IN THE UPPER TRIBUNAL **Appeal No's. CE/1941-3/2018**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Security and Child Support)

Between:

RS

Appellant

- v –

Secretary of State for Work & Pensions

Respondent

Before: Upper Tribunal Judge Mitchell

Hearing date: 28 September 2020, conducted remotely using *Skype for Business* (followed by submission of further written evidence and argument)

Representation:

Appellant: In person
Respondent: Mr S Redpath (of counsel) instructed by the Government Legal Department

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal, taken on 25 January 2018 under file references SC 240/17/02331/02332/02333, to the extent that it concerned the Appellant's liability to repay overpaid Employment and Support Allowance involved errors on points of law and is set aside.

Acting under section 12(2) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal re-makes the First-tier Tribunal's decision as follows:

(a) Mr S's appeal against the Secretary of State's decision of 9 June 2017 (as revised on 14 July 2017) that the Appellant Mr S was liable to repay an overpayment of Employment and Support Allowance (income-related) is allowed;

(b) the Secretary of State's decision is replaced by the following:

(i) For the purposes of section 71(1) of the Social Security Administration Act 1992, Mr S did not fail to disclose a material fact. Mr S discharged his obligation to disclose to the DWP that he was in receipt of two occupational pensions and that his wife received earnings from part-time employment;

(ii) To the extent that Mr S's overpayment of ESA relates to the DWP's failure to take into account as income Mr S's occupational pension income (apart from the arrears of pension paid to him on 12 November 2014) and his wife's earnings from part-time employment, the overpayment is not recoverable from Mr S under section 71(1) of the 1992 Act;

(iii) To the extent that the overpayment of ESA relates to the DWP's failure to take into account arrears of occupational pension paid to Mr S on 12 November 2014, in the sum of £1372.30, the overpayment is recoverable from Mr S under section 74(1) of the 1992 Act. In the case of an overpayment to which section 74(1) applies, recoverability is not dependent on the overpayment having arisen in consequence of a claimant's failure to disclose a material fact.

REASONS FOR DECISION

Introductory remarks

1. This was a complicated overpayment case made more difficult by the DWP's sub-optimal handling of the matter. The most significant failings, which for reasons of fairness should not be repeated in other cases, were as follows:

(a) the case concerned a claimant whose entitlement to contributions-based Employment and Support Allowance (ESA(C)) was exhausted after 52 weeks. Some two years after exhaustion, the claimant began to receive payments of income-related ESA (ESA(IR)). However, the decision-making record for ESA(IR) was

opaque. Initially, the DWP maintained that the claimant had been in receipt of ESA(IR) throughout, which was clearly incorrect. Subsequently, the DWP argued that the claimant must have re-claimed ESA even though they were unable to produce a claim form or even an entry within DWP records to show a decision taken on a fresh claim. The most likely explanation for the claimant starting to receive ESA(IR) is that his (exhausted) award of ESA(C) was superseded and thereby replaced by an award of ESA(IR) but, again, DWP records shed no light. Since the social security system is a decision-based process, it is always important to have clarity as to the formal basis for any award but it is especially important to establish the legal foundations of awards where the DWP seek to recover overpayments of benefit;

(b) the Secretary of State was required by the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 to provide the First-tier Tribunal with "copies of all documents relevant to the case in the decision maker's possession" (rule 24(4)(b)). Here, the requirement was more honoured in the breach than the observance. As the case has progressed, the quantity of relevant evidence provided by the DWP has grown and grown, and the last supply of evidence did not occur until after the final Upper Tribunal hearing of this appeal. As matters stand, there is probably more relevant documentary evidence before the Upper Tribunal than was supplied to the First-tier Tribunal. Rule 24(4)(b) operates on the assumption that the DWP can be trusted to supply documentation of whose existence only it is aware. I am sorry to say that in this case that trust was misplaced;

(c) much of the DWP evidence took the form of 'screen prints', i.e. print-outs from the DWP's database of claimant contacts and actions taken in connection with awards. Often, the relevant entries incorporated codes, which evidently stand for something. Of itself, that is not a problem; it is for the DWP to manage its decision-making as it sees fit. However, when these screen prints are supplied to the First-tier Tribunal (as relevant evidence) the codes used need to be translated. They must show something relevant. Otherwise, why supply them to the tribunal? To my surprise, the DWP Presenting Officer who appeared before the First-tier Tribunal supplied a witness statement in the present proceedings which includes the following:

> "Whilst I have an understanding of DWP 'jargon' used in notepads, it is, in the main, just that, and despite a degree of universality, various officers do use different acronyms, abbreviations etc., some of which I am unfamiliar with. It would, therefore, be potentially misleading for me to speculate as to the

> meaning of some entries, and could severely compromise the quality, and reliability, of the advice given to the tribunal".

This is unacceptable. It is not for the First-tier Tribunal to try and decode the Rosetta Stone of DWP screen prints. The DWP's obligation to supply all relevant documentary evidence necessarily incorporates an obligation to provide that evidence in an intelligible form. If legislative authority for that proposition is required, it is supplied by the DWP's duty, as a party to proceedings, to help the tribunal to further the overriding objective of its procedural rules which includes ensuring, so far as practicable, that parties are able to participate fully in the proceedings (rule 2(4)(a)), and the DWP's duty to co-operate with the tribunal generally (rule 2(4)(b));

(d) the Appellant, who is an older person, was interviewed under caution by DWP officials. The conduct of the interview left much to be desired (verbatim extracts are set out below in these reasons). The interviewing officers' preparations seem to me to have been deficient. They began by forcefully asserting that the Appellant had been in receipt of income-related ESA for six years which was clearly incorrect. The Appellant persuaded the interviewing officers that they were mistaken but he should not have needed to do so. More worrying was the interviewing officers' assertion that any gaps in the DWP record of claimant contacts might be due to DWP computer systems automatically and randomly 'cleansing' themselves of data (i.e. deleting data). In the present proceedings, the DWP confirm that this assertion was simply wrong and they cannot explain why it was made by the interviewing officers. Now I do not say that the 'cleansing' assertion was made in bad faith, as an attempt to lure a claimant into fabricating evidence in the mistaken belief that a claimed disclosure of information could not be gainsaid but, in the heat and stress of the moment, there was a clear risk of that happening. If DWP interviewing officers are generally mistaken about how the DWP's claimant contacts database operates, it is important that that is rectified.

Background

2. Much DWP-held evidence about the Appellant Mr S's ESA award was supplied during these Upper Tribunal proceedings. Since this evidence is necessary to understand the history of this case, I refer to it here although it was not of course before the First-tier Tribunal. The newly-supplied evidence is shown in italicised text.

2011 award of ESA (Contributions)

3. In 2011, Mr S was awarded ESA(C). The evidence related to this award is as follows:

- **9 June 2011**, *DWP records state: "New ESA claim"; DWP sent Mr S a letter (contents unspecified); DWP telephone contact with Mr S, lasting 36 minutes (call recording erased);*

- **10 June 2011**, DWP records give this as the "claim start date" for an award ESA(IR) which ended on 26 January 2017. This is clearly incorrect because it is not disputed that in 2011 Mr S only received payments of ESA(C). *The DWP explain that their computer system indicated that Mr S had been entitled to ESA from 2011 through to 2017 because "where entitlement to ESA is not awarded due to failure to satisfy the conditions of entitlement…but the claimant remains entitled to NI Credits, that initial claim is maintained on the system, as if it were the original claim", which "ensures that automated notification of credits to HMRC are made annually";*

- **12 July 2011**, Mr S issued with "initial entitlement letter" and Form INF1 (as I understand it, this form is used to challenge a DWP decision); *DWP records also indicate that unspecified evidence about Mr S's wife was 'captured' on this date;*

- **18 July 2011**, *Mr S sent a letter (contents not described in DWP records);*

- **28 February 2012**, Mr S issued with annual uprating letter;

- **9 April 2012**, Mr S issued with "ESA (C & IR), approaching exhaustion letter";

- **11 June 2012**, Mr S issued with letter described as "ESA (C & IR), IR NIL, EXHAUSTED'. *The DWP state that, upon the cessation of Mr S's ESA(C), his wife's income meant that they, as a couple, were not entitled to ESA(IR). Thereafter, Mr S's only entitlement as a person with limited capability for work, according to the DWP, was to National Insurance credits;*

- **11 September 2012**, payments of ESA(C) terminate.

