**IN THE UPPER TRIBUNAL** **Appeal No: CE/4587/2014**

**ADMINISTRATIVE APPEALS CHAMBER**

**Before: Upper Tribunal Judge Wright**

# DECISION

**The Upper Tribunal allows the appeal of the appellant.**

**The decision of the First-tier Tribunal sitting at Peterborough on 24 January 2014 under reference SC143/13/02068 involved an error on a material point of law and is set aside.**

**The Upper Tribunal gives the decision the First-tier Tribunal ought to have given. The Upper Tribunal's decision is to allow the appeal and set aside the Secretary of State's decision of 28 May 2013, with the consequence that the rate of employment and support allowance payable to the appellant was not reduced from 18 May 2013.**

**This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.**

**Representation:** Ms Lorna Reith of FRU represented the appellant.

Ms Zoë Leventhal, instructed by the Government Legal Service, represented the Secretary of State for Work and Pensions

# REASONS FOR DECISION

Introduction

1. This appeal concerns the conditionality regime introduced into employment and support allowance (ESA) by the Employment and Support Allowance (Work-Related Activity) Regulations 2011 ("the ESA 2011 Regs"), and the complications and difficulties in challenging decisions made under those regulations.

Factual background

2. The appeal concerns a claimant ("the appellant") who had been in receipt of ESA since 18 May 2009. At that time she was aged 24. In March 2012 at an interview at the jobcentre she agreed on a voluntary basis to undertake work-related activity under the Work Programme. This was to be provided by a company called *Ingeus*. On 25 March 2013 *Ingeus* wrote to the appellant notifying her that she had to attend an interview at the Papworth Trust on 17 April 2013. The appellant did not attend the interview. She was written to on 13 May 2013 and asked to provide her reasons for not attending by no later than 20 May 2013. No reply was received from her by that date. This led the Secretary of State to decide on 28 May 2013 that the appellant had failed to undertake work-related activity on 17 May 2013 (by not attending the interview at the Papworth Trust) and had not shown good cause for that failure within 5 working days of being notified of that failure. In consequence, the decision awarding ESA was superseded and a sanction imposed reducing the amount payable by £71.70 per week from 18 May 2013[1].

3. The form sent to the appellant on 13 May 2013 asking for her reasons for not attending the interview was returned by the appellant on 7 June 2013. It had been completed by her on 30 May 2013. In that form she said:

> "I decided to go on the work-based programme following an appointment at the Jobcentre, a week before a medical. I started attending college, went to the one-on-one appointments a Papworth Trust. My medication started to come on usual delivery in smaller doses which ended up in myself running out of medication. I had numerous visits to hospital to see the crisis team.
>
> In February 12th my mother passed away, as I was the only relative in Peterborough I had to go and go to Leicester to collect my brother as funeral arrangements had to be made.

[1] Although not made clear in the Secretary of State's decision and notwithstanding what is said on page 6 of the appeal bundle about "**1st failure, 1 weeks sanction to follow**", it would appear from the terms of regulation 63(6) of the Employment and Support Allowance Regulations 2008 (the terms of which are set out below) that this was the minimum sanction of two weeks. Whatever the correct period ought to have been is, however, immaterial given my decision that no sanction was applicable.

> I was away from college for a while and felt I couldn't go back as thought my time had ended with college as being away for the time I did.
>
> My brother also ended up on a life support machine and at the time I was told by doctors he might pass away. It was May 16th my brother went to intensive care. But now he is on a ward and is surviving."

4. The Secretary of State refused to revise the decision. The reason stated for this in the revision decision of 24 June 2013 was because "the claimant has not provided any relevant additional evidence". That was inaccurate and untrue given what is set out immediately above.

5. The appellant then lodged an appeal against the unrevised sanction decision. Her grounds for her appeal were stated as follows:

> "My medication was not being received with full doses which I ended up in hospital (A+E). My mother passed away Feb where only me and my brothers had to arrange the funeral. In May my brother then went on a life support machine. My medication is better now the funeral has passed but my brother remains in hospital. Well he is."

6. The Secretary of State's appeal response to the First-tier Tribunal set out the above and argued that the appeal must fail because it was not enough for the appellant to have good cause for not attending the interview on 17 April 2013, she had to show that good cause within five working days of being asked to do so and she had failed to do this. The response went on to argue that in any event the reasons given by the appellant did not explain why she had been unable to attend the interview on 17 April 2013 as the events she had referred to (death of her mother and brother's illness) pre-dated and post-dated the date of the interview.

