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Case Nos: CO/1643/2018
CO/1552/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/01/2019

Before:

THE RIGHT HONOURABLE LORD JUSTICE SINGH
AND
THE HONOURABLE MR JUSTICE LEWIS

- -

Between :

R (on the application of **(1) DANIELLE JOHNSON** **(2) CLAIRE WOODS** **(3) ERIN BARRETT** **(4) KATIE STEWART)**	**Claimants**
- and - **SECRETARY OF STATE FOR WORK AND PENSIONS**	**Defendant**

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- -

Jenni Richards QC and Tom Royston (instructed by **Leigh Day**) for the **First Claimant**
Jenni Richards QC and Stephen Broach (instructed by the **Child Poverty Action Group**) for the **Second-Fourth Claimants**
Edward Brown (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 27 and 28 November 2018

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Approved Judgment

LORD JUSTICE SINGH AND MR JUSTICE LEWIS:

INTRODUCTION

1. This is the judgment of the Court.

2. These claims for judicial review concern the proper method of calculating the amount of universal credit payable to each claimant under the Universal Credit Regulations 2013 ("the 2013 Regulations").

3. Universal credit is a single welfare payment comprising a basic personal amount and also amounts to reflect the cost of caring for children, housing and other prescribed needs. The amount of universal credit that is payable to a claimant is assessed by reference to a fixed monthly period, known as an assessment period, which runs from the date of the first claim for universal credit. In determining the amount of universal credit payable, the 2013 Regulations require the calculation of the maximum allowance payable to a claimant. The 2013 Regulations then require that some of a claimant's earned income be deducted from the maximum allowance so that the amount of universal credit payable is accordingly reduced. Certain claimants (being those with childcare responsibilities or limited capacity for work) are allowed to retain a certain amount of their earned income (a figure known as the work allowance which, at the relevant time, was £192 for each assessment period) without that affecting the amount of universal credit the claimant receives. Thereafter the amount of universal credit payable is reduced by 63% of earnings above £192.

4. The four claimants are employees who are paid monthly. As they receive their salary on or around either the last working day or last banking day of the month, there are times when salaries payable in respect of two months are paid during one assessment period. In applying the 2013 Regulations, the defendant has attached critical significance to the fact that the two months of salary are paid in that single assessment period (irrespective of the fact that the salaries are referable to two months). The defendant has, then, allowed the relevant claimant to retain a single amount of £192 by way of the work allowance from the combined two months' salary before calculating the amount by which universal credit is to be reduced by a proportion (63%) of their earned income. Had the defendant attributed each of the two months' salary to different assessment periods, the claimants would have been able to retain £192 of each month's salary before their universal credit was reduced. The claimants also contend that the method of calculation leads on occasions to fluctuations in the amount of universal credit payable which creates severe cash flow problems for them.

5. The claimants seek judicial review of decisions relating to an assessment period when they were treated as receiving two months' salary in that assessment period and were allowed to retain only one work allowance, that is one sum of £192 from the combined salary for the two months. The claimants initially challenged the method of calculation on the basis that it led to effects that were irrational, or failed to promote the policy and objectives of the underlying statute, the Welfare Reform Act 2012 ("the 2012 Act"), and so was *ultra vires* the parent statute or that it led to unlawful discrimination contrary to Article 14 of the European Convention on Human Rights ("the ECHR") read with Article 1 of the First Protocol to the ECHR, those being

Convention rights within the meaning of the Human Rights Act 1998 ("the 1998 Act"). One claimant, Ms Johnson, also contended that the defendant failed to comply with its duty to have due regard to certain matters as required by section 149 of the Equality Act 2010 ("the 2010 Act").

6. On analysis, it emerged that the first, and critical, issue concerned the proper interpretation of the relevant Regulations and whether the defendant had, in fact, properly interpreted the relevant Regulations when calculating the amount of universal credit payable. In particular, the first question is whether the 2013 Regulations, properly interpreted, do require the defendant to treat two months' salary received during one assessment period to be attributed solely to that assessment period, irrespective of the fact that the salaries are attributable to periods falling within two separate assessment periods. This judgment, therefore, considers first the factual situation of each claimant, then the legal framework governing the calculation of the amount of universal credit before analysing the proper interpretation of the regulations governing that calculation in these cases. Finally, the judgment considers the question of whether the defendant complied with the public sector equality duty imposed by section 149 of the 2010 Act.

THE FACTS

Danielle Johnson

7. Ms Danielle Johnson is a single mother with one child, a six year old daughter. Ms Johnson receives universal credit. Her assessment period runs from the last day of a month to the penultimate day of the next month (e.g. from 30 November to 29 December 2017).

