IN THE UPPER TRIBUNAL **UT refs:** UA-2020-000040-DLA
UA-2020-000041-DLA

ADMINISTRATIVE APPEALS CHAMBER

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

Between:

BM

Appellant

- v –

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 7 April 2022
Decided on consideration of the papers

DECISION

The decision of the Upper Tribunal is to allow the appeals. The decisions of the First-tier Tribunal made on 5 December 2019 under case numbers SC228/18/01032 and SC228/18/01033 were both based on a material error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set the two decisions aside and redecide the first instance appeals. In redeciding the first instance appeals I set aside the Secretary of State's decisions of 23 March 2018 and 28 March 2018 as having no proper legal basis.

REASONS FOR DECISION

1. I am satisfied on the arguments before me that the First-tier Tribunal erred in law in the two decisions to which it came on 5 December 2019 ("the tribunal") and that those decisions should be set aside as a result.

2. I am also satisfied that there was no lawful basis for the Secretary of State's decisions under appeal to the tribunal and, in redeciding the first instance appeals, my decision is simply to set those decisions of the Secretary of State aside. I do so, in a nutshell, because there was no lawful basis to supersede the earlier First-tier Tribunal's decision of 31 August 2011 on the basis of a mistake of a material fact as at 31 August 2011 as that First-tier Tribunal was not concerned with matters as at 31 August 2011. As there was no lawful basis for the Secretary of State's supersession

decision of 23 March 2018, no overpayment arises. Therefore the Secretary of State's other decision, of 28 March 2018, that the overpayment under the 23 March 2018 decision was recoverable from the appellant must be set aside as well as there is in law no overpayment.

3. Although in redeciding the first instance appeals I am empowered, following the Tribunal of Commissioner's decision in *R(IB)2/04*, to find a different basis for the supersession decision, I decline to exercise the power to do so. The effect of my decision means that it will still be open to the Secretary of State to seek to supersede the First-tier Tribunal's decision of 31 August 2011 if she can identify a proper legal and evidential basis for so doing. It seems to me that this is the fairer course to take because, if it is taken, it will enable the appellant to appeal against any adverse decisions, and for the First-tier Tribunal to adjudicate on any such appeals, on a properly understood basis for the new decisions. I also take into account in exercising the discretion in the way I do that, as is her statutory function, it is the Secretary of State who bears the burden of establishing any proper basis for such decisions.

4. The decisions the tribunal made concerned, first, an overpayment decision superseding and removing entitlement to Disability Living Allowance (DLA) for the past period from 31 August 2011 (I will refer to this at times as the "supersession decision") and, second, a decision that the resultant overpayment of DLA amounting to £41,090.15 was in law recoverable from the appellant ("the recoverable overpayment decision").

5. The grounds of appeal put forward on behalf of the appellant concern, inter alia, the correctness of the tribunal's approach to whether grounds for supersession had been made out and thus whether any overpayment of DLA had as a matter of law been shown to have arisen. Importantly, the supersession decision was in respect of a previous First-tier Tribunal's decision of 31 August 2011. I gave permission to appeal against both decisions made by the tribunal. At the time I did so on the mistaken basis that the grounds of appeal only sought to challenge the lawfulness of the tribunal's decision on the supersession decision. However, even disregarding any errors of law the tribunal may have made in upholding the recoverable overpayment decision, if the tribunal's decision on the supersession decision was wrongly arrived at then its decision that <u>that</u> overpayment was recoverable must be set aside as well as without a lawful supersession decision there was (and is) no overpayment.

6. The tribunal made an error of law which went to heart of both decisions under appeal before it. The error of law was to uphold the Secretary of State's decision superseding the past DLA awarding decision when that supersession decision was fundamentally flawed.