7. This was the totality of the information put before the First-tier Tribunal when it decided the appeal on 24 January 2014 ("the tribunal"). In particular, the Secretary of State's appeal response did not provide the tribunal with any of the documents or evidence showing why the appellant was on ESA and had been so for a number

of years. For example, the tribunal were not told the nature of the appellant's medical conditions, what score she had obtained under Schedule 2 of the Employment and Support Allowance Regulations 2008 or whether instead she had been found to satisfy regulation 29(2)(b) of those regulations. This and other information (e.g. the written 'action plan' – see below) may arguably have assisted the tribunal in understanding (a) the effect a decrease in medication may have had, and (b) how the appellant may have been affected by her mother's death and her brother's pending illness; and so may have been relevant in identifying whether 'good cause' had been shown within the statutory five day period, notwithstanding that the appellant's reasons in reply were not provided within the five working days statutory period.

8. The tribunal heard and dismissed the appeal. It did so in the absence of the appellant as she failed to attend the hearing (she had got the dates for the hearing mixed up). This led the appellant to write to the First-tier Tribunal. In this letter she explained she had been put in the 'support group' of ESA from 14 September 2013. Her letter had attached to it correspondence which referred to the appellant's brother's personality disorders and schizophrenia and the appellant's own mental health issues. A letter from a community psychiatric nurse, dated 4 September 2013, referred to the appellant having had a very difficult year in 2013 (due to her mother having died and her brother's problems) and her mental health having deteriorated, and said that all of this had caused her to find it difficult to attend benefit appointments[2].

9. The appellant's letter was treated as a request for a statement of reasons for the tribunal's decision, which it duly supplied. It statement makes clear that the key to its decision was that the appellant had not

[2] Evidence subsequently supplied by the appellant in the course of the Upper Tribunal proceedings underscores the very fragile nature of her mental health in the first four months of 2013.

shown good cause for the failure to attend the interview within the required five day period.

10. I gave the appellant permission to appeal. My reasons for so doing were as follows:

> "First, on such appeals ought not the Secretary of State inform the First-tier Tribunal of the basis on which the person is entitled to ESA (e.g. health conditions, points awarded under Schedule 2, whether regulation 29(2)(b)), given the relevance of that information to 'good cause'?
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> Second, even if there is no statutory requirement to warn a claimant of the consequences of not attending work-rated activity, following paragraphs 64-66 of the Supreme Court's decision in *Reilly and Wilson* [2013] UKSC 68 does not a common law duty of fairness require this information to be given?
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> Third, how was the letter of 13 May 2013 notified to [the appellant] and, if done by post, how can that sensibly give her any prospects of replying within 5 working days? Given these considerations and the shortness of the 5 day time limit, ought not the words "gives notice of the failure" in regulation 8(1) of the ESA Regs 2011 be read as meaning actual notice given to the claimant?
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> Fourth, what is the statutory effect if good cause exists but is only shown after 5 days (the delay in showing perhaps being for the same good cause reasons)? Can the 5 day time limit be extended (as page 7 suggests)? And, if it can, did the Secretary of State consider extending time here?
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> Fifth, where is the evidence of [the appellant] having been notified of a written action plan under regulation 5 of the ESA Regs 2011, and if not notified of the same does this not nullify regulation 8 of the same regulations?
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> Sixth, did the First-tier Tribunal materially misdirect itself by reading the letter on page 14 as explaining why [the appellant] missed the appointment when in fact it was directed at explaining missing the appeal hearing, and did that lead the tribunal into not enquiring properly into the reason given on page 8 and whether they amounted to good cause (subject to the answer to the fourth point above)?"

Relevant law

11. The ESA 2011 Regs provided at the relevant time materially as follows:

> "**Interpretation**
> **2.**— (2) For the purpose of these Regulations where a written notice is given by sending it by post it is taken to have been received on the second working day after posting.

**Requirement to undertake work-related activity**
**3.**—(1) The Secretary of State may require a person who satisfies the requirements in paragraph (2) to undertake work-related activity**(a)** as a condition of continuing to be entitled to the full amount of employment and support allowance payable to that person.
(2) The requirements referred to in paragraph (1) are that the person–
(a) is required to take part in, or has taken part in, one or more work-focused interviews pursuant to regulation 54 of the ESA Regulations;
(b) is not a lone parent who is responsible for and a member of the same household as a child under the age of 5;
(c) is not entitled to a carer's allowance; and
(d) is not entitled to a carer premium under paragraph 8 of Schedule 4 to the ESA Regulations.
(3) A requirement to undertake work-related activity ceases to have effect if the person becomes a member of the support group.
(4) A requirement imposed under paragraph (1)–
(a) must be reasonable in the view of the Secretary of State, having regard to the person's circumstances; and
(b) may not require the person to–
(i) apply for a job or undertake work, whether as an employee or otherwise; or
(ii) undergo medical treatment.
(5) A person who is a lone parent and in any week is responsible for and a member of the same household as a child under the age of 13, may only be required to undertake work-related activity under paragraph (1) during the child's normal school hours.

