



The decision is that, from the commencement date of the award of universal credit on 17 May 2022, Mr W was entitled to an award of universal credit comprising the standard allowance, the carer element, a limited capability for work-related activity element and a severe disability premium at the lower rate of £120, not the higher rate of £405.

This decision is made under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

**Representation: Mr Denis Edwards, counsel, for the Appellant  
(instructed by the Government Legal Department)**

**Mr Martin Williams, CPAG, for the Respondents**

## **REASONS**

### **Introduction**

1. This is an appeal, with the permission of District Tribunal Judge McCarroll dated 23 May 2023, against the decision of the First-tier Tribunal (“the Tribunal”) which sat (by telephone) in Caernarfon on 16 December 2022.

2. In summary, this appeal concerns a short issue of statutory construction. The appeal concerns the meaning and effect of Schedule 2 to the Universal Credit (Transitional Provisions) Regulations 2014 (“the 2014 Regulations”), in the version which was in force prior to 29 June 2023, and its interrelationship with regulation 6(6) of Schedule 4 of the Employment and Support Allowance Regulations 2008 (“the 2008 Regulations”) in circumstances where:

(i) a claimant, as part of a couple, was in receipt of income-related Employment and Support Allowance (“ESA”) which included an amount in respect of the higher rate of the severe disability premium (“SDP”)

(ii) the claimant is cared for by a younger partner

(iii) when the claimant reaches state pension age, a claim is made by the couple for UC.

3. In those circumstances, where an award of UC is made which includes both a carer element of UC in respect of caring for the older partner and a limited capability for work related activity (“LCWRA”) element, do paragraphs 3(b) and 5(b)(i) of Schedule 2 to the 2014 Regulations, in the light of paragraph 6(6) of schedule 4 to the 2008 Regulations mean that the award must include the *lower* amount of the transitional SDP element (“TSDPE”) or the *higher* amount? The lower amount is £120; the higher amount is £405. The difference is £285. The Tribunal decided that the UC award must include the higher amount of TSDPE because of the receipt of the higher rate of SDP before the claim. The Secretary of State contends that that is an error of law. For Mr and Mrs W, CPAG assert that the decision was right, albeit for the wrong reasons. It appears that there is only one other case before the Upper Tribunal, which has been stayed behind this one, where these circumstances are replicated.

### **Factual Background**

4. Mr and Mrs W are a couple. Mrs W’s date of birth is 18 May 1956 and she reached state pension age on 18 May 2022. She was in receipt of income-based ESA for herself and her husband from 30 November 2016 until 17 May 2022 and received the couple rate of SDP as part of that award.

5. Although nothing turns on it in the context of this particular appeal, I should for the sake of completeness add that Mr W had an award of the daily living component of personal independence payment (“PIP”) at the standard rate for and that Mrs W also had an award of the daily living component of PIP, but at the enhanced rate.

6. On 17 May 2022, one day before his wife’s 66<sup>th</sup> birthday, Mr W made a joint claim for UC on behalf of himself and Mrs W as a couple. The claim for

UC was the result of a natural migration to UC, following the change in the couple's circumstances as a result of Mrs W reaching state pension age.

7. On 30 May 2022 Mr W declared in his claim for UC that he was caring for his wife for at least 35 hours per week with effect from 17 May 2022. (It appears that he had omitted to tick that box on the form when the claim was first submitted 13 days previously.) That was an amendment of the claim and took effect from when the claim was made.

8. On 17 June 2022 the Secretary of State determined that, from the start date of the UC award on 17 May 2022, Mr W was entitled to an award of UC comprising the standard allowance, the carer element (in respect of himself), a LCWRA element (in respect of his wife) and a TSDPE. The Secretary of State's determination was that the carer element was awarded because, as mentioned above, on 30 May 2022 Mr W had notified the Secretary of State that he was caring for his wife with effect from 17 May 2022.

9. As regards the award of TSDPE, the determination was that the amount of TSDPE was at the lower amount, namely £120, because the award included an LCWRA element. The higher SDP rate (£405) was not payable because (a) the couple's award of UC included an award for LCWRA (b) Mr W and his wife did not continue to satisfy the conditions for the higher rate of SDP up to and including the first date of the UC award (17 May 2022) because, on that date, Mr W had been awarded the carer element of UC.

10. The Secretary of State made that decision because he said that "a significant change in circumstance had occurred by the first day of their award of Universal Credit", in other words on 30 May 2022 Mr W had declared that he was regularly and substantially caring for his wife and had been doing so from 17 May 2022. That meant that the carer element was paid from the start of the award and that in turn meant that, on the first day of the award, Mrs W did not meet the SDP conditions and thus the couple were not entitled to higher rate SDP.

11. On 18 July 2022, Mr W requested mandatory reconsideration of the determination of his UC award, specifically on the amount of the TSDPE and its inclusion at the lower rather than the higher amount, but on 19 August 2022 the determination of 17 June 2022 was upheld and the amount of TSDPE included in the Mr W's award of UC was not revised.

12. On 31 October 2022 Mr W appealed against that decision awarding him the lower amount of TSDPE. On 18 December 2022 the Tribunal held an oral hearing of the appeal by telephone at which Mr W and his wife were present together with their representative. The Secretary of State did not participate in the hearing.

13. The Tribunal allowed the appeal and remade the decision. It held that the couple met the conditions for the higher rate of TSDPE of £405. Its reasons were based on the fact that the change of circumstances reported on 30 May 2022 took effect from 17 May 2022 only due to the supersession rules for UC. The Tribunal held that nothing had changed on 17 May 2022, meaning that on that date both spouses continued to meet the conditions of entitlement for SDP and were entitled to the higher rate of TSDPE.

14. The Secretary of State applied to the Tribunal for permission to appeal to the Upper Tribunal, which was granted by the District Tribunal Judge on 23 May 2023.

15. On 12 December 2023 I directed an oral hearing of the appeal, which I heard on the morning of 13 August 2024 and reserved my decision. Mr and Mrs W appeared by videolink from their home in Wales and were represented before me by Mr Martin Williams of the Child Poverty Action Group ("CPAG"). The Secretary of State was represented by Mr Denis Edwards of counsel, to both of whom I am indebted for their able written and oral submissions.

