GARDEN COURT
CHAMBERS

Housing and welfare benefits:

policy issues in the rented sector

by Bethan Harris, Garden Court Chambers

Contents:

- Migration from housing benefit (HB) to Universal Credit Housing Element (UCHE): issues in the migration process; switching to direct payments to the landlord
- Local Housing Allowance Rates
- "*No DSS*" (landlords who refuse to let to benefits claimants)

Rollout of UC – replacing HB with UCHE for most claimants

- The **rollout of UC** (introduced in 2013) involves: UC replacing a range of means-tested benefits and tax credits for working-age people ("**legacy benefits**") including HB

- By November 2023, 5.36 million households in GB were on UC and around 1.66 households were on legacy benefits (See HC Library Research Briefing, Managed Migration, Completing UC Rollout, 11 March 2024 for source.)

- **HB will not cease to exist entirely:** will remain payable to those who have reached State Pension age and in relation to a small group of types of accommodation including supported housing and temporary accommodation under Part 7 Housing Act 1996
- Regulations on UCHE are **similar to HB** (HB case-law still relevant).

Rollout of UC - replacing HB with UCHE for most claimants (continued)

- Migration from legacy benefits to UC (including from HB to UCHE) can be by one of **3 tracks**:
  - **natural migration**: when a person makes a new claim after a change in circumstances
  - **voluntary migration**
  - **managed migration**: when the DWP sends a migration notice to the claimant stating a deadline day for making a claim for UC which is at least 3 months from the day the notice was sent out.

When will the rollout of UC end?

- The rollout timetable for UC has been pushed back repeatedly and was due to reach an end in 2028/9, but in April the government announced it was bringing this forward significantly: ESA and ESA with HB claimants to start to receive notices in September 2024 with the aim of notifying everyone to make the move by December 2025 (LA Welfare Direct 5/2024).

Issues for claimants in the managed migration process

- Managed migration requires that the person **engages in the process**
- After being sent a UC migration notice, if the person does not apply for UC within the deadline, they risk termination of their receipt of benefits (and accumulation of rent arrears)
- Data shows that people **may be falling out of the system** who ought not to be: between July 2022 and August 2023 only 74 per cent of those who were served with a migration notice made a claim for UC ("Move to UC – insight on tax credit migrations and initial discovery activity for wider benefit cohorts", DWP, February 2024)
- "***The Department has a limited understanding of why some people do not switch to UC***" (House of Commons Public Accounts Committee 29th Report of Session 2023-4, 26 April 2024, p.6)
- "***Enhanced Customer Support Journey***" recently introduced for households in receipt of ESA and households deemed to require additional support: additional contact to be made by text, phone and referral for home visit, and further escalations considered on a case-by-case basis (Letter from Neil Couling to local authorities, 20 March 2024).

Issues for claimants in the managed migration process (continued)

- Particular concern about claimants who have mental health problems:

  Universal Credit: Why managed migration is failing people with mental health problems, Money and Mental Health, May 2024 -

  - calls for DWP not to stop benefits of those who are known to be vulnerable during the migration process
  - calls for DWP to make it easier for someone to get help from a person close to them, or other third party, to manage UC.

Issues for claimants in the managed migration process (continued)

- Child Poverty Action Group publication- "*Universal Credit: A Three-step plan*", June 2024 states:

"*CPAG is extremely concerned that 32 per cent of people have not (made the move over to UC) and have had their benefit payments terminated.* ***The DWP has little information about why so many claimants with strong financial incentive to move to UC are not doing so. Yet it is set to continue with the roll out****, and recently announced plans to bring forward the managed migration to sick and/or disabled employment allowance claimants….*"

and calls for

- a pause/slow in the rollout of managed migration
- DWP to automatically transfer the most at-risk claimants
- fill gaps in the "enhanced support journey".

UCHE – payment to tenant or landlord?