**Notification of work-related activity and action plans**
**5.**—(1) The Secretary of State must notify a person of a requirement to undertake work-related activity by including the requirement in a written action plan given to the person.
(2) The action plan must specify–
(a) the work-related activity which the person is required to undertake; and
(b) any other information that the Secretary of State considers appropriate.

**Requirement to undertake work-related activity at a particular time not to apply**
**6.** The Secretary of State may determine that a requirement as to the time at or by which work-related activity is to be undertaken is not to apply, or is to be treated as not having applied, if in the view of the Secretary of State it would be, or would have been, unreasonable to require the person to undertake the activity at or by that time.

**Reconsideration of action plans**
**7.**—(1) A person may request reconsideration of an action plan.
(2) On receipt of a request the Secretary of State must reconsider the action plan.
(3) A decision of the Secretary of State following a request must be in writing and given to the person.

**Failure to undertake work-related activity**

> **8.**—(1) A person who is required to undertake work-related activity but fails to do so must show good cause for the failure within 5 working days of the date on which the Secretary of State gives notice of the failure.
> (2) The Secretary of State must determine whether a person who is required to undertake work-related activity has failed to do so and, if so, whether the person has shown good cause for the failure."

12. Regulation 63 of the Employment and Support Allowance Regulations 2008 deals with the level of sanctions for a failure to take part in work-related activity. The relevant parts of regulation 63 provided at the material time as follows:

> "**Reduction of employment and support allowance**
> **63.** (1) Where the Secretary of State has determined–
> (a) that a claimant who was required to take part in a work-focused interview has failed to do so and has failed to show good cause for that failure in accordance with regulation 61; or
> (b) that a claimant who was required to undertake work-related activity has failed to do so and has failed to show good cause for that failure in accordance with regulation 8 of the Employment and Support Allowance (Work-Related Activity) Regulations 2011,
> ("a failure determination") the amount of the employment and support allowance payable to the claimant is to be reduced in accordance with this regulation.
> (2) Subject to paragraph (3), the amount of the reduction in relation to each failure determination is 100% of the prescribed amount for a single claimant as set out in paragraph (1)(a) of Part 1 of Schedule 4.
> (3) In any benefit week, the amount of an employment and support allowance payable to a claimant is not, by virtue of this regulation, to be reduced–
> (a) below 10 pence;
> (b) in relation to more than–
> (i) one failure determination relating to work-related activity; and
> (ii) one failure determination relating to a work-focused interview; and
> (c) by more than 100% of the prescribed amount for a single claimant as set out in paragraph 1(a) of Part 1 of Schedule 4 in any circumstances.
>
> (6) Subject to paragraph (10), the reduction is to have effect for–
> (a) one week for each 7 day period during which the claimant fails to meet a compliance condition; and
> (b) a further fixed period determined in accordance with paragraph (7).
> (7) The length of the fixed period is–
> (a) 1 week, where there has been no previous failure by the claimant which falls within paragraph (8);
> (b) 2 weeks, where there has been only one previous failure by the claimant which falls within paragraph (8); or

> (c) 4 weeks, where there have been two or more previous failures by the claimant and the most recent of those failures–
> (i) falls within paragraph (8), and
> (ii) resulted in a reduction that has effect for 2 weeks under sub-paragraph (b) or 4 weeks under this sub-paragraph, or would have done but for paragraph (3).
> (8) A previous failure falls within this paragraph if–
> (a) it relates to a failure for which a reduction was imposed under this regulation, or would have been but for paragraph (3);
> (b) that failure occurred on or after 3rd December 2012; and
> (c) the date of that failure is within 52 weeks but not within 2 weeks of the date of the current failure."

Arguments and conclusion

13. I should acknowledge at the outset that pretty much from the start of these Upper Tribunal proceedings the Secretary of State has wanted to reverse his sanction decision of 28 May 2013. The problem, however, has been in identifying a legally sound route by which that can be achieved.

