



Universal Credit – Managed Migration Update

Since publication of our Summer 2023 Bulletin, you may well have come across clients who have received a migration notice, informing them that their tax credit award will be ending and giving them a deadline date to claim Universal Credit.

Here is a reminder of the current migration schedule:

- those receiving tax credits but no other benefit will be subject to managed migration to Universal Credit during 2023/4
- those receiving a combination of tax credits plus a legacy benefit, and those getting Income Support, income-based Jobseeker's Allowance or Housing Benefit (without an award of income-related Employment and Support Allowance) are to be migrated during 2024/25
- those with an award of income-related Employment and Support Allowance either on its own or with Housing Benefit are not to be migrated until 2028/29.

In addition, on an ongoing basis and in selected regions, migration notices are being issued to households in receipt of a range of legacy benefits so some claimants may be migrated earlier than the given timeline.

For more information, visit www.gov.uk/government/publications/completing-the-move-to-universal-credit/completing-the-move-to-universal-credit--2

Closure of the tax credits system

In confirmation of the above schedule, HM Revenue and Customs' annual report and accounts 2022-2023 states that they are "on track to transfer all tax credit claimants to Universal Credit by 2025". This would mean no ongoing awards of Child Tax Credit or Working Tax Credit by April 2025.

Households receiving tax credits are getting a leaflet through the post in advance of their migration notice warning them of the upcoming changes. The leaflet gives details of what to do but, as we know, some claimants may panic or may not read or be able to read the leaflet and potentially make a Universal Credit claim without waiting for the migration notice.

This is a huge concern as transitional protection will only apply if a claim is made in response to a migration notice. If claimants move to Universal Credit before this, and without a full benefits check, they could be worse off.

Remember: if you have a claimant who would be better off receiving Universal Credit, they do not need to wait to be invited to claim via managed migration. Any claimant moving from legacy benefits to Universal Credit should get advice to ensure that claims are made in the right way to maximise income.

Experiences so far

An analysis by Child Poverty Action Group (CPAG) of migration notices issued to tax credit recipients between November 2022 and March 2023 shows that two-thirds made a successful claim for Universal Credit by their migration deadline, 5% claimed after their deadline and 28% made no claim to Universal Credit at all.

CPAG's Chief Executive, Alison Garnham said "something is really wrong when 28 per cent of people who have maintained a tax credit claim haven't got a Universal Credit claim off the ground. And with the managed migration to Universal Credit set to continue apace, it's desperately worrying that so many families are at risk of having their tax credits summarily stopped because they haven't got a Universal Credit award up and running."

Continued overleaf →

CPAG recommend a range of measures including the removal or amendment of the ID verification requirement, and improving communications, in particular those relating to the possible extension of deadlines and information for the self-employed.

Visit: cpag.org.uk/news-blogs/news-listings/worrying-proportion-tax-credit-claimants-not-moving-universal-credit-and

Maximising entitlement to legacy benefit and Universal Credit

Under managed migration, the migration notice must give at least three months for the Universal Credit claim to be made. It is important to claim by the relevant deadline in order to benefit from any available transitional protection. Claimants may be able to maximise entitlement by ensuring that they are receiving their full entitlement to legacy benefits before making the claim for Universal Credit. Where there are imminent changes, the timing of the claim within the deadline window may also have an impact on the amount of transitional protection. Clients should seek advice.

Tax credit overpayments and Universal Credit

Where there is an outstanding overpayment of tax credits at the date of migration to Universal Credit, the overpayment becomes an overpayment of Universal Credit and is recoverable from that benefit. It is important for claimants to try to resolve any challenges against an overpayment decision or dispute about its recovery prior to claiming Universal Credit if possible.

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Extension of Deadline for Making Voluntary National Insurance Contributions

The amount of the new State Pension you receive depends on how many years of National Insurance contributions you have made or been credited with. A full new State Pension requires 35 years of contributions of at least 52 times the lower earnings limit for the appropriate year. You need to have 10 years of contributions to get any new State Pension at all.

It is worth knowing, therefore, that it has been possible to plug gaps in your contribution record from 2006-2016 with retrospective payments, at least for those who can

afford to do so. This opportunity was introduced as part of the transitional arrangements when the new State Pension was introduced.

The deadline for making these retrospective payments was originally 5 April 2023 but it has been extended, first to 31 July 2023, and now, in order to meet the surge in demand, to 5 April 2025.

For further information, visit the Social Security (Contributions) (Amendment No. 4) Regulations 2023 (SI.No.751/2023), laid on 5 July 2023.

Increase in the Interest Charged on Support for Mortgage Interest (SMI) Loans

From 1 July 2023, the amount of interest charged on DWP SMI loans has increased to 3.28%, up from 3.03%. This is the amount of interest charged on loans from the DWP taken out by claimants to help them meet the cost of mortgage repayments.

