IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case Nos. CSE/269/12
CSE/443/12
CSE/518/12

Before: **Mr Justice Charles CP**
Upper Tribunal Judge Rowland
Upper Tribunal Judge Gamble

Attendances:

For the Secretary of State: Ms Ruth Crawford QC, instructed by the Ms Helena Janssen of the Office of the Solicitor to the Advocate General for Scotland

For the claimants: Mr Jonathan Mitchell QC, instructed by Ms Lesley Anne Mulholland of Quinn, Martin & Langan

Decisions: In CSE/269/12, the claimant's appeal is dismissed.
In CSE/443/12, the Secretary of State's appeal is allowed.
The decision of the First-tier Tribunal dated 28 March 2012 is set aside and the case is remitted to a differently-constituted panel of the First-tier Tribunal to be re-decided.
In CSE/518/12, the claimant's appeal is dismissed.

REASONS FOR DECISION

Introduction

1. In each of the three cases before us, the Secretary of State decided that an award of income support based on the claimant's incapacity for work should terminate because it did not qualify for conversion into an award of employment and support allowance. Each claimant now submits that the decision relating to him was invalid because he did not receive, in the prescribed form or at all, a notice required to be issued as part of the conversion process. The Secretary of State submits that there was compliance with the legislation but that, even if there was not, any breach did not render the decisions invalid.

The legislation

2. Employment and support allowance was introduced by Part 1 of the Welfare Reform Act 2007, section 1(1) to (4) of which provides –.

> "**1**.—(1) An allowance, to be known as an employment and support allowance, shall be payable in accordance with the provisions of this Part.
> (2) Subject to the provisions of this Part, a claimant is entitled to an employment and support allowance if he satisfies the basic conditions and either—

(a) the first and the second conditions set out in Part 1 of Schedule 1 (conditions relating to national insurance) or the third condition set out in that Part of that Schedule (condition relating to youth), or
(b) the conditions set out in Part 2 of that Schedule (conditions relating to financial position).

(3) The basic conditions are that the claimant—
(a) has limited capability for work,
(b) is at least 16 years old,
(c) has not reached pensionable age,
(d) is in Great Britain,
(e) is not entitled to income support, and
(f) is not entitled to a jobseeker's allowance (and is not a member of a couple who are entitled to a joint-claim jobseeker's allowance).

(4) For the purposes of this Part, a person has limited capability for work if—
(a) his capability for work is limited by his physical or mental condition, and
(b) the limitation is such that it is not reasonable to require him to work."

3. Section 8 provides that "whether a person's capability for work is limited by his physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require him to work shall be determined in accordance with regulations".

4. Employment and support allowance is replacing incapacity benefit and severe disablement allowance and also income support for those claimants entitled to income support on the ground of incapacity for work or disability (see the definition of "existing award" in paragraph 11 of Schedule 4). Where the conditions of entitlement to employment and support allowance are different from those for entitlement to incapacity benefit, severe disablement allowance and income support, they are generally more stringent. In particular, the test for whether a person has limited capability for work under the Employment and Support Allowance Regulations 2008 (SI 2008/794) ("the 2008 Regulations") is stricter than the test for incapacity for work under the Social Security (Incapacity for Work) (General) Regulations 1995 (SI 1995/311).

5. Awards of employment and support allowance have been made to new claimants since 27 October 2008 but it was only from 1 October 2010 that there began a process of "converting" existing awards of incapacity benefit, severe disablement allowance or income support into awards of employment and support allowance. This conversion process started in pilot areas but was then rolled out nationally and we are told that it has been initiated in 11,000 cases per week since May 2011.

6. Statutory provision for conversion is made by the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No.2) Regulations 2010 (SI 2010/1907) as amended ("the 2010 Regulations"), made under Schedule 4 to the 2007 Act. Of particular relevance to these cases is regulation 4, which provides –

> "**4.**—(1) Subject to paragraph (5), the Secretary of State may at any time issue a notice to any person who is entitled to an existing award.
> (2) Any person to whom such a notice is issued is referred to in these Regulations as a notified person.

(3) The notice must inform the notified person—
(a) that an existing award is to be converted into an award of an employment and support allowance if certain conditions are satisfied;
(b) that, if those conditions are not satisfied, the existing award will not be converted and will terminate by virtue of these Regulations;
(c) of the requirements that must be met in order to satisfy those conditions; and
(d) of such other matters as the Secretary of State considers appropriate.
(4) The issue of the notice to a notified person begins the conversion phase in relation to that person, with effect from the date of issue.
(5) No notice may be issued to any person—
(a) who reaches pensionable age at any time before 6th April 2014; or
(b) at any time when payment of the existing award to the person is subject to adjustment under regulation 4 of the Social Security (Transitional Payments) Regulations 2009 (adjustment of subsequent payments following an adjusting payment of benefit).
(6) Where a person is entitled to—
(a) an existing award of incapacity benefit or severe disablement allowance; and
(b) an existing award of income support,
the notice issued to the person under this regulation shall have effect in relation to both such awards."

7. Regulations 5(1) and (2), 7(1) and 15 (1), (2) and (2A) then provide –

"**5.**—(1) In relation to the existing award or awards to which a notified person ("P") is entitled, the Secretary of State must, except where paragraph (8)(a) applies, make a conversion decision in accordance with these Regulations.
(2) A conversion decision is:
(a) a decision that P's existing award or rewards qualify for conversion into an award for an employment and support allowance in accordance with regulation 7 (qualifying for conversion); or
(b) a decision that P's existing award or awards do not qualify for conversion into an award for an employment and support allowance."

"**7.**—(1) Subject to paragraph (two), for the purposes of regulation 5 (2)(a) (deciding whether an existing award qualifies for conversion), and existing award or awards to which a notified person ("P") is entitled qualified for conversion into an award of an employment and support allowance under the Regulations only if P satisfies the basic conditions set out in section 1(3)(a) to (d) and (f) of the 2007 Act."

"**15.**—(1) Subject to paragraphs (2A) and (4), paragraphs (2), (3) and (6) apply in any case where the conversion decision is a decision that a notified person's ("P") existing award or awards do not qualify for conversion into an employment and support allowance.
(2) P's entitlement to one or both of—
(a) an existing award of incapacity benefit or severe disablement allowance; or
(b) an existing award of income support (being an award made to a person incapable of work or disabled),
shall terminate by virtue of this paragraph immediately before the effective date of P's conversion decision.
(2A) Where P–
(a) has an existing award of income support, and
(b) would, on the effective date of P's conversion decision, remain entitled to income support (by virtue of another provision of the Income Support (General) Regulations 1987) were P not a person to whom regulations 6(4)(a)

> or 13(2)(b) or (bb) of, or paragraph 7(a) or (b), 10, 12 or 13 of Schedule 1B to, those Regulations (persons incapable of work or disabled) applied, P's existing award of income support shall only terminate under paragraph (2)(b) if P notifies the Secretary of State before the effective date of P's conversion decision that P does not wish to remain entitled to income support on that date.
>
> (2B) Where paragraph (2A) applies, and P's existing award of income support does not terminate under paragraph (2)(b), any entitlement of P to a disability premium by virtue of paragraph 12(1)(b) of Schedule 2 to the Income Support (General) Regulations 1987 (additional condition for the higher pensioner and disability premiums) shall terminate immediately before the effective date of P's conversion decision."

