



Neutral Citation Number: [2020] EWCA Civ 778

Case No: C1/2019/0593

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
LORD JUSTICE SINGH and MR JUSTICE LEWIS
CO/1643/2018 and CO/1552/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 June 2020

Before :

LORD JUSTICE UNDERHILL
(Vice President of the Court of Appeal Civil Division)
LORD JUSTICE IRWIN
and
LADY JUSTICE ROSE

Between :

**SECRETARY OF STATE FOR
WORK AND PENSIONS**

Appellant

-and-

(1) DANIELLE JOHNSON
(2) CLAIRE WOODS
(3) ERIN BARRETT
(4) KATIE STEWART

Respondents

Edward Brown (instructed by the **Treasury Solicitor**) for the Appellant
Jenni Richards QC and Tom Royston (instructed by **Leigh Day**) for the First Respondent
Jenni Richards QC and Stephen Broach (instructed by **Child Poverty Action Group**) for the
Second to Fourth Respondents

Hearing dates : 19 and 20 May 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30 a.m. on Monday 22 June 2020

Lady Justice Rose:

1. BACKGROUND

1. This appeal raises an important issue arising from the implementation of the new system of universal credit providing social security benefits. Universal credit is described in the evidence before this Court as marking a fundamental move away from previous policies for supporting the poorest and most vulnerable members of our society. It has been a central platform of the Government's social policy reform agenda since 2010 and will be the most significant welfare reform in the past 70 years. It is intended to make social entitlement provision fairer, more affordable and better able to tackle poverty, worklessness and welfare dependency.
2. The Secretary of State for Work and Pensions ('SSWP') appeals against the order of the Divisional Court (Singh LJ and Lewis J) following the judgment of that court handed down on 11 January 2019. Permission to appeal was granted by Hickinbottom LJ on 5 November 2019. The case concerns the application of the provisions of the Universal Credit Regulations 2013 (SI 2013/376) ('the Regulations') which set out how a claimant's earned income is calculated for each monthly assessment period within that claimant's period of entitlement to universal credit. The amount of earned income in an assessment period is an important element when working out how much benefit the claimant will be awarded for that assessment period. The dispute arises because, broadly, the system for identifying the income earned by a claimant in a particular assessment period does not accommodate the fact that people who are usually paid their salary on a particular day each month, such as on the last day of the month, will in fact be paid on a different day if their usual payment date falls on a weekend or bank holiday. In certain circumstances this leads to two monthly salary payments falling within one of the monthly assessment periods applicable for that claimant. The claimant's universal credit award in respect of that assessment period is then greatly reduced in response to the apparently high level of income received. In the next assessment period they will typically receive no monthly salary payment. In response to that apparent sudden drop in income, they will subsequently get a much higher universal credit award. I shall refer to that problem in this judgment as caused by "the non-banking day salary shift".
3. Although one might think that this would even itself out over time, there are two reasons why the Respondents argue that that is not a sufficient answer and why they have brought these proceedings to challenge this aspect of how the scheme operates. The first is that the great fluctuations in income each month, aggravated by the fact that universal credit is paid in arrears, make it very difficult for claimants to budget for their stable monthly outgoings. This causes them to incur additional costs such as overdraft fees, high interest on short term loans or unpaid bills, and in some instances court fees to prevent landlords evicting them if they fall behind with their rent. Even more concerning is that claimants affected by this problem irrevocably lose money over the course of a year because they lose the opportunity to receive the work allowance for the assessment period when they appear to have nil income. The work allowance is the amount of salary that a universal credit claimant can earn before their award of benefit is reduced.

4. The Divisional Court held that the problem had arisen because the SSWP had wrongly construed regulation 54 of the Regulations which sets out the general principles for calculating earned income. They held that the wording of the provision did not, as the SSWP had argued, require that all earned income received in a particular assessment period be included in the calculation of the claimant's universal credit award in respect of that period. The wording of the regulation indicated that an adjustment has to be made where, as here, some of the income received in fact relates to a different assessment period. The SSWP appeals to this Court arguing that the Divisional Court was wrong to construe regulation 54 in that way. Such a construction, she says, throws the whole operation of the universal credit system approved by Parliament into confusion because the calculation of the appropriate award for each assessment period for the millions of claimants each month is an automated process requiring clear, easily identified inputs. This is achieved by basing the award on the actual amount of income received in the assessment period without considering whether it relates in some subjective way to that period or to another period. The Regulations cannot achieve what Parliament intended to achieve when setting up the scheme if the SSWP has to perform the kind of evaluative exercise of working out which income received relates to which assessment period that the Divisional Court's construction seems to mandate.
5. The Respondents seek to uphold the Divisional Court's construction of the regulation largely for the reasons given by that Court. They have also served a Respondents' Notice raising two challenges on which they rely if the SSWP is right about how to construe the Regulations. They argue that the result of the SSWP's construction for these claimants and the many thousands of other claimants in the same position is so arbitrary and contrary to the aims of the universal credit reforms that the Regulations should be struck down on grounds of irrationality in so far as they mandate that result. Secondly, the Respondents assert that the Regulations discriminate against them contrary to Article 14 of the European Convention on Human Rights ('ECHR'), in conjunction with Article 1 of Protocol 1.

(a) The legislation

6. The Welfare Reform Act 2012 ('WRA') is an open-textured statute which lays down the building blocks of the universal credit regime but leaves the definition of each element to be enacted in regulations made by the SSWP. Universal credit is payable to those who meet the basic conditions set out in section 4 WRA and the financial conditions set out in section 5 WRA. Section 7 WRA provides:

"7 Basis of awards

- (1) Universal credit is payable in respect of each complete assessment period within a period of entitlement.
- (2) In this Part an "assessment period" is a period of a prescribed duration.
- (3) Regulations may make provision-
 - (a) about when an assessment period is to start;

(b) for universal credit to be payable in respect of a period shorter than an assessment period;

(c) for the amount payable in respect of a period shorter than an assessment period.

(4) In subsection (1) “period of entitlement” means a period during which entitlement to universal credit subsists.”

7. Section 8 WRA provides that the amount of an award of universal credit is to be the total of the four elements that go to make up an award less the amounts to be deducted. The four elements that make up the maximum amount are the standard allowance, an amount included for a claimant who has responsibility for children and young persons, housing costs and an amount for other particular needs or circumstances including disability or caring for a severely disabled person. As to the amounts to be deducted from that maximum amount, section 8(3) provides:

“8 Calculation of awards

...

(3) The amounts to be deducted are —

(a) an amount in respect of earned income calculated in the prescribed manner (which may include multiplying some or all earned income by a prescribed percentage), and

(b) an amount in respect of unearned income calculated in the prescribed manner (which may include multiplying some or all unearned income by a prescribed percentage).”

8. The power to make regulations is granted by a series of powers set out in Schedule 1 to the WRA. Paragraph 4(1) of that Schedule states that regulations may provide for the calculation or estimation of a person’s earned and unearned income and also of a person’s earned and unearned income in respect of an assessment period. The regulation-making power was drafted widely to cover potential policy choices that were not in fact adopted. For example, paragraph 4(2) allows for the calculation to be made by reference to an average over a period.

9. Part 3 of the Regulations contains provisions for the purposes of sections 7 and 8 WRA. Assessment periods are fixed to start on the date of presentation of the claim since that is when entitlement starts. Universal credit awards are paid within seven days following the end of the assessment period. In relation to assessment periods, regulation 21 provides so far as relevant as follows:

“21 Assessment periods

(1) An assessment period is a period of one month beginning with the first date of entitlement and each subsequent period of one month during which entitlement subsists.

(2) Each assessment period begins on the same day of each month except as follows—

(a) if the first date of entitlement falls on the 31st day of a month, each assessment period begins on the last day of the month; and

(b) if the first date of entitlement falls on the 29th or 30th day of the month, each assessment period begins on the 29th or 30th day of the month (as above) except in February when it begins on the 27th day or, in a leap year, the 28th day.

(2A) But paragraphs (1) and (2) are subject to regulation 21A (assessment period cycle to remain the same following change in the first date of entitlement).”

10. Regulation 22 deals with the amounts to be deducted from the maximum amount in accordance with section 8(3) WRA and sets the amount of the work allowance:

“22 Deduction of income and work allowance

(1) The amounts to be deducted from the maximum amount in accordance with section 8(3) of the Act to determine the amount of an award of universal credit are—

(a) all of the claimant’s unearned income (or, in the case of joint claimants all of their combined unearned income) in respect of the assessment period; and

(b) the following amount of the claimant’s earned income (or, in the case of joint claimants, their combined earned income) in respect of the assessment period—

(i) in a case when no work allowance is specified in the table below (that is where a single claimant does not have, or neither of joint claimants has, responsibility for a child or qualifying young person or limited capability for work), 63% of that earned income; or

(ii) in any other case, 63% of the amount by which that earned income exceeds the work allowance specified in the table.

(2) The amount of the work allowance is—

(a) if the award contains no amount for the housing costs element, the applicable amount of the higher work allowance specified in the table below; and

(b) if the award does contain an amount for housing costs element, the applicable amount of the lower work allowance specified in that table.”

11. The table included in regulation 22 provides that the higher work allowance applicable for a single claimant who is responsible for one or more children or qualifying young persons and/or has limited capability for work and who does not receive an amount for housing costs is currently £512 (updated as at 6 April 2020). The lower work allowance for a single claimant who is responsible for one or more children or qualifying young persons and/or has limited capability for work and who does receive a housing costs element in their award is currently £292.
12. The detailed calculation of earned income for the purposes of section 8 WRA is set out in Chapter 2 of Part 6 of the Regulations. First there is the definition of “earned income”:

“52 Meaning of “earned income”

“Earned income” means —

- (a) the remuneration or profits derived from—
 - (i) employment under a contract of service or in an office, including elective office,
 - (ii) a trade, profession or vocation, or
 - (iii) any other paid work; or
- (b) any income treated as earned income in accordance with this Chapter.”

13. Regulation 54(1) which is at the heart of this appeal provides as follows:

“54 Calculation of earned income - general principles

(1) The calculation of a person’s earned income in respect of an assessment period is, unless otherwise provided in this Chapter, to be based on the actual amounts received in that period.

...”

14. Regulation 55 applies for the purposes of calculating earned income from employment under a contract of service or in an office including elected office – that income is referred to as “employed earnings”. Employed earnings comprise any amounts that are general earnings as defined in section 7(3) of the Income Tax (Earnings and Pensions) Act 2003 (‘ITEPA’) but excluding or disregarding certain amounts which are treated as earnings under that Act or which are exempt from income tax or which are expenses that can be deducted under ITEPA. Further, certain benefits are to be treated as employed earnings for the purposes of calculating earned income such as statutory sick pay and shared parental pay. Some deductions are allowed from those general earnings or benefit receipts such as relievable pension contributions or charitable donations to an approved scheme under the payroll giving arrangements: see regulation 55(3) and (5).

15. Regulation 61 deals with how the SSWP obtains information for the purposes of calculating a claimant's earned income:

“61 Information for calculating earned income - real-time information etc

(1) Unless paragraph (2) applies, a person must provide such information for the purposes of calculating their earned income at such times as the Secretary of State may require.

