

50TH ANNIVERSARY ISSUE

Welfare Rights Bulletin 300



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News in brief

Bank accounts, fraud and error

Further legal advice added to concerns about powers in the Data Protection and Digital Information Bill. Concerns about additional powers to access data from claimant bank accounts (with banks required to trawl accounts) were expressed from several quarters, including the Information Commissioner's Office and the Equality and Human Rights Commission (see *Bulletin* 299, p2).

In April, civil liberties campaign group Big Brother Watch published legal advice that the powers would 'breach privacy rights'.^{*} That followed from a letter to the Work and Pensions Secretary in March from over 40 campaign organisations and charities (including CPAG) raising privacy and human rights concerns, and warning of the risk of wrongful investigations and benefit suspensions.

The legal advice, said Big Brother Watch: 'stated that in light of broad existing powers to compel banks to provide account information in specific cases, "It is clear that the purpose of the *new* proposed powers is to carry out monitoring of bank accounts where there are no 'reasonable grounds' for believing a particular individual has engaged in benefit fraud or has made any mistake in claiming benefits".'

At the time of writing, it was understood that the Bill had been dropped in full and will not now become law.

^{*} bigbrotherwatch.org.uk/press-releases/governments-new-bank-spying-powers-breach-privacy-rights-warn-lawyers, 17 April 2024

Words, welfare and worry

The Prime Minister's speech on welfare on 19 April insisted on a continuing belief in the 'timeless values' of the welfare state and 'compassion and understanding', while also insisting that the system is afflicted by a 'sick note culture', with too many passing the work capability assessment (WCA), personal independence payment (PIP) being 'misused' and in need of being 'harder to exploit'.^{*}

Regarding specific announcements, the speech included a restatement of the 'tightening up' of the WCA and a consultation on fundamental reform of PIP (for which, see the article on p8). An 'acceleration' of the universal credit managed migration process also got a mention – subsequently revealed (on social media, later confirmed in *LA Welfare Direct* 05/24) as accelerating the conclusion of the process from 2028/29 by bringing forward the sending of managed migration notification letters to income-related employment and support allowance claimants not getting tax credits – to be complete by December 2025.

^{*} gov.uk/government/speeches/prime-ministers-speech-on-welfare-19-april-2024

Claims and delays

Government statistics show that many benefit claim processing times have slowed significantly in recent years, so that many are not completed within official target times. Answers to a parliamentary question show that since 2016/2017, the percentage of child disability living allowance (DLA) claims completed within the target time has plummeted from over 96 per cent to just 3.5 per cent. For personal independence payment (PIP), the reduction is from 85 per cent to about 52 per cent, and for employment and support allowance (ESA) from about 85 per cent to 39.5 per cent. By contrast, the equivalent percentages have remained stable or improved in state pension, pension credit and universal credit (UC).

Commenting on the child DLA figures, DWP minister Paul Maynard said:

- 'Demand for child DLA has increased in recent years and is significantly higher than pre-pandemic volumes.
- During 2020–21 we deferred case renewal activity to focus on processing new claims. Since then the service has had to service both high new claims volumes and the deferred renewal work which has led to longer processing times.
- We have increased the numbers of staff working on child DLA to respond to increase new claims volumes, and clear cases in date order to ensure fair customer service.'

The current official target time for processing a child DLA claim is within 40 working days. For PIP it is within 75 working days, and for ESA it is within 10 working days.

^{*} questions-statements.parliament.uk/written-questions/detail/2024-04-23/23130

UC conditionality jumps again

From 13 May, the administrative earnings threshold (AET) in universal credit (UC) has been increased again. From then, the AET is £892 a month for an individual claimant (an equivalent of 18 hours earnings a week at the national living wage level), and £1,437 a month for joint earnings in a couple claim (equivalent to 29 hours a week at the national living wage). See SI 2024 No.536 on p12 for more information. There is no transitional protection to the lower AET for claimants already earning at the pre-13 May level but below the new one. The new AET will see an immediate increase of around 140,000 in the number of claimants put in the intensive work regime.

Implementation of the increase without further 'robust data' to support it was opposed by the Social Security Advisory Committee (SSAC).^{*} Writing to the Secretary of State in March, SSAC chair Dr Stephen Brien said:

'This change will increase by an estimated 140,000 the number of claimants in the intensive regime and is the third change in quick succession....we were concerned about insufficient robust data and understanding of both the current labour market conditions and what works for different groups of individuals affected by the policy...it is clear that the evidence required to support both the AET policy, the AET increase, and to have due regard to necessary exemptions and mitigations, are either still being developed, or have not been adequately considered...We therefore remain concerned that many gaps in the evidence base remain, and that the potential risks and impacts are not fully understood... In the absence of a persuasive rationale for the current timetable for full implementation, we strongly believe the Department should reconsider its schedule for enacting these regulations...'

^{*} gov.uk/government/publications/the-universal-credit-administrative-earnings-threshold-amendment-regulations-2024-si-2024

Managed migration – MPs raise alarm

MPs on the Public Accounts Committee have

issued a report urging the government to better support claimants undergoing managed migration from legacy benefits to universal credit (UC).* The MPs are concerned about the numbers of claimants subject to the process so far who have not claimed UC. The Committee said: ‘DWP said it was not concerned that so far 21 per cent of tax credits claimants had not transferred to universal credit when invited to do so, even though it has only limited assurance that people who did not switch over are not missing out on benefits they are entitled to. The report warns that even a small proportion of people not transferring to UC could translate into substantial numbers facing financial hardship. To address this, the DWP should explain how it will ensure it is providing the right level of support to claimants moving to universal credit, including face-to-face support and through the “Help to Claim” service – especially for vulnerable claimants – that it funds Citizens Advice to provide.’

Dame Meg Hillier MP, Chair of the Committee, said: ‘Our Committee has scrutinised universal credit since its inception. We must not forget how massive a change it is to how benefits are delivered, impacting millions of people. This means if the transition from legacy benefits to UC fails even an apparently small proportion of people, it will lead to real world misery for thousands. The DWP must make sure that people are not cast into financial hardship due to a bureaucratic change, and that robust support is in place for those vulnerable claimants who need it most.’

* ‘Universal Credit: PAC raises alarm over risk of vulnerable claimants losing benefits’, 26 April 2024, committees.parliament.uk/committee/127/public-accounts-committee/news/201041

300 not out

This is the 300th edition of the *Welfare Rights Bulletin*, which is now 50 years old. The first edition, in 1974, featured an article – the first in the *Bulletin* – by Stuart Weir on ‘The new rate rebate scheme’. Stuart was involved in setting up the National Association of Welfare Rights Advisers (NAWRA) which will also turn 50 next year! Many test cases, rules and reforms, people and policies, even benefits themselves, have come and gone since that first edition. The pace of change seems faster than ever. Challenges for claimants and advisers have changed a lot too, and keep coming (see, for example, ‘Words, welfare and worry’ on p2).

One constant, however, has been the industry and goodwill of all those in the field. Reading, writing, editing and commenting are as essential to the *Bulletin* now as they were in 1974. So, on the *Bulletin*’s 50th birthday, a raised glass and a toast to all our readers, contributors, editors, colleagues and correspondents down the years. The *Bulletin* could not have got this far without you. Thank you.

CPAG’s advice services

We operate the following welfare benefit advice services for advice workers.

For advisers in the UK:

Telephone advice line: 020 7812 5231
Monday to Friday from 10am – noon and 2pm – 4pm.

For advisers in the England, Wales and Northern Ireland:

Email advice is limited to enquiries that are specifically about universal credit, child benefit or tax credits.
Email: advice@cpag.org.uk

For advisers in Scotland:

Email: advice@cpagscotland.org.uk
Telephone advice line: 0141 552 0552
Monday to Thursday 10am – 4pm
Friday 10am – noon

Tax credits and pension age

From July 2024, the DWP is due to begin ending the tax credit awards of pension-age claimants. They will be directed to claim universal credit (UC) (if they get working tax credit – WTC) or pension credit (PC) (if they get child tax credit (CTC) but not WTC) instead. Special rules (in both UC and PC) will apply in such cases, including for transitional protection. The rules are in the Social Security (State Pension Age Claimants: Closure of Tax Credits) (Amendment) Regulations 2024, SI No.611. More details will be in the August edition of the *Bulletin*.

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ISSN 0263-2098

CPAG is a charity registered in England and Wales (registration number 294841) and in Scotland (registration number SC039339), and is a company limited by guarantee, registered in England (registration number 1993854).
VAT number: 690 808117

Subscriptions

An annual print subscription to the *Welfare Rights Bulletin* (6 issues) costs £62.50 and £53.15 for members and CABs. Send a cheque/PO to CPAG, see cpag.org.uk/membership.

Child Poverty Action Group works on behalf of the more than one in four children in the UK growing up in poverty. It doesn’t have to be like this. We use our understanding of what causes poverty and the impact it has on children’s lives to campaign for policies that will prevent and solve poverty – for good. We provide training, advice and information to make sure hard-up families get the financial support they need. We also carry out high-profile legal work to establish and protect families’ rights.



