Secretary of State for Work and Pensions v NS
[2024] UKUT 5 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal Nos. UA-2021-000249/250-ESA

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

Secretary of State for Work and Pensions

Appellant

- v –

NS

Respondent

Before: Upper Tribunal Judge Church

Decided following an oral hearing at Field House, London on 19 April 2023

Representation:
Appellant: Ms Wakeman of counsel, instructed by GLS
Respondent: Mr Rylatt, of counsel, acting on a direct access basis

DECISION

The decision of the Upper Tribunal is to allow the appeal.

The decision of the First-tier Tribunal made on 11 May 2020 was materially in error of law both in respect of the recoverability of the overpayment made to the Claimant and in respect of the imposition of a civil penalty on the Claimant.

The decision of the First-tier Tribunal in respect of entitlement to Employment and Support Allowance was not appealed and is unchanged by this decision.

Although the First-tier Tribunal's decision in respect of the Secretary of State's imposition of a civil penalty involved a material error of law I do not exercise my discretion to set it aside.

Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set the First-tier Tribunal's decision in respect of the recoverability of the overpayment aside, and I remake the decision as follows:

"The Claimant was overpaid Contributory Employment and Support Allowance from 3 August 2013 to 6 October 2017 (both dates included) in the amount of £23,675.55. That overpayment was made in consequence of the Claimant's failure to disclose the material fact of his receipt of payments in respect of his occupational pension and is recoverable from him pursuant to section 71(1) of the Social Security Administration Act 1992. The Secretary of State's decision as to recoverable overpayment is confirmed."

REASONS FOR DECISION

What this appeal is about

1. This appeal is mainly about the proper interpretation of the ESA40 booklet which the Department for Work and Pensions sends to claimants, and what it, and the relevant provisions of the Social Security Administration Act 1992 (the **"1992 Act"**) and the Social Security (Claims and Payments) Regulations 1987 (the **"1987 Regulations"**) requires recipients to do if they are to avoid liability to repay overpayments made to them. There is also an issue about whether the Secretary of State was right to impose a penalty.

Factual background

2. The Appellant (to whom I shall refer as the **"Claimant"**), had a career in university teaching. When he became too unwell to work, he claimed and was awarded Contributory Employment and Support Allowance (**"ESA(C)"**) from and including 11 October 2012. He was placed in the Support Group, which is reserved for those who have the highest degree of limitation as a result of their health conditions.

3. The Claimant accepts that when he first started to receive ESA(C) he was issued with an 'ESA40' booklet. It was agreed by the parties that the version of the booklet he received would have been the April 2012 version, which included the following statements:

> *"While you are getting Employment and Support Allowance you must tell us straight away if your circumstances change …"*
>
> *"You must also tell us if you or your partner … get a pension or your pension changes"*
>
> *"Some pension incomes, benefits, capital or savings can affect the amount of Employment and Support Allowance that you get.*
>
> *By 'pension income' we mean:*
>
> - *occupational pension*
>
> *…*
>
> *If you have not already told us about any pension income, benefits or allowances you or your partner get, please tell us straight away."*
>
> *"Also tell us if you or your partner start or stop getting any pension income, benefits or allowances. Tell us if the amount of money you or your partner are getting changes"*

4. On 2 November 2012 the Claimant was issued an 'initial entitlement notice' which informed him that he was *"required to immediately report any change in your circumstances to us, or the circumstances of your partner if you have one."*

5. On 15 June 2013 the Claimant wrote a letter to his benefit office (the **"June Letter"**). In the June Letter he said:

> *"As from 10th July 2013 I shall cease to be employed by [Employer Name] and will take retirement based upon my age, which in my case will be 60 as of that date. My pension will be paid by Teachers' Pensions.*
>
> *It was not my intention to retire on my 60th birthday; however, the University would have terminated my contract due to being unable to work.*
>
> *Once and if I am fully recovered from my illness, I intend to seek work."*

6. The Secretary of State took no action in relation to this information and continued to make payments of ESA(C) to the Claimant.

7. The Claimant received small increases in his pension payments from 09 May 2014, 09 April 2015 and 09 March 2017. He did not report these increases.

8. In October 2017, the Secretary of State received information that the Claimant had been in receipt of pension payments since 09 August 2013, with increases in the amount of those payments on the dates set out in the preceding paragraph.

