IN THE UPPER TRIBUNAL **Appeal No: CJSA/1393/2015**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the Secretary of State.

The decision of the First-tier Tribunal sitting at Sheffield on 18 November 2014 under reference SC993/13/02470 involved an error on a material point of law and is set aside.

The Upper Tribunal gives the decision the First-tier Tribunal ought to have given. The Upper Tribunal's decision is to dismiss the claimant's appeal to the First-tier Tribunal from the Secretary of State's decision of 29 July 2013, with the result that jobseeker's allowance is not payable to the claimant from 30 July 2013 to 12 August 2013.

This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

1. This appeal concerns a sanction decision made by the Secretary of State on 29 July 2013 that jobseeker's allowance was not payable to the claimant (the respondent on this appeal) for the two week period from 30 July 2013 to 12 August 2013 because he had failed, without good reason, to participate in the Work Programme on 10 July 2012.

2. This is one of a number of similar appeals which raised an argument about whether one issue on which the appeal may in fact have been decided by the First-tier Tribunal was an issue raised by the appeal under section 12(8)(a) of the Social Security Act 1998. I have already covered the relevant law on this point in my decision in *SSWP v CN* (JSA) [2020] UKUT 26 (AAC) and do not repeat that here. However,

for the reasons given below, in my judgment this appeal stands to be resolved on a different basis.

3. However, like *CN*, this too is an appeal which, regrettably, I wrongly misfiled as being dependent on the Remedial Order that was to be made consequent upon the Court of Appeal - in what I will call *Reilly (No 2) and TJ and others* [2016] EWCA Civ 413 - upholding the High Court's declaration of incompatibility made in respect of the Jobseekers (Back to Work Schemes) Act 2013. The Remedial Order, however, does not apply because the claimant's appeal of 9 August 2013 to the First-tier Tribunal fell *after* the date that Act came into effect. (The breach of Article 6 of the European Convention on Human Rights found by the High Court and upheld by the Court of Appeal in *Reilly (NO 2)* only applies where an appeal was in fact made before the 2013 Act came into effect on 26 March 2013 (as it was the effect that Act had on existing appeals that wrongly interfered with those appellants Article 6 rights): see paragraphs [31(1)] and [83] of *Reilly (No. 2)*.) It was only towards the end of last year when an enquiry was made of me about why this appeal remained undecided that I realised my error. I can only apologise unreservedly to the parties for the unnecessary and extensive further delay to which my error has led.

4. The First-tier Tribunal allowed the claimant's appeal to it and gave the following reasons for so doing in its Decision Notice.

> "Following the Supreme Court's decision in Reilly and Wilson, the tribunal finds that the respondent has failed to provide the [claimant] with sufficient information about the work programme so as to enable the [claimant] to make informed and meaningful representations before a decision has been made to refer him to a particular scheme."

The subsequent statement of reasons said the following of relevance.

> "7. On 11.6.12 the [claimant] was issued with a letter concerning the work programme. The letter stated that he was now taking part in the work programme.

> 8. The respondent failed to provide the [claimant] with information prior to 11.6.12 that would enable him to make informed and meaningful representations before making a decision to refer the [claimant] to a relevant scheme.
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> 9. On the same date of 11.6.12 the [claimant] was instructed by letter from G4S to attend an appointment on 10.7.12.
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> 10. The [claimant] did not attend the appointment on 10.7.12.
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> 11. Over a year later on 29.7.13 the respondent made the decision against which the appeal is now brought.
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> 12. In coming to its decision the tribunal notes that the Supreme Court in Reilly and Wilson held that the respondent had erred in law in not publishing sufficient information about the employment, skills and enterprise scheme so as to enable the claimants in that case to make informed and meaningful representations to the decision maker before a decision had been made to refer either of them to a work related activity scheme (that is before they were served with a notice requiring them to take part in either of the schemes relevant to them).
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> 13. The court further held that a failure to ensure that a claimant was adequately informed before serve of a notice requiring participation would be likely to vitiate the service of the notice.
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> 14. The 2013 Act does not appear to alter the Supreme Courts decision on that particular issue.
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> 15. In the present case the respondent has failed to adduce adequate evidence showing that the [claimant] was provided with sufficient information about the scheme so as to enable the [claimant] to make informed and meaningful representations prior to service of the notice on 11.6.12 telling him that he was taking part in the scheme. The respondent having been given the opportunity to do so, has adduced no substantive documentation showing what steps were taken or documentation issued prior to the [claimant] being told that he was in the scheme by letter of 11.6.12.
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> 16. Accordingly, the effect is to vitiate the notice stating that he was required to participate and to attend appointments. It therefore follows that the [claimant] is not the subject of a sanction for the 2 week period from 30.7.13 to 12.8.13."