A reflection on litigating for impact at CPAG

Claire Hall considers the role of test cases and discusses some areas of interest.

CPAG has a long history of advancing social security test cases – as solicitors and representatives for claimants, as an Intervener to assist the courts on important points of law or policy in CPAG’s areas of expertise and as a claimant judicially reviewing government policies when individuals are unable to bring cases.

This work goes back decades – CPAG social security judicial reviews in the 1980s included challenges to delays in decision making, failures by a Secretary of State to carry out statutory duties due to the claimed expense and ‘inconvenience’ of doing so, and procedures to rectify previous mistakes in decision making.¹ Over time, the conditions for this litigation have evolved, with the advent of domestically enforceable human rights through the Human Rights Act 1998, shifts in judicial approaches, cuts to legal aid and more mundane – but nonetheless important – procedural changes that affect things such as the costs risks of litigating. The term ‘strategic litigation’ has been used to capture this proactive approach to using legal cases to advance the rights of claimants. Whatever we call it, the aim is – as it has always been – to use legal cases for positive impact, to benefit our clients and other families who find themselves in similar situations.

Strategic litigation supports CPAG’s core objective of maximising family incomes and reducing child poverty. Cases can aim to:

- encourage a social security system that ensures claimants receive all of the support they are legally entitled to;
- challenge discriminatory and unfair practices and policies, particularly where they negatively impact children in poverty – we know children in racialised communities and in households with at least one disabled person are disproportionately in poverty;²
- uphold human rights and children’s rights.

With these overlapping aims in mind, we can look to litigate issues across the entire social security system – reflecting CPAG’s analysis that adequate social security is a key solution to child poverty. We monitor the lawfulness of policy decisions that negatively impact children in poverty: for example, by challenging the

coalition government’s failure to set up a Child Poverty Commission, which they were required to consult under the (since amended) Child Poverty Act 2010.³ We aim to advance access to justice for claimants – for example, challenging the Lord Chancellor on refusals of legal aid in cases before the social security tribunals and commissioners.⁴ In the current climate, when a comprehensive child poverty strategy is still much needed, and legal aid funding for welfare benefits issues is decimated following LASPO (the Legal Aid, Sentencing and Punishment of Offenders Act 2012), these areas sadly remain relevant, over a decade since those cases.

How advisers can contribute

CPAG’s litigation work would not be possible with the support of frontline advisers and the commitment and patience of our individual clients.

This article does not cover all possible areas for litigation, and there will be issues not yet identified by CPAG that welfare rights advisers come across in casework. We welcome referrals to testcases@cpag.org.uk and continue to use our Early Warning System, Upper Tribunal and Judicial Review Projects to identify recurring problems faced in frontline work.

Specific calls for issues of interest are circulated to National Association of Welfare Rights Advisers (NAWRA) members or posted on Rightsnet but some of our ongoing work concerns the following areas.

Flawed administration resulting in missed entitlement – UC digital system

Last year CPAG published a research report *You Reap What Code: universal credit, digitalisation and the rule of law*,⁵ highlighting a myriad of ways in which the universal credit (UC) digital system undermines rule of law principles in the areas of claims processes, decision making, the communication of decisions and disputes processes. The report identifies shortfalls in transparency, procedural fairness and lawfulness – all areas which public law and litigation have a role in upholding.

Failures to ask relevant questions or take relevant information into account

The Court of Appeal recently criticised the Secretary of State for Work and Pension’s

(SSWP’s) UC claim process in *Abdul Miah (by his litigation friend Mashuq Miah) (Respondent) v SSWP* [2024] EWCA Civ 186.⁶ The Court of Appeal highlighted that ‘it is very unsatisfactory that the system for claiming UC does not offer claimants any opportunity to ask to have their claim backdated’, particularly when the affected group is ‘by definition people who could not reasonably have been expected to make their claim earlier and some of whom are [e]specially vulnerable as a result of ill-health or disability; many will not have ready access to advice’.

Systemic failures by the SSWP to ask relevant questions to establish entitlement or failing to take relevant information into account when it is already held by the Department (for example, regarding receipt of other benefits) when taking decisions engage public law principles that long pre-date digital systems. Moreover, the DWP has options to resolve the identified issues at a systemic level, by amending the IT systems that perpetuate them.

Examples of ongoing areas of interest include:

- absence of claim processes to identify all UC entitlement – for example, in relation to backdating, additional bedrooms (which would result in a higher rate of local housing allowance, or removal of an under-occupancy deduction), and exemptions from the shared accommodation rate;
- reverification and review processes of existing awards that wrongly remove previous lawful entitlement.

Lack of transparency

You Reap What You Code highlighted aspects of the UC system that are opaque and make it difficult for claimants and advisers to know whether they have received their correct entitlement.

Aspects of decision making are partially or fully automated. For example, in relation to managed migration to UC, the DWP has stated in response to a freedom of information request that ‘the calculation of the transitional element itself is an automated process that happens within our systems and there are no manual checks of the actual calculation. Therefore, there is no specific information on the automated process in terms of specific calculations, spreadsheets or formulas that we can share.’⁷ Claimants are not provided with a breakdown of how their transitional element has been calculated. Lack of transparency risks leaving advisers ill-equipped to advise their clients and check whether decisions are correct. Systemic changes are needed, but in the meantime template wording

for requesting written explanations for individual cases and a survey for advisers is available here: cpag.org.uk/migration-to-uc-tools-templates.

Policies or practices that are unfair, discriminatory or otherwise breach human rights

Our legal work supports CPAG's advocacy focused on policy changes that would most effectively reduce child poverty. We are always keen to hear about unfair or discriminatory aspects of the social security system, particularly when they relate to CPAG's core policy focus areas, such as the two-child limit, the benefit cap, child benefit and free school meals. Our complaints to the European Court of Human Rights on behalf of three families affected by the two-child limit are pending with the Strasbourg court and we are actively working on the application of the exemptions to the two-child limit.

Unfair or discriminatory policies or practices that can result in families losing out have emerged recently as part of the ongoing managed migration exercise. Areas of ongoing interest in this context include:

- transitional protection rules in managed migration: despite the core aim of transitional protection being to ensure claimants are not worse off at the point of transfer, some claimants' benefit entitlement at the point of transfer to UC is lower than their legacy benefit entitlement due to the way that the transitional element is calculated. Claimants in this situation might include: families newly affected by the benefit cap, families previously entitled to childcare support in working tax credit but not the UC childcare element (including carers of disabled children), parents with children in residential education, some separated parents with shared responsibility for a child, some families with children temporarily absent or abroad, some claimants whose dependent child has a child (particularly where two-child limit applies) and some kinship carers;
- failures to grant extensions to managed migration deadlines, refusals of cancellation requests in relation to migration notices and failures to make reasonable adjustments for disabled people or other groups as part of the Department's managed migration exercise.

Even if not referring a case to CPAG, advisers encountering the issues discussed in this article can contact CPAG's advice services through the usual routes and request that their query be flagged to the Strategic Litigation Team.

1 *R v Secretary of State for Social Services Ex p Child Poverty Action Group* [1988] 1 WLUK 660; *R v Secretary of State for Social Services Ex p Greater London Council* [1984] 1 WLUK 601; *R v Secretary of State for Social Services Ex p Child Poverty Action Group* [1985] 1 WLUK 531

2 DWP, *Households Below Average Income: for financial years ending 1995 to 2023*, 21 March 2024, available at gov.uk/government/statistics/households-below-average-income-for-financial-years-ending-1995-to-2023

3 *R (CPAG) v Secretary of State for Work and Pensions and Secretary of State for Education* [2012] EWHC 2579

4 *R v Lord Chancellor Ex p Child Poverty Action Group* [1999] 1 WLR 347

5 cpag.org.uk/news/you-reap-what-you-code

6 CPAG represented Mr Miah before the Upper Tribunal and Court of Appeal.

7 whatdotheyknow.com/request/calculating_transitional_element/response/2453751/attach/html/3/Review%20IR2023%2064604.pdf.html

LCWRA and migration to UC

When a claimant with limited capability for work-related activity migrates from the legacy benefit system to universal credit (UC), how is that reflected in the UC award? Simon Osborne reviews the situation.

The context

Before migration to UC, a claimant with limited capability for work-related activity (LCWRA) will very often be getting 'old-style' employment and support allowance (ESA). Alternatively, they may be getting 'credits only' – ie, have no award of ESA but still be getting national insurance contribution credits for limited capability for work (LCW). That is sometimes referred to as an 'ESA credits only' award, although there is in fact no award of ESA in this situation (see the article on p7 for more).

Migration to UC is ultimately brought about by making a claim for UC. Much focus is now on where that happens under the 'managed' migration process – ie, the claimant has claimed UC after being sent a migration notice telling them that their legacy benefits are to end and inviting them to claim. But it is still possible for claimants (advisedly or not) to claim UC before being sent a migration notice, and so undergo 'natural' migration to UC.

