THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL JUDGE

The claimant's appeal to the Upper Tribunal is allowed. The decision of the Edinburgh First-tier Tribunal dated 23 September 2016 involved an error on a point of law and is set aside. However, the claimant gains only a very small practical advantage from that. The Upper Tribunal re-makes the decision on the claimant's appeal against the decision of the Secretary of State dated 30 June 2016, as revised on 8 August 2016 (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(ii). That decision as re-made is that the decision awarding the claimant employment and support allowance from and including 7 August 2010 falls to be superseded on the ground of relevant change of circumstances so as to include an income-related allowance with effect from the first day of the benefit week in which 28 April 2016 fell (see paragraph 20 below).

REASONS FOR DECISION

1. The claimant claimed employment and support allowance (ESA) on 4 August 2010 At that point she was in receipt of disability living allowance (DLA) at what (from the amount of the award) can only have been the highest rate of the care component and the higher rate of the mobility component. That entitlement to DLA has continued throughout the period in issue. At that point she was also living with her husband, who was in remunerative work (i.e. 24 hours or more per week) as a finance director. That meant that the claimant could not satisfy the condition of entitlement to an income-related .allowance of not being a member of a couple the other member of which is engaged in remunerative work (Welfare Reform Act 2007, Schedule 1, paragraph 6(1)(f)). Accordingly, only the contributory allowance was awarded, for which that particular condition does not apply. But the amount of the contributory allowance was a fixed one, without access to any of the premiums set out in Schedule 4 to the Employment and Support Allowance Regulations 2008, which apply only to the income-related allowance. In particular, there was then no possibility of her qualifying for the severe disability premium (SDP) by reason of her receipt of the care component of DLA under paragraph 6 of Schedule 4 (which in any event has restrictions where a claimant has a partner).

2. It is now known and accepted that the claimant's husband left her household permanently on 9 November 2011. So far as the Department is concerned, it says that it was not in terms notified of that change of circumstances until receipt on 15 June 2016 of the form ESA3 (re-assessment) signed by the claimant on 14 June 2016. The evidence of the history of contact between the claimant and the Department put before the tribunal of 23 September 2016 showed no enquiries about the income-related allowance or the SDP (or any notification of her husband having left the household and thus no longer counting as a partner) until 9 December 2015. The claimant has argued consistently that the Department's record is partial and that there were earlier contacts from members of her family. I shall come back to that later, but for the moment proceed on the Department's view, as that was accepted by the tribunal of 23 September 2016.

3. The fullest Departmental record of the contacts from 9 December 2015 onwards is on pages 109 to 110, made by the officer who carried out the revision of 8 August 2016, who had listened to the recordings of the telephone calls in question. On 9 December 2015 the claimant was said to have telephoned to ask what ESA she was getting and what the difference was. An officer explained the difference between contributory and income-related allowances and told the claimant that she was receiving contributory allowance. The claimant asked whether that was taxable and why. The officer of 8 August 2016 notes that the claimant did not ask any other questions or whether she could claim income-related allowance. On 28 April 2016 the claimant is recorded as asking about the disability premium she might be missing out on. The officer advised, after checking, that she was receiving the contributory allowance only, where there were no extra premiums. It was said that an income-related claim could be looked into, but that other income coming in would have to be looked at and if anyone else lived with her. The claimant said that no-one else lived with her, but was recorded as saying that she was happy with her claim as it was. Then on 20 May 2016 the claimant telephone to say that she had had a review of her benefits with RAF (RAFBA?) and been told that she should be getting disability premium. The officer said that she would send a form in the post to check her eligibility. The form sent was apparently the form IS10 signed by the claimant on 23 May 2016 and received back on 31 May 2016, which was specifically about SDP. The form contained the answer no to the question whether the claimant lived with a partner and she wrote at the end that circumstances had changed on 9 November 2011. Following another telephone call on 14 June 2016 the ESA3 form mentioned above was issued.