8. Ms Johnson obtained work as a general kitchen assistant at a school. She is employed by a large local authority and, under her terms of employment, is paid monthly by bank transfer. Ms Johnson is paid on the last banking day of each month.

9. Ms Johnson was paid her November 2017 salary on 30 November 2017 and her December 2017 salary on 29 December 2017. On 6 January 2018, she received notification of her universal credit for the 30th November to 29th December 2017 assessment period (universal credit being paid monthly in arrears). As two months' salary had been received in the assessment period running from 30 November to 29 December 2017, her universal credit had been calculated as if she had received both the November and December months' salary in that single assessment period. In calculating the amount payable for that assessment period, the defendant took the maximum allowance available to Ms Johnson, allowed Ms Johnson to retain one amount of work allowance, that is £192 of her combined earnings for November and December 2017, and then reduced the amount of the allowance by 63% of the combined earnings for those two months.

10. In the next assessment period, running from 31 December 2017 to 30 January 2018, Ms Johnson was treated as having no earnings (as her December 2017 salary had been taken into account in the previous assessment period and her January 2018 salary did not fall to be paid until after the end of that assessment period). As a result, she was

not, in fact, able to retain any of her earnings in that assessment period in respect of work done during that assessment period. Had she been treated as having received the November salary in one assessment period and the December salary in another assessment period, she would have been entitled to retain £192 from each month's earnings. Ms Johnson therefore lost the benefit of being able to keep £192 from her earnings in December 2017 before reduction of the amount of her universal credit.

11. On 22 January 2018, Ms Johnson asked the defendant to undertake a reconsideration of her claim and to re-assess the January 2018 payment. By letter dated 7 February 2018, a civil servant at the Department for Work and Pensions informed Ms Johnson that she was unable to revise the decision dated 6 January 2018. The letter stated that regulation 61(a) of the 2013 Regulations provided that the amount of a person's employed earning was to be based on the information provided by the employer to the tax authorities under the PAYE system. The letter said:

> "I cannot make a change to the original decision. It is correct that you were paid twice within this Assessment Period (AP) therefore Universal Credit Regulations, regulation 61(2)(a) applies. The information from the employer was accurate and timely; and as such cannot be disregarded.
>
> As such this is stated in Law and cannot be changed therefore the decision remains upheld".

12. Ms Johnson also asked her employers to change the dates on which she is paid to avoid the problem with universal credit arising in future months when she receives two monthly salaries in one assessment period. Her employers indicated it was not possible to make special arrangements for her as the payroll was operated on the same day for all employees.

13. Ms Johnson sought to challenge the decision of 6 January 2018.

Claire Woods

14. Claire Woods is a single mother with two children aged nine and six. Following graduation in June 2017, Ms Woods began to receive universal credit. In Ms Woods' case her assessment period runs from the 30th of each month to the 29th of the following month.

15. Ms Woods began work in the childcare legal department of the local county council. While there she was paid monthly on the last working day of each month. At the end of 2017, Ms Woods was paid her November salary on 30 November 2017 and her December salary on 29 December 2017.

16. On 3 January 2018, she received notification of her universal credit award. As the salary for November and December 2017 had been received in the assessment period running from the 30 November to 29 December 2017, her universal credit had been calculated as if she had received both months' salary in that single assessment period. In calculating the amount payable for that assessment period, the defendant took the maximum allowance, allowed Ms Woods to retain one amount of work allowance, that is £192, from her combined earnings for November and December and then reduced the amount of the universal credit payable by 63% of the combined earnings for those two months.

17. In the next assessment period, running from 30 December 2017 to 29 January 2018, Ms Woods was treated as having no earnings (as her December 2017 salary had been taken into account in the previous assessment period and her January 2018 salary did not fall to be paid until after the end of that assessment period). As a result, she was not, in fact, able to retain any of her earnings in that assessment period in respect of the December 2017 salary. Had she been treated as having received the November salary in one assessment period and the December salary in another assessment period, she would have been entitled to retain £192 in respect of each month's earnings. Ms Woods therefore lost the benefit of being able to retain £192 from her December earnings before reduction of the amount of her universal credit.

18. Ms Woods tried to change her assessment period by trying to close her claim for universal credit and making another claim starting on a different day to avoid the problem occurring in future. She was not allowed to do this as, under the 2013 Regulations, the new claim was treated as linked to the earlier claim and had the same assessment period. Ms Woods asked her employer to change her pay date but they declined to make any changes.

