

## ***The Universal Credit (Miscellaneous Amendments and Saving and Transitional Provision) Regulations***

The Department has recently laid in Parliament *The Universal Credit (Miscellaneous Amendments and Saving and Transitional Provision) Regulations*.

The Social Security Advisory Committee scrutinised individual aspects of this regulatory package during the course of two separate Committee meetings towards the end of 2017. The proposals remained subject to the Parliamentary Business and Legislation (PBL) Committee triage process at that time, and were therefore presented to the Committee in confidence. As a consequence we were unable to publish the minutes of the Committee's scrutiny until PBL clearance had been received.

While we have now updated the minutes on our website, I thought it might be helpful to draw together here a full transparent record of our scrutiny of these proposals, two aspects of which we decided to take on formal reference. You can read our reports, and the Government's response to our recommendations, here:

- [Transition to UC housing payments: SSAC report and government statement on the Universal Credit \(Miscellaneous Amendments, Saving and Transitional Provision\) Regulations 2018](#)
- [Surplus earnings: SSAC report and government statement on the Universal Credit \(Miscellaneous Amendments, Saving and Transitional Provision\) Regulations 2018](#)

Paul Gray  
Chair

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## **SSAC scrutiny of**

### ***The Universal Credit (Miscellaneous Amendments and Saving and Transitional Provision) Regulations***

#### **SSAC MEETING: NOVEMBER 2017**

3.1 The Chair welcomed Liz Crowther (G6, Working Age), Lynne Isaacson (A/G7, Working Age) and Dave Higlett (G6, Working Age) to the meeting. The draft regulations were being introduced to make a number of disparate amendments, principally to the Universal Credit Regulations 2013, but also to several other sets of regulations affecting recipients of income-related benefits for those of working age.

3.2 The amendments being introduced were as follows:

- (i) a change was being introduced to prevent an unnecessary and disproportionate level of disruption to the Department and claimants alike which sometimes arose when a decision was made revising or superseding an earlier decision determining the date of claim and consequent start of entitlement in an individual case. Because an individual's monthly assessment period was based on the date of claim, a belated change in the date of claim may have significant repercussions in the administration of the award. The amendment was designed to give decision-makers discretion to allow the original monthly assessment cycle to stand but make an additional and discrete assessment based on a period of less than a month;
- (ii) an anomaly that had been identified in the existing regulations relating to student couples entitled to Universal Credit (UC) was being addressed. This amendment would ensure that the student member of the couple would not be subject to work-related requirements during term time;
- (iii) an amendment was being introduced in relation to claimants subject to work search and work availability requirements. The rules currently provided that those requirements could be temporarily suspended during periods of short-term ill-health. The change was in relation to claimants found not to have limited capability for work following a work-capability assessment and was to the effect that any suspension in the work search/availability requirements would only be applied if the short-term health condition from which they would be suffering, was different from any condition from which they were suffering at the time of the work-capability assessment;
- (iv) the list exempting certain categories of claimants aged 18-21 from the housing costs exclusion rule in UC was being extended to include anyone in receipt of the Armed Forces Independence Payment;
- (v) an amendment was being made so that claimants were required to supply information or evidence required by the Secretary of State in connection with an advantageous change of circumstances within 14 days, rather than one month;

- (vi) the proposals provided a general default rule for the effective date on which any new secondary legislation would take effect;
- (vii) an amendment was being made to the Universal Credit (Transitional Provisions) Regulations 2014 so that a recipient of tax credits, given a final notice under section 17 of the Tax Credits Act 2002, may be treated as entitled to a tax credit with effect from the start of the tax year if, in certain circumstances, they had good reason for their late claim;
- (viii) an amendment was being introduced to treat any payments of foreign pensions or payments from a payment protection fund as unearned income so that it would be taken into account for the purposes of UC. Such payments were considered by the Department to be analogous to a State Pension;
- (ix) a significant change was being put in place to avoid the current difficulties that often arose when claimants were placed in temporary accommodation. Existing rules meant that if a claimant entered and left temporary accommodation within a single assessment period, no assistance with housing costs was available within UC. The Department's approach was to cease classifying rent payment for temporary accommodation as housing costs. The intention was that help with such rent payments could be allowed through Housing Benefit in respect of the period the temporary accommodation was occupied; and
- (x) the Universal Credit (Surpluses and Self-Employed Losses) (Digital Service) Amendment Regulations 2015 were being amended in a way that was designed to future-proof the legislation in the light of planned reforms to the National Insurance contributions payable by the self-employed.

3.3 The Department's intention was that the draft legislation should come into force on 5 February 2017.

3.4 Introducing the legislation, Lynne Isaacson explained that the Department had presented the Committee with an early draft of the regulations which had included consequential amendments affecting the benefit cap as a result of the proposed changes in relation to temporary accommodation. However upon further reflection, officials had concluded that the changes would have no practical effect upon the way in which the benefit cap operated. For that reason it had been decided to omit amending provisions relating to the benefit cap.

3.5 The following main questions were raised in discussion by Committee members:

- (a) **In amending regulation 33 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment Support Allowance (Decisions and Appeals) Regulations 2013, why did the Department believe it was necessary to be reduce the one month rule to 14 days?**

The rule was already 14 days for a change of circumstance that resulted in a decrease in benefit. The aim was to keep a simple and uniform approach in UC; having two different rules for reporting and verifying a change of circumstances within UC could lead to confusion and delays in paying the correct amount of benefit. The change also simplified the IT build.

**(b) The supporting documentation stated that there was no evidence that the 14 day rule in the Live Service had had any adverse impact. How did the Department reach that conclusion?**

The test and learn approach used in UC suggested that having a 14 day rule in relation to all changes of circumstances would make for consistency, simplicity and an improved delivery of service. The Department's experience was that most people on the Universal Credit Live Service, where this policy was being tested, provided evidence to support a reported change of circumstances within 14 days. Also some claimants were unaware whether the change of circumstances in question would lead to increased or decreased benefit. Having a 14 day rule for disadvantageous changes and a one-month rule for advantageous changes was confusing. It was important that claimants knew that there was a single 14 day rule which applied whatever the nature of the change in circumstances. The change would mean that the information given by the Department to claimants in relation to changes in circumstances could be clearer and simpler.

