

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

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

**INCOME SUPPORT**

Application by the claimant for leave to appeal  
and appeal to a Social Security Commissioner  
on a question of law from a Tribunal's decision  
dated 10 February 2017

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. I grant leave to appeal and proceed to determine all questions arising thereon as though they arose on appeal.
2. The decision of the appeal tribunal dated 10 February 2017 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.
3. I am able to exercise the power conferred on me by Article 15(8)(a)(ii) of the Social Security (Northern Ireland) Order 1998 to give the decision which I consider the appeal tribunal should have given as I can do so having made further findings of fact. The fresh findings in fact are outlined below.
4. My substituted decision is as follows:
5. There has been an overpayment of Income Support (IS) for the period from 18 March 2010 to 30 September 2010.
6. The IS which was overpaid to the appellant for the period from 18 March 2010 to 12 May 2010 is **not** recoverable from the appellant.
7. The IS which was overpaid to the appellant for the period from 13 May 2010 to 30 September 2010 **is** recoverable from the appellant. The amount of IS recoverable in respect of this period is to be calculated by

the Department. If the appellant does not agree that calculation, she may refer the matter to the Office of the Social Security Commissioners in writing within one month of the date on which the letter notifying her of the calculation is sent to her.

## **Background**

8. The background to this appeal is set out in detail in paragraphs 5 to 9 of my previous decision in *EMcG-v-Department for Social Development (IS)* [2016] NlCom 41, C1/15-16(IS) ('*EMcG v DSD*'), and do not need to be repeated here. In *EMcG v DSD* I stated the following, at paragraph 4:

'During the course of the proceedings before me the appellant has been represented by her father, and the Department by Mr Smith of Decision Making Services (DMS). The appellant's father is also an officer of the Department and, ordinarily, I would provide his name in a written decision. The practice of the Office of the Social Security Commissioners is to anonymise decisions so that the name of the appellant will not be identified. I am concerned that the release of the name of the appellant's father might lead, somewhat easily, to the identification of the appellant. For that reason he is referred to, in the remainder of the decision, as the 'appellant's father.'

9. I follow that procedure in the present decision. In *EMcG v DSD*, I decided that the decision of an appeal tribunal dated 16 October 2013 was in error of law. I declined 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. I noted that although the appellant's appeal to the Social Security Commissioner in that case had been successful she might have been disappointed that what had already been prolonged proceedings would be lengthened further by remittal of the appeal to a differently-constituted appeal tribunal. I expressed my aspiration that as there had been, by the date of the decision, clarification of the issues which remained in the appeal, they might be resolved by referral of the case to a differently constituted appeal tribunal for re-determination. As the present proceedings attest, that aspiration has not been realised.
10. The remitted oral hearing of the appeal took place on 10 February 2017. The appellant was not present but was represented by her father. The Department was represented by Ms Beagan. The appeal tribunal disallowed the appeal and issued a Decision Notice as follows:

'Appeal disallowed. As a result of a decision dated 1/5/12 as revised on 8/10/12, an overpayment of Income Support has been made for the period from 18/3/10 to 30/9/10 (both dates included) amounting to £1166.60. On 18/3/10, or as soon as practicable after, the appellant

failed to disclose the material fact that she had commenced remunerative work. As a consequence, Income Support amounting to £1166.60 from 18/3/10-30/09/10 (both dates included) was paid which would not have been paid but for the failure to disclose. Accordingly that amount is recoverable from the appellant.’

11. On 17 May 2017 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). On 30 May 2017 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

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

12. On 3 July 2017 a further application for leave to appeal was received in the office of the Social Security Commissioners. On 7 July 2017 observations on the application for leave to appeal were requested from Decision Making Services (‘DMS’). In written observations dated 13 September 2017, Mr Smith, for DMS, supported the application for leave to appeal on one of the grounds advanced on behalf of the appellant. Written observations were shared with the appellant and her father on 14 September 2017. Written observations in reply were received from the appellant on 13 October 2017 and were shared with Mr Smith on 16 October 2017.
13. On 3 July 2018 I directed an oral hearing of the application. The oral hearing took place on 1 August 2018. The appellant was not present but was represented by her father. The Department was represented by Mr Smith. I am grateful to both representatives for their carefully-prepared oral and written submissions.