(2) Where a person is, or has been, engaged in an employment in respect of which their employer is a Real Time Information employer—

(a) the amount of the person's employed earnings from that employment for each assessment period is to be based on the information which is reported to HMRC under the PAYE Regulations and is received by the Secretary of State from HMRC in that assessment period; and

(b) for an assessment period in which no information is received from HMRC, the amount of employed earnings in relation to that employment is to be taken to be nil.

(3) The Secretary of State may determine that paragraph (2) does not apply—

(a) in respect of a particular employment, where the Secretary of State considers that the information from the employer is unlikely to be sufficiently accurate or timely; or

(b) in respect of a particular assessment period where—

(i) no information is received from HMRC and the Secretary of State considers that this is likely to be because of a failure to report information (which includes the failure of a computer system operated by HMRC, the employer or any other person); or

(ii) the Secretary of State considers that the information received from HMRC is incorrect or fails to reflect the definition of employed earnings in regulation 55, in some material respect.

(4) Where the Secretary of State determines that paragraph (2) does not apply, the Secretary of State must make a decision as to the amount of the person's employed earnings for the assessment period in accordance with regulation 55 (employed earnings) using such information or evidence as the Secretary of State thinks fit.

(5) When the Secretary of State makes a decision in accordance with paragraph (4) the Secretary of State may —

(a) treat a payment of employed earnings received by the person in one assessment period as received in a later assessment period (for example where the Secretary of State has received the information in that later period or would, if paragraph (2) applied, have expected to receive information about that payment from HMRC in that later period); or

(b) where a payment of employed earnings has been taken into account in that decision, disregard information about the same payment which is received from HMRC.

(6) Paragraph (5) also applies where the Secretary of State makes a decision under regulation 41(3) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 in a case where the person disputes the information provided by HMRC.

(7) In this regulation "Real Time Information Employer" has the meaning in regulation 2A(1) of the PAYE Regulations."

16. Regulation 2A of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) referred to in regulation 61(7) was inserted by amendment in 2012 and provides that a Real Time Information Employer is an employer who has been given a general or specific direction by HMRC to deliver to HMRC real time information about payments of salary.

(b) The evidence before the Divisional Court

17. Ms Woods lodged her judicial review claim in April 2018 and Ms Barrett and Ms Stewart were joined to that claim in July and August 2018. Ms Johnson brought separate proceedings also in April 2018 and the two sets of proceedings were linked by order of Lang J in July 2018. Ms Woods described the decision she was challenging as the ongoing decision of SSWP not to amend her assessment period for universal credit purposes every time that two monthly wage payments fall to be included in one assessment period. The decision to be judicially reviewed in Ms Johnson's claim was said to be the decision to calculate her entitlement to universal credit in an assessment period based on the day she applied for universal credit. In both the claim forms the basis for the challenge was discrimination contrary to article 14 ECHR and irrationality. Ms Johnson in addition alleged a breach of the public sector equality duty and Ms Woods alleged a breach of the *Padfield* principle (named after *Padfield v Minister for Agriculture, Fisheries and Food* [1968] AC 997), asserting that the Regulations undermine the purpose of the primary legislation. Neither of them raised an issue about the interpretation of regulation 54. Each of the Respondents provided evidence before the Divisional Court explaining their personal circumstances, how they came to claim universal credit, the amounts awarded to them and the effect on their lives of the way the SSWP has implemented regulation 54.

18. Danielle Johnson left school at 16 and studied at college full-time for two years obtaining a vocational qualification as a hairdresser. She worked part-time during her studies. Her daughter was born in September 2012 and Ms Johnson was for a time a full-time mother claiming income support allowance, child tax credits, child benefit, housing benefit and council tax reduction. When her daughter started school, Ms Johnson was offered a job as a dinner lady at a local school. Ms Johnson says she really enjoys her job and that the set days and hours work well with her childcare responsibilities. She describes how proud she was that she had found a job by herself: “When I was told I had the job, I cried down the phone because I was so happy to have a job that worked around my daughter’s childcare needs. It was a massive relief.” Although she only worked during term time, her pay was spread evenly throughout the year so each month she was paid £472. She is paid her salary on the last working day of each month unless that day is a non-banking day in which case she is paid early. Part of the attraction of the job was, she says, that it provided a regular, steady income which gave her security.
19. Once she had been formally offered the job Ms Johnson contacted the local Jobcentre and was advised to apply for universal credit. The date she applied for universal credit was 31 August 2017 and she started work on 1 September. Her assessment period runs from the last day of the month to the penultimate day of the following month. The maximum amount of universal credit to which she is entitled in any one assessment period is about £950.
20. At the time when she was joined to the judicial review proceedings, Erin Barrett was living with her son born in November 2014. She left school with good qualifications and went straight into working full-time rather than further study. After a period of maternity leave, she went back to work part-time and started claiming child tax credit and working tax credit. In December 2016 she was engaged as a healthcare assistant at York Hospital working 24 hours per week. She claimed housing benefit in August 2017 which meant that she moved on to universal credit. She made a claim for universal credit at her local Jobcentre. The date of her application meant that her assessment period runs from the 28th day of one month to the 27th of the next. She was paid by York Hospital on the 28th day of the month unless that was a non-banking day in which case she was paid on the working day before the 28th.
21. Claire Woods lives with her two sons born September 2009 and May 2012. After finishing school, she attended a further education college where she obtained a BTec National diploma in public services. She worked both before and after her first maternity leave. After moving house following the birth of her second son, she became a full-time mother. When the eldest boy started at the local primary school Ms Woods took a full-time foundation degree in Early Childhood Studies followed by a BA Hons in Health and Social Care, graduating in June 2017. After graduating she secured a job in the childcare legal department of Somerset County Council. She started work on 18 September 2017 and worked there three days a week. Her pay date was the last working day of the month and she earned £776 per month. She applied for universal credit in June 2017 on completion of her studies. Her initial appointment at the Jobcentre was on 30 June 2017 so her assessment period runs from the 30th of the month to the 29th of the following month.
22. Katie Stewart is also a single parent with a daughter born in November 2016. Ms Stewart has an NVQ Level 3 in childcare. When her daughter was a baby Ms Stewart

moved into social housing and claimed universal credit. Her assessment period runs from the 28th day of one month to the 27th day of the next and her salary is paid on the 28th day of each month.

23. All the Respondents are responsible for one or more children and receive a housing costs element as part of their universal credit award. They therefore have an entitlement to the lower work allowance amount specified in the table to regulation 22. All of them work for RTI employers so that regulation 61(2) applies.
24. In addition to the evidence filed by the four Respondents, the Divisional Court had evidence from other witnesses on behalf of the Respondents. There was a witness statement from Carla Clarke the solicitor with the Child Poverty Action Group ('CPAG') instructed by Ms Woods, Ms Barrett and Ms Stewart. There was also evidence from Helen Hargreaves who is the Associate Director of Policy at the Chartered Institute for Payroll Professionals. The Institute provides payroll and pensions support to individuals and businesses. Her evidence dealt with how payrolls work. There was also a witness statement from Edward Pickering who is the CEO of Citizens Advice Craven and Harrogate Districts and formerly worked as a Senior Manager at Citizens Advice Merton and Lambeth. His evidence deals with the difficulties created by fluctuating income for people on benefits.
25. On behalf of the SSWP there were statements from Neil Couling CBE, Debbie McMahon and Niamh Parker. Mr Couling holds the position of Universal Credit Programme Senior Responsible Owner. In 2010 he was the principal policy adviser on universal credit and describes the key policy proposals, core objectives, rationale and principles underpinning universal credit. The overriding policy rationale was, he says, "to make the journey into work smoother by removing some of the frictions in the legacy system." He explains in detail how the DWP arrived at the decision that an assessment period should be one month long rather than weekly like many legacy benefits or yearly like tax credits. Ms McMahon is Head of Service Design, Business Architecture and Product Impacting and has oversight of the build and structure of the universal credit service. She addresses various suggestions put forward by the Respondents as to how the system could be amended or designed to avoid the problem that has arisen from the non-banking day salary shift. She also describes the process of Parliamentary scrutiny and consultation on universal credit, particularly on the question of whether the assessment period should be monthly. She describes the Ministerial decision-making on assessment periods and exhibits to her witness statement some contemporaneous policy submissions to which I will return later.

(c) The judgment of the Divisional Court

26. As I have said, the judicial review challenges did not raise the issue of the proper interpretation of regulation 54 but contended that the Regulations as applied by the SSWP were irrational and discriminatory. At the hearing, the Court raised what it described at para. 40 of the judgment as "the first and logically prior question" of the proper interpretation of the relevant statutory provisions. The Court referred to the speech of Lord Nicholls of Birkenhead in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 396F-398F where he set out the exercise which the court undertakes when identifying the meaning borne by words in a statute. The task is to identify the meaning of the words used in regulation 54 in the particular context in which they are used having regard to

other permissible aids to interpretation such as any relevant presumption, the legislative history of the provision and other background material, in so far as that assists in identifying the defect that the provision is intended to cure or the purpose that the provision is intended to achieve. The Court then considered the wider context of the Regulations in the structure created by the WRA. That Act was intended to confer an entitlement to welfare benefit to be comprised of amounts reflecting the needs of individuals in terms of the elements of caring for children, housing costs and other prescribed needs. Part at least of the underlying aim was to facilitate or encourage people to work and to that end regulations prescribed the amount of earned income to be deducted from the amount of universal credit otherwise payable and conversely the amount of earned income that could be retained by the claimant without having any effect on the amount of benefit paid: [45]. Turning to the specific context, the Divisional Court referred to regulation 22 stipulating when the work allowance applies.

27. The Divisional Court analysed the wording of regulation 54(1) focusing on two phrases used:

“(1) The calculation of a person’s earned income **in respect of** an assessment period is, unless otherwise provided in this Chapter, **to be based on** the actual amounts received in that period.”

28. The Court went on:

“50 Regulation 54 of the 2013 Regulations does not provide that the amount of earned income “is to be the actual amounts” received “in” the assessment period. Rather, the amount of earned income is to be “based on” the actual amounts received. Furthermore, the purpose of the calculation is, as appears from the opening words of the calculation, to calculate the amount of a person’s income “in respect of an assessment period”.

51. Similarly, where information is supplied by the employer in accordance with Regulation 61, the amount of “the persons’ employed earnings from that employment for each assessment period is to be based on the information provided”. Again, the amount is not to be, for example, “the amount specified in the information provided”. Rather, it is “to be based” on the information provided. That, again, reinforces the view that the amount of earned income to be deducted is not necessarily the amount actually received in an assessment period but is to be based on those amounts. There is intended to be some other factor, not the mere mechanical addition of monies received in a particular period, which the calculation has to address.

52. That other factor is the period in respect of which the earned income is earned. It is the earned income in respect of the period of time included within the assessment period that is to be calculated. That is to be based on the actual amounts received in the assessment period. There may, however, need to

be an adjustment where it is clear that the amounts received in an assessment period do not, in fact, reflect the amounts of earned income received in respect of the period of time included within that assessment period.”