What should happen?

Whether the migration is via managed or natural migration, a claimant already determined as having LCWRA outside the UC system at the time of their UC claim should as a matter of law:

- be treated as having LCWRA for the purposes of UC; *and*
- have the LCWRA element included in the award from the first assessment period – ie, not be subject to the default 'relevant

period' of three assessment periods before that element is included.

The relevant provisions are in regulations 19 and 21 of the Universal Credit (Transitional Provisions) Regulations 2014 (the 'TP Regulations').¹ They apply in all migration to UC cases – they do not specifically refer to managed or to natural migration.²

These transitional provisions apply at the point of migration only: there is nothing to prevent the Secretary of State from revisiting the LCWRA issue (ie, via a new work capability assessment) at some future date. In practice, the rules considered here have not always been followed, so advisers need to be alert. They require the claimant either to have been entitled to old-style ESA with LCWRA or at least to credits with LCWRA outside the UC system at the point of the claim for UC. However, recent caselaw has held that to be unlawful discrimination in some cases where migration is undergone by a 'mixed-age' couple – see 'Discrimination and mixed-age couples' on p6.

ESA-entitled claimants

The relevant rule regarding what happens on migration is regulation 19 of the TP Regulations. That includes the following:

- '19. (1) This regulation applies where—
- an award of universal credit is made to a claimant who was entitled to old style ESA on the date on which the claim for universal credit was made or treated as made "the relevant date"; *and*
 - on or before the relevant date it had been determined that the claimant had limited capability for work or limited capability for work-related activity (within the meaning of Part 1 of the 2007 Act)...
- (4) Where, on or before the relevant date, it had been determined that the claimant had

limited capability for work-related activity (within the meaning of Part 1 of the 2007 Act) or was treated as having limited capability for work-related activity—

(a) regulation 27(3) of the Universal Credit Regulations [2013] does not apply;...

(b) the claimant is to be treated as having limited capability for work and work-related activity for the purposes of regulation 27(1)(b) of those Regulations and section 19(2)(a) of the Act; and

(c) the claimant is to be treated as if the determination that they have limited capability for work and work-related activity, for the purposes of regulation 14(1)(b) of those Regulations, was made before the date on which the claimant started receiving education...'

So, if the claimant was entitled to old-style ESA on the date of the claim for UC and (in LCWRA cases) had LCWRA, they are (as per 19(4)(a) and (b)) to be treated as having LCWRA without a new work capability assessment. Those in education are treated as having had that before starting the education, to ensure disabled students on old-style ESA transfer to UC successfully (19(4)(c)).

Regulation 19 further provides:

'(5) Unless the assessment phase applied and had not ended at the relevant date, in relation to a claimant who is treated as having limited capability for work and work-related activity under paragraph (4)(4)(b)—

(a) regulation 28 of the Universal Credit Regulations does not apply; and

(b) the LCWRA element is...to be included in the award of universal credit with effect from the beginning of the first assessment period....'

So, a claimant who is treated as having LCWRA under this rule is exempt from the relevant period for inclusion of the LCWRA element at regulation 28 of the Universal Credit Regulations 2013, meaning that the element is included straight away.

'Credits only' cases

The rules described above are very similar for 'credits only' cases (although here there is no deeming provision regarding those receiving education). The relevant rule is at regulation 21 of the TP Regulations.³ That includes the following:

'21. (1) This regulation applies where—

(a) an award of universal credit is made to a claimant who was entitled to be credited with earnings equal to the lower earnings limit then in force under regulation 8B(2)(iv), (iva) or (v) of the Social

Security (Credits) Regulations 1975 ('the 1975 Regulations') on the date on which the claim for universal credit was made or treated as made (the 'relevant date'); and

(b) neither regulation 19 nor regulation 20 applies to that claimant (whether or not, in the case of joint claimants, either of those regulations apply to the other claimant)...

(4) Where, on or before the relevant date, it had been determined that the claimant would have limited capability for work-related activity (with the meaning of Part 1 of the 2007 Act) if he or she was entitled to old style ESA—

(a) regulation 27(3) of the Universal Credit Regulations does not apply; and

(b) the claimant is to be treated as having limited capability for work and work-related activity for the purposes of regulation 27(1) of those Regulations and section 19(2)(a) of the Act....'

Again, the regulation goes on to disapply the relevant period in regulation 28 of the Universal Credit Regulations:

'(5) Unless the notional assessment phase applied and had lasted for less than 13 weeks at the relevant date, in relation to a claimant who is treated as having limited capability for work and work-related activity under paragraph (4)—

(a) regulation 28 of the Universal Credit Regulations does not apply; and

(b) the LCWRA element is...to be included in the award of universal credit with effect from the beginning of the first assessment period....'

'Mixed-age' couples

What if migration to UC is undergone by a 'mixed-age' couple – ie, where one member of the couple has already reached pension age? The rules described above should apply in the same way as to a non-mixed-age couple – but that has not always been the case in practice. A decision that holds that those rules do not apply where it is the pension-age member of the couple that has the LCWRA (on the specious ground that UC is a working-age benefit and so does not apply to them) is flat wrong: neither regulation 19 or 21, nor the rules about LCWRA itself in the Universal Credit Regulations, impose any requirement that it must be the working-age member of the couple that has LCWRA.

Discrimination and mixed-age couples

The rules specifically require either entitlement

to ESA or to credits for LCW at the point of the claim for UC. What if neither applies at that point? Straightforwardly, neither regulation 19 nor 21 of the TP Regulations can apply, so that the claimant cannot benefit from them.

But in *PR v SSWP (UC)* (*Bulletin 298*, p12),⁴ the Upper Tribunal held on the facts that the application of the relevant period before the LCWRA element was included amounted to unlawful discrimination on grounds of age. The claimants were a mixed-age couple where it was the pension-age member of the couple who had LCWRA and was the ESA claimant. She had lost entitlement to ESA *only because of reaching pension age* (ie, not following re-assessment under the work capability assessment), but had been informed of that loss only after it had happened. Consequently, she could not meet the requirement at regulation 19 to have been on ESA at the time of the UC claim. Neither could she meet the parallel requirement regarding credits for LCW at regulation 21 as, again *solely due to being of pension age*, she was no longer entitled to credits for LCW.

Judge Wright held that in those circumstances the application of the 'relevant period' was in breach of her human rights, as unlawful discrimination on grounds of age. The remedy was to disapply the relevant period rule and award the LCWRA element from the start of the award. Although dependent on particular facts, the decision will be useful in any similar mixed-age migration case – ie, where UC was not claimed before the ESA was ended on age grounds, and the LCWRA element is linked to the pension-age member of the couple.

¹ SI 2014 No.1230

² Very similar provision is made regarding being treated as having limited capability for work (LCW) on migration to UC and may still apply in non-LCWRA cases. But provision regarding the LCW element was removed in the light of the abolition of that element for new claims from 3 April 2017.

³ On credits for LCW for the purposes of this rule, in particular their continuation when ESA is ended for reasons other than a finding that the claimant no longer has LCW, see *JW v SSWP (UC)* [2022] UKUT 117 (AAC).

⁴ [2023] UKUT 290 (AAC)

Reader offer

To celebrate the 50th anniversary of the *Welfare Rights Bulletin*, subscribers can get a free 2024/25 *Benefits and Tax Credits Rates* poster with their next order from cpag.org.uk/shop. Simply add an A2 poster to the basket and use code WRB300 at the checkout.



Credits where credits due – NI credits for LCW

While getting national insurance (NI) credits for LCW is important for future entitlement to contribution-based benefits, such as state pension, entitlement can also help with getting universal credit (UC), or extra amounts of UC, quicker than would otherwise be the case. Henri Krishna looks at when someone should get these NI credits, how they are claimed, and some of the advantages of getting them.

Introduction

A person entitled to employment and support allowance (ESA) is entitled to NI credits for limited capability for work (LCW). However, someone with LCW can also be entitled to these NI credits if their ESA award ends or even if they are not entitled to ESA. Entitlement without an ESA award is commonly referred to as an ‘ESA credits only’ award, but is not in fact an award of, or necessarily dependent on a claim for, ESA. NI credits for LCW cannot be awarded for periods when someone is entitled to UC (which gives entitlement to its own NI credits), unless they are entitled to ESA too.

How to claim?

If not awarded NI credits for LCW automatically, they must be claimed. The DWP administers claims for NI credits, and while those for LCW are not necessarily linked to ESA, the DWP’s preferred method is use of the ‘new-style’ ESA claim form. If using the online ‘new-style’ ESA claim form, the claimant can choose to make a ‘credits only claim’ by ticking the appropriate box when prompted.¹ This remains the best way to claim if it is not awarded automatically.