**(c) Did the Department consider having a simplified and consistent rule around one month?**

Due to the way that assessment periods worked in UC, even if the evidence was provided after the 14 day period but within the same assessment period, there would be no adverse effect on the customer's payment. In such cases many claimants would be receiving the correct benefit on time. In contrast, the one month rule almost inevitably meant that any claimant producing the required evidence near to the deadline would be too late to receive the increased benefit on time. Instead an adjusting payment of arrears would be required. It was therefore in the claimant's interest to provide the required information promptly. This amendment did not affect the discretion given to decision-makers to extend the time limit for producing evidence and information. This might apply, for example in the case of a tenancy agreement, where the required documentation may take longer to obtain. It was also the case that the Department was now able to do some of its own checking on-line. An example of this would be checking to see that the claimant was in receipt of Child Benefit. This meant that the amount of evidence a claimant was required to produce had decreased.

**(d) Could claimants potentially lose out because of that rule?**

Yes – if a claimant failed to provide the required information or evidence within 14 days, the decision-maker saw no grounds to extend the time limit and the date on which the evidence was produced came in the following

assessment period, the increased amount of benefit would only be payable from the date the reported change was verified.

- (e) **Was the statement that “we already allow 14 days in UC Live Service and it has had no adverse impact” reached on the basis of statistical information received?**

That statement should perhaps have been qualified. It was more of a subjective and anecdotal view based on the fact that it had not been recorded as an issue of concern, rather than being statistically-based. There was no management information in relation to these decisions and, in practice, the circumstances on the last day of an assessment period determined the amount of UC to be paid. Any change of circumstances notified and verified before the last day would therefore be accommodated in the payment due at that time. However it was not possible to know whether the lack of any impact was due to the timing of the assessment period or whether the claimant would have benefitted from discretion had it been required.

- (f) **Was there a problem with childcare costs? Given that people were often invoiced monthly how would they be expected to provide verification within the 14 day period, or would there be specific guidance in relation to applying discretion in such cases?**

It was true that child-care costs often vary each month depending upon hours worked. However if child-care costs were to go down, that was still a change that had to be substantiated within 14 days anyway. Clearly if it was unrealistic for the documentation to be provided within 14 days, that would be a prime case where discretion should be applied in the claimant’s favour.

- (g) **In regulation 4(7) – the provision which amends regulation 89 of the Universal Credit Regulations – the aim was to ensure that students who were members of a couple entitled to UC were not inadvertently subjected to work-related requirements. Was there scope for this to be extended to anyone in vocational training?**

The change was a technical one and referred to a narrow group of people who were eligible for UC, had their student income taken into account but who were subject to the work-related requirements regime. It was a point identified by the Committee in relation to the Social Security (Treatment of Postgraduate Master’s Degree Loans and Special Support Loans) (Amendment) Regulations 2016. Anyone undergoing vocational training would be placed in an appropriate conditionality regime following a one-to-one discussion with their work coach.

- (h) **It had been observed during a recent Committee visit that DWP operational staff who had been asked about student provision within UC Full Service were uncertain as to the rules relating to students and conditionality. It appeared to be their understanding that the guidance was “a work in progress.” Was this so, and could the Department**

**ensure that due consideration would be given to expanding and improving existing guidance?**

The Department would review the guidance when the new rules came into force.

- (i) **Draft regulation 8 proposed a change to the wording of regulation 3 of the Universal Credit (Surpluses and Self-Employed Loses) (Digital Service) Amendment Regulations 2015 so that the policy intention of deducting national insurance contributions from the earnings of the self-employed was preserved after the Government's intended reform of the contributory system for the self-employed was in place. However an unintended consequence of the proposed wording might be that the self-employed could opt to pay class 3 contributions with the result that their UC award would increase by the same amount. Had the Department considered this?**

The Department agreed to look into this and provide an answer to the Committee outside of the meeting.

- (j) **On the same amendment, the reference to "trade, profession or vocation" in connection with payments of national insurance contributions and income tax had been re-ordered. Whereas previously it was possible to consider national insurance and income tax more generally and make appropriate deductions, the new provision seemed to require something more specific. It was not possible to draw a clear distinction between a trade, a profession or a vocation for tax purposes and yet the new regulation appeared to require it. Could the Department check that what was now required would work in practice?**

The Department agreed to look into this and respond to the Committee outside of the meeting.

- (k) **On the proposed amendment to regulation 99 of the Universal Credit Regulations 2013 and regulation 16 of the Jobseeker's Allowance Regulations 2013 in relation to short term periods of ill health, would the work-related requirements be switched off if the claimant suffered a flare-up of a previous condition? Could the Department clarify the policy intention with this provision and particularly so in relation to mental health conditions?**

If it was the same medical condition as the claimant had had at the work-capability assessment then there would be no automatic switching off of the work-related requirements. The policy was that if it was a re-occurrence or a worsening of a previous condition they should see their work coach in the normal way so that appropriate advice could be given. It could mean that the person needed to be allocated to a different conditionality regime.

- (l) **What would happen if there was a significant change or deterioration in the claimant's condition?**

The work coach still had discretion to switch off the conditionality requirement, but this provision simply addressed the automaticity of it.

- (m) So would the Department require a different medical diagnosis in these cases?**

The Department undertook to respond to the Committee in writing outside of the meeting.

- (n) There appeared to be a difference in approach between regulation 41 of the Universal Credit Regulations which provided that a failure without good reason to fill in or return a questionnaire would lead to a claimant being treated as not having limited capability for work, and parallel provisions in other sets of regulations which related a decision on treating a person as not having limited capability for work more generally to failing to provide the information requested. That meant that a person could be treated as not having limited capability for work on slightly different grounds. That would affect decisions about short term periods of sickness and could be critical because a failure to return a questionnaire or attend an interview could be attributable to an underlying mental condition. Was there a policy reason for a different approach? Could the Department look at the wording of regulation 41 and consider whether it might be too tightly drawn?**

The Department agreed to look into the matter further and respond to the Committee outside of the meeting.

- (o) With regard to regulation 4(3) and (4) which amend regulation 21 of the Universal Credit Regulations 2013, could the Department provide some examples as to how this would work?**

It would only apply in cases where the award was in progress and was, at least, into its second assessment period. It would also only apply if, for some reason, the decision maker decided to back-date the date of claim or if it was determined that the date of claim was earlier, or should be treated as made on a date earlier, than that assigned in accordance with the original decision. If that happened then the claimant should already have received at least one payment of benefit and a cycle of assessment periods have been established. Rather than reconfigure the entire cycle of payments, it made good sense to enable the back-dated period to be treated as a discrete entity for benefit purposes, whilst all other aspects of the award be allowed to continue undisturbed. This would benefit claimants and the Department alike. The rationale was to make the necessary changes with minimal disruption for the claimant.

- (p) Were there any circumstances where the claimant would still be in their first assessment period and the discretion would be applied to retain the original start date?**

In those circumstances the Department would simply adjust the start date of each assessment period as now, and proceed on that basis. Claimants should not lose out on benefit whichever way the decision maker deals with this.

