ADM Memo 6/19

 EFFECT OF RECENT UT DECISION WHEN DECIDING SANCTIONS CASES

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 Introduction

1 The purpose of this memo is to inform decision makers about a decision of the Upper Tribunal1 in Great Britain and the effects of that decision when deciding sanctions cases

*1 JB v SSWP [2018] UKUT 360 (AAC)*

 **THE UPPER TRIBUNAL DECISION**

2 On 8.10.18, the Upper Tribunal Judge ruled that when deciding sanctions cases the consideration is

 **1.** whether the work-related requirement was validly imposed in the first place **and**

 **2.** the issue of good reason for failing to comply

 Requirements will **only** be validly imposed if the claimant has been notified of the **‘substance’** of the particular requirement and the consequences of failing to comply with it1.

 **Note 1:** This applies to any work-related requirement(s) the Department mandates the claimant to take part in as prescribed for in relevant legislation2.

 **Note 2**: See guidance at paragraph 13 for the meaning of ‘substance’.

*1 JB v SSWP [2018] UKUT 360 (AAC);
2 WR (NI) Order 2015, Art 18 - 28*

3 The Judge also confirms that the public law principles of fairness (see paragraphs 4 – 12 of this memo) apply equally to Universal Credit claimants1. Although within Universal Credit legislation there is a degree of flexibility to permit multiple methods of communication to claimants, the key matter is whether fair notice has been given, having regard to all of the communications between the Department and the claimant.

 **Note:** Also see existing guidance in ADM [Chapter K1](http://intranet.dwp.gov.uk/manual/advice-decision-making-adm/adm-chapter-k1-sanctions-general-principles) (Sanctions- General principles). [Paragraph K1151](http://intranet.dwp.gov.uk/manual/advice-decision-making-adm/public-law-principles-fairness-k1151-k1999) et seq applies.

*1 JB v SSWP [2018] UKUT 360 (AAC)*

 **Public law principles of fairness**

4Public law principles of fairness apply to ensure that sanctions are only lawful where the claimant has been given adequate notice of

**1.** a work-related requirement **and**

 **2.** the consequences of failing to comply with it1.

*1 R (Reilly) v SSWP [2014] AC 453; R (Reilly 2) v SSWP [2016] ECWA Civ 413*

5 Tribunals are entitled to consider whether

 **1.** adequate notification was given and

 **2.** a particular means of communication satisfied the requirement of notification1.

*1 R (Reilly) v SSWP [2014] AC 453; R (Reilly 2) v SSWP [2016] EWCA Civ 413*

6 Accordingly, for a failure to be sanctionable, the Department must be able to show that there has been proper notification of

 **1.** the requirement **and**

 **2.** consequences of non-compliance1.

 In other words the Department **must** be able to evidence that a particular requirement was in fact imposed.

 **Note** : It is the Department’s burden of proof to show there has been a sanctionable failure and only then must the claimant show good reason for the failure. There will therefore need to be cogent documentary evidence that shows that the claimant was required to undertake a work-related or connected requirement on a given day which they failed to do.

*1 RR v SSWP (UC) [2017] UKUT 459(AAC)*

7 It is expected that the Department will produce to a tribunal, as a minimum, copies of

 **1.** the claimant commitment

 **2.** any appointment letters (for example, standard notification letters used for referring to employment programmes such as Steps 2 Success)

 **3.** records of telephone or electronic communications (for example, a copy of the relevant ‘to-do’ or journal notes)

 **4.** internal electronic records (for example, a copy of the sanctions information screen)

 **5.** any other relevant documents (for example a copy of the relevant Agent Lead Process)

 that shows the imposition of any work-related requirement and the consequences of non-compliance to the claimant1.

*1 SSWP v DC (JSA) [2017] UKUT 464 (AAC)*

8 Although there is no specification in legislation that notifications should be in written or permanent form, the need to produce acceptable evidence of the existence and terms of specification requires a need for written and computer records to be kept and to be available. The Department’s record keeping will therefore be the key. The more informal the means of communication to a claimant, for example, by face to face, the more efficient the Department’s recording systems will need to be in recording what has happened and when.

