not a case where there was no evidence, because the WP08 contained statements that amounted to evidence that the appointment letter had been issued. I accept that statements in the WP08 did amount to such evidence. However, the First-tier Tribunal did not find that the appointment letter had not been given to the claimant; it was concerned about the adequacy of the contents of the letter. The WP08 gave limited assistance on that issue. It suggested that the letter had required the claimant to attend an appointment on 21 August 2012 at 1.15pm but it did not say where the claimant was required to go or give any indication as to what other information was provided to the claimant or how it was expressed.

31. As regards the information that was not mentioned in the WP08, the Secretary of State relies on the presumption of regularity and the "inherent probabilities". The "inherent probabilities" is a phrase that was used by Lord Sumption in *Prest v Petrodel Resources Limited* [2013] UKSC 34; [2013] 2 A.C. 415 and that I adopted in *HS*, but it was used by both of us in the context of considering when an adverse inference may be drawn to the advantage of a party who carries the burden of proof in family proceedings or social security proceedings and I do not consider that referring to it adds anything to the presumption of regularity in the present case.

32. The justification for presuming regularity is that things are *usually* done regularly and thus, in the absence of any contrary evidence, it may be regarded as probable that they will have been done regularly in any particular case. However, the presumption is no more than that: it is rebuttable. Moreover, since it may be contrary to experience that certain things are *always* done regularly, a party wishing to rely on the presumption may properly be required to prove that things were in fact done regularly in the particular case in hand.

33. In the present case, I do not doubt that the First-tier Tribunal could quite properly have presumed that the contents of the letter were sufficiently clear to make it effective. Judges in specialist tribunals are entitled to rely on the experience they have drawn from determining other cases and may be aware of guidance given to those who administer benefits. However, it is not unknown for documents to be issued in an unapproved form or in a form that is reasonably intelligible to the sender but not to an uninitiated recipient. In adversarial litigation, a party may sometimes be "put to proof" by the other party. Where the First-tier Tribunal exercises an investigatory jurisdiction in which litigants very seldom have legal representation, it is that tribunal that may require strict proof of a matter, whether or not it has expressly been put in issue by a party.

34. It is important to consider the facts of the case in some detail. The claimant had neither denied receiving the appointment letter nor positively asserted that it was confusing and

section 12(8)(a) of the Social Security Act 1998 does not require the First-tier Tribunal to consider issues not raised by the appeal. On the other hand, his grounds of appeal did not really explain his non-attendance at the appointment at all and left open the possibility that he had not in fact received the letter or that he had been confused by it. In the absence of any evidence from the claimant that he had not received the letter, receipt was adequately proved by the statements in the WPO8 and the presumption that what has been sent has been received. But there was no evidence as to the contents of the letter beyond the date and time of the appointment and, the parties having consented to the appeal being decided without a hearing, there was not going to be a hearing at which the claimant's reasons for non-attendance could be further explored unless the First-tier Tribunal expressly directed one. Although it was possible that the claimant had retained the letter, given the passage of time it was plainly more probable that the Secretary of State would be able to provide a copy and he bore the burden of proving that a letter in a proper form had been issued. In those circumstances, it seems to me that the First-tier Tribunal was clearly entitled to direct the Secretary of State to provide a copy of the appointment letter and to decide the case on the burden of proof when he failed, without explanation, to do so.

35. Had the Secretary of State said that he had been unable to obtain a copy of the letter and so was unable to provide it to the First-tier Tribunal, he could at the same time have argued that the First-tier Tribunal should presume, in the light of that circumstance and of copies of other appointment letters from Interserve, that the appointment letter of 14 August 2012 had been adequate for its purpose. However, he did not do that or respond at all to the directions until after the time for complying with them had expired and the decision had been made.