16. In the course of the hearing I asked the parties to prepare for me a statement of Mr and Mrs W's benefit entitlements in (a) the last month of the award of ESA and (b) in the first assessment period of UC in the period from

17 May 2022 to 16 June 2022 (on the footing that the Secretary of State was correct that only the lower rate of TSDPE was payable). Those figures were provided to me in the course of September. In round figures the amounts in question were (a) £1300 (b) £1100. If the Secretary of State is correct, the result is that Mr and Mrs W were about £200 per month worse off than previously. By contrast, if it is correct that they were entitled to the higher rate of TSDPE in the first assessment period of UC in the period from 17 May 2022 to 16 June 2022, the amount in question in round figures would have been £1400 per month, leaving them £100 better off.

17. The Secretary of State added that

“When considering the above tables, it is also necessary to explain one further matter.

In response to the judgment in *TP/AR3 and AB & F v SSWP*, the Secretary of State has agreed to provide additional transitional protection for certain eligible claimants when moving from legacy benefits to universal credit. These additional amounts, reflecting the Enhanced Disability Premium, Disability Premium and an amount for disabled children are contained in regulations which came into force on 14 February 2024 for eligible new claimants to universal credit.

The Department for Work and Pensions, whilst having regard to the efficient administration of universal credit and other delivery obligations, is fully committed to identifying and paying eligible customers. This is a highly complex piece of work and providing a solution is one of the Department’s highest priorities. Work is continuing at pace and the solution to make back payments and ongoing monthly payments will be implemented as soon as practically possible.

Once this solution has been implemented the UC award will increase by £104 per assessment period. The Respondents will also be paid arrears back to the start of the universal credit claim”.

There were further submissions on other points, but they were subsequently withdrawn. The final position did not, however, become clear until 24 September 2024.

## **The Statement of Reasons**

18. In its statement of reasons the Tribunal held that

### **“What the appeal is about**

1. This appeal concerns the rules which determine whether the transitional Severe Disability Premium (SDP) element may be included in the calculation of the amount of Universal Credit (UC), and if so, the amount of the transitional SDP element.

2. The Respondent's decision dated 17/06/2022 was that Mr and Mrs W were entitled to have the transitional SDP element included in the assessment of their entitlement to UC at the lowest rate of £120 per assessment period (AP).

3. Mr W contends that £405, the highest amount of the transitional SDP element, should have been included.

4. The highest amount is included if, in the month prior to the claim for UC and on the first day of the award of UC, both members of a couple satisfied the conditions for eligibility for the SDP.

5. The Respondent's case is that only Mr W, and not his wife, satisfied the conditions on the first day of the award of UC.

6. Mr W contends that both he and his wife satisfied the conditions and therefore the highest rate should have been included in the calculation of their entitlement to UC.

### **The hearing**

7. There was an oral hearing of this appeal conducted by telephone using the BT Meet Me telephone conferencing system. Mr and Mrs W were both present and their Representative Ms Alex Ferrier was joined on a separate line. No Presenting Officer representing the Respondent participated.

### **Chronology**

8. Mr and Mrs W claimed UC on 17/05/2022.

9. Prior to this date Mrs W was in receipt of income-related Employment and Support Allowance (ESA) for

herself and her husband. The higher SDP rate was included in the award of ESA.

10. On 30/05/2022 Mr W declared that he was caring for his partner for 35 hours or more a week. This resulted in the inclusion of the Carer's element in the award of UC from the start of the claim.

11. On 17/06/2022 the Respondent decided that a transitional SDP element of £120 should be included in the calculation of the amount of UC to which Mr and Mrs W were entitled.

### **Reasons for the decision**

12. The rules determining whether the transitional SDP element can be included in the award of UC, and if so the amount, are set out in Schedule 2 of the UC (Transitional Provisions) Regulations 2014 which I reproduce below.

#### **“SCHEDULE 2**

#### **Claimants previously entitled to a severe disability premium**

1. This Schedule applies to an award of universal credit where the following conditions are met in respect of the claimant, or each of joint claimants.

2. The first condition is that the award was not made as a consequence of the claimant becoming a member of a couple where the other member was already entitled to an award of universal credit.

3. The second condition is that the claimant—

(a) was entitled (or was a member of a couple the other member of which was entitled) to an award of income support, income-based jobseeker's allowance or income-related employment and support allowance that included a severe disability premium within the month immediately preceding the first day of the award of universal credit; and

(b) continued to satisfy the conditions for eligibility for a severe disability premium up to and including the first day of that award.

4. Where this Schedule applies (subject to paragraphs 6 and 7), a transitional SDP element is



to be included in the calculation of the award and the amount of that element is to be treated, for the purposes of section 8 of the Act, as if it were an additional amount to be included in the maximum amount under section 8(2) before the deduction of income under section 8(3).

5. The amount of the transitional SDP element in the first assessment period is—

(a) in the case of a single claimant—

(i) £120, if the LCWRA element is included in the award, or

(ii) £285, if the LCWRA element is not included in the award;

(b) in the case of joint claimants—

(i) £405, if the higher SDP rate was payable,

(ii) £120, if paragraph (i) does not apply and the LCWRA element is included in the award in respect of either of them, or

(iii) £285, if paragraph (i) does not apply and the LCWRA element is not included in the award in respect of either of them.

6. The award is not to include a transitional SDP element where the claim was a qualifying claim and the award is to include a transitional element.

7. In this Schedule—

“LCWRA element” has the meaning in the Universal Credit Regulations;

“the higher SDP rate” is the rate specified in subparagraph (ii) of paragraph 11(2)(b) of Schedule 4 to the Employment and Support Allowance Regulations 2008 or, as the case may be, the corresponding rate of a severe disability premium in relation to income support or income-based jobseeker’s allowance”.

13. There is no dispute that the first condition for the inclusion of the transitional SDP element set out in paragraph 2 is satisfied.

14. Nor is it disputed that the condition in paragraph 3(a) is satisfied. It is also accepted that, as required by paragraph 3(b), Mr W continued to satisfy the conditions for the SDP on the first day of the claim for UC. Entitlement to a transitional SDP element is therefore established.

15. The dispute in this appeal is about the amount of the transitional SDP element. For the highest rate to be paid paragraph 5(b)(i) requires that the higher SDP rate was payable, and referring back to paragraph 3, the conditions had to be satisfied on the first day of the UC claim.