7. In terms of supersession, the last 'awarding' decision had been made by an earlier First-tier Tribunal on 31 August 2011. By that decision the First-tier Tribunal in effect reinstated to the appellant awards which had previously been made to her of the higher rate of the mobility component and the highest rate care component of DLA. These awards ran from earlier date(s) and were for an indefinite period. The use by me of "in effect" in the earlier sentence is deliberate. What the 2011 First-tier Tribunal in fact did was to set aside decisions of the Secretary of State which had superseded, with effect from 7 December 2006 and 31 March 2006 respectively, earlier decisions awarding the appellant the mobility and care components of DLA. The legal effect of the 2011 First-tier Tribunal setting aside the Secretary of State's

supersession decision (of 17 February 2010) was that the earlier awards of DLA continued.

8. It is of relevance that the basis for the Secretary of State's earlier supersession decision, of 17 February 2010, was that the appellant's working part-time in a carpet shop from 2006 and taking part in a television programme ('Come Dine With Me') in 2007 were inconsistent with her being entitled to DLA. Her award of DLA was then superseded and removed from the above dates in 2006. In allowing her appeals, the First-tier Tribunal in August 2011 concluded on the evidence before it, on the balance of probabilities, that the appellant's mobility and care needs had remained the same in and from 2006 and 2007 notwithstanding the part-time work and her taking part in the TV programme. It was on this basis that the 2011 First-tier Tribunal concluded that the Secretary of State's supersession of the prior DLA awarding decision(s) was not made out on the evidence, and as result those prior awards of DLA continued from the dates they had been awarded.

9. That the Secretary of State had 'lost' this earlier attempt to remove the appellant's awards of DLA did (and does) not prevent her seeking to do so again. However, she had to do so on a proper legal foundation, and in circumstances where the decision to be superseded was the 31 August 2011 First-tier Tribunal's decision. That decision remained the final determining decision on the appellant's entitlement to DLA as it had not been set aside on a further appeal (see section 17(1) of the Social Security Act 1998). The only statutory route left open to the Secretary of State to change the First-tier Tribunal's decision of 31 August 2011 was (and is) supersession under section 10(1)(b) of the Social Security Act 1998. Any appeal against the First-tier Tribunal's decision of 31 August 2011 would be hopelessly out of time and revision of a prior decision under section 9(1) of the same Act cannot be used in respect of First-tier Tribunal decisions. None of this is in dispute or is controversial.

10. Given the superior legal status of the First-tier Tribunal as decision maker, as compared to the Secretary of State's decision-makers, the grounds on which the Secretary of State can seek to change a First-tier Tribunal's decision if she has not successfully appealed it are (rightly) limited. Supersession is the only statutory basis for doing so. In effect supersession of a First-tier Tribunal's decision is only available in two circumstances. First, if there has been a relevant change of circumstances since the effective date of the decision that had been appealed to the First-tier Tribunal. Second, if the First-tier Tribunal's decision was made in ignorance of, or was based upon a mistake as to, some material fact. It is the latter ground under which the Secretary of State purported to supersede the First-tier Tribunal's decision of 31 August 2011. However, it is the evidential basis on which this ignorance or mistake of a material fact ground was said by the Secretary of State and the tribunal to be established that give rise to the material error of law on these appeals.

11. The Secretary of State's supersession decision is dated 23 March 2018. The effect of the decision was to remove the appellant's entitlement to DLA from 31 August 2011. That is the date of the previous First-tier Tribunal's decision. The basis for the supersession decision is given on page 397. It is that the 31 August 2011 First-tier Tribunal was ignorant of a material fact and that fact was said to be that the appellant "was still working as a Demonstrator on an ad-hoc basis <u>at the date of the hearing</u> [on 31 August 2011], but did not disclose this fact when her work was discussed" (the

underlining is mine and has been added for emphasis). The explanation given for the supersession decision was that the appellant had led the 31 August 2011 First-tier Tribunal to believe she had given up work due to ill-health. The explanation concludes by stating that the "[31 August 2011] Tribunal were ignorant of [the appellant's] actual recent working hours as a Demonstrator and the fact her employer was not aware she had any disability".

