

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998**

**JOBSEEKERS ALLOWANCE**

Appeal to a Social Security Commissioner  
on a question of law from a Tribunal's decision  
dated 15 February 2019

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. The decision of the appeal tribunal dated 15 February 2019 is in error of law. The error of law identified will be explained in more detail below. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.
2. For further reasons set out below, I am unable to exercise the power conferred on me by Article 15(8)(a) of the Social Security (Northern Ireland) Order 1998 to give the decision which the appeal tribunal should have given. This is because there is evidence relevant to the issues arising in the appeal, including evidence from the appellant, to which I have not had access. Further, there will be further findings of fact which require to be made and I do not consider it expedient to make such findings, at this stage of the proceedings. Accordingly, I refer the case to a differently constituted appeal tribunal for re-determination.
3. In referring the case to a differently constituted appeal tribunal for re-determination, I direct that the appeal tribunal takes into account the guidance set out below.
4. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of her entitlement to Jobseeker's Allowance (JSA), for a limited period, remains to be determined by another appeal tribunal. In accordance with the guidance set out below, the newly constituted appeal tribunal will be undertaking its own determination of the legal and factual issues which arise in the appeal.

## **Background**

5. The appellant had been in receipt of Employment and Support Allowance (ESA) from 10 June 2013. On 25 November 2016 a decision maker of the Department decided that the appellant was not entitled to ESA from 13/08/2015 as she held capital in excess of the statutory upper limit of £16,000.
6. The appellant made a claim to Jobseeker's Allowance (JSA) from 14 September 2017. On 16 October 2017 a decision maker of the Department decided that the appellant held actual capital in excess of £16,000 from 14 September 2017 notwithstanding the evidence provided which stated that she no longer held said capital. The decision dated 18 October 2017 was reconsidered by the Department on 7 December 2017 but was not changed. An appeal against the decision dated 18 October 2017 was received in the Department on 12 January 2018.
7. Two supplementary responses from the Department were subsequently received in the Appeals Service (TAS). The substantive appeal tribunal hearing took place on 15 February 2019. The appellant was not present and was not represented. There was a Departmental Presenting Officer present. The appeal tribunal disallowed the appeal. The substance of the appeal tribunal's decision and its reasoning are addressed below.
8. On 13 June 2019 an application for leave to appeal to the Social Security Commissioner was received in TAS. On 27 June 2019 the application was refused by the Legally Qualified Panel Member (LQPM).

## **Proceedings before the Social Security Commissioner**

9. On 16 July 2019 a further application for leave to appeal was received in the Office of the Social Security Commissioners. On 22 August 2019 observations on the application were requested from Decision Making Services (DMS). In written observations dated 19 September 2019, My Yeates, for DMS, supported the application for leave to appeal. The written observations were shared with the appellant on 24 September 2019. On 27 September 2019 observations in reply were received from a friend of the appellant and were shared with Mr Yeates on 1 October 2019.
10. On 30 October 2019 I granted leave to appeal. When granting leave to appeal I gave as a reason that it was arguable that the appeal tribunal had failed to take the proper approach to the issue of notional capital.
11. On 29 January 2020 I asked the Legal Officer to prepare a note on certain aspects of the appeal. The requested note was received on 24 March 2020. On 6 May 2020 I made a further direction to the Department which was issued on 19 May 2020. A response from Mr Yeates was received on 9 June 2020.

12. In the latter part of 2020 and into the first half of 2021 priority had to be given to a large group of cases in the Office of the Social Security Commissioners. This has led to a delay in the promulgation of this determination for which apologies are extended to the applicant, his representative and Mr Yeates.

### **Errors of law**

13. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?
14. In *R(I)2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:
- “(i) making perverse or irrational findings on a matter or matters that were material to the outcome (‘material matters’);
  - (ii) failing to give reasons or any adequate reasons for findings on material matters;
  - (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
  - (iv) giving weight to immaterial matters;
  - (v) making a material misdirection of law on any material matter;
  - (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; ...

Each of these grounds for detecting any error of law contains the word ‘material’ (or ‘immaterial’). Errors of law of which it can be said that they would have made no difference to the outcome do not matter.”

### **The appeal tribunal’s decision-making and reasoning**

15. The appeal was first listed for oral hearing on 25 May 2018. The appeal was adjourned by the LQPM. The principal reason for the adjournment was recorded as follows:

‘To enable the Department to prepare a further submission dealing with whether the decision of 16.10.17 should not have been made under “deprivation of capital” regulations; and to provide as much information as possible about the benefits claims history of Mr RF in the past 5 years.’

