KK v SSWP (PIP)
[2023] UKUT 151 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2022-000194-PIP**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

K.K.

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 4 July 2023
Decided on consideration of the papers

Representation:

Appellant: In person
Respondent: Miss Emma Fernandes, Decision Making and Appeals, DWP

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 11 August 2021 under number SC065/18/00926 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and re-make the First-tier Tribunal's decision as follows:

> *The Appellant's appeal against the Secretary of State's decision dated 12 May 2018 is allowed.*
>
> *Daily living descriptors 1b, 3b, 4c, 6c, 9c and 10b (13 points in total) apply, as do mobility descriptors 1d and 2b (14 points in total).*
>
> *The Appellant is accordingly entitled to both the enhanced rate of the daily living component of PIP and the enhanced rate of the mobility component of PIP for the period from 16 January 2018 to 15 January 2028.*

REASONS FOR DECISION

This appeal to the Upper Tribunal: the result

1. The Appellant's appeal to the Upper Tribunal succeeds but not in any way that assists him.

2. In summary, the Appellant had previously been entitled to the highest rate of the care component of disability living allowance (DLA) together with the higher rate of the DLA mobility component. He was required to transfer to personal independence payment (PIP) in 2016, and was initially paid only at the standard rate of the PIP daily living component. A First-tier Tribunal (FTT) later awarded him the enhanced rate of both PIP components. The issue on this further appeal concerns the correct date from which the increased PIP rates were properly payable.

3. The Appellant argues that the higher rates of the PIP components should be payable from the point he ceased to be entitled to DLA in 2016. For the reasons that follow, I conclude that the correct date is 16 January 2018, the date he applied for a supersession of his then existing PIP award. The FTT decision (that he was entitled from a date in 2017) involves several errors of law.

The benefits adjudication and appeals machinery

4. This case also illustrates two important features of the benefits adjudication and appeals machinery.

5. The first is that the primary focus of the adjudication and appeals machinery in the benefits system is on individual decisions on entitlement, rather than on the people who are the subject of those decisions. As I explained in another decision (*GJ v Secretary of State for Work and Pensions (PIP)* [2022] UKUT 334):

> 10. The Appellant's statement in his notice of appeal in 2020 that "the appeal has been going on since May 2017" needs to be unpacked a little. It is entirely understandable that he sees the question of his entitlement to PIP as being a single discrete issue starting with his original claim for benefit. However, the benefits appeals system takes a different approach, which focusses more on specific decisions than just on the claimant as an individual. Mr Commissioner Powell explained the decision-based system in the unreported Social Security Commissioner's decision *CA/1020/2007* (at paragraph 12) as follows:
>
> > "What is meant by this is that the system proceeds, or is based, on formal decisions being given. If a benefit is awarded it must be awarded by a formal and identifiable decision. If that decision is to be altered by, for example, increasing or decreasing the amount involved, it can only be done by another formal and identifiable decision. Likewise a decision is required if the period of the award is to be terminated, shortened or extended."
>
> 11. The present appeal shows the importance of identifying the precise nature of the decision under appeal.

6. The present case is yet another example of the importance of identifying the precise decision under appeal as that will then determine the potential scope of the appeal and so a claimant's entitlement to benefit.

7. The second important feature is the principle of finality. This is embodied in section 17(1) of the Social Security Act 1998 (as amended), which provides as follows:

> "(1) Subject to the provisions of this Chapter and to any provision made by or under Chapter 2 of Part 1 of the Tribunals, Courts and Enforcement Act 2007, any decision made in accordance with the foregoing provisions of this Chapter shall be final; and subject to the provisions of any regulation under section 11 above, any decision made in accordance with those regulations shall be final.

8. The main effect of this provision is to prevent there being two decisions relating to the same individual's entitlement to the same benefit for the same period. As Upper Tribunal Judge Hemingway explained in *GG v Secretary of State for Work and Pensions (PIP)* [2019] UKUT 318 (AAC) (at paragraph 15):

> The effect of section 17(1), as explained in *CSDLA/237/03* (though the wording was slightly different at the date of the Commissioner's decision) is that decisions on claims are final, subject to appeals, revisions, supersession or judicial review. As was also explained by the Social Security Commissioner, section 12(8)(b) has to be applied in conformity with section 17(1) and with the basic rule that there cannot be overlapping decisions in respect of the same benefit. As was pointed out, if that were not the case the situation "could be chaotic". So, as the Commissioner went on to explain, a F-tT must decide the period over which it has jurisdiction to make an award. This will usually be open ended. But where a decision has already been made on a later period section 17(1) along with the common-sense principle that there cannot be two or more overlapping decisions concerning the same period, operates to limit the period over which a decision-making body has jurisdiction.