The Secretary of State's decisions

9. On 09 April 2019 a decision maker on behalf of the Secretary of State decided that the Claimant was no longer entitled to payments of ESA(C) from and including 07 October 2017 as his pension payments were more than his entitlement to ESA(C) (the **"Entitlement Decision"**). The claimant was notified of the decision on 11 April 2019.

10. It followed from the Entitlement Decision that there had been an overpayment of benefit to the Claimant. The Secretary of State's decision maker decided on 09 April 2019 that the Claimant had been overpaid ESA(C) from 03 August 2013 to 06 October 2017 (both dates included) in an amount of £23,675.55. and that the overpayment was recoverable from the Claimant on the basis that he had failed to disclose material facts in relation to his pension income (the **"Recoverable Overpayment Decision"**).

11. The Secretary of State's decision maker also decided to impose a civil penalty on the Claimant on the basis that he had not reported a relevant change of circumstances promptly and he had no reasonable excuse for that failure (the **"Civil Penalty Decision"**).

12. The claimant appealed the Entitlement Decision, the Recoverable Overpayment Decision and the Civil Penalty Decision to the First-tier Tribunal (Social Entitlement Chamber).

The law

What the statutory scheme says about when the Secretary of State can recover overpayments of benefit

13. Section 71(1) of the 1992 Act sets out the Secretary of State's powers to recover overpayments of certain benefits where those overpayments have been caused by a person's misrepresentation of, or a failure to disclose, a material fact. It provides:

> "(1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure –
>
> (a) a payment has been made in respect of a benefit to which this section applies; or,
>
> (b) any sum recoverable by or on behalf of the Secretary of State in connection with any cash payment has not been recovered,
>
> the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose."

14. Section 5 of the 1992 Act, which is headed *"Regulations about claims for and payments of benefit*", gives the Secretary of State the power to make regulations on various matters. Insofar as material to the issues in this case it provides:

> "(1) Regulations may provide –
>
> …
>
> (i) for the person to whom, time when and manner in which a benefit to which this section applies is to be paid and for the information and evidence to be furnished in connection with the payment of such a benefit;
>
> (ii) for notice to be given of any change of circumstances affecting the continuance of entitlement to such a benefit or payment of such a benefit [or of any other change of circumstance of a prescribed description]
>
> (1A) Regulations may make provision for requiring a person of a prescribed description to supply any information or evidence which is, or could be, relevant to –
>
> (a) a claim or award relating to a benefit to which this section applies, or
>
> (b) potential claims or awards relating to such a benefit."

15. Regulation 32 of the 1987 Regulations which was made pursuant to Section 5 of the 1992 Act, sets out the information that is required to be provided to the Secretary of State, and the changes of which the Secretary of State should be notified. It provides:

> "(1) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner […] as the Secretary of State may determine … such information or evidence as the Secretary of State may require for determining whether a decision on the award of benefit should be revised

under section 9 of the Social Security Act 1998 or superseded under section 10 of that Act.

(1A) Every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner and at such times as the Secretary of State may determine such information or evidence as the Secretary of State may require in connection with payment of the benefit claimed or awarded.

(1B) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom or on whose behalf sums by way of benefit are receivable shall notify the Secretary of State of any change of circumstances which he might reasonably be expected to know might affect –

(a) The continuance of entitlement to benefit; or

(b) The payment of the benefit,

As soon as reasonably practicable after the change occurs by giving notice of the change to the appropriate office –

(i) in writing or by telephone (unless the Secretary of State determines in any particular case that notice must be in writing or may be given otherwise that in writing or by telephone); or

(ii) in writing if in any class of case he requires written notice (unless he determines in any particular case to accept notice given otherwise than in writing)"

What the statutory scheme says about when the Secretary of State may impose a penalty

16. Section 115D of the 1992 Act grants the Secretary of State a power to impose a civil penalty for non-disclosure. It provides:

"(1) A penalty of a prescribed amount may be imposed on a person by the appropriate authority where –

(a) the person, without reasonable excuse, fails to provide information or evidence in accordance with requirements imposed on the person by the appropriate authority in connection with a claim for, or an award of, a relevant social security benefit,

(b) the failure results in the making of an overpayment, and

(c) the person has not been charged with an offence or cautioned, or been given a notice under section 115A, in respect of the overpayment.