- The policy backdrop: UC “***prepares claimants for the world of work***”; “***encourages claimants to take responsibility for their own financial affairs***” (Alternative Payments Arrangements Guidance, UK.GOV (“APA guidance”))
- UC is paid in a single monthly sum, unless an APA is in place
- “***APAs are for claimants who cannot manage their single monthly payment and there is a risk of financial harm to the claimant or their family***” (APA guidance)
- One of 3 types of APA is a direct payment of the UCHE to the landlord

The APA guidance says:

- APAs can be considered any time during the claim
- Can be triggered by information received from claimant or their landlord
- DWP staff decide whether to award the APA using the Tier 1 and 2 guidance in Annex A

UCHE – payment to tenant or landlord? (continued)

APA guidance - continued

- Contact information for making the request is stated in the guidance
- No right of appeal against the decision whether to award an APA, but can be reviewed if further information provided
- The APA is allocated a review period (expected to be set in 3 – 24 months time) to decide if the person is now capable of managing the single monthly payment.
- **The Annex A factors**:

Tier 1 "Highly likely or probable need for APA"

- Drug, alcohol or other addiction problems such as gambling
- Learning difficulties including problems with literacy or numeracy
- Severe or multiple debt problems
- in temporary accommodation
- "Homeless"

APAs – criteria for payment direct to the landlord (continued) -

- Domestic violence and abuse
- Mental health condition
- Currently in rent arrears or threat of eviction (2 months arrears or more, continually underpaid for over 2 months and has 1 month's arrears; evicted for rent arrears in the last 12 months; subject to or threatened with eviction or repossession)
- 16- or 17-year-old care leaver
- Families with multiple and complex needs

(NB: See the guidance for the specific criteria under each heading.)

Tier 2 factors – "Less likely or possible need for APA"

- Third party deductions in place (such as for fines or utility arrears)
- Refugee or asylum seeker (in certain circumstances)
- History of rent arrears
- Previously homeless or in temporary or supported accommodation

APAs – criteria for payment direct to the landlord (continued)

- Other disability (such as physical disability or sensory impairment)
- Claimant has just left prison
- Claimant has just left hospital
- Recently bereaved
- Language skills (such as English not spoken as the first language)
- Ex-service personnel
- A person who is “not in Education, Employment or Training” (NEET) (age 18 – 24)

(NB See the guidance for the criteria under each heading.)

UCHE issues and defending possession proceedings for rent arrears

- Arrears may have accrued in the migration process from HB to UCHE if the tenant had problems adjusting to the change from HB paid directly to landlord to UCHE paid to them to pay to the landlord (if an APA was not in place)
- These factors and the landlord's response to them are relevant to reasonableness (discretionary grounds for possession)
- Where a person has a disability that impacts on their ability to manage these things, Equality Act 2010 defences may apply (under the PSED or other sections).

- **Pre-action protocol for possession claims by social landlords**
  - court will take into account whether the protocol has been followed when considering what order to make
  - landlord should offer to assist the tenant in any claim they may have for HB, DHP or UC (housing element)

UCHE and defending possession proceedings for rent arrears (continued)

Pre-action protocol for possession claims by social landlords (continued)

- Landlord should make every effort to establish effective ongoing liaison with housing benefit departments and the DWP and, with the tenant's consent, **make direct contact with the relevant housing benefit department or DWP office** before taking enforcement action

- Landlord and tenant should work together to resolve any housing benefit or universal credit (housing element) problems.

Local Housing Allowance rates

- Local Housing Allowance (LHA) is the name for the maximum amount of HB or UCHE payable to renters in the private sector
- In August 2023, the **shortfall between LHA and actual rents** was a median of £183 per month (for England)(HC written answer, 31 January 2024)
- LHA rates are set every year for each area by Rent Officers, but the amount depends on the formula set by the government
- In 2020 (during the pandemic) LHA rates were increased to the 30th percentile of local rents, with revised national caps BUT after that, LHA rates were **frozen at the March 2020 amounts** and this freeze was maintained until April this year
- From April 2024, LHA levels were **restored at the 30th percentile of rents** with increased national caps (Rent Officers (HB and UC Functions) (Amendment) Order 2024
- While many households gain from the restoration to the 30th percentile, some will not because they are affected by the **benefit cap** (“*A Temporary Thaw*”, Resolution Foundation, 9 December 2023).

“ *No DSS*” (landlords who refuse to let to benefits claimants)

Renters (Reform) Bill

S 31 **Discrimination relating to benefits status**

A relevant person must not, in relation to a dwelling that is to be let on an agreement which may give rise to a relevant tenancy—

(a) **on the basis that a person is or may be a benefits claimant**, prevent the person from—
(i) enquiring whether the dwelling is available for let,
(ii) accessing information about the dwelling,
(iii) viewing the dwelling in order to consider whether to seek to rent it, or
(iv) entering into a tenancy of the dwelling, or
(b) apply a provision, criterion or practice in order to make benefits claimants less likely to enter into a tenancy of the dwelling than people who are not benefits claimants.