### **Errors of law**

14. 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?
15. 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 submissions of the parties**

16. In the Case Summary prepared for the oral hearing of the application, the appellant's father made the following submissions:

#### **'Argument**

##### **Officer of the Department**

As my father was an officer of the Department for Social Development I failed to see how he was not acting as such when he provided me with the advice I requested given that the advice concerned his area of work, was given from his office and similar advice would have been available to any member of the public. (in the "Reason For Decision the LQM has stated that my father's role did not include giving advice to the public nor to myself)

Is his ability to act as an officer of the Department negated when dealing with a family member? Or even the public. If so I would be interested to view those specific regulations.

I consider that if my father had provided the same advice and service to a neighbour and the current situation arose that this matter would not be in front of a commissioner nor indeed a tribunal.

At the tribunal hearing the Presenting Officer accepted that my father was an officer of the Department but not the benefit paying department. As the "benefit paying" department is ultimately the Department For Communities

and as my father is an officer of the Department of Communities it follows that he is an officer of the Department.

It seems that the Presenting Officer's main comment regarding my father being an officer of the Department was the fact that his advice to me regarding the detail of my letter was inferior to the information she would have provided in a similar situation.

### **Courier**

I am still unsure of the exact nature of the relationship between the courier service and the Department. An e-mail has been produced to explain what the relationship isn't but not what it actually is. It would appear from a lay persons view point that the courier is employed by the Department to deliver mail but if the courier fails to do so, for example due to a burst courier bag, then that is merely regrettable.

### **Modification**

The LQM has stated that as my letter did not contain the detail, in essence the detail that the Presenting Officer stated that she would have included had she been advising me, that this was an indication that no discussion between myself and my father took place.

The LQM has stated that if such a discussion had taken place my letter would have included rates of pay, name and address of employer and details of hours worked etc as I may have retained some reduced entitlement to IS.

Therefore by the LQM's reasoning this lack of necessary detail was a clear indication that the discussion between my father and myself did not take place.

However as I was in receipt of Income Support on account of being in receipt of Carers' Allowance and I had also sent a letter to Carers' Allowance, who, eventually closed my claim, the detail or lack of same relied upon by the LQM was immaterial as my IS was dependent on me being in receipt of CA.

Of course the Presenting Officer may also have contributed to this misconception.

## **Continuing duty to disclose**

Leaving aside modification of instruction the LQM accepted that my father placed two letters in his offices out tray for onward delivery to the two separate benefit offices.

Therefore if the LQM accepted that I had attempted to make disclose but at a later stage should have realised that this attempt was unsuccessful the principles of CIS 14025/1996 should have been considered and either rejected or accepted and the reasons given accordingly.

## **Impartiality of the tribunal hearing**

For the reasons outlined in my letter dated 12<sup>th</sup> October 2017 e.g. the apparent acceptance of the Departments appeal submission which included “findings” from the original tribunal decision which itself had been set aside, the apparent concern of the LQM in establishing a dangerous precedent, the willingness of the LQM to consent to “I don’t know” as an acceptable answer to a central point of my case and the reliance on immaterial details to justify what I can only presume was an already arrived at decision lead me to question the impartiality of the tribunal hearing and ultimately as its decision.

As a final point I would note the following which relates to the issue of modification of instruction which has already been highlighted.

In the Commissioner’s decision C1/15-16 (IS) at paragraph 100 it is noted,

“The lesson to be derived from paragraph 13 of *R(A)2/06* is that it is essential that there is a rigorous assessment of the available evidence and that careful findings of fact are made about the representations which are made and, just as significantly, the extent of the modification which results. The extent of the modification may be that the claimant need do nothing further or that information provided would be passed on to the relevant office.”

I have already stated that I know little about the benefits system so when offered a casual contract at the BBC who else would I turn to for advice but my father. I prepared two letters, under his instruction, why else would “training

days” have been referred to in my letters nor indeed my offer to refund any overpayment which had not yet been raised for the initial two weeks and for which I had yet to receive payment from the BBC.

I find it difficult to comprehend what more would be expected of such a conversation.

I have never stated that my father specifically informed me that he was modifying my instructions but I did state that having told me that he would send my two letters via the internal courier he concluded by advising me that there was nothing further for me to do.

Although not case law I would like to highlight a submission that was made by the Department on an appellant’s unsuccessful application for leave to appeal to the commissioner.

In A1/12-13 (CA) the Departments submission states, in the last paragraph of on page 12,

“For the duty to have been modified, (Ms C) would have needed to have given assurance to (the applicant) that the fact she was working would be reported to Carer’s Allowance on her behalf”.