Events following termination of Mr S's payments of ESA(C)

4. Following termination of Mr S's ESA(C) in 2012, the relevant documentary evidence is as follows:

- **24 January 2013***, Mr S undergoes medical consultation with a DWP-commissioned Healthcare Professional in connection with determining whether he had limited capability for work;*

- **8 February 2013**, Mr S issued with "change of circumstances ending award" letter, *although a separate entry in DWP records indicates that, on this date, Mr S was issued with Form INF1*;

- **18 February 2013***, DWP decide that, for the purposes of entitlement to N.I. credits, Mr S continues to have limited capability for work so that he remains entitled to credits;*

- **20 February 2013***, Mr S issued with Form INF1;*

- **12 April 2013 to 25 September 2014**, DWP records indicate that, during this period, ESA(IR) was both 'current' and 'not current', which does not make any sense to me;

- **5 June 2014**, West Yorkshire Pension Fund inform DWP that Mr S's two occupational pensions "started" on this date;

- **16 June 2014**, DWP computer records state that Mr S was "awarded" ESA(IR) from this date. *The DWP now submit that Mr S probably made a 'claim' for ESA(IR) in 2014 by completing Form ESA3 either in writing or by telephone. Form ESA3 is apparently designed to enable a claimant whose ESA(C) entitlement has expired to obtain ESA(IR). The DWP submit that Mr S probably completed the version of Form ESA3 that was in use from October 2012 a template version of which was supplied to the Upper Tribunal (after the hearing of this appeal). That form:*

  - states that a person may be entitled to ESA(IR) if s/he does "not have enough money coming in" and may be claimed for "you and your partner";

- states that "we may reduce your [ESA(IR)] if you or anyone you are claiming for has…money coming in each week. For example, earnings from part-time work…personal or occupational pensions", and "you will not be entitled to [ESA(IR) your partner is working more than 24 hours a week…";

- requested information about a claimant's partner's work, including weekly hours worked but not the amount earned;

- included a range of questions under the heading "are you getting or waiting to get a pension?";

- included a section about "other money coming in" which began by identifying certain types of income. The list did not mention employment income but did include "sick pay from an employer". The list ended with "any other money coming in";

- included, in the 'Declaration' at the end of the form, the statement "If I…fail to report changes in my circumstances promptly, I understand that my [ESA] may be stopped or reduced and any overpayment may be recovered".

- **26 September 2014 to 26 January 2017**, Mr S paid ESA(IR);

- **4 November 2014**, *DWP records indicate that unspecified evidence about Mr S's wife was 'captured' on this date;*

- **4 & 6 November 2014**, *Mr S issued with Form INF1;*

- **5 November 2014**, 'JSA' request closure of Mr S's ESA claim because his partner had claimed JSA and "the partner has been removed off this claim but [entry in DWP records ends here]";

- **6 November 2014**, internal DWP email to 'JSA' informing them that "the partners JSA claim is conts claim only so cust ESA (IR) claim to continue and partner JSA to be paid clerical @£72.40PW so partner added back on claim & JSA taken into account, JSA claim 30/9 with 3WD so paid from 3/10". *DWP*

records also indicate that unspecified evidence about Mr S's wife was 'captured' on 6 November 2014);

- 6 November 2014, *DWP telephone contact with Mr S, described as "General Enquire Regarding Claim", duration of call 12 minutes but "recording erased";*

- **14 November 2014**, Mr S receives his first occupational pension payments. The sum paid in respect of pension 1 was £1612.45 and included arrears accumulated since Mr S became entitled on 5 June 2014. Subsequent monthly pension payments were £274.85. The sum paid in respect of pension 2 was £41.83 which, again, included arrears dating back to 5 June 2014. Subsequent monthly payments for pension 2 were £7.13;

- **26 February 2015***, DWP records indicate Mr S was issued with an annual uprating letter for ESA(IR). In the present proceedings, the DWP state that this was the only annual uprating letter issued to Mr S;*

- **1 March 2015**, Mr S's wife commences employment at an organisation called People in Action. Payments made to Mr S's wife were: 20 April 2015 (£91.80 gross, £73.60 net); 20 May 2015 (£211.15 gross, £168.95 net); 20 June 2015 (£31.40 gross, £25 net); 20 July 2015 (£294.38 gross, £235.58 net); 20 August 2015 (£251.20 gross, £201 net); 20 October 2015 (£86.35 gross, £68.95 net); 20 November 2015 (£157 gross, £125.6 net);

- **25 March 2015**, *DWP telephone contact with Mr S, described as "Cust called will send in wife's 1st wage slip when she receives it – coming off JSA", duration of call 8 minutes;*

- **2 April 2015**, Mr S's wife's JSA award terminates but the DWP continued to count her JSA payments as joint income for the purposes of his ESA(IR) resulting in an underpayment of Mr S's ESA. The DWP's submissions to the First-tier Tribunal stated "as a result we owed him arrears of £5430 for period 03/04/15 to 08/09/16. This came to light when I asked ESA to take his pension into account";

- **16 April 2015**, pension 1 payment increased to £277.59, and pension 2 to £7.21;

- **17 April 2015**, Mr S telephone contact with DWP, the record of this call reads "TCFC [*telephone call from claimant?*] for taxable benefit letter – trf'd call to ESA enqs";

- **15 May 2015**, Mr S's pension 1 payment increases to £278.14, and pension 2 to £7.22;

- **9 September 2015**, Mr S's wife starts employment at an organisation called Pyramid of Arts. Payment dates were 15 October 2015 (£164 gross, £131.20 net); 20 November 2015 (£216 gross, £172.80 net); 20 December 2015 (£288 gross, £230.40 net); 20 January 2016 (£72 gross, £57.60 net); 20 February 2016 (£309.50 gross, £247.20 net); 20 March 2016 (£216 gross, £172.80 net); 20 April 2016 (£226 gross and net); 20 May 2016 (£210.12 gross and net); 20 June 2016 (£442.17 gross and net); 20 July 2016 (£469.71 gross and net); 20 August 2016 (£500.31 gross and net); 20 September 2016 (£90.27 gross and net); 20 October 2016 (£409.53 gross and net); 20 November 2016 (£295.29 gross and net); 20 December 2016 (£462.06 gross and net); 20 January 2017 (£466.14 gross and net);

- **24 September 2015**, entry in DWP records: "1202 BC, 9:20 S003 clrd – NC-". *In the present proceedings, the DWP explain this entry as follows: "an officer with the initials NC at Barnsley Benefit Centre (1202) took action to clear case control S003. This action did not change the rate of ESA(IR) awarded. Case control SOO3 covers a variety of possible actions";*

- **19 November 2015**, *Mr S issued with Form INF1;*

- **18 April 2016**, *DWP telephone contact with Mr S, described as "Gen Enq";*

- **9 May 2016**, entry in DWP records: "3591 9:35. Abdn, cc, LMC POB issued as requested. LMC". *In the present proceedings, the DWP explain this entry as follows: "made by an officer at Aberdeen Contact Centre (3591) to issue proof of benefit (POB) to the customer";*

- **14 July 2016**, West Yorkshire Pension Fund supply the DWP with details of Mr S's pension 1, to which he became entitled on 5 June 2014;

- **25 July 2016**, West Yorkshire Pension Fund inform the DWP that Mr S has an additional pension which "started" on 5 June 2014. At 25 July 2016, the annual payment was only £86.62;

- **7 September 2016**, *DWP records indicate that, on this date, they received evidence that Mr S was in receipt of an occupational pension, which was paid monthly in the gross sum of £7.22;*

- **8 September 2016**, *DWP records indicate that Mr S was issued with Form INF1;*

- **12 September 2016,** People in Action inform DWP that Mr S's wife employment with them commenced on 1 March 2015;

- **14 September 2016**, *DWP contact with Mr S, described as "Pay Q";*

- **5 December 2016**, *DWP records indicate that, on this date, Mr S was issued with 'Review of Occupational Pension (Reply Slip/Env)';*

- **25 January 2017**, Mr S interviewed under caution by DWP officials (see below for details of the interview);

- **3 February 2017**, Pyramid of Arts inform DWP that Mr S's wife employment with them commenced on 9 September 2015.

