HOUSE OF COMMONS LIBRARY

BRIEFING PAPER

Number 08494, 15 February 2019

Universal Credit and the Severe Disability Premium

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The Severe Disability Premium (SDP) is an addition payable with means-tested social security benefits. Universal Credit does not include an element equivalent to SDP – or indeed any of the disability premiums currently available. Disabled people may therefore find that their entitlement to UC is significantly lower than their previous "legacy" benefits. Transitional protection will be available to those moving onto UC at the final "managed migration" stage so that they are not worse off in cash terms at the point of transfer, but there is no such protection for those who move onto UC by "natural migration" – i.e. following a change of circumstances.

In June 2018 the High Court ruled in June that the Secretary of State unlawfully discriminated against two men who had to claim Universal Credit when they moved to another area, and as a result experienced a sudden drop in income due to there being no equivalent to SDP (and the Enhanced Disability Premium) within UC. The DWP compensated the two individuals for the losses experienced, but the Court left it to the Government to devise a wider solution to the problem of unlawful discrimination.

On 16 January 2019, regulations came into force preventing people in receipt of benefits including a Severe Disability Premium from moving onto Universal Credit until the final managed migration stage, when they can receive transitional protection. People who have already moved to UC and lost their SDP are to receive additional payments – both backdated and on an ongoing basis – although these may not fully compensate individuals for the amounts lost. Draft regulations providing for these "SDP transitional payments" are currently before Parliament.

This Commons Library briefing gives further background to the abolition of the Severe Disability Premium and covers developments following the High Court judgment.

1. What is the Severe Disability Premium?

The Severe Disability Premium (SDP) is not a benefit in its own right, but is an additional amount payable with certain means-tested benefits including Income Support and income-related Employment and Support Allowance. It is currently worth £64.30 a week, or £128.60 a week for some couples (from April 2019 the rates will be £65.85 a week and £131.70 a week, respectively). SDP is intended to give additional help to those severely disabled people who, because they live independently and don't have someone caring for them who receives Carer's

Allowance, are most likely to need to rely on bought-in care. At November 2017, 518,000 people of working age were in receipt of SDP, of whom 500,000 were getting income-related Employment and Support Allowance.[1]

2. What will happen to SDP when Universal Credit is introduced?

Universal Credit is replacing means-tested benefits – including those which may include SDP – for people of working age. When UC is fully introduced, SDP will no longer be payable. The Coalition Government maintained that UC would simplify means-tested support for disabled people and make it easier to understand, but disability organisations pointed out that the abolition of SDP could result in people with care needs losing more than £3,000 a year, and that their needs were unlikely to be met in other ways.[2]

In response to criticisms, the Government drew attention to the fact that transitional protection would be available to ensure that people moving onto Universal Credit do not lose out in cash terms at the point of transfer if their entitlement to UC is lower than their existing benefits. However, this protection will only be available to people moving onto UC at the final "managed migration" stage. For most people, this is not due to start until late 2020. For people moving onto UC in the meantime – due to, for example, a change in their circumstances or following advice to make a claim – there is no such protection. The DWP estimated that by December 2018 around 7,000 former SDP claimants would have already moved to UC.[3]

3. What did the High Court say?

On 14 June the High Court gave its judgment in TP and AR, R (On the Application Of) v Secretary of State for Work And Pensions [2018] EWHC 1474 (Admin). This concerned two men in receipt of income-related Employment and Support Allowance who had to claim Universal Credit following a move to a Full Service area, and as a result experienced a sudden drop in income due to there being no equivalent to the Severe Disability Premium (and Enhanced Disability Premium[4]) within UC.