5. In his appeal to the First-tier Tribunal of 9 August 2013, thus over a year after the missed appointment, the claimant had put his case as follows.

> "I think the decision should be reconsidered because I was due to attend the appointment on 10/7/13 but it was discussed and done with

> my advisor before the due appointment and I was told by my advisor not to attend."

Ignoring that the date given here is in 2013 and not 2012 (which I will put down as a 'typo' by the claimant), I can see nothing in the appeal that was raising any issue about the fairness around the claimant having been referred to the Work Programme in the first place.

6. However, the judge who decided the appeal had previously directed the Secretary of State to, inter alia, "provide a full submission together with supporting evidence dealing with….the information given to the claimant before being required to participate in the scheme; and whether or not it contained sufficient information to enable the [claimant] to make an informed choice and meaningful representations". This no doubt is what the First-tier Tribunal meant by the 'opportunity' it referred to in paragraph 15 of its statement of reasons.

7. I am prepared to accept, for the purpose of deciding this particular appeal that by this direction the First-tier Tribunal had raised as an issue on the appeal what I will term "prior information". Had it been contested by either party, or otherwise been of importance as to the correct decision I should make, an issue might well have arisen as to whether the judge's direction was soundly based in terms of explaining why "prior information" was already an issue raised by the appeal or why he was exercising the discretion of the tribunal to bring it into issue on the appeal.

8. The material error of law made by the First-tier Tribunal was that, having raised 'prior information' as an issue on the appeal, it failed adequately to address why the absence of that information in this case meant that the claimant had been deprived of a meaningful opportunity to make representations about his referral. Put another way, the First-tier Tribunal missed the crucial part of the Supreme Court's analysis of "prior information" in paragraph [75] of *Reilly and Wilson* [2013] UKSC 68; [2014] AC 453; [2014] AACR 9, namely that a failure to

provide 'prior information' would vitiate the notice if that failure was material. The said paragraph 75 said:

> "75. A failure to see that a claimant was adequately informed before service of a notice under regulation 4 would be likely to, but would not necessarily, vitiate the service of the notice. That would depend on whether the failure was material. Public law is flexible in dealing with the effects of procedural failures. Ultimately the issue must be determined by reference to the justice of the particular case. If the effect of the lack of information given to a claimant materially affected him or her by removing the opportunity of making representations which could have led to a different outcome, it would normally be unjust to allow the notice to stand. If it was immaterial on the facts, justice would not require the notice to be set aside."

9. Particularly in a context where the claimant had not raised any issue about not having had sufficient information in order to make representations before he was referred to the Work Programme, in my judgment it was incumbent on the First-tier Tribunal to explain why on the facts before it might have made a difference to this particular claimant had he been provided with that information. Its failure to do so was a material error of law. As *Reilly and Wilson* shows, a failure to provide that information does not automatically vitiate the notice.

10. The utility of "prior information" arguments was further and usefully explored by the Court of Appeal in *Reilly (No 2)* in the following paragraphs (after having set out the above and other relevant paragraphs from the Supreme Court's judgment in *Reilly and Wilson*);

> "156. It is unnecessary that we should attempt any gloss or summary of those passages, which speak for themselves. In so far as particular points need to be referred to we will do so in the course of our discussion of the issues. But we would sound a note of caution about the label "prior information duty" (or "prior information requirement", as the Tribunal described it). Although it is necessary by way of shorthand, it risks presenting what is in truth a simple proposition about administrative fairness as a rigid rule of law. Lord Neuberger and Lord Toulson were at pains to emphasise that what fairness might require in a particular situation would depend on all the circumstances and that the duty had to be applied flexibly.
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> 171. [It was] submitted that the effect of the [Upper] Tribunal's guidance [in *SSWP v TJ* [2015] UKUT 0056 (AAC)] was that there was no scope at all for a claimant to make representations, in connection

with the decision to refer a claimant to the Work Programme, since referral was "mandatory"; and thus also no scope for the prior information duty to operate. He submitted that that guidance was wrong. The criteria for referral to the Work Programme were only a policy, and the Secretary of State could not fetter his discretion as to whether to apply the policy in a particular case. He described the Tribunal as holding that the Supreme Court in [*Reilly and Wilson*] had "erred".