16. The higher rate of the SDP is payable for ESA claims for a couple where both members of the couple satisfy all the conditions for the award of the SDP. The rules are set out in Parts 2 and 3 of Schedule 4 of the ESA Regulations 2008. Only one of the conditions is relevant in this case, it is not disputed that all the other conditions were satisfied. The condition is that nobody is in receipt of Carer's Allowance or has the Carer's Element included in the award [of] UC for caring for either member of the couple.

17. Following Mr W's declaration on 30/05/2022 that he was caring for his wife the Carer's Element was included in the calculation of the couple's entitlement to UC. Changes of circumstances take effect from the start of the AP [Assessment Period] in which they occur. This resulted in the Carer's Element being paid for the whole of the first AP of their UC claim which ran from 17/05/2022 to 16/06/2022. The Respondent's case is that because the Carer's Element was included in the award of UC with effect from first day of the claim in respect of Mr W caring for his wife this had the effect that that the conditions for the higher SDP rate were not satisfied on the first day of the claim.

18. I did not agree. I decided that Mr and Mrs W were entitled to have the transitional SDP element of Universal Credit included in the assessment of their entitlement to UC from 17/05/2022 at the rate of £405 per Assessment Period (AP).

19. This was because on 17/05/2022 when Mr and Mrs W claimed UC and which was the first day of the UC award, they both satisfied the conditions for eligibility for the SDP. Nothing changed on that day. There was a

change when Mr W declared on 30/05/2022 that he was caring for his wife. That the Carer's Element was included from the first day of the award does not alter the fact that throughout the day on 17/05/2022, the first day of the UC award, the conditions for the higher SDP rate were satisfied.

20. As an aside, in drafting this statement and considering further the legal provisions, it appears to me that there may be another flaw in the Respondent's case. That is, Part 3 of Schedule 4 of the ESA Regulations 2008 refers only to Carer's Allowance and not to the Carer's Element of UC when specifying who is entitled to the higher SDP rate. When this is read with paragraph 6(2)(b) of the Schedule it seems to me that it could be argued that, only in the case of couples, inclusion of the award of the Carer's Element does not prevent payment of the higher SDP rate. This appears to be the result of an oversight when the schedule was amended to include reference to the Carer's Element of UC."

### **The Statutory Framework**

19. Schedule 2 to the 2014 Regulations has effect pursuant to regulation 63 of the 2014 Regulations. Regulation 63 provides that

**"Claimants previously entitled to a severe disability premium**

Schedule 2 contains provision in respect of certain claimants who have been entitled to a benefit which included a severe disability premium".

### **The Original Version of Schedule 2**

20. At the material time (17 June 2022) the Schedule provided as follows (with emphasis added):

**"Claimants previously entitled to a severe disability premium**

1 This Schedule applies to an award of universal credit where the following conditions are met in respect of the claimant, or each of joint claimants.

2 The first condition is that the award was not made as a consequence of the claimant becoming a member of a

couple where the other member was already entitled to an award of universal credit.

3 The second condition is that the claimant-

(a) was entitled (or was a member of a couple the other member of which was entitled) to an award of income support, income-based jobseeker's allowance or income-related employment and support allowance that included a severe disability premium within the month immediately preceding the first day of the award of universal credit; and

*(b) continued to satisfy the conditions for eligibility for a severe disability premium up to and including the first day of that award.*

4 Where this Schedule applies (subject to paragraphs 6 and 7), a transitional SDP element is to be included in the calculation of the award and the amount of that element is to be treated, for the purposes of section 8 of the Act, as if it were an additional amount to be included in the maximum amount under section 8(2) before the deduction of income under section 8(3).

*5 The amount of the transitional SDP element in the first assessment period is-*

(a) in the case of a single claimant—

(i) £120, if the LCWRA element is included in the award, or

(ii) £285, if the LCWRA element is not included in the award;

*(b) in the case of joint claimants-*

(i) £405, if the higher SDP rate was payable,

*(ii) £120, if paragraph (i) does not apply and the LCWRA element is included in the award in respect of either of them, or*

(iii) £285, if paragraph (i) does not apply and the LCWRA element is not included in the award in respect of either of them.

6 In respect of the second and each subsequent assessment period, regulation 55(2) (adjustment where

other elements increase), regulation 56 (circumstances in which transitional protection ceases) and regulation 57 (application of transitional protection to a subsequent award) are to apply in relation to the transitional SDP element as if it were a transitional element in respect of which the amount calculated in accordance with paragraph 5 was the initial amount.

7 The award is not to include a transitional SDP element where the claim was a qualifying claim and the award is to include a transitional element.

8 In this Schedule-

“LCWRA element” has the meaning in the Universal Credit Regulations;

“the higher SDP rate” is the rate specified in subparagraph (ii) of paragraph 11(2)(b) of Schedule 4 to the Employment and Support Allowance Regulations 2008 or, as the case may be, the corresponding rate of a severe disability premium in relation to income support or income-based jobseeker’s allowance.”

## **The Amended Version of Schedule 2**

21. From 29 June 2023 (i.e. slightly more than one year after the date of the decision under appeal), regulation 6 of the Social Security and UC (Miscellaneous Amendments) Regulations 2023 (“the 2023 Regulations”) amended paragraphs 5 and 8 as follows (in each case with emphasis added for ease of reference).

22. First, paragraph 5(b)(i) of Schedule 2 now reads

*“£405 if the higher SDP rate is payable on the first day of the award and no person becomes a carer for either of them in the first assessment period”.*

23. Secondly, paragraph 8 is amended so that its existing provision is renumbered paragraph 8(1), following which a new paragraph 8(2) provides:

*“(2) In paragraph 5(b)(i), the reference to a person being a carer for another person is to the person being entitled to, and in receipt of, a carer’s allowance or having an*

*award of universal credit which includes the carer element in respect of caring for that other person.”*

24. The 2023 Regulations also provide for a new paragraph 9 in Schedule 2 to the 2014 Regulations, which is as follows:

*“For the purposes of paragraph 3(b) and 5(b)(i), paragraph 6(6) of Schedule 4 to the Employment and Support Allowance Regulations 2008 or, as the case may be, the corresponding provision in relation to income support or income-based jobseeker’s allowance, is to be disregarded”.*

### **The Explanatory Memorandum**

25. The explanatory memorandum to these amendments explains as follows:

#### **“Amendment to Schedule 2 of the Universal Credit (Transitional Provisions) Regulations 2014**

7.13 The amendment clarifies that for Universal Credit couple claims, the highest rate of transitional Severe Disability Premium element (SDPTE), will be payable if the higher Severe Disability Premium (SDP) rate was payable in their previous legacy benefit (Income Support, Income Based Jobseeker’s Allowance or Income Related Employment and Support Allowance) and no person has since become a carer for either of them.