(2) A penalty of a prescribed amount may be imposed on a person by the appropriate authority where –

(d) the person, without reasonable excuse, fails to notify the appropriate authority of a relevant change of circumstances in accordance with requirements imposed on the person under relevant social security legislation,

(e) the failure results in the making of an overpayment, and

(f) the person has not been charged with an offence or cautioned, or been given a notice under section 115A, in respect of the overpayment.

…"

The principles established by the authorities

17. A person can only fail to disclose a material fact if they were under a legal duty to disclose that fact (see Regulation 32 of the 1987 Regulations, *CIS/4348/2003* and *B v SSWP* [2005] EWCA Civ 929, [2005] 1 WLR 3796 (being the same case on appeal to the Court of Appeal).

18. For an instruction to give rise to an obligation on a claimant to "furnish" information or evidence under Regulation 32(1) and (1A) of the 1987 Regulations, it must be a "clear and unambiguous" instruction (see *Hooper v SSWP* [2007] EWCA 495; *R(IB) 4/07*).

19. The rationale for the 'division of labour' that applies to the investigation of a claimant's entitlement to a social security benefit was explained authoritatively by the House of Lords in *Kerr v Department for Social Development (Northern Ireland)* [2004] UKHL 23; [2004] 1 WLR 1372. Baroness Hale said (at [62]):

> "What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced."

20. In *Jeleniewicz v SSWP* [2008] EWCA CIF 1163 (reported as an appendix to R (IS) 3/09 the Court of Appeal held that this applied equally in respect of information needed to determine whether entitlement had ceased. Having considered the passage of Baroness Hale's speech in *Kerr* quoted above, as well as the point made by Lord Hope at [16] of *Kerr* that facts which may be reasonably within the claimant's knowledge are for the claimant to supply at each stage of the inquiry, Mummery LJ said (at [30]):

> "In my judgment, this is as true in determining whether the conditions of entitlement have ceased to be satisfied as it is when determining whether the conditions have been satisfied."

21. The matter was considered further by Judge Jacobs (then a Commissioner) in *CDLA/2328/2006*:

> "As Mr Commissioner Rice once pointed out, the duties to report are designed to gather information on which a decision-maker can, perhaps after further inquiry, decide whether the claimant remains entitled to the award made. The duties to report are drafted more loosely than the conditions of entitlement. They do not spell out those conditions and impose the duty to report if the claimant no longer complies with any of them. That would impose too onerous a burden on claimants (i) to read the notes, which would be voluminous, (ii) to interpret and understand them, and (iii) to identify how they would apply to their circumstances. Instead the duties are written in looser terms. They

> identify *facts* that the claimant should report. These facts are ones that *might* show that the claimant's entitlement is affected, whether for better or worse. The responsibility then passes to the decision-maker (a) to investigate further, if necessary, and (b) to identify the precise facts relevant to the conditions of entitlement before (c making a decision."

22. The duty on the claimant is to comply with the instructions they have been given. It is not relevant to the question of whether a claimant had in fact discharged their disclosure obligations that the DWP could have itself made enquiries to obtain the information (see *R (Rew) v SSWP* [2008] EWHC 2120 (Admin) at [7]-[8]).

23. A wholly innocent failure to disclose is still a failure to disclose, although a person cannot disclose a fact or matter that they do not know (see *B v SSWP*).

24. A claimant is not "entitled to make any assumptions about the internal administrative arrangements of the [DWP]" and, in particular, they may not "assume the existence of infallible channels of communication between one office and another" (see *Hinchy v SSWP* [2005] UKHL 16; [2005] 1 WLR 967 at [32]).

25. The decision maker is not deemed to know anything which they do not actually know (see *Hinchy v SSWP*).

26. A claimant is not entitled to assume that the Secretary of State knows anything about his or her other benefit entitlements which cannot be described as common knowledge (see *Hinchy v SSWP*).

27. For a payment to be recoverable by the Secretary of State there must be a causal connection between the failure to disclose and the making of the overpayment. (see s.71 of the 1992 Act, which provides that the overpayment must "be in consequence of the … failure"). The test is whether "but for" the failure to disclose, the DWP would have made the overpayment (see *Duggan v Chief Adjudication Officer* (R(SB) 13/89).

The FtT Decision

28. Judge Meegan, sitting as a judge of the First-tier Tribunal (Social Entitlement Chamber) in Wolverhampton on 11 May 2021 (the **"FtT"**) allowed the appeal in relation to the Recoverable Overpayment Decision and the Civil Penalty Decision, while confirming the Entitlement Decision (the **"FtT Decision"**). The FtT Decision was made on the basis that the judge decided that the information provided in the June Letter discharged the disclosure obligations placed on the Claimant by the ESA40 and the Claimant did not fail to disclose any material or fail promptly to report any relevant changes in his circumstances.