Observations on the evidence before the First-tier Tribunal

5. This is an appropriate point at which to mention deficiencies in the evidence supplied to the First-tier Tribunal by the DWP (i.e. the evidence described above apart from that in italicised text):

(a) none of the numerous letters referenced in DWP records were supplied to the First-tier Tribunal (nor have the DWP been able to produce them in the present proceedings);

(b) there were obvious inconsistencies and inaccuracies in the DWP's description of Mr S's ESA history. He was variously described as having been entitled to ESA(IR) from 2011 to 2017, entitled to ESA(C) only for 12 months in 2011/12, to have both a

current and non-current award of ESA(IR) in 2013 and also entitled to ESA(IR) from 2014;

(c) the change of circumstances leaflet supplied to the tribunal was not current in 2014-15;

(d) a significant quantity of evidence was not supplied at all;

(e) some of the evidence supplied incorporated decision-making codes that were unintelligible without explanation.

Mr S's interview under caution

6. On 25 January 2017, Mr S was interviewed under caution by DWP officers. I should refer to certain parts of the transcript of that interview the conduct of which has caused me some concern:

- Mr S: "I claimed contribution based Jobseekers Allowance in 2011 / official: 2011, yeah? / Mr S: yeah, contribution based Jobseekers Allowance, it's a different benefit I believe / official: It's the same benefit…It's just based on what contributions you've paid whilst you've worked, it was a single claim";

- Official: "it may be that there's two different start dates but you've been continuously in receipt of benefit" / Mr S: "have I?" / official: "since June 2011" / Mr S: "have I?"; official: "according to your records that we've got here" / Mr S: "that surprises me but go on" / official: "Well why does that surprise that…" / Mr S: "…er, as far as I'm aware the jobseekers, the contribution based seized [*presumably 'ceased'*] in 2012";

- Official: "so you reclaimed did you?" / Mr S: "I believe so" / official: "according to this system here, the prints I've got here, you've con, continuously in receipt since 10th of June 2011…there's no end date you see";

- Mr S: "…but presumably I wasn't in receipt of anything but in actually fact like the claim might have still been there but I wasn't in receipt of any benefit" / official 1: "Why?" / official 2: "Why is that?" / Mr S: "because presumably once the contributions ended I wasn't entitled to anything" / official: "No, because

you will then have been invited to claim income related and depending on your circumstances at that time";

- Mr S: "So they'll be another claim or so?" / official: "Cont, yes, potentially yes" / Mr S: "Okay" / official: "yes, you've not stopped your claim? You've not actually rung us up and said I am fit to work or you've not done anything like that have you?" / Mr S: "No but I thought the moment that my entitlement to something seizes [presumably 'ceases'] / official: "we would automatically then look into the income related side? We wouldn't just stop your…" / Mr S: "…didn't to happen that way" / official: "It did, it has";

- Official 1: "so have we got a, I mean I don't, have we got claim forms" / Mr S: "yeah, yeah" / official 1: "[A]? [*A refers to the name of official 2*]" / official 2: "No, unfortunately it was er…the, the form you see" / Mr S: "…I was expecting…yourselves to come with specific dates" / official 1: "yeah, well as I say, we can only go by what information we've got for you" / Mr S's solicitor: "Yeah and once that that period for, of a year seized [presumably 'ceased'] then they both did a joint claim for ESA";

- Official: "we were gonna ask you, yeah because between, even though it says there 10 6 11 and it's looking like it's been a continuous claim" / solicitor: "oh" / Mr S: "yeah" / official: "on here there is a gap of two years" / Mr S: "yes" / official: "…so that accounts for that" / Mr S: "absolutely it does" / official: "…I can only apologise because it's just unfortunate that our system as it, as it erm, deletes dates and information, it does it, it do, it can do it sometimes and I'm not making excuses, it can do it sometimes not in date order, it can pick a period in the middle…" / Mr S: "yeah but" / official: "so that clarifies that" / Mr S: "…obviously you know it, I'm sort of incandescent with rage about this because as far as I was concerned we had no claim with you…";

- Official 1: "so we were not sure if that was a gap in the, where the system has cleansed itself and just taken some random payments which it does happen" / official 2: "Erm, so that's why we're clarifying it with you…and what I didn't want to do at this stage was request your bank accounts, I just think it's too intrusive for me to go to your bank and get all the payments with that…" / official 1: "That's why we've asked you to come in" / official 2: "…do you not agree with, I don't think you'll like it if I went to the bank and got your bank

accounts would you?" [*I note that, by this stage, the DWP had already required Mr S's pension provider and his wife's former employer to supply financial details; it is not clear to me why Mr S being called for an interview under caution was presented as an act of consideration*];

- Mr S: "So I must have completed a claim form" / official: "yeah" / "otherwise the benefit couldn't have gone into payment" / official: "right" / Mr S: "And I must, I, I, unless I suffered the most terrible brain fart, I cannot see how I didn't declare the income at the time" / official: "right" / Mr S: "so I mean one of the things I would like you to do is to produce my claim form from 2014" / official: "I'd love to be able to do that for you" / Mr S: "yeah, even though you can't" / official 1: "that's the problem unfortunately" / official 2: "no we can't";

- official 1: "we, we get frustrated with it as well cos most claims are taken over the phone now you see"; Mr S: "well" / official 1: "you see sometimes the voice recordings" / official 2: "yeah" / official 1: "we don't have them anymore, they get erased you know";

- official 1: "we don't keep them" / Mr S: "because" / official 2: "we don't keep them all the time, you know" / official 1: "it's very, it is frustrating because we could sit down and actually go through like a, a, a pi, history of what your claims have been" / Mr S: "yeah" / official 1: "and what you've said on the forms and things but unfortunately if they're not" / Mr S: "so" / official 1: "available we can't" / Mr S: "I mean" / official 1: "we can only go by what's on the screens you see" / Mr S: "if, if, I mean I'm not, honestly I'm not trying to be funny but you don't have a claim form the, for the period we know that a mistake, one mistake was made on the payment of my claim form so what you're actually saying, you don't actually have any proof that I didn't declare" / official 1: "no, not at this stage" / Mr S: "oh for Christ's sakes…why am I in this situation for God's sake" / official 1: "well we need to, we need to make sure that what we are paying you is correct that's what";

- Mr S: "in a situation where the last god knows how many weeks I've had a letter from the fraud team, their strong suggestion is that I've done something illegal or potentially illegal and I haven't, oh it's driving me crazy" / official: "yeah and I can, I can only empathise with that, I, we, as I've tried to explain, it's out of our hands. We, we're given the information and we have to deal with the information and we're only allowed to deal with it in what, in a certain way so any letters we send out it's that, that's the letter goes to everybody";

- Official 2: “yeah we…can’t unfortunately send another letter out, you know” / official 1: “er, we can’t send a nicer note out to you particularly you see”;
- Official 1: “right March, when did you, now wait a minute here, yeah March ’15. There is some reference in our notes regarding your er, March 15 ‘er, been sent in for partner after wage details in March ’15 being sent in for partner” / Mr S: “well there you go” / official: “yeah, so that clears that, you see I wanted to clear it with you because we haven’t taken it into account…”
- official: “so it would appear that you have contacted…there is a note…to say that you’ve rung us about your wife working” / Mr S: “…I can only assume that I’ve done the right thing because that’s the sort of person I am and I would’ve reacted…you know in a timely fashion to the instructions I was given”;
- official: “the one thing that we do know is that your benefits didn’t change…after we received that information from you” / Mr S: “…I don’t know…yeah I’m presuming they didn’t go down I mean…even if they, even if they did go down I, you know it would’ve been something that was, you know”;
- official: “…so alright, okay so basically, as far as you’re concerned you, you’ve told us about everything, all these changes” / Mr S: “I believe so” / official: “and written it down yeah” / Mr S: “I’m, I’m absolutely certain” / official: “yeah because wh, when they do sent you, you know the uprating letters out every year…we send a leaflet about this, you know and which tells you to declare all your” / Mr S: “What” / official: “changes” / Mr S: “is an uprating letter?” / official: you know when you, every, around April time when your money goes up slightly, every year…they send it you saying, your money, your money has now changed” / Mr S: “but does, does it, does it list what” / official: “it lists changes to declare as well as the amount you know…it’s going up by, you know”.