14. The Secretary of State's original submission to the Upper Tribunal supported the appeal and argued that the Upper Tribunal could decide that it was unreasonable to require the appellant to undertake work-related activity at the relevant time and so remove the sanction decision. He relied on regulation 6 of the ESA 2011 Regs and argued it could engage at any time after a requirement to undertake work-related activity had been placed on a claimant. What ought to have occurred, so he argued, was that on the appellant returning (late) her reasons for not attending the interview (as set out in paragraph 3 above), the information the appellant there gave should have triggered further investigations into her mental health at the time. On the basis of that information it was argued that the Secretary of State, and subsequently the First-tier Tribunal, could have determined under regulation 6 of the 2011 ESA Regs that it was unreasonable to have required the appellant to attend the interview on 17 April 2013. The Secretary of State further argued that as the evidence had been presented within one month of the sanction decision, that decision could be revised under regulation 3(1)(a) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (revision at any time) (the "DMA Regs").

15. I was unconvinced by this argument based on regulation 6 of the ESA 2011 Regs, at least in so far as it had been argued in the original submission. I need not finally rule on it however given the alternative (and perhaps easier) route by which this appeal can be allowed and the result contended for secured. I was also troubled that the Secretary of State's argument did not address any of the issues I had raised when giving permission to appeal. This led me to issue directions on the appeal in which I set out my concerns about the argument.

> "Regrettably, and despite an extension of time sought by the Secretary of State so as to obtain legal and policy advice "**in order to provide a full and complete response to the various grounds that the Upper Tribunal Judge has identified**", the Secretary of State's submission does not address any of the issue[s] I raised when I gave permission to appeal. Moreover, and at least initially more importantly, I do not understand the basis upon which it is said by the Secretary of State that the First-tier Tribunal erred in law by its decision of 24 January 2014. If the First-tier Tribunal did not err in law in the way the Secretary of State submits then unless and until another error of law is identified I will have no option but to uphold its decision. Hence the unfortunate need for these further directions.
>
> It is said by the Secretary of State that the facts are sufficient for the Upper Tribunal to make the decision which the First-tier Tribunal ought to have made, "**namely that it was unreasonable to require [the appellant] to undertake work-related activity at that time**" and as a consequence revise the decision to impose the sanction on her. The revision power relied on is regulation 3(1)(a) of the Social Security and Child Support (Decision and Appeals) Regulations 1999 (SI 1999/991) (the "DMA Regs"). However that power vests in the Secretary of State alone. It is not a power either the First-tier Tribunal or the Upper Tribunal can exercise. Moreover, it is dependant on the Secretary of State having in fact commenced action to revise within one month of 28 May 2013, which did not happen here.
>
> Moreover, I cannot see that any "official error" revision ground can apply because the official error, if it be one, does not lie in the decision made on 28 May 2013 but the *failure to make* a revision of that decision within one month, which of course means that there is no subsequent decision caused by official error. Further, the "any ground" revision power in regulation 3(4A) of the DMA Regs only arises if the appeal to the First-tier Tribunal has not been determined, which doesn't apply here because the appeal was decided by the First-tier Tribunal on 24 January 2014.
>
> This brings us back to whether the First-tier Tribunal erred in law in the decision it came to on 24 January 2014. It is important to bear in mind here the terms of section 12(8)(b) of the Social Security Act 1998, which in effect compels the First-tier Tribunal to decide the appeal on the basis of the circumstances applying to [the appellant] on

> 28 May 2013 and not any later date. However as at that date the Secretary of State had decided that [the appellant] had not within 5 days shown good cause for her failure to undertake work-related activity on 17 April 2013. He had made no (retrospective) determination or decision under regulation 6 of the ESA Regs 2011 that the requirement to undertake work-related activity did not apply as at 17 April 2013. Even if a Secretary of State's determination (if made) under regulation 6 is appealable (and I find it difficult to see why it would need to be given it would be a decision favouring a claimant – and I would wish submissions on the basis on which it is appealable if this point becomes relevant), I cannot at present see the basis on which a First-tier Tribunal can exercise the regulation 6 decision-making function where there has been no decision made under regulation 6 by the Secretary of State. The First-tier Tribunal's powers only arise on an appeal against a decision made by the Secretary of State and not otherwise: see section 12 of the Social Security Act 1998. I therefore at present simply cannot see the basis for the Secretary of State's argument that the First-tier Tribunal erred in law in not exercising for itself the regulation 6 decision-making power (or that the Upper Tribunal can do so).
>
> A separate issue may arise as to whether, given the backwards looking language of regulation 6 ("**is to be treated as not having applied**" and "**or would have been unreasonable to require**"), the Secretary of State can, so to speak, act after the event under regulation 6 so as to remove the requirement to undertake work-related activity which a person may have been found to have failed to meet and who has not shown good cause within the 5 days in regulation 8 of the ESA Regs 2011. Does that decision take affect as a revision decision or a supersession decision, or otherwise? If revision, is the revision power contained in regulation 3(5C) of the DMA Regs? If so what is the "failure determination" that stands to be revised? On the face of regulation 1(3) of the DMA Regs and the definition of "failure determination" contained therein, the failure determination would seem to be limited to regulation 8(2) of the ESA Regs 2011. However, is that not here precisely the decision of 28 May 2013 which was upheld on appeal? If that is the case and if the decision of the First-tier Tribunal replaces that of the Secretary of State dated 28 May 2013 (see on this paragraph 25 of my decision in *VW –v- LB Hackney* (HB) [2014] UKUT 0277 (AAC)), is there any Secretary of State decision left for a revision consequent to regulation 6 of the ESA Regs 2011 to then bite on (revision, in effect, being limited to decisions of the Secretary of State and not extending to decisions of the First-tier Tribunal)?"