8. A "conversion decision" is therefore defined as the decision *whether* an award or awards qualify for conversion and not as a decision that an award *does*, or awards *do*, qualify for conversion rather than terminate. The process of making a conversion decision involves it being determined whether or not the claimant has limited capability for work. The 2008 Regulations are applied for this purpose by regulation 6 of the 2010 Regulations and generally it is necessary for a claimant to complete a questionnaire (the ESA 50) and then attend a medical examination for assessment by a healthcare professional. The ESA 50 and the form completed by the healthcare professional (the ESA 85) are designed to elicit and record the evidence and information that is relevant to the determination of whether the claimant has limited capability for work applying the detailed provisions of the 2008 Regulations. By filling in the ESA 50 and answering the questions posed by the healthcare professional to enable him or her to complete the ESA 85 the claimant is enabled to provide information relevant to those detailed provisions. If the claimant is found to have a limited capability for work, the existing award is converted under regulation 7 of the 2010 Regulations. If not, the award or awards of benefit and entitlement to credits on the ground of incapacity for work are terminated under regulation 15, save as otherwise provided by regulation 15(2A), from a date calculated in accordance with regulation 13. The term "notified person" is used throughout the 2010 Regulations and, in particular, in regulations 5, 7, 13 and 15.

Form IBM01

9. The document that the Secretary of State sends to claimants as the notice required to be sent under regulation 4 is known as Form IBM01. (When issued clerically, the document bears the number IBM259, but the computer knows it as IBM01 and that is the number we will use.)

10. Form IBM01 is issued as a letter in various versions, depending on whether or not the Department holds a telephone number for the claimant and whether or not the claimant has a representative. Nothing turns on those differences. There is before us a template for the form. This template has some numbered paragraphs, some optional, and a separate standard information sheet, but it appears that when the form is printed it is a single document without paragraph numbering. The template provides:

> "1. For [insert customers first name and last name]

THE BENEFIT YOU RECEIVE IS CHANGING

2. You currently receive Incapacity Benefit, Severe Disablement Allowance, or Income Support on the grounds of illness or disability. We are phasing out these benefits. This letter explains how this will affect you and what you need to do.

3. We need to assess you for Employment and Support Allowance. This is a new benefit that helps people with an illness or disability move into work and provides people with the support they need.

4. Please, take time to read the Further Information section included with this letter, which will help to answer your questions and will tell you more about the changes we are making to your benefits.

WHAT WE ARE GOING TO DO

[Paragraph 5 & 6 for customers for whom we do hold a telephone number]

5. We will telephone you soon to talk about how this change will affect you and to answer any questions you have. We will ask you some questions to confirm your identity. After the call, we will send you a questionnaire to complete with details of your illness or disability. This questionnaire is called the Limited Capability for Work questionnaire.

6. The number we will call you on is xxxx xxxxxxxx. If you haven't heard from us within two weeks of the date of this letter, or if the number we have for you is not correct, please call us on the number above between Monday and Friday, from 8.00am to 6.00pm. This is a local rate call. If you have speech or hearing difficulties you can contact us using a textphone on the number above.

Paragraphs 7, 8 & 9 for customers for whom we do **not** hold a telephone number]

7. We need to telephone you to talk about how this change will affect you and to answer any questions you have. We currently do not hold a telephone number for you so please call us on the number above in the next seven days. This is a local rate call.

8. We will ask you some questions to confirm your identity. After the call, we will send you a questionnaire to complete with details of your illness or disability. This questionnaire is called the Limited Capability for Work questionnaire.

9. If you have speech or hearing difficulties you can contact us using a textphone on the number above between Monday and Friday, from 8.00am to 6.00pm.

[paragraphs 10, 11 & 12 for all customers]

WHAT YOU NEED TO DO

10. Once you receive it, please complete and return the questionnaire as soon as possible. IF YOU DON'T, YOUR BENEFIT MAY BE AFFECTED. It is important that you provide full details of your illness or disability on the form. After we have received your questionnaire we will contact you and tell you what you need to do next. You may need to attend a Work Capability Assessment and more

details about this are included in the
Further Information section of this letter.

11. If you need further advice on how to complete the questionnaire you can contact Jobcentre Plus, or your local welfare rights service such as Citizens Advice Bureau.

KEEPING IN TOUCH WITH YOU

12. We will keep in touch with you to let you know what is happening. If you have any concerns about these changes please tell us when we speak to you.

FURTHER INFORMATION

WHAT IS CHANGING?
Employment and Support Allowance is replacing Incapacity Benefit, Income Support paid on the grounds of illness or disability and Severe Disablement Allowance.

WHY IS IT CHANGING?
Employment and Support Allowance is a new way of helping people with an illness or disability move into work. The Government wants everyone who has an illness or disability to have this opportunity.

DOES THIS CHANGE AFFECT EVERYONE?
Yes, but at different times. Customers will be considered and assessed for Employment and Support Allowance between 2010 and 2014. We are writing to you because you are affected now.

HOW WILL I BE ASSESSED?
To decide if you are entitled to Employment and Support Allowance we need to assess and understand how your illness or disability affects the amount and type of work you could do.

We will send you a questionnaire to complete and we use the information you provide to decide if you need to attend a Work Capability Assessment. It is important that you attend this assessment if you are asked to, or your benefit may be affected. We then decide if you are entitled to Employment and Support Allowance.

WHAT HAPPENS AT A WORK CAPABILITY ASSESSMENT?
A health care professional will assess you and advise Jobcentre Plus how your illness or disability affects you in your everyday life. We will contact you by telephone to arrange the appointment and will also send you a letter with the appointment details and directions to the medical examination centre.

WHAT HAPPENS IF I AM ENTITLED TO EMPLOYMENT AND SUPPORT ALLOWANCE?
No one migrating from their existing benefit to Employment and Support Allowance will see a reduction in the level of their benefit entitlement at the point of change. You may be required to attend a work-focused health- related assessment and work-focused interviews. It is important that you attend these appointments or your benefit may be affected.

WHAT IS A WORK-FOCUSED HEALTH-RELATED ASSESSMENT?
A health care professional will ask you how you feel your illness or disability could be managed to enable you to return to work, and to understand better what help you

may need to start work.

WHAT IS A WORK-FOCUSED INTERVIEW?
This is a face-to-face interview with a job adviser. The purpose is to help you identify work you could do and the steps you could take to find work.

WHAT HAPPENS IF I AM NOT ENTITLED TO EMPLOYMENT AND SUPPORT ALLOWANCE?
We will call you to discuss what your benefit options are including how to challenge our decision if you think it is wrong. You may be entitled to Jobseekers Allowance, Income Support for other reasons or Pension Credit. The minimum age from which you can get Pension Credit is rising in stages from April 2010 from age 60 to 65. We will get in touch with you to discuss what your benefit options are at the appropriate time.

WHAT IF I HAVE CHILDREN?
Employment and Support Allowance does not include payment for children. If you currently get extra money in your Income Support for a child or children, we will send your details to HM Revenue and Customs and you will be assessed for Child Tax Credit. You do not need to make a claim. You will continue to be paid benefit for your child or children until you start receiving Child Tax Credit.

WHAT IS CHILD TAX CREDIT?
Child Tax Credit is a payment from the government to support people bringing up children. To claim Child Tax Credit you must have the main responsibility for a child or young person. Also, any extra help you get (such as free school meals, Healthy Start and free prescriptions) will carry on if you receive Child Tax Credit.

WHERE CAN I GET FURTHER INFORMATION ABOUT TAX CREDITS?
If you have any questions about Child Tax Credit, or tax credits in general, please have your National Insurance number available and phone the tax credits helpline 0845 300 3900 or Textphone 0845 300 3909. They are open from 8.00am to 8.00pm, seven days a week. Or go to www.hmrc.gov.uk/taxcredits.

WHERE CAN I GET FURTHER INFORMATION?
You can get information from our website www.direct.gov.uk/benefits. You can also get further advice from Jobcentre Plus or alternatively your local welfare rights service, such as Citizens Advice Bureau. Should you require special arrangements such as Braille, large text, audio or information in other languages, please tell us when we call you."