12. The Secretary of State's decision to supersede the 31 August 2011 First-tier Tribunal's decision was confirmed by the tribunal when it upheld the Secretary of State's supersession decision of 23 March 2018. This gave rise to an overpayment of DLA of over £41,000, which it was found was recoverable from the appellant. On any analysis, that is a large sum of money which was of importance to both parties. If the Secretary of State was right in her case then it was a sum to which the appellant was not entitled and which could have been used to meet the entitlement of others. If the Secretary of State's case was wrong, however, then the sum had been correctly paid to the appellant to meet her disability needs. However, the question of whether the previous awarding decision was 'wrong' or not is not decided on an unfettered basis. The statutory scheme enacted under the Social Security Act 1998 provides important safeguards against awards of benefit being taken away. Neither the Secretary of State nor the First-tier Tribunal is able to remove an award just because they now think the claimant was not entitled to it. An award once made is final under the law (section 17(1) of the Social Security Act 1998). It can only be changed by way of appeal (if applicable) or if there is a ground to either supersede or revise the awarding decision. The first two issues that therefore ought to have arisen on this appeal was, first, to identify the status of the decision that the Secretary of State had purported to supersede and, second, establish whether the Secretary of State's basis for her supersession decision was one which was available to her under the law enacted under the Social Security Act 1998. It is matter of regret that the tribunal failed in any proper sense to confront and determine either of these key issues.

13. There is little if any analysis by the tribunal of the basis in law for which the decision of the previous First-tier Tribunal could in law be changed. In paragraph 4 of its combined statement of reasons for its decisions the tribunal may have mistakenly concluded that the Secretary of State had based her supersession decision on there having been a relevant change of circumstances since the effective date of the 31 August 2011 First-tier Tribunal's decision. If so, that was plainly wrong. The relevant part of paragraph 4 reads:

> "The decision made on 23 March 2018 that she was not entitled to either component of DLA from 31 August 2011 mean that an overpayment had occurred which the Department alleged was recoverable from [the appellant] as it had occurred because of a change of circumstances the details of which had not been forthcoming to the DWP."

14. It may be that the tribunal was here referring to the Secretary of State's ground for having then found that the DLA overpayment was recoverable under section 71 of the Social Security Administration Act 1992. However, the difficulty, if that is the correct reading of what the tribunal said in paragraph 4 of its reasons, is that the ground the Secretary of State was relying on for the overpayment being recoverable under section 71 was that the appellant had *misrepresented* a material fact. The language used by the tribunal quoted above is more consonant with the other ground for recoverability under section 71, namely failure to disclose a material fact.

15. The short note of the presenting officer's submissions for the Secretary of State to the tribunal on 5 December 2019 shows that that officer's case was that the "previous tribunal 31/8/11 – Come Dine with Me and Kenton Carpets only info – subsequent information is all post decision therefore looking from 31/8/11 – employment was not available to [the 31 August 2011] Tribunal – may not have made an ongoing award" and "previous tribunal [was] unaware [the appellant] was back in employment [and] therefore [it] may not have awarded [any] ongoing award". These submissions are consistent with the basis of the decision under appeal (ignorance of a material fact) and there is nothing to show the Secretary of State was seeking to advance a *changed* basis for her decision to the tribunal (i.e. relevant change of circumstances since the effective date of the 31 August 2011 First-tier Tribunal's decision).

16. I note moreover that at a previous hearing on 25 September 2019, at which the tribunal membership was identical to the membership which decided the appeals on 5 December 2019, the presenting officer (who was also the presenting officer at the tribunal hearing on 5 December 2019) expressed the supersession decision under appeal as being one based on ignorance of a material fact. It is true that the presenting officer then said that at 2011 there was only one employment and one television show but "now multiple employers". It appears from the 25 September 2019 record of proceedings that those statements may have led the tribunal in September 2019 to query whether it was being asked to consider whether the appellant's circumstances had changed since 2011, but that possibility was not explored further.