4. On that basis, the decision was made on 30 June 2016 disallowing income-related ESA for the period from 9 November 2011 to 14 June 2016 and thus by implication superseding the existing award of ESA to include an income –related allowance from 15 June 2016. The reasons for decision stated on page 87 were slightly confused, in that the form ESA3 was described as a claim form and there was said to be a request for backdating to 9 November 2011, but the rule relied on was that the effective date is the first day of the benefit week in which a claimant reports a change of circumstances if the change is reported later than one month after the change occurred and the superseding outcome decision is advantageous to the claimant. The claimant's request for mandatory reconsideration produced no change, but after the claimant lodged her appeal, the revision of 8 August 2016 was carried out. That was to the effect that, since the claimant should have been issued with a form ESA3 following her telephone call of 20 May 2016, the effective date of the supersession should be 25 May 2016, the first day of the benefit week in which the completed form IS10 was received back. By her subsequent letters the claimant showed an intention to continue to challenge that result and so is to be regarded as having appealed against the decision of 30 June 2016 as revised on 8 August 2016.

5. The claimant opted for her appeal to be decided on the papers. In her letter of appeal she had said that after November 2011 she had telephoned the helpline numerous times to enquire about extra money to help her but was always told that as she was receiving contributory allowance no additional benefits were due. She said that she should have been sent an ESA3 form following those enquiries to check her eligibility. She also complained about the delay in issuing the form in 2016 and said that the officers had told her that the SDP would be applicable from the date that her husband left, but that the decision made did not correspond with that assurance. She had been discriminated against because of her lack of knowledge of disability premiums, and should have been awarded the enhanced disability premium automatically from the outset and then the SDP from 9 November 2011. Following the sending

out of the Secretary of State's written submission to the tribunal with its supporting documents, the claimant and her mother put in several detailed written submissions. Apart from the points already mentioned, they stressed the extreme difficulties of the claimant's condition, the hardship she had suffered through receiving considerably less than her proper ESA entitlements over many years, the inconsistent way she had been treated in 2016 and the omission of relevant telephone calls from the Department's evidence, including calls from members of her family enquiring about whether additional amounts were payable.

The First-tier Tribunal's decision

6. The tribunal disallowed the claimant's appeal on 23 September 2016 and confirmed the decision of 30 June 2016 as revised on 8 August 2016. The statement of reasons signed on 30 November 2016 accepted the Department's evidence of the contents of the telephone calls as on pages 109 to 110. The tribunal considered it unlikely that the claimant had been told that she qualified for payment of SDP going back to 2011, but I do not need to consider whether or not that was justified. On the basis that the claimant was told something along those lines, that could not affect the outcome of the decisions of 30 June 2016 and 8 August 2016 or of the tribunal of 23 September 2016. That is because both decision-makers acting on behalf of the Secretary of State and tribunals are bound to apply the legislation in its actual meaning to the case before them and that duty is not affected if some officer of the Department has made some statement suggesting a different result. Thus I can go on to the crucial part of the tribunal's reasoning. This is in paragraph 9 (after some confused statements in paragraph 8 appearing wrongly to suggest that there can be separate claims to contributory and income-related allowances, rather than one claim to ESA that can consist of either or both allowances, which do not in my judgment affect the substance of the tribunal's decision):

> "9. The [claimant] seeks to have her income-related ESA award backdated to 09.11.2011, the date she separated from her husband. There is no provision within the legislation for such backdating to be allowed. In terms of regulation 7(2) of the [Social Security and Child Support (Decisions and Appeals) Regulations 1999], a supersession on the grounds of a change of circumstances advantageous to the claimant is effective from the date of change if the change is notified within one month (or such longer period as is allowed under regulation 8) but is otherwise effective only from the date of notification. The [claimant] did not notify the [Secretary of State] of her change in circumstances within one month of that change occurring. She is not assisted by regulation 8 of the 1999 Regulations, because in terms of regulation 8(6) no account can be taken of the fact that a claimant may have been aware of, or have misunderstood, the relevant law or time limits. The [claimant] argues that she was unaware of the law, and unaware of the distinction between contributory and income related ESA, but no account can be had to that. The [claimant] did not officially notify the [Secretary of State] of her change of circumstances until she completed and returned the IS10 Extra Money – Severe Disability Premium form on 25.05.2016. Her award can be reassessed for income related ESA only from that date."