A person should be able to claim without using the ‘new-style’ ESA claim form. The rules governing such claims (regulation 8B(4) of the Social Security (Credits) Regulations 1975, SI No.556 – the ‘Credits Regulations’) requires only that they ‘furnished to the Secretary of State notice in writing of the grounds on which he claims’. As such, any written application, including arguably a previous claim for UC, should be sufficient – but how the authorities deal with such applications is not clear.

When to claim?

To get these NI credits for any tax year, they need to be claimed before the end of the

following ‘benefit year’ (roughly the calendar year), or any longer period considered reasonable in the circumstances. The ESA time limits do not apply. So, a claim made in June 2024 should cover at least the period back to the start of the 2022/23 tax year – ie, the start of April 2022.

If not already assessed as having LCW (eg, for an ESA award ended due to 365-day time limiting or other income being too high), a claim for NI credits for LCW requires an assessment. Regulation 8B(2) of the Credits Regulations requires that each day was, or would have been, a day of LCW for the purposes of Part 1 of the Welfare Reform Act 2007 – ie, a day on which you would have been entitled to ESA if you had, or could have, claimed it at the time. As such, you should initially provide medical evidence (eg, ‘fit notes’) and then complete the work capability assessment (WCA), as if claiming ESA. If you fail the WCA, you can appeal.

For claiming these credits while a student, see ‘UC and disabled students – an update’ (*Bulletin 287*).

NI credits for LCW if UC ends

In practice, the DWP automatically continues to award NI credits if an ESA award ends for a reason other than being found not to have LCW – eg, due to time limiting of contributory ESA, or if income is too high for income-related ESA. However, this does not seem to be DWP practice where someone has LCW and their UC award comes to an end.

It is very arguable that, as for ESA, a UC award ending, other than because the person no longer has or is treated as having LCW, means that the LCW determination stands.² As someone with LCW but no UC award, they should be entitled to NI credits for LCW – eg, by treating the UC claim as a claim for the credits.³ But as the DWP does not appear to do this routinely, a person in this situation should request, in writing, the credits on the basis that they already have LCW. Failing that, they can claim the credits – eg, using the online ‘new-style’ ESA claim form, from the date the UC award ended.

Effect of NI credits for LCW award on a new UC claim

Regulation 21 of the Universal Credit (Transitional Provisions) Regulations 2014 (the

‘TP Regulations’) deals with ‘credits only’ transitions to UC. Straightforwardly, it concerns migration from legacy benefits to UC, where a claimant is getting NI credits for LCW, but not old-style ESA, when they claim UC. The rule allows for a claimant to be treated as having LCW or, in relevant cases, limited capability for work and work-related activity (LCWRA) from the start of the UC award (see the article on p5 for more about LCWRA in this situation).

Arguably, the rule could also apply where the claimant is a ‘credits only’ case but was previously getting UC or ‘new-style’ ESA. This argument has not been tested and seems unlikely to be accepted by the DWP (on the basis that it does not involve migration to UC). However, the argument is that regulation 21, although referring to the ‘old-style’ test of LCW (ie, the work capability assessment provided for in the Welfare Reform Act 2007) uses a notional test. That is because regulation 21(2) and (4) refer to the situation where the claimant ‘would have’ satisfied that test ‘if he or she was entitled to old style ESA’. Arguably, that could apply to a former UC or ‘new-style’ ESA claimant who ‘would have’ had LCW (or LCWRA) under the 2007 Act if they could instead have been on old-style ESA.⁴

If that argument were successful, such a claimant would (as in an actual transition to UC case) have LCW and, in relevant cases, LCWRA (including the element) from the first assessment period of the new UC award.

Pre-migration to UC

If a claimant is soon to migrate to UC (either ‘naturally’ or ‘managed’), is sick or disabled but not already assessed as having LCW or LCWRA (eg, if only getting tax credits, a disability benefit and housing benefit), it may be beneficial to make a NI credits for LCW claim. Given that a claim covers the tax year prior to the benefit year in which it is made, a successful award should mean regulation 21 of the TP Regulations applies, as described above, once UC is claimed.

1 If you do not meet the NI contributions for ‘new-style’ ESA, you are asked ‘What do you want to do?’ You should choose ‘Continue to apply for New Style ESA. I understand that I might not get a payment, but I may get Class 1 National Insurance credits’.

2 In relation to an old-style ESA rather than UC, the DWP confirms this at para 20 of *JW v SSWP (UC)* [2022] UKUT 117 (AAC)

3 Again, at para 20 of *JW*: the DWP confirms that the ESA claim is treated as an NI credits claim, but given that UC entitlement is not dependent on LCW, and NI credits for LCW are not awarded if only getting UC, the DWP may be unlikely to accept a UC claim as an NI credits claim.

4 Para 7.15 of the Explanatory Memorandum to the TP Regulations supports this interpretation: ‘... they may be entitled to the LCW or LCWRA element in UC from the start of the first assessment period, on the basis of... an assessment whilst the claimant is in receipt of UC ...’.

A new plan for PIP?

Carri Swann reviews the DWP's green paper on personal independence payment (PIP).

Introduction

The 2024 PIP green paper is a consultation document and does not actually make the sweeping changes that many expected after the Prime Minister's April speech on welfare. For the most part, it avoids the rhetoric used in the April speech when discussing PIP.¹

It does not, in fact, contain any firm plans: it has been described in parliamentary debate (albeit not by the government) as 'an exam that the Secretary of State [for Work and Pensions] is hoping he will never have to sit'.² The green paper does, however, invite discussion on some fundamental PIP questions, such as how entitlement should be determined and the financial value of awards.

Diagnosis

A diagnosis is not currently necessary for entitlement to PIP.³ Instead, PIP eligibility has always been based on the impact an individual's condition has on their daily life and mobility.

However, Chapter 1 of the green paper states that the DWP is considering ending its 'functional' approach to PIP and instead having 'a new or hybrid approach based entirely or partly on the diagnosis given to an individual':⁴

'We want to understand if evidence of a clinical diagnosis made by a healthcare professional could provide a more objective assessment of need than the current functional assessment. This would mean that people could receive entitlement to PIP based on specific health conditions or disability, evidenced by a health care professional, without undergoing an assessment.'⁵ Clearly, this change would be a major departure from what has come before. While the government is now publicly criticising a system 'undermined by the way people are asked to make subjective and unverifiable claims about their capability',⁶ the functional approach has previously been described as dynamic and personalised.

Indeed, when it consulted on introducing PIP in 2010, the DWP stated:

'Eligibility for [disability living allowance, which PIP replaced] is sometimes based on medical condition rather than the impact of that condition, meaning that support is not always appropriately targeted. In [PIP], we

intend to move away from a system that awards automatic entitlement for certain conditions; instead we propose to treat each application individually. This will deliver a more personalised service that ensures resources are targeted where they are most needed.'⁷

The 2024 green paper does not repeat these earlier concerns about a diagnosis-based system, but does acknowledge some other risks, including the extra work that the system might create for GPs and the broader NHS.⁸

The green paper suggestions go further than the DWP's separate proposals for a severe disability group (SDG): a group of claimants who could be awarded PIP without an assessment, based on having a specific, life-long condition with no realistic prospects of improvement. The SDG was proposed in the government's last health and disability green paper in July 2021 and is still in the testing stages.⁹

Activities and descriptors

Chapter 2 of the green paper considers what other changes could be made to the PIP eligibility rules if the DWP decided against a diagnosis-based approach. Specifically, it states that 'if a functional assessment is retained, we could consider partially or fully reviewing the PIP entitlement criteria to ensure they are working as intended'.¹⁰

Talking about the rationale behind the current activities and descriptors, the green paper acknowledges that:

'At the time [when PIP was introduced], the government concluded that the best approach would be to identify proxies for an individual's ability to participate in everyday life. Twelve key activities which are fundamental to everyday life were chosen, to keep a strong focus on care and mobility, while also providing a more holistic assessment of the impact of a health condition or impairment on an individual's ability to participate.'¹¹

Unfortunately, some public statements around the green paper have not made the same acknowledgements. The Prime Minister's April welfare speech incorrectly implied that PIP is intended to address the direct costs of particular items – like 'handrails' – rather than recognising that those needs are proxies for the wider impact of an individual's condition.

As elsewhere, there are no specific proposals or commitments in the green paper, but

the consultation questions focus on:¹²

- the 'aids and appliances' descriptors;
- the 'prompting' descriptors;
- any activities that could be added, removed or merged; *and*
- whether 'people who accumulate low points across activities have the same level of extra costs as those who score highly in one or more activities'.

Required period

Chapter 2 also shows that the DWP is concerned with ensuring PIP is only awarded to those with long-term conditions. The consultation questions ask whether the current three-month qualifying period is long enough and 'whether [the DWP] should retain, remove, or change the length of the prospective test'.¹³

Cash benefits, vouchers, receipts

Chapter 3 of the green paper looks at what PIP is intended to pay for. While the consultation document suggests a holistic view is taken of which extra costs are attributable to having ill health or a disability,¹⁴ the DWP clearly does not see it as PIP's purpose to meet all of these.