"*No DSS*" landlords who refuse to let to benefits claimants

- The Renters (Reform) Bill was in the course of being debated upon its 2nd reading in the House of Lords when the election was called

- The Labour Party's Manifesto commits to:

  "*overhauling the regulation of the private rented sector*"

  and to "*prevent private renters being exploited and discriminated against*"

  (p.78)

Thank you

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Welfare Benefits and Housing

Desmond Rutledge

Wednesday 17 July 2024

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Reasonable steps required to apply for a student loan– religious objections to the payment of interest

IB v Gravesham BC and Secretary of State for Work and Pensions [2023] UKUT 193 (AAC), [2024] PTSR 130

- The claimant, IB, enrolled on a degree course but did not apply for a student loan.
- IB, as a devout Muslim, believed that his religion forbade him to take out a student loan as it was repayable with interest.
- The case raised the issue of whether a student loan should be taken into account notionally as income when the claimant could have acquired the loan 'by taking reasonable steps to do so' (reg 64(3)).

IB v Gravesham BC and SSWP cont.

- UTJ Poynter held that on the ordinary construction of those words, regard should be had to all the relevant circumstances of the case. This included IB's sincere and strongly held religious convictions.
- IUTJ Poynter held that the phrase 'reasonable steps' was not confined to 'the mechanics' of obtaining a student loan as the claimant was required to sign an agreement to repay the loan with interest (*CH/4429/2006* not followed).
- On the facts of the case, the UT ruled that IB's personal circumstances outweighed any loss to public funds.

The correct test for 'essential' repairs - temporary absence

SH v Southwark LBC [2023] UKUT 198 (AAC)

- SH had a secure tenancy, and in 2012 she was required to move out of that property (property 1) because essential repairs needed to be made. She was provided with another property (property 2) which she was not required to pay any rent on. SH continued to be entitled to HB in relation to property 1 under reg 7(4).

- The LA carried out repairs to property 1, but there was an ongoing dispute as to the adequacy or otherwise of those repairs. Matters were complicated, due to the claimant having significant mental health problems, including agoraphobia and social anxiety.

- SH argued that she could not be expected to move back into property 1, pending the repair of an insecure boundary fence in the garden, as this led her to feeling anxious and vulnerable at the thought of moving back in.

Essential Repairs – cont.

- Having concluded that the repairs at property 1 were complete, the Local Authority decided in March 2019 that SH was no longer entitled to HB in relation to property 1, as reg 7(4) no longer applied.
- The FtT dismissed the claimant's appeal, saying that it was reasonable for her to re-occupy property 1, despite the problems with the boundary fence in the back garden.
- UTJ Hemingway dismissed SH's appeal to the UT. He accepted that in deciding whether the test in reg 7(4) is met, it is not: -

Essential Repairs – cont.

(i) a question of asking what the reasonable individual might regard as an essential repair, or;

(i) what the reasonable individual might think is sufficient to require a tenant to move out for such repairs to be carried out.

(i) rather, the evaluation takes account of the claimant's individual characteristics, which will include 'impairment or vulnerability in consequence of ill health', CH/393/2002 approved.

Essential Repairs

- Applying that approach, the FtT had not erred in deciding that repairs to the garden fence at the back of property 1 did not require SH to move out, even accepting her medical problems, which included mental health conditions, as it could be repaired with SH in situ.

Restriction on entitlement housing costs for prisoners

Secretary of State for Work and Pensions v AH [2023] UKUT 274 (AAC)

- This case examined the rule restricting payment of UC housing costs to prisoners in custody for up to six months in UC Regs 2013 reg 19(1)(b). The prohibition is disapplied by reg 19(2) where:

> *'the person was entitled to universal credit as a single person immediately before becoming a prisoner, and the calculation of their award included an amount for the housing costs element ..'*

- UTJ Wikeley held that reg 19 should not be interpreted in isolation from the overall architecture of the UC scheme.

Prisoners cont.