The appeal to the Upper Tribunal

7. The claimant applied for permission to appeal to the Upper Tribunal. She had already put forward an argument, based on information from an adviser, that regulations 6(2)(e) and 7(7)(a) of the Decisions and Appeals Regulations should have been applied. Numerous dates for contacts with the Department after 9 November 2011 were given. Neither of those matters had been brought forward before the tribunal of 23 September 2016 made its decision. I gave the claimant permission to appeal on 3 March 2017, saying that an issue arose that deserved consideration in a written submission on behalf of the Secretary of State and continuing:

> "The issue is whether, on the evidence that was before the tribunal of 23 September 2016, it should have considered the possible application of regulations 6(2) and 7(7) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. At first sight it looks as though regulation 6(2)(e) could not apply because, as shown by the award history on pages 99 and 100 of the papers, the claimant first became entitled to DLA (apparently at the level relevant to the severe disability premium), well before first day of her period of entitlement to ESA. However, regulation 6(2)(e)(ii) applies not only where subsequent to that day a claimant becomes entitled to another relevant benefit (i.e. in the present case DLA), but also where subsequent to that day the claimant becomes entitled to an increase in the rate of another relevant benefit. The award history shows an increase in the rate of DLA payable each April, no doubt through the annual process to alter the rates of benefit under s.150 of the Social Security Administration Act 1992 and following sections. Are the plain words of regulation 6(2)(e) to be regarded as applying in such circumstances or is a limitation to be inferred that in cases where the other relevant benefit is DLA they only apply when a claimant becomes entitled to a different rate of the care component under section 72 of the Social Security Contributions and Benefits Act 1992? It is notable that regulation 6(2)(e) does not require any particular consequences to follow from what is identified in head (ii). It merely requires that state of affairs to have come about. Then the rules as to effective date of a supersession are in regulation 7(7)."

If regulation 6(2)(e) applies, the effective date of the supersession under regulation 7(7)(a) is the date on which entitlement arises to the other relevant benefit or to an increase in the rate of that benefit.

8. In the written submission dated 20 April 2017 the representative of the Secretary of State did not support the appeal, relying in part on a recent decision of Upper Tribunal Judge Hemingway in an appeal with file number CPC/2634/2015. It is particularly helpful that most of the relevant legislative provisions on supersessions and effective dates are set out in CPC/2634/2016. As that decision is already in the papers I do not need to set out all the legislation again here. The Secretary of State says, in essence, that an alteration in the amounts payable for particular rates of either component of DLA does not equate to a claimant becoming entitled to an increase in the rate of a relevant benefit, so that regulation 6(2)(e) does not apply. The claimant has made observations in reply maintaining her general points of argument and supporting the application of regulation 6(2)(e) on the basis I had suggested.

Regulation 6(2)(e): discussion

9. With some regret, because the legislation on supersessions and effective dates could have been drafted a lot more clearly and appears to draw lines that do not always reflect the merits of specific cases, I conclude that regulation 6(2)(e) of the Decisions and Appeals Regulations does not assist the claimant in the present case. Although that is not quite for the reasons put forward on behalf of the Secretary of State, the citation of the decision in CPC/2634/2016, of which I was not aware when I gave permission to appeal, has helped a great deal in working out the answer to the issues raised then.