The DWP has also confirmed that the interest rate used to calculate the amount of support paid to claimants under the scheme increased to 2.65% from May 2023.

Minister Mims Davies told the House of Commons:

'SMI is intended to provide reasonable support by making a contribution towards mortgage interest to protect claimants against the threat of repossession. The rate of SMI we pay is based on the Bank of England average and recently increased from 2.09 per cent to 2.65 per cent in May 2023. Any further changes will occur when the average differs by 0.5 percentage points or more.'

Ms Davies full statement can be found here: questions-statements.parliament.uk/written-questions/detail/2023-06-26/191193

For information about the scheme see: www.gov.uk/support-for-mortgage-interest

Disability Living Allowance for a Child who Moves to Scotland

As you may know, under devolved powers, the Scottish Government has introduced alternative disability benefits for adults and children who are resident in Scotland. For children, this is the Child Disability Payment.

Rules are now in place to deal with situations where a child with an award of Disability Living Allowance or where a claim has been made for a child and a decision is pending, and that child becomes resident in Scotland.

From 7 July 2023, the *Scotland Act 2016 (Social Security) (Disability Living Allowance) (Amendment) Regulations 2023 (SI.No.664/2023)*:

- ✓ alter the presence requirement for Disability Living Allowance so that the child must be present in England or Wales (rather than Great Britain)
- ✓ provide for continued entitlement to Disability Living Allowance for a run-on period of up to 13 weeks from the date the child becomes resident in Scotland
- ✓ require a decision to be made on a claim for Disability Living Allowance made before the child became permanently resident in Scotland and for any resulting entitlement to continue for up to the end of the 13-week run-on period.

The DWP has now issued guidance in [DMG Memo 6/23](#)

The guidance confirms that where a Disability Living Allowance entitled person moves to Scotland they retain entitlement for approximately 13 weeks from the date of the move. If there is a fixed term award which is due to expire during the run-on period, the fixed term period is extended to expire at the end of the run-on period.

The guidance also points out that amendments to the presence test relate only to establish whether the claimant is currently present in England and Wales and do not alter the past presence test. The past presence test can be satisfied by presence in England and Wales or Scotland.

For more information, visit: assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1170070/dmg-06-23.pdf

Staggering Cost of Living Payments Across 13 Weeks

In this article we return again to the plight of those Universal Credit claimants who receive weekly, fortnightly or four-weekly pay.

Regular readers and advisers will know that, for working claimants, UC calculations only really make sense for those monthly paid. UC is calculated according to what is received in the monthly assessment period. In some calendar months those paid weekly, fortnightly or four-weekly will receive one extra wage payment and they may end up with a nil award for that month. [For readers new to this concept, you may find this webpage useful: www.gov.uk/government/publications/universal-credit-different-earning-patterns-and-your-payments/universal-credit-different-earning-patterns-and-your-payments-payment-cycles#if-youre-paid-every-4-weeks]

Back in November 2022 the Chair of the Work and Pensions Committee, Stephen Timms, brought to the attention of the Work and Pensions Secretary, Mel Stride, another problem for these claimants: missing out on the Cost of Living Payments. Mr Timms estimated up to 551,000 lost out due to having a nil award, some of whom will have been paid more than once in the qualifying assessment period. He asked the DWP to find a way to resolve this problem before the 2023/2024 payments are made.

Mr Stride responded that there were always going to be some people who would lose out and the system could not identify this cohort, but that the 2023/2024 Cost of Living Payments would be *'delivered in three payments over the financial year, to reduce the chance of someone missing out completely.'*

The DWP has now confirmed to the Work and Pensions Committee that it will stagger the Cost of Living payment qualifying periods to ensure people do not miss more than one payment due to the frequency of their earnings. Neil Couling, Universal Credit Senior Responsible Owner, gave this evidence to the Committee:

'... we staggered the qualifying periods for later payments, so they are not in a 13-week cycle. That means that if people who are paid either fortnightly or weekly miss one of the payments because their earnings have accrued in that month and they don't qualify for universal credit in that month, they qualify for the next two.'

Claimants who miss out because it is only in a later appeal that their entitlement is established should always contact the DWP if the lost Cost of Living Payment is not paid automatically.

Pension Credit Take-up Campaign – DWP Launches 'Invitation to Claim'

The DWP is to launch a take-up campaign, aimed at those who might be entitled to Pension Credit guarantee credit.

Letters and leaflets will be targeted at 2,000 households, across 10 local authority areas, who are already in receipt of Housing Benefit and who are likely to be entitled to Pension Credit. The 10 local authorities (selected to include urban, rural, regional and national areas) are: Eastbourne, Teignbridge, Pendle, Charnwood, Vale of White Horse, Redcar and Cleveland, Craven, Harrow, Powys and West Lothian.