The *first case – CSE/269/2012*

11. The claimant had been in receipt of income support on the ground of incapacity for work since 12 March 2007 and had been entitled on the same basis to have National Insurance contributions credited to him. According to a computer screen print, on 7 April 2011 a form IBM01 relating to him was generated. On 27 May 2011 he completed an ESA 50 questionnaire that had been sent to him, he was examined by a registered medical practitioner on 17 August 2011 and, on 19 October 2011, the Secretary of State decided that his existing award of income support did not qualify for conversion into an award of employment and support allowance and would terminate, along with his entitlement to "credits", with effect

from 4 November 2011. He appealed. He asked for the case to be decided on the papers. His appeal was dismissed on 2 February 2012.

12. He applied for permission to appeal to the Upper Tribunal on the ground that there was no evidence that a notice had been issued as required by regulation 4 or that any purported notice complied with the requirements of regulation 4(3) and that therefore there was no evidence that the claimant was a "notified person" in respect of whom a conversion decision could be made under regulation 5. Permission to appeal was refused by the First-tier Tribunal but granted by Upper Tribunal Judge Sir Crispin Agnew of Lochnaw Bt QC. The claimant now denies ever having received a notice under regulation 4.

The second case – CSE/443/2012

13. The claimant had been in receipt of income support on the ground of incapacity for work since 22 December 1988 and had been entitled on the same basis to have National Insurance contributions credited to him. According to a computer screen print, on 12 July 2011 a form IBM01 relating to him was generated. On 31 August 2011 he completed an ESA 50 questionnaire that had been sent to him, he was examined by a registered nurse on 14 September 2011 and, on 10 November 2011, the Secretary of State decided that his existing award of income support did not qualify for conversion into an award of employment and support allowance and would terminate, along with his entitlement to "credits", with effect from 8 December 2011.

14. The claimant appealed. Mr Steven Craig, a welfare rights officer employed by Queens Cross Housing Association, made a written submission to the effect that the claimant's award of income support should not be terminated, and his entitlement to credited contributions should continue, because there was no evidence that a notice had been issued as required by regulation 4 or that any purported notice complied with the requirements of regulation 4(3) and that therefore there was no evidence that the claimant was a "notified person" in respect of whom a conversion decision could be made under regulation 5. The Secretary of State responded, referring to the computer record showing that form IBM01 had been generated and sent on 12 July 2011. It was said to be impossible to provide a copy of the precise form sent to the claimant, but extracts from the template form IBM01 were quoted and it was argued that the form was sufficient to amount to a notice under regulation 4. Both parties were represented at the hearing, at which the claimant denied ever having received form IBM01.

15. The First-tier Tribunal allowed the claimant's appeal on the ground that there was insufficient evidence that form IBM01 contained the information necessary for compliance with regulation 4(3) or that such a form had actually been dispatched to the claimant. It gave the following reasons –

> "3. The terms (again, this was common ground between the Representatives) which must be included in such a Notice (apparently now given the administrative designation IBM01) in order to constitute that person a 'notified person' are stated in Regulation 4(3) to include:-
>
> (a) That the existing award is to be converted into an award of an employment and support allowance if certain conditions are satisfied;

(b) That, if those conditions are not satisfied, the existing award will not be converted and will terminate by virtue of these Regulations;
(c) Of the requirements that must be met in order to satisfy those conditions; and
(d) Of such other matters as the Secretary of State considers appropriate.

4. At the outset of the Hearing, [the claimant's] Representative bluntly stated that [the claimant] had never received a Letter or Notice in those Terms. In reply, the PAO pointed to Document 16 in the Papers — a Print of Screen 803 from Dialogue RP001 of the PSCS System which the PAO claimed demonstrated that a Form IBM01 had been issued to [the claimant]. Document 16 contains a handwritten addition in the following terms:- 'Certified on behalf of the Secretary of State as confirmation that notification that the conversion phase had commenced was issued to [the claimant] on 12.07.11'. Unfortunately that is followed by a set of initials and a date (5.1.12) but nothing to say who the individual certifying was and no stamp or other marking to demonstrate their authority to issue such a certificate on behalf of the Secretary of State. That, accordingly, became the Preliminary issue in this case — namely, whether or not [the claimant] had in fact received a Letter or Notice which would satisfy the terms of Regulation 4(3) above.

5. In passing, the Tribunal observes that it theoretically ought to be possible for any competent administrative system to create and preserve a Notice or Letter clearly addressed to [the claimant] and setting out the information required by Regulation 4(3). That Document could then be preserved for the period of time within which any appeal requires to be made (and included in any such appeal). If no appeal was made, or any the expiry of the time allowed for appeals, that Document could be destroyed and replaced by a computer record of the event.

6. Instead, it appears that in an effort to save administrative time and money, such Notices are now computer-generated. It is still not dear to this Tribunal why any such notice which is computer-generated but identifiable as relating to [the claimant] should not be preserved in some computer form so as to be produced in an appeal such as this one.

7. Be that as it may, what was placed before the Tribunal in this case was Document 16. The PAO says that that Document is sufficient for the purposes of this appeal. The Representative says that it is not. That is the Preliminary Issue in this case upon which this Tribunal was called upon to issue a Decision. This Tribunal decided that Document 16 (alone) was insufficient for a number of reasons:

8. Firstly, this Tribunal considered that in a case of this sort there requires to be found within the appeal papers some document or submission setting out (a) That the existing award is to be converted into an award of an employment and support allowance if certain conditions are satisfied; (b) That, if those conditions are not satisfied, the existing award will not be converted and will terminate by virtue of these Regulations; (c) the requirements that must be met in order to satisfy those conditions; and (d) any such other matters as the Secretary of State considers appropriate. No such document (not even an example of a Form IBM01) can be found in the papers in this case.

9. Secondly, there should be evidence was [sic] such a Notice or Letter was intimated to the Claimant in the particular case ([the claimant] in this case). In that respect, this Tribunal found Document 16 to be insufficient. It is entirely possible that an Employee of the Department of Work and Pensions programmed a computer to produce a Form IBM01 in the case of [the claimant]. That, however, in the view of this Tribunal, is a considerable distance away from acceptable proof that any such Notice was in fact despatched to [the claimant].

10. At the end of the day, the Preliminary Issue in this case appears to come down to the rather mundane issue of whether or not [the claimant] in fact received a Form IBM01 and that is an issue for the Tribunal to decide on the balance of probabilities. In general, Tribunals are prepared to accept that Departments operate tried and tested administrative systems in the manner in which they have been designed to operate. Unfortunately, however, the Postal System has proved not to be infallible. A Claimant may give evidence that no such Letter or Notice was ever received by them. A Tribunal must then decide on the balance of probabilities whether or not any such Letter or Notice was received. In this case, that process did not get off the ground because the Tribunal decided that the evidence provided by the Tribunal of actual despatch of the Letter or Notice to [the claimant] was insufficient

11. The Tribunal considers that such a deficiency could have been cured by a certified statement from the Department both of their procedures for the despatch of IBM01 Notices or Letters and a certificate that despatch had in fact been made in the case of [the claimant]. This Tribunal found that Document 16(alone) was not sufficient in that respect.

12. If the Tribunal is wrong in that respect and Document 16 may be taken (read short) as a form of certification for that whole procedure, then this Tribunal found that that certificate was inadequate for its purpose here. The Tribunal was of the view that a Certificate given on behalf of the Secretary of State can only be made by a person whose identity as a person so authorised can be verified if necessary. That requires a dear name and not a mere set of initials. Further, the person making any such certificate requires to demonstrate in some way their authority to do so and that is normally done by the application of some form of official stamp. That is missing in this case.