29. The Court held that this construction was consistent with the wording of the Regulations read as a whole and with regulation 22 in particular. Regulation 22 referred to the deduction of the amount of the claimant’s earned income “in respect of” the assessment period. The interpretation better reflected the aim of regulation 22 which was that the claimant should retain a particular amount of earned income in respect of each assessment period to reflect the living costs that that claimant will incur in that assessment period:

“54 ... It would be odd in the extreme if the calculation method in regulation 54 meant that a claimant would in respect of one month’s salary be prevented from retaining the amount of the work allowance for that month because the salary happened to have been paid in the same assessment period as another month’s salary, with the consequence that the two months’ salary were combined and only one amount of work allowance could be deducted.”

30. The interpretation favoured by the Court also accorded with the reality of the underlying factual situation. The Court concluded:

“56. For all those reasons, on a proper interpretation of regulation 54, read in context, the earned income of a claimant is the earned income he or she receives in respect of the assessment period, that is in respect of periods of time comprising the assessment period. The calculation will be based upon the actual amounts received. That will be the starting point and in many, perhaps in the vast majority of cases, may well be the finishing point of the enquiry that the legislation requires. However, there may need to be an adjustment where it is clear that the actual amounts received in an assessment period do not, in fact, reflect the earned income payable in respect of that period.”

31. The Court then considered and rejected the arguments put forward by Mr Brown who appeared on behalf of the SSWP before them as he did before us. They held that the SSWP had wrongly interpreted regulation 54 and wrongly assumed that where salaries for two different months were received during the same assessment period the combined salaries from the two months were to be treated as earned income in respect of that assessment period.
32. The Divisional Court did not therefore need to address the arguments on rationality, discrimination or the *Padfield* principle. The Court did address the alleged breach of the public sector equality duty imposed by section 149 of the Equality Act 2010. The Court examined the evidence put forward and held that the SSWP had complied with her duty under that section: para 67. There is no appeal against that conclusion to this Court.

33. There was a subsequent hearing dealing with consequential matters following which the Divisional Court made its order which was worded as follows:

“The Claimants’ applications for judicial review are allowed to the extent that it is DECLARED for the purposes of regulation 54 of the Universal Credit Regulations 2013 that for the reasons set out in the Court’s judgment, the amount of earned income of a claimant in respect of an assessment period is to be based on, but will not necessarily be the same as, the amount of earned income actually received in that assessment period.”

2. THE PROPER CONSTRUCTION OF REGULATION 54

34. Mr Brown did not take issue with the Divisional Court’s formulation of the test derived from *ex p Spath Holme*. He argued that the Court was wrong to draw from the phrases “in respect of” and “to be based on” used in regulation 54 any flexibility in the attribution of monies received to various assessment periods or any requirement for making adjustments in the calculation of earned income. The Court, he submitted, fell into error in failing to take into account the wide range of circumstances in which the provision had to be applied and the importance to the system as a whole of having a simple way of identifying inputs required for the automated calculation of the monthly award for many millions of claimants.
35. I have concluded with some reluctance that the Divisional Court did fall into error in construing regulation 54. I consider that the provision cannot bear the meaning they gave to it without substantially undermining the scheme as Parliament intended it to operate.
36. The following factors are important within the wider context of the regulation. The definition of “earned income” in regulation 52 is deliberately drawn very widely to catch not only remuneration from conventional employment under a contract of service but pay received for a trade or “any other paid work”. The cohort of people likely to be claiming universal credit will contain many people whose work is of a casual, sporadic nature and who receive their payment for that work in lump sums or instalments rather than in regular amounts. The general principles set out in regulation 54 have to apply to all those kinds of work and all those patterns of income. The regulation is not specific to those in employment still less to those working for an RTI employer. During the course of argument many different commonly-occurring instances were discussed where people receive money for work which they have performed in a different assessment period from the period in which the money is received. A person may receive a commission or bonus payment rewarding them for achieving a sales target as a result of work performed over the previous six months; a tradesman may take on a job and receive an upfront payment before starting the job, then work for a number of months and receive a lump-sum payment at the end of the job, or in weekly instalments following the end of the job. In each case the actual receipt could be said not to be earned income in respect of the assessment period in which it is received but in respect of a number of assessment periods including that one or in respect of one or more entirely different assessment periods.

37. I accept Mr Brown's submission that the construction of regulation 54 adopted by the Divisional Court raises a large number of questions about whether an adjustment would be appropriate in all those cases as well as in the instant cases. The circumstances in which the Divisional Court envisaged that an adjustment would need to be made were described in para. 52 of the judgment. The Court referred first to the "period in respect of which the earned income is earned" and went on to say that there may need to be an adjustment "where the amounts received in an assessment period do not, in fact, reflect the amounts of earned income received in respect of the period of time included within that assessment period". The formulation in the final sentence of paragraph 56 was that an adjustment may be needed where "the actual amounts received in an assessment period do not, in fact, reflect the earned income payable in respect of that period". Whether these two formulations were intended to limit the circumstances where an adjustment is needed to the circumstances in which these Respondents find themselves but not to other commonly occurring circumstances is not clear. It is difficult to see how one could infer such a subtle line from the wording of the provision.
38. The Divisional Court rejected the argument that a broad interpretation of regulation 54 opened up the possibility of many claimants arguing that their earned income should not necessarily be the same as their actual receipts during one or more of their assessment periods. The Court said that in those other cases it may well be that the appropriate starting point is to base the earned income on the actual amounts received and that depending on the circumstances there will not be any reason for considering that that results in an incorrect calculation: para 57. The present circumstances involved employees working on a monthly basis and paid a monthly salary and in those circumstances regulation 54 required that such an adjustment could be made. The difficulty that I see with rejecting SSWP's argument for that reason is that the Court's construction of regulation 54 produces wording that provides no guidance as to when the starting point should also be the finishing point, or when the application of regulation 54 does result in an incorrect calculation of the earned income in respect of that assessment period. The potential breadth of the provision as construed by the Divisional Court is apparent from the wording of the declaration granted in the order under appeal. That states that the earned income is to be based on, but not necessarily the same as, the actual receipt in that assessment period. Although the declaration refers back to the reasoning of the Court's judgment, it does not otherwise attempt to describe when the earned income will not be the same as the amount actually received.
39. In my judgment the wording of regulation 54 is designed to avoid the need for that kind of examination of the relationship between the work done and the amount received in any one assessment period. That is essential because, as Mr Brown submitted, the system of universal credit is intended to be automated so that the calculation of the monthly amount can be performed by a computer rather than a DWP officer able to make an evaluative determination.
40. The Divisional Court dealt with that argument at paras 59 and 60 of their judgment. The Court said that if the Regulations properly interpreted mean that the calculation must be done in a particular way, that is what the law requires. The language of the Regulations cannot be distorted to give effect to a design proceeding on a basis which is wrong in law, whatever the administrative inconvenience or cost involved. That is

of course correct but does not entirely meet Mr Brown's point. If the Regulations were drafted with the aim of ensuring that the calculation of awards each month could be an automated process, it is legitimate to take that purpose into account when applying the canons of construction described in *Ex p Spath Holme*. The Divisional Court also rejected that argument on the grounds that the Regulations clearly do contemplate manual intervention in some circumstances. Regulation 61 contemplates that there are circumstances where the SSWP will need to decide what information to use when accurate and timely information is not forthcoming from the RTI employer. Again, this does not meet the SSWP's objection that the interpretation set out in the declaration made by the Divisional Court opens up the possibility of very many more and varied occasions where manual intervention would be necessary to determine whether the amount received in the assessment period really is earned income payable in respect of that assessment period. I do not agree that the existence of a limited exception in regulation 61 deprives the SSWP's concerns of any validity.

41. There is no need in my judgment to give regulation 54 the meaning adopted by the Divisional Court in order to give some substance to the phrases "in respect of" and "to be based on". The phrase "earned income in respect of an assessment period" used in regulation 54 and similar phrases are used elsewhere in the WRA and the Regulations where they do not denote that some kind of allocation or attribution is required. For example, section 7 WRA refers to universal credit being "payable in respect of each complete assessment period". In section 10(1), the WRA provides that universal credit is to include "an amount **for** each child" for whom a claimant is responsible but subsection 10(1A) refers to the amount being available "**in respect of** a maximum of two persons". The two formulations are clearly intended there to mean the same thing; the legislation does not always use the phrase "in respect of" to mean something different from simply saying "for" or "in".
42. The reference to the calculation "being based on" the amount received makes sense given that regulation 55 specifies a number of ways in which the employed earnings to be taken into account as "earned income" may differ from the sum actually received by the claimant. If, for example, the amount actually received in the assessment period included expenses falling within regulation 55(3)(a) or (b), those would need to be disregarded in the calculation of the claimant's earned income. It would be wrong therefore were the provision to state simply that a person's earned income "is" the actual amount received in that period; it is correct to say that the calculation of the claimant's earned income is to be based on the actual amounts received in that period. The adjustments to be made are, however, limited to those contemplated in the Regulations such as regulation 55. The existence of adjustments mandated by other regulations is, in my view, the "other factor" which the Court identified at para 51 as needing to be addressed by the calculation in addition to the mere mechanical addition of monies received in a particular period.
43. The Divisional Court held that their construction of the wording of regulation 54 was reinforced by the use of the same phrase "to be based on" in regulation 61(2)(a). That provision states that the amount of earned income is to be based on the information provided by the RTI employer. A wider construction of the phrase "to be based on" in regulation 61 would not give rise to the problems envisaged by the SSWP, since that regulation is limited to the specific case of an employee working for an RTI employer. But I do not see that it is possible to give the phrase a different meaning in

regulation 61 from the meaning it bears in regulation 54. There is nothing in the provisions that suggests that that was intended.

44. Finally, I should say that I do not accept the Respondents' argument that they could rely on regulation 61(3) in these circumstances if the SSWP's construction of regulation 54 were correct. That provision is intended to apply where the information provided by the RTI employer is incorrect in the ways described in that paragraph. There is nothing inaccurate or untimely in the information that the Respondents' employers are providing to HMRC and DWP.
45. I would therefore hold that the ground of appeal brought by the SSWP is well founded. I therefore turn to the arguments raised in the Respondents' Notice.

2. IRRATIONALITY

(a) What is alleged to be irrational here?