7.14 This ensures claimants, who would not have continued to receive the higher SDP rate had they remained on their legacy benefit, will not be awarded the higher SDPTE rate as part of their Universal Credit award”.

### **The 2008 Regulations**

26. The conditions of eligibility for the SDP are set out in Schedule 4 of the ESA Regulations 2008 (“the 2008 Regulations”).

27. Paragraph 6(1) of Schedule 4 to the 2008 Regulations sets the condition for SDP, namely that a recipient must be a “severely disabled person”.

28. Paragraph 6(2) then provides for entitlement to different rates of SDP as follows (with emphasis added):

“(2) For the purposes of sub-paragraph (1), a claimant is to be treated as being a severely disabled person if, and only if-

(a) [in the case of a single claimant ...]

(b) in the case of a claimant who has a partner-

(i) the claimant is in receipt of the care component, the daily living component, the daily living component of adult disability payment, armed forces independence payment or attendance allowance;

(ii) the claimant's partner is also in receipt of the care component, the daily living component ... or attendance allowance; and

(iii) subject to sub-paragraph (4), the claimant has no non-dependants aged 18 or over normally residing with the claimant or with whom the claimant is normally residing,

and, either a person is entitled to, and in receipt of, a carer's allowance or has an award of universal credit which includes the carer element in respect of caring for only one of the couple ... or no person is entitled to, and in receipt of, such an allowance or has such an award of universal credit in respect of caring for either member of the couple ...

(3) [N/A as it relates to blind partners]

(4) For the purposes of sub-paragraph (2)(a)(ii) and (b)(iii) no account is to be taken of—

[N/A as no non-dependants in any event and the rule simply ignores some non-dependents for (2)(b)(iii)]

(5) For the purposes of sub-paragraph (2)(b) a person is to be treated—

[N/A as simply treats certain persons not in receipt of a disability benefit as in receipt in certain circumstances- Mr and Mrs W do not need to rely on a deeming measure to come within (2)(b)]

*(6) For the purposes of sub-paragraph (2)(a)(iii) and (b), no account is to be taken of an award of carer's allowance or universal credit which includes the carer element to the extent that payment of such an award is backdated for a period before the date on which the award is first paid.*

(7) [N/A as just a limitation on (4)(b) which does not figure in this case].

(8) [not relevant as a deeming measure to treat people as getting carer element in UC if not getting an award due to loss of benefit provisions].

(9) In this paragraph— [...]

(b) A person has an award of universal credit which includes the carer element if the person has an award of universal credit which includes an amount which is the carer element under regulation 29 of the Universal Credit Regulations 2013 ...”.

29. Paragraph 11(2)(b) of the 2008 Regulations then specifies the different rates of the SDP:

“(2) Severe disability premium—

[...]

(b) where the claimant satisfies the condition in paragraph 6(2)(b)—

(i) if there is someone in receipt of a carer's allowance or if the person or any partner satisfies that condition only by virtue of paragraph 6(5)(i) [lower amount]

(ii) if no-one is in receipt of such an allowance (ii) [higher amount]”.

30. Finally, Regulation 29 of the UC Regulations 2013 provides as follows:

“(1) An award of universal credit is to include an amount (“the carer element”) specified in the table in regulation 36 where a claimant has regular and substantial caring responsibilities for a severely disabled person, but subject to paragraphs (2) to (4) and section 70(7) of the Contributions and Benefits Act (entitlement by different



persons to the carer element and to carer's allowance in respect of the same severely disabled person.

(2) In the case of joint claimants, an award is to include the carer element for both joint claimants if they both qualify for it, but only if they are not caring for the same severely disabled person.

(3) Where two or more persons have regular and substantial caring responsibilities for the same severely disabled person, an award of universal credit may only include the carer element in respect of one of them and that is the one they jointly elect or, in default of election, the one the Secretary of State determines.

(4) Where an amount would, apart from this paragraph, be included in an award in relation to a claimant by virtue of paragraphs (1) to (3), and the claimant has limited capability for work and work-related activity (and, in the case of joint claimants, the LCWRA element has not been included in respect of the other claimant), only the LCWRA element may be included in respect of the claimant."

### **The Secretary of State's Submissions**

31. Mr Edwards submitted that the Welfare Reform Act 2012 ("the 2012 Act") introduced UC to replace six types of legacy benefits, including ESA. Subject to qualifying conditions, an award of a legacy benefit could include a premium in respect of disability, such as SDP where income-related ESA was in payment.

32. By virtue of ss. 33, 35, 36 and Schedule 6 of the 2012 Act, where a claim was made for UC, a claimant was not entitled to, and no new award could normally be made, of certain legacy benefits, including ESA.

33. Pursuant to the 2012 Act, an award of UC might include a standard allowance (s.9), an amount for housing costs, that is, the housing element (s.11), an LCWRA element (s.12(2)(b)) and a carer element (s.12(2)(c)). The 2012 Act did not replicate any legacy premiums in respect of disability, such as SDP, UC not being designed wholly to replicate the legacy benefit entitlements. The government decided to concentrate support on the most

severely disabled, the LCWRA amount in UC being more than double the equivalent amount in ESA.

34. Schedule 2 to the 2014 Regulations was inserted by the UC (Managed Migration Pilot and Misc Amendments) Regulations 2019 (“the 2019 Regulations”) and further amended by the UC (Transitional Provisions) (Claimants previously entitled to a SDP) Amendment Regulations 2021 (“the 2021 Regulations”). These regulations made provision for a transitional SDP amount to be awarded in certain cases. Schedule 2 complied with the ruling of the Court of Appeal in ***R (TP, AR & SXC) v. Secretary of State for Work and Pensions*** [2020] EWCA Civ 37, which was to the effect that those who claimed UC, following natural migration (due to a change of circumstances) and who received SDP as part of their legacy benefits, should be compensated for their loss of income. The 2014 Regulations therefore allowed an award of transitional SDP amounts to persons who met specific criteria, namely that claimants had received the premium as part of a defined legacy benefit (such as income-related ESA) in the month before the date of the UC claim and still met the qualifying conditions up to and including the start of their UC award. Since 13 October 2020, the 2014 Regulations made provision for a transitional SDP amount to become a transitional element paid and treated as per other transitional elements of UC. Significantly a TSDPE was not designed to be indefinite and was subject to erosion as set by regulation 55 of the 2014 Regulations.