29. The FtT's key findings and reasoning are set out in paragraph [10] of its decision notice as follows:

> "I find that the appellant reported receipt of a pension and the date of his retirement. The only reason that the first payment was not made until 9.8.13 was because it is paid (as is normal) in arrears. The appellant does not have to specify the exact amount of the pension payments. In fact he did not know of the precise amount at the time of retirement. The DWP can make a digital data enquiry of HMRC to ascertain dates and amounts and I find that it is reasonable for them to do so. Alternatively Teachers' Pensions is a huge public sector pension provider with a history of

> cooperation with the HMRC and DWP. This appellant made timely proper disclosure. The change in circumstances here was the material fact of the retirement, payment of a pension and the name of the pension provider. All of this information was given." (See page [300] of the appeal bundle)

The permission stage

30. The Secretary of State applied to the First-tier Tribunal for permission to appeal the FtT Decision. Judge Meegan refused to review the FtT Decision and refused permission to appeal.

31. The Secretary of State then applied to the Upper Tribunal for permission to appeal and the matter came before me.

32. The Secretary of State's grounds of appeal were that the FtT wrongly construed the scope of the Claimant's duty to disclose when he found that that duty was discharged by the Claimant's letter stating that a pension would be paid to him at an unspecified and as yet unknown future date, that this was in error of law, and the FtT Decision should be set aside.

33. It was further argued on behalf of the Secretary of State that the effect of the FtT Decision was to saddle the Secretary of State with an investigatory burden to make enquiries of third parties as to when the Claimant got his pension, which was in error of law because the obligation to disclose that fact properly rested with the Claimant.

34. I was persuaded that the grounds were arguable and gave permission to appeal.

The oral hearing of the appeal before the Upper Tribunal

35. At the oral hearing of the appeal I had the benefit of hearing well-argued submissions from Ms Wakeman for the Secretary of State and from Mr Rylatt for the Claimant. I am grateful to them both for their helpful approach, and I am particularly grateful to Mr Rylatt for accepting the instruction pro bono.

36. Ms Wakeman argued that the FtT had wrongly construed the scope of the claimant's duty to disclose his occupational pension when finding that that duty was discharged by the claimant's forwarding of a letter from his employer that merely stated that a pension would be paid to him at an unspecified and as yet unknown date in the future. Ms Wakeman said that Judge Meegan's "findings" that the Claimant reported receipt of a pension and complied with the instruction given in the ESA40 were not pure findings of fact, because they involved a construction of the meaning of the words in the ESA40 and of the words in the June Letter, and that construction was erroneous in law.

37. As to the meaning of the words in the ESA40, Ms Wakeman placed reliance on *CDLA/2328/2006* (quoted in paragraph 21 above), in which Judge Jacobs said at [23]: "The interpretation of the duties must reflect their nature and purpose." Ms Wakeman said that that nature and purpose was identified in [22]:

> "… the duties to report are designed to gather information on which a decision-maker can, perhaps after further inquiry, decide whether the claimant remains entitled to the award made."

38. Ms Wakeman submitted that the June Letter neither allowed the Secretary of State to decide the amount of benefit to which the Claimant would be entitled after

the pension was paid nor alerted the Secretary of State to existing facts that could be uncovered by further investigation, and that therefore it could not properly be regarded as a sufficient discharge of the duty to disclose those matters set out in the ESA40.

39. While acknowledging the different factual matrix in that case, Ms Wakeman argued that Judge Lunney's reasoning in *CSPC/384/2015* (in which the claimant had notified the making of pension contributions but not the receipt of pension payments) applied equally to the circumstances of this case. Judge Lunney held that disclosure of the fact of pension contributions was crucially different from disclosure of receipt of pension. He held that the former did not trigger the responsibility to investigate passing from the claimant to the Secretary of State. Were the disclosure of facts which *might* affect benefit entitlement to shift the onus onto the decision maker, that would "place a burden on the Secretary of State of continuing vigilance to ascertain when and how much pension is eventually paid to a claimant as a consequence of the making of pension contributions" that would be a "wholly unreasonable burden" (see [9]).