9. The present case is an example of how the principle of finality intersects with the decision-based system of adjudication. In the Appellant's case, this requires careful consideration of the fate of his two separate FTT appeals about his entitlement to PIP.

The Appellant's first Personal Independence Payment FTT appeal

10. The Appellant has complex mental health issues as well as musculoskeletal problems. On 20 June 2016 he made a claim by telephone for PIP. On 28 July 2016 the Appellant completed a PIP questionnaire (pp.17-49). On 19 August 2016 he was assessed by a health care professional (HCP). She recommended that the following PIP daily living descriptors applied: 1d (2 points); 3b (1 point); 4b (2 points); 6b (2 points); 9b (2 points) and 10b (2 points) (pp.67-94). The HCP also recommended mobility descriptor 2b (4 points). Based on that report, on 15 September 2016 the Secretary of State's decision-maker scored the Appellant at 11 daily living points (and 4 mobility points) and so made an award of the standard rate of the PIP daily living component (pp.97-103), but with no entitlement to the

mobility element. This PIP award was for a period of just less than three years from 12 October 2016 (the day after his previous DLA award had ended) to 18 August 2019.

11. On 26 September 2016 the Appellant applied for mandatory reconsideration of that decision (pp.106-109). He pointed out that a previous tribunal had awarded him the highest rate DLA care component and the higher rate DLA mobility component for a period until 25 October 2016. However, the outcome of that mandatory reconsideration process on 6 December 2016 was to make no change to the new PIP award (pp.110-116). On 22 December 2016 the Appellant lodged an appeal with the FTT. On his notice of appeal he argued that he qualified for the enhanced rate of the PIP daily living component and "at least" the standard rate of the PIP mobility component (pp.119-126). A written submission prepared on his behalf by Citizens Advice (pp.130-132) argued that he qualified for the enhanced rate of the mobility component on the basis of descriptors 1d (10 points) and 2b (4 points).

12. On 25 August 2017 the FTT dismissed the Appellant's appeal against the decision of 15 September 2016 under file reference SC065/17/00006 (p.263), so confirming the award of the standard rate of the PIP daily living component for the period from 12 October 2016 to 18 August 2019 (pp.263-264). The FTT awarded 10 points for daily living and 4 for mobility, as explained in its detailed statement of reasons (pp.283-290). The Appellant then applied for permission to appeal to the Upper Tribunal. This application was refused by the FTT on 30 January 2018 (p.292) and, having been renewed, then again refused by the Upper Tribunal on 6 March 2018 (under what was then file reference CPIP/408/2018, now file reference UA-2018-000275). There appears to have been no further challenge to that decision.

Pausing there

13. Pausing there, the decision of the FTT on 25 August 2017 was accordingly final within the meaning of section 17(1) of the Social Security Act 1998. As such, it definitively decided that the Appellant was entitled to the standard rate of the PIP daily living component (but to no award of the mobility component) for the period from 12 October 2016 to 18 August 2019. Given that there was no further onward appeal, and given that decisions of the First-tier Tribunal cannot be revised, the only way that FTT decision could then be changed thereafter (i.e. after 25 August 2017) was by way of a supersession decision (typically for a change in circumstances).

The Appellant's second Personal Independence Payment FTT appeal

14. On 16 January 2018 the Appellant telephoned the Department for Work and Pensions (DWP) to ask for a further review of his PIP entitlement. On 12 February 2018 he completed a PIP review form (pp.295-328). He had another HCP assessment on 4 April 2018 (pp.333-362), which recommended daily living descriptors 1d, 3b, 4c, 6c, 9b and 10b (11 points in total), together with no scoring mobility descriptor. On 12 May 2018 a decision-maker again decided that the Appellant was entitled to the standard rate of the PIP daily living component (but this time for the period from 12 May 2018 to 3 April 2022; pp.363-369). According to the accompanying explanation, "You asked us to look at your award on 16

January 2018. I looked at the health care professional consultation report and changed the descriptors previously chosen based on the medical evidence received, I decided to award you PIP for a longer time. Your rate of PIP has not changed."