35. It was first necessary to note that the title to Schedule 2 of the 2014 Regulations was “claimants *previously* entitled to a severe disability premium” (emphasis added). It was also necessary to recall the background to the 2019 Regulations which inserted Schedule 2 into the 2014 Regulations. That background included the litigation leading to the Court of Appeal decision in ***TP, AR & SXC***.

36. Mindful of these considerations, the Secretary of State first submitted that the purpose of Schedule 2 to the 2014 Regulations was to allow an award of TSDPE, in certain cases and subject to certain conditions, for a claimant (or

joint claimant) of a relevant legacy benefit, who was “previously entitled” to SDP and who migrated to UC. If, on a correct understanding of the facts upon a claimant’s migration to UC, it simply could not be said that, given those facts, he was “previously entitled” to SDP at the higher rate, then on a literal construction of paragraph 5(b)(i) as it stood at the material time, it could not be said that the SDP higher rate “was payable”.

37. When construing paragraph 5(b)(i), it was necessary to construe it as part of Schedule 2 as a whole. That meant that there was a linkage between paragraph 3 and paragraph 5. Provisions in legislation could not be read as “stand alone” terms. If that approach were adopted here, an absurdity resulted because it was never possible to say, on the actual facts of a case, when “the higher rate of SDP was payable”. That term could only refer to what a person was “previously entitled”, in accordance with the provisions of paragraph 3. Those turned on the claimant continuing “to satisfy the conditions for eligibility for a severe disability premium up to and including the first day of [the UC] award”. If entitlement to a higher rate of SDP were not payable under reference to paragraph 3, it was not “payable” for the purposes of paragraph 5(b)(i).

38. On the Tribunal’s erroneous approach, argued Mr Edwards, if a claimant had the lower SDP rate in the last month prior to the first date of the UC award, but prior to that he had the higher SDP rate, it could be argued that paragraph 5(b)(i) could still apply in that case, because the higher rate had been payable in the legacy benefit at one point. That led to an absurdity in that the temporal limitations of paragraph 3(b) were defeated.

39. Secondly, as to the purpose of TSDPE, it was not to maintain for ever SDP, as received as part of the legacy benefit, as part of the award of UC on the same conditions as it had been received as part of the legacy benefit. In particular, TSDPE was subject to erosion in accordance with regulation 55 of the 2014 Regulations. Furthermore, the purpose of TSDPE was not to put claimants in a better position than they were under legacy benefits; TSDPE

was designed only to compensate certain claimants who received SDP following their migration to UC.

40. As already noted, an award of UC might include an LCWRA element and in relevant cases that amount in UC could be more than double the equivalent amount in ESA. That was a reason why the conditions for an award of TSDPE in Schedule 2 reflected any award of LCWRA.

41. Here Mrs W had an award of LCWRA and, under the terms of regulation 29 of the 2013 Regulations, that did not affect Mr W's award of the carer's element of UC. An UC award could include only one of a carer's element or a LCWRA in respect of the same claimant. Since Mr W did not have an award of LCWRA, he was still entitled to the carer's element if, on the facts, he was caring for his wife. On 30 May 2022 he confirmed that he was, which is why the carer's element was awarded with effect from the first day of the first assessment period, namely 17 May 2022. The Secretary of State's decision in that respect involved no "backdating". Rather, it was an award decision from the first date of the assessment period, based on the facts appertaining on that day, as they had been disclosed to the Secretary of State.

42. Given what Mr W told the Secretary of State on 30 May 2022 about his caring responsibilities for his wife, the Secretary of State had to approach the decision awarding UC on the basis that there had been a relevant change of circumstances with effect from the first day of the first assessment period (namely 17 May 2022). It inevitably followed from that that, on the facts disclosed by Mr W about his caring responsibilities, neither his wife nor the couple were entitled to the higher rate of SDP on that day. Rather, they were entitled to – and awarded - the carer's element of UC with effect from that day. Accordingly, on the first day of the first assessment period, it could not be said that the SDP higher rate "was payable".

43. Applying the literal construction of paragraph 5(b) of Schedule 2 to the 2014 Regulations, which was also the purpose of TSDPE, only the lower rate

of TSDPE was payable, given that there was an award to one member of the couple of LCWRA (and also an award of the carer's element).

44. The amount of TSDPE was prescribed by law in Schedule 2 to the 2014 Regulations (as amended from time to time). The amounts did not, and were not intended to reproduce what was received by way of SDP as part of a relevant legacy benefit. That reflected the fact, as explained above, that there was in payment an LCWRA as an element of the award of UC, which was greater than that which was paid as part of the legacy benefit. In any event, when paragraph 6 of Schedule 4 to the 2008 Regulations was applied to the facts of the case as they stood on 17 May 2022, given the facts disclosed by Mr W pertaining to that day, it followed that they were not entitled to the higher rate of SDP on that day.

45. In this case, the couple's award of UC included both LCWRA and a carer's element. Given the award of the latter, and the facts of their case as revealed on 30 May 2022, they were no longer entitled to SDP on the first day of the first assessment period. The natural and ordinary meaning of Schedule 2 taken as a whole must be that they were only entitled to the lower rate of TSDPE.

46. For these reasons, the Secretary of State's determination of the award of TSDPE at the lower rate was correct in law.

47. That analysis could also be tested against an alternative scenario. While in the present case, the change of circumstances concerning the fact of Mr W caring for his wife led to the lower rate of TSDPE, a change of circumstances could work the other way. For example, where two legacy benefit claimants each had a lower rate SDP in their legacy award and then moved in together, so as to become a couple, and claimed UC, their award would satisfy the higher rate SDP in their legacy benefit as at the date of the first day of the UC award, such that paragraph 5(b)(i) of Schedule 2 would be satisfied. On the Tribunal's erroneous approach in this appeal, that couple would have their

actual circumstances ignored in favour of past circumstances which no longer maintained, and their UC award would be to their financial detriment.