16. The response of the Department to this direction is addressed below. The LQPM remitted the further listing of the appeal to himself.
17. In his detailed observations on the application for leave to appeal, Mr Yeates set out the appeal tribunal’s decision and reasoning as follows:

‘An oral hearing was held on 15.02.2019 and the tribunal’s decision was issued on 18.02.2019. The Statement of Reasons (“the SOR”) for the decision was issued on 07.06.2019.

The SOR began by identifying the decision under appeal as that of 16.10.2017, as revised on 07.12.2017 which found:

*“...that the Appellant was not entitled to Jobseekers Allowance (JSA) from 14.09.2017 on the ground that she had deprived herself of capital in order to obtain this benefit and should be treated as still possessing that capital.”*

18. The SOR outlined the history of the appeal and listed the evidence supplied by the appellant before expressing the tribunal’s decision as follows:

*“The tribunal is entirely satisfied, on the basis of the documentary evidence available to it, that the Appellant had deprived herself of sums amounting to more than £40,000 in 2016, for the principal purpose of bringing herself below the relevant capital limits to obtain benefits including Jobseekers Allowance. Neither she nor her solicitor has produced any credible evidence that the person to whom she transferred the money was the beneficial owner of it. The various documents at Tab 6 on the initial submission have been given little or no weight by the tribunal, because neither the Appellant nor Mr F have made themselves available for questioning by the tribunal in relation to the same. The tribunal has concluded on a balance of probability that those documents constitute an attempt by the Appellant to explain the transfer of the large amounts of capital*

*already referred to, for the purpose of qualifying for benefit.*

*For the reasons are set out above, the appeal has been disallowed.”*

### **The Department’s position before the appeal tribunal**

19. In his very helpful written observations, Mr Yeates summarised the Department’s position before the appeal tribunal as follows:

#### **‘DETERMINATION DATED 06.10.2017 AND DECISION DATED 16.10.2017**

In the Department’s determination dated 06.10.2017 the decision maker noted that (the appellant) had provided statements pertaining to three bank accounts for various periods between August 2015 and September 2017, as well as a Credit Union Account statement. Bank of Ireland account ... is noted as having a balance of £55,800.00 in November 2015 which had diminished to £20,800.00 by March 2016; Santander account ... had a balance of £38,028.31 at 13<sup>th</sup> August 2015 which had diminished to £259.57 by September 2017; Santander account ... had a balance of £2,052.85 in March 2017 and had diminished to £520.99 by September 2017. The Credit Union account balance is noted as £3,497.29 at 18<sup>th</sup> March 2016.

The decision maker referred to (the appellant’s) statement that the capital in these accounts did not belong to her, but rather to her carer, Mr. RF. The decision maker acknowledged that (the appellant) had provided receipts indicating that the aforementioned funds had been repaid to Mr. RF, but was not satisfied with the evidence provided.

Having considered the evidence above, the decision maker determined:

*“[T]here is insufficient information as to how the balance reduced, and as a result I am not convinced [the appellant] has capital under the capital limit of £16,000”*

It appears from this that the decision maker was satisfied that (the appellant) had actual capital in excess of £16,000.

This was given effect in an outcome decision dated 16.10.2017.

### **RECONSIDERATION DATED 07.12.2017**

On 07.12.2017 the decision dated 16.10.2017 was reconsidered but remained unchanged. The decision maker explained that the funds transferred from Bank of Ireland account ... amounting to £42,800 remained in (the appellant's) possession as the Department did not accept that these funds ever belonged to another person.

In his concluding paragraphs, the decision maker stated:

*“In view of this I am concluding that as at 14/09/17 (the appellant) is treating [sic] as possessing capital of:*

*£413.04 in Santander account ending ...  
£500.99 in Santander account ending ...  
£1,788.07 in ... Credit Union  
£42,800 transferred to Mr F”*

Whilst this reconsideration purported to uphold the decision dated 16.10.2017, I submit that the decision maker's use of language in this determination was somewhat problematic. Whilst the decision to be upheld concerned actual capital held by (the appellant), the use of the phrase “*is treated as possessing;*” and stating that capital was “*transferred to Mr F*” without further explanation both may have implied that the decision maker was considering notional capital. This issue will be discussed further from paragraph 17 of these observations.

### **THE DEPARTMENT'S FIRST RESPONSE TO THE TRIBUNAL**

(The appellant) appealed the decision dated 16.10.2017 on 12.01.2018. The Department prepared a response to the tribunal which was submitted on 01.02.2018.