15. On 21 May 2018 the Appellant requested a mandatory reconsideration of that decision. That process led to a change to the start date (to 9 April 2018, for reasons that are unclear) but no change to the rate of the PIP award (pp.372-378). Thus the decision letter did not explain the reason for the change of date but it made no difference in practice as the level of the award had remained the same throughout, namely the standard rate of the PIP daily living component. The Appellant appealed again to the FTT. His new representative filed a written submission arguing that the Appellant qualified for the enhanced rate of both components (pp.386-387). On 28 August 2019 a FTT dismissed the Appellant's appeal against the decision of 12 May 2018 (pp.399-400) and later provided a statement of reasons (pp.402-410). The FTT made no reference to the revised start date of 9 April 2018 as stated in the mandatory reconsideration notice. Instead, the FTT referred to 12 May 2018 as both the date of the Secretary of State's decision and as the start date for the newly extended award of the standard rate of the PIP daily living component (p.399). This date was presumably chosen because the change made (namely to maintain the existing level of award but to extend the period of the award) was regarded as a supersession initiated by the Secretary of State.

16. The Appellant then applied for permission to appeal to the Upper Tribunal on the basis that the FTT had made inadequate findings of fact and/or given inadequate reasons in relation to various of the daily living activities (pp.416-419). On 20 July 2020 the FTT refused permission to appeal (pp.420-421). However, on 10 September 2020 the Upper Tribunal gave the Appellant permission to appeal under case reference CPIP/1171/2020 (p.433). Furthermore, on 4 February 2021, the Upper Tribunal allowed the Appellant's appeal and remitted the case to the FTT for re-hearing. This was a short-form decision, with the reasons running to just a single page, as the Judge had accepted the arguments advanced by the Secretary of State in support of the Appellant's appeal. In remitting the case the Upper Tribunal also directed as follows: "the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on and from the effective date of 12 May 2018." The choice of that date was not explained in the Upper Tribunal's short decision in CPIP/1171/2020, but was presumably based on the date identified by the FTT as the relevant date (see the previous paragraph above).

17. On 11 August 2021 a new and differently constituted FTT re-heard and allowed the Appellant's remitted appeal against the DWP's decision of 12 May 2018 (p.445). This is the decision now under appeal to the Upper Tribunal. There was both a straightforward aspect and a much less straightforward aspect to the FTT's decision.

18. The straightforward aspect of its decision was that the FTT awarded the Appellant the enhanced rate of both PIP components (scoring the Appellant at 13 points for daily living (descriptors 1b, 3b, 4c, 6c, 9c and 10b) and 14 points for mobility

(descriptors 1d and 2b)). It is only right to point out that the Secretary of State's representative has not challenged that substantive aspect of the FTT's decision.

19. The much less straightforward aspect of the FTT's decision was the period for which the new rate of PIP was awarded and in particular its start date. At the end of the hearing, and after the FTT had deliberated, the Tribunal Judge announced that the FTT's decision was to award the enhanced rate of both PIP components with effect from 16 January 2018, being the date the change of circumstances was notified by the Appellant. However, there was then some further discussion after the end of the hearing, with the Appellant and his representative arguing that the new award at the enhanced rates should start in 2016, when his DLA had stopped. After another adjournment for the FTT to deliberate further, the Tribunal Judge then announced that the award would in fact take effect from 26 August 2017, being the day after the date of the previous tribunal on 25 August 2017, relating to the first PIP appeal. The FTT's decision notice then recorded that the award was for the period from 26 August 2017 until 15 January 2028.

20. In its decision notice, the FTT stated further as follows: "The Tribunal considered that the respondent was entitled to supersede the earlier decision however the Tribunal has made the above award. The commencement date is the date on which the appellant first notified the respondent of a change in circumstances" (p.446).