36. I would add that I consider that the First-tier Tribunal was right to say that a copy of the appointment letter "should have been included in the appeal bundle". I do not doubt that, in principle, the Secretary of State is entitled to rely on the presumption of regularity when making initial decisions. However, the practicalities of the First-tier Tribunal exercising an investigatory jurisdiction with unrepresented litigants mean that the Secretary of State ought generally to provide, and ensure that he is able to provide, a copy of the appointment letter in every case where a claimant is appealing against a sanction imposed for not keeping an appointment. It is necessary to do so even when the existence or content of the letter has not been put in issue in the grounds of appeal because many claimants do not explain themselves fully in their grounds of appeal and so issues are liable to arise later, whether raised by the claimant at a hearing or by the First-tier Tribunal when satisfying itself for the purposes of rule 27(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) that a case can fairly be determined without a hearing. However, it does not follow that the Secretary of State necessarily breaches the duty imposed by rule 24(4)(b) of those Rules to provide to the First-tier Tribunal "copies of all documents relevant to the case in the decision maker's possession" if he fails to provide a copy of the appointment letter. Since the terms of the appointment letter had not been put in issue by the claimant in this case, I consider that the First-tier Tribunal was right to give the Secretary of State an opportunity to produce a copy of the appointment letter before determining the appeal.

37. I dare say that the First-tier Tribunal issued the directions partly because it was looking for possible grounds upon which it might fairly determine the case quickly rather than stay it as the Secretary of State had requested (which would have resulted in a delay of months or years as has since happened), but that does not alter the point that it was entitled to issue them

and that the Secretary of State must bear the consequence of having failed either to comply with them in time or to provide a satisfactory explanation for not doing so.

38. During the course of the proceedings before the Upper Tribunal, the Secretary of State has managed to obtain the copy of the letter given to the claimant on 14 August 2012 that the claimant signed to confirm receipt of the original, together with copies of a personal profile and employment plan, an action plan and a letter from Interserve explaining the implications of the mandatory actions in the action plan, each of which was also signed by the claimant on the same day. It is now apparent that the appointment letter was quite clear enough, particularly as it can now be seen that it was given to the claimant when he actually complied with a requirement to attend an appointment at Interserve's office on 14 August 2012 and that the appointment that it required him to attend on 21 August 2012 was at the same place. It is possible that the claimant overlooked the appointment on 21 August 2012 because the letter was mixed up with all the other documents but, in any event, had a copy of the letter been provided to the First-tier Tribunal before it made its decision, the First-tier Tribunal would no doubt have found that the claimant had not had good cause for not attending the appointment. However, I cannot have regard to that new evidence on this appeal, which lies only on a point of law.

39. I therefore reject the Secretary of State's first ground of appeal.

40. On the other hand, I accept the Secretary of State's submission that the First-tier Tribunal acted unfairly, as it did in *HS*, in holding against the Secretary of State the fact that he had not provided evidence "that the service provider was duly authorised and given delegated powers to issue instructions and require attendance". In *HS*, I drew a distinction between an appointment letter, "which was of central importance to the claimant's appeal" and ought to have been provided with the response to the appeal, and evidence of delegated powers, of which I said –

"19. ...I do not doubt that a claimant or the First-tier Tribunal may require the Secretary of State to provide evidence to prove that a provider had the relevant powers, but it does not follow that the Secretary of State is obliged to provide such evidence in every case if he is properly able to assert in his response that the body that issued the relevant notice had the power to do so and nobody challenges the assertion. There is a presumption of regularity, because it would be extremely unusual for a body to be issuing notices under the 2011 Regulations without it had having been given proper authority to do so, and it would be disproportionate to require production of this evidence in all cases. Moreover, it seems undesirable from a claimant's point of view that a bundle of appeal documents should routinely be cluttered up with documents of such a technical nature...."

41. As in *HS*, the Secretary of State had not in fact been directed in this particular case to provide evidence as regards the delegation of powers. If the opening words of paragraph 13 of the statement of reasons are to be read literally, the First-tier Tribunal relied on the failure to provide the appointment letter but, even if the First-tier Tribunal relied on the failure to comply with the wider direction it actually issued, the reasoning was unsound because none of "the notices issued to the Appellant" was likely to have provided further evidence as to the delegation of powers or, at least, the reasoning failed to explain why the First-tier Tribunal thought that any of them might have done so.

42. I therefore accept the Secretary of State's second ground of appeal. However, this is a case where the Secretary of State needs to succeed on both his grounds. Any error in relation to the delegation of powers is immaterial because the First-tier Tribunal was entitled to allow the claimant's appeal solely on the basis that there was no evidence that the appointment letter was written in sufficiently clear terms to be effective.