19. Ms Wood sought to challenge the decision of 3 January 2018. She described the decision as an ongoing decision not to amend the claimant's assessment period for universal credit purposes every time that two monthly wage payments fall to be included in one assessment period.

Erin Barrett

20. Ms Barrett is in a materially similar position. She is a single mother with a 4 year old son. She is eligible for universal credit and her assessment period runs from the 28th of one month to the 27th of the next month. Ms Barrett works as a health care assistant at York Hospital. As a result of the dates on which her salary is paid, there have been occasions when two months' salary have been paid during one assessment period. In calculating her universal credit, Ms Barrett was able to retain one work allowance of £192 before reduction of her universal credit to reflect those earnings but, if each month's salary had been attributed to different assessment periods she would have been able to retain £192 in respect of each of those monthly salary payments before reductions in her universal credit.

Katie Stewart

21. Katie Stewart is a single mother with a two-year old daughter. She is eligible to receive universal credit and her assessment period runs from the 28th of one month to the 27th of the next month. Ms Stewart worked as a service adviser at Warrington Motors and was paid monthly.

22. In the assessment period 28 September to 27 October 2017, Ms Stewart received two month's salary. Her September salary was paid on the 28th September. As 28 October was a Saturday, she was paid her October salary on Friday 27 October 2017. Consequently, that too fell within that assessment period. Her universal credit was calculated by allowing her to retain one amount of £192 before reducing her universal credit to reflect her earnings. If the September and October salaries had been attributed to different assessment periods she would have been able to retain £192 in

respect of her earnings for each month of September and October before reductions in her universal credit. The problem has arisen on subsequent occasions.

Additional Difficulties for the Claimants

23. As indicated, all four claimants periodically suffer real financial loss by reason of the way in which universal credit is being calculated. There are times when they are not able to retain part of a month's salary (the work allowance of £192) before any reductions in universal credit to reflect earned income. The claimants also refer to another difficulty that arises out of the method of calculation. The way in which universal credit is calculated in their cases leads to fluctuations in the amounts they receive which create severe cash flow problems for the claimants living as they do on low incomes with little or no savings.

24. The problem arises in this way. Universal credit is paid monthly in arrears. Each month the claimant will have regular, foreseeable and more or less fixed outgoings such as rent, utilities, and food and necessities for themselves and their children. They will have salary and universal credit to pay for those monthly outgoings. If, by way of example, they have two salaries, November and December, paid in an assessment period covering November to December, they will receive far lower universal credit in the month of January (when universal credit calculated on the figures for November to December is paid). In the January, therefore, they will have to pay the same outgoings and will have one monthly salary but a far lower amount of universal credit. In the next month, February, they should receive a much higher amount of universal credit. They will have been treated as having no earnings in the December to January period (as the December salary will have been taken into account in the November to December assessment period and the salary payable at the end of January will fall in the next assessment period). The maximum allowance of universal credit will not be reduced by any earnings. The higher payment in February should balance out the lower figure in January (apart from the loss of the working allowance, that is the £192 which they could not retain from the December salary). But the claimants have to wait a month until they receive the higher amount of universal credit to compensate for the lower amount paid in the previous month. That creates cash flow problems for the claimants as they have the same monthly outgoings in January, they have one salary payment for January – and on some occasions they receive no or little universal credit in January. That creates cash flow difficulties which, for persons on low income, with little or no savings, can create difficulties in terms of paying for rent, or utilities or other bills. Each of the four claimants set out in their evidence the difficulties that they have had in this regard.

The Proceedings

25. By order dated 13 June 2018, Ms Johnson was given permission to apply for judicial review of the decision of 6 January 2018. By order dated 6 July, Ms Woods was given permission to challenge the decision of 3 January 2018 and Ms Barrett was permitted to be joined as a second claimant. By an order dated 2 August 2018, Ms Stewart was permitted to be joined as a third claimant in Ms Woods' case.

THE LEGAL FRAMEWORK

The 2012 Act

26. Universal credit is intended to be a single welfare payment, replacing other benefits, and comprised of a basic personal amount (the standard allowance) and also amounts to reflect the cost of housing, caring for children and particular need such as disability. The origin of universal credit was described by Lewis J in *R (TP and AR) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2018] EWHC 1474 (Admin).

27. Part 1 of the 2012 Act deals with entitlement and awards. Section 1 of the 2012 Act provides that:

> "(1) A benefit known as universal credit is payable in accordance with this Part.
>
> (2) Universal credit may, subject as follows, be awarded to—
>
> (a) an individual who is not a member of a couple (a "single person"), or
>
> (b) members of a couple jointly.
>
> (3) An award of universal credit is, subject as follows, calculated by reference to—
>
> (a) a standard allowance,
>
> (b) an amount for responsibility for children or young persons,
>
> (c) an amount for housing, and
>
> (d) amounts for other particular needs or circumstances."