13. It is not the intention of this Tribunal to place any form of unduly onerous or inconvenient administrative burden upon the Department and the Tribunal feels that the required level of evidence ought to be capable of being easily provided within any existing computer-driven system. The Tribunal does not consider it unreasonable to seek such evidence in cases such as these because, as noted above, a material change in a financial lifestyle is at stake for the Claimant. It is only fair (as the UK Parliament has provided) that ample and complete notice of any such changes and their potential effects are given to the Claimant. Along the same lines, it is reasonable for a Tribunal to seek full and complete evidence that that has been done.

14. This Tribunal found that such evidence produced in the case of [the claimant] was inadequate and issued a Decision Notice to that effect Presumably, the Department can issue a fresh Notice which can be produced in any future proceedings."

16. The Secretary of State now appeals against that decision with permission granted by the First-tier Tribunal.

The third case – CSE/518/2012

17. The claimant had been in receipt of income support on the ground of incapacity for work since 25 November 1991 and had been entitled on the same basis to have National Insurance contributions credited to him. According to a computer screen print, on 4 June 2011 a form IBM01 relating to him was generated. On 30 July 2011 he completed an ESA 50 questionnaire that had been sent to him,

he was examined by a registered nurse on 8 September 2011 and, on 9 November 2011, the Secretary of State decided that his existing award of income support did not qualify for conversion into an award of employment and support allowance and would terminate, along with his entitlement to "credits", with effect from 29 November 2011

18. The claimant appealed. Mr Hugh McCourt, a welfare rights officer employed by Glasgow City Council, represented him at the hearing and produced a written submission. The Secretary of State was not represented. Mr McCourt's submission was to the same effect as Mr Craig's in the second case but the claimant appears not to have been asked at the hearing whether he had received the notice. The First-tier Tribunal dismissed the claimant's appeal. In relation to Mr McCourt's written submission, the statement of reasons says –

> "23. The rep made a preliminary submission concerning the failure of the respondents to notify of the conversion in the correct format and the alleged failure of the submission to specify the content of the letter which appears on the screen print of converted cases supported by Decision Maker certification. We have noted that a copy of the actual letter is not routinely produced in the bundle. The screen print (page 17 of the papers) appeared to us to be placed in the bundle to verify that the appellant has been notified of the new system in terms of Regulation 4 of the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No.2) Regulations 2010 (SI No 1907). There is a presumption of regularity and it seemed to us that it was not necessary for a copy of the letter notifying conversion to be produced. It was not alleged to us that [the claimant] had not received the letter."

19. The claimant now appeals against the First-tier Tribunal's decision with permission granted by Upper Tribunal Judge May QC and he now denies ever having received a form IBM01.

The principal arguments on these appeals

20. The claimants argue that:
    a. the IBM01 does not contain the information required by regulation 4 and so does not comply with it,
    b. to be effective a notice under regulation 4 has to be served, and
    c. a failure to comply with regulation 4 because of a failure to serve it or because the content of the notice was inadequate has the result that the decisions in their cases that their existing awards do not convert and terminate are of no effect and the Secretary of State has to start again.

21. The Secretary of State argues that:
    a. the content of IBM01 satisfies regulation 4,
    b. a regulation 4 notice is issued when it is sent to the relevant person, and so
    c. in all three cases regulation 4 was complied with.

Further and alternatively, the Secretary of State argues that a failure to comply with regulation 4 for any reason does not render the subsequent conversion process, and so its result, ineffective.

22. We have concluded that the Secretary of State is right in all material respects.

General observations

23. The questions raised by the parties' arguments require a consideration of the language used in, and the purpose of, the relevant legislation and the answer to each of them has an impact on the answers to the other questions. As a process of reasoning each question has to be considered separately but we recognise that it is necessary to stand back and consider them as a whole, particularly when considering the purpose of the legislation and the intention of Parliament.

24. All of the claimants assert that they did not receive any notice under regulation 4 (and so the form IBM01 that the computer entries show was generated in each case). But they each filled in an ESA50 and attended an examination by a healthcare professional. In our view, it is significant that there is no assertion by any of the claimants that they suffered any difficulty, prejudice or unfairness in filling in the ESA50, or at their examinations, or otherwise in the substantive decision-making process leading to the conclusion that their existing awards did not convert and so terminated because they did not receive a regulation 4 notice. This is relevant because it provides a clear confirmation of our view that it is difficult to see what difficulty, prejudice or unfairness could be caused by not receiving a regulation 4 notice. In turn this is because the relevant information to enable the claimant to provide and support his claim that he has limited capability for work (and is thus entitled to employment and support allowance) is provided through the ESA50 questionnaire, the question and answer session at the examination and the ability of a claimant to obtain further information about the tests that are applied from the jobcentre and elsewhere. It is not suggested that the regulation 4 notice is required to contain any information that would assist a claimant to complete an ESA50 or answer questions when examined.

25. The only point made in this context was that a valid notice would alert the relevant person to the fact that the conversion process was due to begin and in general terms inform him or her of the tests that would be applied in deciding whether the existing award would convert or end and that this might enable the relevant person to start gathering information or seek advice. On the face of it this is a timing point but its force as such is diminished because counsel for the claimants accepted that notice under regulation 4 could properly be issued at the same time as a questionnaire, as is now done as a back-up through letter ESA51. Alternatively, it was suggested that the information that a forthcoming assessment was to be in respect of a new benefit with different conditions of entitlement might prompt claimants to gather information or seek advice when they would not otherwise do so. But, in our view, it is very difficult to see how this possibility will give any advantage to a claimant who wanted to gather such information or seek advice. He could do so on receipt of the ESA50. So, in our judgment, these suggestions do not found a conclusion that a failure to serve a notice in terms directed by regulation 4 would be likely to cause any difficulty, prejudice or unfairness in the substantive decision-making process on whether an existing award should convert or should end. That is an administrative process and a claimant is not expected to make a case beyond answering questions posed in the questionnaire or by a healthcare professional

conducting a medical examination., If a claimant's award is terminated, he or she can appeal, as all the claimants in these cases did, and, an appeal being a judicial process, the Secretary of State's response to an appeal will provide the claimant with considerably more information than is required to be provided in a regulation 4 notice.

26. Thus, the claimants' arguments are not based on the loss of any identified advantages in the substantive decision-making process by reason of a failure to comply with regulation 4. Rather, they are based on the argument that :

a. such a failure results in a failure to initiate the decision-making process in accordance with terms of the 2010 Regulations that are included for the benefit of claimants, and
b. such a failure renders the claimant subject to that decision-making process and therefore the result that his existing award will either convert, or (subject to regulation 15) end and that this change, particularly if it leads to a termination of his existing awards, prejudices the claimant and constitutes a disadvantage.

The adequacy of the notice

What is required by regulation 4 (3)?

27. Regulation 4(3)(a) and (b) requires it to be stated in the notice issued under regulation 4(1) that either an existing award is to be converted into an award of employment and support allowance or it will be terminated, depending on whether or not "certain conditions are satisfied", and regulation 4(3)(c) requires the notice to include information as to "the requirements that must be met in order to satisfy those conditions". Regulation 4(3)(d) permits other information to be included but does not specify what it might be.

28. The essential issues are:

(1) what are the "certain conditions", and
(2) what description of them should be included within the notice.

The "certain conditions"

29. The impact of regulation 4(3)(a) and (b) is that if those "certain conditions" are satisfied the existing award is converted and if they are not it will be terminated. This gives rise to the question: what are the conditions that have this effect?