Likewise in CF4822/2013 paragraph 2 it was stated by the appellant,

“The advisor stated I did not have to contact either so my claim would finish in May 2012”

The Commissioner in this case accept this evidence and found that the appellant’s instructions had been duly modified.

As can be seen from both of these cases the modification occurred or would have occurred when one sentence was or would have been included in the conversation.

In my own case it should not be too difficult to accept that the substance of the conversation that took place between myself and my father ended with “is there anything else I need to do”, and “there is nothing further that you need to do”, which barring the failure of the courier service, the inability of my letter to be traced or the sheer bad luck that one of my letters would be lost, was correct.

Additionally, and with a view to what was accepted in CF4822/2013 as being a modification, there was no need for my father to give me a detailed explanation of what he was instruction me to do.

In my opinion my evidence is being unfairly weighed and a higher threshold being applied on account of my father's involvement in the case. I just wonder if this level of scrutiny is being applied in all other similar cases.'

17. In the Case Summary, prepared on behalf of the Department, Mr Smith made the following submissions:

'With regards to the Appellant's grounds of appeal the Department was of the opinion that the tribunal:

- was tasked with making a finding of fact whether (the appellant's) letter was received in Lurgan JBO rather than determining if it was unreasonable for her to assume that the letter, having been placed in an out tray in James House would be received in Lurgan JBO and acted upon. The tribunal did investigate the receipt of the letter and has adequately explained why, in its' opinion, the letter was not received in Lurgan JBO;
- examined the relationship between the Department and the Courier Service and has adequately explained that the Courier Service is a private contractor and not an agent of the Department;
- examined the issue regarding the Appellant's father's capacity to act on behalf of the Department and determined that there was a clear conflict of interests in that (the appellant's father's) advice was given as a father and not as an officer of the Department;
- considered that the conversation between the Appellant and her father was scant resulting in the contents of the letter not being sufficient to have enabled the office administering the benefit to close the account. The tribunal concluded that he had no authority, ostensible or otherwise to modify the instructions to report she had been given in the INF4s;

...



With regards to (the appellant's) first three grounds of appeal the Department is of the opinion that the tribunal has dealt with these issues and given an adequate explanation for its decision.

With regards to the fourth ground of appeal the Department is of the opinion that the tribunal erred in law in finding that the Appellant's father, being an officer of the Department, did not have authority to modify the written instructions.'

## **Analysis**

18. I begin by repeating what I said in paragraphs 58 to 63 of my decision in *EMcG v DSD*:

'58. It is axiomatic that the appellant was not entitled to IS for the periods from 3 June 2008 to 17 March 2010 and from 18 March 2010. The Department made a decision to that effect – an 'entitlement' decision – and the appellant did not seek to challenge the validity of that decision.

59. It is equally self-evident that there has been an overpayment of IS for the relevant periods. The Department, for whatever reasons, only seeks to recover the overpayment of IS for the periods from 18 March 2010 to 30 September 2010.

60. There can be no argument that there has been an overpayment of IS for the period from 18 March 2010 to 28 March 2010 which is recoverable from the appellant. The appellant does not challenge recovery of the overpayment of IS for that period. The appellant does challenge recovery of the overpayment of IS for the period from 28 March 2010 to 30 September 2010.

61. The legal basis for the Department's decision to seek recovery of the overpayment of IS for the complete period from 18 March 2010 to 30 September 2010 is that the appellant had failed to disclose the material fact that she was in remunerative work.

62. In overpayment cases based on the test for failure to disclose a material fact one of the issues is usually the source, in evidential terms, of the duty to disclose. No such issue arises in this appeal ...

63. ... The appellant has not sought to challenge any finding by the appeal tribunal on the evidential source of the duty to disclose.'
19. The appellant's father and Mr Smith are in agreement that the decision of the appeal tribunal was in error of law in the manner in which it addressed what might be called the 'modification' principle. In paragraphs 78 to 82 of my decision in *EMcG v DSD*, I said the following about the 'modification' principle:

'78. I turn to the question of modification. Returning to *R(A)2/06*, the facts in that case were that the claimant entered a care home and initially paid her own fees. Following a change in legislation the local authority started paying part of the fees with the effect that attendance allowance was no longer payable to the claimant. Before that change in circumstances the claimant's appointee was visited by an officer of the Pensions Service who advised her that alterations to the claimant's benefits would take place when the local authority started paying the fees, without the need for any further action from her. The appointee did not inform the Disability Benefits Unit of the change of circumstances and an overpayment of attendance allowance resulted.