46. Although I have come to a different conclusion from the Divisional Court on the proper construction of regulation 54, I entirely agree with their description of the way that the Regulations apply to these Respondents as being "odd in the extreme". The Respondents were correct, in my view, to focus the challenge in their original claim forms on the irrationality of the outcome, whereby the happenstance of the date on which they applied for universal credit results in them losing, several months each year, the entitlement to the work allowance which the Regulations clearly intend to confer on them. The first question to address is: what is it more precisely that is said to be irrational here if, as I have found, the wording of regulation 54 bears the meaning given to it by the SSWP?
47. What emerges from the discussion on how to construe regulation 54 is that in the great majority of the wide range of circumstances in which claimants receive actual amounts which are different in different assessment periods, it is sensible and right that the calculation should be based on the receipt of that actual amount. The amount actually received in the assessment period not only forms the starting point but will also be the finishing point, subject to the making of any relevant adjustments expressly provided for in the Regulations. What is alleged to be irrational is the initial and ongoing failure of the SSWP to include in the Regulations a further express adjustment to avoid the consequence of the combination of the non-banking day salary shift and the application of regulation 54 for claimants in the position of the Respondents. Mr Brown at the hearing fairly accepted that the consequence of regulation 54 for these Respondents was arbitrary and that there was no policy reason why these particular Respondents should face the difficulties that they describe. The SSWP's case is that a solution has not been devised or implemented because other factors outweigh the desirability of finding an answer to the problem. It is the rationality of that conclusion that is the subject matter of this challenge.
48. We received few submissions from the parties either in writing or at the hearing as to the test of irrationality that this Court should apply. We were shown passages in Chapter 12 of Bennion *On Statutory Interpretation* (7th edn) describing how the court seeks to avoid a construction of a statutory provision that produces an absurd result, since this is unlikely to have been intended by Parliament. Those passages and the well-known cases cited there (*Project Blue Ltd v HMRC* [2018] UKSC 30, [2018] 1

WLR 3169 and *R (oao Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20 [2003] 4 All ER 209) are not really on point because the irrationality claim only arises once the construction part of the appeal is resolved in the SSWP's favour despite having the result of which the Respondents complain. The irrationality asserted here is the *Wednesbury* unreasonableness that has been a ground for a public law challenge since the early days of the modern jurisprudence on judicial review. The test was more recently described by the Divisional Court (Leggatt LJ and Carr J) in *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649. That case concerned a challenge to the Lord Chancellor's decision to reduce the amount of money made available as legal aid for defending people accused of crimes. The Divisional Court said:

“98 The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of "irrationality" or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic *Wednesbury* formulation it is "so unreasonable that no reasonable authority could ever have come to it": see *Associated Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 233-4. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e.g. *Boddington v British Transport Police* [1998] UKHL 13; [1999] 2 AC 143, 175 (Lord Steyn). The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it – for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error.”

49. In the present case we are concerned mainly with the first aspect described there. The Divisional Court in *Law Society* held that the policy was unlawful for various reasons, but they rejected a challenge to the Lord Chancellor's decision relating to the counting of pages of prosecution evidence ('PPE'). The number of PPE in a criminal case was one of a number of factors used in determining fees, as proxies for the complexity of the case and the amount and difficulty of the work involved. The growth of the electronic evidence that counted as PPE had greatly increased and the Lord Chancellor's response had been to reduce the cap on the maximum amount that influenced the level of fees from 10,000 PPE to 6,000. The Law Society argued that it was irrational simply to reduce the overall number of pages rather than to exclude certain kinds of electronic evidence from the definition of pages that counted. The Divisional Court held that it was impossible to say that the reasons given for rejecting the option of restricting the definition of PPE to exclude certain types of electronic evidence were irrational:

“113. We accept that in principle it was open to the Lord Chancellor to adopt a policy response which did not directly correspond to the problem which it was designed to meet. A policy-maker may reasonably decide that the disadvantages of a finely tuned solution to a problem outweigh its advantages and that a broader measure is preferable, even if the broader measure is both over- and under-inclusive in that it catches some cases in which there is no or no significant problem and fails to catch some cases in which the problem occurs. Such an approach is in any event consistent with the nature of the Scheme, which uses criteria such as PPE as proxies for the complexity of cases. It is inherent in the use of such proxies that they will result in under-compensation in some cases. But this does not cause unfairness if it is off-set by over-compensation in other cases. What matters is that overall a reasonable balance is struck.”

50. That, I believe, provides a helpful framework for how to approach irrationality in this case too. We need to consider what are the disadvantages of deciding not to “fine-tune” the Regulations thereby allowing the non-banking day salary shift problem to persist unresolved; what are the disadvantages of adopting a solution to the non-banking day salary shift problem; would a solution be consistent or inconsistent with the nature of the universal credit regime; and has a reasonable balance been struck by the SSWP - or rather is it possible to say that no reasonable Secretary of State would have struck the balance in the way the SSWP has done in this case?

(b) The allegedly perverse consequences of the present regime

51. As to the disadvantages of allowing the non-banking day salary shift problem to persist, the Respondents describe three main ways in which the earned income calculation method produces perverse results for them:
- i) the wide and frequent oscillation in monthly universal credit payments;
 - ii) the loss for several months each year of the work allowance;
 - iii) the potential effect on other aspects of the scheme which are triggered by the absolute value of earned income received in assessment periods, in particular the exception from the benefit cap in regulation 82.

(i) The oscillation of universal credit payments

52. We were provided with different tables showing the amounts of universal credit awarded to the Respondents across different assessment periods. They were not entirely consistent with each other and it was apparent that there were different factors at work in relation to some Respondents and some months, for example a difficulty with childcare costs which took a while to resolve and changes in employment. However, it is clear from all the figures that we were shown that the variation in the amounts of benefit awarded is extreme:

- i) Ms Johnson's second witness statement includes a table covering nine assessment periods between 31 December 2017 and 29 September 2018. The table shows how many salary payments fell within the period, the wages that were received and the universal credit award for that period and when it was paid. For assessment periods where there are no wages received, her award was over £900. For assessment periods where two salaries were recorded the award was about £480, for periods where one salary was received the award was about £750.
 - ii) Ms Woods' second witness statement included a table covering nine assessment periods from 30 November 2017 to 29 August 2018. She received well over £1,000 in each of the four months following a nil receipt assessment period, about £900 in other months and only £64 in one of the months following an assessment period in which two wages were counted.
 - iii) Ms Barrett's first witness statement includes a similar table covering eight assessment periods from 28 August 2017 to 27 April 2018. In respect of four of those assessment periods she received over £1,000 in universal credit following an assessment period in which she appeared to have no income, but in other months she received only £139 or £254 following an assessment period when she had two wage instalments counted. She provides an updated table in her second witness statement covering assessment periods from 28 August 2017 to 27 September 2018. Again, the payments range between over £900 in respect of assessments periods with nil receipt of wages to amounts of £55, £162 and £148 in respect of assessment periods where she received two instalments of salary.
 - iv) Ms Stewart's table covers 14 assessment periods between 28 June 2017 and 27 August 2018. Her universal credit awards range from £1,418 in respect of the assessment period 28 August to 27 September 2017 when she received no wages to £219 for the assessment period 28 June to 27 July 2018 when she received pay on both 28 June and 27 July because 28 July, her contracted pay date was a Saturday. The amounts in the other months appear entirely random.
53. One might expect the fluctuations in universal credit awards would be matched by equal and opposite fluctuations in wages so that the actual income to the household from the combination of wages and universal credit stayed roughly stable month on month. That however is not borne out by the tables provided in Ms Parker's evidence. She calculates the total income received by each claimant in respect of three sample assessment periods, one in which two wages are received, one in which one wage is received and one in which no wages are received:
- i) For Ms Johnson her maximum universal credit amount was the same, £953.85 in each of the three periods. The amount of benefit awarded in respect of the period when she received two wages was £386.80 and the total income in respect of that period was £1,415.94. For the month where she received one salary, her universal credit award was £849.92 and total income was £1,206.89; in the assessment period when she received no salary, her universal credit award was £916.08 and the income received by the household was therefore £916.08.

- ii) For Ms Woods her maximum universal credit amount was the same in two of the assessment periods and less in one where no childcare cost element was included. The amount of benefit awarded to Ms Woods in respect of the period when she received two wages was £64.91 and the total income in respect of that period was £1,978.39. For the month where she received one salary, her universal credit award was £913.76 and total income was £1,692.36; in the assessment period when she received no salary, her universal credit award was £1,281.19 and the income received by the household was therefore also £1,281.19.
 - iii) For Ms Barrett the amount of her maximum award was almost the same in all three periods. The amount of benefit awarded in respect of the period when she received two wages was £148.95 and the total income in respect of that period was £1,578.30. For the month where she received one salary, her universal credit award was £370.53 and total income was £1,448.05; in the assessment period when she received no salary, her universal credit award and total household income was £880.81.
 - iv) For Ms Stewart her maximum universal credit fluctuated by about £120 over the three periods. The amount of benefit awarded in respect of the period when she received two wages was £308.57 and the total income in respect of that period was £2,044.43. For the month where she received one salary, her universal credit award was £928.43 and total income was £1,796.36; in the assessment period when she received no salary, her universal credit award and total income received was £1,313.55.
54. The effect of these swings in universal credit award and monthly income is described in detail in the witness statements of the Respondents. Ms Johnson states that she finds it impossible to budget for sudden drops in income in the months following an assessment period in which two salary instalments have been counted. She becomes overdrawn at the bank during the month in which the low universal credit award is received. She then incurs interest and bank charges. She expresses her doubts whether she will ever be able to get back on top of her finances and worries that cash flow problems will mean she is unable to pay her rent, jeopardising her tenancy. Ms Woods also says that she feels unable ever to get a foothold on stabilising her finances. She has never previously been so far into her overdraft or unable to pay her rent. She has been forced to attend food banks. Ms Stewart describes how in the months where she receives a reduced universal credit award because she is treated as having received two salary instalments in the preceding assessment period, she does not have enough income to cover her rent and childcare as well as other outgoings. She missed a rent payment and although the rent officer came to an agreement with her not to take legal action, she then had to pay an additional £50 a month on top of her rent to pay off arrears. She has borrowed money from her employer. She says that she seems to be getting further into debt for something which was completely out of her control, even as she was trying to do the right thing and provide for her daughter and herself by going out to work. Ms Barrett says that in the nine months since making her universal credit claim she has not had a single month where her award has been based on receiving just one monthly wage. Instead she has been treated either as receiving two wages and so receiving a substantially reduced universal credit award

or as receiving no wages in which case she receives the maximum award. Her evidence is as follows:

“12. This might be thought to be unproblematic as it could be said that over several months a combination of lower and higher UC awards balance themselves out. However, as somebody managing on my own with a young boy on a tight budget this is simply not the reality. As a result of receiving very little or even no UC in some months, I have fallen into arrears with my rent by about £1800; I was taken to court in April [2018] for non-payment of my council tax; and have been forced to rely on the food bank on 3 to 4 occasions and a charity called Christians Against Poverty who provided me with £70 of supermarket vouchers to ensure that my son and I have at least enough to eat. I have also had to borrow money from my family and friends: I owe my dad about £1500, my mother £200, my brother £100 and friends £50-£60. I have even had to take out a credit card to try and tied me over but have then just found myself unable to pay off my credit card and so getting further into debt. I currently have about £680 credit card debt.

13. Things became so desperate just before Christmas that I attempted suicide and did so again in March. As a result, a social worker has become involved with me and my son.”

