



Welfare Rights Conference 2024

Can't Pay, Won't Pay – rent, liability and universal credit

Henri Krishna and Frances Ryan

Welfare Rights Advisers, CPAG in Scotland



Untidy tenancies

When calculating the housing costs element of universal credit (UC), the default share of the rent between two joint tenants is usually 50 per cent, though this can be apportioned differently by DWP if reasonable eg, if the bedroom sizes are different. But what happens if one of the tenants leaves?

A claimant (or their partner if they are joint claimants) is *treated as* liable to make payments if all of the following conditions are met:

1. the person who is liable for the payments is not making them; *and*
2. the claimant must make the payments themselves in order to continue to occupy the accommodation. They must have been living in that accommodation while the person who is liable was making the payments; *and*
3. it would be unreasonable to expect them to make other arrangements; and
4. it is reasonable in all the circumstances to treat them as liable.

[Universal Credit Regulations 2013, Schedule 2 para 2](#)

DWP calls the situation where a joint tenant has left the property and is no longer paying the rent eg, because they have been sent to prison or have been admitted to hospital or a care home, an 'untidy tenancy' or an 'absent joint tenant'. In these circumstances their share of the rent can be paid to the tenant who remains in the property under the above provision. DWP internal guidance ([Spotlight: June 2020](#)) confirms that the full rent should be paid to the remaining joint tenant

"If a joint tenant(s) moves out of the property but remains named on the tenancy agreement, the claimant can be treated as liable for the total rent. This can apply to both Social Rented Sector and Private Rented Sector cases."

Schedule 2 para 2 of The Universal Credit Regulations 2013 also allows for payment to someone else who remains in the property where a sole tenant has left the property and is no longer paying the rent, or they are no longer entitled to UC - eg, because they have become a student. There is less DWP guidance on this situation.

For an [existing claim](#), the remaining claimant should notify a change of circumstances via, for joint tenants, the 'Record a change in joint tenancy costs' (as per the Spotlight guidance) or for other claimants, the change of circumstances tab. This is a supersession under [regulation 23 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance \(Decisions and Appeals\) Regulations 2013 \(SI 2013/381\)](#) (the 'D&A Regs') to include their full housing costs (usually 100 per cent of the rent). Ideally, they should do this within a month of the change but it can be reported up to 13 months later under [reg 36](#) if reasonable. A refusal to extend the time can itself be revised. In either situation, the effective date of supersession (and the date arrears are paid from) is the assessment period in which the change occurred. If, on the other hand, the

change is reported after 13 months or the extension is refused, the change takes effect from the assessment period in which the change is notified meaning arrears are more limited.

For a new claim where the tenant has already moved out or is no longer entitled to UC, the claim form does not ask about an absent joint or sole tenant. This is confirmed in the Spotlight guidance:

“They must declare that it's a joint tenancy and confirm the number of joint tenants declared on the tenancy agreement. The claim must be verified as a joint tenancy even though there is an absent joint tenant. Case managers can decide that the claimant is wholly liable for the rent, or the percentage split of rent as split between the remaining joint tenants. Case managers must accept the claimant's declaration.”

It will then be up to the claimant to leave a note on their journal advising that the tenant has left, is no longer entitled to UC etc. If they don't do that, which is understandable given that the claim form does not ask about other tenants, the decision not to pay the correct HCE can be revised under D&A [reg 5](#) - this is a mandatory reconsideration so the usual time limit is one month. That can be extended if reasonable, under [reg 6](#) by up to 12 months. After 13 months it may be possible to revise the decision under [reg 9](#) due to 'official error'. Failure to ask relevant questions can constitute official error. The claimant can argue that the DWP has made an official error by failing to exercise the inquisitorial duty described by Baroness Hale in [Kerr \(AP\) v Department for Social Development \(Northern Ireland\) \[2004\] UKHL 23](#), failing to ask the right questions in the claim form under [MB v Christchurch BC \(HB\) \[2014\] UKUT 201 \(AAC\)](#), and failing to ask the right questions and acquaint himself with the right information under [Secretary of State for Education and Science v Tameside MBC \[1977\] AC 1014](#) when deciding the claimant's claim, and that this error caused the incorrect award to be made to the claimant. If the DWP refuses the request, they can appeal to the First-tier Tribunal. There may be a right of appeal against the refusal to consider a revision request for official error.¹

If there is no other recourse the client can request a judicial review (for which they will need legal advice), or at least threaten one. See our template JRs - [JR19 social tenancies](#) and [JR96 private tenancies](#) but bear in mind they need adapting for use in Scotland.

'Irregular' tenants

It is not a condition of entitlement to the housing costs element with UC that the claimant has a current tenancy agreement. As long as they are occupying the property as their home, they can get housing costs if they are legally liable for paying

¹ [PH and SM v Secretary of State for Work and Pensions \(DLA\)\(JSA\): \[2018\] UKUT 404 \(AAC\)](#)

what is defined as rent or service charges. The claimant may never have had a written agreement or the period of their agreement may have run out, but that does not necessarily mean they are not legally liable for the rent or service charges. Case law has confirmed this: [R v Poole BC ex parte Ross \(1995\)](#) and [R v Warrington BC ex parte Williams \(1997\)](#). As such, as long as the claimant can satisfy the DWP of their liability, and meet all the other conditions, they should be entitled to the housing costs element.

Evidence of liability

The DWP is entitled to ask for proof that the claimant is liable for the housing costs and usually asks for a copy of the claimant's current tenancy agreement. However, the legislation (primarily regulations 37 and 38 of [the UC, etc. \(C&P\) Regulations 2013](#) for UC) does not specify what evidence or information must be provided, only that the claimant must comply with any request within one month (or longer if allowed).