**(q) What would happen if there were earnings in the first assessment period?**

The Department would respond to the Committee in writing outside of the meeting.

**(r) Could the Department explain how the new rules affecting temporary accommodation would work? And what was the impact upon the benefit cap?**

It had become important to devise a way to ensure that local authorities received financial recognition for the costs they incurred when UC claimants were temporarily housed in short-term accommodation, but left before the end of the assessment period cycle had been reached. Because UC operated on the basis of circumstances ascertained on the last day of an individual's assessment period, it was possible for a claimant to incur actual housing costs but not be reimbursed for them in their UC. At the outset of devising a new approach for those in temporary accommodation the Department wanted to ensure that nobody would, on the basis of a different system of reimbursing temporary tenants and landlords for rental commitments, be inadvertently caught by the benefit cap. In looking at this in more detail however, it became clear nobody would be affected in this way. In fact there may be some people who may come out of the cap because of it.

**(s) Claimants currently had recourse to Discretionary Housing Payments (DHPs). How might this change affect that scheme?**

There would still be a need for DHPs to be available for UC claimants in temporary rented accommodation. The need for help with a deposit and paying rent in advance would still exist. That said, it would mean a lessening of the pressure upon DHPs. Annual numbers of those in temporary accommodation was around 90,000 a year. Of them only some were currently on UC and of them, only some would need a deposit or rent in advance. For example, the Department had worked with Croydon Council and were assured that they were pleased with the proposal. Although UC had yet to be fully rolled out, Croydon Council was confident that, overall, the pressure on its DHP budget would be lighter.

**(t) On the point about the final day of an individual's assessment period being critical for determining housing costs, was there a case for the Department looking more critically at the policy? Earnings over the course of the entire month were taken into account, for instance. The Department did not look at earnings on the last day of the assessment period and base entitlement on the earnings of that day. The Department's general approach to changes of circumstances must**

**result in some very arbitrary results – some claimants losing out and some claimants gaining. The amounts involved could be quite substantial.**

The Department acknowledged that point, but advised that the change of circumstances rule was fundamental to the operation of UC and went much deeper than the limits of this particular set of regulatory proposals.

- (u) Since DHPs had been devolved to the Scottish Government, was the Department working with the Scottish Government on that issue?**

The Department was working with the Scottish Government on the issue.

- (v) Could the Department clarify whether a change of address would trigger a requirement to claim UC?**

If a claimant on HB changed address within the same local authority, that would be a change of circumstances for HB purposes and would not require a claim to UC. If the move was to an address within a different local authority, that would previously have required a new claim to HB. If the new address came within in a Full Service area (or if the claimant met the gateway conditions in a Live Service area), then they would be required to claim UC.

- (w) Who would lose out under the current UC rules when a person ceased to have any rental obligation shortly before the end of the assessment period?**

The claimant would lose out in legal terms because they had the rental liability. If, as a consequence, no rent for that month was passed to the landlord, it would be the landlord who lost out in practical terms.

3.4 The Chair thanked the officials for attending the meeting and answering the questions that were put to them. He advised them that the Committee was content that the regulations could proceed without the need for their formal reference. A formal letter would be sent confirming that decision. Meanwhile, the Committee would await an early response from the Department to the specific questions on which an answer had not been forthcoming during the course of discussion.<sup>1</sup>

## **SSAC MEETING: DECEMBER 2017**

2.1 The Chair welcomed the following officials to the meeting: Dave Higlett (G6, UC Policy), Ronnie Haynes (G6, UC Policy), Geoff Scammell (G6, Housing Policy), Aidan Armitage (SEO, UC Policy) and Fiona Kilpatrick (Head of Legislative

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<sup>1</sup> A response from the Department on all outstanding issues can be found at annex C to these minutes.

Strategy). Dave Higlett apologised for the fact that there had been a delay in sharing the papers with the Committee.<sup>2</sup>

2.2 Opening the session, the Chair advised the officials that the Committee recognised that the process whereby proposed secondary legislation needed clearance from the Cabinet Office Committee on Parliamentary Business and Legislation (PBL) was creating a degree of uncertainty and consequent difficulties for the Department as well for SSAC. Having discussed the matter with Pete Searle (SCS, Director Working Age), it had been agreed that the minutes of this meeting in relation to them could therefore be published in the normal way, despite not having cleared the PBL triage process. This was because the Chancellor of the Exchequer had previously signalled the abolition of waiting days in Universal Credit (UC) and the Government's intention to provide a Transition to Universal Credit Housing Payment for claimants moving to UC in his November Budget announcement, and therefore these two issues were already in the public domain. The third aspect of the proposals being presented at the meeting however was not in the public domain, and it was agreed that the minutes in relation to it would not be published until PBL clearance had been achieved.

2.3 Fiona Kilpatrick explained that the Government was triaging all Statutory Instruments (SIs) as part of a central function, overseen by the Cabinet Office, to approve the laying / making of SIs. The Department had discussed with Cabinet Office the potential impact this might create for the Committee. Fiona advised that the system was beginning to settle down and the Department was now factoring this into future planning so that draft proposals could come to SSAC with sufficient time for scrutiny after Cabinet Office approval had been secured.

2.4 The following main questions were raised in discussion by Committee Members:

#### *Abolition of Waiting Days*

- (a) **Whilst welcoming the proposal, the decision announced by the Chancellor was clearly made against a background of growing concern over the length of the period a new UC claimant had to wait before getting their first payment of benefit. It was understood that 25 per cent of claimants did not get their first payment on time. By abolishing waiting days, did the Department see this as answering those concerns, or was there an appreciation of the need to look at additional ways of reducing the delay and speeding up the decision-making process?**

The Department appreciated the need to look beyond the abolition of waiting days for reducing delays in getting out first payments of UC. The Programme was looking closely at a number of different ways to secure better average

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<sup>2</sup> Another paper – an Equality Analysis in relation to the Housing Benefit run-on – was sent to the Committee shortly before the meeting commenced and too late for Committee members to have it available at the meeting itself.

clearance times. These measures included the provision of an automatic two week Housing Benefit run on, a focus on identity and housing verification including the Landlord Portal, and general improvements in processing procedures. The system of making advances was also being revised so that claimants would be able to receive 100 per cent of their benefit, including housing costs, with repayments being extended from six to 12 months. Given that payments of UC were made monthly in arrears, there would always be a period of at least a month before the first payment would be made. Given also that the calculation of each payment was based on the claimant's circumstances at the end of the assessment period, there would always be some activity within the Department at that time to determine the correct amount and get it paid a week after the end of the assessment period. Nonetheless the Department recognised that there was an ongoing challenge to meet clearance targets and, in cases where waiting days would have applied, that challenge could be greater. The Department would always be reliant upon claimants producing information and evidence requested of them promptly in order to help them meet targets and it should be remembered that not all new UC claimants currently serve waiting days. Some would migrate from legacy benefits and would be exempt; others were exempt because they satisfied certain conditions set out in the legislation. The fact that the Department would no longer need to investigate whether an individual was an exception to the waiting day rule would mean that, in some cases, there was less work to do.