21. In its subsequent statement of reasons, the FTT gave the following explanation for the period of its award:

> From the evidence … the tribunal concluded that [the Appellant] had been severely limited for a considerable time. The tribunal decision of 25th August 2017 refused [the Appellant's] appeal and he did ultimately appeal that decision. The tribunal could not revisit or overturn that decision but the tribunal considered it would have been open to the respondent to award [the Appellant] at the level decided by this tribunal from the day after the previous tribunal decision which is to say 26 August 2017 and therefore applying s.12 SSA 1998 the tribunal awarded [the Appellant] from that date. The tribunal considered that it is extremely unlikely that there will be any material improvement in [the Appellant's] conditions and that a long award should be made. The date chosen of the 15th January 2028 is ten years from [the Appellant's] application for the supersession.

22. For the reasons that are explained later, this explanation as to how the FTT alighted on 26 August 2017 as the effective date for the supersession decision is, to put it mildly, somewhat problematic.

The proceedings and submissions before the Upper Tribunal

23. The Appellant's case has the benefits of both clarity and simplicity. In short, he argues that there has been no change for the better in his health (which indeed had worsened) over the whole of the period in question since he made the transition from DLA to PIP. As noted above, he had previously been entitled to the highest rate care component and the higher rate mobility component of DLA. As such, the Appellant contends that his entitlement to the enhanced rates of both PIP components should have started the day after his DLA award ended in

2016. To that extent, he submits that the FTT erred in law in essence by not going back far enough in time.

24. Miss Emma Fernandes, the Secretary of State's representative in these proceedings, agrees that the FTT erred in law but not in the way argued for by the Appellant. In particular, she does not agree that the effective date for the change can go back to a date in 2016. In summary, Miss Fernandes submits that the FTT's hands were effectively bound by a start date of 16 January 2018, being the date that the Appellant had applied for a supersession, and could not go back to 26 August 2017. She also contends that the FTT failed to explain adequately how it had arrived at its start date for the new award.

25. There has been no application by either party for an oral hearing of this appeal. The issues have been thoroughly explored in two rounds of written submissions from the parties. I am satisfied it is fair and just to determine the appeal 'on the papers'.

The Upper Tribunal's analysis

Introduction

26. At its most basic level, the FTT's decision involves an error of law in that the reasons given for identifying 26 August 2017 as the operative date for the supersession decision are inadequate in (at least) the following three respects.

27. First, the FTT's decision notice stated that "the commencement date is the date on which the appellant first notified the respondent of a change in circumstances", yet there is no evidence this took place on 26 August 2017.

28. Secondly, the FTT's statement of reasons makes the bold assertion that "it would have been open to the respondent to award [the Appellant] at the level decided by this tribunal from the day after the previous tribunal decision which is to say 26 August 2017". There is no explanation of how this fits in with the legislative requirements for determining the effective date of a supersession decision.

29. Thirdly, that passage is then contradicted by the reference to 15 January 2028 as the end date for the award, being 10 years from the date of the application for a supersession, meaning that the application was recognised as having been made on 16 January 2018 and not 26 August 2017.

30. However, inadequate reasons aside, there are at least three more fundamental difficulties with the FTT's decision about the start date for the award of the enhanced rate of both PIP components, namely: (1) it disregarded the Upper Tribunal's direction on remittal of the appeal; (2) it was confused as to the correct date for the supersession to take effect; and (3) it changed its mind after announcing the decision on the appeal.

The First-tier Tribunal's disregard of the Upper Tribunal's direction on remittal

31. If the Upper Tribunal allows an appeal, it may (but need not) set aside the FTT's decision (Tribunals, Courts and Enforcement Act (TCEA) 2007, section 12(2)(a)). If it does set aside the FTT's decision, it must either remit for re-hearing or re-make the decision under appeal (TCEA section 12(2)(b)(i) and (ii)). If the decision is to remit, then the Upper Tribunal must stipulate "directions for its reconsideration" as to substantive legal matters (TCEA section 12(2)(b)(i)) and

may also "give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal" (TCEA 2007, section 12(3)(b)).