9 The Department has an obligation to ensure the claimant was adequately notified of exactly what the requirement is and the consequences of failure, including the compliance condition where appropriate, when any failure to comply may result in a sanction of the claimant’s benefit1.

 Note : For example if the Department produces records only showing a date of requirement to take part in a work-related requirement and no documents showing the actual wording used, this may be insufficient to show the claimant was required (mandated under threat of sanction) to take part in the requirement rather than being merely requested to do so.

*1 MB v SSWP [2018] UKUT 213*

10 It is also expected that the Department will choose a means of notification to the claimant that is capable of being reasonably understood by the particular claimant concerned. This will depend on scrutiny

 **1.** of the individual circumstances of the case **and**

 **2.** consideration of what is reasonable for the particular claimant.

 Note : Care should be taken with claimants who may indicate they have complex needs or are particularly vulnerable. For example; they indicate they are suffering from mental health issues, are homeless, are a drug or alcohol user, a victim of domestic violence, sexual or physical abuse or are under 18. This list is not exhaustive. For further guidance see ADM [Chapter K2](http://intranet.dwp.gov.uk/manual/advice-decision-making-adm/adm-chapter-k2-good-reason) when considering what may be reasonable in an individual claimant’s circumstances.

11 Notifications should be in a format that the individual claimant can readily understand. Claimants should be in no doubt of

 **1.** exactly what is expected of them **and**

 **2.** what they have to do to complete the work-related requirement (i.e. the how, when, what and where) **and**

 **3.** the consequences of failing to comply with any work-related requirement, including any compliance condition where appropriate.

12 Notice to a claimant may be given by a combination of communications read together1. It will be for the decision maker to look at the totality of the evidence available. For example: a claimant commitment setting a general requirement to “attend and take part in all interviews with the work coach” may meet the notification requirement when read together with a notification detailing the date, time, place and ‘substance’ of a specific appointment. This could be via a ‘to-do’ in the claimant’s on line journal, in journal notes or claimant history.

 **Note 1 :** Evidence other than the claimant commitment about the imposition of a work-related requirement therefore will be crucial. A copy of **all** the relevant communications will need to be available to be included in any appeal papers to the tribunal in the event of an appeal.

 **Note 2 :** See paragraph 13 for the meaning of ‘substance’. Also see further guidance regarding notifications in [K1171](http://intranet.dwp.gov.uk/manual/advice-decision-making-adm/public-law-principles-fairness-k1151-k1999).

*1 DH v SSWP [2016] UKUT 0355; SSWP v TJ & others [2015] UKUT 56*

 **THE MEANING OF ‘SUBSTANCE’**

13The Judge considered that it is not necessary for communications to have any prescribed form of legal wording. However, they cannot be left to implication. It is the ‘substance’ of communications that will be the key1.

*1 JB v SSWP [2018] UKUT 360 (AAC)*

14 ‘Substance’ is not defined in legislation and therefore has to be given its ordinary meaning which is to ‘specify the intended purpose or subject matter’. The Department therefore has an obligation to ensure any notification identifies to the claimant the subject matter of the requirement clearly and definitely. For example; the claimant needs to be told the purpose of a particular interview and not simply that they are required to take part in a ‘meeting’ or an ‘appointment’. The claimant needs to have sufficient information to be able to prepare for the specific interview and have the opportunity to get any relevant information or evidence they need (also see guidance at paragraph 15).

 **Requirement to take part in an interview**

15It is good practice to notify the claimant of the type of interview the claimant is being requested to take part in (i.e. the wording must be sufficient to convey, in basic terms, the reason for the interview). For example, wording could be as follows;

 **1.** ‘you are required to take part in an interview to discuss a training opportunity’ **or**

 **2.** ‘you are required to take part in an interview with your work coach to look at what you have been doing to look for work over the last two weeks’ **or**

 **3.** ‘you are required to take part in an interview to see how you’ve got on writing up a CV and creating an online profile’ **or**

 **4.** ‘you are required to take part in an interview to review your commitments’.

 This list is not exhaustive. It will be for the work coach or case manager when booking an interview requirement to ensure the intent of the interview is recorded in a ‘to-do’ or in journal notes in each individual case.