16. Responding to these concerns, the Secretary of State filed a further, more detailed submission, in which he sought an oral hearing of the appeal.

17. The Secretary of State maintained his argument relying on regulation 6 of the 2011 ESA Regs and the tribunal having erred in law in not applying it on the appeal before it. He argued that the Tribunal of Commissioner's decision in *R(IB) 2/04* provided the authority for his argument that the First-tier Tribunal has jurisdiction to revise an original decision with one it thinks the Secretary of State should have made because it conducts a complete rehearing and can give any decision the Secretary of State ought to have given. In undertaking a complete rehearing of the case, the tribunal should have considered the appellant's circumstances at the date of the failure to undertake work-related activity and, as the Secretary of State ought to have done, invoked regulation 6 of the 2011 ESA Regs and set aside the sanction decision of 28 May 2013. In failing to take this step, the tribunal had erred in law. This rendered the issue of whether the regulation 6 decision was itself appealable irrelevant. The appeal was against the supersession decision under regulation 6(2)(p) of the DMA Regs which had led to the reduction in benefit based on the failure under regulation 8 of the 2011 ESA Regs.

18. As for the issues I had raised when I gave permission to appeal, the Secretary of State argued as follows.

19. First, the relevant documentation that ought to have been before the tribunal was the appellant's 'action plan'. This had first been prepared in March 2012 and had been updated regularly. This highlighted, inter alia, that the appellant had severe depression. Furthermore, the action plan was more relevant to the issues the tribunal had to decide in 2013 as it was more up-to-date than the 2009 decision which had found the appellant to have limited capability for work.

20. I pause at this point to say that I agree that the action plan should have been before the tribunal as evidence relevant to the decision under appeal which was before it. In not providing it the Secretary of State breached his duty under rule 24(4)(b) of 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…" (*ST-v-SSWP* [2012] UKUT 469 (AAC) (not doubted on this point by the three-judge panel in *FN –v- SSWP* [2015] UKUT 670 (AAC)).

21. As for the second issue I had raised when giving permission to appeal, the Secretary of State said it is the policy of the DWP to warn ESA claimants of the consequences of not undertaking work-related activity by telling them that their benefit might be affected if they fail to undertake work-related activity that has been required of them. This is done first at the initial stage of referral on to the work programme where a form WP06 is provided to the claimant. This says "If you fail to do any work-related activity that [*Ingeus*] or one of their partners tells you to do without a good reason, your Employment and Support Allowance could be reduced". It is then done in the appointment letter. The appointment letter issued to the appellant on 25 March 2013 for her appointment at the Papworth Trust on 17 April 2013 (not provided to the First-tier Tribunal, perhaps because the appellant took no issue about having been notified of the appointment, but provided in these Upper Tribunal proceedings), said "If you do not undertake the activities required in this notification your benefits could be affected". (It is noteworthy that one of the requirements of attending the 17 April 2013 interview was for the appellant to update the provider about her current health.)

22. On the third issue the Secretary of State submitted that under regulation 2(2) of the ESA 2011 Regs the 13 May 2013 letter asking for the appellant's reasons within five working days for not attending the interview on 17 April 2013 allowed two working days for receipt from the day it was posted[3]. However the letter had wrongly calculated the five working day response time period as expiring on 20 May 2013 when it should have been 22 May 2013. This, however, made no

[3] The means of calculating the five working days was not disputed before me. I merely record that in paragraph 263 of *SSWP –v- TJ and others* [2015] UKUT 56 (AAC), it was decided that identical wording to that in regulation 2(2) of the 2011 ESA Regs was "**to be read as providing for the calculation of the date from which the notice is effective if it is received, rather than providing for the deemed receipt of the notice**".

material difference as the reply the appellant had in fact provided was well outside even the correct date of 22 May 2013.