'PIP is intended to provide a contribution to a person's extra costs, not necessarily to cover them fully... Therefore, it is important for us to understand... which specific sorts of cost should be prioritised.'¹⁵

Leading on from this, the green paper suggests that PIP could become a non-cash benefit in future:

'If DWP were to consider other ways of supporting people with disabilities and long-term health conditions apart from providing regular cash payments, it could continue to contribute to people's extra costs through alternative models.'¹⁶

The green paper suggests that these could include different forms of financial assistance – a catalogue and/or voucher scheme, a receipt-based reimbursement system, or one-off grants for larger items of expenditure. *Non-financial* assistance is also floated as an option:

'Other forms of support [could include] health care, social services care provision and respite... We would like to understand whether some people receiving PIP who have lower, or no extra costs, may have better outcomes from improved access to treatment and support than from a cash payment.'¹⁷

All of these options would represent major departures from the existing PIP scheme. 'Consistent awards' were part of the promise of PIP when it was first proposed in 2010, particularly as it was acknowledged that 'measuring each individual's expenditure would be

administratively complex and expensive'.¹⁸ And the green paper acknowledges the fundamental logic of a cash transfer approach:

'In the current PIP system, claimants choose which costs are the greatest priority to them and spend their award money accordingly.'¹⁹

Passporting

Chapter 3 notes that PIP reform could have consequences for related benefits like carer's allowance and for passported entitlements like benefit cap exemption and Motability vehicles. The consultation document does not suggest alternatives to the current rules, merely inviting comments.

In light of the government's plan to abolish the work capability assessment, the green paper also asks respondents to 'consider the implications of PIP reform on the gateway to the UC health element'.²⁰

Local authorities, the NHS and PIP

Chapter 4 asks questions about 'aligning' PIP with NHS and local authority care services. The implication is that the DWP thinks this could save money, reduce the assessment burden on individuals and lead to more effective support through localised decision making. These are not new considerations and were also raised in 2010 when the DWP was consulting on the

introduction of PIP. Again, the green paper does not contain any specific proposals about how alignment could be achieved.

Now that a general election has been called for 4 July, the status of the PIP consultation is unclear. It appears that the consultation will still remain open until 22 July 2024. Claimants and advisers are invited to respond. See gov.uk/government/consultations.

- 1 Such as the Prime Minister's 19 April comments that he wants to reform PIP to 'make the system fairer and harder to exploit' and that he 'worr[ies] about it being misused'.
- 2 House of Commons, *Hansard*, 29 April 2024, col 48
- 3 See 'PIP and diagnosis', *Bulletin 298*, February 2024, p9
- 4 DWP, *Modernising Support for Independent Living: the health and disability green paper* ('Green paper'), 29 April 2024, para 62
- 5 Green paper, para 64
- 6 Prime Minister's speech on welfare, 19 April 2024
- 7 DWP, *Disability Living Allowance Reform Consultation*, December 2010, para 19
- 8 Green paper, para 66
- 9 DWP, *Severe Disability Group Test: information for clinicians*, 17 April 2024
- 10 Green paper, para 70
- 11 Green paper, para 57
- 12 Consultation questions 9-14
- 13 Green paper, para 73
- 14 Green paper, para 79; see also the accompanying evidence pack at pp56-59.
- 15 Green paper, para 82
- 16 Green paper, para 83
- 17 Green paper, para 84
- 18 *Disability Living Allowance Reform Consultation*, December 2010

with civil proceedings against the Department for Work and Pensions is the Treasury Solicitor.³ The Government Legal Department webpage⁴ instructs that for 'letters before action, or pre-action protocol correspondence (...), please email these to thetreasurysolicitor@governmentlegal.gov.uk'.

Secondly (says the DWP's legal advisers), to 'the relevant section of DWP', 'if it relates to a particular benefit decision then the pre-action letter should be sent to the address at the top of that letter'.⁵ This can be by post or email.

It is good practice to send new pre-action correspondence to both the Treasury Solicitor and the relevant DWP section. All CPAG pre-action templates for DWP decisions have therefore been readdressed to (by email) thetreasurysolicitor@governmentlegal.gov.uk and (by post) to 'the address on the decision letter'.

Is this effective?

Yes and no. CPAG has received feedback from advisers who have sent PAPs since 19 January 2024.

Where pre-action letters have been sent to thetreasurysolicitor@governmentlegal.gov.uk, in all but one case⁶ no response has been received from the Treasury Solicitor, but in some instances either the claimant or adviser has been contacted by the DWP.

In one, the adviser was told universal credit (UC) 'received the pre-action letter via the Treasury Solicitor and that we should use the TS email address for pre-action letters in future'.⁷ In the same case, a substantive response was then received stating: '(Y)ou contacted our Legal Liaison Team about a proposed claim for a judicial review... Your case was forwarded to the DWP Complaints Team.' This response resolved the issue.⁸

In another, the DWP Complaints Team responded seven days after the PAP was sent, stating: '(O)ur legal team have reviewed your correspondence and determined it is not for their action...it has been forwarded to me to investigate and provide a response... Our target for providing a response is 15 working days'.⁹

In another case, it is clear the PAP had been forwarded to DWP Debt Management as their response stated: 'I write in response to your letter dated 15/02/2024 emailed to the Treasury Solicitor on 05/03/2024, in respect of your client'.¹⁰

No response seen by CPAG has been within the time scale recommended by the pre-action protocol and most have not addressed the legal arguments made in the PAP. In some cases, no response has been received at all.¹¹

Before JR – pre-action

The way DWP accepts and respond to judicial review (JR) pre-action correspondence has changed. Jessica Strode explains that, and how to use the CPAG judicial review templates.

What's happened?

The relevant email inbox for judicial review pre-action correspondence ('pre-action protocol' letters, or 'PAPs') which challenges DWP decisions (legal.queries@dwp.gov.uk) was closed on 19 January 2024 and 'no longer exists'.¹

In the run-up to 19 January 2024, an automatic reply was sent from legal.queries@dwp.gov.uk advising: 'Please note, the mailbox: legal.queries@dwp.gov.uk will close on Friday, 19th January 2024 @ 5pm.' It has since been confirmed to CPAG that this also applied to letters sent by post.

Following the cut-off date, the automatic email reply was turned off. It is not clear what has happened to pre-action correspondence sent using the old details since 19 January 2024. However, a senior DWP lawyer has advised that you should consider 're-sending' any pre-action correspondence 'to which you have not received a reply'.²

Where should we send PAPs now?

Firstly, and most importantly, by email to the 'treasury solicitor' at thetreasurysolicitor@governmentlegal.gov.uk.

Cabinet Office practice direction 'Crown Proceedings Act 1947' (December 2023) requires that pre-action correspondence against a government department: '...be served on the solicitor, if any, for that department'. The solicitor for service in connection

Where pre-action letters have been sent *only* to the DWP decision maker, CPAG has received no reports of responses which acknowledge the pre-action letter. But in one case, the letter was sent ‘to the DWP by post and JCP [Jobcentre Plus] Armed Forces Champion by email’ and the issue was resolved promptly by the ‘Armed Services Champion’.¹² Another was sent to ESA [employment and support allowance] Chippenham by post and resulted in a prompt supersession decision, which had been pursued unsuccessfully for six months before the adviser sent the PAP.¹³

In summary then, yes, CPAG’s templates are still effective where the issue is clear-cut, but currently not within the time scales recommended by the pre-action protocol.

How can we improve the efficacy of our PAPs?

CPAG’s pre-action letter templates are effective where they explain clearly the error of law which has led to the decision your client wants to challenge, and they are well drafted so that when considered by the DWP’s lawyers (or, now, the Treasury Solicitor), a risk is perceived that if the case ends up in the High Court, the DWP could lose (which could set an unhelpful precedent and be expensive). If the risk is perceived as real, the consequences of non-compliance with the pre-action protocol (eg, not responding within 14 days) are relevant.¹⁴

The obvious way to remind the DWP that pre-action letters pose a risk of litigation, and of the requirements under the pre-action protocol, is to issue judicial review proceedings when pre-action correspondence is not responded to or does not address the legal issue. For this to happen, advisers need to keep sending pre-action letters.

Does this change the way I should use the CPAG templates?

A bit. Please send all pre-action letters prepared using the CPAG templates to the CPAG judicial review project (at jrproject@cpag.org.uk) before sending them to the Treasury Solicitor and DWP. CPAG will review your letter and send it back to you.

Before you start drafting, verify from your client’s paperwork or online UC journal all relevant facts, dates and information. It can be helpful to write out a timeline including the dates before you start. This will help you to identify the relevant issue, put events in chronological order, and confirm you have all the details you need. You can then use this timeline in your ‘background facts’ section in the template. Remember, in judicial review the High Court is likely to resolve any factual

dispute in favour of the defendant (the High Court has no fact-finding duty).