The claimants sought to challenge what had happened on three grounds:

- The absence of any additional payment in Universal Credit for those who were previously eligible for Severe Disability Premium and Enhanced Disability Premium

[1] DWP ad hoc statistical analysis, People on income-related ESA and Enhanced or Severe Disability Premium, or both, 7 June 2018

[2] See section 6 of Commons Library briefing SN06548, Draft Universal Credit Regulations 2013, 7 February 2013; Disability Rights UK, Children's Society and Citizens Advice, Holes in the safety net: The impact of Universal Credit on disabled people and their families, December 2012

[3] DWP, Explanatory Memorandum accompanying the draft Universal Credit (Managed Migration Pilot and Miscellaneous Amendments) Regulations 2019, para 12.7

[4] The Enhanced Disability Premium (EDP) for is worth £16.40 a week (£16.80 from April 2019) and is payable if the claimant or their partner receives the highest rate DLA care component, the enhanced rate PIP daily living component or Armed Forces Independence Payment; or if a claimant of income-related ESA gets the Support Component. 1.4 million ESA claimants received EDP at February 2018, of whom 400,000 also received SDP – see People on income-related ESA and Enhanced or Severe Disability Premium, or both, 7 June 2018

constituted unlawful discrimination contrary to article 14 read with article 1 of the First Protocol (A1P1) to the European Convention on Human Rights (ECHR);

- The implementation arrangements for Universal Credit (in the *Universal Credit (Transitional Provisions) Regulations 2014*[5]) gave rise to unlawful discrimination contrary to article 14 read with A1P1 to the ECHR, because of the absence of any element of transitional protection to reflect the difference between the amount they received in legacy benefits and what they received under Universal Credit; and
- The Secretary of State had breached the *Equality Act 2010* by failing to have due regard to the impact of removing the premiums for disabled people when making the *Universal Credit Regulations 2013* and the Transitional Provisions Regulations.

Mr Justice Lewis dismissed the challenges on the first and third grounds, but allowed the appeal on the second ground. The Transitional Provisions Regulations did not strike a fair balance between the interests of the individual and the interests of the community in bringing about a phased transition to Universal Credit. The impact on the individuals was clear – their cash payments were now significantly lower than the amounts they previously received. There appeared to have been no consideration given to the desirability or justification for requiring the individual to assume the entirety of the difference between their previous benefits and Universal Credit; this was all the more striking given Government statements over the years that such persons could need assistance and there was a need to define precisely the circumstances in which persons would not receive assistance. In this case, the operation of the implementation arrangements was "manifestly without reasonable foundation" and failed to strike a fair balance (para 88). The differential treatment was based on status and had not been objectively justified.

Mr Justice Lewis held that at present the implementing arrangements for Universal Credit (in the *Universal Credit (Transitional Provisions) Regulations 2014*) gave rise to unlawful discrimination contrary to Article 14 ECHR read with Article 1 of the First Protocol to the ECHR. A declaration would be granted that there is unlawful discrimination, and the defendant (i.e. the Secretary of State) would then be able to determine how to rectify the unlawful discrimination (para 114).

Following the ruling, in addition to making payments for damages for the pain and distress caused, the DWP agreed to compensate the claimants for the money they had lost as a result of moving onto Universal Credit, and to make ongoing payments of around £170 a month to reflect future loss which would be paid until changes to the regulations came into force.[6]

4. What did the Government announce in June 2018?

In a written statement on 7 June 2018[7], the then Secretary of State for Work and Pensions Esther McVey said that "in order to support the transition for those individuals who live alone with substantial care needs and receive the Severe Disability Premium", the rules would be changed so that claimants getting SDP experiencing a change of circumstances such that they

5 SI 2014/1230 as amended
6 See Leigh Day Solicitors, Men with severe disabilities win compensation following Universal Credit discrimination, 30 July 2018
7 HCWS745

would have migrated to Universal Credit would not move to UC until they qualified for transitional protection – i.e. not until the final "managed migration" stage.

The Secretary of State also announced that claimants who had **already** moved to UC and lost SDP would receive on-going payments and an additional payment to cover the period since they moved.

5. How are the changes being implemented?

Measures to prevent people getting Severe Disability Premium from naturally migrating to Universal Credit, and to make "transitional payments" to people who have already moved to UC and lost their SDP, were included in draft *Universal Credit (Managed Migration) Regulations* laid before Parliament on 5 November 2018. An initial draft of the regulations had been submitted to the Social Security Advisory Committee, which undertook a public consultation on them over summer 2018.[8]

In the event, the DWP withdrew the draft regulations following wider concerns about its proposed approach to Managed Migration. The measures relating to Severe Disability Premium have now (or are being) introduced via separate regulations:

- *The Universal Credit (Transitional Provisions) (SDP Gateway) Amendment Regulations 2019* (SI 2019/10), which came into force on 16 January, prevents claimants of legacy benefits with SDP from making a claim for UC.
- The *draft Universal Credit (Managed Migration Pilot and Miscellaneous Amendments) Regulations 2019*, laid before Parliament on 14 January, among other things introduce transitional payments for claimants who were in receipt of SDP who have already moved to UC, comprising ongoing monthly payments and an additional lump-sum covering the period since they moved.