30. The claimants argued that the phrase "certain conditions" refers to the "basic conditions" of entitlement to employment and support allowance specified in section 1(3)(a) to (d) and (f) of the 2007 Act and so to the conditions mentioned in regulation 7(1) of the 2010 Regulations. This is linguistically attractive and links with regulations 5(2)(a) and 7(1). It is also the approach now adopted in letter ESA51, which is the covering letter sent to claimants with an ESA50 questionnaires and which we are told has been revised to counter the criticisms of form IBM01 advanced in the notice of appeal in the first case before us. The key wording of the revised letter ESA51 is –

> "If you currently receive Incapacity Benefit, Income Support (on the grounds of illness or disability) or Severe Disablement Allowance, your current award of benefit will be converted to Employment and Support Allowance (ESA) if certain conditions are satisfied. The conditions which you must satisfy are found in sections 1(a)-(d) and (f) of the Welfare Reform Act 2007, namely that:
> a) you have limited capability for work
> b) you are at least 16 years old
> c) you have not reached pensionable age
> d) you are in Great Britain, and
> f) you are not entitled to Jobseeker's Allowance.
>
> If these conditions are not satisfied your existing benefit will not be converted to ESA and will stop. Other benefits, such as Jobseeker's Allowance, may be available to you instead depending on your circumstances."

The statutory reference omits the subsection number – it should be to section 1(3)(a)-(d) and (f) – and the letter also informs the claimant that he must complete the questionnaire "to help us reassess [sic] whether you have limited capability for work", but nothing turns on those minor errors. What is important is that counsel for the claimants, accepts that wording as sufficient to comply with regulation 4(3).

31. However, it is not easy to fit this (or indeed any other interpretation of what is included within the phrase "certain conditions" in the context of regulation 4(3)(a) and (b)) with regulation 15(2A), which makes it clear that the symmetry between conversion and termination suggested in regulation 4(3)(a) and (b) does not exist. In our view, correctly, it was not suggested that the certain conditions referred to in regulation 4 included those that could lead to an existing award of income support being continued under regulation 15(2A) rather than being converted or terminated. To do so would over complicate any notice, although we note that the possibility of an award being continued is referred to in IBM01.

32. The symmetry in regulation 4(3)(a) and (b) fits much better with the definition of a "conversion decision" in regulation 5 and thus a decision governed by regulation 7. But by no means all of the general conditions of entitlement to employment and support allowance are mentioned in regulation 7(1). The basic condition specified in section 1(3)(e) of the 2007 Act (that the claimant "is not entitled to income support") and the conditions set out in section 1(2) of the 2007 Act are not mentioned.

33. In respect of the basic condition specified in section 1(3)(e), this is clearly omitted because a claimant may well have an existing award of income support that will either be converted or terminated. However, section 1(2) of the 2007 Act, provides that in addition to satisfying the basic conditions a new claimant for employment and support allowance must additionally satisfy either the condition relating to youth (now subject to section 53 of the Welfare Reform Act 2012) or the contribution conditions or the conditions relating to the claimant's financial position. It would appear that these alternative conditions of entitlement to employment and support allowance are not mentioned in the 2010 Regulations because their similarity to conditions of entitlement to the old benefits, and the provision for transitional protection made by the 2010 Regulations, have the effect that a person will not be

liable to have an existing award terminated, rather than converted, for failure to satisfy those conditions.

34. But, equivalent points can be made in respect of at least three of the five basic conditions mentioned in regulation 7(1), namely those contained in section 1(3)(b), (c) and (f) of the 2007 Act. – that the claimant be at least 16 years old, under pensionable age and not entitled to jobseeker's allowance. Not only are those conditions equivalent to basic conditions for income support, set out in section 124(1)(a), (aa) and (f) of the Social Security Contributions and Benefits Act 1992, but it is also not possible for a person who is under 16 or entitled to jobseeker's allowance to be entitled to incapacity benefit or severe disablement allowance and, although some claimants of those benefits could be over pensionable age, they are not at risk of losing entitlement to their awards because regulation 4(5)(a) of the 2010 Regulations prohibits the issue of a regulation 4 notice to a person over pensionable age. Moreover, the condition that a person be in Great Britain (section 1(3)(d) of the 2007 Act) replicates a condition of entitlement to income support (see the opening words of section 124(1) of the 1992 Act) and regulations treated as made under section 119 of the 1992 Act have the effect of generally disqualifying a person outside Great Britain from incapacity benefit or severe disablement allowance. We have not investigated whether it is possible that differences in subordinate legislation may have the effect that a claimant might have entitlement to an existing award terminated under the 2010 Regulations solely because he or she is absent from Great Britain but, if it possible, this will happen in only a handful of cases.

35. So, in at least the overwhelming majority of cases, it is plain that the only basic condition of entitlement to employment and support allowance that is relevant to the conversion decision, and so to the substantive conversion process, is the condition in section 1(3)(a) – that the claimant has limited capability for work. This is because in that majority of cases the relevant person will be bound to satisfy the other basic conditions and so they could have been left out of regulation 7, just as reference to the conditions of entitlement in section 1(2) of the 2007 Act were left out.

36. In our judgment, this analysis of the symmetry envisaged by regulation 4(3)(a) and (b) and the impact of the basic conditions for entitlement to employment and support allowance lead, to the conclusion that the phrase "certain conditions" in regulation 4(3) does not require the notice to refer to any conditions of entitlement to employment and support allowance that the person to whom it is addressed is bound to satisfy.

37. *Conclusion.* In relation to cases where the claimant is in Great Britain, and so in these cases and the vast majority of cases, regulation 4(3)(a) and (b) have the effect that the phrase "certain conditions" in regulation 4(3)(a) refers only to the condition in section 1(3)(a) of the 2007 Act – having limited capability for work.

The description of the certain conditions.

38. There was argument on whether regulation 4 provides that the relevant person is to be informed of the "certain conditions" pursuant to regulation 4(3)(a) as the Secretary of State submits, or whether regulation 4(3)(a) merely requires it to be

stated that there are conditions and it is regulation 4(3)(c) that requires the conditions to be specified. On that, the Secretary of State submits that regulation 4(3)(c) requires there to be identified the procedural requirements (e.g., the requirement to complete a questionnaire and to attend for a medical examination if asked to do so) that must be complied with. This information is included in the IBM01, but in our view that is not required by a literal reading of that subparagraph. However, it does not matter whether the relevant information on or about the certain conditions has to be provided under either one, or both, of subparagraphs (a) and (c).

39. What is important is that, as was common ground, on either approach regulation 4(3)(c) does not require the Secretary of State to include in the notice a description of the basis upon which a person may be found to have a limited capability for work. If this were not the case, Schedule 2 to the 2008 Regulations would have to be set out more or less verbatim and reference to several of the other provisions that are also made under section 8 of the 2007 Act would have to be included. In our judgment, it is inconceivable that it was intended to provide information at that level of detail in a notice under regulation 4. There is no requirement to give such detailed information to new claimants of employment and support allowance before a decision is made on a claim. Neither was there any requirement to provide the equivalent information to claimants of incapacity benefit or credits based on incapacity for work. There is no reason why claimants subject to the conversion process should be in a different position from others in this respect. We therefore agree that this level of detail is not required.

40. *Conclusion.* In our judgment, regulation 4(3)(c) does no more than require that it must be made clear to claimants that, in order to qualify for employment and support allowance, they must satisfy the requirement of having limited capability for work.

Does form IBM01 comply with regulation 4(3)?

41. We have set out the form earlier. It does not explicitly state that either an existing award is to be converted into an award of employment and support allowance or it will be terminated, depending on whether or not the claimant has limited capability for work.

42. However the Secretary of State submits that this information, which is what we have concluded is required by regulation 4(3), is implicit in the form because:

a. paragraphs 2 and 3, read with either paragraph 5 or 8 and the information in the information sheet under the heading "How will I be assessed?", make it plain that employment and support allowance will replace existing awards for those found to have limited capability for work, and
b. paragraph 2, read with the information in the information sheet under the heading "What happens if I am not entitled to employment and support allowance?" makes it plain that if the existing award or awards are not converted, they are to be terminated.