Announcing the scheme, Pensions Minister Laura Trott said, *'We recognise the challenges some pensioners will be facing with the cost of living which is why we are easing those pressures with measures like Pension Credit, alongside driving down inflation.'*

Pension Credit take-up is at the highest level since 2010, and this trial will help us test even more ways to ensure pensioners are receiving all the support they can.'

For more information visit DWP press release at: www.gov.uk/government/news/trial-encourages-low-income-pensioners-to-apply-for-extra-financial-support

PIP “Light Touch” Reviews

When Personal Independence Payment was introduced in April 2013, the intention was that claimants with ongoing awards, or those who had reached State Pension age, would undergo a ‘light touch’ review after 10 years. As those cases are now coming up for review, the DWP have produced a simplified review form (AR2) which is being sent out to affected claimants.

Claimants who are likely to have been granted ongoing awards (rather than fixed term awards)

are those with stable needs which are unlikely to change, high level needs which will either remain the same or worsen, and those with a review date due on or after reaching State Pension age.

The purpose of the form is to check how claimants’ ability to complete everyday tasks and move around has changed. For those concerned about assessments, the DWP have stated in an email to stakeholders that: ‘in most cases we do not expect an assessment with a health professional will be required, unless there has been a

change of circumstances which affects those abilities.’

DWP have also confirmed that claimants who fail to return their form will not have their claim disallowed. Instead, the claimant will be invited to have an assessment with a health care provider.

The form is available at: assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1177935/ar2-award-review-how-your-disability-affects-you.pdf

Consultation on the Work Capability Assessment

The Government is seeking views on its plans to change some descriptors in the Work Capability Assessment (WCA). The reasoning given is that the workplace has changed since the last WCA review and there are now more opportunities for disabled people to move into work due to more widely available workplace adjustments and the post-covid rise in working from home.

It also cites rising levels of those placed into the LCWRA group. Group membership went from 21% of claimants on the WCA pathway in 2011 to 65% in 2022. The Government reports that being assessed ‘as having LCWRA should be for severe functional limitation, but its application has gone beyond this’.

It adds that ‘too many disabled people and people with health conditions are stuck on incapacity benefits, without the support they need to access work. One in five people who are not expected to engage in work preparation would like to work at some point in the future if the right job and support were available.’

There are four descriptors up for review. These are the mobilising, continence, social engagement and getting about functional activities and descriptors. The Government is also considering removing or changing the substantial risk for limited capability for work-related activity.

Mobilising

For this activity there are three options for change:

- ✎ Remove the mobilising activity entirely (both LCW and LCWRA).
- ✎ Amend the LCWRA mobilising descriptor to bring it in line with the equivalent descriptor in Personal Independence Payment – replacing 50 metres with 20 metres for both descriptors within the LCWRA activity.
- ✎ Reduce the points awarded for the LCW mobilising descriptors.

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Continence

There are three options for change for this activity:

- ✘ Remove the absence or loss of bowel/bladder control (continence) activity entirely (both LCW and LCWRA).
- ✘ Amend the LCWRA absence or loss of bowel/bladder control (continence) descriptor so that claimants are required to experience symptoms 'daily' rather than 'weekly'.
- ✘ Reduce the points awarded for the LCW absence or loss of bowel/bladder control (continence) descriptors.

Coping with social engagement

There are two options for change here:

- ✘ Remove the coping with social engagement activity entirely (both LCW and LCWRA).
- ✘ Reduce the points awarded for LCW descriptors for coping with social engagement.

Getting about (LCW only)

There are two options for change for this activity:

- ✘ Remove the getting about activity entirely.
- ✘ Reduce the points awarded for LCW descriptors for getting about.

Substantial Risk Review

The Government is considering whether to:

- ✘ Amend the LCWRA substantial risk definition to reflect that this would not apply where a person could take part in tailored or a minimal level of work preparation activity and/or where reasonable adjustments could be put in place to enable that person to engage with work preparation.



- ✘ Remove the LCWRA substantial risk criteria entirely so that anyone who met this threshold would be placed into LCW.

Full details of the specific questions asked, along with details of the ways to respond can be found at www.gov.uk/government/consultations/work-capability-assessment-activities-and-descriptors

The deadline for responses is 11.59pm on 30th October 2023.

As you may know, in the longer term the government plans to remove the Work Capability Assessment altogether. For more information, visit: www.gov.uk/government/publications/transforming-support-the-health-and-disability-white-paper

This more major change depends on the introduction of primary legislation and is not expected for several years. The Government has confirmed that the abolition of the Work Capability Assessment remains its intention, but that:

“We cannot wait until these reforms roll out. We are consulting on making changes ahead of the White Paper reforms. Given the Personal Independence Payment assessment will be the only assessment used, we are also considering where the WCA can be changed to mirror the PIP assessment criteria.”