As with the reconsideration dated 07.12.2017, the same ambiguous terminology was contained in the first response to the tribunal wherein the phrase “*treated as possessing*” was again used when discussing actual capital. Following the subsequent oral hearing which was held on 25.05.2018 the Legally Qualified Member (“the LQM”) issued Terms of Adjournment on 03.07.2018 which required the Department to, *inter alia*, consider

*“whether the decision of 16.10.2017 should not have been made under “deprivation of capital” regulations...”*

## **SUPPLEMENTARY RESPONSES TO THE TRIBUNAL**

As per the Terms of Adjournment issued on 03.07.2018, the Department produced a supplementary response to the tribunal dated 11.07.2018. Section 3(3) of this supplementary response begins as follows:

*“On 14-Sep-2017 (the appellant) made a claim for Jobseeker’s Allowance. Her benefit week ending is Tuesday. She is in receipt of Disability Living Allowance and has no other income. On 16-Oct-2017 a decision maker decided she is treated as having capital of £45,502.10 because of deprivation. The decision maker therefore decides that (the appellant) is not entitled to Jobseekers Allowance.”*

Section 3 continued to explain how that amount of notional capital was reduced under the diminishing notion capital rule, taking account of the total benefit to which (the appellant) would have been entitled but for her having notional capital. This was accounted for over a period of 85 weeks, arriving at a total of £23,455.75 which was then deducted from the total amount of notional capital. Section 3(3) concluded with the following paragraph:

*“On 16-Oct-2017 a decision maker decided that (the appellant’s) total capital was £45,502.10 at 14-Sep-2017, her date of claim. The Department has reduced this figure by £23,455.75 (the amount of Jobseekers (the appellant) would have received had she been on benefit). This leaves a balance of £22046.35. However this does not change the decision dated 16-Oct-2017 that (the appellant’s) capital exceeds the upper capital limit of £16,000.”*

From the wording of this supplementary response, it initially appears that the Department had changed its decision of 16.10.2017 and that the capital under consideration was in fact notional, rather than actual capital.

However, the position was clarified by a further supplementary response submitted to the tribunal by the Department on 08.11.2018. Section 3(5) of that response stated:

*“A submission was prepared on 11-Jul-2018 considering deprivation of capital. This submission was provided to show that if (the appellant) was treated as possessing notional capital she would still not have been entitled to Jobseeker’s Allowance of [sic] the diminishing notional capital rule was applied.”*

The supplementary response gave a cursory explanation of the differences between notional and actual capital and acknowledged that neither the decision dated 16.10.2017 nor the reconsideration of that decision (dated 07.12.2017) explicitly stated which form of capital, notional or actual, has been attributed to (the appellant). In order to clarify this issue, paragraph 12 of Section 3 stated:

*“The Department submits that (the appellant) should still be treated as possessing more than £16,000 in actual capital from her date of claim to Jobseeker’s Allowance because she has failed to provide sufficient evidence to show that she no longer possesses capital in the form of savings. As a result the deprivation of capital would not apply in this case.”*

I would note that although the Department was clear that its decision found (the appellant) in possession of actual capital, the conclusion of this supplementary response again misuses the term “treated as possessing” when referring to this capital.’

### **Mr Yeates’ observations on the application for leave to appeal**

20. Mr Yeates made the following observations on the challenge to the decision of the appeal tribunal and its reasoning:

‘As noted previously in these observations, the decision under appeal dated 16.10.2017 was made in relation to the claimant’s possession of actual capital. However, this was not explicitly stated in that decision, and its reconsideration dated 07.12.2017 appeared to incorporate considerations and language which would



normally apply to the issue of notional capital only. As a result, I submit that the decision under appeal was unclear and ambiguous. This was however, addressed by the Department's second supplementary response to the tribunal on 08.11.2018.

I submit that the ambiguity in the aforementioned decisions may have contributed to the tribunal's mistaken impression that the Department found (the appellant) to be in possession of notional capital. Whilst the Department determined that the capital in question did not leave (the appellant's) possession and as such, remained actual capital, I submit that the tribunal was entitled to find, based on the evidence before it, that (the appellant) had in fact disposed of the capital, and that this finding was neither perverse nor irrational.

However, that being the case, I respectfully submit that the tribunal has erred in its conclusion that (the appellant) has notional capital in respect to her award of JSA.