43. Accordingly, I dismiss the Secretary of State's appeal in the first case before me.

The second case – discussion

44. In the second case before me, the First-tier Tribunal did ask the Secretary of State to provide evidence that Interserve had been authorised to exercise functions under the ESE Regulations and, when he said he was unable to provide a letter of authorisation, it expressed its decision in terms of there being no evidence of authorisation. The Secretary of State had answered part of the question asked by the First-tier Tribunal, because he had effectively confirmed that Interserve had been authorised to issue instruction letters at the material time, but he had replied to the rest of the question by indicating that he was unable to produce the letter that would have said when and by whom. What he had not done was explain on what basis he continued to assert that Interserve had been authorised to exercise powers under regulation 4 of the ESE Regulations when he was unable to produce a letter of authorisation.

45. The Secretary of State submits that there was nonetheless evidence of authorisation. He accepts that there was no evidence of a letter of authorisation but he submits that the existence of such a document is not determinative and that the First-tier Tribunal failed to consider the significance of the evidence that Interserve was acting as though it had authority and that the Secretary of State had asserted that it did indeed have authority.

46. He points out that regulation 18 of the ESE Regulations did not specify the form in which, or the method by which, authorisation had to be effected and, referring to *Tanks & Drums Ltd v Transport and General Workers' Union* [1992] ICR 1, he submits that whether there had been authorisation was a question of fact and degree.

47. I accept that submission of law. Regulation 18 did not require authorisation to be in writing and therefore the absence of a formal letter of authorisation in this case was not determinative. Like an unwritten contract, authority may be found to exist on the basis of evidence as to the conduct of those concerned, including what they have said and written over a period of time. Although *Tanks & Drums Ltd* was concerned with a rather different issue from the one confronting me, I accept that whether there has been authorisation is a question of fact and that, in considering whether there has been authorisation, one must have regard to the purposes of the legislation requiring authorisation and to practical considerations that are relevant in the light of those purposes.

48. Because the Secretary of State now accepts that there was never in fact any letter of authorisation, he does not criticise the First-tier Tribunal for making no clear finding as to whether or not there had ever been such a letter, given the implication of the Secretary of State's statement that the Department "no longer" held the letter and the implication of Interserve acting as though authorised. However, I accept that the First-tier Tribunal erred in law because it failed to address in its statement of reasons the question whether, even if there

had been no authorisation letter in respect of Interserve, Interserve had nonetheless in fact been authorised to exercise functions under regulation 4 of the ESE Regulations. I accept the Secretary of State's submission that there was evidence that Interserve was authorised at the material time because it was acting as though authorised and, more importantly, the Secretary of State was asserting that it had been authorised even though he had been unable to produce a letter of authorisation. He had produced evidence that it had been authorised in 2013 to exercise functions under similar legislation and had said that the position had been the same under the ESE legislation. Obviously, that was not conclusive but the First-tier Tribunal had to consider how likely it was that the Secretary of State was mistaken in his assertion or was deliberately misleading the First-tier Tribunal and therefore how likely it was that the Secretary of State would have been referring claimants to Interserve and that Interserve would have been issuing MANs for breach of which the Secretary of State was imposing sanctions if the requisite authority to issue MANs had not been given. Moreover, it had to give reasons for its conclusion. The mere inability to provide a copy of a letter of authorisation was not a sufficient explanation when the Secretary of State was maintaining his position despite that inability.

49. In order to have been in a position to consider the issue properly, it seems to me that the First-tier Tribunal would have had to ask for a full explanation of his position from the Secretary of State, although I acknowledge that the Secretary of State could have volunteered something more substantial than the submission he did make when he produced those documents that he could find. Asking for a further submission would not have been disproportionate because the issue was of obvious importance not just to the present claimant but also many others and it was necessary for panels of the First-tier Tribunal sitting in the relevant area to know what the true facts were.