These interim reforms are still not expected to be implemented before 2025.

Work and Pensions Committee Inquiry into Vulnerable Claimants

The issue of vulnerable claimants and their treatment by the DWP and its agents has gained more public attention recently.

This is because in the three years before 2022 the DWP held 140 internal investigations into deaths – more than double the equivalent figure in 2016-2019.

In February 2021, the assistant coroner at the inquest into the death in 2019 of Phillippa Day, decided that the main factor in her decision to take her own life was a failure in the administration of her welfare benefits by Capita. In a report to the DWP and Capita the assistant coroner stated: *‘in my opinion action should be taken to prevent future deaths and I believe your organisations have the power to take such action.’*



In July 2021, five bereaved parents wrote an open letter to the then Secretary of State for Work and Pensions arguing that the system which is meant to be a ‘safety net and lifeline’ was instead ‘harming some most in need of its support’. They pointed to the high numbers of DWP internal investigations into deaths and serious harm. They asked for a public inquiry and an independent system of investigation.

Two years later, on 23 July 2023, the Work and Pensions Committee of the House of Commons announced that it will carry out an inquiry into how the DWP supports vulnerable benefit claimants and whether its approach to safeguarding needs to change.

The committee will be looking at a series of questions including: whether the DWP should have a statutory duty in relation to vulnerable claimants; whether its guidance about vulnerable claimants is adequate; whether there is enough support for vulnerable claimants in the claiming process; and whether there is a sufficient process for learning from the internal reviews.

This is not the public inquiry sought by the bereaved families and the select committee has no power to change the law or processes but its outcome will be public and will require a response from government.

Welfare Writes...

An e-mail to DWP stakeholders

On 28th September 2023, a DWP e-mail was sent to stakeholders. It confirmed that the Department is to embark upon small-scale testing of a new approach to Personal Independence Payment assessments. The new approach involves the use of health care professionals who have specialist knowledge of the health condition of the person sitting in front of them, or on the other end of the telephone. At the back of the testing lies the Health and Disability White Paper, published in March 2023.

Here’s an extract from the e-mail:

“This small-scale test will run until January 2024, with a maximum of 250 claimants having their assessments conducted by a specific HCP with experience in their condition. We will compare the experiences of these claimants, with a maximum 250 other claimants who will not be assessed by a specific HCP. We will then compare between the two groups. Testing this way will allow us to control external factors as much as possible, increasing the accuracy of the testing. We want to understand whether claimants view this different approach positively and if it improves their trust in the assessment process. The evaluation will help inform our approach to the consideration of specialist assessors in the future.”

Testing will take place on sites in London and Birmingham.

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A letter to several hundred thousand members of the older generation

This letter, from His Majesty's Revenue and Customs, is to be sent to older people who may have errors in their National Insurance records. The errors arose due to a failure to record Home Responsibilities Protection which then led to underpayments of State Pension when the claimant reached State Pension age. The total amount of underpaid State Pension may be as much as £1.3 billion. Affected claimants will include those who claimed Child Benefit before May 2000.

The letter was discussed at a meeting of the Public Accounts Committee in September 2023. Meg Hillier, the Committee Chair, said that the first problem will be identifying who will be the recipients of the letter. Records for those who claimed Child Benefit before 2000 have been destroyed.

The HMRC Operational Excellence Director Richard Hawthorne agreed with Meg.

“It is a big problem”, he said, “and quite a challenging one because of the records that we do not have any longer. We are doing various scans on our IT systems to identify the very likely cohort of parents who could have been eligible for HRP. We think, on the basis of early scans, that that could be several hundred thousand people, although, as the DWP accounts have said, we think the actual number of people affected will be smaller.”

The problem appears to be so big that the DWP have set a four-year target for solving it.

A research report from the DWP

A qualitative research report has been published by the DWP which looks at the pros and cons of telephone claims compared with online claim management. It's to back up the “move to Universal Credit” programme.

Interviews were carried out with thirty UC claimants who either claimed by phone or managed their claim online. Many of the claimants found that claiming online was an uphill struggle, or, as the report

politely puts it, they found it “prohibitively difficult”, to the point where the only option was a telephone claim.

A number of specific difficulties to claiming online were identified. Accessing the internet was a problem, either because the internet had gone down in the claimant's accommodation, or because the claimant had no accommodation. Then there were low levels of confidence in using the internet, and anxiety about writing the wrong thing or ticking the wrong box on the form. And barriers relating to language and disability. And wouldn't it be nice to speak to a real adviser, who could answer complex questions?

The report can be found at assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1184928/qualitative-research-uc-telephone-claimants.pdf

Let's hope the DWP, who produced the report, are not the last to read it.