Observations on Mr S’s interview under caution

7. For anyone, but perhaps especially for an older person such as Mr S, an interview under caution about a benefits discrepancy is likely to be a stressful experience. Competent planning of such an interview will go some way to easing an interviewee’s anxiety. It also makes it more likely that the interview will generate accurate evidence. However, the transcript of Mr S’s interview under caution reveals two particularly worrying shortcomings:

(a) the interviewers were clearly unaware of the correct benefit history, as was shown by their persistent initial assertions that Mr S had been in continuous receipt of ESA since 2011. As the transcript shows, this threw Mr S into a state of some confusion;

(b) in response to Mr S's reasonable request for an explanation for apparent gaps in the DWP's records, he was informed that the DWP computer system randomly 'cleanses' itself of data. The DWP now concede that this was entirely incorrect but the fact that the interviewers seem to have believed it to be so must have increased the chances of explanations that might have favoured Mr S being left unexplored.

DWP decision-making

8. On 13 April 2017, the Secretary of State superseded Mr S's award of ESA(IR) which resulted in an overpayment of that benefit. That decision was revised (replaced) on 12 July 2017 by a decision that, from 29 September 2014 to 26 January 2017, Mr S was overpaid ESA(IR) because his award failed to take into account both his occupational pension income and his wife's earnings from part-time employment. On 13 July 2017, the Secretary of State made a separate revision decision that, for the period 26 September 2014 to 13 November 2014, Mr S was overpaid ESA(IR) in the sum of £365.96 on account of further pension income not previously taken into account.

9. On 14 July 2017, the Secretary of State, revising a decision of 9 June 2017, decided that Mr S was liable to repay the ESA(IR) overpayment generated by the decisions described above. The Secretary of State found that Mr S had failed to disclose two relevant changes of circumstances namely his receipt of an occupational pension and his wife's income from the later of her part-time jobs. This decision rendered Mr S liable to repay a reduced overpayment of ESA(IR) and appears to have been taken because the DWP accepted that, on 25 March 2015, Mr S informed them that his wife had started part-time work with People in Action although, according to the DWP, he failed to inform them of his wife's subsequent part-time employment with Pyramid of Arts so that he remained liable to repay that part of the overpayment which related to his wife's earnings from Pyramid of Arts.

Proceedings before the First-tier Tribunal

10. Mr S's notice of appeal to the First-tier Tribunal, dated 26 July 2017, argued:

(a) he claimed ESA(C) in 2011, which ended after 12 months in the normal way;

(b) the DWP wrongly stated that his ESA(C) remained 'dormant' once he had received that benefit for 12 months. Mr S believed that the claim 'ceased completely' and failed to see how his 2014 ESA award could have been made without some sort of 'prompt' from him to the DWP;

(c) he 'renewed' his ESA claim in 2014 and '"I believe I notified them and told them all of my details";

(d) it was unrealistic for the DWP to argue that he should have remembered the details of a leaflet supplied in 2011 in connection with his ESA(C) claim;

(e) the DWP should have been able to supply correspondence in connection with his 2014 award but had failed to do so;

(f) originally, the DWP claimed that failed to disclose his wife's part-time employment but they had not checked their records properly. Once the DWP did so, they accepted that he had disclosed his wife's employment income.

11. The First-tier Tribunal held a hearing, at which Mr S gave oral evidence and a Presenting Officer represented the Secretary of State. The Tribunal allowed Mr S's appeal in part in that it decided that the portion of the overpayment relating to his pension income was not recoverable.

12. The First-tier Tribunal's decision notice and statement of reasons included the following findings and other conclusions:

(a) the tribunal found Mr S's evidence credible (i.e. it believed him);

(b) Mr S's award of both income and contribution-based ESA became 'dormant' on 12 June 2012 when the contribution-based element expired but "the claim was not closed at that time" and "came back into payment on 26 September 2014";

(c) it was reasonable for Mr S to assume in 2012 that his ESA had ceased. He did not realise that "an underlying entitlement to income-related ESA may lie dormant and be put back into payment upon a change of circumstances";

(d) Mr S was not paid ESA from 12 June 2012 because his household income exceeded the income-based allowance's "threshold entitlement";

(e) in 2014, Mr S signed an ESA form of some unknown type at a Jobcentre in Leeds. Mr S was told that no such form was retained by the DWP; and the DWP Presenting Officer "admitted that the Department did not keep forms all the time". In completing this form, Mr S must have must some kind of income declaration which involved disclosure of his pension;

(f) it was unclear from DWP records how ESA came back into payment but, as the DWP Presenting Officer accepted, some information must have been provided in order to review Mr S's ESA award;

(g) as was ultimately confirmed by DWP records, in March 2015 Mr S disclosed by telephone that his wife was working for an organisation called People in Action. That employment had ended by 20 November 2015;

(h) Mr S's wife started to work for Pyramid of Arts on 9 September 2015;

(i) Mr S did not disclose the material fact that his wife had started work at Pyramid of Arts. While DWP records about Mr S showed an entry for 24 September 2015, the DWP Presenting Officer did not know what its associated coding meant. Whatever happened on 24 September 2015, it was not Mr S's disclosure of his wife's employment at Pyramid of Arts. Had it been such a disclosure, further entries would have been triggered but the next entry in DWP records was not made until 9 May 2016;

(j) Mr S had been under a duty to disclose the material fact of his wife's employment by Pyramid of Arts because he was aware "that the level of income was relevant";

(k) the DWP failed to establish that Mr S was under a duty to disclose his pension income. They did not supply "the applicable leaflet" imposing such a duty. The sample leaflet supplied was published in 2014 and could not have been issued to Mr S when he claimed ESA in 2011. The DWP further failed to establish that any subsequent leaflet imposing disclosure obligations on Mr S was issued.

13. In the present proceedings, the DWP's submissions included a witness statement given by the Presenting Officer who attended Mr S's First-tier Tribunal hearing. This included the officer's reasons for being unable to explain to the tribunal the meaning of DWP decision codes referred to in DWP records:

> "Whilst I have an understanding of DWP 'jargon' used in notepads, it is, in the main, just that, and despite a degree of universality, various officers do use different acronyms, abbreviations etc., some of which I am unfamiliar with. It would, therefore, be potentially misleading for me to speculate as to the meaning of some entries, and could severely compromise the quality, and reliability, of the advice given to the tribunal."

Grounds of appeal

14. Mr S applied to the Upper Tribunal for permission to appeal against the First-tier Tribunal's decision. Upper Tribunal Judge Jacobs directed a hearing of the application, and he also directed that the Secretary of State be represented at the hearing.