50. In any event, the First-tier Tribunal erred in failing to appreciate that there was some evidence of authorisation before it and so it failed to give adequate reasons for its conclusion that Interserve had not been authorised to issue the letter dated 21 June 2012, requiring the claimant to attend an appointment on 27 June 2012. I therefore allow the Secretary of State's appeal and set aside the First-tier Tribunal's decision. In the light of further evidence submitted by the Secretary of State, I am in a position to re-make the decision myself rather than remitting the case.

Re-deciding the second case – authorisation

51. The first issue, given the reasons for the First-tier Tribunal's decision, is whether Interserve was authorised to issue the letter dated 21 June 2012. As I have said, it now transpires that the reason that the Secretary of State was unable to produce to the First-tier Tribunal a copy of the letter authorising Interserve to exercise the relevant functions at the relevant time is that such a letter never existed.

52. The explanation for this state of affairs appears mainly from a witness statement by Mr Glenn Finlayson, a civil servant in the Department for Work and Pensions, and from documents referred to in that statement. Although Mr Finlayson does not entirely exclude the possibility of there having been a formal letter of authorisation, he concedes that it is improbable in view of the failure of all searches for it. I am told that even Serco Ltd says it does not have a copy.

53. It appears that Work Programme contracts were awarded by the Department for Work and Pensions in May and June 2011 in respect of each of forty areas of Great Britain and, when each contract was signed, it was intended that a letter should be issued authorising the contractor and its subcontractors to exercise functions under the ESE Regulations. Thirty-eight such letters had been issued by 14 June 2011. (Mr Finlayson says the contracts were awarded “in” June and the letters were issued “on” 14 June 2011, but that does not seem to be accurate as an authorisation letter issued to Business Employment Services Training Ltd (“BEST”) and its subcontractors in respect of area CP016 was dated 16 May 2011 and referred to a contract of the same date.) However, letters had not been issued in respect of the two contracts in respect of areas CP015 and CP017 because the contractor, Serco Ltd in both cases, had failed to provide a signed order form and therefore, it appears, the contract had not been finalised. Draft letters had been prepared, leaving only the dates to be inserted. They included the name of a civil servant who was to sign them “by authority of the Secretary of State for Work and Pensions”. That was perfectly proper because, although regulation 18 of the ESE Regulations required that authorisation be given by the Secretary of State, it was not necessary for authorisation to be given by him personally and it could be given instead by a civil servant of his Department (see *Carltona Ltd v Commissioner for Works* [1943] 2 All E.R. 560).

54. The draft letter for the area where the claimant lived, CP017, provided for functions under regulations 4, 5(2)(a) and 8(8)(b) and (11) of the ESE Regulations and various provisions of the Employment and Support Allowance (Work-related Activity) Regulations 2011 to be exercised by employees of Serco Limited and those sub-contractors listed in an annex. The list included “Best Training Ltd” (which appears to have been an inaccurate reference to BEST, rather than being a separate company). By the time the order forms were received, those responsible for issuing the letters had moved on to another procurement and the fact that the authorisation letters needed to be issued had not been identified as part of the handover of their work. In these circumstances, since there is no sign of final letters having been issued, it is, as Mr Finlayson accepts, reasonable to infer that they were not. It appears from the 2013 letter of authorisation that the contract was formally agreed on 30 June 2011 and that that is therefore when the letters of authorisation should have been issued.

55. On 4 May 2012, which was before the claimant in this case was referred to the Work Programme, Interserve Plc announced that it had acquired BEST and, on 10 May 2012, the Minister for Employment, Chris Grayling MP, made a written Ministerial Statement to that effect, mentioning that Interserve Plc was already involved in the Work Programme in other areas. The Department for Work and Pensions had been notified in April 2012 of the intended acquisition and a meeting had taken place between representatives of the Department, Interserve Plc and BEST at which it had been confirmed that Serco Ltd was aware of the proposal. Shortly after the acquisition, BEST changed its name to Interserve Working Futures Ltd (*i.e.*, “Interserve”). As a result, as can be seen from documents in the two files before me, appointment letters sent to the claimant up to 29 May 2012 were on BEST notepaper, whereas letters sent from 7 June 2012 were on Interserve notepaper, which from 21 June 2012 also had a Serco logo on it below a slogan, indicating that Interserve was “Delivering the Work Programme on behalf of Serco”. (I record, though, that computers in the Department for Work and Pensions are set up so that copies of letters issued by the Department before the name change, but printed afterwards, not only bear the date on which they were printed, rather than the original date, but also the new name of the company even though they would originally have referred to the company by its old name. Printouts of the history of events before the

name change that are generated after the name change also have the new name substituted for the original one.)