The *draft Universal Credit (Managed Migration Pilot and Miscellaneous Amendments) Regulations* need to be agreed by both the Commons and the Lords before they can come into force.

6. How are SDP claimants now prevented from moving to UC?

The Universal Credit (Transitional Provisions) (SDP Gateway) Amendment Regulations 2019 provide that, from 16 January 2019, no claim to Universal Credit can be made by a single claimant or a joint claimant where either is entitled to Income Support, income-related ESA, income-based JSA or Housing Benefit[9] that includes a Severe Disability Premium. The exclusion also applies where such an award ended within the past month, provided the person(s) continued to satisfy the conditions for eligibility for SDP.

[8] See Draft Universal Credit (Managed Migration) Regulations 2018: SSAC report and government statement, 5 November 2018

[9] For people on Housing Benefit who satisfy the conditions for SDP it is included in the calculation of their minimum needs – the "applicable amount" – and may affect the amount of help they get with their rent in that way

The regulations provide that these claimants will no longer naturally migrate to UC, but will remain on their existing benefits or be able to claim another existing legacy benefit instead until such time as they are moved to Universal Credit as part of the Department's managed migration process.

The DWP has issued guidance to its staff and to local authorities explaining the effect of the changes:

- Advice for Decision Making Memo ADM 01/19, UC claimants entitled to Severe Disability Premium, January 2019
- Housing Benefit Circular A1/2019 (revised), HB gateway: Severe Disability Premium and claimants with 3 or more children, updated 1 February 2019

7. How will 'SDP transitional payments' work?

"SDP transitional payments" will be made to eligible claimants who were in receipt of the Severe Disability Premium who have already moved to Universal Credit through natural migration (e.g. following a change in their circumstances). Eligible claimants will receive both a **lump-sum payment** to cover the period since they moved to UC, and an **ongoing monthly payments**. At some point during the managed migration stage, these monthly payments would be converted into **transitional protection**, and as such would erode over time or end in accordance with the usual rules governing transitional protection.

The DWP's Explanatory Memorandum for the draft Universal Credit (Managed Migration Pilot and Miscellaneous Amendments) Regulations 2019 explains (para 7.42):

> The monthly payments are based broadly on the amount of SDP that the claimant was receiving prior to migration, and are a flat rate of:
>
> - £280.00 a month for claimants not in the UC Limited Capability for Work and Work-Related Activity (LCWRA) group (i.e. the broad monthly equivalent of the lower rate SDP at £64.30 a week).
> - £80.00 a month where the UC claimant has been determined as having LCWRA, and who therefore already receives an additional amount in their UC award because of their health condition. Basically, the additional amount by way of the LCWRA element is taken into account against the extra payments offered by the additional protection.
> - £360 a month where joint claimants were receiving higher rate SDP in their existing benefits.
> - £280 a month where joint claimants are not receiving the LCWRA component in UC.
> - £80 a month where joint claimants are receiving the LCWRA component in UC.

The lump-sum payment covering the period starting from when the claimant migrated to UC will based on the relevant flat rate payment. As some of the backdated payments may be substantial, the regulations provide that any lump-sum payment can be disregarded in UC for a duration of the UC award, or 12 months, whichever is longer.

The regulations provide for a series of one-off checks to ensure that a person is eligible for transitional payments. The claimant–

- must still be entitled to Universal Credit;
- must not, since moving to UC, have formed a couple or separated from their partner;

- must not, since moving to UC, have got a carer who receives either Carer's Allowance or the carer element of UC; and
- must still be receiving a qualifying benefit for SDP, such as DLA or PIP.