**(b) What proportion of claimants were required to serve waiting days?**

It was thought to be around 45 to 50 per cent, but the Department would obtain the latest available figure and send it to the Committee.

**(c) How did average clearance times relate to those who needed to serve waiting days? Was it significantly different from those exempt from the rule?**

The Department undertook to look into that and come back to the Committee.

**(d) When the Government responded in 2015 to the Committee's recommendation that waiting days should not be introduced, it was said that claimants coming new to UC and having to serve waiting days would generally be coming from the world of work and would have savings which could reasonably be expected to carry them over this initial seven day period. With the Department's evaluation of UC, was that found to be the case?**

The decision to abolish waiting days had been taken before any test and learn exercise could be conducted in relation to this policy area.

**(e) Nonetheless it was important to get information about savings in order to understand the circumstances of those claiming UC.**

Noted.

- (f) **When waiting days were introduced the Committee was advised that the savings would be used to fund other schemes, in particular schemes targeted as support for the longer term unemployed. Would the costs associated with abolishing waiting days come from within the Department's own budget or was it new money? In other words would there be any dilution in the support currently being offered to the longer term unemployed?**

The funding was part of a wider package of budget measures from HMT and was not being funded from within the Department's own budget.

- (g) **Paragraph 16 of the Explanatory Memorandum stated: "Although the original rationale for waiting days (which was to deter people from making claims to Universal Credit to cover very short periods of unemployment or sickness) remains, upon review it has been found that the fixed monthly assessment periods provide a sufficient safeguard against this happening in many cases." What was the evidence base on which "it has been found" was grounded?**

It was from qualitative analysis and from listening to what people were saying. The point being made in that paragraph was that although the rationale for introducing waiting days in the first place was still valid, the UC system of monthly assessment periods and determining circumstances at the end of each assessment period provided a deterrence of its own. In practice a person contemplating making a claim for UC when set to return very shortly to employment (with remuneration above UC levels) would probably not be entitled to UC and may therefore be deterred from making a claim. In that way the policy rationale for waiting days had been overtaken by the way UC worked in practice.

2.5 The Chair advised the officials that, subject to providing the information requested in the course of the discussion, the Committee was content that the proposal to abolish waiting days in UC could proceed without formal reference.

#### *Housing Benefit Run-on*

- (a) **Could the Department explain the statement in paragraph 11 of the Explanatory Memorandum that "claimants who move on from specified or temporary accommodation will not be entitled to receive these additional payments"?**

The Department had changed the rules for claimants in specified or temporary accommodation because the system of monthly assessment periods in UC did not fit well with short term spells in such accommodation where the landlord was often unreimbursed. Rather than paying housing costs in UC, claimants would retain an entitlement to Housing Benefit. That meant that the problem of funding rented accommodation when moving to UC did not arise for these claimants. The key point was that although housing costs in these

cases were met by Housing Benefit, the claimant would have already transitioned into UC.

- (b) What would happen if a person currently on Jobseeker's Allowance and Housing Benefit moved into temporary accommodation in an area where they had to claim UC?**

They would receive the additional payment.

- (c) In that case paragraph 11 could be clearer.**

Noted.

- (d) What would happen when a claimant on Housing Benefit whose rent was paid direct to the landlord moved to UC?**

The policy was that everyone would receive a two week run on of Housing Benefit. There was no need for claimants to make a separate claim for it – it would be paid automatically. Whatever payment arrangements were in place already would apply for the additional payment unless it was a change of address, in which case the payment would go to the claimant rather than the landlord.

- (e) How many landlords would benefit?**

It was difficult to know because the Department did not have details on the proportion of claimants who were in arrears with their rent. However, for the landlord to “benefit”, the claimant would have to be on direct payment in both the Housing Benefit system and the UC system and also up to date with their rent.

- (f) Where new claims for UC would be made in these circumstances, what would be the proportion where the payment would go to the landlord?**

The exact proportion was not known but would be very low. The Department would endeavour to get the figures and pass them to the Committee.

- (g) This policy could give an incentive for landlords to request direct payments in advance of their tenants being migrated to UC. There was also a more fundamental issue of taxpayers' money intended to benefit claimants going to landlords.**

These points had been considered by Ministers, but the proposals now being presented had found favour. The underlying philosophy of UC that claimants should take responsibility for their own financial affairs meant that very few UC claimants in the private sector would have their housing costs paid directly to the landlord. As far as landlords anticipating the process of migration to UC was concerned, it was unlikely that they would know when the transition would take place and who would be affected.

- (h) If the claimant had arrears of rent and the Housing Benefit payment was made direct to the landlord, would the tenant's account be credited with the bonus? This question was asked in the context of an understanding that where a landlord had a property in which several tenants reside, payments of Housing Benefit or housing costs in UC were made in the form of an aggregated sum accompanied by a list of the tenants but without specifying the individual sum attributable to each tenant.**

The Department was not aware that that was happening. There were difficulties in finding out the precise practice in each individual local authority, but attempts would be made to discover more and get back to the Committee. It would however be surprising if such a practice was widespread as, ultimately, there needed to be a reconciliation between the payments and the individual rent account. On the question about the landlord crediting the tenant's account with the additional Housing Benefit, certainly that was what the Department expected to happen. If the claimant had rent arrears then the sum should be used to reduce them.

- (i) Some claimants on rent direct would not know that an additional payment had been made to the landlord and would not appreciate that it was for them to ask for it back. Regardless of whether the landlord offsets rent arrears with the additional Housing Benefit or credits the tenant's account with the sum, the legal position was that the money belonged to the tenant and not the landlord.**

That was correct. The Department would ensure that this message was communicated effectively.

- (j) What was the estimated overall cost of making this double payment?**

The Department had calculated that there were 2.3 million people affected who would each receive an average payment of £233. This equated to an estimated total of around £540 million.

- (k) If the migration to UC was planned, was it not possible to plan a way out of this difficulty?**

No amount of planning could navigate the essential problem that arose when a claimant moved to a benefit which was paid in arrears at longer intervals than that to which the claimant was accustomed.