[2023] UKUT 193 (AAC) – 7 August 2023 – UA-2019-001395- HB – Students and reasonable steps to acquire a student loan

As we know, the majority of students are not able to claim income-related benefits while studying, though there are some exceptions. In addition, a student loan will be taken into account as income where a claimant receives a student loan or could receive a loan if they took “reasonable steps to do so”.



This case looks at one example of the steps that a claimant could undertake to receive a loan and whether those steps would be reasonable or not.

The claimant, a student who is a devout Muslim, made a claim for Housing Benefit. He was entitled to do so as a student with parental responsibility for his younger siblings. The claimant did not take out any maintenance loan on the grounds of his faith as he believes that charging and paying interest are forbidden by that faith. Gravesham Borough Council nevertheless treated the claimant as receiving a student loan and this income meant that the claimant’s assessed income was too high to qualify for any Housing Benefit.

The issue of reasonable steps had been dealt with before in CH/4429/2006 and was binding on the First-tier Tribunal. In that case the Commissioner – Commissioner Powell – decided that the word

“reasonable” in the phrase “reasonable steps” qualified the mechanical steps that had to be taken to acquire the loan; it was not concerned with other matters, such as the motives and religious beliefs of the claimant.

However, Judge Poynter noted that Powell’s case was not binding on the Upper Tribunal. He therefore “declined to follow it and ... decided instead that a judgment as to what is reasonable falls to be made having regard to all the personal circumstances of a claimant and, of course, all the other relevant circumstances.”

Judge Poynter went on to consider the facts of this particular case and decided that “even though he undoubtedly had capacity to take the steps to acquire the loan—it would not have been reasonable for him to have violated his strongly-held and conscientious religious beliefs by doing so.”

To allay fears that this decision could give free reign to students up and down the country to decide not to take a repayable student loan in favour of a claim for means-tested benefits because of a passionately held belief, Judge Poynter made it clear that the judgement does not extend to all students, or even all Muslim students. It merely makes clear that where a claimant chooses not to take up a student loan that is otherwise available to them, consideration must be made as to whether this is reasonable in their specific, personal circumstances.

For the decision in full, visit: www.gov.uk/administrative-appeals-tribunal-decisions/ib-v-gravesham-borough-council-and-secretary-of-state-for-work-and-pensions-2023-ukut-193-aac

SM v SSWP (UHC) [2023] UKUT 176 (AAC) – the meaning of “care” for the purposes of overnight care and an additional bedroom

Judge Markus, KC, dismissed this case, in the Upper Tribunal, on 18th July 2023.

The case concerns the rules relating to non-resident carers. A claimant, for Universal Credit housing costs purposes, is allowed an extra bedroom where they or any person in their extended benefit unit require someone to stay overnight to provide care on a regular basis. The person receiving the care must also be in receipt of a specified disability benefit.

Given that Judge Markus examines the legislation in some detail, we'll set out the regulation word for word, as it appears in the Upper Tribunal's decision.

The rule is contained in paragraph 12(A1) of Schedule 4 to the Universal Credit Regulations 2013...and here it is, like I promised, word for glorious word:

“12.— (A1) A renter is entitled to an additional bedroom if one or more of the following persons satisfies the overnight care condition (see sub-paragraph (3)) —

...(b) a person in the renter's extended benefit unit;...

(3) A person satisfies the overnight care condition if—

(a) they are in receipt of—

... (iii) the daily living component of personal independence payment

(b) one or more persons who do not live in the renter's accommodation are engaged to provide overnight care for the person and to stay overnight in the accommodation on a regular basis; and

... overnight care is provided under arrangements entered into for that purpose”

Hold the regulation in your head for as long as you can, and while you're doing that, we'll go to the facts of the case.

A couple lived in a three-bedroom house with their adult daughter. The couple occupied one bedroom, the daughter occupied another, and the third bedroom, for the most part, remained unoccupied.

The couple's daughter suffered from heart problems. More specifically, she had been diagnosed with Tetralogy of Fallot. In addition to shortness of breath, dizziness and tiredness, she would have an overnight episode of arrhythmia between two and ten times a month. And the episodes were unpredictable. When they occurred, mum would wake up in the night and tend to her daughter. And when she needed a break, the mum's sister took over. The daughter also received the daily living and mobility components of PIP.

The trouble started when the couple claimed Universal Credit. And I bet you know where this is going. The decision on their claim for the housing costs element allowed two bedrooms, not three. The parents went on to argue that their daughter satisfied the overnight care condition because her mum sometimes required a break from caring. The care was then provided by mum's sister, and other friends and family members, who stayed in the third bedroom as and when required.

Those were the facts of the case. What did the First-tier Tribunal, which the parents appealed to, make of them?

I might as well get straight to the point on this one. The First-tier Tribunal dismissed the appeal, just as Judge Markus was to dismiss it several months later.