In a parliamentary written answer on 7 February, the Minister of State for Disabled People, Health and Work, Sarah Newton, said that as the draft regulations making provision for SDP transitional payments are subject to parliamentary debate, the DWP could not give a precise date for when they would come into force. She added however:

> Once the regulations are in place we will begin the process of assessing eligible claimants and make payments where appropriate. We aim to have offered all eligible claimants this additional lump-sum within six months of the regulations being approved by Parliament.[10]

8. What have others said about the Government's response?

The measures announced by the Government have been welcomed, but some organisations point out that for some claimants the level of the proposed transitional payments fall short of the amounts paid to the two claimants in the High Court case, and of the level of support received by those who remain on legacy benefits.[11] For example, while claimants with a "limited capability for work-related activity" would receive a monthly transitional payment of £80, the actual loss for people in this group who have naturally migrated would normally be around £184 a month.[12]

There is also concern that the measures only ameliorate the losses for existing claimants. Newly disabled claimants will be entitled to less support – sometimes considerably less – than those who applied earlier under the legacy benefits system. In addition, the value of transitional protection will erode over time, and may be lost completely if a claimant experiences a change in their circumstances.[13] Some organisations have argued that the Severe Disability Premium – or alternatively a "self-care" component for those who live alone and don't have a carer – should be included in Universal Credit.[14]

In its report Universal Credit: support for disabled people published on 19 December 2018, the Work and Pensions Committee recommended that DWP-

> …carry out and publish by March 2019 an assessment of the impact of removing the disability premia from Universal Credit for new claimants. It should include in this an assessment of the costs and benefits of introducing a "self-care" amount in Universal Credit, paid at the same rate as the Care component to claimants who would have been eligible for disability premia. It should also include clear worked examples of the financial support that disabled people claiming different benefits (including disability premia and tax credit disability additions) under the legacy system will receive under Universal Credit.[15]

10 PQ 215192 [on Severe Disability Premium]
11 See Draft Universal Credit (Managed Migration) Regulations 2018: SSAC report and government statement, 5 November 2018, Annex A, pp76-78
12 ESA Support Component + EDP + SDP (monthly equivalent rates) minus the UC LCWRA element
13 See the Work and Pensions Committee's report Universal Credit: support for disabled people, HC1770 2017-19, 19 December 2018, paras 32 and 39
14 Ibid. para 37
15 Ibid. para 41

In a response to its predecessor Committee back in February 2013, the then Government had committed to undertaking a "thorough process of evaluation for the effect of Universal Credit on disabled people."[16]

9. Are there any other legal challenges underway?

Yes. On 8 February 2018 the Child Poverty Action Group launched a judicial review on behalf of two households, each with a person with a disability, challenging the lack of transitional protection or, alternatively, the inability to reinstate legacy benefits once an award of Universal Credit has made, where the decision terminating the award of legacy benefits is subsequently overturned and the household is worse off under UC.

The first case concerned a lone parent with a disabled child whose Income Support was terminated in error and was advised to claim UC. The family received £140 a month less under UC because the lower rate disabled child addition in UC is worth less than the equivalent disabled child element in Child Tax Credit.

The second case involved a single woman who was in receipt of Personal Independence Payment and ESA including the Severe Disability Premium. Both benefits were stopped, and the claimant was left with no option but to claim UC. The claimant challenged the PIP and ESA decisions, but the legislation prevented her from returning to legacy benefits. As a result, she was left more than £180 a month worse off due to the absence of SDP in UC. The case is continuing notwithstanding the announcement of SDP transitional payments since claimants with a limited capability for work-related activity would still be over £100 a month worse off under UC than if they had remained on legacy benefits.

The two cases – *R (TD and AD) v SSWP* CO/590/2018, and *R (Reynolds) v SSWP* CO/4542/2018 – were heard together in the High Court on 23 and 24 January 2019 and the judgment is awaited.

Further information can be found at the Child Poverty Action Group's website – see Universal Credit, disability and transitional protection, last updated 21 January 2019.

16 Government response to the House of Commons Work and Pensions Select Committee's third report of Session 2012-13: Universal Credit implementation: meeting the needs of vulnerable claimants, Cm 8537, February 2013, para 64