28. Section 3(1) of the 2012 Act is headed "Entitlement" and provides that:

> "(1) A single claimant is entitled to universal credit if the claimant meets—
>
> (a) the basic conditions, and
>
> (b) the financial conditions for a single claimant."

29. The basic and financial conditions are then set out in sections 4 and 5 of the 2012 Act and restrictions on entitlement are set out in section 6. Section 7 provides that universal credit is payable in respect of an assessment period. The section is in the following terms:

> "(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) about 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."

30. Section 8 of the 2012 Act then deals with the calculation of awards. In effect, it provides that the amount is to be the maximum amount available for the various elements of universal credit less any amounts deducted in respect of earned and unearned income. The section is headed "Calculation of awards" and provides that:

"(1) The amount of an award of universal credit is to be the balance of—

(a) the maximum amount (see subsection (2)), less

(b) the amounts to be deducted (see subsection (3)).

(2) The maximum amount is the total of—

(a) any amount included under section 9 (standard allowance),

(b) any amount included under section 10 (responsibility for children and young persons),

(c) any amount included under section 11 (housing costs), and

(d) any amount included under section 12 (other particular needs or circumstances).

(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).

(4) In subsection (3)(a) and (b) the references to income are—

(a) in the case of a single claimant, to income of the claimant, and

(b) in the case of joint claimants, to combined income of the claimants."

31. Sections 9 to 12 of the 2012 Act then provide that the calculation of an award of universal credit "is to include an amount" for each element of universal credit. That includes a standard allowance for each claimant (section 9) and an amount for each child for whom the claimant is responsible (section 10). Regulations are to specify the amounts payable under sections 9 and 10. Section 11 of 2012 Act deals with housing costs and provides that universal credit is to include an amount in respect of any liability on the part of the claimants to make payments in respect of accommodation. Section 12 of the 2012 Act provides for the calculation to include amounts in respect of particular needs or circumstances as prescribed by regulations.

The 2013 Regulations

32. Regulation 20 of the 2013 Regulations provides that Part 3 of the Regulations:

> "contains provisions for the purposes of section 7 and 8 of the Act about assessment periods and about the calculation of an amount of an award of universal credit".

Assessment Periods

33 Regulation 21 of the 2013 Regulations deals with assessment periods and, so far as material, provides:

> "(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 a 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."

Calculation of the Amount of An Award

33. The maximum amount of an award of universal credit for an assessment period will be the amounts for which the claimant is eligible, i.e. the standard amount, the amount included for children, housing costs and particular needs. (see section 8 of the 2012 Act set out above). Where the claimant is working, the regulations provide that the claimant may retain a certain amount of income and then a proportion (currently 63%) of the remaining income is deducted from the amount of the universal credit that the claimant is eligible to receive for a particular assessment period. That is provided in Regulation 22 of the Regulations which at the material time was in the following terms (the amounts of the work allowance have been increased since the date of the decisions under challenge in this case):

> "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 where 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 the housing costs element, the applicable amount of the lower work allowance specified in that table.

(3) In the case of an award where the claimant is a member of a couple, but makes a claim as a single person, the amount to be deducted from the maximum amount in accordance with section 8(3) of the Act is the same as the amount that would be deducted in accordance with paragraph (1) if the couple were joint claimants.

Higher work allowance	
Single claimant—	
responsible for one or more children or qualifying young persons and/or has limited capability for work	£397
Joint claimants	
responsible for one or more children or qualifying young persons and/or where one or both have limited capability for work	£397
Lower work allowance	
Single claimant—	
responsible for one or more children or qualifying young persons and/or has limited capability for work	£192
Joint claimants—	
responsible for one or more children or qualifying young persons and/or where one or both have limited capability for work".	£192

34. Regulation 51 of the Regulations provides that the provisions in chapter 2 of Part 6 of the Regulations provide:

> "for the calculation or estimation of a person's earned income for the purposes of section 8 of the Act (calculation of awards)."

35. Earned income is then defined in regulation 52 of the Regulations and means essentially any remuneration or profits derived from any employment, trade, profession, vocation or any other paid work. Employed earnings is defined in

regulation 55 of the Regulations and includes, essentially, income from any employment, less certain specified expenses, but including certain statutory payments (such as statutory sick pay or maternity pay). Regulation 55(5) describes how "the amount of a person's employed earnings in respect of an assessment period" is to be calculated.