10. A few matters can be cleared away at the beginning. I have already mentioned that any statements made by officers over the telephone about whether and when the claimant would qualify for payment of SDP could not bind the tribunal of 23 September 2016 or the Upper Tribunal to decide the case otherwise than in accordance with the proper interpretation of the legislation as applied to the facts found. Secondly, the question of the enhanced disability premium for the period before 9 November 2011 is a non-starter from the claimant's point of view. That, and all the other premiums in Part 2 of Schedule 4 to the ESA Regulations 2008 are only applicable to the income-related allowance within ESA. Prior to 9 November 2011 the claimant could not meet the conditions of entitlement to that allowance, as mentioned above, because she failed to meet the condition in paragraph 6(1)(f) of Schedule 1 to the Welfare Reform Act 2007 of not being a member of a couple the other member of which is engaged in remunerative work.

11. It is then quite plain on the undisputed facts of the present case that the main part of regulation 6(2)(e) could not assist the claimant. She did not become entitled to another relevant benefit (DLA) subsequent to the first day of the period for which she was awarded ESA. She was already entitled to DLA at that date. So it could only assist her, since her entitlement to the care component was at the higher rate throughout, if the annual upratings in the amounts payable for that rate under regulation 4 of the Social Security (Disability Living Allowance) Regulations 1991 were regarded as leading to her becoming entitled to an increase in the rate of DLA.

12. I find that a very difficult question. At one point I thought that I did not need to express a definite conclusion. I thought that, even if regulation 6(2)(e) applied, the claimant would still have to rely on a supersession on the ground of relevant change of circumstances (i.e. ceasing to be a member of a couple) to show entitlement to an income-related allowance regardless of the effect of her entitlement to the care component of DLA. But I am now satisfied that that is wrong. If the claimant were able to get within the terms of regulation 6(2)(e), with an effective date under regulation 7(7) prior to April/May 2016 (say, April 2012 as the first up-rating after November 2011), then in my judgment the identification of that ground of supersession would authorise the supersession process with effect from the effective date, in which process the decision-maker or a tribunal would be required to consider all the evidence as to all the elements of potential entitlement in determining afresh what decision to make as from that effective date. That conclusion is in my judgment in line with the approach of the three-judge panel of the Upper Tribunal in paragraph 70 of *FN v Secretary of State for Work and Pensions (ESA)* [2015] UKUT 670 (AAC), now reported as [2016] AACR 24, and with my decisions in *KB v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 537 (AAC) and *DS v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 538 (AAC), to be reported as [2017] AACR 19. In so far as the approach in CPC/2634/2015 is inconsistent with the principles set out in those decisions I prefer not to follow it. Since I conclude below that the claimant cannot get within the terms of regulation 6(2)(e) I am not going to burden this decision with any further discussion of the point, but the Secretary of State may wish to take it into account in future cases.

13. The use of the phrase "becomes entitled to … an increase in the rate of another relevant benefit" in regulation 6(2)(e) of the Decisions and Appeals Regulations is ambiguous to say the least. On the face of it, in the ordinary use of the English language, the effect of an annual up-rating order under section 150 of the Social Security Administration Act 1992 is in the case of DLA to increase the rates prescribed under sections 72(3) and 73(10) (see regulation 4

of the DLA Regulations) for the various elements of the care component and the mobility component. In the ordinary use of language, a claimant would become entitled to receive that higher, increased, rate from the prescribed date. Although sections 72(4) and 73(11) use the terms of the weekly rate "payable" it would seem artificial to draw a distinction between

entitlement and payability in this context. There are some particular elements of some older social security benefits that are described in the legislation as "increases", for instance those included in the definition of "claim for benefit" in regulation 2(1) of the Social Security (Claims and Payments) Regulations 1987, for which a separate claim is then necessary. It is possible that the intention in regulation 6(2)(e) was to restrict the operation of the phrase about becoming entitled to an increase in a rate to such increases. However, in my view much clearer words would be necessary to produce that result, which would be a limitation on the rights of claimants. It would also have the disadvantage of excluding a case where a claimant entitled to, say, the middle rate of the care component of DLA, was awarded the highest rate on supersession and of potentially drawing a line between such an award on supersession and one made on a renewal claim.

