

Why the DWP has been legally compelled to review the benefit claims of over 1.5 million disabled claimants

The DWP is to undertake five major case trawls involving over 1.5 million claimants. Disability Rights UK (DR UK) says that this demonstrates not just a record of poor benefit administration. It also highlights an unwillingness to acknowledge the actual needs of disabled people, the extra costs they face, as well as a disregard of their human rights.

Employment and Support Allowance (ESA)

In December 2017 the Government admitted that during the transfer of claimants to ESA from previous incapacity benefits [a number were wrongly not assessed for income-related ESA](#) although they may have had entitlement in addition to contributory ESA. This was because they were entitled to extra premiums included in the income-related benefit.

A [March 2018 NAO report](#) concluded that tens of thousands of disabled people had been underpaid ESA by thousands of pounds each due to DWP error. The average underpayment is likely to be around £5,000 but some disabled people will be owed significantly more. The [Public Accounts Committee has announced](#) that it intends to hold an inquiry informed by the NAO's investigation.

The DWP is to review almost 300,000 ESA cases. However, it insists that it will only pay arrears as far back as 21 October 2014 following the Upper Tribunal judgment in [CE/4181/2013](#). As a result, an additional £100 million to £150 million of underpayments will not be repaid.

However, the [Child Poverty Action Group is taking judicial review action](#) against this limitation of ESA arrears on the grounds that the problem was caused by DWP official error.

Personal Independence Payment (PIP)

In January 2018 the Government announced that it would not be appealing the High Court judgment in [RF](#) that held that amendments made to the PIP “planning and following a journey” regulations were unlawful.

The PIP amendments excluded help for those caused problems by “overwhelming psychological distress”. However, the High Court ruled that they breached Article 14 of the ECHR (discrimination) being “blatantly discriminatory against those with mental health impairments”. That the DWP wished to “save nearly £1 billion a year at the expense of

those with mental health impairments” was not a reasonable foundation for them.

Around 220,000 disabled people are estimated by the DWP to be owed PIP mobility component arrears due to the RF judgment.

The DWP is also to undertake a case trawl following the March 2017 Three Judge Panel Upper Tribunal judgment in [‘RJ’](#). This considered how the DWP should assess if a claimant to be carrying out an activity “safely” and whether they need supervision to do so.

In rejecting the DWP’s case, the Three Judge Panel found that -

“An assessment that an activity cannot be carried out safely does not require that the occurrence of harm is ‘more likely than not’.

In assessing whether a person can carry out an activity safely, a tribunal must consider whether there is a real possibility that cannot be ignored of harm occurring, having regard to the nature and gravity of the feared harm in the particular case.”

The DWP’s decision not to appeal the RJ judgment will increase entitlement for many new and existing PIP claimants, largely those with conditions such as epilepsy, which affect consciousness. The DWP estimates approximately 10,000 claims will benefit by £70 to £90 per week in 2022 to 2023.

DWP says that the RF and RJ case trawls are expected to begin “late summer 2018” and will involve the review of 1.6 million PIP claimants.

The DWP has more recently withdrawn its appeal against the Upper Tribunal’s judgment in [LB](#) on pre-2017 PIP descriptors relating to the need for help to manage a therapy.

The Upper Tribunal rejected the DWP’s submission that DWP PIP daily living activity three - the part of the assessment that covers “managing therapy or monitoring a health condition” - excluded treatment which consisted of monitoring health and administering medication. Instead it ruled that support to take medication and monitor their health condition should score in the PIP eligibility assessment in the same way as people needing support to manage treatment therapies such as dialysis.

The LB judgment will require a review of PIP claimants from November 2016 (the judgements date) to March 2017 (when the Government

amended the PIP daily living activity three regulations. The DWP estimates that around 10,000 disabled people will receive arrears of PIP but has not said what these could total. However, [a judicial review could be sought of the Government's March 2017 tightening of the PIP regulations](#). This is because the DWP failed to carry out a public consultation before doing so and that the changes were clearly “a significant change in the law”.

Universal Credit

In a policy U-turn, on 7 June 2018, the Work and Pensions Secretary Esther McVey announced new measures to transitionally protect disabled claimants who lose the severe disability premium (worth £64.30 per week) when they migrate to Universal Credit -

“In order to support the transition for those individuals who live alone with substantial care needs and receive the severe disability premium, we are changing the system so that these claimants will not be moved to Universal Credit until they qualify for transitional protection. In addition, we will provide both an on-going payment to claimants who have already lost this premium as a consequence of moving to Universal Credit and an additional payment to cover the period since they moved.”

However, the above announcement was made just one week before the High Court ruled that that the DWP had unlawfully discriminated against two severely disabled men who both saw their benefits dramatically reduced just because they moved local authority and were required to claim Universal Credit. In [R \(TP and AR\)](#) the High Court ruled that the Universal Credit regulations were unlawful discrimination contrary to Article 14 of the ECHR.

Around 4,000 people who were in receipt of ESA that included a severe disability premium have migrated to Universal Credit. Yet unspecified changes to the Universal Credit rules will be made in late Autumn 2018. The DWP has yet to say when any Universal Credit case trawl will begin, how many disabled claimants will be included or the amount of total arrears due to them.

Of great concern is that despite its commitment to amend Universal Credit regulations relating to the severe disability premium the DWP has sought permission to appeal the High Court's judgment.

This is solely on the grounds there was no unlawful human rights discrimination in the way the claimants concerned were treated.

The judgments against the Government in relation to both RF (overwhelming psychological distress) and R (TP and AR) (severe disability premium) were made on the grounds of unlawful human rights discrimination. The appeal against R (TP and AR) shows that the Government is seeking to reduce the ability of disabled people to successfully challenge damaging benefit restrictions on human rights grounds.

Yet in August 2017, the UK's progress against the [Convention on the Rights of Persons with Disabilities](#) (CRPD) was reviewed by the United Nations Committee on the CRPD.

In relation to benefits, The [UN Committee said that the UK should](#) -

- legislate to ensure that benefits protect the income levels of disabled people and their families taking into account the extra costs that come with disability;
- carry out an assessment of the overall impact of the changes to the benefits system on disabled people, and act to tackle reductions in disabled people's standard of living.
- ensure that eligibility criteria and assessments for PIP, ESA and Universal Credit are in line with the social model of disability; and
- review the circumstances under which receiving the ESA claimants can be sanctioned, and tackle the negative impact of this on disabled people.

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