Any request from the DWP needs to be reasonable and the claimant should be able to ask why a particular piece of evidence or information request is needed if they think it is not. If the claimant cannot provide what is asked for, they should explain why, offer anything else that might instead prove the particular fact and/or ask DWP what else they might accept. A claimant's verbal or written statements are evidence in themselves, and any evidence does not necessarily need to be corroborated unless there is a reason to doubt it.² The evidential test in social security decision making is 'balance of probabilities' rather than 'beyond reasonable doubt', the decision-making process being inquisitorial rather than adversarial.

DWP's own guidance confirms that a tenancy agreement is not necessarily needed to get the housing costs element (see for example [Private rented sector \(v.23\)](#) - UC operational guidance deposited in House of Commons library).

If the claimant is unable to provide the evidence requested by DWP, and DWP refuse to accept the evidence offered and do not pay the claimant's housing costs as a result, the claimant should immediately request a mandatory reconsideration.

Couples

Where joint UC claimants live in a property where one of them is the sole named tenant, the other member of the couple is also liable for the rent under regulation 25(3) of [The Universal Credit Regulations 2013 \(SI 2013/376\)](#), "the claimant (or either joint claimant)—". However, the tenant or the partner are treated as not liable if they make payments to either a child/qualifying young person either of them are responsible for, or a close relative (parent, parent-in-law, son, son-in-law, daughter, daughter-in-law, step-parent, step-son, step-daughter, brother, sister (where any of these is a member of a couple, the partner)) who lives in the same accommodation. A claimant/s is also not treated as liable in the following circumstances: they are liable

² See for example para 21 [EP v SSWP \(JSA\) \[2016\] UKUT 0445 \(AAC\)](#)

to make payments to a trustee of a trust or company of which they are a beneficiary/company owner or director; increased rent payments to cover arrears, in which case the amount for the arrears is not liable; if the tenancy is contrived; service charge payments to someone who lives in the claimant's household, unless the claimant also pays rent.³

CPAG continues to receive reports of UC claimants being awarded only 50 per cent of their housing costs in situations where a couple have separated and one member of the couple, who was also a joint tenant, has left the property. Equally, if one member of a couple (joint claimants) is a sole tenant, the DWP should not require proof of a joint tenancy in order to pay the HCE or refuse the HCE on this basis. Nor should they require that the tenancy is changed. "Case managers and work coaches must not... ask the claimant to get a new tenancy from their landlord or a landlord letter to confirm the claimant is solely liable" – Spotlight guidance (see below). If DWP fail to award the correct HCE, that decision should be revised on the above grounds.

Treated as liable

The claimant is legally liable for housing costs if they are the tenant (or for owner occupiers service charges, the owner). The other member of a couple is always treated as liable even if they are not named on the tenancy (or the owner).⁴ You are also treated as liable if either:

- the legally liable person is a child or qualifying young person for whom you or your partner are responsible;
- or you are part of a couple, your partner is liable, but you are claiming UC as a single person (ie under reg 3(3) UC Regs), other than if this is because you are part of a polygamous relationship.

However, where the legally liable person is not paying the housing costs, another person can be 'treated' as liable for them, and so housing costs paid with their UC award if they meet all the other conditions as well.⁵ Someone is 'treated' as liable for housing costs where:

- the person legal liable is not paying them; *and*
- you must keep making the payments to *continue* occupying the property as your home; *and*
- it is unreasonable for you to make other arrangements; *and*
- it is in all other circumstances reasonable to treat you as liable.

So, you may be treated as liable for housing costs in various circumstances such as where the legally liable person is your ex-partner and has left the property which you occupied together while a couple, or you lived with a relative who is the tenant but they move into residential care or you were the joint tenant with someone who has

³ [Universal Credit Regulations, Schedule 2, Part 2](#)

⁴ Reg 25(3)(a) Universal Credit Regulations 2013

⁵ Reg 25 and Schedule 2, para 2 Universal Credit Regulations 2013

died. This can mean that where before you may have only been liable for a share of the housing costs you are now treated as liable for a greater proportion or all of them. You should not have to wait until a tenancy is altered or assigned to you to get housing costs, or additional housing costs, with your UC in these type of situations, provided you meet the criteria above. If housing costs are refused in these type of circumstances, that decision should be immediately challenged by mandatory reconsideration.

Guidance and further reading

Various guidance on UC housing costs is available from the DWP including:
[Spotlight on: Joint Tenancy Costs - Absent Joint Tenant \(Untidy Tenancy\) and unequal apportionment of rent. Spotlight: June 2020](#)

UC operational guidance deposited in the House of Commons Library (collected and updated at <https://www.rightsnet.org.uk/resources/universal-credit-guidance>):
[Eligibility for housing costs \(v.3.0\)](#)
[Joint Tenancies \(v.8.0\)](#)
[Private rented sector \(v.23.0\)](#)
[Claimants who must pay housing costs without a tenancy \(v.3.0\)](#)

The DWP's Advice for Decision Making:
(<https://www.gov.uk/government/publications/advice-for-decision-making-staff-guide>)
[ADM Chapter F2: Housing costs element](#)
[ADM Chapter A1: Principles of Decision Making and Evidence](#)

CPAG resources:

[CPAG Welfare Rights Housing Costs topic page](#)
[Welfare Rights Bulletin article - Untidy tenancies: still a mess](#)