36. Regulation 54 of the 2013 Regulations is headed "Calculation of earned income – general principles". It provides as follows:

> "(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.
>
> (2) Where the Secretary of State—
>
> (a) makes a determination as to whether the financial conditions in section 5 of the Act are met before the expiry of the first assessment period in relation to a claim for universal credit; or
>
> (b) makes a determination as to the amount of a person's earned income in relation to an assessment period where a person has failed to report information in relation to that earned income,
>
> that determination may be based on an estimate of the amounts received or expected to be received in that assessment period."

37. Regulation 61 of the Regulations is headed "Information for calculating earned income – real time information etc." It provides as follows:

> "(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 Suport Allowance (Decisions and Appeals) Regulations 2103 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."

THE SUBMISSIONS AND ISSUES

38. The essential factual difficulty that arises in these claims is that because the claimants are paid their salaries monthly on or around either the last banking day, or the last working day, of the month there will be occasions when salaries for two different months are paid within one assessment period. The method adopted by the defendant to calculate the amount of an award of universal credit for that assessment period is to treat both salaries as earned income for that assessment period and to apply the method of deduction set out in regulation 22 of the 2013 Regulations to the combined income from the salaries for the two months that were received in that assessment period.

39. The claimants in their claim form and skeleton argument assumed that the method of calculation used was the one prescribed by the 2013 Regulations and contended that that method of calculation led to unfair and irrational consequences or failed to achieve the statutory purposes underlying the relevant provisions of the 2012 Act. They therefore contended that the method of calculation assumed to be prescribed by the 2013 Regulations was *ultra vires* the relevant provisions of the 2012 Act. Further, they contended that the method of calculation gave rise to unlawful discrimination contrary to Article 14, read with Article 1 of the First Protocol, of the ECHR. However, during the course of the hearing, it became clear that there is a more fundamental submission which is available to the claimants.

40. The first and logically prior question is whether, as a matter of the proper interpretation of the relevant statutory provisions, including, in particular regulations 22, 54 and 61 of the 2013 Regulations, the defendant is correct in treating the combined salaries payable in respect of two different months but received in one assessment period as earned income for the purposes of calculating the amount of universal credit payable for that assessment period. If not, the decisions taken by the defendant which are challenged in this case would be unlawful. If the defendant has correctly applied the 2013 Regulations, only then does the question arises as to whether the relevant regulations are *ultra vires* the 2012 Act or incompatible with Article 14 read with Article 1 of the First Protocol to the ECHR. In addition, one claimant, Ms Johnson, contends that the defendant failed to have regard to the matters specified in section 149 of the 2010 Act and thereby breached the public sector equality duty. In particular, it is said that the defendant did not have regard to the effects on women of the loss of the work allowance or the fluctuations in income.

41. Mr Brown for the defendant submits that the method of calculation applied by the defendant is correct. He submits that regulation 54 of the 2013 Regulations means that the defendant must calculate the amount of an award of universal credit by reference to the actual amounts of earned income received in an assessment period. If, therefore, salaries for two different months are paid within the same assessment period, the calculation of universal credit must be based on the combined amount of those two months' salary as the salary for each month was actually received in that assessment period. Further, he submits that the aim underling the provisions governing calculation of universal credit was intended to enable an automated system to be established and that would preclude adjustments to take account of occasions when two monthly salaries were received in one assessment period.

42. Mr Brown submits that it is not irrational to base a method of calculation on amounts actually received in a particular period. Further, such a method of calculation does not involve any failure to give effect to the statutory purposes underlying the 2012 Act notwithstanding the problems that may arise when a claimant receives salaries for two months in one assessment period. Further he submits that, for a variety of reasons, there is no unlawful discrimination contrary to Article 14, read with Article 1 of the First Protocol, to the ECHR. He submits that there was no failure to comply with the public sector equality duty imposed by section 149 of the 2010 Act.

THE PROPER INTERPRETATION OF THE RELEVANT REGULATIONS

43. The first and critical issue is the proper construction of the relevant regulations. The task is to identify the meaning of the words used in regulation 54 of the 2013 Regulations 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: see generally, the observations 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.

The Wider Context

44. The broad context in which the 2013 Regulations come to be interpreted is the structure created by the 2012 Act. That Act intended to confer an entitlement to a welfare benefit known as universal credit on persons who met certain conditions. That benefit was to be comprised of amounts reflecting the needs of individuals in terms of their personal needs (the standard allowance) and amounts in respect of caring for children, housing costs and other prescribed needs. Universal credit was therefore a means of enabling those with limited or no means to meet their basic needs. That appears from sections 1 to 12 of the 2012 Act.