- (l) Was any consideration given to clawing back this sum over a period?**

Yes, but Ministers had decided that help with rent should be given to people at the point at which they needed it. It should be remembered that this was not an ongoing issue. Once people had been migrated from Housing Benefit to UC, the problem was over.

- (m) The purpose of the measure was clear, but how did Ministers arrive at a decision that a two week payment would be sufficient to close the gap?**

That decision was reached more on the basis of providing a significant level of help, together with other measures being put in place, whilst recognising the need to contain costs, rather than on the basis of any evaluation which concluded that a two week payment would resolve the problem in all cases.

- (n) **Would it be possible for a claimant to receive a two week Housing Benefit run-on payment and still get 100 per cent advance of their housing costs?**

There would be little incentive for a claimant to apply for an advance of their housing costs when the need for it had been addressed. In practice making an advance in these circumstances would be unlikely.

- (o) **Could the Department not consider providing a five week Housing Benefit run-on, but legislate so that entitlement to UC in the first assessment period in these circumstances did not include housing costs?**

The Department would consider that suggestion and come back to the Committee, although an initial reaction was that this would simply defer rather than solve the problem.

- (p) **Why did the run-on apply even where a claim for UC had not been determined, and could presumably be disallowed?**

This provision was needed to ensure that help was available even when the claim for UC was in the process of being determined. In practice the circumstances set out in the draft regulations envisage situations where a claim for UC is required because the claimant has fallen out of work, or where the Department is moving them to UC as part of the planned migration. In such circumstances the prospects of the claimant not being entitled to UC would be remote.

2.6 The Chair advised the officials that the Committee had decided to take this particular proposal on formal reference, but would do so without conducting a public consultation. The Committee would therefore draft a report for the Secretary of State which would, in due course, be laid in Parliament with the regulations and together with the Secretary of State's response to the recommendations of the Committee.

*[The Committee's advice to the Secretary for Work and Pensions, and the Government's response, can be found [here](#)]*

### *Surplus Earnings*

2.7 This particular proposal was introduced by Ronnie Haynes (G6, UC Policy) Bridget Hornibrook (G6 lawyer, Universal Credit and Housing Support) and Fiona Kilpatrick (Head of Legislative Strategy). The Chair reminded Committee members and officials that he had agreed with the Department that the Committee would be

notified as soon as this proposal had received PBL clearance so that the minutes could be published as soon as possible afterwards, and ahead of the regulations being laid.

2.8 Introducing this subject, Ronnie Haynes explained that the Department had identified a need to adopt a different strategy towards calculating surplus earnings in UC because the original intention to take into account all earnings in the period of up to six months between the termination of the earlier award of UC and the start of a repeat claim for UC could not be processed electronically. The RTI data had not proved capable of providing the information on a claimant's earnings in a way which would meet the original policy intention. After being twice delayed by 12 months, the Universal Credit (Surpluses and Self-employed Losses) (Digital Service) Amendment Regulations 2015 was now due to come into force in April 2018. The proposed amendment was being put forward by the Department to ensure that it was workable.

2.9 The proposal was focused on calculating the surplus earnings as they stood when the claimant's award of UC ended and setting that surplus, subject to a de minimis amount of £300, against the earnings in the relevant assessment period when a repeat UC claim was made. This process might mean that a claimant receiving a substantial bonus in a particular month would need to make successive unsuccessful claims for UC in the succeeding months in order to ensure that their surplus earnings were fully eroded. Ronnie Haynes explained that the Department had decided to make a temporary and very substantial increase to the de minimis limit, possibly increasing it to £2,500, in order to ensure that the policy could be applied safely and that it could be tested during the 2018 to 2019 period. The intention was that in April 2019 the de minimus figure would return to £300 a month. In the period 2018 to 2019 an estimated 11,000 fluctuations would trigger the surplus earnings rules, although that would not necessarily equate to the number of claimants, as some claimants could trigger the surplus earnings rule two or three times in a year. The proposed amendment would also apportion a straightforward 50/50 split on the surplus earnings when a couple split rather than a split which sought to attribute the surplus earnings to the partner who had worked for them. It also removed the time bound element from the self-employed losses, which was previously set at 11 months.

2.10 The following main questions were raised in discussion by Committee members:

- (a) **The Explanatory Memorandum advised that an equality impact had been conducted and that the “amendments concerning Surplus Earnings and Waiting Days are considered beneficial measures, with no adverse impacts on those with protected characteristics identified”. If surplus earnings were to be apportioned on a 50/50 basis between partners who split, would that not impact more on women when the surplus earnings were more likely to be those of a man? The Department's approach would appear to put the proposed legislation at risk of challenge.**

There were provisions within the draft regulations for a decision-maker to attribute a different split where it was reasonable to do so. This was a simplification measure that was easy to explain for claimants.

- (b) Was it reasonable to require a partner with mental health difficulties – another protected characteristic – not only to make a claim for UC in their own right, but to represent that surplus earnings should be apportioned on a different basis than a simple 50/50 split?**

The Department would expect a claimant to report a drop in earnings if they had gone off UC so that their surplus earnings could be adjusted. This was not a new requirement of this policy. The Department always asked claimants to report changes in their circumstances.

- (c) How would the possibility of having a different split be communicated to the partners, particularly as one of the partners would probably be making a claim in their own right for the first time?**

This was exactly why a 50/50 split would be more beneficial to claimants as it would help them understand the expectations on them. As part of the changes to this policy the Department would need to develop amended communications to claimants to ensure they were aware of the expectations on them at the point of claim and at the point a surplus was triggered.

- (d) In developing the Equality Impact was any analysis done? An analysis was done in relation to the original Surplus Earnings etc Regulations that the Committee saw two years ago. Since then the test and learn approach in UC should have allowed for a further analysis of the impact of the proposals.**

The Department had calculated the numbers that were likely to be impacted by this proposal. It would also check further into the extent to which the original analysis had been conducted in relation to those with a protected characteristic. The Department would come back to the Committee with more information on that particular issue.

- (e) Two years on and we were now in a different environment. The amount of the work allowance, for example, had been changed. Had the Department undertaken any up-to-date analysis which took into account the changes that had occurred?**

The Department would again come back to the Committee on that question.

- (f) How would claimants know that they have to make a repeat claim if there had been a reduction in their earnings since going off UC?**

This would be made clear to them in the information they would receive when their earnings took them off UC.

