CPAG Welfare Rights Bulletin.

When is a UC claim defective?

Given that it is only when a valid claim for UC is made that the various provisions terminating existing awards or HB, tax credits and IS and abolishing income-related ESA and income-based JSA can operate, it is important to understand what counts as a 'valid' claim for UC. That is a question not just of the law but also of how the claim process is designed administratively.

Electronic claims for UC are considered properly made when completed in accordance with the instructions on the electronic claims system (regulation 8(3) of the Universal Credit (etc.) (Claims and Payments) Regulations 2013).

The online claim does not ask the claimant to provide any documents proving identity before the point at which the claimant's journal notifies it that the claim details have been submitted. Instead, once the claim details are submitted, the claimant has an instruction on her/his journal that s/he must verify her/his identity (which can be done online, or if that does not work, at an appointment at the job centre which must be booked by calling the UC helpline). It is at this stage that the claimant provides a national insurance (NI) number – thus although having provided, or having applied for, an NI number is still a condition of entitlement to UC, doing so no longer appears to be part of making a valid claim.

Given this design of the online claim process, it seems that a claimant will count as having made a valid claim once s/he has answered all the questions on the online form (indicated by getting to the point at which a claimant can post on her/his journal). There may be situations where a claimant gives incorrect information deliberately to get to that stage (eg, entering incorrect rent details) and then puts a note on her/his journal to say the information is incorrect and s/he will provide it when s/he can – there it is arguable that the claim is still defective at that point.

In summary, it seems likely that, in most cases, the arguments that a claim is defective and thus that legacy benefits should not be terminated will work only up to the point before the online journal records that the claim has been submitted. Advisers should be cautious with arguments to the contrary, as it is likely that in the future it will be in claimants' interest more generally to argue for the widest possible conception of when a valid claim counts as having been made.

Withdrawing claims

Perhaps a more common situation advisers will face is in advising claimants who would be worse off on UC, and who could remain on legacy benefits but who have already made a valid claim for UC. In cases where that claim has not yet been decided, then it is possible for the claim to be withdrawn (regulation 31 of the Universal Credit (etc.) (Claims and Payments) Regulations 2013). Withdrawals of claims take effect by operation of law[2] as soon as they are received by the DWP (in other words, there is no need for a decision maker to make a decision that a claim is withdrawn).

In a case where a claim is withdrawn in this way, then it is arguable that it is, for all purposes, as if the claim had never been made. Thinking about this in terms of whether income-related ESA and income-based JSA are abolished and whether existing awards of tax credits, HB and IS should terminate:

- a decision as to the first day of the period in respect of which a claim for UC was made, necessary in order to set the date from which income-related ESA and income-based JSA are abolished, cannot be made (there is no claim in existence in respect of which that can be determined);
- similarly, there is no claim before the Secretary of State for Work and Pensions in respect of which she needs to satisfy herself that the four basic conditions of entitlement are met and so no triggering of termination of tax credits, HB and IS. Furthermore, regulation 8(2) does not allow a determination of an end date for these benefits in this case – the claimant is not entitled to UC and the reason s/he is not entitled is not because s/he does not meet all the basic and financial conditions but rather because s/he has withdrawn her/his claim.

Caution will be needed in advising claimants to withdraw a UC claim before determination as there is a risk the local authority, HMRC or DWP will not accept these arguments and decide that the UC provisions are triggered. However, that is a risk a properly advised claimant, who is a significant net loser on UC, may be prepared to take.

1 For example, Welfare Reform Act 2012 (Commencement No.23 and Transitional and Transitory Provisions) Order 2015, SI No.634

2 Reg 31(2) Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regs 2013, SI No.380

Test Case!

'Safely' in personal independence payment

Activities in the personal independence payment (PIP) test must be capable of being carried out 'safely'. That word is defined in regulations, but has been the subject of an important decision of the Upper Tribunal and, most recently, updated official guidance. Ed Pybus explains.

The regulations

In order to determine entitlement to personal independence payment (PIP), a claimant's ability to undertake certain activities is assessed, using a range of descriptors to determine the level at which the claimant can complete the activity. The regulations provide that in the PIP assessment, a particular descriptor only applies if the claimant can carry out the activity, at that level 'reliably'. This includes being able to perform the activity among other things, 'safely'.[1] Some activities include a descriptor that awards points if the activity can only be completed with assistance or supervision. The regulations define these concepts further: '"safely" means in a manner unlikely to cause harm to C [the claimant] or to another person, either during or after the activity'[2] and '"supervision" means the continuous presence of another person for the purpose of ensuring C's safety'.[3]

The Upper Tribunal

Last year, three joined cases were looked at by a three-judge panel of the Upper Tribunal where these issues were considered. The resulting decision was *RJ, GMcL and CS v SSWP (PIP)* [2017] UKUT 105 (AAC). This decision must be followed by decision makers and First-tier Tribunals in preference to that of a single Upper Tribunal judge.