45. Part, at least, of the underlying aims was to facilitate or encourage persons to work and, to that end, regulations were to prescribe 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 without that having any impact on the amount of universal credit payable. That is reflected in section 8 of the Act, and section 8(3) in particular.

The Specific Context

46. The specific context in which the relevant regulation applies is the calculation of the amount of earned income to be deducted from the universal credit that would otherwise be payable. That is dealt with in regulation 22 of the 2013 Regulations. That provides that certain amounts "of the claimant's earned income…. in respect of the assessment period" are to be deducted. The amounts to be deducted do not include a fixed amount of earnings known as the work allowance. That amount of earnings may be retained by a claimant without any impact on the amount of universal credit he or she receives. The amount of the work allowance depends on whether the claimant is responsible for children. If so, and if the universal credit amount does not include an element for housing costs, the amount of earned income in respect of an assessment period (i.e. a month) was at the material time £397 (it is currently £409). That, it can be assumed, is the amount that it is judged a claimant must be able to retain in order to pay housing costs for each assessment period (i.e. each month) and care for children. If the amount of universal credit does include an amount for housing costs, then the amount of earned income that the person may retain does not need to include an amount for housing (as that will be included within the amount of universal credit). It will include the amount considered necessary to meet the needs of a claimant with one or more children, i.e. £192 at the time of the decisions in these cases (and currently £198). Thereafter, 63% of the remaining earned income will be deducted from the amount of universal credit.

47. In other words, for each assessment period, which is defined to be a month, a claimant with children will be entitled to retain a fixed amount of earned income and will have 63% of the remaining earned income deducted from the amount of universal credit otherwise payable.

The Words of Regulation 54

48. Regulation 54 provides for the general principles relevant to the calculation of earned income. Its precise words need to be considered carefully. It provides that:

> "(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".

49. Two features appear from those words. First, the exercise is the calculation of a person's earned income "in respect of an assessment period". Secondly, that calculation is "to be based on the actual amounts received in that period".

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.

53. That interpretation of regulation 54 of the 2013 Regulations is also consistent with the wording of the 2013 Regulations read as a whole, and regulation 22 in particular. Regulation 22 is the regulation prescribing for the purposes of section 8(3) of the 2012 Act the amount of earned income to be deducted from the maximum amount of universal credit. It does so by setting out the amount "of the claimant's earned income… in respect of the assessment period" that is to be deducted. That language, too, focusses on the earned income in respect of the assessment period. It is not expressed in terms of earned income actually received in the assessment period even if the earned income is properly referable to another period of time not included within the assessment period.

54. Furthermore, that interpretation reflects the aim of regulation 22 of the 2013 Regulations. The intention, as is clear from regulation 22 (2), is that a claimant be allowed to a 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. 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.

55. Furthermore, that interpretation of regulation 54 accords with the reality of the underlying factual situation in cases where employees work and are paid on a monthly basis. Taking the facts of Ms Johnson's case, her salary is paid monthly. In respect of the months of November and December 2017, those are months when she worked and for which she received salary. Her assessment period runs from the 30 November to 30 December. It would not be correct to treat Ms Johnson's two salaries as being earned income in respect of a single (monthly) assessment period from 30 November to 30 December 2017. That would not reflect the fact that one salary was paid for the month of November and one for the month of December. Still less, would it be correct to say that Ms Johnson had no earned income for the next assessment period 31 December to 30 January when in fact she worked, and received a salary for that work, during that period. By contrast, the method of calculation that the defendant says regulation 54 requires does result in a calculation of a claimant's earned income in a way that does not reflect the actual facts and, indeed, could be said to lead to nonsensical situations, for example that a person does not have any earned income during a period when in fact he or she clearly is working and is being paid.

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.

Specific Arguments Advanced by the Defendant

57. Mr Brown referred to the fact that any interpretation of regulation 54 of the 2013 Regulations had to take account of the wide variety of circumstances in which claimants received earned income and it should not be assumed that the regulation was solely dealing with an employee working and paid on a monthly basis. That is correct. There may be a wide variety of situations. Some may involve specific issues such as bonuses or commissions. Other situations may involve variable hours of working during different assessment periods. In such cases, it may well be that the appropriate starting point is to base the earned income for an assessment period on the actual amounts received during that assessment period. It may well be, depending on the circumstances, that there will not be any reason for considering that that results in an incorrect calculation of the earned income in respect of that assessment period. Here, however, the situation involves employees working on a monthly basis and paid a monthly salary. It is clear that the earned income received in a particular assessment period is not, on occasions, payable in respect of periods forming part of the assessment period. In those circumstances, regulation 22 of the Regulations does require an assessment of the earned income in respect of each assessment period and regulation 54 contemplates that that assessment will be based on, but will not necessarily be the same as, the actual amounts received in an assessment period.