172. We do not believe that that is a fair reading of what the Tribunal said; and if it is properly understood there does not seem to be any dispute of principle between the parties. The Tribunal was not laying down any absolute rule. The Secretary of State's policy, embodied in the guidance, is that referral to the Programme should be automatic (ignoring the specified exceptions) if the criteria are met. All that the Tribunal was doing was to point out that, that being so, any representations would have to address the question why he should depart from the policy; and that it was not easy to see what such representations might be. That seems to us an obvious common sense observation, particularly since referral to the Work Programme does not as such involve any specific obligation; see para. 151 above. But it does not mean that there could never be such cases, and indeed para. 224 is expressly addressed to that possibility. The Tribunal did not depart from anything that the Supreme Court said in [*Reilly and Wilson*]. It was simply considering its application in the particular circumstances of referral to the Work Programme.

173. [It was] also submitted that in para. 224 the Tribunal wrongly put the burden on a claimant to show that representations could have made a difference to the decision to refer. He referred to the established principle that where a public body has acted unfairly the burden is on it to show that the unfairness was immaterial (see, e.g., *R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] EWCA Civ 1291, [2006] 1 WLR 3315).

174. We do not think that this is the correct analysis. The question of materiality would only arise if there had been a breach in the first place – that is, if the DWP has failed to give a claimant the information that they need in order to make meaningful representations about why they should not be referred to the Work Programme. It is true that there is an overlap between the question of breach and the question of materiality, because in deciding what information should be given it is necessary to consider what information is material, in the sense that it might reasonably be capable of affecting the decision to refer. (Indeed a very strict logician might argue that the overlap was total, but the established approach is to ask the two questions separately.) The Tribunal was clearly concerned with the prior question, namely breach. Its point was that it was hard to see what material information could be given prior to referral that had not already been given. It is important to appreciate that there was full evidence before the Tribunal about what information JSA claimants were given at the referral interview: this is summarised very fully at para. 53 of its judgment, making the point that the relevant guidance requires advisers to give claimants the opportunity to raise any questions or concerns. It was never part of the tribunal appellants' case that that

information, taken generally, was inadequate. Against that background we see nothing wrong in expecting a claimant who alleges that there has been a breach of the prior information duty to specify what information they say should have been given but were not.

175. Having said all that, we are bound to say that we find it hard to see that the application of the prior information duty at the moment of referral to the Work Programme is likely to be an important issue in the real world. Given its open-textured nature, JSA claimants are unlikely to object to referral as such. Any problems are likely to arise only when, following referral, particular requirements are made of claimants which they believe are unreasonable or inappropriate and which may lead to sanctions if they fail to comply. It is at that stage that they may need to be able to make representations and will need sufficient information to be able to do so meaningfully. That is the subject of Mr de la Mare's criticism of para. 249 of the Tribunal's judgment, to which we now turn.

176. The Tribunal appears to say at para. 249 that there is little or no scope for the operation of the prior information duty once a claimant has been referred to the Work Programme, because compliance with requirements notified to claimants as part of the Programme is mandatory, in the sense that they are liable to sanctions if they do not comply.

177. Mr de la Mare submitted that that is wrong. If it is indeed what the Tribunal meant, we agree. So also does Ms Leventhal, who explicitly accepted in her written submissions that "the requirements of fairness continue to apply after referral"[15]. In principle, JSA claimants who are required, or who it is proposed should be required, under the Work Programme to participate in a particular activity should have sufficient information to enable them to make meaningful representations about that requirement – for example, that the activity in question is unsuitable for them or that there are practical obstacles to their participation. The fact that that participation is mandatory if the requirement is made is beside the point: the whole purpose of the representations, and thus of the claimant having the relevant information to be able to make them, is so that the provider may be persuaded that the requirement should not be made, or should be withdrawn or modified.