32. The Upper Tribunal's directions on remittal must be followed by the FTT that re-hears the case, as that obligation is inherent in the concept of precedent (see e.g. *BPP Holdings Ltd v Revenue & Customs Commissioners* [2016] 1 WLR 1915 at [25]). As Upper Tribunal Judge Mesher observed in *SD v Secretary of State for Work and Pensions (ESA)* [2015] UKUT 116 (AAC) at paragraph 9:

> That obligation follows as a matter of necessary implication from the terms of section 12(2)(b)(i), whose words would have no practical application if the First-tier Tribunal were free to disregard directions properly given by the Upper Tribunal in remitting a case. It also follows from the practical application of the hierarchy of tribunals and the process of appeal to the Upper Tribunal set up by the 2007 Act, under which the purpose of requiring the giving of directions in such cases is to promote the desirable outcome of the new First-tier Tribunal coming to a decision that involves no error of law and which therefore can bring an end to the particular dispute without the need for further consideration by the Upper Tribunal.

33. The Upper Tribunal on 4 February 2021, in allowing the Appellant's appeal against the FTT decision of 28 August 2019, had stipulated certain directions. The Upper Tribunal Judge's directions included one to the effect that "the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on and from the effective date of 12 May 2018." The FTT on 11 August 2021 made no mention of this direction, either in its decision notice or its statement of reasons. That said, a failure to follow an Upper Tribunal's direction on remittal will not necessarily amount to an error of law (see *SD v SSWP* at paragraphs 8-10). In addition, even of the failure amounts to an error of law, it may not be a material error of law. This is demonstrated by the FTT's confusion as to the correct date for the supersession decision to take effect.

The First-tier Tribunal's confusion as to the correct date for the supersession

34. It may be helpful to recap the key relevant chronology. As a result of his first PIP claim, the Appellant had an award of the standard rate daily living component for the period from 12 October 2016 to 18 August 2019. During the currency of that award, he applied by telephone on 16 January 2018 for his PIP entitlement to be reviewed. The DWP made a decision on 12 May 2018 that he remained entitled at that rate and for the period from 12 May 2018 to 3 April 2022. This was the decision under appeal to the FTT and which was before the FTT on 11 August 2021 (the Upper Tribunal having allowed his appeal against the earlier FTT decision of 28 August 2019 and remitted the case for re-hearing). The FTT on 11 August 2021 decided that the Appellant was entitled to the enhanced rate of both PIP components but the question remained as to the period of that award. That question in turn involved identifying the start date of the new award.

35. The effect of the FTT's decision on 11 August 2021 was thus to increase the Appellant's PIP award by way of making the supersession decision that the DWP should have made on 12 May 2018. Section 10(5) of the Social Security Act 1998, which governs supersessions, provides that "a decision under this section shall take effect as from the date on which it is made or, where applicable, the date on

which the application was made". Furthermore, regulation 35 of the Universal Credit, PIP, JSA and ESA (Decisions and Appeals) Regulations 2013 (SI 2013/381; 'the D & A Regulations 2013') governs 'Effective dates: Secretary of State decisions'. In particular, regulation 35(1) provides as follows:

> **35.**—(1) Schedule 1 (effective dates for superseding decisions made on the ground of a change of circumstances) makes provision for the date from which a superseding decision takes effect where there has been, or it is anticipated that there will be, a relevant change of circumstances since the earlier decision took effect.

36. The general rule, as laid down by paragraph 12 of Schedule 1 to the D & A Regulations 2013, is that "in the case of personal independence payment, a superseding decision made on the ground of a change of circumstances takes effect on the date on which the relevant change of circumstances occurs or is expected to occur."

37. There are, however, several exceptions to this general or default rule, notably paragraph 14:

> … where the superseding decision is advantageous to the claimant and the change of circumstances was notified to an appropriate office more than one month after the change occurred or after the expiry of such longer period as may be allowed under regulation 36 (effective dates for superseding decisions where changes notified late), the superseding decision takes effect from the date of notification of the change.

38. To sum up, the FTT on 11 August 2021 was superseding the existing PIP award (standard rate daily living) which ran for the period from 12 May 2018 to 3 April 2022. The start date for the new award (enhanced rate daily living and enhanced rate mobility) had to be determined by the rules governing the effective date for the implementation of a supersession decision. As the superseding decision was both "advantageous to the claimant" and had been "notified … more than one month after the change" (the FTT recognising that the Appellant's conditions were of longstanding), it followed that "the superseding decision takes effect from the date of notification of the change", namely 16 January 2018. There has been no suggestion that the highly restrictive criteria in regulation 36 had been made out, which might otherwise have allowed an earlier date to be identified.