15. Following the hearing, I granted Mr S permission to appeal on the following grounds:

> "Arguably, the First-tier Tribunal erred in law by giving inadequate reasons for its finding that Mr S's 2011 award remained dormant following the expiry of his ESA contributory allowance and was then revived, or reimplemented, in 2014. The case as presented to the Tribunal was that the 2011 award was of a contributory allowance…the Welfare Reform Act 2007 clearly provides for entitlement to a contributory allowance to cease once it has been in payment for the relevant maximum number of days (typically 365 days). If the 2011 award was not also comprised of an income-related allowance, on what legal basis could the ESA award both be (a) revived without a new claim being made, and (b) apparently transformed into a joint-claim award of ESA? These matters were not addressed in the First-tier Tribunal's reasons. The reasons simply state that this is a feature of ESA that is poorly understood by many claimants.
>
> Arguably, the First-tier Tribunal erred in law by failing adequately to investigate the whereabouts of the claim form / other form, which it found to have been completed by Mr S in order to 'reimplement' his 'dormant' ESA award in 2014.

> Arguably, the First-tier Tribunal erred in law by failing to require the DWP to explain the potentially relevant but 'untranslatable' 2014 screen print entry."

Legislative framework

Contributory and income-related ESA

16. The general rule in section 1(1) of the Social Security Administration Act 1992 is that no person is entitled to any benefit unless the person duly claims the benefit or is treated by regulations as having claimed it.

17. Section 1(1) of the Welfare Reform Act 2007 provides that ESA shall be payable in accordance with the provisions of Part 1 of that Act. Section 1(2) provides that, generally, a claimant is entitled to ESA if the basic conditions are met, which I need not describe, and also the criteria referred to in section 1(2), which include the first and second conditions in Part I of Schedule 1 to the Act (conditions relating to national insurance) or, alternatively, the financial conditions referred to in Part 2 of that Schedule. The connected allowances are referred to in the Act, respectively, as a contributory allowance (ESA(C)) and an income-related allowance (ESA(IR)) (section 1(7)).

18 Section 1A of the 2007 Act is entitled "Duration of contributory allowance". Section 1A(1) provides that the "period for which a person is entitled to a contributory allowance" shall not exceed the relevant maximum number of days. The relevant maximum number of days is typically 365 (section 1A(2)). Section 24(1) provides that, in Part 1 of the 2007 Act, "entitled" is to be "construed in accordance with (a) the provisions of this Act…".

19. Section 6 of the 2007 Act deals with claimants who are entitled to both a contributory allowance and an income-related allowance of ESA. In such cases, the amount payable is taken as consisting of two elements. The Upper Tribunal has held that, if a claimant is entitled to both a contributory allowance and an income-related allowance, it is not necessary to make separate claims for each allowance, and the legislation does not in fact contemplate a claim for only one element of ESA (*LH v Secretary of State* [2015] AACR 14).

20. In *LH* the Upper Tribunal agreed with the Secretary of State that:

> "14… if a person already has an award of the contributory allowance and wishes the total amount of employment and support allowance to be increased

through an award of the income-related allowance, he or she needs to make an application for supersession under section 10 of the Social Security Act 1998, rather than making a new claim".

21. In *MC v Secretary of State* [2014] AACR 35 the Upper Tribunal decided that where entitlement to a contributory allowance ceases, by virtue of a claimant having been entitled for the maximum number of days (typically 365), this does not of itself terminate the award of ESA. Termination is performed by way of a separate decision revising or superseding the original ESA award decision.

22. For the purposes of the income-related allowance, Part 2 of Schedule 1 to the 2007 Act, paragraph 6(2), provides: "where the claimant is a member of a couple, the income and capital of the other member of the couple shall, except in prescribed circumstances, be treated…as income and capital of the claimant".

Overpayments and their recovery

23. Section 71(1) of the Social Security Administration Act 1992 empowers the Secretary of State to recover an overpayment of benefit where it is determined that any person has misrepresented or failed to disclose any material fact in consequence of which the overpayment arose. The amount recoverable is that which would not have been made but for the misrepresentation or failure to disclose.

24. Before the First-tier Tribunal, the Secretary of State argued that Mr S failed to disclose a material fact. It has been held that a person cannot fail to disclose a material fact unless he is under a duty to disclose that fact (*R(IS) 9/06*). Duties to disclose are imposed by regulation 32 of the Social Security (Claims and Payments) Regulations 1987 and are of two types:

(a) a duty to disclose any matter in respect of which the Secretary of State has given unambiguous disclosure directions;

(b) a duty to notify any changes of circumstance that a claimant might reasonably be expected to know might affect continuance of entitlement to benefit, including the amount of benefit.

25. Separately, under section 74(1) of the Social Security Administration Act 1992 the Secretary of State is empowered to recover the amount of any overpaid ESA(IR) which would not have been paid had a payment of prescribed income been made on the prescribed date. Dates and income, for this purpose, are prescribed in regulations and it is my understanding that the parties accept that Mr S's pension income, to the extent that it constituted arrears paid after the due date, fell within section 74(1).

Proceedings before the Upper Tribunal

26. Case management directions for the hearing of this appeal made it clear to the parties that, if Mr S's appeals succeeded, I might re-make the First-tier Tribunal's decision rather than remit this case to that tribunal for re-hearing. The parties were required to prepare their cases for the hearing on that basis. With the concurrence of both parties and in the light of current Government guidance regarding the need to minimise activities that heighten the risk of transmitting the Covid-19 virus, the hearing was conducted by telephone. The hearing and the form in which it was to take place had been notified in the 'daily courts list' along with information telling any member of the public or press how they could observe the hearing. No member of the public or press sought to attend the hearing.

DWP's permission submissions

27. The Secretary of State's written submission for the permission hearing, as directed by Upper Tribunal Judge Jacobs, asserted that, in June 2011, Mr S claimed both ESA(C) and ESA(IR). However, upon the expiry of the 365-day maximum period of entitlement, Mr S's award "ended, and payments ceased" although Mr S remained entitled to National Insurance credits. While credits are not an award of benefit, the fact that Mr S was entitled to credits meant that "the case remained 'live' on the [DWP] computer system in order for credits to be awarded and to ensure the entitlement conditions for credits were maintained". If an award of benefit is terminated, the Secretary of State submitted that, as a matter of law, the award cannot 'lie dormant' so that it is capable of being revived subsequently. In such circumstances, a new claim is required.

28. The Secretary of State argued that the DWP were very unlikely, in 2014, to have started to pay ESA(IR) without Mr S having provided them with some information. Mr S probably completed form ESA3, which is used "for an application for supersession of an award of ESA(C), or as a claim for ESA(IR) in time-limiting cases" as a means of claiming and establishing entitlement to the income-related component of ESA. Such a form "would have required information about financial conditions". I note that a sample Form ESA3 was not supplied by the DWP until after the final hearing of this appeal.

DWP's appeal submissions

29. Mr Redpath, for the Secretary of State, submits that the First-tier Tribunal erred in law in holding that Mr S's 2011 award of ESA remained in abeyance, following the exhaustion of his entitlement to a contributory allowance, so that the award could then revive without a fresh claim being made. There was no legislative authority for

such a proposition. Nevertheless, Mr Redpath argues that the First-tier Tribunal's final decisions on Mr S's appeals were essentially correct.

30. The DWP inform the Upper Tribunal that all clerical records relating to Mr S's 2011 ESA(C) award were destroyed under the Department's document 'retention' policy. Similarly, there is little direct evidence available about events in 2014 in consequence of which Mr S began to receive payments of ESA(IR). However, the DWP submit that ESA(IR) would not have been put into payment without Mr S making a claim as part of which he must have been asked to provide material information about his and his wife's circumstances.

31. The DWP submit that the payments of ESA(IR) made to Mr S from 2014 must be taken to have been made with lawful authority. He must have made an ESA claim in 2014. The DWP further submit that Mr S's award of ESA(IR), while it included a couple's element, was not a joint claim. While certain DWP records describe a joint ESA claim, "this is because ESA claims and awards are maintained on the same computer system as for JSA, which allows for joint claims".