43. It is difficult to see why the information required by regulation 4(3) was not given expressly (as is now done in letter ESA 51) and more simply, but we accept

the submission that a personalised form IBM01 as set out above is sufficient for compliance with regulation 4(3) in the present cases, for the reasons advanced by the Secretary of State..

44. In substance, in the cases before us the limited information required to be provided, was provided. We do not accept the claimants' submission that the effect of a personalised IBM01 notice is to suggest that employment and support allowance is not subject to conditions and is therefore liable to mislead claimants, who read it, into a false sense of security. The reference to a need for assessment is enough to show that entitlement is not automatic.

45. *Conclusion.* Form IBM did comply with the requirements of regulation 4(3) in these cases. It is unnecessary for us to decide whether form IBM01 would be adequate when a claimant was absent from Great Britain, or was for some reason not bound to satisfy the basic conditions in section 1(3)(b), (c) and (f), and we do not do so.

When is a notice issued for the purposes of regulation 4?

46.. Although the term "notified person" and the words "must inform the notified person" support the argument that the person is to have received the notice, we agree with the Secretary of State that the key word or concept in regulation 4 is "issue" because, by regulation 4(2), a person satisfies the description of being a notified person when the notice is "issued" and regulation 4(4) refers to the "date of issue".

47. The word "issue" can mean different things in different contexts. In some contexts a document may be issued when it is created or sealed or otherwise perfected. In other contexts, it may be issued when it is sent to a particular person. This accords with the most literal meaning of "issue". However, in yet other contexts, a document may be issued only when it is received by a particular person. As with all questions of statutory construction, the meaning of the word is to be determined by ascertaining the legislator's intention and it is necessary to have regard both to the language used and to the practical considerations likely to have been in the legislator's mind.

48. In this legislation, the notice is issued "to" a person and as this indicates an intention that it is to be conveyed to that person, we agree that the Secretary of State was correct not to advance an argument that the first of the possible meanings suggested above was intended.

49. In relation to the other two meanings, both parties referred us to section 7 of the Interpretation Act 1978, which provides –

> "**7.** Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

50. The Secretary of State submitted that section 7 of the Interpretation Act entitled the Secretary of State to issue the regulation 4 notice by post and to presume that delivery was effected in the ordinary course of post. The claimants, on the other hand, referred to the words "unless the contrary is proved" and submitted that the section indicated that if non-receipt was proved the presumption did not apply and so section 7 supported the view that the question whether the notice had been received had to be considered by the First-tier Tribunal, if it was raised. If, section 7 applies, we would accept the claimants' argument as to its effect. But, in our view, the section proceeds on the premise that service by post of the document is authorised or required and then deals with how that service and its date is to be proved and not with the prior questions whether the document has to be served (and so be received or deemed to be received) and whether service is authorised or required by post. Further, the section only applies if a contrary intention does not appear.

51. So, in our view, although we are prepared to accept that regulation 4 notices may be sent by post and although section 7 demonstrates that the concept of sending can include receipt and so equate to service, section 7 does not assist here because, as we have already mentioned, the word "issue" can have the meaning that it is completed when the document is sent and receipt (or deemed receipt) is not required and, if it does have that meaning, section 7 does not apply.

52 In our view, the key to determining whether the "issue" required by regulation 4 is completed when the notice is sent or only when it is received is an examination of what the notice is intended to do and whether non-receipt results in unfairness.

53. As to the first point, it is necessary to consider an argument raised in the context of the question whether a breach of regulation 4 is fatal to the conversion process but which we consider is equally relevant to the prior question of the construction of regulation 4. It was argued by the claimants that being a "notified person" was an important status and it was important that a claimant should know that his or her status or position had changed, The statutory provisions for conversion in the 2007 Act and the 2010 Regulations demonstrate a Parliamentary intention that each and every person who is in receipt of a relevant award or awards will be subject to it. So, by introducing the Act and then the 2010 Regulations Parliament altered the substantive rights of those persons. The selection of an individual claimant by Department for assessment on the issue whether his or her existing award or awards will convert of (subject to regulation 15) terminate is therefore a matter of timing as to when that substantive change will be implemented. The primary purpose and effect of generating and issuing a regulation 4 notice is to make that selection, and activate the substantive decision-making process in respect of the substantive change made by the 2010 Regulations. If the notice is actually received it will inform the claimant that this is now happening or is about to happen. But the information given by the notice is not information on which claimants are required or expected to act. Following issue of the notice the claimant does not have to do anything and it does not start time running for any purpose. Rather, such steps start down the line with the effective start of the substantive decision-making process, in most cases by the requirement to complete an ESA50 questionnaire and then a requirement to attend for an examination by a healthcare professional.

54. We do not dispute that, as and when that selection takes place it can be said that the position of that person changes and therefore it can be said that he or she is given a status. But, on the same basis, it can also be said that he or she was given a status when the legislation introducing the conversion process became law because he or she was then put in class of persons whose award or awards were subject to conversion or termination. When this is remembered, the change of status that occurred when the 2010 Regulations became law was a substantive change to the continuing rights of persons in receipt or relevant awards and the change in that status flowing from a valid regulation 4 notice is founded on the administration rather than the imposition of the conversion process and it moves that claimant from someone whose award or awards is subject to the conversion process to someone whose award or awards is actively being considered thereunder. It follows that, in our view, the issue of a valid regulation 4 notice (and on the claimants' case its actual service) does not impose or bring about a change of substantive rights and is properly categorised as merely a part of the administrative process relating to that change.

55. The question is therefore whether Parliament intended that receipt of notice of that change of status should be an essential part of the administrative process or, to put it the other way round, whether non-receipt of an unparticularised notice mentioning certain statutory provisions of the 2007 Act by the person whose award or awards are subject to the conversion process imposed by the 2010 Regulations, was to render the substantive decision-making process on whether such an award or awards were to convert or terminate (subject to possible continuation under regulation 15) invalid or ineffective, with the result that the Department and the relevant person had to go through the substantive elements of the process again (if the substantive decision reached was challenged or if the point that the notice was not received was picked up).

56. There is no doubt that it was intended that claimants should receive that which must be sent to them, but it does not follow that non-receipt was intended to invalidate any subsequent decisions. It is, of course, good "customer relations" to inform claimants that the benefit to which they are entitled is to be abolished and replaced by another with different conditions of entitlement, but a failure of a claimant to receive such information does not actually result in unfairness in this context. As we have already said, the common, and in our view correct, ground that a regulation 4 notice does not need to set out in any detail the "certain conditions" referred to in it is a factor that shows that receipt of the notice could only be of very limited benefit to a person in receipt of an existing award or awards that Parliament has decided are to be subject to the conversion process (see paragraph 25 above). The very limited importance of the information contained in a regulation 4 notice points strongly to the conclusion that in regulation 4 "issue" is used in the sense of "send" and that it was not intended that the process should have to start again if the document was not received.