- (g) Could the Department confirm that a claimant who deferred making a repeat claim for UC for three months could be better off than someone who had claimed in each of those three months?**

Yes, that would be true if, in the succeeding three months the earnings had continued to be high. That was why the information given to claimants by the Department would make it clear that they should make a repeat claim if their earnings reverted back to the level it was before they received the spike which took them off UC. Essentially the Department wanted people to report a change in circumstances and to reclaim when it would have a favourable impact upon any UC entitlement.

- (h) But that assumed a simple change of circumstances where it was easy to determine the effect. In practice there may be several changes in circumstances which may make it difficult to predict whether the impact on UC would be positive or negative. This would appear to present a problem for the Department in its messaging.**

Noted.

- (i) Would it be possible for a person to make a late claim for previous months when it became evident that it was in their interests to do so?**

The rules on backdating claims in UC were tightly prescribed and it was unlikely that these circumstances would allow the Department to backdate a claim.

- (j) Could a person make a repeat claim and, if it seemed likely that it would have a detrimental effect on any potential UC entitlement, withdraw it before it had been determined?**

Yes, provided that intention was communicated to the Department in a clear and timely manner.

- (l) This rule was likely to affect the self-employed more than others. Given that they were often tied up with trying to make the business viable, how realistic was it to expect them to repeat claims in order to reduce the level of their surplus earnings?**

It had been estimated that it would only take around eight minutes for a person to make a repeat claim in these circumstances where the only change was in earnings.

- (m) Did it make sense to defer the introduction of these rules until the precise communications to claimants and staff could be worked out?**

The regulations had already been deferred twice for a year. Putting it off for a further year would prevent the Department learning from the process and would also cause difficulties for the self-employed who had monthly assessment periods where there were significantly high expenses or a significant drop in income. A deferral in this policy would also defer the

introduction of self-employed losses which was favourable to claimants. There would also be savings from this measure once the de minimis level had reverted to £300 a month, so that further deferral would probably be met with resistance.

- (n) Was there not an issue when it came to reverting the de minimis figure back to £300? Claimants with highly fluctuating earnings would have got used to a far higher figure by that time.**

The onus would be on the Department to explain the change effectively. The alternative would be to introduce the rule at the £300 level and this would be difficult during the period of test and learn.

- (o) But would a de minimis figure set at a very high level as proposed in the interim period not give a different set of results since it would also extend to very different types of work and patterns of work?**

Yes some of the claimant groups impacted would ultimately be different. However, there was still the benefit of learning from the introduction of this policy now as well as the benefit of self-employed losses for claimants.

- (p) The explanatory memorandum stated that this proposal would benefit claimants. Where was the benefit?**

The gainers would be those who had subsequent months where there were further spikes in earnings. When they eventually reclaimed UC no account would be taken of further surplus earnings – it would only be the surplus earnings at the point at which they came off UC that would be factored in to the calculation. The Department did not estimate that there would be many in this category. Bonuses, for example, were typically paid annually.

- (q) In which case what was the policy objective?**

The policy objective was to find a fair way of managing UC, which was based on monthly assessment periods, when claimants experienced high levels of fluctuations in their earnings. The original intention was to use RTI data to assess earnings during short periods of non-entitlement to UC but this has not proved possible. In fact the entire UC programme would be put at risk if Department tried to build in an RTI capture of this information.<sup>3</sup> That meant a different approach and the proposed solution had been devised as the simplest and fairest for all affected and the easiest to operate. As UC did not assess earnings on an annual basis, this was the fairest way to ensure that

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<sup>3</sup> The Department subsequently clarified that using RTI data to assess earnings during short periods of non-entitlement to UC would require new functionality to be built in the UC Full Service that would keep claim information alive and running in the background and provide a platform to which RTI data could be attributed. To build it would require a significant shift of resource away from the core UC build which would significantly impact the continued development of the UC IT platform.

large increases in earnings that took a person off UC were not discounted in the event of a subsequent reclaim of UC.

- (r) **Returning to the communications the Department would need to provide for claimants, the message would have to be that a person coming off UC because of surplus earnings should continue to live at or near UC levels for six months in the event that they might need to make a repeat claim. They could, for example, find themselves in real financial difficulties if they used the surplus earnings to pay off rent arrears.**

The Department's approach was broadly in line with HMRC rules on tax credits where subsequent adjustments were made at a later date following spikes in earnings. It was reasonable to expect that benefits should be adjusted in line with earnings levels.

- (s) **In draft regulation 4(2) should the reference to "31<sup>st</sup> March 2018" not be "31<sup>st</sup> March 2019"?**

The Department undertook to check that date.

2.11 The Chair thanked the officials for attending the meeting and answering the questions that were put to them. He advised them that the Committee was concerned, as was evident from the discussion, about the difficulties faced by the Department in effectively communicating the rules to claimants as well as to members of staff. He further advised the officials that the Committee would inform the Department of a decision on formal reference as soon as the Committee had been informed that the proposals had been cleared by PBL and ahead of the regulations being laid.

*[The Committee subsequently confirmed it would take this proposal on formal reference. Its advice to the Secretary for Work and Pensions, and the Government's response, can be found [here](#)]*

**DWP's response to questions that remained unanswered  
at November's meeting**

**Question at minute reference 3.5(i)**

Draft regulation 8 proposed a change to the wording of regulation 3 of the Universal Credit (Surpluses and Self-Employed Loses) (Digital Service) Amendment Regulations 2015 so that the policy intention of deducting national insurance contributions from the earnings of the self-employed was preserved after the Government's intended reform of the contributory system for the self-employed was in place. However an unintended consequence of the proposed wording might be that the self-employed could opt to pay class 3 contributions with the result that their UC award would increase by the same amount. Had the Department considered this?

**Answer**

Yes. Regulation 57(2) of the UC Regulations was amended by SI 2015/478 to cross-refer to Class 2 contributions under section 11(2), (6) and (8) of the Contributions and Benefits Act. Subsection (6) covers voluntary Class 2 contributions and we want to maintain the substance of that provision for voluntary Class 3. However, we also want to take this opportunity to future proof the treatment of National Insurance contributions, so far as possible, by dropping the current reference to particular classes of contribution and instead allowing deduction of all contributions paid in respect of the self-employed trade, profession or vocation – whether mandatory or voluntary.

**Question at minute reference 3.5(j)**

On the same amendment, the reference to “trade, profession or vocation” in connection with payments of national insurance contributions and income tax had been re-ordered. Whereas previously it was possible to consider national insurance and income tax more generally and make appropriate deductions, the new provision seemed to require something more specific. It was not possible to draw a clear distinction between a trade, a profession or a vocation for tax purposes and yet the new regulation appeared to require it. Could the Department check that what was now required would work in practice?