17. Both records of proceedings from 5 December 2019 do not show any attempt by the tribunal to clarify the legal basis of the supersession decision or analyse the validity of its alleged factual basis. Nor does the record of proceedings (or anything else) demonstrate that the tribunal put the appellant on any, let alone any sufficient, notice that it considered a changed basis for supersession was merited, namely supersession for a relevant change of circumstances since the effective date of the last tribunal's decision. The appellant was unrepresented at the hearing, though she had representation prior to and after the hearing. An argument that the 31 August 2011 First-tier Tribunal had been correct in the decision to which it came but the appellant's circumstances had changed since the effective date of that tribunal's decision (such that she was no longer entitled to DLA by 31 August 2011) is not obviously the same as an argument that that earlier tribunal was ignorant of a fact which was material to its decision. I do not consider that the prior directions of a District Tribunal Judge of 9 April 2019 provided any sufficient notice to the appellant that a changed ground of supersession even might, let alone would, be taken up as an issue on the appeal. The language used by that judge of "[t]he Tribunal may decide to use different dates to those chosen by the Secretary of State" lack sufficient specificity to properly put the appellant on notice that a different supersession ground would be in issue.

18. If the tribunal was basing its decision on the relevant change of circumstances supersession ground, contrary to the Secretary of State's case before it, it may have been entitled to do so: see, again, *R(IB)2/04*. However if it did so fairness required it to put the appellant on notice about the changed case she was being asked to meet and, at least very arguably, required it to adjourn the proceedings to enable the appellant to have a sufficient opportunity to address the changed case she was now being asked to meet. The tribunal's failure to at least put the appellant on notice would amount to an error of law on its part, *if* that is what it did.

19. However, a major problem is that the tribunal's decision is so lacking in any reasons explaining how it approached the supersession ground before it that I cannot determine on what ground it decided that the 31 August 2011 First-tier Tribunal's decision should in law be superseded from 31 August 2011. The fairness considerations set out above would point to the tribunal not having changed the basis for the supersession, because had it done so that should have been set out clearly in the reasoning. On the other hand, it may (see paragraph 11 above) have considered that the supersession decision before it was based on a relevant change of circumstances.

20. Against this, however, the tribunal's later analysis in paragraph 9 of its statement of reasons uses language more consistent with the 'ignorance of a material fact' supersession ground. The tribunal there said:

> "The Tribunal therefore found that as from 31 August 2011 which is the date of the findings of fact by the previous tribunal [the appellant] was not virtually unable to walk. The fact that she was working at that time was not known to the Tribunal[1] but the DWP submitted it was not seeking to look further back than the date of the previous Tribunal."

21. The tribunal's complete failure to provide any clear explanation for the basis on which the 31 August 2011 First-tier Tribunal's decision was in law superseded is itself a material error of law in the tribunal's decision. However, for the reasons given above I consider the more likely explanation is that the tribunal upheld the Secretary of State's decision on the basis that the prior First-tier Tribunal's decision stood to be superseded on the ground that it was made in ignorance of a material fact. The tribunal failed to explain why this was so, and that too amounts to a material error of law.

22. Both of these failures are made even more telling because the ability to supersede the 31 August 2011 First-tier Tribunal's decision under the ignorance of a material fact ground, on the basis of work the appellant was allegedly doing on 31 August 2011, was a point that was directly in issue on the appeals. It was a point which was expressly taken by the appellant's representative in a submission of 1 March 2019, and was then debated between the Secretary of State and the representative (see the Secretary of State's reply submission of 22 March 2019 and the reply to that submission by the appellant's representative dated 6 September 2019). Even had no such submissions been made, however, the tribunal would have been required to address the issue of whether the Secretary of State had properly established a ground to supersede the previous First-tier Tribunal's decision and explain its reasoning in that regard. But the submissions that were made precisely on this issue by the parties make the tribunal's failure to address this issue all the more egregious.

23. However, the most fundamental material error of law is that there was no proper basis to supersede the 31 August 2011 First-tier Tribunal's decision on the ground of mistake as to a material fact based on work the appellant was (allegedly) doing on 31 August 2011.