48. Finally, for the record, the Secretary of State submitted that the changes made to Schedule 2 to the 2023 Regulations with effect from 29 June 2023 had no bearing in the appeal, given that they post-dated the relevant facts and the decision under appeal. However, for the avoidance of doubt, the Secretary of State submitted that the changes made to Schedule 2 merely clarified the effect of the Schedule as it stood at the material time, and accorded with the construction of Schedule 2 set out above.

49. Accordingly, the appeal should be allowed and the decision of the Tribunal remade such that Mr and Mrs W were entitled to the TSDPE of UC at the lower rate from 17 May 2022.

### **Mr & Mrs W's Submissions**

50. By contrast, Mr Williams submitted that the Tribunal reached the correct decision in outcome, albeit for an incorrect reason.

51. The Tribunal was mistaken in holding that the carer's element was only included from 17 May 2022 by operation of rules about changes of circumstances taking effect from the start of the assessment period in which they occurred. That was wrong because:

(a) as a matter of fact Mr W had declared that he had been a carer since the first date of the claim.

(b) that meant that that was not a change of circumstances case anyway (where a supersession was conducted), but actually an amendment of the claim which had not, as at 30 May 2022, been decided.

52. However, argued Mr Williams, the Tribunal decision in outcome was right. That was because:

(a) as a matter of law, on 17 May 2022, but for the claim to UC, the couple would have been entitled to the higher rate of the TSDPE on that day and so the condition in paragraph 3(b) of Schedule 2 to the 2014 Regulations was met in any event.

(b) the inclusion on 17 June 2022, of the carer element in the couple's UC award with effect from 17 May 2022 did not change that analysis as, for ESA purposes, a person remained entitled to an SDP for a period when someone else was retrospectively awarded the carer element as part of their UC (see paragraph 6(6) of Schedule 4 to the 2008 Regulations).

(c) regardless of that point, in the version of Schedule 2 to the 2014 Regulations in force at the date of decision, the wording of the provisions did not have the effect for which the Secretary of State contended. That is why the Secretary of State was forced to amend the regulations from 29 June 2023. The amendment showed that his argument was wrong.

53. There was no dispute in this case that Mr and Mrs W met the first condition in paragraph 2 of Schedule 2 to the 2014 Regulations (they had not recently formed a couple and neither had previously been on UC) and the first part of the second condition (i.e. paragraph 3(a)) in that they had been getting income-related ESA in the month immediately prior to their UC claim.

54. The Secretary of State argued that they did not meet the second part of the second condition (i.e. paragraph 3(b)). It was said that, as they had a carer element included within their UC award from 17 May 2022 (the first day of their claim), this meant that they did not continue to "satisfy the conditions for eligibility for a severe disability premium up to and including the first day of that award". To show why that argument was wrong one needed to turn to the conditions of entitlement to the SDP for ESA.

55. Before doing that, however, it was worth noting that the paragraph 3(b) condition, as worded, appeared to be met when a claimant continued on the first day of the UC award to meet the conditions of entitlement to SDP,

regardless of rate. It did not appear to be linked to paragraph 5 in such a way that such a couple were getting the higher rate SDP but did not, at their date of claim, meet the conditions for the higher rate, then they would fall into paragraph 5(b)(i). The Secretary of State's analysis depended on reading into paragraph 5(b)(i) a requirement, not as the provision actually stated that "the higher SDP rate was payable", but also that "and the conditions for the higher rate continued to be met on the date of claim". The paragraph did not say that (and indeed was amended to correct that). If that were right, the Secretary of State's whole appeal was misconceived for that reason in any event.

56. Did the retrospective payment of carer element of UC in respect of Mrs W mean they did not continue to satisfy conditions for higher rate SDP on date of UC claim?

57. Turning to the rules within ESA for the SDP, paragraph 6 of Schedule 4 to the 2008 Regulations set the conditions of eligibility for the SDP. Considering matters as at 17 May 2022, which was what is required by paragraph 3(b) of Schedule 2 to the 2014 Regulations, as that was the first day of the UC award, it could be seen that Mr and Mrs W in fact continued to be entitled to SDP on that date and in fact continued to be entitled to the higher rate. That was because, although from 17 May 2022, they did have an award of UC which included the carer element (included as Mr W was a carer for his wife), that award was not made until the decision of 17 June 2022 and payment not made until after that. By paragraph 6(6)

"no account is to be taken of an award of carer's allowance or universal credit which includes the carer element to the extent that payment of such an award is backdated for a period before the date on which the award is first paid."

58. Mr and Mrs W argued that that point was fatal to the attempt to overturn the Tribunal's decision in this case. For the purposes of ESA SDP, one ignored a retrospective payment of carer element within UC. The Secretary of State was wrong to overlook that rule.



59. The amendment to the 2013 Regulations after the date of decision showed that the appeal was misconceived. From 29 June 2023, paragraph 5 of Schedule 2 to 2014 Regulations was amended by the 2023 Regulations to produce a result similar to the one for which the Secretary of State wrongly contended in this case, so that:

“(a) in paragraph 5(b)(i), for “if the higher SDP rate was payable” substitute “if the higher SDP rate is payable on the first day of the award and no person becomes a carer for either of them in the first assessment period”.

60. That amendment effectively closed off, for cases decided from 29 June 2023, the points made by Mr and Mrs W in this case. It now stated that one was looking, not at whether the SDP was payable on the previous ESA award, but whether it would have been payable on the first day of the UC award and further made the inclusion of the carer element relevant. The amendment showed that that was not how the rule operated at the time of the decision under appeal in this case.

61. Although the explanatory memorandum to the amendment explained that it clarified the position, it was plain that what it did was to “correct” the legislation (otherwise it would not “ensure” anything as the Regulations would already have ensured that).

62. The Upper Tribunal should either dismiss the appeal or set aside the decision of the Tribunal and remake it to the same effect, namely that Mr and Mrs W were entitled to the higher rate of the TSPDE with effect from 17 May 2022, as determined under paragraph 5(b)(i) of Schedule 2 to the 2014 Regulations as then in force.

## **Discussion**

63. It is common ground that the amended version of Schedule 2 of the 2014 Regulations did not apply to the decision under appeal since those amendments did not come into force until slightly more than a year after the

event. I have therefore had no recourse to the amended version in considering the meaning and effect of the original version as at 17 June 2022.