55. Mr Pickering’s evidence based on his experience working for Citizens Advice is that fluctuations in income exacerbate financial problems and increase stress. The experience of these Respondents is typical of many universal credit claimants: consistency of income is really important for people on low income.
56. The SSWP argues that oscillations in universal credit payments are a central feature of the universal credit scheme. It is set up to respond immediately to changes in circumstances of claimants as they move in and out of work, or as their housing or other circumstances change. This is one of the ways that it incentivises work, a key policy underlying the new regime. It is not right therefore, Mr Brown submits, to describe oscillation of benefits as “perverse” because it is the reasonable and deliberate basis on which the system is designed. I do not accept that the SSWP’s argument on this point has merit in the particular circumstances of this case. The oscillations here are not a response to any change in the Respondents’ work patterns or family circumstances. The oscillation is a response only to whether a claimant’s regular monthly pay date coincides with the end date of her assessment period so that she sometimes receives two monthly wages in one assessment period. There has been no change in the claimants’ circumstances. This has no part to play in incentivising work or encouraging any of the other kinds of behavioural change considered desirable. It is no part of the policy underlying universal credit to encourage claimants or employers to adopt a non-monthly salary cycle; on the contrary the choice of monthly assessment periods was based in part on the increasing prevalence of that salary cycle amongst the working population and because many household bills are payable monthly. Indeed, the alignment of the duration of the assessment

period with household outgoings is intended to encourage responsible budgeting by low income claimants.

57. It is also no part of the policy underlying universal credit to encourage claimants to base their employment choices on the salary payment date offered by a prospective employer. Yet that is what is happening for these Respondents. Ms Woods says that she was offered a promotion by her previous employer. She was reluctant to take up the new position because if two months' pay at the new salary level were counted in one assessment period she would be over the maximum income limit and would receive no universal credit award for that assessment period. She has invested a great deal of time and money with a view to achieving a qualification as an occupational therapist. But to work as an occupational therapist, she needs experience in the NHS. The NHS pays staff on the last working day of the month. Therefore, instead of pursuing her intended career, she obtained a secretarial position at a local livestock auction and worked as a waitress in a local café. The auction house was sympathetic to her problem and was prepared to pay her on the first week of the month and her waitressing job was paid on a weekly basis. She says in her second witness statement:

“11. While I am obviously frustrated at being in positions that do not stretch me and in no way build on my studies, I cannot describe what a relief it is to have a stable and predictable income coming in each month from the combination of my wages and Universal Credit. Moreover, working locally means that I save considerably on travel and childcare costs and so I am in fact financially better off than doing a better paid and more fulfilling job with real prospects of progression and so coming off benefits altogether further away”.

58. Ms Stewart's evidence is that she stopped work in June 2018 and decided to look for work with an employer who has a pay date which is not near her assessment period date. She says “it seems unbelievable that before applying for jobs I am having to ask potential employers what their pay date is but that is the reality that I have been forced into.”
59. I therefore agree with the Respondents' description of the oscillations in their universal credit award in response to the non-banking day salary shifts as perverse. Those oscillations are extreme. They lead to significant variations not only in the benefit award but in the combined income for the household from benefits and salary in a particular assessment period. They cause considerable hardship and they create perverse incentives affecting a claimant's employment choices, cutting across the policy of the overall scheme.

(ii) Loss of work allowance

60. The work allowance calculation provided for in regulation 22 is intended to allow claimants to keep from their earned income the applicable amount without suffering any reduction in the amount of their universal credit award. 63% of the rest of their earned income is then deducted from their award in respect of that period. In the assessment periods in which these Respondents receive two salaries they can only deduct one work allowance entitlement. In the assessment periods in which they receive no salary there is nothing from which the work allowance can be deducted.

They therefore lose irretrievably one work allowance each time the non-banking day salary shift problem arises. This is a frequent occurrence for claimants whose contracted pay date is the last day of the month. Taking, for example, the calendar year 2018, a claimant whose assessment period runs from the last day of the month to the penultimate day of the next month, whose contracted salary pay date is the last day of the month but who is paid their salary early if the last day of the month falls on a non-banking day would have a payment pattern as follows:

| Assessment period | Salary pay dates in assessment period |
|-----------------------------------|--|
| Sun 31.12.17 – Tues 30.1.18 | None |
| Wed 31.1.18 – Tues 27.2.18 | Wed 31 Jan |
| Wed 28.2.18 – Good Friday 30.3.18 | Wed 28 Feb and Thurs 29 March |
| Sat 31.3.18 – Sun 29.4.18 | None |
| Mon 30.4.18 – Wed 30.5.18 | Mon 30 April |
| Thurs 31.5.18 – Fri 29.6.18 | Thurs 31 May and Fri 29 June |
| Sat 30.6.18 – Mon 30.7.18 | None |
| Tues 31.7.18 – Thurs 30.8.18 | Tue 31 July |
| Fri 31.8.18 – Sat 29.9.18 | Fri 31 Aug and Fri 28 Sept |
| Sun 30.9.18 – Tues 30.10.18 | None |
| Wed 31.10.18 – Thurs 29.11.18 | Wed 31 Oct |
| Fri 30.11.18 – Sun 30.12.18 | Fri 30 Nov |

61. In that year therefore a claimant with a contracted salary date of the last day of the month forwent the work allowance in four assessment periods when there was no salary from which it could be deducted. Ms Barrett, whose contractual pay date is fixed as the 28th day of the month rather than the last day of the month, suffers a similar loss. In the course of 2018 there were five months when the 28th day fell on a weekend or bank holiday. According to the table in her second witness statement between 28 August 2017 and 27 August 2018 there were almost no assessment periods in which she received only one wage. This loss of work allowance is money which is never recovered by the Respondents. They receive less universal credit overall because of the coincidence of the end of their assessment period with their contracted salary pay date. The judgment of the Divisional Court records the lost work allowance as £192 for each assessment period, that being the lower work allowance applicable to single claimants responsible for one or more child where their award contains an amount for housing costs element. That was the work allowance in 2018. For the current financial year from April 2020, the applicable work allowance is £292 so that the loss is now substantially greater. For a claimant who does not have a housing costs element in their award the figure was £397 in 2018 and is now £512. Ms Stewart's evidence is that one month's work allowance is a considerable amount in her situation as it represents over 10% of her usual combined income from

universal credit and wages. Ms Johnson says that the loss of the work allowance in several months a year is very significant:

“Some people might consider that losing £500 over a year is not much but for me and my daughter that is a huge amount of money. I need that £500 to meet our minimum outgoings and to ensure that all of my daughter’s basic needs are met.”

62. The SSWP argues that it is illusory to say that the Respondents are “losing” a month’s work allowance because they receive just as much work allowance as the system is designed to give them. I reject that argument. The value of the work allowance is presumably not chosen at random but based on some assessment of the additional amounts needed each month to support a claimant with the characteristics that Parliament has decided should attract the work allowance, namely being responsible for one or more children or having limited capability for work. The link between the amount of work allowance and the inclusion of a housing costs element in the claimant’s award also shows that the work allowance is connected to a typically stable and regular monthly household expenditure. The monthly household costs incurred by these Respondents do not fluctuate according to whether the end of the month falls on a weekend. The SSWP has put forward no reason why the date on which these Respondents submitted their claim for universal credit should result in them losing a considerable amount of money each year for however long their entitlement lasts. In my judgment this is the most egregious aspect of the way the system works.

(iii) Potential effect on other elements of the scheme

63. The benefit cap is a limit on the amount of income-based benefits which a claimant is entitled to receive for her household. It is established by section 96 WRA and Part 7 of the Regulations (regulations 78 onwards). Regulation 79 provides that the benefit cap applies where the welfare benefits to which a claimant is entitled during an assessment period exceed the amount set in regulation 80A. Where the benefit cap applies its effect (as the name suggests) is that the amount of the award is reduced by the excess unless certain circumstances pertain. Regulation 82 provides for an exception. Broadly, the benefit cap does not apply to an award of universal credit in relation to an assessment period where the claimant’s earned income equals or exceeds the amount she would earn if she worked for 16 hours per week at the national minimum wage; currently £604 per month. Although it may appear counterintuitive to lift the cap and thereby increase the benefits paid where a person is earning more than a set amount, this is part of the scheme designed to incentivise work as well as set a limit on the award of benefits to non-working households: see *R (SG and others) v SSWP* [2015] UKSC 16, [2015] 1 WLR 1449, paras 66 – 69. This is another provision, therefore, the application of which depends on the value of a claimant’s earned income.
64. The Respondents say that their benefit entitlements have so far been below the level of award at which the cap may come into operation. It is entirely feasible, however, that their circumstances may change such that they become entitled to a level of universal credit above the benefit cap. In those circumstances, the availability of the exception in regulation 82 may depend on them being able to show that their earned income in each assessment period exceeds the value of 16 hours work at the national minimum wage. They are concerned that in each month where the system currently

records their income as nil, they may be subject to the cap even though their monthly salary is in excess of the specified amount.

65. The SSWP dismisses this point saying that it does not apply currently to the Respondents and any asserted unlawful consequences should be considered if appropriate in a case where it has been pleaded and arises on the facts.
66. I agree that there is no need in this case to examine in detail the workings of the benefit cap. However, it is relevant to show that the effects of the failure of the system to accommodate non-banking day salary shifts is not limited to the loss of the work allowance but arises in other parts of the regime which are triggered by the absolute amount of earned income in an assessment period. Ms Clarke's evidence is that CPAG is aware of other universal credit claimants who have a higher maximum award which takes them over the benefit cap limit. Because they have a regular monthly salary which is more than the specified amount they are generally exempt from the benefit. However because they are also affected by the non-banking day salary shift there are some assessment periods where they are treated as not having received any wages. When this issue has been raised with DWP, a workaround has been put in place so that they are not subject to the benefit cap in those months where they appear to receive no salary. She is not aware of the specifics of how this is done.
67. There are other benefits which are triggered or influenced by the receipt of universal credit so that the repercussions of this aspect of the regime can be far reaching. Ms Woods' evidence is that her council tax reduction support is linked to her universal credit award. The fall in that award in the month following a two-salary assessment period means that she no longer qualifies for council tax support and has to pay double the amount of council tax than in other months.

(b) The disadvantages of resolving the problem

68. Mr Brown did not shrink from descriptions of the effect of the non-banking day salary shift on the Respondents as "arbitrary", "unfortunate" or "challenging". The SSWP does not point to any way in which the operation of regulation 54 in their cases can be said to further the policies underlying the introduction of universal credit for these Respondents. The reasons put forward for not taking steps to resolve the problem are three-fold:
 - i) The supposed irrationality is based on a misconception because it aligns the assessment period with the period of a calendar month.
 - ii) There is a need for bright lines to ensure that the universal credit system operates in a coherent way.
 - iii) It is important to ensure that the calculation of the monthly award of universal credit can take place in an automated way without the need for "manual intervention" by a DWP officer carrying out an individual calculation of the amount of the award.

(i) Assessment periods are not intended to be aligned with calendar months

69. The SSWP argues that it would be inconsistent with the scheme as a whole to make an exception to resolve this problem because the supposed irrationality of the outcome is based on a misconception of aligning the assessment period with a period of a month. The assessment period is, Mr Brown submits, a statutory construct which establishes the temporal cycle for the assessment and payment of universal credit. It is not meant to be the same as a calendar month and its purpose is to capture actual income received within that defined period. I accept that is right but only to an extent. The evidence lodged by the SSWP makes it clear that the reason why the assessment period was set at a month, rather than a week like many legacy benefits, was because that was already the most common way in which people were paid and looked set to grow in popularity. This was also apparent from the Explanatory Memorandum to the Regulations published on 25 February 2013. The Memorandum described a key difference between universal credit and legacy benefits as being that it will be assessed and paid monthly:

“This approach is intended to reflect the world of work where around 75% of people receive their wages monthly. Paying in this manner will encourage and support claimants to budget on a monthly basis, which will help smooth the transition into monthly paid work.”