79. The Commissioner was faced with an argument that the ordinary duty to disclose had been modified by something said to the claimant's appointee by an officer of the Department. This is what has been referred to since as the principle of 'modification'. He set out the legal basis for the principle in paragraph 13, as follows:

'A representation by an officer that there is no need to make further disclosure may have an impact on the duty to disclose imposed by regulation 32(1), (1A) and (1B) in a number of ways. Where regulation 32(1) or (1A) is concerned, the claimant might understand the representation as a modification of written instructions to furnish information because, perhaps, he or she might understand that the information would not be relevant to entitlement to benefit in the particular circumstances of the claimant's case. There is no reason why an officer acting on behalf of the Secretary of State may not modify written instructions

because there is nothing in regulation 32(1) or (1A) to suggest that the requirement to furnish information or evidence need itself be in writing. Where regulation 32(1B) is concerned, the claimant might again understand the representation as meaning that the change of circumstances that he or she would otherwise have disclosed would not in fact have any effect on his or her entitlement to benefit so that, after the representation has been made, the change would no longer be one the claimant "might reasonably be expected to know might affect" entitlement to, or payment of, benefit. Alternatively, the claimant might understand that information disclosed to the officer making the representation would be passed on to the relevant office where disclosure should ordinarily be made. That is a modification of the general rule as to where disclosure is to be made.'

80. Once again, the principle to be extracted from this reasoning is that '... there is no reason why an officer acting on behalf of the Secretary of State may not modify written instructions.'
81. What is the effect, however, of a modification by an officer of the Department, of written instructions, on the general duty to disclose? In *R(A)2/06* Commissioner Rowland stated the following in paragraph 13:
- '... Such a modification was accepted in paragraph 28 of *R(SB) 15/87* and was not excepted from the general approval of that decision by the House of Lords in *Hinchy*. In such a case, it was held in *R(SB) 15/87*, a further duty to disclose would arise if it became apparent to the claimant that the information had not been passed on because an anticipated reduction in his or her entitlement to benefit had not occurred. If the claimant did not know whether or not the information would result in a reduction in benefit, that further duty might not arise.'
82. On the facts of the case before him, the Commissioner found that there had been no such modification.'

20. To that analysis I would add what was said by Upper Tribunal Judge Ward in paragraphs 25 to 28 of his decision in *WW v HM Revenue and Customs (CHB)* ('*WW*'), ([2011] UKUT 11 (AAC)) and Upper Tribunal Judge Wright in paragraph 15 of his decision in *NH v Her Majesty's Revenue and Customs (CHB)* ('*NH*'), ([2014] UKUT 0508 (AAC)).
21. It is the case, of course, that for the purposes of what I said in paragraph 81 of *EMcG v DSD* the appeal tribunal did not accept that when the appellant's father interacted with the appellant on the subject of the commencement of her employment, the effect of employment on her entitlement to social security benefits and the action which she was required to take, he was acting as an officer of the Department and, accordingly, had not authority to modify the written instructions accepted as having been given to the appellant. Rather, the appeal tribunal determined that the appellant's father '... was acting on his daughter's behalf and not in the course of his employment.' Accordingly, the appeal tribunal '... concluded that he had no authority, ostensible or otherwise to modify the instructions to report she had been given in the INF4s ...'
22. I do not accept that the appeal tribunal's conclusions in this regard are correct. I emphasise, however, that I can envisage a situation in which the appellant's father was asked for advice or guidance in circumstances outside of his formal role as an officer of the Department and where, in giving a response, it could not be said that he was acting as an officer of the Department for the purposes of the 'modification' principle or any analogous precept. One example might be a conversation in a social setting. In such circumstances there is a strong argument that the appellant's father would have no ostensible authority to act on behalf of the Department.
23. In the present case, however, what is convincing of an argument that he had crossed the line into his role as an officer of the Department is not only the guidance and advice which he gave to his daughter to write the two separate letters to different sections of the Department but his proactive and hands-on decision to take the letters from his daughter and place them in the internal mail within his own section of the Department. In my view, the appellant placed a reliance on her father which went beyond the advice which any father might give in such circumstances. He had the necessary ostensible authority to represent to his daughter that her action in drafting the letters to the two sections of the Department and his own act in placing those letters in the internal mail were sufficient to meet the requirements to notify both sections of the Department that, for the purposes of her entitlement to IS and CA, there had been a relevant change of circumstances, namely that she had commenced employment. More formally, I am satisfied that the appellant's father had acted, and was entitled to act as an officer of the Department for the purposes of the 'modification' principle. The appeal tribunal had concluded that the appellant's first port of call, when she was faced with the conundrum of what action to take on commencing