Regulation 113(1) of the JSA Regulations states:

***“113.— Notional capital***

*(1) A claimant shall be treated as possessing capital of which he has deprived himself for the purpose of securing entitlement to a jobseeker's allowance or increasing the amount of that allowance, or for the purpose of securing entitlement to or increasing the amount of income support...”*

In order for (the appellant) to be treated as having capital which she no longer possesses (i.e. having notional capital) it is necessary that the tribunal is satisfied that she deprived herself of said capital with the significant operative purpose of securing entitlement to JSA or IS, or to a greater amount of JSA or IS.

Tribunal's treatment of the issue of notional capital

Whilst I submit per paragraph 18 of these observations that the tribunal was entitled to determine that (the appellant) had deprived herself of the capital in question, I respectfully submit that, for the reasons outlined below, it erred in law in relation to its subsequent treatment of that capital.

On the facts of the case, the tribunal found unequivocally that (the appellant) deprived herself of the capital in question in 2016 with the principle purpose of securing entitlement to JSA. As (the appellant) was in receipt of ESA at the time in question, and she did not make a claim to JSA until September of 2017, I submit that the tribunal could not have reasonably inferred that (the appellant's) intent when depriving herself of capital was to gain entitlement to JSA.

The decision by the Department which disallowed (the appellant's) award of ESA dated 25.11.2016 did so on the basis that she held actual capital, specifically that money had been transferred from her bank account but she was unable to satisfy the Department that the money had actually been disposed of. Notwithstanding that decision I submit that it was open to the tribunal to disagree with the findings of fact therein and to determine that (the appellant) had in fact disposed of the capital in question at that time. In so doing, I submit that the tribunal may make that finding of fact in the context of the JSA appeal without impinging upon the outcome of the ESA decision. However, I further submit that in making such a finding it is inherently improbable that the tribunal could establish that (the appellant) disposed of the capital in question for the purpose of securing entitlement to JSA, as required by regulation 113 of the JSA Regulations. I submit that it is significantly more probable that, if the capital in question was disposed of for the purpose of securing entitlement to any benefit, it would be for the benefit which was in payment to the claimant at that time, (i.e. ESA), rather than for a benefit which would not be claimed until almost a year after the decision was made. This being the case, I submit that any sum disposed of for that purpose could not be considered notional capital with respect to JSA as regulation 113 would not be satisfied.

The equivalent provision of the ESA Regulations (NI) 2008 which defines 'notional capital' is regulation 115. Unlike regulation 113 of the JSA Regulations, regulation 115 specifies that the definition of 'notional capital' will be satisfied for the purposes of a claim to ESA if a claimant has deprived themselves of capital in order to secure entitlement to, or a greater amount of, ESA, JSA or IS. This is in contrast to regulation 113 of the JSA Regulations which only specifies JSA and IS as the relevant benefits.

The effect of this difference is that a claimant who is found to have deprived themselves of capital for the purpose of securing entitlement to JSA for example, may continue to have notional capital when a subsequent claim is made to ESA (assuming the capital has not diminished by that time). However, had a similar claimant been found to have deprived themselves of capital in order to secure entitlement to ESA, they would not have notional capital when a later claim was made to JSA.

I submit that this is supported by the commentary on regulation 113(1) of the JSA Regulations in Sweet and Maxwell's *Social Security Legislation 2017/18, Volume 2, Income Support, Jobseeker's Allowance, State Pension Credit and the Social Fund* at paragraph 3.348:

*“Under para. (1) a person who has deprived himself of capital will be caught by this rule if the purpose of the deprivation was to secure entitlement or to increase the amount of old style JSA or income support. This avoids the question that might otherwise have arisen on a claimant transferring from income support to old style JSA whether a deprivation which had only been for the purposes of income support could be caught by para. (1). But note that para. (1) has not been amended to include a reference to a deprivation for the purposes of obtaining old style ESA. Such an amendment, however, was made to para. (1) of reg. 105 on October 31, 2011”*

This issue is explored from the reverse perspective in C9/14-15(ESA). In that case the appellant had entitlement to IS and was found to have deprived herself of capital whilst in receipt of that benefit. Several years later she made a claim to ESA and the Department determined that she had notional capital under the ESA definition. In his analysis, Chief Commissioner Mullan explained this as follows:

*“39. The highlighted part of regulation 113(1) represents a difference between the notional capital rule for JSA and that for IS. As was noted above, the IS rule is relatively uncomplicated treating as notional capital that capital of which a claimant has deprived himself for the purpose of securing entitlement to IS only. The JSA rule repeats*