23. On the fourth issue, the Secretary of State argued that this issue had been answered conclusively by the three judge panel in *SSWP –v TJ and others* [2015] UKUT 56 (AAC) at paragraphs 255-265 (not doubted on this point in the further appeal from that decision to the Court of Appeal in *SSWP –v- Jeffrey and Bevan* [2016] EWCA Civ 413), and therefore the good cause had to be shown within five working days and that time could not be extended.

24. This argument was not disputed by the appellant and in any event in my judgment must be correct. The language of regulation 8(1) of the ESA 2011 Regs cannot reasonably admit of any other construction and to hold otherwise would run contrary to the decision in *TJ*. Moreover, the main *vires* for the parts of ESA 2011 Regs set out above - section 13 of the Welfare Reform Act 2007 - like the regulation making power in issue at paragraph 258 of *TJ*, enables regulations to be made to make provision (section 13(2)(e) Welfare Reform Act 2007);

> "for securing that the appropriate consequence follows if a person who is subject to such a requirement
> (i) fails to comply with the regulations, and
> (ii) does not, within a prescribed period, show that he had good cause for that failure." (my underlining).

This power is entirely consistent with the good cause having to be shown within five working days.

25. This does not, however, reduce the concerns raised in *TJ* about the potential for harsh consequences to arise from such a short period in which to show good cause. Indeed those consequences may be of an even acuter concern in ESA where claimants may not be regularly attending the jobcentre and where their medical conditions may in and of themselves limit their ability to respond in time. These considerations are therefore likely to affect, more so than perhaps in

other benefits, the need for the Secretary of State to scrupulously adhere to his duty under rule 24(4)(b) of Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 and the concomitant need for the First-tier Tribunal, perhaps especially where the claimant does not wish to attend a hearing of his or her appeal, to be astute to ensuring the Secretary of State's compliance with his rule 24(4)(b) duty. As I have already said in *NM –v- SSWP* (JSA) [2016] UKUT 0351 (AAC) at paragraph 20, the three judge panel's decision in *FN* –v- SSWP [2015] UKUT 670 (AAC) does not, it seems to me, mean that a First-tier Tribunal will not err in law – in terms of natural justice and the right to a fair hearing – where it faithfully and properly (on what is before it) decides the appeal on the evidence that is before it if it is later shown that other relevant evidence was available and ought to have been before it.

26. As for the fifth issue, although the written action plan had wrongly not been included in the papers put before the Fist-tier Tribunal by the Secretary of State, he argued that it had in fact been notified to the appellant and agreed by her. Again, this was not disputed.

27. On the sixth and final issue, the Secretary of State submitted that any misdirection as to the evidence the tribunal may have made about not attending the appeal hearing rather than not attending the appointment was immaterial as on the evidence it was plain that the reasons given for not attending the appointment were not provided within the statutory five working day period.

28. Given my concerns as to the Secretary of State's primary argument, I directed an oral hearing of the appeal. Fortunately the appellant was able to gain representation at that hearing from the Free Representation Unit (FRU). The representation at the hearing was as set out above.

29. FRU did not seek to join with the Secretary of State on his argument that the tribunal had erred in law in not applying regulation 6 of the ESA 2011 Regs to the decision under appeal and that argument did not really feature in the hearing before me (though it was not abandoned by the Secretary of State). In these circumstances and given there is another route agreed by which the appeal can be allowed, although the Secretary of State's argument as it has developed may have some force, I decline to give any ruling on it. In my view it is best decided in an appeal where it is needed.

30. FRU took two arguments on behalf of the appellant. The first concerned the issuing of a written action plan under regulation 5 of the ESA 2011 Regs. The second concerned whether the appellant was correctly notified of the requirement to provide good cause within five days.

31. The first argument focused on the words the "action plan must specify…the work-related activity which a claimant is required to undertake" (my underlining) in regulation 5(2)(a) of the ESA 2011 Regs, and argued that the action plan which had been disclosed did not identify clearly and definitely what it was that the appellant was required to undertake by way of work-related activity. Without such detail in the action plan it was difficult to assess, so FRU argued, whether the requirement to undertake work-related activity was reasonable on the appellant's circumstances: per regulation 3(4)(a) of the ESA 2011 Regs. Reliance was placed on *IM –v- SSWP* (ESA) [2014] UKUT 412 (AAC); [2015] AACR 10, in respect of the need to give some detail of the work-related activity required so as to assess its reasonableness. The failure to do this "effectively nullified the implementation of regulation 8 [of the ESA 2011 Regs".