employment, with respect to her entitlement to social security benefits, was her local Jobs and Benefits office. I am of the view that it was wholly reasonable for the appellant to have contacted her father in the manner in which she did and, after receiving the advice and guidance which he gave, was entitled to rely on it.

24. I have noted that the appeal tribunal, notwithstanding its conclusions on the issue of authority, '... concluded that there had been no discussion to the effect that further disclosure was not required and that the appellant need do nothing further.' After a somewhat lengthy analysis of the evidence which was before it, described by the appeal tribunal as 'scant', the appeal tribunal concluded that it '... did not accept the credibility of the evidence that the appellant's father, acting on behalf of the Department had modified her instructions to report'. . It is the case that a Social Security Commissioner should be reluctant to interfere with an appeal tribunal's assessment of evidence, including the assessment of credibility. In this case, however, the appellant's father has not only made submissions on the legal and procedural issues arising in the appeal, but has given evidence in connection with those issues. On that basis and with respect to the appeal tribunal, I have arrived at the opposite conclusion. Having heard from and seen the appellant's father I find his evidence to be straightforward and reliable.
25. I stated in *EMcG v DSD* that the facts of this case are idiosyncratic. I repeat that in the context that my conclusion that the appellant's father had ostensible authority to make representations to his daughter which had the effect of modifying the instructions which she had been given, turns wholly on the individual facts of this case. This decision is not authority for a principle that any officer of the Department, when giving advice or guidance to a relative is acting in the formal role of an officer of the Department.
26. That is not the end of the matter, however. In paragraphs 66 to 75 of my decision in *EMcG v DSD*, I said the following:

'66. I start with the principle of a 'continuing' duty to disclose. In *R(A)2/06*, Commissioner Rowland, review stated the following, at paragraph 9 of his decision:

'In the light of the decision of the Court of Appeal in *B v Secretary of State for Work and Pensions* [2005] EWCA Civ 929, [2005] 1 WLR 3796 (now also reported as R(IS) 9/06), it is now clear that there is a failure to disclose a material fact where there is a breach of any of the duties to give information or notify changes imposed by regulation 32 of the Social Security (Claims

and Payments) Regulations 1987 (SI 1987/1968).’

67. That reasoning is irrefutable. I applied the reasoning of the Court of Appeal in England and Wales in the Northern Ireland context in paragraphs 40 to 42 of my decision in *C6/08-09(IB)*.

68. Commissioner Rowland went on to discuss the “manner” in which information is provided. He stated the following, in paragraph 12:

‘Before then, it is necessary to note that regulation 32(1) and (1A) enables the Secretary of State to specify the “manner” in which information is provided, which will include specification of the person or place to which the information should be sent, and that regulation 32(1B) requires disclosure to be made to the “appropriate office” but that, so far as is relevant in this case, regulation 2(1) simply defines “appropriate office” as “an office of the Department for Work and Pensions” so that the paragraph itself gives no indication as to which of the Department’s offices any disclosure must be made. However, it is apparent from *Secretary of State for Work and Pensions v Hinchy* [2005] UKHL 16, [2005] 1 WLR 967 (also reported as *R(IS) 7/05*), that disclosure must ordinarily be made to the office administering the benefit concerned. The claimant’s daughter does not dispute that as a general proposition and accepts that, ordinarily, disclosure in relation to payment of attendance allowance should be made to the Disability Benefits Unit which is, of course, what the tribunal said should have been done in the present case.’

69. Once again that reasoning is unassailable. The phrase to be extracted is that ‘... disclosure must ordinarily be made to the office administering the benefit concerned.’