32. The DWP also submit that they cannot supply an explanation of the various codes used in DWP notepad entries / screen prints. Apparently, DWP Operations advise that it is:

> "unable to supply the list of acronyms and abbreviations as requested. This is due to the way they are maintained on the DWP's computer system. Lists are held on an alphabetical basis and are lengthy. The lists are subject to change as new ones are added and others deleted."

33. The DWP cannot supply the truncated 'notepad' entry for 5 November 2014 because "the number of entries on the notepad screen is limited, and earlier entries have to be deleted once that limit is reached and new entries need to be made". The DWP also explain that a reference to an entry having been 'archived' means that it has been deleted, which is a misleading use of language in my view.

34. The DWP inform the Upper Tribunal that, contrary to assertions made during Mr S's interview under caution, DWP computer systems do not of their own volition delete claimant data:

> "the computer system does not randomly delete data as was asserted. The system does advise that certain elements may have been archived (such as notepad entries), and that a full print out may be obtained, as has been done in this case. It is not known why the assertion was made during the interview under caution."

35. The DWP also inform the Upper Tribunal that "the assertion that there was more than one annual uprating letter was a regrettable error". In relation to the 2014 award of ESA(IR), only one uprating letter was issued on 26 February 2015. No uprating letter was issued in 2016 because the amount of Mr S's ESA(IR) was not apparently uprated in that year.

36. Regarding DWP staff practice in recording claimant contacts, the DWP inform the Upper Tribunal that, at the relevant dates on this appeal, staff were instructed to record "the reason/action taken".

37. Despite the evidential deficiencies conceded by the DWP, Mr Redpath argues that Mr S must have made a fresh claim for ESA in 2014, which resulted in the award of ESA(IR). The claim form that Mr S must have completed would have required him to provide information about his wife's employment income as well as any current or anticipated pension income. That would also have put him on notice of the need to disclose any subsequent receipt of pension income by himself or employment income by his wife. While the DWP accept that Mr S did inform them of his wife's first part-time job, they argue that he could not have informed him of her subsequent job. Had he done so, his award would have been adjusted accordingly. Similarly, the DWP argue that Mr S could not have disclosed his pension income because, had he done so, his award would have been adjusted. That, essentially, is the DWP's case on the facts.

38. Mr S's ESA(IR) award was properly superseded because "it is sufficient that the Decision Maker has gone through the mental process required for a supersession" (*CPC/2014/2011*). The Decision Maker in Mr S's case may have confused the date of the decision being superseded but that was not a material error. Further, the overpayment partly arose under section 74 of the Social Security Contributions and Benefits Act 1992 which does not require revision or supersession of an award (*CIS/4316/1999*) nor any failure to disclose on the part of a claimant.

39. In post-hearing written submissions, the DWP argue that, should Mr S's appeal succeed, the Upper Tribunal should remit his case to the First-tier Tribunal rather than re-make that tribunal's decisions on Mr S's appeals against the Secretary of State's decisions. This is because further fact-finding is likely to be required. The post-hearing submissions and evidence (Form ESA3) were supplied to Mr S but he had no further comment to make.

Mr S's case

40. Mr S's submissions largely focus on the merits of his case that he always disclosed all information that he was asked to disclose. He candidly admits that he

does not understand the distinction between, or relevance of, a new claim as opposed to supersession of an existing award and is content for me to make whatever ruling on that point I consider correct.

41. At the hearing before myself, Mr S was adamant that, in 2014, he made a written claim for ESA rather than a telephone claim. He visited a local Jobcentre and was supplied with a form. Mr S says he left the matter with the Jobcentre to deal with. He could not now remember in any detail the contents of the form but, if it asked him about his pension arrangements, he would have disclosed them although he pointed out that when he claimed (or thought he claimed) ESA in early 2014 his occupational pension was not in payment.

42. At the hearing, Mr S argued that he disclosed his receipt of pension income to the DWP during a telephone conversation which he thought took place around the time at which his pension began to be paid, which was in November 2014. He was less certain about whether he disclosed his wife's second part-time job but thought he recollected doing so over the telephone. His memory may have merged two separate disclosure conversations into one since both would have been about his wife's part-time employment with similar organisations. Overall, he thought it was likely that he had disclosed his wife's second job. Why, he asked, would he have disclosed one job but not the other? He was not the sort of person who would seek to defraud the DWP as was shown by his ignorance of the fact that, once his wife ceased to be paid contributions-based JSA, he was underpaid ESA (because the DWP continued to assume that his wife's income included payments of JSA(C)), as well as his incredulity at receiving an arrears cheque of some £5,000. Rather than cashing the cheque straight away, he contacted the DWP because he thought they must have made a mistake.

43. Mr S draws my attention to deficiencies in the DWP's record-keeping. In the light of those deficiencies, it is hardly surprising, he says, that the DWP failed to note and act upon his income disclosures. Mr S bolsters this argument by reference to the Secretary of State's belated acceptance that he did notify one of his wife's part-time jobs.

Conclusions

Why the First-tier Tribunal erred in law

44. The Secretary of State submits that the First-tier Tribunal erred in law because it mistakenly assumed that an award of contributions-based ESA could lie dormant until such time as it was resurrected through a claimant satisfying the criteria for award of the income-related allowance.

45. As I understand it, the Secretary of State argues that once Mr S exhausted his 365-day entitlement to ESA(C), his ESA award ceased to exist. However, the Upper Tribunal has held that an award of only ESA(C) does not, in those circumstances, simply disappear. A formal decision, by way of revision or supersession, is required in order to terminate the award of ESA itself even though, by this point, the claimant is not entitled to the contributions-based allowance (*MC v Secretary of State* [2014] AACR 35). And, if a person entitled to ESA(C) wishes to receive the income-related allowance, that is achieved not by making a new claim but through revising or superseding the original ESA decision awarding only the contributions-based allowance (*LH v Secretary of State* [2015] AACR 14).

46. Applying the above case law, the most likely explanation for Mr S starting to be paid ESA(IR) in 2014 is that, in 2012, no formal step was taken to terminate his 2011 award of ESA (contributions-based only), and in 2011 the award was superseded so as to award him the income-related allowance of ESA. Mr S is sure that he made a fresh claim for ESA(IR) in 2014. However, Mr Redpath informs me that the DWP use a single form to deal with the consequences of exhaustion of the contributions-based allowance after 365 days of entitlement. Form ESA3 may be used either to apply for supersession of an award of ESA(C) only so as to award ESA(IR) or to make a fresh claim on which it is anticipated that only the income-related allowance might be awarded. On Mr S's case, he completed a claim form in 2014 but he was not to know that the form in question had the dual purpose described by Mr Redpath.

47. However, the question whether Mr S was awarded ESA(IR) in 2014 through supersession of his 2011 award of ESA(C) or through the making of a fresh ESA entitlement decision does not matter for present purposes, as I shall explain in a moment.

48. The First-tier Tribunal did not explain its finding that Mr S's award of ESA remained 'dormant' using the language of revision or supersession, and its description of an 'underlying' entitlement to ESA(IR) was incorrect because this is not the case of an entitlement to one benefit being masked by entitlement to another. Nevertheless, I am not persuaded that the tribunal materially erred in law by misdirecting itself as to the legal nature of Mr S's ESA award. In substance, the tribunal reasoned that no formal step had been taken to bring the 2011 ESA award to an end and that, in consequence, it remained liable to be altered, through a formal decision, so as to award Mr S the income-related allowance. That reasoning process was consistent with the Upper Tribunal case law referred to above.