40. Ms Wakeman argued that the FtT had erred further by assuming that it was for the Secretary of State to "fill in the gaps" in the Claimant's disclosure by making enquiries of third parties. Ms Wakeman invited me to allow the appeal and set aside the FtT Decision.

41. Mr Rylatt argued that the Secretary of State's appeal was properly characterised as an attack on the FtT's fact finding, and therefore should be seen as a perversity challenge.

42. Mr Rylatt maintained that the interpretation of the instruction in the ESA40 that Ms Wakeman argued for required it to be rewritten to change both the verb tense and the subordinating conjunction. He said that the words *"you must also tell us if you or your partner … **get** a pension or your pension **changes**"* in the ESA40 must be changed to *"you must also tell us **when** you or your partner … **got** a pension or your pension **changed**"*. This, Mr Rylatt argued, demonstrated that it was far from "clear and unambiguous" and fell well short of the clarity required by *PPE v DDWP (ESA)* [2020] UKUT 59 (AAC).

43. Mr Rylatt argued that the interpretation for which Ms Wakeman argued could lead to absurd and unfair results: a claimant who sends a letter to the Department for Work and Pensions the day before receiving his first payment of pension notifying that he was to receive such payment would not amount to proper disclosure. This, he said, could not have been the intention of the drafter, and the principle that legislation should be interpreted to avoid an absurd or undesirable result should be applied to the interpretation of the instructions in the ESA40 (invoking *Cramas Properties v Connaught Fur Trimmings Ltd* [1965] 1 WLR 892 HL).

44. Mr Rylatt said that the underlying requirement placed on the Claimant by the 1987 Regulations was to notify the Secretary of State of a relevant "change of circumstances", and the relevant change of circumstances in this case was the Claimant's decision to retire on 10 July 2013 and to start drawing his pension, matters that were duly disclosed in the June Letter.

What I must decide

45. The Claimant accepted before the FtT that he received the ESA40 booklet quoted at paragraph 3 above. He accepted that he had read it, and that it gave a clear and unambiguous instruction to report the changes of circumstances referred to in it.

46. The issue this appeal must resolve is precisely *what* that booklet instructed the Claimant to report. In other words, I must decide what it means to *"get a pension"*, or to "*start or stop getting any pension income"*, or if *"the amount of money you … are getting changes"* or if *"your pension changes".*

47. I must then decide, in the light of that, whether the FtT was in error of law when it found that the June Letter achieved compliance with the 1987 Regulations. In other words, whether the FtT was entitled to find that the June Letter disclosed the information that the ESA40 booklet required him to disclose.

Discussion

48. The drafter of the ESA40 booklet sought to use ordinary everyday language to explain to claimants what they must do. The words in the booklet must be given their ordinary meaning.

49. The ordinary meaning of "get" is to "come to have (something)" or to "receive" something (per Oxford Languages (publisher of the Oxford English Dictionary)) or "to receive or be given something" (per the Cambridge Dictionary).

50. At the hearing Mr Rylatt argued that to arrive at the meaning asserted by the Secretary of State required the relevant passages in the ESA40 to be rewritten to change both the verb tense and the subordinating conjunction. I do not accept that. The instruction *"You must also tell us if you or your partner … get a pension or your pension changes"* needs no amendment whatsoever.

51. The word "get" is, clearly and unambiguously, the language of receipt. You "get" something when you receive it. You "start to get it" when you first receive it. You are "getting" something for as long as you continue to receive it.

52. Mr Rylatt sought to characterise this as an overly literal interpretation, and one that could result in absurdity and unfairness. It is instructive to take a step back to look at the issue in the context of the purpose of requiring benefit claimants to disclose information, which is to allow the Secretary of State to calculate any changes to benefit entitlement that might result from changes in a claimant's income. It is the receipt of income that is relevant to such a calculation, not the accrual of benefits under a scheme. To calculate a claimant's entitlement to benefit the Secretary of State needs to know about receipts, not entitlements.

53. Mr Rylatt argued that the relevant "change of circumstances" that Regulation 32(1B) of the 1987 Regulations required the Claimant to disclose was his decision to retire on 10 July 2013 and to start drawing his pension. However, the Secretary of State has by way of the ESA40 leaflet communicated the information which he requires of the Claimant, as he is entitled to do by Regulation 32(1A) of the 1987 Regulations. The Claimant was required to tell the Secretary of State what the ESA40 told him he must.