39. The FTT, at least initially, correctly identified 16 January 2018 as the date of notification and hence the start date for the supersession decision making the new award. It also announced this orally as part of its decision. However, it then changed its mind, which leads on to the third error of law in the FTT's approach.

The First-tier Tribunal changed its mind after announcing its decision

40. Unusually this is a case in which, put simply, the FTT announced one decision at the end of the substantive hearing and then changed its mind after further discussion with the Appellant and announced a different decision, or at least a revised decision modified in one important respect. Even more unusually, this is a case in which a 73 page professional transcript of the FTT hearing has been prepared by The Transcription Agency, the cost having been met by HMCTS.

41. The first 53 pages of the transcript cover the hearing itself. There was then an adjournment while the panel deliberated. After the tribunal clerk read out the case details again for the record and the Judge had indicated that they would dispense with the introductions, the FTT announced its decision (pp.511-512):

> **Judge**: We have considered your appeal and we have allowed it. We think the award, well we don't think, we know the award is enhanced daily living and enhanced mobility, yeah?
>
> **Appellant**: OK.
>
> **Judge**: Have you got that?
>
> **Appellant**: Yes.
>
> **Judge**: We've the extra points for the daily living come from engaging with other people face to face. Whether there are other points there or not is immaterial, because they stop when we get to 12, when we've got the maximum award, we don't need to consider any more, so don't think it's that we haven't listened to you.
>
> **Appellant**: OK.
>
> **Judge**: And then there's the mobility, a combination of planning and following and moving around, yeah?
>
> **Appellant**: OK, thank you.
>
> **Judge**: OK, now we've given you that from 16 January '18 which, which is the date on which you first went to the DWP and said that you, you'd got worse, yeah? That's the date, that's the date when, in which they started the process. So it's back to that stage…
>
> **Appellant**: That was…
>
> **Judge**: Yeah.
>
> **Appellant**: Yeah.
>
> **Judge**: Yeah, it's back to that date and it's through, because this has taken so long and to be honest because you know it's unlikely that there'll be much of an improvement. If there is, of course, you will, I know you will tell the DWP. So we've taken that through to January 2028.
>
> **Appellant**: OK.
>
> **Judge**: OK?
>
> **Appellant**: There's one thing, doesn't this case relate back to 2016, as we discussed?
>
> **Judge**: No, because you, it was a change of circumstance and the date on which the change of circumstance was reported was 2018, 16 January 2018.

42. This passage was then followed by a further five pages recording a three-way discussion between the Appellant, his representative and the Judge, during which the Appellant explained the problems he had had with his various previous different representatives since 2016. The Judge then indicated that the panel

would withdraw again and consider what had been said. The hearing was adjourned again, and on its return the court clerk announced the case reference again. This protocol was followed by this exchange (pp.518-519):

> **Judge**: Considered everything you've had to say and had a look at a number of things. Now we are stuck with a Tribunal decision that has not been appealed, yeah.
>
> **Appellant**: OK.
>
> **Judge**: Which confirms the decision of the, it was 12 October 2016, wasn't it?
>
> **Appellant**: Yes, well yeah, 2016 anyway.
>
> **Judge**: Yeah, it was 12 October 2016.
>
> **Appellant**: OK.
>
> **Judge**: We cannot get behind that decision because to get behind that decision, you would have to appeal it. Now I hear everything you say about your representative, your previous representative, but it doesn't alter the fact that only the Upper Tribunal can overturn that decision, yeah.
>
> **Appellant**: OK.
>
> **Judge**: OK, however, having heard what you've said about your condition, there is no reason why we, we have the power that we can, we can give this from the date following that decision. Now that decision was 25 August '17, wasn't it?
>
> **Appellant**: Yeah.
>
> **Judge**: So we can award you this from 26 August '17, and that's what we 're going to do, yeah, now that's…
>
> **Appellant**: August when, August when, sorry?
>
> **Judge**: '17.
>
> **Appellant's representative**: '17.
>
> **Appellant**: OK.

43. The conversation as transcribed then continued for a further eight pages. As noted above, the FTT's decision notice and statement of reasons both recorded the period of the award of the enhanced rate of both PIP components as being from 26 August 2017 (and not 16 January 2018, as originally announced) to 15 January 2028.