70. The monthly cycle of assessment periods was therefore chosen specifically because very many claimants will be in the same position as the Respondents, being paid a regular salary and receiving that salary in monthly instalments. It is not right to say that there is no significant connection between the choice of a monthly assessment period cycle and the fact that many claimants are paid their salary monthly. It would not be inconsistent with the overall universal credit scheme to devise an exception to solve this problem.
71. The SSWP argues that the problem arises because the Respondents are examples of many kinds of people who receive their pay “irregularly”. The actual cause of the issue, the SSWP says is “the objective fact that the Claimants are paid irregularly by their employers (notwithstanding that each salary payment is for a month’s work), whereas UC Assessment Periods are designed to be regular and fixed.” In fact, neither half of that sentence is correct. On that basis, everyone who is paid monthly would be regarded as paid “irregularly” by their employer since there is always the possibility that the contracted pay date falls on a non-banking day whether that pay date is expressed as the last day of the month or the 28th day of the month. Even if the contracted pay date is the last Friday of the month, that Friday might fall on Christmas Day or Boxing Day, Good Friday or New Year’s Day. I agree with the Respondents’ submission that the salary payment pattern of the Respondents would not be described by most people as ‘irregular’ in the same way as commission payments or lump sum payments made to a tradesman. It is also not entirely true that assessment periods are “regular and fixed” since they have to be adapted to accommodate February: see regulation 21(2). Payment dates for universal credit awards are ‘irregular’ in the same way because payment of the benefit itself must be made on a banking day.

(ii) The need for bright lines

72. Mr Brown submitted that a complex system like this is not going to work in an optimal way for everyone. It was always appreciated that there would be people better off under the old system or under different versions of this system. The system will only work if it has clearly defined inputs which are simple to understand and to administer. The nature of the potential claimant cohort is such that they are more likely to be moving in and out of work or working in the ‘gig economy’ so that their monthly income will vary greatly with the consequent effect on their universal credit award. It is an inevitable consequence of such a system that there are hard cases and the Respondents’ position is simply a manifestation of that. The SSWP refers again to examples of people who may receive two payments in one assessment period if they are paid a bonus or commission as well as their basic salary and to people who regularly receive lump sum payments for work carried out over a number of assessment periods. Those in the latter category would also ‘lose’ a work allowance entitlement in the months when they are working but not receiving an instalment for the job done as compared with their entitlement if they were paid in a number of instalments.
73. In my judgment that argument was a strong point when construing the wording of the general principle in regulation 54 but has less merit when considering the rationality of failing to make an exception for this particular group of people. In fact, there are already several exceptions to the bright lines set out in the Regulations where it is clear that a policy imperative has overridden the need for simplicity. Regulation 76 provides that where a person receives a payment from an approved scheme providing compensation or support such as that given to people diagnosed with variant Creutzfeldt-Jacob disease or who suffered forced labour during the Second World War or who were victims of the Manchester bombing on 22 May 2017, such payment whether it is capital or income is to be disregarded when calculating unearned income.
74. The Respondents point out that the system appears to be capable of flexibility where this is in SSWP’s interests. The Regulations depart from a focus on actual amounts received in an assessment period by creating a category of notional unearned income, providing that if unearned income such as a state pension would be available to a person upon the making of an application for it, the person is to be treated as having that unearned income (regulation 74). Similarly, the Regulations provide that it is to be assumed that there is a yield from capital above a certain level so that, even though no such income is actually received, it is treated as part of the person’s capital from the date it is due to be paid to the person: (regulation 72). The Respondents point to a different kind of exception in regulation 21A where the duration of the assessment period is adapted to create what was described as a ‘mini assessment period’. Regulation 21A applies when the first date of entitlement has been determined but it is subsequently determined that it should have fallen on a different start date. If the Secretary of State considers that changing the start date would cause unnecessary disruption to the administration of the claim she can activate regulation 21A, with the effect that the first assessment period is to be a short period beginning with the start date and the amount payable for that shorter first assessment period is the appropriate proportion of the monthly award. Ms Parker explains in her witness statement that this regulation was introduced in 2018 to deal with a specific problem where someone had an established assessment period, lost their entitlement to universal credit and then made a new claim establishing a different assessment period cycle. If they successfully appealed against the original loss of entitlement, they should in principle

go back to their original cycle. This was considered to be administratively too complicated so the regulation provides for a mini assessment period to bridge the gap between the two cycles so that the established second cycle remains in place and the payment for the gap period can be quickly and easily made.

75. It is inevitable that in any scheme designed to simplify and reduce the cost of delivering benefits there will need to be bright lines. I agree that there will often be hard cases with people falling just on the wrong side of the line where their needs and circumstances are otherwise indistinguishable from those falling just on the right side – the requirement that the claimant be 18 years old is an obvious example. It may well be rational to introduce such a requirement on the ground that the benefits outweigh the disadvantages arising from those bright lines. In my judgment, however, those situations are readily distinguishable from the significant, predictable but arbitrary effects on benefit of a regular monthly salary which frequently falls into different assessment periods because of the non-banking day salary shift.
76. I have described a number of instances in the Regulations where careful and detailed drafting has been adopted to address a specific issue. It cannot be impossible to draft an exception to cover the particular problem highlighted in this case. On this point I agree with Ms Richards' submission that the SSWP must not allow the best to be the enemy of the good. It is irrational to refuse to sort out this problem because there are other groups of claimants for whom it is too difficult to fashion an exception to the general rule. It does not strike me as "odd in the extreme" that claimants whose income is truly irregular can only take advantage of the one work allowance in assessment periods when they receive that income. That does not justify refusing to put right the problem that has arisen for the Respondents. A properly drafted, narrow exception or amendment would not in my judgment generate legitimate calls from those in quite different circumstances for an exception to be made in their case also.

(iii) The automated calculation of the amount of the monthly award

77. The witnesses on behalf of the SSWP emphasise the importance of the fact that benefit awards made each month are not calculated manually by DWP officers but are generated by a computer programmed to take the many and varied inputs about the claimant's family and financial circumstances and work out the award each month. The automation of the process is an important advantage of the universal credit regime over the legacy benefits system for a number of reasons. First, it generates substantial savings in the costs of administration thereby releasing more money to be paid out in benefits. Secondly, it enables the amount awarded to respond immediately to changes in circumstances; a payment made seven days after the end of the assessment period can take into account any changes reported by the claimant during that assessment period. Thirdly, the overall move to digitisation prompts claimants to develop skills which enable them to access other online services which they might previously have been reluctant to use. This may itself be a way of reducing poverty, for example enabling access to cheaper online services offered by utilities. In order to achieve that objective it requires simple and automatic processes.
78. The computer system has been the subject of large financial investment. Mr Couling's evidence is that as at the date of his statement in September 2018 the universal credit IT system had cost £1.3 billion to build and the estimate was it would need another £1 billion to finish the task. Any additional adjustments would increase this cost.

Building another calculator to allow the amendment of assessment periods would, he says, require a complete rebuild, therefore substantially increasing the cost to the taxpayer by at least many hundreds of millions of pounds. It would also result in a delay to the rollout of universal credit nationwide, undermining the social policy goals that underpin the reform. Ms McMahon says that it is not possible for there to be an automated change to address this particular issue; the changes needed to solve this problem would “require a new version of the calculator to be essentially rebuilt from scratch”. This would be hugely demanding in terms of resources and cost. The lowest amount this would cost she estimates would be about £7.35 million without taking into account lost savings arising from the delayed implementation of universal credit. An alternative to completely rebuilding the calculator would be for there to be a manual intervention to resolve the problem for each claimant affected. A single manual intervention of this type would take about 1.5 hours of agent time and given the complexity of the exercise would have a higher risk of error. The intervention would only work for as long as the claimant stayed in that particular job with that particular payment cycle. Changing job or employer could create further problems.

79. The evidence provided by both sides discussed in detail proposed ways that the problem could be avoided by adjusting the length of the first assessment period, or the start and end date of the assessment periods affected by the non-banking day salary shift; allowing income to be averaged over multiple assessment periods; permitting work allowances to be carried over from month to month; making provision for amounts received to be treated as received on the dates they would have been received but for that date being a non-banking date. Ms McMahon criticised each of these in her witness statement explaining why an exception along the lines of an existing provision could not be transposed to deal with this problem or explaining that an existing provision that seemed to require a manual intervention was acceptable because it related to only a few claimants rather than the many thousands in the same position as the Respondents.
80. More ways of working round the problem were considered during the hearing. Mr Brown warned of the danger that an apparently sensible solution might have some hidden defect which he and those instructing him could not immediately identify but which would in fact make it unworkable. The Court should not, he submitted, make a finding that the decision not to incorporate somewhere an exception to regulation 54 to solve this problem was irrational, if that finding was based on an assumption that there must be a satisfactory way of resolving it that has not yet been found. Ms McMahon said in her witness statement:

“There is no predictable way of identifying when a person is in receipt of monthly, weekly, biweekly or four weekly payments. This would rely entirely upon self-reporting, which would provide scope for fraud, and those with fluctuating income only reporting a double payment when it would advantage them. This could also create scope for people to manipulate their payments so that they use an averaging system overall. The use of RTI is, in part, designed to prevent this kind of abuse and improve faith in the system.”

81. With all due respect to Ms McMahon’s expertise I find this comment hard to understand. We are not concerned here with making an exception for people who are

paid at frequencies other than monthly. Much of the evidence lodged by the SSWP assumes that what would be needed would be a wholesale move away from automation and a return to the former method of manual calculation by DWP officers. I do not see that that is inevitable. There is no difficulty in identifying a person who is in receipt of monthly salary payments on a date which coincides with the end of their assessment period. The occurrence of the non-banking day salary shift is entirely predictable because we know for the foreseeable future when the last day of the month will fall on a weekend or on a bank holiday. Even Easter, the most moveable feast, can be calculated for decades ahead. There may be occasional changes such as occurred this year when the early May Bank Holiday was moved from 4 May to 8 May 2020. If the only time that the Respondents encountered this problem was when such a shift coincided with the end of their assessment period I doubt they would have been prompted to litigate the matter. If the claimant is not employed by an RTI employer then regulation 61(1) in any event contemplates self-reporting in response to requests for information from the SSWP. There must be ways of verifying the information that is already reported by all those falling within regulation 61(1). As for creating scope for people to manipulate their payments, the Respondents have given realistic counter examples of ways in which people could manipulate their payments taking advantage of the existing system to increase their universal credit entitlement during months when they appear to have no salary.