Remember to check that your client is in time and, if so, act quickly. The time limit to issue judicial review proceedings is ‘promptly and within three months’ of the decision your client wants to challenge. Time has not started to run if you are challenging a delay.

CPAG has produced a guide to using the templates which you may find useful when choosing your letter, formatting your document, adding and reviewing content. You can access this at cpag.org.uk/how-use-our-judicial-review-pre-action-letter-templates. Please read this before using the templates, even if you have used them before. CPAG is also preparing a course on ‘legal drafting’ for advisers. Please contact dnorris@cpag.org.uk to express your interest.

I want to refer my client for judicial review

CPAG’s map of legal support¹⁵ has been updated and includes solicitors who may be able to accept referrals from advisers who have used CPAG’s pre-action letter templates. CPAG may also be able to accept a small number of referrals. A referral is more like to be possible if your pre-action letter is well drafted, the issue is clearly and concisely explained, and all dates and facts have been checked.

When making a referral, include:

- the date of the decision you want to challenge (or explain if it is a delay);
- details and the dates of any steps you have already taken – eg, date mandatory reconsideration requested, date of your pre-action letter, date of any response and what it says;
- why there is no ‘effective alternative’ remedy. Does your client have a right of appeal? If so, have they used it? Why not? Remember, judicial review is a ‘remedy of last resort’;
- the impact on your client – what are they living on?;
- whether your client is likely to be eligible for legal aid (are they in receipt of means tested benefits, and if not, what income, capital and savings do they have?).

CPAG suggests sending your referral (not including client details) to a number of solicitors at once; you can use the bcc email feature. It is not advisable for claimants to issue proceedings on their own behalf, as they will not have the protection of legal aid and are less likely to be successful if not legally represented.

UPDATE

It remains unclear how correspondence sent since the cut-off date has been responded to.

Paul Maynard MP, Parliamentary Under-Secretary (Department for Work and Pensions), responded to a parliamentary question ‘How many pieces of pre-action correspondence relating to his Department have been (a) received by the Treasury Solicitor and (b) responded to since 1 January 2024’ on 15 May 2024,¹⁶ stating: ‘[The Department] does not currently collect data that can answer the question asked, and nor is there a requirement for it to do so.’

- 1 Email to CPAG from DWP Legal, 16 February 2024
- 2 Email to CPAG from DWP Legal, 4 March 2024
- 3 assets.publishing.service.gov.uk/media/657c891d83ba380013e1b66c/List-of-Authorised-Government-Departments-gov.uk/government/organisations/government-legal-department
- 5 Email to an adviser from DWP Legal, 16 February 2024
- 6 An acknowledgement was received by a well-known law firm on 21 February 2024 to a PAP sent on the same day. This may suggest a risk of litigation was perceived in this case.
- 7 Email to CPAG from an adviser, 15 April 2024
- 8 Letter to an adviser by DWP Complaints Team, 16 April 2024
- 9 Letter to an adviser by DWP Complaints Team, 7 May 2024
- 10 Letter to an adviser by DWP Debt Management, 12 March 2024
- 11 Email to CPAG from an adviser on 21 March 2024 confirmed no response to had been received to a PAP sent by email on 26 February 2024 to the Treasury Solicitor.
- 12 Email to CPAG from an adviser, 14 March 2024
- 13 Email to CPAG from an adviser, 19 March 2024
- 14 The likely consequences include that if the case reaches the High Court, the non-compliant party be penalised financially.
- 15 cpag.org.uk/jr-court-solicitor
- 16 Question by Marsh De Cordova MP, tabled 7 May 2024, questions-statements.parliament.uk/written-questions/detail/2024-05-07/25037

A CPAG Handbook

Mental Health and Benefits Handbook



This handbook is a comprehensive guide to benefits for people who have mental health problems. It provides legal insight and practical guidance for the different stages of a benefit claim and addresses the problems that might be encountered. With chapters on UC, PIP and other health-related benefits, the handbook addresses key topics including assessments and appeals, supporting evidence, work-related requirements, rules for third parties, and getting reasonable adjustments. The handbook is aimed at professionals supporting individuals with mental health problems as they navigate a benefit claim.

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To order, call 020 7812 5227, email bookorders@cpag.org.uk or visit cpag.org.uk/shop.

At a glance

'Erosion' of UC transitional elements

In the first of a new occasional series providing key advice points on tricky issues, we look at the 'erosion' of transitional elements in universal credit (UC).

Why it matters

Claimants who undergo migration from legacy benefits to UC may be entitled to a transitional element in their UC. One of two elements may be awarded: a 'transitional element' (in managed migration cases) or a severe disability premium (SDP) transitional element (in natural migration cases, or in managed migration where they are not entitled to a transitional element).

These transitional elements provide very important financial protection, or at least partial protection, in migration to UC. But, even where entitlement to these elements has not actually stopped, they do not last forever. That is because they are reduced, or 'eroded', by subsequent increases in UC. Understanding how and when erosion happens is essential to good advice in the context of migration to UC.

Key points

- Erosion works by reducing the amount of the transitional element, or the transitional SDP element, potentially to nil.
- The same rules apply regarding the transitional element and the transitional SDP element.
- Erosion cannot apply in the first assessment period of the UC award – so increases to UC *in that assessment period* do not trigger erosion. But it can apply from the second assessment period, and in subsequent assessment periods.
- Erosion is triggered by increases in UC maximum amounts, including increases to standard allowances and most elements – but not the childcare element.
- The reduction of the transitional element is pound for pound, by the total of increases to UC maximum amounts – where the limited capability for work (LCW) element is increased to the limited capability for work-related activity (LCWRA) element, the increase is taken to be the difference between the two elements.
- Becoming entitled to a UC element, or an

increase to an element already awarded, will result in erosion.

- Annual uprating of UC amounts will trigger erosion – so erosion of existing transitional elements will always happen at least in April of each year.
- Erosion leading to immediate loss of the whole of the transitional element and 'cliff-edge' reduction in benefit was found to have breached human rights rules on the facts of the case in *SSWP v JA (UC) [2024] UKUT 52 (AAC)* (available at gov.uk/administrative-appeals-tribunal-decisions/sswp-v-ja-uc-2024-ukut-52-aac).

Relevant rule

- Regulation 55(2) of the Universal Credit (Transitional Provisions) Regulations 2014, available at legislation.gov.uk/uksi/2014/1230/regulation/55

Official guidance

- ADM Chapter M7 paragraph M7500 and following (transitional element), available at gov.uk/government/publications/advice-for-decision-making-staff-guide
- ADM Chapter M6, Appendix 1 paragraph 21 (transitional SDP element), available at gov.uk/government/publications/advice-for-decision-making-staff-guide

More information from CPAG

- 'Erode to nowhere', *Bulletin 286* (February 2022), available at askcpag.org.uk/content/207613/erode-to-nowhere
- *Welfare Benefits and Tax Credits Handbook*, Chapter 5, section 3, 'Transitional element'
- CPAG welfare rights tools (UC elements) at cpag.org.uk/welfare-rights/tools-templates/universal-credit-tools-and-templates

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Q&A

Universal credit and 'cryptoassets'

Q *My clients have assets in the form of cryptocurrency. Does that count as part of their capital for universal credit?*

A Straightforwardly, yes – so they should ensure that universal credit (UC) is aware of it. There is no specific cryptocurrency rule in UC. But that is not significant: the principle in UC is that all forms of capital count (ie, so can affect entitlement, depending on the amount) unless there is a specific disregard. Generally, cryptocurrency will count as a capital asset and fall to be valued as such.

The most directly relevant rule is at regulation 46 of the Universal Credit Regulations 2013. That provides that 'the whole of a person's capital is to be taken into account', unless it is treated as income or to be disregarded. 'Personal possessions' are not to be treated as capital. There is no definition of capital as such, but the general approach is that an asset is capital unless it is income or is disregarded. A cryptocurrency asset is not income by nature, and there is nothing to treat such assets as income or to disregard them. As such they would fall to be regarded, along with many other types of investment, as capital. Official guidance at *Advice for Decision Making (ADM)* paragraph H1020 instructs decision makers to treat cryptocurrency as capital for UC, advising that 'investments such as...crypto and virtual assets' are to be considered as capital.

In individual cases, complications may then arise about things like how the asset is to be valued (which may be difficult where the value fluctuates violently) or whether the claimant has access to the asset so as to be able to sell it or convert it into value (ie, is the 'beneficial owner'), or even whether it might fall to be disregarded as a business asset. But all such questions very much depend on the individual facts, and none change the basic default position that a cryptocurrency asset will be treated as part of a claimant's capital.