The judge for the appeal concluded that the attention that the daughter received during the night was not specialised enough to count as care. Nor was the overnight care provided on a regular basis. In the words of the judge: *“There was no pattern of care and it was infrequent. This does not amount to regular”.*

By the time the case reached the Upper Tribunal, the appellant's arguments had been sharpened and reduced to two by a representative from Harrow Law Centre.

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The first ground amounted to this: the regulations (quoted above) give no definition of care; therefore, there should be no assessment of the nature of the care provided. Furthermore, regulation 12(A1) requires receipt of a specified disability benefit – this, by itself, means that the care is needed and dispenses with the need for a definition within the regulations.

The appellant's second ground took on the meaning of "on a regular basis". Their representative, using the *SD v Eastleigh Borough Council* case, argued that the meaning of regularly can cover provision of care "that is erratic, that the assessment of regularly must be made over a fairly long period, and that there is no requirement that it is provided on a majority of nights".

Judge Markus, in coming to a decision, gave a brief legislative history of the additional bedroom provision, before going on to deal with the appellants two grounds of appeal.

The history begins with the *Burnip* case. In this case the Court of Appeal decided that the existing Housing

Benefit provisions discriminated against those claimants who required an overnight carer. Judge Markus directed attention to comments made by Henderson J. The exception sought in the *Burnip* case was appropriate "for only a very limited category of claimants, namely those whose disability is so severe that an extra bedroom is needed for the carer to sleep in". As a result of the case, from 1st April 2011, a set of regulations provided for the additional bedroom where the claimant or their partner requires overnight care.

Judge Markus, rather ominously for the appellants in his case, went on to quote from the Explanatory Memo to the regulations. The Memo explains that the intention was that an additional bedroom should be available for those with a proven need for overnight care...provided by a non-resident carer and where there is an established need for such care.

With Markus' thoughts heading in the above directions, all that remained was for the Judge to dismiss the appellants two grounds.

He rejected the ground 1 arguments, saying that "receipt of a relevant benefit [the relevant disability benefit, that is] will not necessarily reflect a need for overnight care". He went on to reject the submission that "because there is no definition of "care" in the regulations, there should be no consideration of the nature of what is provided". Regulation 12 requires a decision to be made as to whether overnight care is provided, and the decision-maker therefore has to give meaning to the word "care".

The rejection of ground 1 was sufficient to end the claimant's appeal in the Upper Tribunal, without Judge Markus having to expatiate, at some length, upon the ground 2 arguments, despite the Judge going on to do just this. It's also sufficient, before it, too, goes on at too great a length, to end this article.

The full judgement is available here: www.gov.uk/administrative-appeals-tribunal-decisions/sm-v-secretary-of-state-for-work-and-pensions-uhc-2023-ukut-176-aac

Timson R v SSWP [2023] EWCA Civ 656, 9 June 2023 – third party deductions for utility debts – DWP guidance unlawful

Following this Court of Appeal decision, claimants should be given opportunity to make arguments and provide information before a decision is made to take deductions from a legacy benefit for fuel or water debt.

The case involved a claimant who had deductions from her income-related Employment and Support Allowance for fuel and water debts.

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They successfully appealed to the High Court, who, in [2022] EWHC2392 (Admin) 23 September 2022, decided that the official guidance regarding third-party deductions was unlawful.

Rejecting the Secretary of State's further appeal, the Court of Appeal upheld the High Court decision. The DWP guidance in chapter 46 of the Decision maker's guide relating to fuel and water debts was unlawful in failing to make it clear that a claimant should be given opportunity to make representations and provide information to the decision maker, before the decision to take deductions is taken.

The power to make deductions from Income Support, income-based Jobseeker's Allowance, income-related Employment and Support Allowance and Pension Credit for

payment to third parties is contained in regulation 35 and Schedule 9 of the Social Security (Claims and Payments) Regulations 1987 No.1968. The Schedule sets out the conditions for making deductions, including that the Secretary of State is satisfied that it would be in the interests of the family.

Judge Edis states *"in my judgement, the Regulations, by framing the decision making as they do, require a consideration of the interests of the individual claimant and their family. Under the guidance, however, the decision-maker has the option of contacting them, or of investigating benefit records, but the guidance allows a decision to be made where the claimant or their family has been given no opportunity to supply information beyond what the utility company puts in the spreadsheet. This appears to me to be obviously unfair"*.

Note that this decision relates to deductions from legacy benefits and not under Universal Credit, where the regulations are worded differently. Arguably, however, the same principles could apply to deductions from Universal Credit.

Note also that, since 1 April 2023, a claimant's consent is required before an energy company may take new or increased rates of deductions from legacy benefits or Universal Credit for ongoing usage of fuel – see: [SI.No.428/2022](#). This followed a temporary pause on all new and increased deductions for ongoing usage between April 2022 and April 2023.