**Answer**

This seems to be working well in practice. The intention of the amendment is to maintain the current basis for the assessment of self-employed earnings for UC, which is closely aligned with HMRC's simplified cash basis accounting, with claimants self-reporting these earnings to us on a cash-in and cash-out basis. Any additional earnings as an employee are reported separately to us, generally via the employer, with any relevant tax and National Insurance contributions deducted from those earnings. This allows us to assess total combined earnings, after all tax and National Insurance paid, in each monthly UC assessment period.

**Question at minute reference 3.5(l)**

What would happen if there was a significant change or deterioration in the claimant's condition?

### **Expanded answer**

We want to simplify our processes for claimants, and provide consistent messages and support for claimants to move into work at the earliest opportunity once they have been found 'fit for work' following a Work Capability Assessment. We also want to align Universal Credit with Jobseeker's Allowance, where claimants would be expected to look for and be available for work under similar circumstances. Automatically switching off work search and work availability requirements for a short period of time for the same (or substantially the same) condition, for which a claimant has been found fit for work, sends mixed messages to claimants and does not help them move forward in the search for suitable employment.

### **Question at minute reference 3.5(m)**

So would the Department require a different medical diagnosis in these cases?

### **Answer**

The Work Capability Assessment takes into consideration fluctuating conditions. It is not a snap-shot, so if a person cannot carry out a function repeatedly and reliably they will be treated as being unable to carry out that function at all. The assessment gives claimants with fluctuating conditions the opportunity to explain how their condition varies over time. Indeed the ESA50 health questionnaire, completed by claimants before their WCA, directly asks how the claimant's condition varies in how it impacts on their ability to complete activities over time, and if so to give details of how this affects them as an individual. Healthcare Professionals (HCPs) who undertake the WCA are trained and given guidance on how to consider fluctuating conditions. As part of a WCA the HCP will consider a claimant's functional capability against activities that an individual may undertake such as awareness of hazards, learning new tasks and mobilising unaided by another person (known as "descriptors"). The guidance to HCPs advises that where a claimant has a fluctuating health condition, they should be considered against those descriptors which apply to the claimant on most days. Both physical and mental health descriptors are considered.

### **Question at minute reference 3.5(n)**

There appeared to be a difference in approach between regulation 41 of the Universal Credit Regulations which provided that a failure without good reason to fill in or return a questionnaire would lead to a claimant being treated as not having limited capability for work, and parallel provisions in other sets of regulations which related a decision on treating a person as not having limited capability for work more generally to failing to provide the information requested. That meant that a person could be treated as not having limited capability for work on slightly different grounds. That would affect decisions about short term periods of sickness and could be critical because a failure to return a questionnaire or attend an interview could be attributable to an underlying mental condition. Was there a policy reason for a different approach? Could the Department look at the wording of regulation 41 and consider whether it might be too tightly drawn?

### **Answer**

The policy on what happens where an ESA50 / UC50 health questionnaire is not returned to CHDA as part of the WCA process, depends on whether the claimant suffers from a physical or mental health condition.

At the new claim stage, and during the gathering of information from the claimant. DWP will set a marker for mental health where the claimant has indicated that their condition is related to mental health. Where a claimant has this mental health marker set and doesn't return their ESA50 / UC50, then the WCA process will continue, and the impact of their condition will be based on the face to face assessment. At the assessment, the claimant is free to bring a family member or friend with them to provide support through the assessment process. If a claimant does not attend an assessment, then HCPs will refer the case to a Decision Maker who will consider whether the claimant had good cause for not attending the assessment.

Where a claimant does not have the mental health marker set, (and so is likely to be claiming on the basis of physical impacts of their condition) and the ESA50 / UC50 questionnaire is not returned, then decision makers will consider whether to continue the WCA process and will consider whether the claimant had good cause for not returning the questionnaire, and may choose to issue a duplicate ESA50 / UC50 to the claimant. Where no good cause is shown by the claimant, the decision maker may terminate the ESA award. In UC, the claim is not terminated if the claimant continues to meet the eligibility criteria. The claimant will remain in their allocated labour market regime, with appropriate work-related requirements set.

If, following a WCA, there is a relevant change in the claimant's circumstances, supported by appropriate medical evidence, a claimant will be referred for a new WCA.

The differences in the drafting change to the UC regulations and the JSA regulations are intentional and are due to inherent differences in how the two benefit regimes work. However, they have no policy implications.

The first difference is that UC provision (in new paragraph (4ZA) of Regulation 99 of the Universal Credit Regulations 2013) allows for work search and work availability requirements to be lifted on the basis of a fit note (under paragraph (4) of that Regulation) in the period between the Secretary of State deciding to reassess a claimant in a Work Capability Assessment and when determination is made following that assessment. Once such a determination is made and no LCW is found, paragraph (4ZA) disapplies paragraph (4) so that the work requirements can no longer be lifted on the basis of a fit note relating to the same or substantially the same health condition in respect of which the WCA was made.

However, the analogous JSA provision (in new paragraph (5A) of Regulation 16 of the Jobseekers Allowance Regulations 2013) provides that work requirements cannot be lifted in those circumstances (under paragraph (5) of that Regulation) at any time – there is no need for a provision for paragraph (5) to continue to apply pending a WCA determination, as there is no provision for reassessment for JSA claimants.

The second is that Part 5 of the UC Regulations allows for claimants to be "treated" as having LCW or LCWRA without the need for a WCA in certain circumstances (Regulation 39(1)(b), (6) and Schedule 8 for LCW; Regulation 40(1)(b), (5) and Schedule 9 for LCWRA), such as where the claimant is receiving treatment in hospital, prevented from work by law or terminally ill. If one of these circumstances

had previously applied to a claimant but it is subsequently determined that it no longer applies, i.e. the claimant is no longer being treated as LCW/LCWRA, then new paragraphs (4ZA) and (4ZB)(a)(ii) would mean that a claimant could not have work requirements lifted on the basis of a fit note relating to the same (or substantially the same) circumstance.

In JSA, this circumstance could not arise. If a claimant had been treated as having LCW/LCWRA, they would have been prevented from claiming JSA on this basis. If they had been treated as having LCW/LCWRA in a prior ESA claim due to circumstances which no longer apply, this would not be relevant to the current JSA claim.

**Question at minute reference 3.5(q)**

What would happen if there were earnings in the first assessment period?

**Answer**

Where there is an established assessment period and backdating, change in application of waiting days, reconsideration or appeals means the effective date of claim needs to change, and therefore the associated assessment period, we would have the power to keep the current assessment period cycle and create a mini, longer or shorter assessment period to assess, and pay (if applicable) for this period.

