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Universal Credit Policy

By email only

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Dear

**RE: DWP Guidance post *SSWP v MJ***

1. We write regarding the guidance issued to DWP decision makers regarding the decision of the Upper Tribunal in *SSWP v MJ* [2025] UKUT 035 (AAC)<sup>1</sup>. CPAG believes that the guidance is incorrect in the manner and for the reasons set out below.
2. We understand that you are the best person to contact regarding this issue. If that is incorrect, we apologise and would be grateful if you could forward the letter appropriately within the Department.
3. The relevant part of the guidance is as follows:

***Which cases can have the MJ decision applied, but only by the First-Tier Tribunal?***

- *Where the effective date of the LCWRA Element and erosion decision falls in an Assessment Period that ends **prior to 29/01/25 and***
- *There was an MR decision made (to not revise that LCWRA Element and erosion decision) **on or prior to 29/01/25 and***
- *The customer appeals to the FtT (including late appeals admitted by the FtT).*

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<sup>1</sup> The guidance is publicly available here:

[https://www.whatdotheyknow.com/request/guidance\\_and\\_operational\\_instruc#incoming-3135186](https://www.whatdotheyknow.com/request/guidance_and_operational_instruc#incoming-3135186)

*In these cases, the FtT can apply the MJ judgment even though the effective date of the LCWRA Element and erosion decision pre-dates the relevant termination date (29/01/25).*

**NB** – *In the FtT these cases should **not** be lapsed, rather the Tribunal must be the one to make the decision to apply MJ. The decision maker should allow these cases to progress to appeal and then make the argument that MJ can apply.*

*Which cases cannot have the benefit of the MJ decision?*

- *Where the effective date of the LCWRA Element and erosion decision falls in an Assessment Period that ends **prior** to 29/01/25 **and***
- *they did **not** have an MR decision until **after** 29/01/25 (regardless of when the MR was lodged).*

*In these cases, the previous full LCWRA Element and erosion decision is correct and the customer cannot have the benefit of MJ*

### **The problem**

4. The guidance thus makes the power of the First-tier Tribunal (“**FtT**”) to give a decision which applies *MJ* for assessment periods prior to the date on which the decision in *MJ* was given depend on the date on which the SSWP refuses to revise her original decision (ie make the “MR decision”) which had wrongly eroded transitional protection by the full amount of the LCWRA element.
5. That is wrong because the appeal which such a claimant makes is not against the refusal to revise and so the date on which SSWP refused to revise is irrelevant to the powers of the FtT.

### **Explanation**

6. To explain further:
  - a. As the guidance recognises (although it does not refer to the legislation), s.27 Social Security Act 1998 applies to the SSWP where, after the date of *MJ*, she comes to consider an application for revision of a decision made before *MJ* that had eroded a person’s transitional element by the full amount of the LCWRA.
  - b. That means that the SSWP, in such a situation, is required not to give effect to *MJ* and should refuse to revise.
  - c. However, when the claimant then appeals, the appeal is made not against the decision refusing to revise but rather against the original decision (ie the supersession decision

which eroded transitional element by the full amount of LCWRA element). That is because s.12(1) Social Security Act 1998 does not confer a right of appeal against a refusal to revise. The SSWP accepted this in R(IS)15/04 as recorded at [17] of that judgment:

*“It is common ground that a decision under section 9 to revise or not revise is not itself made appealable by the 1998 Act; the only decision which can be appealed is the original decision as either revised or not revised. [...]”*

Similarly, at [38] of R(IB)2/04 the Tribunal of Commissioners held:

*“38. So far as decisions under section 9 (revision) are concerned, section 12(1) provides a right of appeal, not against the decision under section 9 as such, but only against the original decision as either revised or not revised. [...]”*

- d. That means that the only role which a refusal of a mandatory reconsideration request plays is that it:
  - i. Opens the way for the claimant to file an appeal against the original decision (because the reg. 7(2) Universal Credit etc. (Decisions and Appeals) Regulations 2013 condition is thereby satisfied); and
  - ii. Starts the time running during which the claimant can appeal against the original supersession decision (under rule 22(2)(d)(i) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008).
- e. When the FtT comes to determine such an appeal it stands in the shoes of the Decision Maker and may make any decision it was open to the SSWP to make at that time. Authority for this can be found at [24-25] of R(IB) 2/04:

*24. [...] However, as Mr Commissioner Monroe made clear in R(SB) 1/82, the approach he adopted was required by the nature of an appeal by way of a rehearing, as well as by any specific statutory wording. As a matter of principle, on such an appeal the tribunal may make any decision which the officer below could have made on the legal questions properly before that officer. [...]*

*25. In our judgment, that approach to the nature of an appeal as a rehearing, which is how it was understood in the social security context before the 1998 Act changes, is to be applied to the current adjudication and appeal structure, subject only to express legislative limitations on its extent. [...] The appeal tribunal in effect*

*stands in the shoes of the decision maker for the purpose of making a decision on the claim. [...]*

- f. As the SSWP could have decided not to discriminate against a claimant at that time (noting, again, that the decision fell to be made prior to the decision in MJ), so too can the FtT.
- 7. That this position is correct can be appreciated if one considers what the position would have been before the introduction of the mandatory reconsideration requirement. A claimant who had a decision eroding their transitional element by the full amount of LCWRA within the last 13 months could, on MJ being handed down, simply have filed an appeal against that decision. The FtT would have not been caught by s.27.

#### **What should happen now**

- 8. CPAG requests that:
  - a. DWP issue a corrected, and publicly available, version of the guidance in question;
  - b. Carry out a trawl for cases in which submissions to First-tier Tribunals have been made on the basis of the incorrect guidance, and provide tribunals with further submissions setting out the correct position.
- 9. The SSWP will be aware that those affected are relatively recently migrated claimants from legacy benefits who have the double burden of being carers and are also themselves disabled. CPAG anticipate that given the Upper Tribunal found (and SSWP has accepted by not seeking to appeal) that in making these decisions she breached the human rights of this group, she would be keen to resolve the issue as soon as possible.

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Many thanks for your consideration of the points made above. We would be most grateful to receive a reply as soon as possible and by Friday 26<sup>th</sup> of September in any event- if a reply is likely to take longer, we would be grateful if you could let us know.

Yours sincerely:

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Martin Williams

**CPAG**