82. Devising a computer programme capable of recognising and responding to the huge number of factors covering every aspect of a claimant's family and financial circumstances – their earned and unearned income, their receipt of other state benefits or compensation payments that may need to be taken into account or disregarded, their responsibility for children or other caring responsibilities, their own disability or that of a household member, their housing situation and so forth must be an exercise of mind-boggling complexity. Taking full account of all the SSWP's evidence and bearing in mind Mr Brown's warning, I cannot accept that the programme cannot be modified to ensure that the computer can recognise that the end date of a particular claimant's assessment period coincides with their salary pay date so that if the latter date falls on a non-banking day the receipt of two roughly equal payments is likely to be the result of a salary payment being made a day early and the second payment should be moved into the next assessment period. It may not solve the problem in every instance but it would go a long way towards doing so.
83. Regulation 21A, which I described earlier, is one of many provisions of the Regulations that has "A" added to the regulation or paragraph number, denoting that it has been inserted at a later stage. Each of these reflects a refinement of the system in response either to a problem that became apparent or to an amendment to another enactment which affected the operation of the universal credit scheme. All these changes seem to have been accommodated without fatally upsetting the computer. Further, as has been discussed in other cases in this Court, the roll out of universal credit involves the implementation of a managed migration pilot now provided for in the Universal Credit (Managed Migration Pilot and Miscellaneous Amendments) Regulations 2019 (SI 2019/1152). It is in the nature of a pilot scheme that it is intended to throw up problems so that they can be sorted out before the new scheme is implemented across the whole of the country. It must be the case that the computer programme is sophisticated enough to enable that to happen. If this problem had emerged for the first time as a result of the experience of some of the first migrated

cohort of 10,000, I cannot accept that the Department would have responded by saying that it was now too late to modify the scheme and that nothing could be done to resolve it without throwing away all the money so far spent.

(c) Is it irrational for the SSWP not to enact a solution to this problem?

(i) Was the possibility of solving the problem considered and rejected when the Regulations were adopted?

84. Before considering any further factors that the SSWP should take into account when deciding whether to solve the problem, beyond those already discussed, it is useful to address the question whether Ministers did in fact consider this potential problem when the policy decisions about universal credit were being made and if so, what were the reasons they chose not to resolve it. The Detailed Grounds of Resistance refer to deliberate choices and system design decisions that have been made by the SSWP. Much of that discussion focuses on different issues such as the choice of a monthly rather than weekly length of assessment period, the decision to disengage the assessment period from the calendar month so that it runs for a month from the date of claim rather than corresponding to the calendar month and the decision that earnings are not averaged.
85. There is very little evidence as to whether this particular problem arising from the non-banking day salary shift was recognised at the time. Ms Parker comes closest to addressing this problem when she deals with common patterns of salary payment. Her evidence is that about 17% of employers pay their staff on the last day of the month and a further 14% pay either on fixed pay dates or on 29th/30th of the month except in February when they pay on the last day of the month. She says:
- “In these cases pay cannot move between assessment periods due to the pay date timing, provided that the employer reports the correct contracted pay date where it falls on a non-banking day”.
86. This appears to assume that the RTI feed will report payment on the contracted, non-banking day even if the payment was actually made a day or two earlier. According to the Respondents, this assumption is understandable because the guidance issued by HMRC tells RTI employers to do just that. The most up-to-date version of the guidance deals specifically with Easter 2019 when there were four consecutive non-banking days between 19 April and 22 April 2019. The guidance states that “a payment reporting easement applies to ensure that this payment is treated correctly for tax purposes.” Employers are instructed that if they pay employees early they should still report the contracted salary pay date in the RTI feed. This guidance has, according to the Respondents, been in place more generally since at least 2018. If this guidance had been followed by the Respondents’ employers, the problem which has prompted these proceedings would not have arisen for those whose contracted salary date is the last day of the month although it might still have arisen for those whose contracted salary date is the last *working* day of the month.
87. Ms Parker exhibits a number of contemporaneous documents to her witness statement. These include documents relating to a workshop held on 24 January 2012 to consider assessment periods. The slide presentation given at the workshop does not refer to the problem now identified. One slide does refer to the payment of the benefit award being delayed or advanced by weekends and bank holidays and it was estimated that this would affect 30 million payments per year to be paid up to 3 calendar days early. The recommendation was that all claimants have a set benefit

payday seven days after the assessment period ends and that “the payday will be advanced to the nearest working day (much like in work)”.

88. Ms Parker exhibits a response from the Minister for Welfare Reform by email dated 31 January 2012 to policy officials summarising the conclusions of the meeting. This email does not indicate to me that the Minister was, at that stage at least, committed to an immutable system for assessments periods. On the contrary the email records the outcome of the meeting as being that although “As a general rule” assessment periods should start on the date of entitlement, claimants paid monthly should be given the choice to have the assessment period running until for example the 1st or 15th of the month “to align the assessment period with the RTI feed, i.e. their pay day.” It follows from this, the Minister went on, that at the outset of a claim by someone in work, there would be one assessment period that is shorter or longer than one month. There is also a rather gnomic comment “We need to establish the impact of bunching pay days for in-work claimants operations and agree mitigations”. It is not entirely clear what that means, though it may be a reference to this problem. Ms Parker’s evidence is that the possibility of offering claimants the choice of an initial assessment period that was shorter or longer than the calendar month was rejected after further work.
89. An earlier workshop was held on 24 November 2011 to discuss the options of taking into account the actual amount of earnings received in the assessment period as against averaging or attributing earnings and the effect of this on people who are paid weekly. Again the workshop was supported by a slide presentation on the treatment of earnings from employment covering the treatment of benefits in kind and the possible averaging of earnings for those paid weekly. The recommendations referred to consideration of incorporating a trigger in the system to prompt an inquiry where there is a sudden drop in the level of earnings. A submission dated 26 January 2012 following up on that meeting asked the Minister to agree that as a general principle in straightforward cases there would be no averaging or attribution rules applied to the calculation of earnings. The focus on taking actual receipts into account was intended to “reflect the cash flow into the household”. The Minister is recorded as having expressed a concern that the system could be manipulated by claimants opting to receive large bonuses with lower salary in order to maximise their entitlement. The response to this in the submission was:
- “We are working with design colleagues to establish safeguards and options, including a system of thresholds which would act as a prompt to investigate any changes outside a set amount. This would enable us to treat the majority of earnings with modest increases or fluctuations in the most straightforward way, whilst preventing exploitation by those seeking to maximise their Universal Credit entitlement.”
90. At that stage therefore it was regarded as possible for to programme the computer to notice substantial changes in the amounts received. The Minister was asked to confirm that he was content that there would be no averaging or attribution to earnings received in the assessment period “if they are within an agreed tolerance threshold”.
91. Having read carefully the documents exhibited to Ms Parker’s witness statement I draw the following conclusions. First they contain nothing to show that the problem

of advance payment of salary was highlighted to the Minister and a decision taken to do nothing about it. Secondly, they show that where the Minister had concerns that manipulation of the system might lead to much higher income in some assessment periods and low or zero income in other assessment periods he was assured that the computer might be programmed to recognise unexpected and significant fluctuations so that they could be investigated. I recognise that ultimately that was not incorporated in the scheme but the Minister was not told that there was nothing that could be done about such issues without compromising the automated nature of the calculation process.

(ii) Other factors

92. Other factors I consider relevant to the rationality of the ongoing decision not to create an exception to allow for the non-banking day salary shift are (a) the size of the cohort affected; (b) the duration of the impact on them; (c) the arbitrary occurrence of the effect and (d) the inconsistency between the effect of the problem and the aims of the universal credit regime.
93. **The size of the cohort affected:** Various statistics were put forward by the parties as to the number of claimants likely to be affected by this problem though without coming to any very definite conclusion. It is clear that the numbers may be very substantial, possibly 85,000 claimants. The SSWP states in her Detailed Grounds of Resistance that when fully introduced universal credit will be available to around 6.5 million households, about half of whom will be in work. Mr Couling's evidence is that in the economy as a whole around 75% of working people are paid monthly, a proportion that has been growing steadily over time as the economy shifts away from manual labour typically paid weekly or fortnightly. Ms Hargreaves' evidence is that since 2008, the Institute where she works has carried out an annual survey asking its members questions about payroll operation. Since 2008 there has been a steady decline in weekly payroll. Monthly payroll has been the most common frequency throughout the 10 years between 2008 and 2018. Almost all employers surveyed ran a monthly payroll although some also ran other frequencies in addition. Further, the survey shows that by far the most common payday for monthly payrolls is the last working day of the month. That has remained consistent throughout every year the research has been conducted with other popular dates being the 25th and 28th of the month. Although this point is not covered by the survey results, Ms Hargreaves' evidence based on her own experience is that the great majority of employers will make payment on the last working day before the contractual payment date if the latter date is a non-banking day. Ms Clarke's evidence based on the experience of the CPAG in the welfare field is that a large number of benefit claims are made towards the end of a month as that is often when people leave jobs, receive final pay even when they have left a job earlier or when contracts come to an end.
94. All this points to the fact that many tens of thousands of people are likely to experience the same problem as these Respondents. The total number of people affected by the loss of benefit and the difficulty of budgeting for the fluctuations in income is even larger since it must usually include everyone in the claimant's household.
95. **The duration of the impact on the Respondents:** At present there is no way for the Respondents themselves to put matters right once the start and end dates of their

assessment periods are fixed by the date on which they submit their claim. As the table in para 60 above shows, the problem arises in several months each year and will last throughout the years of the claimant's period of entitlement. The problem cannot be solved by a claimant stopping and restarting their claim because of regulation 21(3C). That provides that where a new claim is made within six months of the closure of an earlier claim, then if the claimant continued to meet the basic conditions for universal credit throughout those six months, the assessment period for the new claim begins on the same day as the assessment period of the old claim. Ms Woods discovered this when she closed her universal credit claim with a view to starting a new one with an assessment period which would avoid the problem. She found that she retained her assessment period because her new claim was treated as linked with the old claim. The only way to start a new claim with a fresh assessment period is to stop claiming benefits for more than six months, something which is not possible for these Respondents.

96. The SSWP has suggested that the Respondents should speak to their employers to ask for their salary pay date to be changed. Ms Hargreaves' evidence is that it is not usual for a worker to be able to choose the date or frequency of wage payment as it is commonly included as part of the employer's standard terms and conditions in the contract of employment. Ms Stewart and Ms Barrett both say in their evidence that they approached their employers to ask but were told, unsurprisingly, that the employer was not prepared to set up and run a different monthly payroll just for a few employees. I regard it as unrealistic to expect employees in low paid jobs to have the bargaining power to convince their employers make an exception to their automated payroll for them.
97. **The arbitrary nature of the occurrence:** The SSWP does not suggest that the Respondents ought to have predicted and avoided the problem by ensuring that they submitted their benefit claims in the middle of the month. All the Respondents state, and this is not disputed, that they were not alerted by the staff at the Jobcentre from which they made their claim for universal credit to the problems that would arise for them if the end date of their assessment period coincided with the day of the month on which their salary is paid. Ms Johnson's evidence is that when she attended at the Jobcentre she was told that she should complete the application there and then since her legacy benefits had been stopped and there would be a six-week wait for the first universal credit award. She says that no one warned her that the date she made the claim might affect how much money she received and no one suggested she should wait.
98. It is clear from the evidence before us that the arbitrary nature of the problem increases the stress felt by the Respondents because of the perceived unfairness of the position they find themselves in. Ms Johnson's evidence is:

"I have never been this financially unstable before, to the point of being unable to afford my rent and having to go into my overdraft when buying food. UC is supposed to be simpler and fairer, but my experience of it is the opposite. Nobody from the Jobcentre told me how the AP worked or that if I applied for UC on a different day I would be treated differently and would not lose out on my benefits entitlement.