70. In *Secretary of State for Work and Pensions v Hinchy* ([2005] UKHL 16, [2005] 1 WLR 967 (also reported as *R(IS) 7/05*)), Lord Hoffman had stated the following, at paragraph 32:

'The claimant is not concerned or entitled to make any assumptions about the internal administrative arrangements of the Department. In particular, she is not entitled to assume the existence of infallible channels of communication between one office and another. Her duty is to comply with what the Tribunal called the "simple instruction" in the order book ... For my part, I would approve the principles stated by the Commissioners in R(SB) 15/87 and CG/4494/1999. The duty of the claimant is the duty imposed by regulation 32 or implied by section 71 to make disclosure to the person or office identified to the claimant as the decision-maker. The latter is not deemed to know anything which he did not actually know.'

71. In paragraph 49, Baroness Hale stated the following:

'... there is nothing intrinsically wrong in relying on the claimant to give the Secretary of State the information he requires to make his decisions, provided that this is information which the claimant has and that the Secretary of State has made his requirements plain.'

72. *R(SB)15/87* was a decision of a Tribunal of Commissioners in Great Britain. At paragraphs 26 to 28, the Tribunal stated the following, in connection with the general duty to disclose:

'To whom is there this obligation to disclose? We are concerned here with breaches of the obligation which have the consequence that expenditure is incurred by the Secretary of State; and, in our view, the obligation is to disclose to a member or members of the staff of an office of the Department handling the transaction giving rise to the expenditure. We consider hereafter the way in which this obligation can be fulfilled. Miss Kearns conceded, rightly in our view, that once disclosure had been made to a particular person there can be no question of his being under any

obligation to repeat that disclosure to the same person; and for reasons to which we shall come we consider that there is nothing in paragraph 18 of Decision R(SB) 54/83 relied on by the appeal tribunal in this case, inconsistent with Miss Kearns' concession.

How is this obligation fulfilled? Mr. Powell, by way of qualification of his wider submission already described, submitted that disclosure by any person to any member of the staff of the Department would suffice if either the disclosure contained some reference (however oblique) to the fact that the claimant was claiming supplementary benefit or was made in any part of the "integrated office" in which the claimant was claiming supplementary benefit. We are not able to accept even this narrower formulation. In truth the problem is twofold, there being a question to whom and a question by whom the necessary disclosure needs to be made. We will take these two matters separately.

We accept that a claimant cannot be expected to identify the precise person or persons who have the handling of his claim. His duty is best fulfilled by disclosure to the local office where his claim is being handled either in the claim form or otherwise in terms that make sufficient reference to his claim to enable the matter disclosed to be referred to the proper person. If he does this, it is difficult, having regard to our acceptance of Miss Kearns' concession, to visualise any circumstances in which a further duty to disclose the same matter can arise.'

73. In addition to their comments on the general duty to disclose, the Tribunal went on to say, in paragraph 28:

'But, as was pointed out in R(SB)54/83, there can be other occasions when the duty can be fulfilled by disclosure elsewhere. This can happen, for instance, if an officer in another office of the Department of Health and Social Security or local unemployment



benefit office accepts information in circumstances which make it reasonable for the claimant to think the matters disclosed will be passed onto the local office in question. It was in reference to this sort of case that the Commissioner included in paragraph 18 of Decision R(SB)54/83 his statement about a continuing duty. A claimant who has made such disclosure has not in fact made disclosure to the right person or in the right place, but he has done something which has the effect that, for the time being at least, further disclosure is not reasonably to be expected of him. We consider that paragraph 18 of R(SB)54/83 is concerned with the case of a claimant who subsequently becomes aware, or should have become aware, that the information has not been transmitted to the proper person or place and who is then under a duty to make disclosure to that person or place.'

74. What is being referenced here is the principle of a 'continuing' duty to disclose. It is vital, however, to place that principle in the proper context of its development. What the Tribunal of Commissioners was saying in *R(SB)15/87* was that if disclosure of information is accepted by an officer of the Department, not being the officer or the office to which such disclosure should primarily be made, but in circumstances which makes it reasonable for the claimant to believe that the disclosed information will be passed on to the office to which it ought to have been disclosed, then disclosure is, initially, effective. Further the claimant is entitled to believe, for an initial period of time (described in *R(SB)15/87* as 'the time being at least') that further disclosure is not reasonably to be expected.
75. That is not the end of the matter, however, for such a claimant. Where such a claimant becomes aware, or ought to have become aware, that the information which he reasonably believed would have been passed on, was not passed on to the proper person or office, then at the moment of that awareness, or deemed awareness, that claimant is under a duty to make disclosure to the correct

person or office. That is the context of the continuing duty to disclose.