Handbook update

p19 Key facts

4th bullet: delete '2028', insert '2025/26'.

p21 Who can still make a new claim for legacy benefits

1st bullet: at start, insert 'Until April 2025'.

p22 How your legacy benefits are affected

4th, 5th and 6th bullets (re CTC, WTC and pension credit): at end of each bullet, add 'also see the Note below';

1st para under bullets: at end, insert a new para:

Note: from July 2024, the DWP is to begin a process of ending the tax credit awards of pension-age claimants. They will be directed to claim UC (if they get WTC) or PC (if they get CTC but not WTC) instead. Special rules (in both UC and PC) will apply in such cases. See future online updates to this Handbook and CPAG's *Welfare Rights Bulletin*.

p28 Managed migration timetable box

2nd para: at end, delete '2028', insert '2025/26'.

p179 Mixed-age couples

1st bullet: Before the Note, insert:

'You can reclaim the HB where this would continue to apply but for the fact that your HB award was ended because you came under the 'managed migration' to UC process (see p27) and you claim within three months either of your UC award ending or, where you did not actually claim UC, of the ending of your HB award.'

p252 The rules about your age

1st para under 1st set of bullets: after '...since 14 May 2019', insert a new sentence: 'This is intended still to apply where the HB was ended because you came under the managed migration to UC process, but have been able to reclaim the HB (see p179).'

p1036 You have sufficient earnings from employment

1st bullet: delete '£743 a month (from April 2024)', insert '£892 a month (from 13 May 2024 – £743 before then);

2nd bullet: delete '£1,189 a month (from April 2024)', insert '£1,437 a month (from 13 May 2024 – £1,189 before then)';

Note: delete '15', insert '18'; delete '24', insert '29'; delete 'These amounts are...for updates.'

p1490 Domestic violence or abuse

Note, 5th line: delete 'in', insert 'from'.

p1631 Family benefits

1st para, last sentence: delete 'recently'; after '...the main co-ordination rules', insert '(this decision has recently been upheld by the Court of Appeal'.

Legal section

New regulations

The Universal Credit (Administrative Earnings Threshold) (Amendment) (No.2) Regulations 2024, SI No. 536

These regulations came into force on 13 May. They amend rules regarding the 'administrative earnings threshold' for universal credit, with the effect that from 13 May that threshold is increased to £892 a month regarding an individual claimant, or £1,437 for joint earnings where the claimant is a member of a couple.

Note: the regulations replace an earlier set of amendments in SI 2024 No.529, which provided for the same increases but would have been in force from 6 May.

The Welfare Reform Act 2012 (Commencement No.31 and Savings and Transitional Provisions) (Amendment) Order 2024, SI No.604

This Order came into force on 8 June. Broadly, it extends the savings provision whereby certain 'mixed-age' couples can retain entitlement to pension credit (in essence, those with entitlement to pension credit or pension-age housing benefit from before 15 May 2019), so as to apply where the housing benefit (HB) has been terminated due to the claimant being subject to the managed migration to universal credit process, by allowing the HB to be reclaimed in certain circumstances. According to the Explanatory Note, the Order 'allows that saving, which would otherwise cease when a migration notice is issued, to be reinstated when universal credit ends. It also allows the saving to continue where the couple are issued with a migration notice but do not make a claim for universal credit or make a claim but are not entitled.'

Court cases

Simkova v Secretary of State for Work and Pensions [2024] EWCA Civ 419 (26 April 2024): child element of universal credit – not a 'family benefit' for main European co-ordination rules

In this decision, the Court of Appeal unanimously held that the child element was not a 'family benefit' for the purpose of the main European co-ordination rules in EC Regulation 883/04. In so holding, the court in effect upheld the previous decision in this case by the *Upper Tribunal in SSWP v MS [2023] UKUT 44 (Bulletin 293, p13)*.

The claimant was a Slovakian national living and working in the UK. Her son lived in Slovakia. She was refused the child element of universal credit (UC) for him (as she did not satisfy the 'main responsibility' test in the domestic UC rules). She argued that the child element was severable from UC (ie, could be treated separately), so as to be regarded in itself as a 'family benefit' and therefore be payable by virtue of the co-ordination rules in EC Regulation 883/04. She also argued that, if unable to accept that, the court should make a reference to the Court of Justice of the European Union (CJEU).

The court rejected that argument. The child element was not severable from UC and was not to be treated as a 'family benefit' for the co-ordination rule. Giving the lead judgment, Lord Justice Green's starting premise was that '...properly construed by reference to its purpose and context Regulation 883/2004 does not incorporate a test of severance' (paragraph 37).

After reviewing the relevant caselaw, the judge concluded: '... I do not detect in the jurisprudence of the CJEU either the existence of a principle of severance, or even its earliest germs. To the contrary, the caselaw is consistent with the proper inferences to be drawn from the structure and policy of Regulation 883/2004 which is that the Regulation does not undermine the essential freedom of member states to shape their own social security systems and that generalised, composite, benefits schemes are outside the scope of the regulation. In my judgment the position is sufficiently clear for there to be no need for a reference to be made to the CJEU under Article 158 of the Withdrawal Agreement' (paragraph 52).

Upper tribunal decisions

Housing benefit (HB)

DG v Bromley LBC [2024] UKUT 49 (AAC) (22 May 2024) (appeal number UA-2021-00047-HB): overpayment recovery – failure to disclose and official error – substantive cause of the overpayment

The claimant (a housing association tenant) became entitled to HB in December 2014. His mother was his appointee. In January 2015 he was detained under the Mental Health Act and admitted to hospital. His detention in hospital continued through 2015 and 2016, although he intended to return to his rented property. Although his mother visited the council in June 2016 and told them orally that her son was in

hospital, she did not say that he had been absent since January 2015. The council did not learn of the length of the absence until May 2018, when a social worker informed it that the claimant was not resident at the property. The council decided that an overpayment had occurred and (allowing on the facts for temporary absence of 52 weeks) that a recoverable overpayment had been made between June 2016 and May 2018. That decision was upheld by the First-tier Tribunal, which also found that the housing association had been unaware of the claimant's absence from the property and that the overpayment was recoverable solely from him, as he had caused it by failing to disclose the length of his stay in hospital.

Judge West refused the claimant's further appeal, holding that the tribunal had not made a material error of law. The claimant argued that the overpayment was not recoverable, as it had been caused by official error and the claimant, (through his representative) could not have been expected to have realised that there was an overpayment. The official error was alleged to be that the council failed to respond properly to the visit of the claimant's mother in June 2016, in particular by not pointing out to her that disclosure of a change of circumstances needed to be made in writing and, more generally, by failing to ask relevant questions about her son's stay in hospital. The tribunal was then alleged to have erred by failing to consider the substantive cause of the overpayment, and failing to consider or make findings about whether there had been an official error.

Judge West dismissed those arguments, holding that the substantial, common sense cause of the overpayment (as per the test set out in *R (Sier) v Cambridge City Council Housing Benefit Review Board* [2001] EWCA Civ 1523) was his failure to disclose the extent of his stay in hospital. The main relevant rule was at regulation 100 of the Housing Benefit Regulations, which provides that any overpayment of HB is recoverable, except those caused by an official error which the claimant had not caused or contributed to, and where the claimant could not reasonably have been expected to have realised there was an overpayment.

Regarding the duty to disclose, the claimant had failed to comply with the duty under regulation 88 of the regulations to notify a relevant change of circumstance in writing. The claimant's argument that the council had erroneously failed to advise of that need, so making the official error that had occurred in *West Somerset District Council v JMA (HB)* [2010] UKUT 190 (AAC), was rejected: it was accepted in this case that in fact the claimant had been clearly advised of that need when

he was awarded HB. The judge did accept, however, that the council had nevertheless made an error. That was in June 2016, when it failed to ask the 'obvious question' arising from the mother's partial disclosure, namely how long the claimant had been in hospital (paragraph 56). But, per the reasoning in *MB v Christchurch BC (HB)* [2014] UKUT 201 (AAC), the claimant still needed to show that he did not cause or materially contribute to that error – which in the present case he had. Regarding the cause of the overpayment, held the judge, 'if a claimant (or a person acting on his behalf) has failed to disclose a material fact, the reality is that he has materially contributed to the mistake, act or omission on the part of the council' (paragraph 70). Putting it slightly differently (with the focus more on the substantial cause of the overpayment), the judge also said: '... a claimant who has got benefit by not disclosing a relevant fact (as required by regulation 101(2)(b) as to the duration of his hospitalisation) is not able to turn the case into one of overpayment caused by official error by saying that, if only officialdom had been more vigilant, the problem would have been spotted' (paragraph 71).

Comment: this decision, which applies existing authority, is a further illustration of the harsh environment for claimants where the rules do not provide an overall test of reasonableness regarding the duty to disclose. As the judge also said: 'I am bound to say, however, that the situation in which the appellant therefore finds himself is a very unfortunate and a very unhappy one, through no fault of his own. I am, nevertheless, satisfied that his lack of mental capacity is not a relevant factor for the purposes of the housing benefit legislation, although it may well be a relevant factor in the council's consideration of what it should do in the light of this decision.'