- Section 7 of the Welfare Reform Act 2012 provides that UC is only payable in respect of a 'complete assessment period', which lasts for a period of one month from the date of claim (UC Regs reg 21(1)). A claimant needs to be entitled to the benefit throughout that assessment period.
- The requirement in reg 19(2)(a) that the claimant must be entitled to UC 'immediately before becoming a prisoner' means in the immediately preceding assessment period.
- AH had applied for UC on 17 August 2021 [so his assessment period would have been 17 August 2021 to 17 September 2021]. On 11 September 2021, he was remanded in custody. A decision was made on 20 September 2021 that AH was not entitled to the housing costs element of UC as he was in prison. AH was subsequently released from prison on 26 January 2022.

Prisoners cont.

- On the facts of AH’s case, he did not satisfy the requirement in reg 19(1)(b) as by the time the assessment took place he was not entitled to UC.
- The DWP confirmed that if AH had become a prisoner in circumstances where custody was not expected to last beyond six months in the second assessment period rather than the first, he would have been entitled to housing costs by virtue of reg 19(2).

'Nil award' of UC - not a passport to full HB

Secretary of State for Work and Pensions v AH [2023] UKUT 274 (AAC)

- In October 2020, TD and her partner became homeless and were placed in temporary accommodation, which meant that TD had to claim HB (UC (TP)) Regs reg 6(8)).
- HB was awarded at the maximum amount on the basis that TD and her partner were in receipt of UC, and this acted as a 'passporting' benefit. They had, in fact, been receiving nil payments '(i.e. payments of £0.00)' of UC for five consecutive assessment periods spanning the period from December 2019 to May 2020 [based on their earnings].
- When Ipswich BC found out, it concluded that TD had been wrongly passported to full HB and after reassessing her entitlement, it decided that she had been overpaid HB.

Nil award cont.

- One of the financial conditions for joint claimants is ‘their combined income is such that, if they were entitled to universal credit, the amount payable would not be less than any prescribed minimum’ (WRA 2012 s5(2)(b)).
- The prescribed minimum is one penny (UC Regs reg 17). Without at least one penny award, there can be no entitlement to UC.
- TD’s nil payments of UC in the relevant periods showed that this condition was not met and so, in law, she was not entitled to UC.
- Given the potential for confusion, UTJ Wright said it would be better if UC notices used language that set out the true legal position, such as, ‘*You are not entitled to universal credit for this assessment period because … your income is too high*’ (para 43).
- The case was remitted to a new FtT to decide whether TD could reasonably have been expected to realise that she was being overpaid.

Test for temporary absence from Great Britain

***AM v Secretary of State for Work and Pensions* [2024] UKUT 137 (AAC)**

- This case examines UC Regs 2013, reg 11(1) which permits a temporary absence from Great Britain and the basic entitlement condition to be 'in Great Britain' (Welfare Reform Act 2012, s 4(1)(c)) to be disregarded if (a) the person was entitled to UC immediately before the period of their temporary absence, (b) the absence is not expected to exceed one month and (c) the absence does not exceed one month.

- The claimant was in receipt of UC. He travelled to Ethiopia for a family emergency, expecting to return to Great Britain three weeks later.

- Coronavirus restrictions were imposed on travel from Ethiopia (designated a “red zone” country) to Great Britain, delaying the claimant’s return by several months.

Absence from GB cont.

- UTJ Church allowed the appeal on the basis that the FtT, having accepted that the claimant intended to return to Great Britain less than a month after he left, and not having made any finding that he had changed his intention, or that the "expectation" of when he would return had changed, the FtT was bound to find that the conditions in reg 11(1) applied up until the date on which the claimant's period of absence from Great Britain exceeded one month.

- The UT set aside the decision and remade it, with the effect that the claimant's award was superseded from 29 June 2021 rather than 29 May 2021, such that there was no overpayment for the assessment period starting 29 May 2021.

Note: ***GL v His Majesty's Revenue & Customs*** **[2023] UKUT 100 (AAC)** in which the UT ruled that the tax credits' eight-week temporary absence rule could not be relaxed in cases where the claimant was unable to return to the UK as a result of Covid-19-related travel restrictions.

Retaining worker status - 'undue delay'

***SSWP v PC (UC)* [2024] UKUT 186 (AAC)**

- The claimant (PC) was a Polish national who had been granted pre-settled status under Appendix EU of the Immigration Rules on 21 February 2020. She worked in the UK until she was dismissed from her job on 21 July 2020.