In relation to the mini assessment period and earnings, earnings are gathered via RTE and the claimant(s) have up to 6 months of earnings if interest was set in previous claim(s). If not – they would need to self-report.

Earnings – SRE, SEE information is gathered by the claimant with a prompt for the claimant to declare gainful self-employment, or any other earnings.

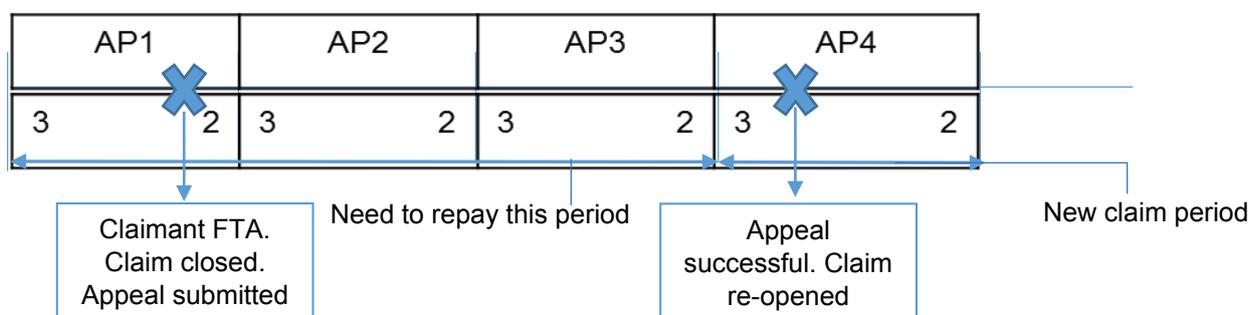
We apply the earnings policy and would take into account the earnings that are declared for the relevant assessment period, whether that is a weekly, fortnightly, four weekly or monthly amount received from RTE and apply that amount to the mini assessment period.

I have set out below a straight forward scenario to illustrate how the mini assessment period works. Earnings that were received in the mini assessment period would be taken into account in the normal way:

**Scenario 1 – straight forward – recon/appeal – no new claim**

Scenario:

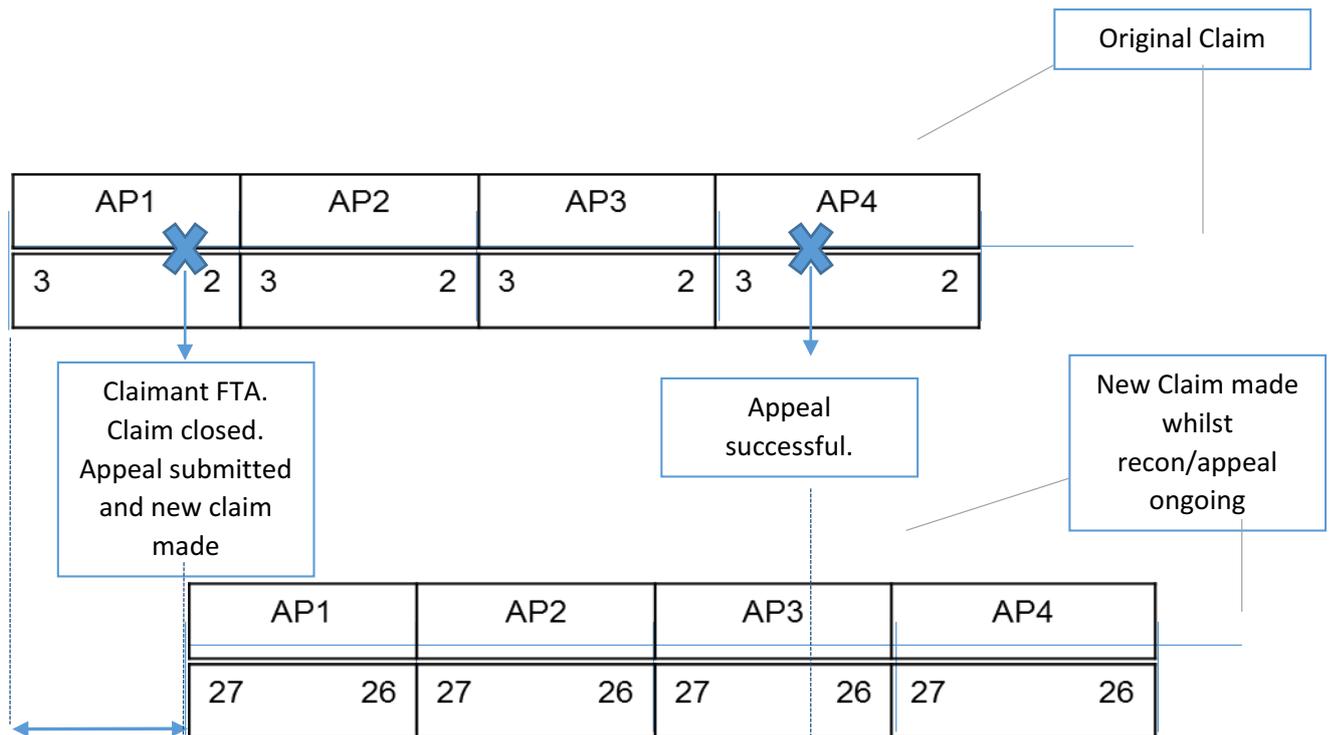
- Claim made on 3 June 2016. Claimant failed their HRT
- They were informed they were entitled on the 28 June
- They appealed on the same day as they were informed they weren't entitled
- They made a new claim on the 10 June
- Money due covers 1 Assessment Period (AP) and 7 days



This is to make a new claim from the new claim period, extend the AP back to cover the previous AP's in line with the regulations, but assume the data that applied at the new claim period was true for the previous 3 AP's back to the new claim date.

**Scenario 2:**

- Claim made on 3 June 2016. Claimant failed their HRT
- They were informed they were entitled on the 27 June
- They appealed on the same day and made a new claim AP 27 to 26
- Wins appeal on original claim into AP 4 of original claim and AP 3 of new claim



Need to repay this period – Mini AP period

This is to keep the new claim made on the 27 June and create a mini AP to cover the period of the 3 June to the 26 June and pay as arrears payment based on the data checked on the system on the 27 June claim.

Both scenarios above are inherently complex and there is an excess of 60 other variations, however the key variations of this process are:

- scenarios for non-entitlement;
- larger gap between non entitlement date and successful appeal;
- gap less than one month;
- couple and single claimant cases;
- change of circumstances between periods;
- non-entitlement in first AP and occurs in a subsequent AS;
- backdating prior to first day of first AP