The full judgement is available here: www.bailii.org/ew/cases/EWCA/Civ/2023/656.html

[2023] UKUT 186 (AAC) UA-2022-001498-PIP Personal Independence Payment – past presence test – inability to travel

To be entitled to Personal Independence Payment the claimant must satisfy the past-presence test or fall within one of the specified exceptions. In this decision, the Upper Tribunal found that the exceptions do not include a situation where the claimant is 'unavoidably detained overseas through no fault of their own' and consequently the claimant was not entitled to Personal Independence Payment.

The claimant in the case, a British national, had been living in South Africa since 2001 and planned to return to the UK in 2019. She was prevented from doing so due to a serious brain injury making her medically unfit to travel. As confirmed by one of her doctors, this resulted in her being detained in South Africa against her will.

Continued overleaf →

A subsequent violent attack resulted in deterioration in the claimant's mental health, leading the doctors to approve her return to the UK.

The claimant returned to the UK on 25 August 2021 and made their claim for Personal Independence Payment on 9 September that year. Her claim was refused on grounds that she did not satisfy the requirement, under regulation 16 (b) of the Personal Independence Payment Regulations 2013, to have been present in Great Britain for at least 104 out of the past 156 weeks.

A First-tier Tribunal dismissed the appeal, finding no legal basis for entitlement and identifying no human rights arguments. A further appeal was made to the Upper Tribunal.

At Upper Tribunal the claimant's arguments included that she should be entitled to Personal Independence Payment as a returning British national and because of the tragic and exceptional circumstances which made her unable to return to the UK as intended in 2019.

The Upper Tribunal dismissed the appeal, noting the limited range of exceptions under regulations 17 to 23A of the Personal Independence Payment Regulations 2013, none of which applied to the claimant's situation.

Upper Tribunal Judge Wikeley found that the First-tier Tribunal had applied the law correctly and concludes, "the appellant's challenge is in effect to the law itself, rather than the First-tier Tribunal's application of the law. Accordingly, I dismiss the appellant's appeal."

You can find the judgement in full here: www.gov.uk/administrative-appeals-tribunal-decisions/at-v-secretary-of-state-for-work-and-pensions-pip-2023-ukut-186-aac

Jwanczuk v Secretary of State for Work and Pensions [2023] EWCA Civ 1156 – The national insurance requirement and Bereavement Support Payments

In this case, the Secretary of State for Work and Pensions appealed to the Court of Appeal after a busy time in the lower courts.

At the outset, when a claim for Bereavement Support Payment was refused by the Department, the claimant requested a mandatory reconsideration but the claim was again refused and this was followed by a judicial review.

The appeal to a first-tier tribunal from the MR was stayed pending the outcome of the judicial review.

Next, the High Court dealt with the judicial review and found in favour of the claimant.

The Secretary of State for Work and Pensions then appealed to the Court of Appeal, after, like I said at the start, a busy time in the lower courts.

That's the process, but what about the substance of the appeal?

The substance is the national insurance requirement for a Bereavement Support Payment. The requirement is that the late spouse, civil partner or cohabiting partner satisfied the national insurance contribution condition.

In the words of "Welfare Benefits and Tax Credits Handbook", 25th edition, published by CPAG: "To satisfy the contribution condition for bereavement support payment, your late spouse, civil partner, or cohabiting partner must have paid NI contributions on earnings of at least 25 times that year's

lower earnings limit – eg £3,075 in 2023/24: 25 x £123". This condition must be met in any one tax year in your late spouse's, civil partner's or cohabiting partner's working life, but only class 1 or 2 NI contributions count.

The requirement puts severely disabled people at a disadvantage. The *Jwanczuk* case illustrates this. The claimant's late wife was unable to work due to severe and lifelong disabilities. Human Rights Act arguments formed the basis of the case. At the High Court, Judge Kerr followed the Northern Ireland Court of Appeal case of *O'Donnell* and decided that the Human Rights Act 1998 allowed him to infer that there should be an exception based on severe disability to the NI contribution requirement. So this is what he did. And a further obligation compelled him: he had to make the NI requirement compatible with the European Convention of Human Rights.

The Department for Work and Pensions came up with four arguments at the Court of Appeal, including an argument against what Judge Kerr had done, and the Court of Appeal rejected all four of them.

The outcome of the decision will require adjustments to primary legislation, and amendments to page 516 of the current edition of CPAG's "Welfare Benefits and Tax Credits Handbook" as well as to page 92 of the current edition of our own "Advisers Guide Benefits".

Looking Forward To... Receiving the Next Cost of Living Payment

Further to our article on “Staggering Cost of Living Payments” in this Bulletin (see page 4) we can now reveal, if you haven’t already noted them, the key dates for the Autumn Cost of Living Payments.