54. Providing a retirement date (and a reasonably imminent one at that) might appear, for practical purposes, very similar to disclosing the receipt of pension

income. It could be said that such information should have alerted the Secretary of State to the likelihood that the Claimant would soon start to "get" pension income. However, the situation must be viewed through the prism of the 'division of labour' discussed in the authorities. The "co-operative process of investigation" described by Lady Hale in *Kerr* can be conceived of as akin to a relay race: it starts with the baton being placed in the claimant's hand by the giving of a "clear and unambiguous" instruction to the claimant as to the information they must provide. One of the ways in which that is done, in the case of Employment and Support Allowance, is by sending claimants the ESA40 booklet.

55. The baton remains in the hand of the claimant unless and until the claimant provides the information that the Secretary of State has required (no more, and no less).

56. If, having received from the claimant the information required, the Secretary of State requires more information or evidence to decide whether there has been any change in the claimant's entitlement, then a further "clear and unambiguous" requirement must be communicated to the claimant in respect of that additional information or evidence.

57. Unless and until the Secretary of State communicates such a requirement the baton remains in the hand of the Secretary of State and the claimant is under no obligation to provide any further information or evidence (except to the extent that it is caught by the requirements that have been communicated previously). If overpayments of benefit are then made, they are not caused by any non-compliance by the claimant with his or her obligations, and so they will not be recoverable by the Secretary of State.

58. However, if the Secretary of State has clearly and unambiguously required the claimant to provide information or evidence, and the claimant fails to do so, any overpayment of benefit made to the claimant will be recoverable from the claimant provided that the Secretary of State didn't actually have knowledge of the information which the claimant was bound to provide. It doesn't matter that the Secretary of State *could* have sought the information from other sources (such as by running a scan of the 'RTI' (Real Time Information) data feed that it receives from HM Revenue & Customs) even if, as the FtT judge considered, that would have been a straightforward thing to do.

59. In *MW v SSWP (ESA)* [2023] UKUT 50 (AAC) Judge West ventured that it was time that the factual circumstances underpinning the decision in *Hinchy* were re-examined in the context of the operation of the benefits system in the digital age, but he confirmed that *Hinchy* remains good law. It was binding on the First-tier Tribunal, and it is binding on me.

60. The facts set out in the June Letter were (a) that the Claimant would retire on a specified date, (b) that he would be paid a pension on an unspecified future date, (c) that his pension provider was Teachers' Pensions, and (d) that he would return to work should his health improve.

61. Mr Rylatt highlighted Judge Meegan's finding that "[i]n the ESA40 there is no reference to informing the DWP of dates and amounts", which led him to conclude that the Claimant "does not have to specify the exact amount of the pension payments". That is all very well, but it is irrelevant because neither the June Letter nor any subsequent communication from the Claimant disclosed the information that

the Claimant had been told he must notify: that he had started to *"get a pension"* or *"start[ed] getting any pension income"*.

62. That being so, it wasn't the Secretary of State's responsibility to seek further information, whether from the Claimant, from another agency with which there was a data sharing arrangement, or indeed from any third party such as the Claimant's pension provider. The baton remained firmly in the hand of the Claimant.

63. Had the Secretary of State in fact sought and obtained the required information from another source that would, at the risk of labouring the analogy, amount to the Secretary of State taking the baton back from the Claimant and choosing to complete the race even though it was the Claimant's leg. While the Secretary of State would have been under no obligation to seek out that information from another source, the obtaining of it would break the chain of causation. In such circumstances, the Claimant's failure to disclose could no longer be regarded as causing the overpayment that might follow, so the overpayment would not be recoverable.

64. I am not persuaded that my reading of the wording of the ESA40 leaflet is liable to give rise to absurd or unjust results. It reflects the 'division of labour' set out in *Kerr* and reflects the principle that facts that are reasonably within the claimant's knowledge are for the claimant to supply.

65. Mr Rylatt raised the possibility that a claimant might write to the Secretary of State the day before he was due to receive his first pension payment, stating that he would receive payment on that date. He said that it would be absurd if such a disclosure were to be considered non-compliant. The reality is that such a disclosure would be likely to trigger the making of further enquiries by the Secretary of State because by the time the notification was received the pension would be in payment and there would be income to investigate, so any overpayment would be likely to be avoided. In any event, the Secretary of State is entitled to rely on claimants complying strictly with the very slight requirements made of them. The claimant must give the information that the Secretary of State has required, not some other information which the claimant might consider to be equivalent.