56. It was not considered necessary to issue a new letter of authorisation following the name change, because the company remained the same legal entity and there had not been the substitution of one company for another. However, of course, there had never been a letter authorising BEST to exercise the relevant functions in the first place.

57. Was there nonetheless authorisation? As I have said, this is a question of fact to be determined in the light of the purpose of the statutory provisions and relevant practical considerations. It seems to me that the reason that regulation 18 of the ESE Regulations required providers to be authorised by the Secretary of State was to impose a duty on the Secretary of State to ensure both that any provider was a fit person to carry out the relevant functions and that the provider was required to carry them out properly. In this case, it is plain from the letter that was prepared in draft that it was intended by the Department for Work and Pensions that BEST would be a subcontractor of Serco Ltd and that it was intended to authorise BEST to exercise the relevant functions as and when the order form was submitted by Serco Ltd so that the main contract could be finalised. Mr Finlayson explains that the contract was entered into in the light of the Work Programme specification, the Work Programme terms and conditions and the Work Programme provider guidance, which were all incorporated into it and required providers to issue appointment notices and, indeed, gave guidance as to the form in which such notices were to be issued. Clearly the contract simply could not work as intended unless the contractor and subcontractors were authorised to exercise the relevant functions under the ESE Regulations. Equally clearly, the Department was, by the time the letters were drafted, satisfied that BEST was an appropriate subcontractor. Indeed, it was by then a prime provider in area CP016.

58. In these circumstances, I am satisfied that, when the contract for area CP017 was finalised by the Secretary of State or his officials, Serco Ltd and the subcontractors listed in the annex to the draft letter were implicitly authorised to exercise the functions specified in that draft letter even though a formal letter of authorisation was not issued. It had clearly been agreed, both within the Department and between the Department and BEST and Serco Ltd, that BEST would be authorised to exercise the functions when the contract was finalised. Those finalising the contract intended that to be the position and those implementing the contract understood it to be the position. In short, BEST had, in reality, been authorised to exercise the functions. I also accept that no further authorisation was required when BEST changed its name and that therefore Interserve Working Futures Ltd was authorised to issue the relevant appointment letter to the claimant on 21 June 2012.

Re-deciding the second case – failure to participate in the Scheme without good cause

59. Turning to other issues, I am satisfied that the appointment letter was sent to the correct address and was in sufficiently clear terms to be effective and I observe that the First-tier Tribunal did not suggest otherwise in this case. As to the claimant's reason for not attending the appointment on 27 June 2012, since he was sent notice in writing on 21 June 2012 and the date of the appointment was six days later, any problems he was having with his telephone from 6 July 2012 were obviously not relevant. I note that he said in his grounds of appeal in August 2013 that he would not have missed an appointment and that he had not missed one since August 2012, but this appointment was in June 2012 and at no time since it

was pointed out that the notice of the appointment was sent in writing has he said that he did not receive the letter, which was one of several in respect of which he took no action. In these circumstances, I presume that he received the appointment letter and he has not persuaded me that he had good cause for not attending the appointment. Accordingly, I am satisfied that the Secretary of State was right to impose a sanction.

Re-deciding the second case – the period of the sanction

60. However, the Secretary of State now concedes that the sanction ought not to have been for a period of 26 weeks, notwithstanding the previous history of sanctions. That is because paragraph (6) of regulation 8 of the ESE Regulations was made subject to paragraph (7) and there is evidence that the claimant had “re-complied”, within the meaning given to that term in paragraph (8), before the sanction was imposed.