58. Mr Brown further relied on the fact that the system of universal credit was intended to be automated. He referred to the evidence in particular of Ms McMahon indicating the importance of automation in the design of the system of universal credit and indicating that it would not be possible to make an automated change to address the issue that has arisen in this case. Ms McMahon indicates that any solution would have to involve a manual calculation of the amount of the award. There are a number of answers to that.

59. First, this is a question of statutory interpretation. If the regulations, properly interpreted, mean that the calculation must be done in a particular way, that is what the law requires. We do not belittle the administrative inconvenience or the cost involved but the language of the regulations cannot be distorted to give effect to a design which may have proceeded on a basis which is wrong in law.

60. Secondly, the existing regulations already contemplate manual intervention at some stages. Regulation 61 of the 2013 Regulations contemplate that there will be circumstances where the defendant cannot base a calculation on the information provided by the employers (for example, where the information is unlikely to be sufficiently accurate or timely). Then the defendant must calculate the person's employed earnings using such information as the Secretary of State thinks fit and that may involve treating a payment of employed earnings received in one assessment period as received in another. That indicates that there is no insurmountable problem in carrying out calculations, including calculations treating earned income received in one assessment period as being received in another assessment period. It may be that the number of instances where that will need to be done because of the problem which arises in this case will be greater than might otherwise have been anticipated by the defendant (although the defendant's evidence is that it will be less than 1% of the universal credit caseload). Ultimately, however, the regulations properly interpreted require that exercise to be carried out and there is no insurmountable problem in doing so.

61. Mr Brown also submitted that one purpose underlying the 2012 Act, and the 2013 Regulations, was to encourage changes in behaviour. He submitted that it would be open to the employees to ask their employers to alter the date or the method of paying salaries so that the problem with two months' salaries being paid within one assessment period would not arise. That, it seems, is suggested as a reason why the interpretation of regulation 54 adopted by the defendants would not necessarily lead to problems. First, the ultimate question is whether, on a proper interpretation, regulation 54 is to be interpreted in the way contended for by the defendant and, for the reasons given above, it does not. Secondly, in these cases, and more generally, it is the employer not the employee who determines the date and method of payment. It is difficult to see how it could be said that the regulations were drafted on the assumption that any problems would be resolved by claimants asking third party employers to alter their payroll systems. Thirdly, Ms Johnson, Ms Woods and Ms Stewart did ask their employers to change their pay arrangements and the employers declined. Fourthly, whilst it may be that universal credit was intended to contribute to changed behaviour patterns, those would appear to be connected, at best, with encouraging or facilitating work in particular as a means of enabling those on low incomes to move out of poverty. There is nothing to suggest that the behavioural changes envisaged included encouraging employees to request, and employers to

make, changes to payroll arrangements. In any event, however desirable such behavioural changes may be (and that is a matter of policy for the executive and not a matter of law for the courts), there is no basis for inferring that the relevant regulations in this case were drafted on the assumption that such changes would occur. The Secretary of State must apply the legislation as it currently is and as correctly interpreted.

Conclusion

62. In the circumstances of this case, the defendant wrongly interpreted regulation 54 of the Regulations 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. As a result, the decisions under challenge in this case are flawed. Further submissions will need to be made to identify the appropriate remedy.

63. As the claimants have succeeded in establishing that the relevant regulations have been wrongly interpreted in their case, it is not necessary, and indeed would be unhelpful, to speculate on whether the relevant regulations, if they were to be interpreted as the defendant had contended, gave rise to consequences that led to the relevant regulations being irrational or failing to reflect the statutory purpose underlying the 2012 Act and so were *ultra vires* the 2012 Act. Similarly, it would be unhelpful to consider the claim as currently formulated in relation to the alleged unlawful discrimination contrary to Article 14, read with Article 1 to the First Protocol. It is correct that that claim involves a claim for damages under section 8 of the Human Rights Act 1998 ("the 1998 Act"). The claim, however, has been advanced on the basis that the relevant regulations, interpreted in the way contended for by the defendant, would give rise to unlawful discrimination. For the reasons given above, the regulations are not to be interpreted in that way and, again, it would be unhelpful and unnecessary to speculate on whether, if the regulations were interpreted in that way, they would be incompatible with Article 14, read with Article 1 to the First Protocol. The reality now is that if any claim for damages were to be pursued under section 8 of the 1998 Act that claim would no longer be directed at the regulations. Rather, it would now be alleged that the failure to apply the regulations correctly gave rise in some way to a failure to act compatibly with a Convention right. Furthermore, any such claim would need to take account of any remedy granted or order made in relation to that failure and the consequences of the decision of the court to see whether there had been just satisfaction (see section 8(3) of the 1998 Act). None of those matters has been the subject of argument before us and it would not be appropriate or useful to speculate on those matters.