In paragraphs 83 to 84 I added:

- '83. Thus the continuing duty to disclose can arise in two different ways. The first is where the claimant has made initial disclosure to a different office other than the one dealing with his or her benefit and in circumstances where it is reasonable to expect that the information disclosed will be passed on to the correct person in the right office but who subsequently becomes aware, or should have become aware, that the information has not been transmitted to the proper person or place. The claimant is then under a duty to make disclosure to the proper person or place. **The second is where the duty to disclose information or a change of circumstances to the office administering the benefit concerned is modified by an oral representation by an officer of the Department. The extent to which a further or continuing duty to disclose will arise will depend on the nature of the modification. A further duty to disclose will arise, however, if the claimant understood that information disclosed to the officer making the representation would be passed on to the relevant office and it subsequently becomes apparent, because an anticipated reduction in his or her entitlement to benefit has not occurred, that the information has not been passed on.**
84. In *WW v HMRC (CHB)* ([2011] UKUT 11 (AAC), Upper Tribunal Judge Ward found that the appellant's duty to disclose had been modified by an officer of the Department for Work and Pensions (DWP), rather than by an officer of HMRC, but that the DWP officer had ostensible authority to make such a representation. The representation was that information which should have been disclosed to HMRC, and which would have affected the claimant's entitlement to benefit, would be passed to HMRC. Nonetheless, the claimant was under a continuing duty to disclose when it became clear, some three months later, that the initial disclosure had not been effective.'

27. The emphasis here is my own. To that I would add the further comments of Upper Tribunal Ward in paragraphs 29 and 30 of his decision in *WW*:

‘29. However, in my judgment the claimant came under a continuing obligation to disclose. The position is summarised in Social Security Legislation 2010/11, vol.III, page 81, in a passage which was approved in CIS/14025/1996. (In the present case, references to the Department must be read as though they were to the Board (of HMRC), because of the particular allocation of responsibility for decision-taking in relation to child benefit.)

“(2) A continuing obligation to disclose will exist where a claimant (or someone acting on the claimant’s behalf) has disclosed to an officer of the Department either not in local office or not in the section of that office administering the benefits. Such disclosure will initially be good disclosure provided that the claimant acted reasonably in thinking that the information would be brought to the attention of the relevant officer. But if subsequent events suggest that the information has not reached that officer, then it might well be considered reasonable to expect a claimant to disclose again in a way more certain to ensure that the information is known to the relevant benefit section. How long it will be before a subsequent disclosure is required will vary depending on the particular facts of each case.”

30. If this principle applies to disclosure to officers of the same body but who are not in the relevant office or section of the office, **it should apply equally to attempted disclosure via a person who is not an officer of the relevant body but who, as I have held, has ostensible authority to receive the information and transmit it, as there may be at least as much scope in the latter circumstances for the information not to reach its intended destination.**’

28. Once again, the emphasis here is my own.

29. The appellant’s father has submitted that if it was accepted that he had the authority to modify the instructions given to the appellant, and, as part of that modification, had told the appellant that following the forwarding of

the correspondence the appellant need do nothing more i.e. no further disclosure was required, then that was the end of the matter and no continuing duty to disclose would arise. For that submission he relied on the contents of paragraph 9245 of the Decision Maker's Guide ('DMG'). In paragraph 99 of my decision in *EMcG v DSD*, I said the following about the DMG:

'The DMG is an important publication and gives useful guidance to decision-makers and other adjudicating authorities on the substantive and procedural rules relating to social security law and the interpretation of those rules by the appellate authorities. Nonetheless, it is no more than what its title describes, a guide. The law on social security is to be found in the legislative provisions setting out the substantive rules of entitlement and other specific subjects, such as in the instant case, the rules on the raising of overpayments of social security benefits and their recovery. The law is also to be found in the meaning given to those legislative provisions by the appellate authorities including the Social Security Commissioners, the Upper Tribunal and the appellate courts. The jurisprudence on the principles of the duty to disclose, the continuing duty to disclose, the modification of the disclosure obligation, and the effects of such a modification, are summarised above. With respect to the helpfulness of the DMG, the legislative provisions and the interpretative jurisprudence are the sources to be utilised by decision-makers and appeal tribunals.'