32. The second argument advanced by FRU was to the effect that the wrong response date of 20 May 2013 given in the 13 May 2013 letter seeking the appellant's reasons for not attending the 17 April 2013 interview

was material as the appellant was given less time than allowed for by the law in which to respond.

33. I am reluctant, again, to rule on either of these arguments in a case where, bluntly, they do not matter given it is agreed the appeal can be allowed wholly in the appellant's favour on another basis, and I decline therefore to determine whether either of these arguments has merit.

34. I should note, however, that the Secretary of State presented detailed arguments in response to both of these points. Taking those arguments very shortly:

    (i) on "specify" he argued that reading them together the WP06, action plan and the appointment letter did specify sufficiently the requirement to undertake work-related activity (here relying on paragraphs 181-187 of *TJ*). Moreover, any breach of this requirement had to be judged in terms of the consequences flowing from it and, critically, whether any prejudice flowed from the breach: *R-v Soneji* [2006] 1 AC 340 at paragraphs 23-24, *TJ* at paragraph 192 and *R(Reilly and Wilson) –v- Secretary of State for Work and Pensions* [2013] UKSC 68; [2014] AC 453 at paragraph 56 (and see now also *IC –v- Glasgow City Council and SSWP* (HB) [2016] UKUT 321 (AAC) at paragraph 47). He did accept, however, as I understood it, that if there had been a material breach of regulation 5(2) of the ESA 2011 Regs then no lawful requirement would have been placed on the appellant under those regulations and, therefore, no failure to meet such a requirement could arise for the purposes of regulation 8 of the ESA 2011 Regs. On this argument I merely observe that the language of regulation 5 of the ESA 2011 Regs "including the requirement in a written action plan given to the person" and "[t]he action plain must specify…" might

suggest, unlike the notice in *TJ*, a focus on the written action plan document on its own (though that may have implications for the argument made under paragraph 39 below);

(ii) on the failure to tell the appellant she had until 22 May 2013 to reply, he argued that this error was in no sense material because (a) the appellant had not put together her reply until 30 May 2013 in any event, and (b) there was no argument made to suggest that had the appellant been given the correct 'reply by date' of 22 May 2013 she would have acted any differently than she did. If I may say so, that seems to me to be an argument of some force.

*Regulation 3(4) of the ESA 2011 Regs*

35. However the basis on which the appeal is allowed has nothing to do with these arguments or the argument based on regulation 6 of the ESA 2011 Regs. The appeal succeeds because I am persuaded by the Secretary of State's argument, with which FRU agree, that the tribunal erred in law in failing to consider whether regulation 3(4)(a) of the ESA 2011 Regs was met as at the date of the decision under appeal to the tribunal.

36. It may be helpful to be reminded of the terms of regulation 3(4)(a). It appears in regulation 3, which by paragraph (1) provides that the Secretary of State may require certain ESA claimants (who fall within paragraph (2)) to undertake work-related activity as a condition of continuing to be entitled to be paid their full amount of ESA. However by paragraph (4)(a) the requirement imposed under paragraph (1) "must be reasonable, in the view of the Secretary of State, having regard to the person's circumstances".

37. The Secretary of State's argument is that in an appeal against a 'no good cause shown within five days' decision made under regulation 8 of the ESA 2011 Regs, the First-tier Tribunal can consider for itself whether it is satisfied that the particular requirement imposed was reasonable and rule accordingly, and, given the terms of section 12(8)(a) of the Social Security Act 1998, must do so where it is an issue that arises on the appeal. The issue of the reasonableness of the work-related activity is relevant under regulation 8 of the ESA 2011 Regs because regulation 8 only applies to "[a] person who is required to undertake work-related activity" and, so it is argued (and I accept), for such a requirement to be lawfully imposed for the purposes of regulation 8 it must have been a reasonable requirement given the terms of regulation 3(4)(a). In other words, satisfaction of regulation 8 of the ESA 2011 Regs requires the Secretary of State's decision maker, and the First-tier Tribunal on an appeal from such a decision to be satisfied, in a case or where the issue arises, that the requirement was reasonable on the circumstances of the claimants case, as a claimant cannot 'fail' to meet a requirement where there was in law no lawful requirement.

38. Further, in this case although as at the date of the 28 May 2013 decision under appeal the appellant's full circumstances may not have been *known to* the decision maker (though the 'action plan' ought to have been before both the Secretary of State's decision maker and the tribunal on the appeal), later evidence as to what her circumstances were "obtaining at [that] time" could still be taken into account under section 12(8)(b) of the Social Security Act 1998: see, for example, *CJSA/2375/2000*.