49. However, I am satisfied that, in other respects, the First-tier Tribunal's decision involved material errors on points of law:

(a) as I have explained, certain DWP evidence took the form of screen prints / notepad entries that used incomprehensible codes. Since questions of disclosure of information were important in this case and the DWP had belatedly accepted that Mr S did disclose at least one of his wife's jobs, the tribunal should have required the DWP to explain what these codes meant and its failure to do so deprived Mr S of a fair hearing;

(b) the tribunal found that the form signed by Mr S at a Leeds Jobcentre in 2014 must have required him to make some type of income declaration. Given the potential significance of such a form, the tribunal erred in law by failing to consider whether it was necessary, in order for Mr S to have a fair hearing, to require the DWP to supply, if not the form itself, then a copy of the type of form in question in use in 2014;

(c) as the history of these proceedings demonstrates, much relevant DWP-held documentation was not supplied to the First-tier Tribunal. Of itself, this was an error of law in the tribunal's decision albeit one whose genesis lay in the DWP's failure to discharge its disclosure obligations under rule 24 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008. Since the tribunal did not consider whether to adjourn and direct further DWP disclosure despite clear gaps in and questions raised by the documentary evidence that was disclosed, the tribunal erred in law (*EN v Secretary of State* (ESA) [2015] UKUT 670 (AAC).

50. The First-tier Tribunal's decisions concerning Mr S's liability to repay overpaid ESA involved errors on points of law and I set them aside. Mr S does not dispute the First-tier Tribunal's decisions insofar as they concerned his entitlement to ESA.

Upper Tribunal's remaking of the First-tier Tribunal's decisions

51. The Secretary of State's post-hearing submissions argue that, were Mr S's appeals to succeed, the Upper Tribunal should not re-make the First-tier Tribunal's decisions. Instead, it should remit this case to the First-tier Tribunal because further findings of fact are likely to be required. While that is the most appropriate course in many cases, in my judgment it is not so here. Upper Tribunal case management directions made it clear to the parties that they should prepare their cases for the final hearing on the basis that the Upper Tribunal might ultimately re-make the First-tier Tribunal's decisions. The parties have had a fair opportunity to present their cases on the facts. I am also conscious of Mr S's need for closure of this matter and I accept what he told me at the hearing of the worry and anxiety caused by having this matter 'hanging over' him. If the Upper Tribunal can fairly determine the merits of Mr S's appeals against the Secretary of State's decisions, it should do so rather than further prolong proceedings by remitting this matter to the First-tier Tribunal.

52. I said above that, for the purposes of this case, it does not really matter whether, in 2014, Mr S made a new claim for ESA or the Secretary of State superseded his 2011 ESA award so as to award the income-related component. I now explain why.

53. The principal issue is whether Mr S failed to disclose material facts in connection with his award of ESA(IR). Case law holds that a person cannot fail to disclose a material fact unless he is under a duty to disclose the fact (*R(IS) 9/06*). There are two ways in which such a duty may arise. Firstly, where the Secretary of State has given an unambiguous instruction to the claimant to disclose the material fact and, secondly, where the fact is a change of circumstances that a claimant might reasonably be expected to know might affect continuance of entitlement to benefit including the amount of benefit. There is no evidence that events connected with Mr S's award of ESA(C) in 2011 gave rise to a duty to disclose financial information for the purposes of entitlement to ESA(IR). In particular, there is no evidence that, in 2011, Mr S was instructed to disclose facts relevant to entitlement to ESA(IR) which is not surprising since, at that time, entitlement to the income-related component was not in issue nor is there any evidence that, in the light of Mr S's 2011 award of the contributions-based component, he might reasonably have been expected to know that certain changes of circumstances might affect entitlement to the income-related component of ESA being a component to which he was not at that time entitled.

54. In other words, 2014 was a blank slate so far as Mr S's duties to disclose material facts in connection with ESA(IR) were concerned. The nature and extent of any such duty would not vary depending on whether, in 2014, Mr S was paid ESA(IR) as a result of a new ESA claim or through supersession of the award of ESA(C) made in 2011. In either case, the nature and extent of any duties to disclose would be a function, in respect of the first disclosure obligation, of any disclosure instructions given to him in connection with the award of ESA(IR) and, in respect of the second disclosure obligation, all circumstances relevant to the question whether Mr S might reasonably be expected to know that particular changes of circumstance might affect his entitlement to benefit.

55. The relevant timeframe in this case runs from 2014 to 2017. I set out below the key events and connected documentary evidence in tabular form:

Date	Event	Documentary evidence
5 June 2014	Mr S becomes entitled to pension 1 and pension 2 (first pension payments	Letters to DWP from pension provider dated 14 and 25 July 2016

	not made until November 2014)	
16 June 2014	Mr S awarded ESA(IR)	DWP screen print
4 November 2014	DWP 'capture' unspecified evidence about Mr S's wife	DWP screen print
5/6 November 2014	JSA section request 'closure' of Mr S's ESA award on the basis that his partner had claimed JSA. However, on 6 November 2014 an internal DWP email records that Mr S's wife's JSA claim is contributions-based only so that his ESA continues but taking into account his wife's JSA as income	DWP records
4 or 6 November 2014	Mr S issued with Form INF1 which, as I understand it, is a form used to 'disagree' with a DWP decision	DWP screen print
6 November 2014	DWP 'capture' unspecified evidence about Mr S's wife	DWP screen print
6 November 2014	Telephone conversation between Mr S and DWP official, lasting 12 minutes	DWP screen print (recording of call erased)
14 November 2014	Mr S receives his first payments from pension 1 (£274.85 per month) and pension 2 (£7.13 per month), including arrears accrued since 5 June 2014	Letters from pension provider to DWP dated 14 July 2016 (pension 1) and 25 July 2016 (pension 2)
26 February 2015	Mr S issued with ESA(IR) annual uprating letter	DWP screen print

1 March 2015	Mr S's wife commences part-time employment at People in Action	Records supplied to DWP by People in Action on 12 September 2016
25 March 2015	DWP telephone contact with Mr S, described as "Cust called will send in wife's 1st wage slip when she receives it – coming off JSA", duration of call 8 minutes	DWP records
2 April 2015	Mr S's wife's award of JSA(C) terminates. However, Mr S's award of ESA(IR) mistakenly continues to include payments of JSA(C) within household income	DWP screen print
16 April 2015	Annual increase in amount of Mr S's pensions	Letter from pension provider to DWP
17 April 2015	Mr S telephone contact with DWP officials described as a request for a 'taxable benefit letter'; the call was transferred to 'ESA enqs'	DWP screen print
9 September 2015	Mr S's wife commences part-time employment at Pyramid of Arts	Records provided to DWP by Pyramid of Arts on 3 February 2017
24 September 2015	DWP 'took action to clear case control S003'; the nature of that action is unknown	DWP screen print
19 November 2015	Mr S issued with Form INF1	DWP screen print
18 April 2016	DWP telephone contact	DWP screen print

	with Mr S described as 'Gen Enq'	
9 May 2016	Mr S issued with 'proof of benefit'	DWP screen print
14 July 2016	West Yorkshire Pension Fund supply DWP with details of pension 1	Pension Fund letter dated 14 July 2016
25 July 2016	West Yorkshire Pension Fund supply DWP with details of pension 2	Pension Fund letter dated 25 July 2016
8 September 2016	Mr S issued with Form INF1	DWP screen print
12 September 2016	People in Action supply DWP with details of Mr S's wife's part-time employment	Records supplied by People in Action
14 September 2016	DWP contact with Mr S described as 'Pay-Q'	DWP screen print
5 December 2016	DWP issue Mr S with "Review of Occupational Pension (Reply Slip/Env)	DWP screen print
25 January 2017	Mr S interviewed under caution by DWP officials	Interview transcript
26 January 2017	Mr S ceases to be paid ESA(IR)	DWP screen print
3 February 2017	Pyramid of Arts provide DWP with details of Mr S's wife's part-time employment	Records supplied by Pyramid of Arts dated 3 February 2017
26 July 2017	Mr S's notice of appeal to the First-tier Tribunal against the DWP's decision	Notice of appeal

56. I make the following observations on the evidence:

(a) even after the supply of significant new documentary evidence during the present proceedings, much DWP record-keeping has shown to be inadequate. The DWP have not been able to supply copies of any correspondence with Mr S nor a copy of the form which both the DWP and Mr S say he must have completed in 2014 and which led to him being awarded ESA(IR). The descriptive records made of telephone contacts with Mr S and actions taken on his ESA award are, for the most part, either too general to disclose the substance of the conversation or use an inexplicable descriptive coding;