64. The language of paragraph 5(b)(i) is, as even Mr Williams accepted, infelicitous, or as he put it “awkward”. In the first place it does not say when the SDP is payable. Secondly, the language is in any event imprecise or loose since it is not SDP which is payable as such – rather it is ESA which is paid, but calculated so that the amount of SDP is included in the applicable amount. Mr Edwards was similarly critical of the lack of precision in relation to the phrase “was payable” since it did not specify when the higher SDP rate was payable.

65. As Mr Edwards put it in his skeleton argument, on the approach of the Tribunal, if a claimant had the lower rate of SDP in the last month prior to the first date of the UC award, but prior to that he had the higher SDP rate, it could be argued that paragraph 5(b)(i) meant that he could still be entitled to the higher rate of TSDPE because the higher rate “was” or had been “payable” in the legacy benefit at one point in time. That would lead to an absurdity in that the temporal limitations of paragraph 3(b) would in that way be defeated. Indeed on that approach it would never be possible to say, on the actual facts of the case, *when* the higher rate of SDP “was payable” for the purposes of the condition in paragraph 3(b). To obviate that potential problem and to avoid the outflanking of the temporal limitations of paragraph 3(b), the word “payable” in paragraph 5(b)(i) must be narrowly circumscribed.

66. In my judgment, paragraph 5(b)(i) of Schedule 2 to the 2014 Regulations does not stand alone and must be construed as part of the whole of the Schedule in those Regulations. One cannot interpret paragraph 5 other than in the light of paragraphs 2 and 3 which precede it. Thus, whether the higher rate of SDP “was payable” for the purposes of paragraph 5(b)(i) can only be understood by reference to what the claimant was previously entitled to under paragraph 3(b) (neither paragraph 2 nor paragraph 3(a) being in issue in this case).

67. In CPAG's initial response to the appeal, Mr Williams submitted that the Secretary of State's analysis depended on reading into paragraph 5(b)(i) a requirement, not as the provision actually stated that "the higher SDP rate was payable", but also that "and the conditions for the higher rate continued to be met on the date of claim". The paragraph did not say that (and indeed was amended to correct that).

68. By the time of the service of the skeleton arguments and in the oral submissions, the parties' differences on that point had very much narrowed and the focus of the argument shifted instead on to the application of paragraph 6(6) of Schedule 4 as the crucial matter in the case.

69. As Mr Williams put it in oral argument, paragraph 5(b)(i) could be redrafted to say that the higher rate of SDP was payable if the conditions for eligibility continued to be satisfied up to and including the first day of the first UC assessment period. For the Secretary of State Mr Edwards agreed when I put it to him that, on his case, the claimant had to satisfy the conditions of eligibility for a SDP up to and including the first day of the award, but that in this case, on his argument, the claimant had only satisfied the conditions of eligibility for a SDP up to, but not including, the first day of the award on 17 May 2022.

70. As Mr Williams again put it, in his skeleton argument, the parties appeared to be agreed that the issue in dispute in relation to Schedule 2 boiled down simply to whether it was correct to describe Mr and Mrs W as meeting the conditions of eligibility (as that phrase was used in paragraph 3(b)) for the higher rate of SDP on the day of the commencement of their UC award.

71. However, given what Mr W had told the Secretary of State on 30 May 2022 about his caring responsibilities for his wife, which reflected the position as at 17 May 2022, the Secretary of State was obliged to approach the decision to award UC on the basis that there had been a relevant change of circumstances with effect from the first day of the assessment period (17 May 2022). It must follow from this that, on the facts disclosed by Mr W as to his

caring responsibilities, neither Mrs W nor the couple were entitled to the higher rate on SDP on that day. They were instead entitled to, and were awarded, the carer's element of UC with effect from that day. Accordingly, it cannot be said that on the first day of the first assessment period that the higher rate of the SDP was payable, a phrase which can only be understood in the light of, and with reference to, paragraph 3 of Schedule 2.

72. If the higher rate was not therefore payable under paragraph 5(b)(i), one then turns to paragraph 5(b)(ii) which provides that if paragraph (i) does not apply and the LCWRA element is included in the award in respect of either member of the couple, the amount of TSDPE in the first assessment period is £120, not £405 because paragraph 5(b)(i) is not applicable.

73. It is therefore necessary to consider paragraph 6(6) of Schedule 4 to the 2008 Regulations. Mr Williams sought to argue that, considering matters as at 17 May 2022, it could be seen that Mr and Mrs W continued to be entitled to SDP on that date and continued to be entitled to the higher rate. That was because, although from 17 May 2022 they had an award of UC which included the carer element (because Mr W was a carer for his wife), that award was not made until 17 June 2022 and payment was not made until after that. Thereafter, by virtue of paragraph 6(6) of Schedule 4 to the 2008 Regulations

“no account is to be taken of an award of carer's allowance or universal credit which includes the carer element to the extent that payment of such an award is backdated for a period before the date on which the award is first paid”

and that was fatal to the attempt to overturn the Tribunal's decision in this case. For the purposes of ESA SDP, one ignored the retrospective payment of carer element within UC.

74. Mr Williams argued that that provision defeated the Secretary of State's argument that, when paragraph 6(6) of Schedule 4 was applied to the facts of

the case as they stood at 17 May 2022, and given the facts disclosed by the couple pertaining to that day, it followed that they were not entitled to the higher rate of SDP on that day. On the contrary, the Secretary of State's submission provided no answer to the fact that, for the purposes of paragraph 6(6), one needed to ignore the award of UC which included the carer element because the payment of that award was backdated for a period before the date on which the award was first paid. Regulation 47 of the UC, PIP, Jobseeker's Allowance and ESA (Claims and Payments) Regulations 2013 ("the C & P Regulations 2013") provided that UC was paid monthly in arrears, so that the payment of the award was always backdated for a period before which it was first paid.

75. That, he argued, was the way in which paragraph 6(6) of Schedule 4 was supposed to work. In particular the reference to "backdating" was not used in the usual way of an award being made and then paid for a period *before* the claim was presented. That was clear from the Secretary of State's own Guidance to Decision Makers, which at paragraph 44159 contained the following example

**"Arrears of CA/UC that includes the carer element**

44159 An award of CA/UC that includes the carer element may be backdated for a period before the date on which the CA/UC that includes the carer element award is first paid. Arrears of CA/UC that includes the carer element due in such circumstances do not affect entitlement to SDP (ESA Regs, Sch.4 para 6(6)]. SDP is only affected from the date the CA/UC that includes the carer element award is paid.