39. The requirement to undertake work-related activity was the need to attend the "mandatory appointment" at the Papworth Trust on 17 April 2013 imposed on the appellant by *Ingeus's* letter to her of 25 March 2013. No issue arises that *Ingeus* were lawfully delegated to carry out this function under regulation 9 of the ESA 2011 Regs. Moreover,

assuming without the Upper Tribunal deciding, that the appointment letter was not rendered invalid as a requirement because it was not included in the written 'action plan', it was on its face a requirement imposed on the appellant by the Secretary of Stat'es lawful delegate under regulation 3 of the ESA 2011 Regs and had been notified to the appellant (even if it had not been notified to her in the written action plan under regulation 5(1)).

40. I accept the Secretary of State's argument. In my judgment on the evidence which was, and ought to have been, before the tribunal, an issue arose as to whether it was reasonable on all the appellant's circumstances for her to attend the appointment on 17 April 2013. The tribunal erred materially in law in not addressing that issue in coming to its decision and its decision must be set aside on this basis. This was a separate issue (and legally a logically prior issue) to whether the appellant had shown within five working days whether she had good cause for not attending the appointment on 17 April 2013. Any good cause shown would have been relevant to whether she had *failed* to meet a lawfully imposed requirement to undertake work-related activity, but given the structure of the ESA 2011 Regs, and regulation 3(4)(a) in particular, if the work-related activity required to be undertaken was unreasonable then, in my judgment, it did not amount to a lawful requirement at all, and so was not a "requirement" which the appellant could fail to meet for the purposes of regulation 8.

*Wider guidance?*

41. The only remaining issue I need to address is whether I can give any wider guidance on when regulation 3(4)(a) of the ESA 2011 Regs will arise on appeals by ESA claimants against a decision that they have not shown good cause, or not shown it within five days, for having failed to undertake work-related activity, or whether it will arise on all such appeals.

42. It is important, I consider, to distinguish here between two points. The first is that, as held above, as a matter of the correct legal construction of the ESA 2011 Regs, regulation 3(4)(a) is always *capable* of being relevant to the answer to be given to an appeal ostensibly about whether regulation 8 is satisfied. The second, however, is whether regulation 3(4)(a) and the reasonableness of the individual requirement alleged to have been breached without good cause is an issue raised by the appeal, and so needs to be addressed and decided (per section 12(8)(a) of the Social Security Act 1998), will depend on the facts of each individual appeal.

43. Beyond these very general points it may inappropriate to stray much further. If a claimant in his or her appeal letter or at the appeal hearing says the requirement was not reasonable having regard to his circumstances (or some such words, the exact statutory wording obviously does not need to be used) then the First-tier Tribunal will need to determine that issue in deciding the appeal. On the other hand, an appeal written by a welfare rights officer which focuses solely on arguing that the reasons given within the five days amount to good cause and where the surrounding evidence does not suggest that the particular requirement was other than a reasonable one for the particular appellant, would probably not be an appeal giving rise to an issue under regulation 3(4)(a) to be determined.

44. Between these two, perhaps, extremes, the question of whether the requirement imposed was a reasonable one on the claimant's circumstances will be a matter for the judgment of the tribunal based on the facts of the case before it. I would suggest, however, that given what I said in paragraphs 20 and 25 above, First-tier Tribunals probably need to be astute to question whether regulation 3(4)(a) and the reasonableness of the requirement is an issue arising on the 'good cause' appeal, especially where appellant does not seek or appear at a hearing and where the Secretary of State fails to include the 'action

plan' or other information relevant to the appellant's health and functioning with his appeal response.

45. It would no doubt assist First-tier Tribunals on all such appeals if the Secretary of State's written appeal response set out, however briefly, why he considered the work-related activity requirement he had imposed was a reasonable one for the appellant. After all he must have formed that view in each case given the terms of regulation 3(4)(a). But on what has been argued before me I do not consider it would necessarily be a breach of his duties under rule 24(2)(e) and 24(4)(b) of Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 for him not to do so in every case. The less he does provide, however, the more likely he may find himself, in appropriate cases, facing directions from the First-tier Tribunal to provide it with all the evidence in his possession relevant to whether the requirement imposed was a reasonable one.

46. For the reasons set out above, I am satisfied that the tribunal made a material error of law in coming to its decision of 24 January 2014 and that decision must be set.

47. I give the decision the tribunal ought to have given in the form set out above on the basis of my being satisfied on the evidence relevant to the appellant's mental state and family situation between 25 March 2013 and 17 April 2013 that the requirement imposed on her to attend the appointment on 17 April 2013 was not a reasonable one.

**Signed (on the original) Stewart Wright**
**Judge of the Upper Tribunal**

**Dated 28th July 2016**