Tribunals (Scotland)

***CD v Social Security Scotland* [2024] UT12 (appeal number UTS/AS/23/0031) (5 March 2024): funeral support payment – late claim – application of social security principles in Social Security (Scotland) Act 2018**

The claimant was refused a funeral support payment (the replacement in Scotland for funeral grants from the social fund in the UK) because her claim was made too late. Her partner had died on 3 May 2020 – ie, during the Covid-19 pandemic. On 29 May, she contacted the DWP to make a claim and received a text message saying that it might take longer than usual to process it. But the

DWP did not, as it was supposed to, refer the claim to Social Security Scotland (SSS). The funeral took place on 2 June 2020. Eventually the claimant contacted the DWP to enquire what was happening, at which point the Department apologised for its erroneous handling of the claim and (eventually) told the claimant she had to claim from SSS. That claim was made on 22 November 2022 and was refused by SSS because it was made more than six months after the funeral date. That decision was upheld by the First-tier Tribunal for Scotland.

In the Upper Tribunal for Scotland, Lady Poole allowed the claimant's further appeal and substituted a decision that the claimant was entitled to a funeral support payment. The basic rule was that an application for a funeral support payment had to be made within six months of the day the funeral took place. But one of the limited exceptions to that was provided for by section 52B of the Social Security (Scotland) Act 2018 ('the Act'). That was one of a number of specific provisions introduced during the Covid pandemic, and provided that an application may be treated as made on time if '...the reason for its not being made sooner is related to coronavirus'. Lady Poole held that on the facts and construing the reference in section 52B of the Act to the lateness being 'related to coronavirus', the claim to SSS should have been treated as made on time. The First-tier Tribunal had erred in law in not holding that.

In construing section 52B, Lady Poole considered that the impaired ability of the DWP during the pandemic to pass the application to SSS meant that the reason the eventual claim was made outside the basic time limit was indeed 'related to coronavirus'. In so holding, Lady Poole referred to the social security principles in section 1(a)–(h) of the Act. At section 2 of the Act, it is provided that 'a court or tribunal...may take the Scottish social security principles into account'. The use of the word 'may' (rather than 'must'), and the reference to 'taking into account' the principles (rather than using them to override rules) meant that arguments made for the claimant that the basic time limit for claiming should be disapplied or ignored, with the principles used as a checklist to be used by tribunals, had to be rejected. However, in the present case, the possible operation of the exception to the time limit in coronavirus cases, as set out in section 52B, was disputed and so required to be interpreted

Lady Poole held that 'the social security principles help point towards the approach which is to be preferred', and 'if there is a construction and application of section 52B that gives effect to the policy and intention underlying principles (b) (social security is a

human right), (c) (the delivery of social security is a public service) and (e) (that the Scottish social security system is to contribute to reducing poverty in Scotland), it is to be preferred over one which does not' (paragraph 22). Accordingly, the DWP service failures and consequent lateness of the application could be said to 'relate to' coronavirus.

Comment: this decision provides helpful authority that the principles in section 1 of the Act can, in a relevant case, be used by courts and tribunals as an aid to interpreting and applying (albeit not simply ignoring) provisions regarding Scottish devolved benefits. Whether that should be done, and what the result is, will depend on the facts of the case.

Other decisions in brief

London Borough of Waltham Forest v CA [2024] UKUT 39 (AAC) (17 January 2024)

(appeal number UA-2021-000675-HB):

housing benefit (HB) – overpayment recovery – tribunals – claimant overpaid HB due to starting work and not telling the local authority until almost three months later – as the claimant's earnings had changed a number of times during the overpayment period, the First-tier Tribunal was required to make clear findings of fact in respect of each of those changes of circumstances, to enable it to determine whether the overpayments caused by the claimant first finding work and then receiving increases in income were the results of official error (*AG v Calderdale Council (HB)* [2016] UKUT 396 (AAC) cited and approved)

SSWP v PC (UC) (no neutral citation number at time of writing) (14 February 2024)

(appeal number UA-2022-000316-USTA):

right to reside – retained worker status – 'undue delay' between work ending and date of joint claim (with partner) for universal credit (UC) – claimant last worked on 21 July 2020 and the claim for UC was made on 24 October 2020 (ie, just over three months later) – 'undue delay' test regarding retained worker status and gaps between the end of work and contacting the job centre to register as a jobseeker, established in *SSWP v MK* [2013] UKUT 163 and subsequent decisions – on the facts, claimant took no steps prior to 24 October to notify the DWP, and there was no evidence of job search in that period – lack of DWP monitoring of that is irrelevant – in particular considering the three-month delay, there was 'undue delay' and claimant had therefore not retained worker status

Social Security Scotland v FK 2024UT23 (17 April 2024) (appeal number UTS/AS/23/1024):

adult disability payment – First-tier Tribunal

CPAG conference

CPAG Welfare Rights Conference 2024

Join us in London and Manchester this autumn for our annual Welfare Rights Conference – a must-attend event for advisers committed to learning about and discussing the latest developments in social security.

The same event will be held in two locations:

- **Friday 20 September 2024** – London (Leonardo Royal Hotel London City, EC3N 2BQ)
- **Thursday 10 October 2024** – Manchester (thestudio Manchester, M1 1FN)

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- **comprehensive materials** – take-home training materials and watch pre-recorded versions of the workshops at your convenience after the live events

Time	Session
9.15 – 10.00	Arrival and registration, tea and coffee
10.00 – 11.00	Host welcome and keynote
11.00 – 11.20	Refreshment break and viewing of exhibition stands
11.20 – 12.30	Morning workshop session
12.30 – 13.20	Lunch
13.20 – 14.30	Afternoon workshop session
14.30 – 14.50	Refreshment break and viewing of exhibition stands
14.50 – 16.00	Afternoon grand workshop with Judge Jacobs and closing remarks

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- **Tribunal Procedure Rules: an underused but useful toolbox?** (Martin Williams)
- **Continuing complexity for claimants with pre-settled status** (Rebecca Walker)
- **Same PIP, different day: personal independence payment in 2024** (Carri Swann)

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made an award of the daily living component based mainly on the effects of the claimant's hernia – hernias 'do not necessarily give rise to the type of substantial and sufficiently enduring type of limitation covered by the ADP [adult disability payment] regulations, particularly when potential treatments are taken into account', and so the 'required period condition' for ADP entitlement was a 'substantial question' in this particular case – the tribunal erred by not explaining why it considered the required period condition was satisfied – decision quashed and remitted to a fresh tribunal

ONLINE TRAINING

Our programme of online training courses has been designed to help advisers stay informed and up to date during the coronavirus pandemic. For full details, fees and booking information, see cpag.org.uk/training-and-events.

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10.00am – 11.15am *session 1* 11.15am – 11.45am *break* 11.45 am – 1.00pm *session 2*

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For full details of courses covering England and Wales, see cpag.org.uk/training-and-events, email training@cpag.org.uk or call 020 7837 7979. Face-to-face courses in London will take place at our office at 30 Micawber Street, London N1 7TB.

Date	Course	Level	Tutor	Location	Length of course
2 July	Limited capability for work in universal credit	Standard	Will Hadwen	Online	Half-day
3 & 4 July	Stick or twist? Jumping ship to universal credit	Experienced	Steve Johnson	Online	Two half-days
5 July	Universal credit and work	Standard	Barbara Alexander	Online	Half-day
8 & 9 July	Benefit essentials with Disability Rights UK and CPAG	Introductory	Steph Pike	Online	Two half-days
9 & 10 July	Dealing with debt	Introductory	Marina Gallagher	Online	Two half-days
9 & 10 July	Judicial review	Experienced	Jess Strode	Online	Two half-days
11 & 12 July	Universal credit – housing costs	Standard	Barbara Alexander	Online	Two half-days
11 & 12 July	Mental health and benefits	Standard	Jo Silcox	Online	Two half-days
15 & 16 July	Challenging WCA decisions	Standard	Steve Johnson	Online	Two half-days
17 & 18 July	WCA – exceptional opportunities	Experienced	Steve Johnson	Online	Two half-days
22 & 23 July	Universal credit migration – the end of the line	Experienced	Steve Johnson	Online	Two half-days
27, 28 & 29 August	Introduction to welfare benefits	Introductory	Steve Johnson	Online	Three half-days

Scotland courses

For full details of courses covering Scotland, see cpag.org.uk/Scotland/training or email pchalmers@cpagscotland.org.uk.

Date	Course	Level	Tutor	Location	Length of course
15 & 16 August	Appeals to the Upper Tribunal	Experienced	Jon Shaw	Online	Two half-days
19 August	Adult disability payment – an introduction	Introductory	Liam Casey	Online	Half-day
20 & 21 August	Universal credit update and tactics	Experienced	Henri Krishna	Online	Two half-days
22 August	Limited capability for work in universal credit	Standard	Will Hadwen	Online	Half-day
27 August	Benefits overview	Introductory	Ali Lord	Online	Half-day
28 & 29 August	QBC – making the most of your calculator	Standard	Barbara Donegan	Online	Two half-days

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