57. The fact that Parliament would have been well aware that this would be a computer driven process within the Department and would cover a large number of cases also supports that view. There are obvious practical reasons why the issuing of regulation 4 notices, should be completed when the relevant computer

driven process of the Department is completed rather than at a later stage of actual or deemed receipt, particularly if the deeming is based on a rebuttable presumption. This is generally the approach taken to the millions of notices the Secretary of State has to issue to unrepresented claimants each year. Thus, for instance, regulation 2(b) of the Social Security and Child Benefit (Decisions and Appeals) Regulations 1999 (SI 1999/991) expressly provides that any notice (including notification of a decision of the Secretary of State) required to be given or sent to a claimant under the Social Security Act 1998 or those Regulations is treated as having been given or sent on the day that it was posted. This seldom results in any unfairness or other injustice, Time limits can be extended or other provision may be made where something important gets lost. The same approach is implicit in the 2008 Regulations in which it was felt necessary to make specific provision equivalent to section 7 of the Interpretation Act 1978 in regulation 65 in relation to Part 8, implying that receipt is not an essential part of issuing notices under other Parts of the Regulations. Again, this does not cause unfairness or other injustice. Non-receipt of an ESA50 questionnaire or of a notice to attend a medical examination will nearly always amount to "good cause" for not submitting the completed questionnaire or attending the examination (see regulations 22(1) or 23(2) of the 2008 Regulations). We are quite satisfied that in the 2010 Regulations also, a notice may be issued to a person notwithstanding that it is not received.

58. *Conclusion.* In our view, a notice under regulation 4 is "issued" when it is generated and sent out by, or on behalf of, the Secretary of State.

What is the effect of a breach of regulation 4?

59. It was common and correct ground before us that, in the light of *R v Soneji* [2005] UKHL 49; [2006] 1 A.C. 340, the answer to the question whether a breach of a statutory provision has the effect of invalidating subsequent decisions depends on whether it was the legislator's intention that it should have that effect (see for example Lord Steyn at paragraph 23, where he concludes that the rigid mandatory and directory distinction has outlived its usefulness, that this is a question of statutory construction and that "the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly to be taken to have intended total invalidity").

60. Our conclusions on what a regulation 4 notice should contain and when it is issued make it difficult to see how the question of non-compliance will arise and it only arises in the second of the cases before us on the flawed finding therein that there was insufficient evidence that the notice had been sent. However, this issue was a vital final stage in the claimants' argument and so we should address it on the basis that, contrary to our conclusion, there was a failure to comply with regulation 4 because either the content of the notice was insufficient and/or, as each claimant asserts, the notice was not received by them. Even then, it is common ground that, any initial failure to comply with regulation 4 can be, and would have been, remedied whenever a revised letter ESA51 (or the earlier supplementary letter in the same terms issued from 16 August 2012 (form IBM350)) has been issued with an ESA50 questionnaire. It is therefore highly probable that any claimant who has completed a questionnaire issued since 16 August 2012 has received adequate notice under

regulation 4 even if all the claimants' arguments were accepted in relation to the cases before us.

61. It is unnecessary for us to consider in these cases either what the position would be if no regulation 4 notice was generated at all in respect of a claimant or the notice received by the claimant was so misleading that it had an impact on the fairness of the subsequent decision-making process. The first of these possibilities was not asserted or raised in argument and it is difficult to see how the substantive decision-making process would in practice take place in such circumstances. As to the second possibility, we have rejected the argument that the IBM01 was liable to mislead claimants into any false sense of security (see paragraph 44 above) and as we have pointed out it was not asserted that any of the claimants were misled by the contents of the notice; indeed they all said they did not receive them.

62. As we have noted, it was in our view correctly common ground that the notice does not have to contain a description of the details of the basis on which a person may be found to have a limited capability to work and unparticularised information, such as that now in the ESA 51, is sufficient (see paragraphs 30 and 39 above). We have also concluded that regulation 4 does not impose or bring about a change in substantive rights and is properly categorised as a part of the administrative process (see paragraph 54 above).

63. Once such a notice has been generated a breach of regulation 4 could arise for a range of reasons and some might be attributable to a failure by the Secretary of State to do something, others to mechanical failure and others to the postal service. However we consider that any such breach of regulation 4 does not of itself invalidate any subsequent substantive decision because, it seems to us, that Parliament could not have intended that breach of an administrative provision relating to o a notice of virtually no practical importance would have this result.. The essential reason for this is that, for reasons we have already indicated, it is highly unlikely that any such breach would give rise to any unfairness or other injustice.

64. It does not follow that the Secretary of State can simply ignore the requirement to send notices. The statutory requirement must still "be obeyed down to the minutest detail" (per Lord Hailsham of St Marylebone LC in *London and Clydeside Estates Ltd v Aberdeen District Council* 1980 SC (HL) 1 at 30; [1980] 1 W.L.R. 182 at 189F). Quite apart from the possibility that Parliament might have intended a different consequence to flow from a deliberate flouting of the Regulations or even a systemic failure to comply with the Regulations due to their being misconstrued, there are other sanctions that he might face in such cases, whether through judicial review proceedings or merely criticism in Parliament or elsewhere.

65. So, in our judgment, if a notice is not issued because it is not sent, Parliament cannot have intended that such a breach of regulation 4 would result in the invalidity of the subsequent substantive decisions. Indeed, if we are right that a notice is "issued" when it is sent it seems to us inconceivable that this would have been intended.

66. Further, if we are wrong as to the construction of the word "issue" and, despite the lack of importance of a regulation 4 notice, such a notice is not issued until it is

served, we are satisfied that a failure to effect service would be so unlikely to give rise to any unfairness that it would not have been the intention of Parliament that it would invalidate the substantive decision made at the end of the decision-making process.

67. , Also, and for the same reasons, if we are wrong as to the adequacy of form IBM01 and the claimants' arguments that references to paragraphs (b), (c), (d) and (f) of section 1(3) of the 2007 Act should be included were to be accepted, we are satisfied that the inadequacy would not invalidate a subsequent conversion decision. Even if the omitted information might have been relevant to the particular claimant concerned, which is not the position in the cases before us, it is highly unlikely that there would be any unfairness or other injustice as a result of the failure to include the information.

68. On the assumption that the notices were not served in these cases they would, if the claimants are right, provide good examples of results which in our view Parliament cannot have intended: namely that they can go through the substantive process on the basis that they can accept a favourable decision and reject an unfavourable one (and so require the substantive decision to be made again) because of something, the non-receipt of a regulation 4 notice, that has not caused them any prejudice and which they cannot show is likely to cause any other claimant to suffer any unfairness or other injustice.

69. *Conclusion.* Any breach of regulation 4 due to form IBM01 being inadequate on the grounds contended for by the claimants or due to it not being sent or received does not result in any subsequent conversion decision being invalid.

What evidence of compliance with regulation 4 is required?

70. The civil standard of proof – the balance of probabilities – applies and, in our view, the content and sending of a personalised IBM01 and thus of a notice under regulation 4 can be proved by evidence of the relevant computer entry or entries and, if it is challenged and is not shown by those computer entries, of the system that provides that once generated an IBM01 is sent. An assertion that the personalised IBM01 was not received does not mean that further evidence of the content or issue of the personalised IBM01 is required because, even if one assumes that that assertion is true, that assumption does not found the view that it is more likely than not that the personalised IBM01 was not generated and sent and so not issued. Moreover, as the computer entry will prove that the notice has been generated and we have held that a failure to send a notice is not fatal to subsequent steps in the conversion process and although the Secretary of State should send the notice (see paragraph 62 above), it is not actually necessary for a finding to be made as to whether a notice was in fact sent.

71. Given that we have concluded that form IBM01 was adequate for compliance with regulation 4(3), nothing now turns on the failure to provide a copy of the form to the First-tier Tribunal in the first and third cases before us. Nonetheless, we should record that it seems to us that the First-tier Tribunal erred in the third case in considering that there was a presumption of regularity so far as the contents of form

IBM01 was concerned. The First-tier Tribunal was correct in saying that it was not necessary for the Secretary of State routinely to include a copy of the form in the documents but, since the claimant had specifically raised the question of the adequacy of its contents and the First-tier Tribunal did not know from previous experience or a decision of the Upper Tribunal what its contents were, it ought to have adjourned in order to give the Secretary of State, who had had no warning that the point would be raised, an opportunity to produce a copy of the document so that it could properly consider the submission made by Mr McCourt.