14. There is, though, one element of the wider context of the Decisions and Appeals Regulations that I find persuasive. That is in regulation 3(7) of the Decisions and Appeals Regulations on revision:

> "(7) Where -
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> (a) the Secretary of State or an officer of the Board makes a decision under section 8 or 10 [of the Social Security Act 1998] awarding benefit to a claimant ("the original award"); and
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> (b) an award of another relevant benefit or an increase in the rate of another benefit is made to the claimant or a member of his family for a period which includes the date on which the original award took effect,
>
> the Secretary of State or an officer of the Board, as the case may require, may revise the original award."

By comparison, regulation 6(2)(e) provides:

> "(2) A decision under section 10 may be made on the Secretary of State's or the Board's own initiative or on an application made for the purpose on the basis that the decision to be superseded -
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> …
>
> (e) is a decision where -
>
> (i) the claimant has been awarded entitlement to a relevant benefit; and
>
> (ii) subsequent to the first day of the period to which that entitlement relates, the claimant or a member of his family becomes entitled to another relevant benefit or an increase in the rate of another relevant benefit;"

15. Although the language of regulation 3(7) is not absolutely crystal clear, it seems to me that the "award" in sub-paragraph (b) covers both an award of a relevant benefit and an award of an increase in the rate of such a benefit. Now, regulations 3 on revision and 6 on supersession are meant to operate in harmony, revision covering cases where the "original decision" is to be changed from the outset of the period it covered, with there having to be a supersession if the change is to operate from some later date. That finds expression in the provision in regulation 6(4) that in general a decision that may be revised under regulation 3 cannot be superseded under regulation 6 and in the provisions enabling the Secretary of State to treat as application for a revision as an application for a supersession and vice versa. Thus there is in my judgment some degree of presumption that, when two provisions in regulations 3 and 6 respectively are two sides of the same coin or at least intended to operate in tandem, their terms should be interpreted consistently. Since regulation 3(7) applies only where the other relevant benefit or an increase of it is awarded, in my judgment the ambiguous words of regulation 6(2)(e) are to be interpreted in the same way, so that head (ii) applies only where the other relevant benefit or an increase of it has been awarded. An award in that sense is something that can only stem from a decision by the Secretary of State or by a First-tier Tribunal or the Upper Tribunal or some higher court on appeal. The up-rating of benefits by an order under section 150 of the Social Security Administration Act 1992 does not take effect through any decision of the Secretary of State under section 8 or 10 of the Social Security Act 1998. It takes effect by the force of the order and the enabling legislation itself and so in my judgment does not fall within the terms of regulation 6(2)(e). By contrast, an award of a higher rate of the care component of DLA than formerly in effect, whether through supersession or on a renewal claim, would fall within its terms.

16. Thus, the result is that the claimant in the circumstances of the present case cannot get within the terms of regulation 6(2)(e) of the Decisions and Appeals Regulations and can only rely on the ground of supersession for relevant change of circumstances. I have considered what has been said by and on behalf of the claimant about when regulation 6(2)(e) can produce "backdating" of SDP. However, the circumstances of the examples put forward are not the same as those of the present case. The existence of those examples does not alter my conclusion above. Nor can it be altered if I agreed with the claimant that she is just as deserving of receiving the benefit that she could have received over the missing five years as some of those who can take advantage of the "backdating" rules. I can only consider the circumstances of the present case as they actually are and apply the legislation in what in my judgment is its proper meaning.

Did the tribunal of 23 September 2016 err in law?

17. The tribunal did not in its statement of reasons give any consideration to the potential application of regulation 6(2)(e) of the Decisions and Appeals Regulations, which I have found above to be a matter of substance and only decided against the claimant on a fairly close balance. Instead it considered only the ground of relevant change of circumstances under regulation 6(2)(a) and the provisions on effective dates of supersessions on that ground. However, by 23 September 2016 no arguments had been put forward to the tribunal specifically relying on regulation 6(2)(e). Since I have concluded that the claimant cannot get within regulation 6(2)(e), there can be no question of setting the tribunal's decision aside for failing to deal with the point.