(b) I cannot identify any material respect in which Mr S's evidence is contradicted by the documentary record. Even during the inadequately conducted interview under caution when Mr S was presented with factually incorrect claims by the interviewing officers about the duration of his ESA(IR) award and DWP computerised record-keeping (the 'cleansing' point), he made no attempt to modify his version of events or embroider the facts as might be expected in the case of a claimant who sets out to mislead or cover his tracks. Like the First-tier Tribunal, I find Mr S's evidence to be credible;

(c) there were three key events/dates in this case: 14 November 2014, when Mr S started to receive occupational pension payments; 1 March 2015, when Mr S's wife commenced employment with People in Action; and 9 September 2015, when Mr S's wife commenced employment with Pyramid of Arts. While the nature of Mr S's contacts with the DWP are, for the most part, not revealed by the documentary evidence, those contacts, as well as DWP actions on Mr S's ESA(IR) award, were clustered around those key dates or the dates in April when Mr S's pension payments were subject to annual increases. The sole telephone contact in 2014 was on 6 November, which was eight days before Mr S received his first pension payments. The DWP belatedly conceded that Mr S notified them that his wife took up part-time employment with People in Action in March 2015 (see the telephone contact on 25 March 2015). Mr S's occupational pension payments were increased on 16 April 2015 and, on the following day, Mr S made telephone contact with the DWP, that contact being described as a request for a taxable benefit letter. No further action on Mr S's claim is recorded until 24 September 2015 on which date some unknown action was taken. That was 15 days after Mr S's wife commenced part-time employment with Pyramid of Arts. The next recorded contact between Mr S and the DWP was on 18 April 2016, described in DWP records as a 'Gen Enq'. That contact was made shortly after Mr S's occupational pension payments were subject

to annual uprating and was followed, on 9 May 2016, by the DWP issuing a 'proof of benefit' letter.

57. I make the following findings of fact:

(a) in 2014, Mr S was awarded ESA(IR) in response to him completing Form ESA3 which, as explained above, has been designed for claimants whose entitlement to ESA(C) has been exhausted but who might be entitled to ESA(IR). This is consistent with both Mr S's evidence that, in 2014, he completed what he thought was an ESA claim form at a Leeds Jobcentre and with the DWP's argument that Mr S's award of ESA(IR) must have been preceded by him completing some kind of form which sought details relevant to ESA(IR);

(b) Form ESA3 conveyed a clear and unambiguous instruction to Mr S to supply details of his forthcoming occupational pension payments as well as certain information related to his wife's employment including the hours worked. However, Form ESA3 did not require Mr S to supply information about his wife's earnings. While the form sought information about hours worked by a claimant's partner, it did not seek information about a partner's earnings from employment;

(c) Mr S did not breach his duty to disclose material facts relating to his occupational pension. Given Mr S's credibility, it is more likely than not that he provided details of his anticipated occupational pension when completing Form ESA3. But, even if he did not, I find that he notified the DWP on 6 November 2014 that he was about to start receiving his occupational pension. On that date, which fell eight days before Mr S received his first pension payments, Mr S contacted the DWP by telephone. Given the way in which Mr S's telephone contacts with the DWP were clustered around the dates of the key events in this case regarding pension payments and Mr S's wife's employment, it is more likely than not that the purpose of Mr S's 6 November 2014 telephone contact was to provide the DWP with details of his imminent receipt of occupational pension payments. The DWP argue that Mr S could not have disclosed his occupational pension because, had he done so, his ESA(IR) would have been adjusted accordingly. In essence, this is an argument that the DWP never make mistakes. However, the history of Mr S's ESA claim disclosed a number of significant mistakes in the handling of Mr S's ESA award all of which the DWP now accept as such. The DWP initially argued that Mr S had been continuously in receipt of ESA(IR) since 2011 but they now accept that his award of ESA(IR) began in September 2014. The DWP initially contended that Mr S failed to disclose his wife's employment with People in Action but, by the mandatory reconsideration decision-making stage, the DWP accepted that; during the currency of his award of ESA(IR), they failed to act on his telephone disclosure that his wife had taken up part-time employment. The DWP

accept that they failed to act in response to Mr S's wife ceasing to be entitled to JSA(C) in 2014 and which led to Mr S being underpaid some £5,000 in ESA(IR). I reject the argument that the mere fact that Mr S's award of ESA(IR) was not reduced on account of his pension income means that he must have failed to disclose his receipt of pension income. Even if Mr S failed to disclose his anticipated occupational pension when he completed Form ESA3 in early 2014, he did disclose his pension shortly before it was put into payment in November 2014. On that basis, the overpayment referable to Mr S's occupational pension was not in consequence of his failure to disclose pension income. It arose in consequence of the DWP's failure to act on Mr S's November 2014 disclosure that he was about to start receiving occupational pension payments;

(d) in relation to Mr S's wife earnings from self-employment, there is no question of Mr S having failed to disclose a material fact in Form ESA3. When that form was completed, Mr S's wife was not working. In relation to Mr S's wife's first job, with People in Action, the DWP belatedly accepted that Mr S did notify them of that material fact. In relation to Mr S's wife's second job, with Pyramid of Arts, I find that Mr S did notify the DWP of this material fact. I find that Mr S was unlikely to have disclosed his wife's first job but not her second, which is further supported by the fact that, of the few actions taken on Mr S's ESA(IR) award during 2015, one occurred only two weeks after Mr S's wife began working for Pyramid of Arts. But for the significant mistakes in handling Mr S's ESA award, as recounted above, I might have more sympathy with the argument that, had Mr S disclosed his wife's second job, it would have been recorded in the way that his disclosure of the first job was recorded. As it is, I reject the argument.

58. The upshot of the above findings is that Mr S's overpayment of ESA(IR) did not arise in consequence of Mr S failing to disclose a material fact. Accordingly, under section 71(1) of the Social Security Administration Act 1992, Mr S is not liable to repay any part of the overpayment referable to his ongoing occupational pension payments, beginning on 14 November 2014, nor to his wife's earnings from employment.

59. The above finding does not dispose of the entire overpayment. As the DWP correctly argue, Mr S's first payment of occupational pension on 14 November 2014 included arrears of pension accumulated since his pension entitlement commenced on 5 June 2014. At 14 November 2014, Mr S's monthly pension entitlements were £274.85 (pension 1) and £7.13 (pension 2). It follows that, of the £1,654.28 pension payment received by Mr S on 14 November 2014 (£1612.45, pension 1 + £41.83,

pension 2), £1372.30 constituted arrears of pension (£1,654.28 minus £274.85 (pension 1) and £7.13 (pension 2)).

60. The DWP correctly submit that, under section 74 of the Social Security Administration Act 1992, the arrears of pension paid to Mr S on 14 November 2014 are recoverable from him. Since these arrears were paid to Mr S after their due date, the overpayment referable to them is recoverable from Mr S despite there being no failure on his part to disclose a material fact. As set out formally at the beginning of this document, the Secretary of State's overpayment decisions are set aside and replaced with a decision that Mr S is liable to repay to the DWP that part of the overpayment of ESA(IR) which relates to the arrears of pension income paid to him on 14 November 2014. I am not sure of the exact amount of the overpayment that Mr S is liable to repay but it will be far less than the £5,000 or so that he was liable to repay under the First-tier Tribunal's decision.

61. I shall end by pointing out that the Secretary of State has a power, not a duty, to recover the remaining overpayment from Mr S. It is open to Mr S to argue to the DWP that, in the light of the way in which his case was handled, the overpayment should not be recovered or that a reduced amount should be recovered. However, Mr S should note that decisions about whether to recover an overpayment do not attract a right of appeal. The right of appeal concerns the question whether an overpayment is recoverable, and the amount of the recoverable overpayment, and those matters have now been dealt with by this decision.

Mr E Mitchell,
Judge of the Upper Tribunal.
Signed on original on 31 March 2021