72. In the second case before us, the Secretary of State had known that the point would be raised and there arises the question whether the First-tier Tribunal erred in law in finding that there was insufficient evidence as to the adequacy of form IBM01 in the light of evidence before it, which did not include a copy of the form despite the adequacy of its contents being in issue. The Secretary of State submitted to us that, if the First-tier Tribunal found the evidence to be insufficient, it ought to have adjourned to allow the Secretary of State an opportunity to provide further evidence. However, in our judgment the real error was in finding the available evidence to be insufficient.

73. Although we do not agree with its criticisms of the computer records kept by the Secretary of State, we understand why the First-tier Tribunal wished to see a complete form IBM01, given the submission made to it on behalf of the claimant, and it is a pity that a template like the one provided to us was not provided. However, the Secretary of State set out large parts of form IBM01 in his additional submission to the First-tier Tribunal and, crucially, set out the parts upon which the Secretary of State relied before us. Those parts of the submission were evidence and there was no reason to doubt its accuracy. In those circumstances, although the evidence of the contents of form IBM01 may have been incomplete, it was sufficient to show that the form complied with regulation 4(3) and the First-tier Tribunal erred in deciding otherwise.

74. We also consider that the First-tier Tribunal erred in making its finding that no regulation 4 notice had been sent to the claimant in that case. It took the view that evidence had to be in the form of a certified statement of procedures and a certificate of dispatch or, at least, that the computer screen print had to be certified by someone giving his or her full name. However, there is no justification for that view. Section 39ZA of the Social Security Act 1998 provides that certain certificates relating to decisions of the Secretary of State shall be conclusive but it does not provide that other evidence of decisions cannot be relied upon and, more importantly, nothing requires statements or records of the type envisaged by the First-tier Tribunal to be certified in any particular form or at all. The Secretary of State is no more required to provide evidence in a particular form than is a claimant and evidence that is technically hearsay is admissible. We accept that the First-tier Tribunal was not bound to accept the computer screen print as conclusive evidence that a form IBM01 had actually been sent and that a lack of a complete explanation of procedures and the apparent possibility of computer records being inaccurate may be reasons why a tribunal might not accept evidence in computer records. However, in the absence of evidence of a breakdown in the dispatching process, tribunals must when applying the approach set out in paragraph 68 above take a realistic and

proportionate approach to an allegation that a notice has not been sent because, for example, it is alleged it has not been received.

Other issues arising in CSE/518/2012

75. Three other issues are raised in the written grounds of appeal submitted by Mr McCourt in the third case before us.

76. First, it is submitted that the First-tier Tribunal gave inadequate reasons for accepting the healthcare professional's report, given that the full extent of her qualifications were not known. She was a registered nurse but Mr McCourt had pointed out that there was no indication that she had any specific mental health qualifications and the claimant's mental health was very much in issue. That might have been a good reason for not accepting her opinion on relevant matters but the First-tier Tribunal was not bound to reject her evidence and it gave reasons for not doing so. It presumed that she would have had relevant training for carrying out assessments and it also found the report to be "detailed and informative". The First-tier Tribunal included a registered medical practitioner among its members and it was entitled to assess the adequacy of the report on its own merits. Moreover, it received a substantial amount of evidence from the claimant himself. It is clear that to a substantial extent it found there to be no conflict between his evidence and the healthcare professional's findings and that one reason it preferred the healthcare professional's assessment to the claimant's own evidence where there was a difference was that, having heard him, it considered the claimant's evidence was "overstated". In our judgment, it was entitled to make the findings it did and it has given adequate reasons for them. It is true that there is an inconsistency between the healthcare professional's record that the claimant's medication was not brought to the examination (doc 39) and her record that he appeared to have no difficulty getting out and handling medication with both hands but that has nothing to do with the healthcare professionals' knowledge of mental health. Either one entry was incorrect or the claimant had taken some medication with him but not all of it. The First-tier Tribunal was not bound to regard the discrepancy as significantly undermining the assessment as a whole. Nor was it bound to regard as significant the fact that the healthcare professional had recorded without subsequent comment that the claimant drank 24 cans of lager a day. The First-tier Tribunal received rather more detailed evidence about the claimant's drinking but, in any event, the effects on the claimant of his drinking were more important than the precise amount he drank, which was likely to vary from day to day.

77. Secondly, it is submitted that the First-tier Tribunal erred because it noted that the claimant was not a credible witness but it was not clear whether it had put this to the appellant or his representative. Tribunals ought to ask questions in a way that gives the witness a fair opportunity to present their evidence fully and to deal with the points relevant to credibility and other matters that the tribunal considers to be relevant but we do not consider that there is any requirement for a tribunal to give a party or his or her representative an opportunity to comment on the impression it is forming, or has formed, of the credibility of a witness. The evidence and the way it is given will be apparent to those present and there is no assertion or indication that the

First-tier Tribunal failed in this case to give the claimant a fair opportunity to present his evidence.

78. Thirdly, it is submitted that the First-tier Tribunal failed to provide adequate reasons for the weight it gave to a letter from the claimant's general practitioner, particularly as some of the conditions listed would have affected the claimant's ability to perform functions. There is no indication that the First-tier Tribunal did not fully accept the letter as far as it went and indeed, it is implicit that it did accept it. It referred to the letter on several occasions, drawing attention to what it did not say as a reason for not accepting all of the claimant's evidence. It also recorded that the claimant "did not allege his COPD as affecting his walking ability". The general practitioner's letter merely listed conditions from which the claimant was suffering and stated that he had recently been referred to the psychiatry service. The First-tier Tribunal had to consider to what extent the conditions were disabling in the particular case of the claimant and the letter provided no help on that issue.

Conclusion

The first case – CSE/269/2012

79. In the light of our acceptance that sending form IBM01 to the claimant was sufficient for compliance with regulation 4, there was adequate evidence that the claimant was a notified person and, in the absence of any relevant submission from the claimant, the First-tier Tribunal did not err in law in not making any specific finding as to the issue of form IBM01 to the claimant. Counsel rightly did not insist on the other points raised as grounds of appeal. Accordingly, we dismiss the claimant's appeal.

The second case – CSE/443/2012

80. The First-tier Tribunal erred in law in holding that that there was insufficient evidence that form IBM01 was sufficient for compliance with regulation 4(3) and also that the issue it had to decide was whether the claimant had received the form IBM01, but those errors were immaterial because it found that there was insufficient evidence that the form had ever been sent to the claimant. However, it further erred of law in so finding because it relied on the lack of certification of the evidence by the Secretary of State and failed to consider whether it might be more probable that the form had been lost in the post, especially as it had commented that the postal system had proved "not to be infallible". That error was also immaterial because the First-tier Tribunal made the more fundamental error of considering that a failure to send a regulation 4 notice rendered the substantive decision invalid. Accordingly, the Secretary of State's appeal is allowed and the case is remitted to the First-tier Tribunal, who must determine whether the claimant had limited capability for work or for work-related activity at the material time.

The third case – CSE/518/2012

81. We accept that the First-tier Tribunal erred in law in relying on the presumption of regularity in respect of the contents of form IBM01, when the

adequacy of the document had been expressly raised before it. However, in the light of our finding that IBM01 was adequate for compliance with regulation 4, that error is not material. Even though it was unnecessary to do so, the First-tier Tribunal was clearly entitled to find that form IBM01 had been issued to the claimant, given that the claimant had not denied receipt. Indeed the grounds of appeal to the Upper Tribunal did not assert otherwise. We have rejected the other three grounds of appeal. Accordingly, we dismiss the claimant's appeal.

Mr Justice Charles
Chamber President

Mark Rowland
Judge of the Upper Tribunal

A. J. Gamble
Judge of the Upper Tribunal

15 May 2013