The dates relate to eligibility and payment arrangements.

To be eligible for the second Cost of Living Payment, a claimant must have been entitled to a payment of Universal Credit for an assessment period that ended in the period between 18th August 2023 and 17th September 2023.

For the other means tested benefits – income-based Jobseeker’s Allowance, income-related Employment and Support Allowance, Income Support and Pension Credit – there must have been entitlement for any day in the same period as for Universal Credit. This entitlement can include claimants who were entitled to less than 10 pence and who met all other qualifying criteria but who did not receive a benefit payment.



For both the above groups of claimants, a Cost of Living Payment can be made where they are later found to be entitled to a payment.

Tax credit claimants are entitled to a Cost of Living Payment where they received a payment of tax credits on any day in the period above – that is, between 18th August and 17th September 2023, or where it is found at a later date that they should have received a payment during that period.

Where there is entitlement to the Cost of Living Payment, it will be paid automatically to claimants between 31st October and 19th November 2023.

Where there is receipt of tax credits only, the payment will be paid automatically between 10th and 19th November 2023.

For all the exquisite details, please visit the statutory instrument and its explanatory memo, at www.legislation.gov.uk/ukxi/2023/1017/made, the press release at www.gov.uk/government/news/second-2023-to-2024-cost-of-living-payment-dates-announced and updated guidance at www.gov.uk/guidance/cost-of-living-payment

Welcome!

The WBU are pleased to welcome Alison Hodgson and Tom Meares to the team. Alison is our new Welfare Rights Adviser and Tom our new Chief Executive.

Alison brings with her 20 years’ experience of providing advice and support at the Peasholme Charity.

Tom joins WBU from York Community Furniture Store where he has been running the IT reuse scheme and has most recently been the Interim Chief Executive.

We look forward to both Alison and Tom settling into the WBU family, please do say hello if they are answering your queries or you bump into them at a meeting!

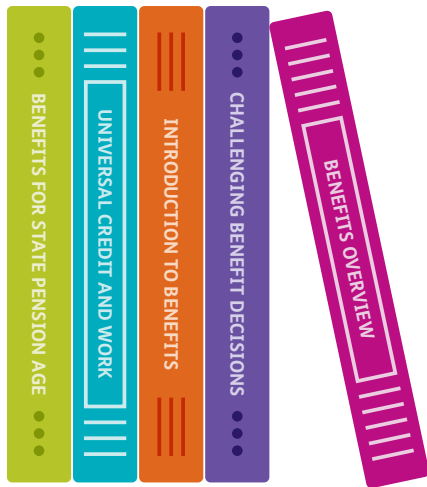


Training Programme November 2023 to March 2024

“Really great combination of delivered information and practice exercises made complex information easy to learn”

Are you new to welfare benefits, in need of a refresher, or looking to expand your knowledge? Whatever your level of experience or particular interest, take a look at our upcoming courses and come and join our “friendly supportive and extremely knowledgeable” tutors.

Book your course today at www.welfare-benefits-unit.org.uk/training



Upcoming Training

Benefits for State Pension Age

Thursday 9 November 2023
10am to 4pm

Challenging Benefit Decisions

Wednesday 22 November 2023
10am to 4pm

Introduction to Benefits

Thursday 18 and 25 January 2024 and 1 February 2024
10am to 4pm

fully booked

Universal Credit Housing Costs

Wednesday 7 February 2024
10am to 12:30pm

Universal Credit and Work

Thursday 8 February 2024
10am to 12:30pm

Benefits Overview – Working Age

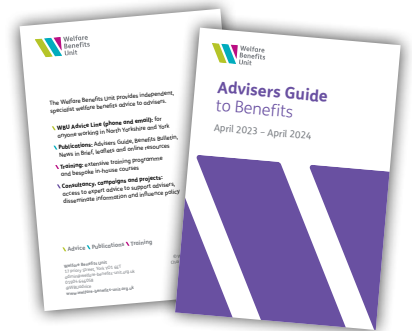
Wednesday 21 February 2024
10am to 4pm

Advisers Guide to Benefits 2023/24

“Up-to-date information written in a clear and understandable way”

Our Advisers Guide to Benefits is written for people who give information and advice as part of their work. This concise annual guide provides an overview of benefit criteria including Universal Credit, disability benefits and additional help available. Its clear format makes it ideal for quick reference, and the compact style is handy to use, whether in the office, out and about, or for home working.

The 2023/24 Guides are available to buy now. Order your copy today online at www.welfare-benefits-unit.org.uk/publications/advisers-guide



Welfare Benefits Unit Advice Line 01904 642512
advice@welfare-benefits-unit.org.uk

Monday – Thursday, 9am – 5pm | Friday, 9am – 4.30pm
Available to advisers in North Yorkshire and York

Please do not give our contact details to members of the public

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