**Example**

Karim is a single claimant in receipt of SDP. On 20 November a relative claims CA. CA is awarded on 23 January. It is first paid on 6 March. Arrears are included in the first payment from the date of claim. SDP is affected from 6 March".

76. I am, however, satisfied that the Secretary of State is correct and that regulation 6(6) of Schedule 4 does not assist Mr and Mrs W on the facts of this case because their case involves no element of backdating.

77. Mr Williams was constrained to admit that the reference to “backdating” in regulation 6(6) was confusing and that the word was not used in the usual way of an award being made and then paid for a period *before* the claim was presented. He accepted that this was not a case of backdating entitlement, but argued that it was a case of backdating payment, which would always arise because UC was always paid in arrears by virtue of regulation 47 of the C & P Regulations 2013. The language used in the provision was one of payment, not entitlement. One had to work out the date *on* which UC was first paid, not the date *from* which it was first paid and therefore no account should be taken of an award of UC which included the carer element to the extent that *payment* of such an award was backdated for a period before the date on which the award was first *paid*.

78. However, in my judgment, Mr Edwards was right to submit that the word “backdating” was used in its orthodox sense and thus would have to involve payment *for a period earlier* than the first day of the first assessment period, which was not the case here since the payment was not for an earlier period than the first day of the first assessment period. Here the payment, albeit received in arrears, was made from the first day of the first assessment period (17 May 2022) and not in respect of any earlier period.

79. In my judgment, Mr Edwards is also correct that the purpose of regulation 6(6) is a much more limited one: it is a means to avoid backdating giving rise to an overpayment of ESA and is simply a protective element to avoid an overpayment of ESA SDP in the event of a backdating of carer allowance or the carer element of UC.

80. The Secretary of State’s Guidance is therefore quite correct, but it is not of any assistance to the respondents in this case. The example of Karim does not undermine her case, but rather assists it. The example is correct in relation to the set of circumstances with which it deals, but it does not speak to this case where the circumstances changed in the course of the determination of the claim and during the first assessment period because of

the information provided on 30 May 2022, but with effect from the first day of the first assessment period on 17 May 2022 when Mr W stated that he started caring for his wife.

81. For the sake of completeness, I should add that I do not accept the tentative conclusion posited in paragraph 20 of the Tribunal's statement of reasons to the effect that there may be another flaw in the Secretary of State's case, namely that Part 3 of Schedule 4 of the 2008 Regulations refers in paragraph 11(2)(b), when specifying who is entitled to the higher rate of SDP, only to carer's allowance and not to the carer's element of UC:

“(2) Severe disability premium—

[...]

(b) where the claimant satisfies the condition in paragraph 6(2)(b)—

(i) if there is someone in receipt of a *carer's allowance* or if the person or any partner satisfies that condition only by virtue of paragraph 6(5)(i) [lower amount]

(ii) if no-one is in receipt of such an allowance (ii) [higher amount]”.

82. Thus, speculated the Tribunal, when that provision was read with paragraph 6(2)(b) of the Schedule, it could be argued that, only in the case of couples, inclusion in the UC award of the carer's element did not prevent payment of the higher SDP rate. That appeared to be the result of an oversight when the Schedule was amended to include reference to the carer's element of UC.

83. What paragraph 11(2)(b) provides is that, where the claimant satisfies the condition in paragraph 6(2)(b) (which is not in dispute in this case), if no-one is in receipt of such an allowance as is mentioned in (b)(i), then the higher amount is payable. In this case, no-one is in receipt of such an allowance as is mentioned in (b)(i) because no-one is in receipt of carer's allowance

(instead the entitlement is to the carer element of UC, which is not referred to in paragraph 11(2)(b)(i)).

84. However, the definition in paragraph 11(2)(b) of the 2008 Regulations falls to be construed in the context of Schedule 2 of the 2013 Regulations. In the Schedule it is provided in paragraph 8 that

““the higher SDP rate” is the rate specified in sub-paragraph (ii) of paragraph 11(2)(b) of Schedule 4 to the Employment and Support Allowance Regulations 2008 or, as the case may be, the corresponding rate of a severe disability premium in relation to income support or income-based jobseeker’s allowance”.

85. Thus in the context of Schedule 2 to the 2013 Regulations, the definition in paragraph 11(2)(b) of the 2008 Regulations only defines “the higher SDP *rate*”. It does not bear on the question of whether that rate “was payable” within the meaning of paragraph 5(b)(i), which must be construed in the light of paragraph 3 and does not therefore militate against the conclusion which I have reached above.

86. The conclusion which I have reached above accords not only with the correct construction of paragraphs 3 and 5 of Schedule 2 when taken together and regulation 6(6) of the 2008 Regulations, but also aligns with the background to Schedule 2 in the light of the decision of the Court of Appeal in ***R (TP, AR & SXC)***. The effect of that decision was that those who claimed UC, following natural migration due to a change of circumstances, and who received SDP as part of their legacy benefits, should be compensated for their loss of income. It was not intended to place such claimants in a more favourable financial position than they were previously.

87. As Mr Edwards submitted, TSDPE is designed only to compensate certain claimants who received SDP following their migration to UC. The arrangements for UC were not intended to replicate the provisions governing legacy benefits. An award of UC may include an LCWRA element and in relevant cases such an amount in UC can be more than double the equivalent



amount in ESA. That is one reason why the conditions for an award of TSDPE in Schedule 2 reflect any award of LCWRA.

### **Conclusion**

88. For these reasons I am satisfied that the decision of the First-tier Tribunal sitting at Caernarfon dated 16 December 2022 under file reference SC220/22/00036 involves an error on a point of law. The appeal against that decision is allowed and the decision of the Tribunal is set aside.

89. I remake the decision which the Tribunal should have made.

90. The decision is that, from the commencement date of the award of UC on 17 May 2022, Mr W was entitled to an award of UC comprising the standard allowance, the carer element, a LCWRA element and a SDP at the lower rate of £120, not the higher rate of £405.

**Mark West**  
**Judge of the Upper Tribunal**

**Signed on the original on 12 December 2024**