THE PUBLIC SECTOR EQUALITY DUTY

64. Ms Johnson contends that the defendant failed to comply with the requirements of section 149 of the 2010 Act when making the 2013 Regulations. The material provisions of section 149 of the 2010 Act relied upon provide as follows:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

…..

"(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

…..

"(7) The relevant protected characteristics are—
…..
sex;

….."

65. The general approach to whether the public sector equality duty has been complied with is now well-established. The relevant principles are set out in the decision of the Court of Appeal in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWC Civ 1345, especially at paragraph 26. There, the relevant government department decided to close a fund operated by an independent non-governmental body which, broadly, provided funding to assist disabled persons to lead independent lives. On the facts, the Court of Appeal concluded that the information provided to the relevant minister did not give her an adequate awareness that the proposals would place independent living in serious peril for a large number of people. The Court concluded that the minister had not complied with the public sector equality duty and quashed the decision.

66. The Court of Appeal in *R (Barker) v Secretary of State for Communities and Local Government* [2008] 2 P. & C.R. 6 also gave valuable guidance on assessing whether there had been compliance with section 71 of the Race Relations Act 1976, as amended ("the 1976 Act"). Similar principles now apply to the equivalent duty in section 149 of the 2010 Act: see *Hotak v London Borough of Southwark* [2016] A.C. 811 at paragraphs 73 to 74. In broad terms, the duty is a duty to have due regard to the specified matters, not a duty to achieve a specific result. The duty is one of substance, not form, and the real issue is whether the relevant public authority has, in substance, had regard to the relevant matters having regard to the substance of the decision and the authority's reasoning. The absence of a reference to the public sector equality duty will not, of itself, necessarily mean that the decision-maker failed to have regard to the relevant matters although it is good practice to make reference to the duty, and evidentially useful in demonstrating discharge of the duty (see, e.g., *Baker* at paragraphs 36 to 37, and *Bracking* at paragraph 26). As Lord Neuberger observed at paragraph 74 of his judgment in *Hotak v London Borough of Southwark* [2016] A.C.

811 "the weight and extent of the duty are highly fact-sensitive and dependent on individual judgment".

67. The evidence is that the defendant has carried out a number of equality impact assessments on the proposals for universal credit that were ultimately included in primary and subordinate legislation. These included an assessment in November 2011 which considered the likely impact on groups with protected characteristics including gender. An equality assessment in August 2015 considered the revision of work allowances in universal credit. Those assessments drew specific attention to the obligations under section 149 of the 2010 Act. They assessed the impact of the proposals relating to universal credit and their effect on, amongst other groups, women. It may be that the analyses carried out did not, at that stage, appreciate the possible impact of different methods of calculating the amount of earned income to be deducted when calculating the amount of universal credit and may not have anticipated the problems that arose in this case. The fact that a particular situation, associated with a particular group with a protected characteristic (here, women) was not identified does not mean that the defendant failed to have due regard to the matters referred to in section 149 of the 2010 Act (see, e.g. the observations of Elias L.J. in *R (Hurley and Moore) v Secretary of State for Business and Skills* [2012] EWHC 201 at paragraph 87; and of Sullivan L.J. in *R (Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1202 at paragraph 60). On the material before this court, the defendant did comply with her duty under section 149 of the 2010 Act in this case.

CONCLUSION

68. On a proper interpretation of regulation 54 of the 2013 Regulations, read in context, the amount of the 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. There will need to be an adjustment where, as in the present case, the claimants actually received two months' salary in one assessment period but the combined salaries do not, in fact, constitute earned income in respect of the period of time included in that assessment period. The defendant, therefore, erred in treating the combined salary for those two months' as earned income in respect of that assessment period for the purposes of calculating the amount of universal credit payable.

69. These claims for judicial review succeed on that basis. It is unnecessary and inappropriate to address other grounds which do not arise on the correct interpretation of the legislation. The only other ground which it is necessary and appropriate to address (based on section 149 of the 2010 Act) is not made out on the facts of this case.

70. At the request of the Secretary of State, made after a confidential draft of this judgment had been circulated in the usual way, we will adjourn the question of remedies and any consequential applications to a further oral hearing to take place before this Court as soon as it can be arranged.