Drawing on the approach taken by the House of Lords[4] when looking at the likelihood of harm in the context of protecting people against future harm, the judges held that the approach taken in previous caselaw, which

referred to the infrequency or remoteness of harm occurring and the need for the descriptor to be satisfied most of the time, was incorrect. Instead the Upper Tribunal concluded that:

> 'an assessment under the PIP Regulations that an activity cannot be carried out safely does not require that the occurrence of harm is "more likely than not". 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. Both the likelihood of the harm occurring and the severity of the consequences are relevant. The same approach applies to the assessment of a need for supervision.'

So decision makers and First-tier Tribunals should not consider that a claimant can undertake an activity safely if there is a real possibility of harm to either the claimant or another person.

Supervision

The decision in *RJ* also held that Judge Jacobs was correct when in *IM v SSWP* [2015] UKUT 680 (AAC), he stated that 'a risk that gives rise to a need for supervision need not be a risk that is unique to a particular activity [...] it is sufficient if it is a general risk'. So if there is a real possibly of harm, either to a claimant or to others, if the claimant isn't supervised, the claimant may score points under the descriptors that include supervision, regardless of whether or not the risk of harm is related to the activity.

Updated guidance

The Secretary of State is not appealing against *RJ* and has issued guidance and updated the PIP assessment guide to take account of the judgment. The PIP assessment guide now states that it is necessary to consider the likelihood of harm and the severity of harm that may occur.[5]

Also, guidance issued to decision makers advises that three factors should be used when considering whether an activity can be performed safely:[6]

- the frequency of incidents [that could cause harm];
- the severity of harm caused by an incident; *and*
- the extent to which the condition is predictable, controlled or the risk can be mitigated.

The frequency and severity of harm are highlighted in *RJ* as relevant factors. The guidance to decision makers goes on to advise that it is important to consider the likelihood that the incident occurs at the exact moment when an individual is undertaking an activity that could cause harm. The example the guidance uses is of a claimant who has one seizure a day, but only spends 45 minutes per day cooking; it therefore concludes that the likelihood of the seizures occurring at the time s/he is cooking is low, suggesting s/he would be able to undertake the activity safely.[7] It is arguable that this analysis fails the 'real possibility test' outlined in *RJ*.

The predictability of an incident occurring is not covered in detail by the judges in *RJ*, but in one of the cases under consideration they note that the First-tier Tribunal's reasons for awarding points under Activity 4 due to the unpredictability of her seizures was consistent with its own approach. This suggests that the predictability, or otherwise, of an 'incident' occurring would be relevant.

Mitigation of risk

Many of the examples in the guidance to decision makers cover the ways in which a claimant could be expected to mitigate the risks, and therefore undertake the activity safely. There is no discussion of mitigation of risk in the judgment.

While in some instances mitigation of the risks may be reasonable, in some it may not. Under the regulations, the claimant must still be able to undertake the activity 'to an acceptable standard'.[8] Also, in *PE v SSWP (PIP)* [2015] UKUT 309 (AAC), reported as [2016] AACR 10, Judge Jacobs held that a tribunal is entitled to 'consider reasonable and practical alternatives' when assessing a claimant's ability to complete an activity, but also noted: 'There must be a balance struck that prevents claimants generating their own entitlement while at the same time not allowing their own disability to be used against them.' These comments were made regarding Activity 6 but could potentially apply to other activities and the reasonableness of mitigating risk.

Reviewing awards

The second part of the guidance to decision makers discusses the process for revising awards.[9] It states that all decisions made between the date of the judgment in *RJ* (ie, 9 March 2017) and the date of the guidance (November 2017), and all PIP awards in payment on the date of the judgment, will be reviewed in an 'independent exercise'. It also outlines the process that the DWP should take when reconsidering awards that may be affected by *RJ*.

Conclusion

Advisers should be aware that if there is a real possibility of harm occurring, then the claimant cannot be considered to be able to undertake the activity safely. Advisers should be prepared to explain why the claimant cannot mitigate the risk.

If a claimant's awards would be increased as a result of *RJ*, the awards should be reviewed by the DWP, but the claimant can request a supersession or revision of her/his award instead.

1 Reg 4(2A)(a) Social Security (Personal Independence Payment) Regs 2013, SI No.377 ('SS(PIP) Regs')
2 Reg 4(4)(a) SS(PIP) Regs
3 Sch 1 SS(PIP) Regs
4 In *Re H and others (minors)(sexual abuse: standard of proof)* [1996] AC 563
5 *DWP, PIP Assessment Guide: part 2 – the assessment criteria*, para 2.1.15
6 Memo ADM 29/17
7 para 16 Memo ADM 29/17
8 Reg 4(2A)(b) SS(PIP) Regs
9 Memo ADM 30/17