I don't understand how I can receive so much less money than someone else in exactly the same position who applied for UC on a different day."

99. Ms Woods says that she has a sister who claims universal credit and has an assessment period from the 15th of one month to the 14th of the next so that she does not encounter the problem that Ms Woods is facing. Nothing was said to her at the interview she had at the job centre to explain the interaction between assessment periods and salary pay dates.
100. **Disincentivising work:** It is common ground that the legislative policy behind universal credit in general and section 8(3) of the WRA and regulation 22 in particular is to encourage work by being responsive to changes in earned income and making work pay to the fullest possible extent. There have been many Ministerial statements to that effect in policy documents and orally to Parliament. The Respondents cite a speech delivered by the Minister for Welfare Reform in September 2011, discussing how people with children and disabled people will be allowed to keep more of the money they earn before applying the taper which reduces their benefit award when their earnings rise. The Minister said that the system will provide people claiming benefits and those on low incomes with some certainty around what they are entitled to and how much they will receive. It means, he said, "families can budget on the basis of a guaranteed minimum income". The evidence of Mr Couling on behalf of the SSWP also stresses that the objective of incentivising work, both as a way of alleviating poverty and as an outcome in itself, was a fundamental tenet of the new system.
101. I described earlier how the non-banking day salary shift has led Ms Woods to refuse a promotion at work and to seek less rewarding employment where the salary pay date does not clash with the end of her assessment period. She comments in her witness statement:
- "27 ... If I am completely honest though, my maximum UC award of around £1200 if I was not working is manageable financially and would enable me to avoid all the stress of fluctuating monthly income levels. However, I will find a job once my present contract comes to an end as I have always worked or been studying and it is not in my nature just to sit around. That though is me pushing myself to fulfil my potential. As far as I am concerned, the current situation I find myself in with my UC assessment periods is a disincentive to finding work"
102. Ms Stewart and Ms Barrett also give evidence that their lives would be more manageable if they were not working as that would mean they would have a stable universal credit award to budget around. Ms Johnson concludes her second witness statement saying:
- "13. ... I am trying to make the best of myself, despite the difficulties caused by being on UC but sometimes I feel like it would be easier if I was unemployed because at least then I would have a steady and predictable income. When I didn't

work I was a lot more financially stable than I am now. It is maddening. I can't say the amount of times I have broken down in tears because I don't know how I'm going to get through the month. It shouldn't be like this."

103. Ms Woods included in her judicial review claim form a ground of challenge described as breach of the *Padfield* principle, as recently delineated by the Court of Appeal in *R (Rights of Women) v Lord Chancellor* [2016] EWCA Civ 91, [2016] 1 WLR 2543. That case concerned a judicial review of secondary legislation concerning access to legal aid for victims of domestic violence. The challenge was to the requirement that in order for a victim of domestic violence to be eligible for legal aid, the evidence of such violence must be less than 24 months old. Longmore LJ (with whom Kitchin and Macur LJ agreed) identified the purpose of the reforms read as a whole as being partly to withdraw civil legal aid services from certain categories of case in order to save money, but also to make such services available perhaps not to the entire membership of most deserving categories of case (such as victims of domestic violence) but at any rate to the great majority of persons in the most deserving categories: para 41. Longmore LJ rejected the submission on behalf of the Lord Chancellor that this was in effect a rationality challenge, stating that that would be to confuse the *Wednesbury* jurisdiction with the *Padfield* jurisdiction of the court when they are separate concepts. The *Padfield* jurisdiction was concerned with whether the Lord Chancellor had exercised the discretion conferred on him by his wide regulation-making powers in a way which promoted the policy and objects of the statute. Longmore LJ cited Lord Kerr of Tonaghmore JSC in *R (GC) v Commissioner of Police of the Metropolis* [2011] 1 WLR 1230, [83] who said that:

"a discretion conferred with the intention it should be used to promote the policy and objects of an Act can only be validly exercised in a manner that will advance that policy and those objects. More pertinently, the discretion may not be exercised in a way that would frustrate the legislation's objectives."

104. Longmore LJ held that the claimants in that case had put forward a formidable catalogue of areas of domestic violence not reached by the statute whose purpose was to reach just such cases. A rule which excluded so many of them and operated in a completely arbitrary manner frustrated the purposes of the legislation.
105. The arguments accepted by the Court in *Rights of Women* have some echoes in the present case where the complaint is in part that the large cohort of claimants affected by the non-banking day salary shift are unable to benefit from the work allowance to which they are supposed to be entitled. However, my view is that this case is more properly characterised as a *Wednesbury* unreasonableness challenge than as a breach of the *Padfield* principle. The latter principle is more appropriate where a specific exercise of a statutory power such as a rule-making power is challenged because it fails to promote the purpose for which the power was conferred. There is no specific exercise of the regulation-making powers which is alleged to breach the *Padfield* principle here. The challenge is to the combined effect of the Regulations as currently enacted and their failure to include an exception to the general principle in regulation 54.

106. Although I do not consider this to be a case within the *Padfield* jurisdiction of the court to which Longmore LJ referred, the fact that the absence of an exception to regulation 54 operates in so many cases and in a way which is antithetical to one of the underlying principles of the overall scheme, is an important factor when considering the rationality of the SSWP's choices. The evidence establishes in this case that there is a very substantial number of claimants who are likely to come to the same conclusion as the Respondents have arrived at, namely, that it is preferable in many ways not to work because they would then receive a stable, maximum amount of universal credit every month making budgeting much easier and avoiding debt; that the benefits of working longer hours or progressing to higher paid work may be outweighed by the increased fluctuations in benefit award, particularly if the benefit cap exception is lost; and that looking for a job where the salary pay date does not coincide with the end of the assessment period may take priority over accepting a job which makes use of the claimant's skills and educational achievements or which builds on her previous work experience.
107. The threshold for establishing irrationality is very high, but it is not insuperable. This case is, in my judgment, one of the rare instances where the SSWP's refusal to put in place a solution to this very specific problem is so irrational that I have concluded that the threshold is met because no reasonable SSWP would have struck the balance in that way.

3. DISCRIMINATION

108. Since I understand that my Lords agree that the irrationality ground raised by the Respondents' Notice should succeed, the alternative ground relied on that the Regulations discriminate against them contrary to Article 14 ECHR in conjunction with AIP1 does not arise for consideration. The SSWP accepted that this case fell within the ambit of AIP1 so that Article 14 was engaged. There was no agreement between the parties as to whether the Respondents had a relevant "other status" for the purposes of Article 14. The SSWP recognised that being a woman and being a parent were each a relevant status but denied that there was any discrimination against people with those characteristics, given that it could not be said that more women than men or more parents than non-parents were likely to find themselves in the Respondents' predicament of having an assessment period end date that coincided with their salary pay date. The Respondents put forward a more specific status which they defined as "being a person paid monthly wages on a non-fixed monthly date". The SSWP denied that this was a valid status for consideration of discrimination, submitting that it was simply a comparison made by reference to the differential treatment complained of.
109. There have been recent appeals concerning other aspects of the implementation of the universal credit regime where status has been a determining factor and where the jurisprudence of the Supreme Court and of the European Court of Human Rights on this difficult topic has been the subject of detailed analysis: see *R (oao TP, AR and SXC) v SSWP* [2020] EWCA Civ 37 and *R (oao TD, AD and Reynolds) v SSWP* [2020] EWCA Civ 618. I do not propose to add to that debate here since it is not necessary to do so.
110. I would therefore dismiss the appeal on the basis that the Respondents' challenge should succeed on the grounds of irrationality. I would set aside the declaration made

by the Divisional Court and replace it with a declaration focusing more specifically on the problem identified by these Respondents. That would leave it to the SSWP and those advising her to consider the best way to solve the problem. I would invite counsel to agree the terms of such a declaration in the light of this judgment.

Lord Justice Irwin:

111. I agree.

Lord Justice Underhill:

112. I too agree with Rose LJ's comprehensive and careful judgment, but I will very shortly summarise in my own words my reasons for holding that the failure of the Secretary of State to ensure that the Regulations cater for the phenomenon of "non-banking day salary shift" is unlawful.

113. I start by saying that I recognise, as does Rose LJ, the extraordinary complexity of designing a system such as universal credit, and that it necessarily involves a range of practical and political assessments of a kind which the Court is not equipped to judge. I also accept that in order to be workable any such system may have to incorporate bright-line rules and criteria which do not discriminate fully between the circumstances of different individuals. (In that connection the Secretary of State's evidence, and Mr Brown in his submissions, placed great weight on the objective of having as fully automated a system as possible, but the point would be valid even in the case of administrative systems that are not computerised.) For those reasons I fully accept that a Court should avoid the temptation to find that some particular feature of such a system is "irrational" merely because it produces hard, even very hard, results in some individual cases.

114. However, for the reasons which Rose LJ gives, that is not a sufficient answer in this case. Non-banking day salary shift is common and entirely predictable, and its arbitrary effect on entitlement to universal credit is now well-recognised, whether or not it was actually predicted when the scheme was being designed. That effect has a severely harmful impact, which they can do nothing to avoid, on very large numbers of vulnerable claimants. It is not simply a matter of uneven cash-flow (though the impact of that can be serious in itself, as the evidence illustrates): more fundamentally, the affected claimants will receive substantially lower payments in absolute terms because of the loss of the work allowance for "double-payment months" (and potentially also by reason of the operation of the benefit cap). That impact is not the inevitable consequence of the application of some fundamental principle of the legislation. I of course understand that it is a fundamental principle that entitlement should be based on monthly receipts, however much a claimant's income may vary from month to month. But an adjustment specifically to address the non-banking day salary problem would not in any real sense undermine that principle: indeed it could be said to vindicate it, since the receipt of salary in the "wrong" month because of the mechanics of bank payment is purely factitious (unlike other kinds of irregular payment discussed in argument). That is indeed clearly recognised in the HMRC guidance to RTI employers to which Rose LJ refers at para. 86 of her judgment, which asks them to record payments as having been made on the day on which they would have been made but for the contractual date being a non-banking day. If anything, the present operation of the scheme runs positively counter to its

declared purpose, as Rose LJ points out at paras. 100-101. It follows that I cannot accept that there is no way in which an appropriate adjustment can be made without prejudicing the overall statutory purpose; and I agree with Rose LJ that there is nothing in the evidence to justify the conclusion that no solution can be devised without causing unacceptable cost or problems elsewhere in the system.

115. I am inclined to agree with Rose LJ that the relevant form of unlawfulness is best characterised as irrationality, though I also agree that it has echoes of the *Padfield* principle. But ultimately these various characterisations are simply aspects of the fundamental question of whether Parliament can have intended the rule-making power to be exercised in a way which produces so arbitrary and harmful an impact on the Respondents and the very many other claimants who are in the same position. I do not believe that it can.
116. It will be sufficiently apparent from what I have said that, like Rose LJ (see para. 107), I regard this as a case which turns on its own very particular circumstances. It has no impact on the lawfulness of the universal credit system more generally.