 **Note 1 :** This is in addition to the date, time and place of the interview and the consequences of failing to comply (including the compliance condition) which is notified via the ‘to-do’ and in the commitments and sanctions information screen. Not to do so may result in the Department having failed to validly impose a work-related requirement and no sanction for failing to comply could apply.

 **Note 2 :** The requirement is not attendance at an interview at the specified time and place on a certain date but participation in it. Participation means to take part and must at least entail turning up on the date, at the time and place as specified but also extends to making a meaningful contribution at the interview. Full guidance can be found in ADM [Chapter K5](http://intranet.dwp.gov.uk/manual/advice-decision-making-adm/adm-chapter-k5-low-level-sanctions) (Sanctions – low-level sanctions).

 **Note 3:** There is no requirement to take part in a Group Information Session. Taking part in such a session is voluntary and failure to take part in a Group Information Session would not result in a sanction. For full guidance on Group Information Sessions see ADM [Chapter K5](http://intranet.dwp.gov.uk/manual/advice-decision-making-adm/adm-chapter-k5-low-level-sanctions). Therefore it should be made clear to the claimant what type of interview they are required to take part in and if it includes a Group Information Session then it should be made clear to the claimant that taking part in that part of the interview is entirely voluntary.

16 If a claimant was sanctioned for failing to do something they didn’t realise they had to do, for example, the claimant was notified they were required to take part in an interview to discuss a training opportunity but at the interview they failed to provide evidence of their work search which was the reason a sanction was imposed, then they would have a legitimate complaint that they had not been adequately told the purpose of the particular interview.

 **Action to take**

17 The guidance in this Memo should be followed with immediate effect.

18 Each case will be considered on an individual basis. The decision maker will scrutinise all records to check whether the Department can discharge the burden of proof validly imposing a specific requirement in line with the findings of the Upper Tribunal decision1. If the decision maker is satisfied that

 **1.** the public law principles of fairness **and**

 **2.** substance of any requirement

 have been validly imposed they will go on to consider good reason and whether a sanction for the failure to comply is appropriate in the normal way. If not, a sanction will not be able to be imposed and any sanction referral will be cancelled.

 **Note :** Guidance on failure to comply is in ADM [Chapter K1](http://intranet.dwp.gov.uk/manual/advice-decision-making-adm/adm-chapter-k1-sanctions-general-principles) (Sanctions – general principles) and guidance on good reason is in ADM [Chapter K2](http://intranet.dwp.gov.uk/manual/advice-decision-making-adm/adm-chapter-k2-good-reason) (Sanctions – good reason).

*1 JB v SSWP [2018] UKUT 360 (AAC)*

1. It will depend on the

 **1.** totality of the evidence available **and**

 **2.** quality of the record keeping by work coaches and case managers in each individual case.

 **Note :** It may well be permissible to take into account a regular pattern of interviews. For example; a claimant may have been asked back for the same kind of interview two weeks later. The claimant’s experience from earlier interviews may be relevant as to whether they have been informed of the substance of a requirement.

20 In the event of an appeal of a decision to sanction, where the date of the decision is on or after 8.10.18, the appeals officer should ensure that they

 **1.** address in the appeal response how the specific work-related requirement was validly imposed **and**

 **2.** provide all the appropriate evidence for the tribunal

 which shows compliance with the findings of the Upper Tribunal decision1.

 **Note :** If the burden of proof is not discharged an appeal against the application of a sanction will succeed without the tribunal having to consider good reason.

*1 JB v SSWP [2018] UKUT 360 (AAC)*

 Annotations

 Please annotate the number of this memo (ADM Memo 6/19) against the following ADM paragraphs:

 [J3020](http://intranet.dwp.gov.uk/manual/advice-decision-making-adm/connected-requirements-general-j3020-j3029), [J3031](http://intranet.dwp.gov.uk/manual/advice-decision-making-adm/work-focused-interview-requirement-j3030-j3039), [K1151 (Heading)](http://intranet.dwp.gov.uk/manual/advice-decision-making-adm/public-law-principles-fairness-k1151-k1999), [K1171](http://intranet.dwp.gov.uk/manual/advice-decision-making-adm/public-law-principles-fairness-k1151-k1999) and [K1176](http://intranet.dwp.gov.uk/manual/advice-decision-making-adm/public-law-principles-fairness-k1151-k1999).

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