*the basic rule that deprivation of capital for the purpose of securing entitlement to JSA will be treated as notional capital but adds that capital of which a claimant has deprived himself for the purpose of securing entitlement to IS will also be treated as notional capital.*

*40. The ESA notional capital rule goes one stage further. As was noted above, regulation 115(1) of the 2008 Regulations repeats the JSA and IS basic rules that deprivation of capital for the purpose of securing entitlement to ESA will be treated as notional capital but adds that capital of which a claimant has deprived himself for the purpose of securing entitlement to either IS and JSA will also be treated as notional capital.”*

I respectfully submit that whilst the tribunal in the instant case was entitled to determine that (the appellant) had disposed of the capital in question, it has erred in its application of the relevant legislation when determining that she has notional capital per the JSA definition of the term. I further respectfully submit that this represents an error of law.’

## **Analysis**

21. It is axiomatic that an appeal tribunal has the power to remedy defects in a Departmental decision under appeal to it and/or substitute its own decision for that of the Department. In that regard, there is nothing inherently wrong in an appeal tribunal deciding that the Department did not apply the correct legislative tests, remedying that error and re-making the Departmental decision by applying what the appeal tribunal considers to be more relevant legislative provisions.
22. The terms of adjournment for the first listed oral hearing make it clear that the appeal tribunal had it in mind at a very early stage that the Department had not taken the correct approach to its decision-making. That initial view was not assuaged by the further submissions set out in two detailed supplementary submissions. It is the case, however, that once an appeal tribunal decides to engage alternative legislative provisions then that application must be rigorous both in terms of accuracy of the relevant test and in the evidential assessment purportedly justifying its use.

23. It is in regard to the lack of the evidential assessment that the appeal tribunal fell into error of law. As noted above, in the statement of reasons for its decision, the appeal tribunal stated that it was:

‘... entirely satisfied, on the basis of the documentary evidence available to it, that the Appellant had deprived herself of sums amounting to more than £40,000 in 2016, for the principal purpose of bringing herself below the relevant capital limits to obtain benefits including Jobseekers Allowance.’

24. As Mr Yeates has observed, the timeframe during which the deprivation of capital was taking place was a period when the appellant was entitled to Employment and Support Allowance (ESA) and that it:

‘... it is inherently improbable that the tribunal could establish that (the appellant) disposed of the capital in question for the purpose of securing entitlement to JSA, as required by regulation 113 of the JSA Regulations.’

25. I repeat that if an appeal tribunal is intent on re-making a Departmental decision by applying alternative legislative provisions and undertaking an evidential assessment and fact-finding, all to the detriment of an appellant, then it has to be meticulous and precise in its approach.

### **Disposal**

26. In his initial written observations on the application for leave to appeal, Mr Yeates made the following suggestions should I decide that the decision of the appeal tribunal was in error of law:

‘If the Commissioner agrees that the tribunal has erred as outlined above, I submit that the decision should be set aside and the Commissioner gives the decision which the appeal tribunal should have given, *viz.* that (the appellant), having deprived herself of capital in 2016 for a purpose other than securing entitlement to, or a greater amount of JSA or IS, does not have notional capital for the purposes of her assessment of JSA.

Alternatively, if the Commissioner disagrees and finds that the tribunal was mistaken in its determination that (the appellant) had disposed of her capital by 2016, I submit that the decision should be set aside and the appeal be remitted to a new tribunal. This will allow new findings to be made to ensure that both the nature and precise value of (the appellant’s) capital is fully and properly addressed. I would also stress that, whilst I am submitting that the tribunal has erred, this is no guarantee that the claimant’s appeal would be ultimately successful.’

27. Mr Yeates, by way of a direction dated 19 May 2020, was asked the following:

‘The Commissioner notes the suggestion that he makes a final ruling in this matter that the claimant, having deprived herself of capital in 2016 for a purpose other than securing entitlement to or a greater amount of JSA or IS, does not have notional capital for the purposes of her assessment of JSA.

If the Commissioner were to make such a ruling, what would the financial implication be, if any, for the claimant?’

28. In a further written submission dated 8 June 2020, Mr Yeates made the following response:

‘In its statement of reasons dated 07.06.2019 the tribunal found that (the appellant) was not entitled to Jobseeker’s Allowance from 14.09.2017 due to her having notional capital in excess of the prescribed upper limit.