178. However we should emphasise that the foregoing is concerned with the position in principle. It is quite another matter whether the Work Programme as operated in fact fails to give claimants such information. The Secretary of State's evidence before the Tribunal was that the relevant guidance in fact provides for them to be very fully informed. We have already referred to the Tribunal's findings about the information given at the referral interview. But it was also the evidence that at the initial interview with the provider post-referral, which is designed to find out how the claimant can be best supported, and in the subsequent inter-actions between claimant and provider claimants are supposed to be given both information and the opportunity to make representations. Whether in any particular case there has nevertheless been a failure to give information necessary to enable the claimant to make meaningful representations will have to

> be judged on the facts of the particular case. Tribunals will no doubt bear in mind the point made in Reilly 1 that it is important not to be prescriptive about how any necessary information is provided: see para. 74 of the judgment of Lord Neuberger and Lord Toulson."

11. In my view, the comments of the Court of Appeal in paragraph [175] in *Reilly (No. 2)* make the requirement all the greater in this case for the First-tier Tribunal to have explained why the absence of prior information acted to invalidate the claimant being put on the Work Programme.

12. The decision of the First-tier Tribunal must therefore be set aside. I can see no merit in remitting the appeal to a new First-tier Tribunal to be redecided given the lack of engagement of the claimant in these appeal proceedings and the time that has passed since the events in issue on the appeal. Save for his appeal grounds, the only contribution the claimant has made in the Upper Tribunal appeal proceedings was by way of an email dated 30 June 2016. In that email he expressed some frustration and bemusement that what he considered was an open and shut case was taking so long to resolve. He repeated in that email that appointment had been cancelled by his advisor but added (a) that this had occurred at his previous appointment with his advisor and (b) that he had presented a letter signed by the advisor stating that this is what had happened. He added that he did not want to be contacted again by the Upper Tribunal and asked for the appeal to "proceed however you see fit". He has not been in contact with the Upper Tribunal since. Given this, I do not consider remitting the case to be redecided by a local First-tier Tribunal would be likely to lead to any more evidence being provided by the claimant. I therefore redecide the first instance appeal myself.

13. For my own part, I do not consider any issue arises on the appeal about whether the claimant was unfairly referred to the Work Programme in the first place (or indeed thereafter). The dispute by the claimant on his appeal was founded on one point only, namely the appointment had been cancelled.

14. On this point, I prefer the evidence and arguments of the Secretary of State as set out in her responses of 30 August 2016 (pages 68-70) and 12 February 2018 (pages 82-84). I am persuaded by that evidence and the evidence in the WP08 on pages 3-4 that the claimant did not attend the appointment on 10 July 2012. That much in any event is not in dispute. However, I am not persuaded on the evidence before me that this appointment had been cancelled. To hold such would run contrary to the evidence in the WP08, which was compiled by the Work Programme provider on the day of the appointment. And the claimant's case that the cancellation had occurred at the previous appointment would also run contrary to the evidence in the papers showing that a letter had been issued to him at or after this previous appointment in June 2012[1] notifying him of the next appointment on 10 July 2012. It makes no sense for this letter to have been issued if the appointment had already been cancelled. Moreover, beyond his assertion in the later email, there is nothing to show that the claimant had 'presented' a letter signed by his advisor attesting to the fact that he or she had cancelled the 10 July 2012 appointment. His appeal makes no reference to any such letter. I note further that the claimant failed to respond to earlier directions made by the First-tier Tribunal on 29 July 2014 (page 13) which had asked him to provide details of the advisor who had cancelled the appointment and when this had occurred. If the claimant had a letter from his advisor cancelling the appointment, or he had presented it earlier, this was the opportunity for him to make either point plain.

15. I should add that I accept, for the reasons given by the Secretary of State in her submissions of 12 February 2018, that no adverse inference should be drawn against her because i2i (the Work Programme provide) had upgraded its IT system and therefore lost some of its

[1] I accept the evidence of the Secretary of State, she having researched this point with the then Work Providers, that the date on this letter and on the WP08 of 11 June 2012 was probably a mistake because the records still held by that provider show the appointment before 10 July 2012 was on the 12th of June and nor the 11th. There is no evidence that two appointments occurred on 11 and 12 June.

digital records (though not its paper records) relevant to this case. The important point here is that the evidence shows that the IT upgrade took *place* before the sanction decision had been made and therefore before it had been appealed against: see the discussion of *Re Infabrics* at paragraphs 214 to 217 of *SSWP v TJ* [2015] UKUT 0056 (AAC).

16. I therefore uphold the Secretary of State's decision of 29 July 2013.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 5th February 2020