18. There was, though, a question on the application of the effective date rules that the tribunal did not consider. First, I note that regulation 8 of the Decisions and Appeals Regulations, allowing an extension of the time for notifying a change of circumstances, could not be invoked to help the claimant. Any application for such an extension has to be made within 13 months of the date of the change (regulation 8(3)(b)). In the present case any notification and implied application for an extension was made well outside that period. Thus the claimant was left with the rule in regulation 7(2)(b) that where the change was notified to an appropriate office more than a month after the date of the change a superseding decision to the advantage of an ESA claimant takes effect from the first day of the benefit week in which the notification was made. "Notification" and "notify" are given no special meaning in the Decisions and Appeals Regulations. There is not under regulation 7 a requirement to give or send notice such as to bring regulation 2 into play. Thus notification does not necessarily entail writing or the use of any particular form, but can be done orally, face-to-face or over the telephone. Even if the requirement in regulation 32 of the Claims and Payments Regulations for beneficiaries to notify the Secretary of State of changes of circumstances by giving notice to the appropriate office as soon as reasonably practicable applied outside situations where the beneficiary could reasonably be expected to know that the change might affect the continuance of entitlement to or payment of benefit, it allows notification by telephone unless the Secretary of State has specifically required written notice. In the present case there is no evidence of such a requirement beyond the sending out of forms mainly to gather further information. The decision-maker who carried out the revision on 8 August 2016 took the view that, because after the telephone call of 20 May 2016 the claimant was sent a form IS10 instead of a form ESA3, the notification of the change should have been treated as made on the date that the completed form IS10 was received back. The thinking behind that was right as far as it went. But the test in regulation 7(2)(b) is not of notification of all the details necessary for the Secretary of State to make a superseding decision, but merely of notifying the change of circumstances (i.e. her having ceased to be a member of a couple). I do not see why the claimant should not be regarded as having notified an appropriate office in the telephone call on 28 April 2016, when she said that no-one else lived with her. That statement necessarily entailed that she was no longer a member of a couple, and so could not be excluded from entitlement to the income-related allowance under paragraph 6(1)(f) of Schedule 1 to the Welfare Reform Act 2007. It does not matter that she had apparently said that she was happy with her claim as it was. The test is merely of notification of the change of circumstances. Accordingly the effective date under regulation 7(2)b) should have been the first day of the benefit week in which 28 April 2016 fell.

19. I have, since I am re-making the decision on the appeal before the tribunal of 23 September 2016, considered all the evidence put forward about contacts with the Department by the claimant and her family prior to 28 April 2016, to ask whether there was a notification of the change of circumstances at some earlier date. But while that evidence suggests that enquiries might have been made about eligibility for SDP or for some additional allowance, none of it suggests that information was given on the crucial matter of the claimant's husband having left her household on 9 November 2011 and her not being a member of a couple from that date onwards. I quite accept that things might have been very different if someone had asked an extra question or perhaps sent out a form earlier than one was sent. However, I cannot base a decision on what might have happened, only on what did happen. The legislation makes the test one of notification by a claimant, thus putting the onus on a claimant to come forward with the information. I cannot see on the evidence before me an earlier date for that than 28 April 2016.

20. I conclude that the tribunal of 23 September 2016 erred in law by failing to consider whether an earlier effective date than 25 May 2016 was to be applied under regulation 7(2)(b) of the Decisions and Appeals Regulations. I set its decision aside for that reason and re-make the decision on the appeal before the tribunal on the basis set out in paragraphs 18 and 19 above. There appears to be no dispute about the amount of ESA properly payable from 25 May 2016 onwards, which amount is probably to be applied to the period beginning with the date identified above. If there is any unresolved dispute about the calculation of that amount, the case is to be returned to a judge of the Upper Tribunal (Administrative Appeals Chamber) for further decision.

(Signed)
J MESHER
Judge of the Upper Tribunal
Date: 15 June 2017