For the reasons outlined in paragraphs 21 to 27 of my observations dated 19.09.2019, it is the Department’s submission that this decision was erroneous. If (the appellant) had deprived herself of the capital in question, it is inherently improbable that she did so for the purpose of obtaining entitlement to Jobseeker’s Allowance or Income Support as required by the Regulations.

## **OUTCOME**

If the Commissioner is satisfied as the tribunal was, that (the appellant) did in fact deprive herself of the capital in question, and he accepts that this was done for a reason other than securing entitlement to Jobseeker’s Allowance or Income Support, none of the capital in question can have any impact on the assessment of Jobseeker’s Allowance in this case.

Based on the financial information available to the Department, (the appellant’s) total capital at her date of claim was below the prescribed lower limit for Jobseeker’s Allowance. As such, providing that (the appellant) can demonstrate that she met all other conditions of entitlement, she will be entitled to Jobseeker’s Allowance from 14.09.2017 until 21.12.2017. On 22.12.2017 (the appellant) made a claim to Universal

Credit and as such, cannot be entitled to Jobseeker's Allowance beyond that date.'

29. Article 15(8) of the Social Security (Northern Ireland) order 1998, as amended, provides:

(8) Where the Commissioner holds that the decision appealed against was erroneous in point of law, he shall set it aside and—

(a) he shall have power—

- (i) to give the decision which he considers the tribunal should have given, if he can do so without making fresh or further findings of fact; or
- (ii) if he considers it expedient, to make such findings and to give such decision as he considers appropriate in the light of them; and

(b) in any other case he shall refer the case to a tribunal with directions for its determination.'

30. I have held that the decision appealed against was erroneous in point of law. Accordingly, for the purposes of paragraph 8, I set it aside. The error was taking an improper approach to the issue of notional capital.

31. Paragraph 8(a) gives me two options, both involving the consideration of fresh or further findings of fact. In his original written observations, Mr Yeates submitted that if I agree that the appeal tribunal did err in the manner in which it addressed notional capital, then I could, for the purposes of paragraph 8(a)(i), make the decision which the appeal tribunal should have made. That would imply that I could make that decision without making further findings of fact, thereby agreeing that the appellant had deprived herself of capital in 2016 for a purpose other than securing entitlement to, or a greater amount of JSA or IS. With respect to Mr Yeates, I have made no findings of fact in respect of the appellant and do not, by implication, agree with any findings of fact purportedly arising from the appeal tribunal's error. I also decline, for the purposes of paragraph 8(a)(ii) to make fresh or further findings of fact. I do not consider it expedient to do so. The appeal tribunal is the primary fact-finding authority. I have not seen or heard from the appellant.

32. That means that I apply paragraph 8(b) and remit the case to another appeal tribunal.

33. There is a further reason why I consider that remittal is the most appropriate form of disposal. The decision under appeal to the appeal tribunal was a decision dated 16 October 2017 in which a decision maker of the Department decided that the appellant held actual capital in excess

of £16,000 from 14 September 2017 notwithstanding the evidence provided which stated that she no longer held said capital and was not, therefore, be entitled to JSA. The decision dated 16 October 2017 was reconsidered by the Department on 7 December 2017 but was not changed. We now also know that any entitlement to JSA could only be for the limited period from 14 September 2017 until 21 December 2017.

34. In summary the decision under appeal was based on the 'actual' capital JSA rules. The appeal tribunal was intent on the alternative 'notional' capital rules. There has been no consideration, therefore, and on appeal, as to whether the legal basis on which the Department principally refused entitlement to JSA was correct.
35. I direct, therefore, that the parties to the proceedings and the newly constituted appeal tribunal take into account the following:
- (i) the decision under appeal is a decision of the Department, dated 16 October 2017 in which a decision maker of the Department decided that the appellant held actual capital in excess of £16,000 from 14 September 2017 notwithstanding the evidence provided which stated that she no longer held said capital and was not, therefore, entitled to JSA;
  - (ii) as the appellant was awarded entitlement to Universal Credit from and including 22 December 2017, any potential period of entitlement to JSA is limited to 14 September 2017 to 21 December 2017 (see the principles set out in *C20/04-05(DLA)*);
  - (iii) it will be for both parties to the proceedings to make submissions, and adduce evidence in support of those submissions, on all of the issues relevant to the appeal; and
  - (iv) it will be for the appeal tribunal to consider the submissions made by the parties to the proceedings on these issues, and any evidence adduced in support of them, and then to make its determination, in light of all that is before it.

(signed): K Mullan

Chief Commissioner

22 September 2021