My decision

66. The FtT was wrong to find that the June Letter disclosed receipt of the Claimant's pension and was also wrong to find that it complied with the Claimant's disclosure obligations under the 1987 Regulations. It did neither of these things, and it was not open to the FtT to find that it did.

67. It may well be that the Claimant honestly believed that he had provided the Secretary of State with the information he needed to work out any changes to his ESA(C) entitlement. However, that doesn't matter because he didn't do what the ESA40 booklet told him he must do. As the Court of Appeal held in *B v SSWP*, a wholly innocent failure to disclose a material fact is still a failure to disclose.

68. For these reasons I am persuaded that the FtT erred when it found that the June Letter disclosed receipt of a pension and achieved compliance with the requirements of the ESA40 and Regulation 32 of the 1987 Regulations. Its findings in that regard were rooted in its misunderstanding of the scope of the Claimant's duty to disclose as a result of its erroneous interpretation of the wording of the ESA40, and were therefore not findings that were open to it. This amounts to a material error of law.

69. Turning briefly to the second ground of appeal, the FtT said in paragraph [10] of its decision notice:

> "The DWP can make a digital data enquiry of HMRC to ascertain dates and amounts and I find that it is reasonable for them to do so. Alternatively Teachers' Pensions is a huge public sector pension provider with a history of cooperation with the HMRC and DWP."

70. Ms Wakeman argues that it should be inferred from these statements that the FtT Decision involved an erroneous assumption that it was for the Secretary of State to plug gaps in the Claimant's disclosure because it could access relevant data itself. However, I do not need to decide whether that is a proper inference as I have already decided that the FtT erred in law in a way which was material in the way described in the first ground of appeal.

71. I turn next to the FtT's decision in relation to the Civil Penalty Decision.

72. The FtT's decision to set aside the Civil Penalty Decision was based on its finding that the Claimant had not failed in his disclosure obligations. For the reasons I have explained, that finding was not open to it and that error vitiates the FtT's decision in relation to the Civil Penalty Decision.

Disposal

73. Having identified a material error of law in respect of the FtT Decision in respect of the Recoverable Overpayment Decision I exercise my discretion to set it aside. Having done so, I have a discretion under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 whether to remit the matter to the First-tier Tribunal for redetermination or to remake the decision for myself.

74. I consider it appropriate to re-decide that matter myself. It is therefore open to me to make such findings of fact as are necessary to do so. I therefore make the following findings:

a. The Claimant was sent an ESA40 leaflet, which the Claimant read.
b. The ESA40 leaflet clearly and unambiguously required the Claimant to notify the Secretary of State if he started to *"get a pension"* or *"start[ed] getting any pension income"*.
c. The June Letter notified the Secretary of State that:
    i. the Claimant would retire on 10 July 2013, when he would be 60;
    ii. he would be paid a pension by Teachers' Pensions;
    iii. it was not his intention to retire but he was unable to work; and
    iv. he intended to seek work should he recover fully from his illness.
d. The June Letter did not disclose that the Claimant had started *"getting any pension income"* and the Claimant did not otherwise notify the Secretary of State of this.
e. The Secretary of State first became aware of the Claimant *"getting any pension income"* in October 2017.
f. The overpayments of ESA(C) made to the Claimant in the period up to the date on which the Secretary of State became aware that the

> Claimant had started *getting any pension income* (amounting to £23,675.55) were made in consequence of the Claimant's failure to disclose a material fact, namely his receipt of pension income.

75. Given what I have said above, there is only one possible outcome: the overpayments are recoverable from the Claimant in full pursuant to section 71(1) of the 1992 Act and the Secretary of State's Recoverable Overpayment Decision must be upheld.

76. In relation to the Civil Penalty Decision, having identified a material error of law, I have a discretion whether to set the decision aside or not (see section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007).

77. I heard no oral submissions on the civil penalty decision. These proceedings have gone on for a long time. There is no suggestion that the Claimant has sought to conceal information about his pension from the Secretary of State. The Claimant is, and has at all relevant times been, in very poor health. The amount of the civil penalty imposed on the Claimant was £50. In all the circumstances, I do not consider that setting aside the FtT's decision (which was to set aside the civil penalty imposed by the Secretary of State) would serve the interests of justice as it would not be proportionate to prolong proceedings further to allow for determination of whether the Claimant had a reasonable excuse for his failure.

Thomas Church
Judge of the Upper Tribunal
Authorised for issue on 7 December 2023