61. The words “on the same day as or before or” in paragraph (8) were inserted with effect from 31 October 2011 by regulation 29 of the Social Security (Miscellaneous Amendments) (No.3) Regulations 2011 (SI 2011/2425). Until then, there was an ambiguity in the paragraph, because it was not entirely clear whether the relevant date was the date of the determination or the date of the failure to participate. The former was the more natural reading – because otherwise the words “the Secretary of State determines that” were mere surplusage – but it is difficult to imagine that it was ever intended that no credit should be given for re-compliance before a sanction was imposed, although the possibility of a delay before a sanction was imposed may have been overlooked. Anyway, the amendment makes it plain that the relevant date *is* the date of the determination – because the alternative reading would now be absurd – but that credit is to be given for re-compliance before that date.

62. Despite the fact that the claimant’s grounds of appeal to the First-tier Tribunal had suggested that he had re-complied in August 2012, the Secretary of State made no reference to the terms of regulation 8(7) in his response to that appeal. Indeed, he does not appear to have had in place a system for considering whether there had already been re-compliance before imposing a sanction. Had he done so, it is possible that none of the four 26-week sanctions imposed on this claimant would have been imposed.

63. The evidence in the first case before me now shows, as the Secretary of State accepts, that the claimant complied with a requirement to participate in the Work Programme on 14 August 2012, albeit that he then missed the next appointment. The Secretary of State submits that this has the effect that the sanction in this case should be for a period of 7 weeks, by virtue of regulation 8(7)(b), because 7 weeks elapsed between the end of the benefit week in which the failure to comply occurred and the end of the benefit week in which there was re-compliance.

64. I disagree. Paragraph (7)(b) specified only an end date of the additional period. The drafting of paragraph (7) was very odd, because 4 weeks plus *any* period would be longer than 4 weeks, but the most natural reading is that the beginning of that additional period was when the basic 4-week period ended. (It might have been better to have omitted the words “4 weeks plus”.) However, by virtue of paragraph (9), the period specified in either paragraph (7)(a) or paragraph (7)(b) began only after the sanction was imposed. Accordingly, on any reading, paragraph (7)(b) could apply only when re-compliance was more than 4 weeks after the imposition of the sanction. Thus, if, as in this case, the claimant re-complied before the

sanction was imposed, the period of any sanction was always 4 weeks. There was no warrant in regulation 8 for any longer period to be calculated in such a case by reference to the period between the failure to comply and the re-compliance.

65. It is conceivable that the drafting of regulation 8(7), or the amendment to regulation 8(8) to which I have referred, caused the regulation to operate in a manner that was not intended. However, it seems to me more likely that the effect of the amended legislation was deliberate. The object of the legislation was plainly not to impose sanctions for their own sake but to do so only to encourage claimants to participate in a scheme “designed to assist them to obtain employment” (see section 17A (1) of the Jobseeker’s Act 1995). The threat of a sanction, or a longer sanction, was obviously capable of being sufficient encouragement to participate in the Scheme without the sanction actually being imposed. Thus, in the present case, it may well have been the imposition of the first two sanctions and then the mere threat of the first 26-week sanction that induced the claimant to participate in the Work Programme in August 2012, before any 26-week sanction was imposed. Moreover, by virtue of regulation 8(9), sanctions were imposed prospectively, presumably at least partly for administrative simplicity, even though they might then, perhaps arbitrarily, overlap and so be less onerous. These considerations suggest that punishment for past non-compliance was not the primary purpose of sanctions; rather, they were aimed at securing current compliance.

66. It therefore appears to me that 4 weeks’ loss of jobseeker’s allowance was regarded as a sufficient penalty for any particular past failure to comply and that it was intended that there should be a longer sanction only where there was continuous non-compliance between the date of the relevant failure to participate and a date at least 4 weeks after a 26-week sanction had been imposed in respect of that failure. A 26-week sanction would be imposed if the conditions of regulation 8(6) were satisfied and there had not been re-compliance by the time it was imposed, but it would then be superseded if and when there was compliance afterwards, regulation 8(7)(b) applying only if re-compliance was more than 4 weeks afterwards.

67. In any event, whatever was actually intended, the effect of the legislation is clear. Since in this case there was re-compliance before the sanction was imposed, the period of the sanction should have been only 4 weeks, from 23 August 2013 to 19 September 2013 (both dates included). Accordingly, it is only to that extent that I allow the Secretary of State’s appeal.