44. Frankly, it is not entirely clear what the Judge thought he was doing by agreeing to change the FTT's decision in the light of the Appellant's further representations. Perhaps the most generous interpretation is that the Judge believed that the FTT's decision was not finalised until it was issued by way of a decision notice. In fairness this is the position in the courts, where the court order rather than the judge's judgment is determinative. But not so in tribunals. Rule 33(1) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) provides that "The Tribunal may give a decision orally at a

hearing"; if such a decision is given, then that is the point it is promulgated. The Court of Appeal in *Patel v Secretary of State for the Home Department* [2015] EWCA Civ 1175 held that a tribunal had no power to change its decision once it had been given orally. That case concerned an oral determination by a judge of the Upper Tribunal (Immigration and Asylum Chamber) on an application for permission to appeal, but there is no reason why the same principle does not apply to decisions given by the First-tier Tribunal. Accordingly, a decision given orally by the FTT is definitive and cannot subsequently be changed informally, as the FTT in the instant appeal purported to do.

45. True, tribunals are intended to operate as an informal dispute resolution mechanism, but there are and must be limits to that informality. There are also several good reasons why tribunals in the Social Entitlement Chamber are encouraged usually to announce their decisions on the day and indeed shortly after the conclusion of the proceedings. However, this case is a salutary reminder of the problems that can arise if a tribunal fails to make it clear that it has made its decision and the time for further discussion and argument is over. A necessary skill of judge-craft is the ability to draw a line and stick to it once the decision has been given.

Summary of Upper Tribunal's analysis

46. In summary the FTT erred in law because its decision was inadequately reasoned, it was confused as to the operative date for the supersession decision and it purported to change its decision after it had been promulgated orally. The failure to follow the Upper Tribunal's direction about the effective date was not material, given that although the direction had identified the correct DWP decision date there was no reference to the need to identify whether there was any earlier effective supersession date.

47. However, the FTT was correct to resist the Appellant's argument that his entitlement to both the enhanced rates of PIP should run from the date in 2016 when his DLA award ended. His entitlement to PIP in 2016 was ultimately governed by the un-appealed FTT decision of 25 August 2017, which had confirmed the award of the standard rate of the daily living component for the period from 12 October 2016 to 18 August 2019. That decision was not appealed further and could not by law be revised. The earliest date from which a supersession of that award could take place was 16 January 2018, the date of the Appellant's telephone application. No amount of dissatisfaction with the Appellant's previous representative or representatives can change that. As noted at the outset of this decision, this outcome is the consequence of the decision-based system of social security adjudication and appeals and the effect of the principle of finality.

48. I am satisfied that the First-tier Tribunal erred in law for the reasons set out above.

Disposal of the appeal

49. I therefore allow the Appellant's appeal to the Upper Tribunal, although not for the reasons that he contends. The decision of the First-tier Tribunal made on 11 August 2021 under file number SC065/18/00926 was made in error of law. Under section 12(2)(a) of the Tribunals, Courts and Enforcement Act (TCEA) 2007, I set

that decision aside. As the rate of PIP to which the Appellant is entitled is not in dispute, there is no point in remitting the case back to another FTT for yet another re-hearing. Instead I re-make the First-tier Tribunal's decision as follows:

> *The Appellant's appeal against the Secretary of State's decision dated 12 May 2018 is allowed.*
>
> *Daily living descriptors 1b, 3b, 4c, 6c, 9c and 10b (13 points in total) apply, as do mobility descriptors 1d and 2b (14 points in total).*
>
> *The Appellant is accordingly entitled to both the enhanced rate of the daily living component of PIP and the enhanced rate of the mobility component of PIP for the period from 16 January 2018 to 15 January 2028.*

50. In effect, I am substituting the correct decision that the FTT itself made and announced before it allowed itself to be persuaded to change its mind.

51. Miss Fernandes for the Secretary of State advises that the Department has implemented the FTT's (erroneous) decision of 11 August 2021 and paid the Appellant arrears going back to 26 August 2017. As a result of my decision, those arrears should only have been paid back to 16 January 2018. It is not strictly a matter that arises in the present proceedings, but I simply record there is absolutely no evidence whatsoever that any overpayment was the fault of the Appellant. There is no suggestion that he either misrepresented or failed to disclose any material fact.

Conclusion

52. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The decision of the First-tier Tribunal is re-made as above (section 12(2)(b)(ii)). My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 4 July 2023