24. The first fundamental difficulty here is that the entitlement decision under appeal to the 31 August 2011 First-tier Tribunal was dated 17 February 2010. It is an

[1] In context this must mean the 31 August 2011 Tribunal.

axiomatic principle of social security law that the 31 August 2011 First-tier Tribunal could not take into account circumstances obtaining *after* 17 February 2010: see section 12(8)(b) of the Social Security Act 1998. For the purposes of these appeals that meant that the 31 August 2011 First-tier Tribunal was not interested in how the appellant was or what she my have been doing in August 2011, save where those August 2011 circumstances usefully and properly informed how the appellant was (in terms of her functioning relevant to DLA) on and before 17 February 2010. Allied to this, and the second fundamental difficulty, is that the ground of supersession the tribunal confirmed was that the 31 August 2011 First-tier Tribunal's decision was based on a mistake as to, or ignorance of, a material fact. The word "material" in this context means a fact that makes a difference and would justify a different outcome: see *CIS/3655/2007* at paragraph [29]. However, given the 31 August 2011 First-tier Tribunal was concerned with factual circumstances on or before 17 February 2010 and, in effect, was addressing whether the appellant's circumstances were such in dates in 2006 that she ceased to be entitled to DLA from those past dates in 2006. In those circumstances, I cannot see any proper or rational basis on which the fact of the appellant working as at 31 August 2011 was material to the period covered by the 17 February 2010 decision. It is not as if the First-tier Tribunal in August 2011 was finding the appellant was, or continued to be, entitled to DLA as at 31 August 2011. Section 12(8)(b) of the Social Security Act 1998 stands flatly against this.

25. The Secretary of State's representative's argument to the tribunal in support of the above supersession ground was that if the 31 August 2011 First-tier Tribunal had known the appellant was more physically capable, as evidenced by her working as at 31 August 2011, they would not have reinstated the award. I do not follow why this is so. The award the 31 August 2011 First-tier tribunal 'reinstated' was from 2006. The appellant being in and capable of work at the end of August 2011 was not material to how she had been some five years earlier. The period before that First-tier Tribunal was from 2006 to February 2010. Moreover, the 31 August 2011 First-tier Tribunal had confronted head-on that the appellant **had** been working from 2006 part-time (see paragraph 6 above), but had held that that work was not inconsistent with her remaining entitled to DLA. The appellant being too disabled to be able to work between 2006 and 2010, against which finding her in work during those periods may have counted against her, was not part of the case against her before the 31 August 2011 First-tier Tribunal.

26. At highest, the best argument for the Secretary of State may have been that the appellant's evidence to the 31 August First-tier Tribunal was to the effect that her health was such that she had had to cease work, she had argued that her ceasing work was inconsistent with her health and capabilities having improved since 2006, and she had *implied* that she remained unable to work up to an including August 2011. The first problem with this argument is that the appeal before the First-tier Tribunal was not concerned with what the appellant may or may not have been doing in August 2011. The focus of the appeal was on the period from 2006 to February 2010. The main problem with this argument, however, was (and is) is that nothing in the First-tier Tribunal's reasons for its decision of 31 August 2011 shows that it relied on the appellant's working in August 2011 or having had to cease other work before then. We are fortunate to have the reasons for the 31 August 2011 First-tier Tribunal's decision. They record, it is true, the appellant's evidence (at paragraph 22) that she had had to give up her part-time work for the carpet company in 2009 because of her deteriorating health. However, there is nothing in the First-tier

Tribunals reasoning showing it enquired about the appellant's employment after 2009 or, more importantly, that it relied on this evidence as showing the appellant remained entitled to DLA between the date she stopped that employment and 17 February 2010. In other words, the appellant's employment and alleged deterioration in her health in 2009, was immaterial to the First-tier Tribunal's decision on 31 August 2011.

27. In all these circumstances, I cannot see there is any basis in law that the appellant's working as at 31 August 2011 would, had the First-tier Tribunal known about it, have been material to the decision to which the First-tier Tribunal came on 31 August 2011.

28. For the reasons given above, the appeals succeed and I redecide the first instance appeals in the manner set out above.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 7 April 2022