30. Following on, I am satisfied that jurisprudence is clear and is accurately summarised in paragraphs 26-28 above. Accordingly, it is the case that where the duty to disclose is modified by an oral representation by an officer of the Department, a further duty to disclose will arise if the claimant understood that information disclosed to the officer making the representation would be passed on to the relevant office and it subsequently becomes apparent, because an anticipated reduction in his or her entitlement to benefit has not occurred, that the information has not been passed on.
31. Applying those principles to the present case, I have already accepted that the appellant's duty to disclose was modified by oral representations made by her father when acting as an officer of the Department. In those circumstances, while the appellant was justified in understanding that the letters which had been prepared by her would be passed on to the relevant offices and that there was nothing further that she was required to do, if it became apparent to her that the information had not, in fact, been passed on, then a further duty to disclose would arise. For that to apply, however, there would have to be further fact-finding on the issue of whether it did become apparent, or ought to have become apparent to the appellant, at some period between 18 March 2010 and 30 September

2010 that the information had not been passed on. It is self-evident that the potential alert to the appellant would be that the anticipated reduction in her entitlement to benefit had not occurred.

32. Before the appeal tribunal evidence had been given by the Departmental Presenting Officer that IS continued to be paid into the appellant's bank account on Monday 29 March 2010, 5 April 2010, 12 April 2010 and on Mondays thereafter. The Presenting Officer had also given evidence that correspondence had been sent to the appellant from her local Jobs and Benefits office on 2 August 2010 and 31 August 2010 advising the appellant of a change in the pay day for IS. The evidence from the appellant's father, as recorded in the record of proceedings for the appeal tribunal hearing was as follows:

'(The appellant) has no recollection of receiving those letters. She did not check her bank account. She only has one bank account. For a long time she was working on a voluntary basis. He was required to put money into her account at Christmas. She was not aware that she was continuing to receive payments.'

33. With respect to the evidence of the appellant, as narrated to the appeal tribunal by her father, I do not regard it as probable that during the relevant period she did not access her single bank account to determine funds available within it and the source of those funds. We live in an era when access to information about a bank account is readily available through a mobile telephone, tablet device, laptop or PC. I have also noted that the appellant had commenced employment and there was uncertainty about the hours of work and whether payment would be made in respect of the employment undertaken. In all of these circumstances, the appellant had a direct interest in knowing the amount and source of funds available to her in her bank account. The payments of IS were made to her bank account on a regular basis and would have easily been identifiable as such on any access to her bank account. Further, limited printed receipts are available at ATMs when accessed by the bank account holder. Finally, I have noted the evidence that during the relevant period two letters were sent to the appellant from her local Jobs and Benefits office advising her of a change in her IS pay day. As in WW, it was, in my view, not unreasonable to expect the appellant to check her bank account occasionally.
34. I consider that the appellant ought to have realised after a period of six weeks that the initial disclosure had not been effective. I have noted that the letter to the CA section had been received in that section on 31 March 2010 and I allow the period of six weeks from that date.
35. This analysis is sufficient to address most of the grounds of appeal advanced on behalf of the appellant. I have not addressed the ground set out in the Case Summary concerning the impartiality of the appeal tribunal. With respect to the appellant and the appellant's father I do not

accept this ground of appeal. In my view, from what I have read in the record of proceedings for the appeal tribunal hearing and in the statement of reasons for its decision, the proceedings of the appeal tribunal were conducted in accordance with the principles of natural justice, and its decision is reflective of an apposite consideration of, and adherence to such principles.

### **Disposal**

36. The decision of the appeal tribunal dated 10 February 2017 is in error of law. 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.
37. I am able to exercise the power conferred on me by Article 15(8)(a)(ii) of the Social Security (Northern Ireland) Order 1998 to give the decision which I consider the appeal tribunal should have given as I can do so having made further findings of fact.
38. My substituted decision is as follows:
39. There has been an overpayment of Income Support (IS) for the period from 18 March 2010 to 30 September 2010.
40. The IS which was overpaid to the appellant for the period from 18 March 2010 to 12 May 2010 is **not** recoverable from the appellant.
41. The IS which was overpaid to the appellant for the period from 13 May 2010 to 30 September 2010 **is** recoverable from the appellant. The amount of IS recoverable in respect of this period is to be calculated by the Department. If the appellant does not agree that calculation, she may refer the matter to the office of the Social Security Commissioners in writing within one month of the date on which the letter notifying her of the calculation is sent to her.

(signed): K Mullan

Chief Commissioner

12 March 2019