- The SSWP accepted that PC had been in genuine and effective employment and was then involuntarily unemployed. But they decided that PC had lost her worker status during a gap of three months, as she did not make a claim for UC until 24 October 2020.

- UTJ Ward reviewed previous case law on 'undue delay' and decided that it applied in this case. In *SSWP v MK* [2013] UKUT 0163 (AAC), Judge White had said:

Undue delay

'... in determining whether persons are in involuntary unemployment for the purposes of Article 7 of the Citizenship Directive, the proper question is whether they remain engaged in the labour market. In determining the answer to that question, the reasons why the previous employment ended, the intentions of the person concerned, and their actions and the circumstances obtaining after they have left employment are all relevant matters' [46].

- The claimant's job search – This was relevant to an assessment of undue delay. However, the evidence in the case was 'far from demonstrating an active work search between July and October or the likely imminence of a job' ([36]).

- The claimant's resources - The Judge accepted that the availability of resources to tide a person over may have some relevance to whether there has been undue delay. On the facts, however, resources were available for only one-third of the period of delay.

Undue delay

- The absence of monitoring by the State – If a claimant has registered as a job seeker, but the State chooses not to monitor this, then this is not relevant ([28] and [29]), *SSWP v Elmi* [2011] EWCA Civ 1403 considered.

- Publicity and knowledge –UTJ Ward agreed that the route to retaining worker status by claiming unemployment benefits was not as widely understood by EU nationals. The Judge, however, said this was not a suitable case to resolve the issue, as the question of undue delay had not been raised before the FtT.

Pre-settled status and rights under the Charter

SSWP v AT (AIRE Centre and IMA intervening) [2023] EWCA Civ 1307, [2024] 2 WLR 967

Application of the Charter

- The Court of Appeal agreed with the Upper Tribunal [[2022] UKUT 330 (AAC)] that Charter rights continued to apply to EU citizens who are within the scope of the Withdrawal Agreement.
- The CoA held that where the case of AT applies, the Secretary of State was required to consider if a refusal of UC would put a person at risk of destitution.

PSS and the Charter

Threshold for a breach of the Charter

The Court of Appeal in *SSWP v AT* held:

- The benchmark for determining if there has been a breach of Article 1 of the Charter is that taken by the CJEU in *CG v Department for Communities in Northern Ireland* (C-709/20) [2021] 1 W.L.R. 5919 ([113])
- The duty under the Charter is triggered by risk. It is designed to prevent the applicant falling into indignity [154]).
- Support 'in principle' does not count; what matters is the provision of actual support to the individual in need ([118]).
- The provision of accommodation, such as access to a refuge, will not be treated as sufficient if it is merely temporary ([112]).

Guidance on dignity

NOTE: On 9 February 2024, the SSWP was refused permission to appeal against the Court of Appeal's judgment by the Supreme Court (UKSC 2023/0163 *Secretary of State for Work and Pensions (Appellant) v AT* (AP) (Respondent).

DWP Official Guidance

There is DWP guidance on the Court of Appeal's November 2023 decision in *SSWP v AT* in **ADM Memo 6/24,** published 28 June 2024 - 06-24: AT and the EU Charter of Fundamental Rights Assessment.

Note: The DWP says the decision does not apply to non-EU national family members. But see Article in Welfare Rights Bulletin Issue 297 (December 2023) by Martin Williams on the DWP's operational guidance and Appeal template, where DWP says *SSWP v AT* cannot apply because the Appellant is not an EU national but someone with pre-settled status as family member of an EU national.

PSS and s.204 appeals

SSWP v AT and Homelessness cases

There have been county court cases where those granted PSS have been able to rely on their Charter rights when applying under Part 7 of the Housing Act 1996: -

- HHJ Bird in *C v Oldham CC* [2024] EWCC 1 (22 May 2024) at [55]; and
- HHJ Saunders in *Hynek v LB of Islington* (County Court K40CL206, 24 May 2024) at [80]-[127].

The argument that an EU citizen can rely on Article 23 to argue that refusal of assistance, based on eligibility as someone with PSS, is unlawful discrimination was considered in the High Court in *Flertre v Vale of White Horse DC* [2024] EWHC 1754 (KB)

Thank you

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