

# Chapter D1: Overpayments, Recoverability, Adjustments, Civil Penalties and Recoupment – UC, JSA and ESA

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# Chapter D1: Overpayments, Recoverability, Adjustments, Civil Penalties and Recoupment – UC, JSA and ESA

## Scope of Chapter

D1001 This Chapter gives guidance on overpayment decision making. The topics covered are

1. the requirement for revision or supersession
2. the determination of an overpayment period
3. the calculation of an overpayment
4. the recoverability of an overpayment
5. any adjustments to be made to the amount of an overpayment
6. the imposition of a CPen
7. recoupment.

**Note:** This Chapter does not give guidance on the **methods** of overpayment recovery as this is the responsibility of Debt Management.

## Which benefits this guidance applies to

D1002 This guidance only applies to

1. UC
2. new style JSA (hereafter referred to as JSA)
3. new style ESA (hereafter referred to as ESA).

**Note 1:** ADM Chapter M3 contains guidance on the meaning of new style JSA and new style ESA.

**Note 2:** DMG Chapter 09 contains guidance on overpayment decision making for other benefits, including PIP, not listed above.

## When this guidance applies from

D1003 This guidance applies to UC, JSA and ESA overpayments which have arisen on claims for those benefits, made on or after 29.4.13<sup>1</sup>.

## Meaning of “overpayment”

D1004 Subject to D1275, overpayment<sup>1</sup> means an amount of UC, JSA or ESA which may be recovered under specified legislation<sup>2</sup>.

*1 SS (Op & Rec) Regs, reg 2; 2 SS A Act 92, s 71ZB(1)*

## How UC, JSA and ESA overpayments happen

### General

D1005 Overpayments of UC, JSA and ESA happen in a variety of circumstances and may be caused by

1. the claimant **or**
2. the DWP **or**
3. the landlord (in cases where UC housing costs are being paid directly to the landlord).

### Overpayments caused by a claimant

D1006 A claimant may cause an overpayment by

1. giving wrong information when making their claim **or**
2. failing to give relevant information when making their claim **or**
3. being late in reporting a change of circumstances which affects their existing benefit award **or**
4. giving wrong information when reporting a change of circumstances which affects their existing benefit award.

### Overpayments caused by the DWP

D1007 The DWP may cause an overpayment by

1. making a mistake when calculating a benefit award **or**
2. making a mistake when taking action on a reported change of circumstances which affects an existing benefit award **or**
3. failing to act promptly on a reported change of circumstances which affects an existing benefit award.

### Overpayments caused by a landlord

D1008 A landlord may cause an overpayment when

1. the claimant no longer lives in the dwelling for which the landlord is paid UC housing costs **or**



2. the claimant has never lived in the dwelling for which the landlord is paid UC housing costs **or**
3. the amount of UC housing costs paid to the landlord is based on incorrect information supplied by the landlord.

## **DM's action**

D1009 When information affecting entitlement to UC, JSA or ESA is identified, the DM must take the following action

1. except where D1036 applies, give a new entitlement decision by revising or superseding all relevant awarding decisions **and**
2. determine the period of the resulting overpayment **and**
3. calculate the total overpayment, that is, the difference between the amount to which there is entitlement or which is properly payable and the amount which has been paid **and**
4. where appropriate, offset the benefit paid against the new amount awarded **and**
5. determine the person(s) from whom the overpayment is recoverable **and**
6. give an overpayment decision **and**
7. give a decision on whether and on whom to impose a CPen.

D1010 – D1030

## **The requirement for revision or supersession**

### **Introduction**

D1031 The guidance in this section deals with the requirement to give a new entitlement decision by way of revision or supersession when information emerges that affects entitlement to UC, JSA or ESA and which results in an overpayment.

**Note:** ADM Chapter A3 contains guidance on revision. ADM Chapter A4 contains guidance on supersession.

### **The new entitlement decision**

D1032 Overpayments of UC, JSA or ESA are only recoverable when, following the emergence of information affecting entitlement to UC, JSA or ESA, the DM has first made a new entitlement decision. Except where D1036 applies, the DM must ensure that the new entitlement decision revises or supersedes all the awarding

decisions which operated during the period of the overpayment or were varied or reversed on appeal<sup>1</sup>.

*1 R(SB) 7/91; SS A Act 92, s 71ZB(3)*

### **Example 1**

Gavin claims UC from 3 September and it is awarded from and including that date. On 4 October new information emerges showing that Gavin gave incorrect information when he completed his on-line UC claim. Had the correct information been given at the time, Gavin would not have been entitled to UC. The DM revises the award of UC from and including 3 September.

### **Example 2**

Damian has been awarded UC from and including 4 June and he has been paid up to and including 3 October. On 7 October a change of circumstances emerges which affects Damian's entitlement to UC from 31 July. The DM supersedes the award of UC from 4 July to 3 October.

## **Has revision or supersession taken place**

### **General**

- D1033 The DM must be able to produce evidence that revision or supersession has taken place, otherwise they will have failed to meet the burden of proof required<sup>1</sup>. Where that evidence is unclear to anyone reading it, for example, when included as evidence in an appeal response to a FtT and fails to clearly illustrate that a valid revision or supersession has taken place, there must be a full explanation of its contents<sup>2</sup>.

*1 R(IS) 2/96; 2 R(IB) 2/04*

### **Types of evidence**

- D1034 Computer print-outs are commonly presented as evidence that revision or supersession has taken place and these will usually require an explanation. If available, a copy of the letter notifying the claimant of the (new entitlement) decision will be useful, additional evidence. However, this too will usually require explanation of its contents.

## **Revision or supersession decision not properly made**

- D1035 If it is realised after an overpayment decision has been made that there has been no proper alteration of entitlement for all or some part of the overpayment period, the overpayment decision is of no force or effect. The DM must ensure that the awarding decisions for the entire overpayment period are revised or superseded and a further overpayment decision made.

### **Example**

Asif has been awarded UC from and including 4 June and he has been paid up to and including 3 October. On 7 October information emerges that affects Asif's entitlement to UC from 31 July. The DM incorrectly supersedes the award of UC from 4 September to 3 October. As the resulting decision does not include proper alteration of entitlement to UC for all of the overpayment period, the associated overpayment decision is of no force or effect. The DM revises the previously incorrect superseding decision to correctly remove entitlement from 4 July to 3 October. A new overpayment decision is then made.

## **Recovery not dependent on revision or supersession**

D1036 D1032 does not apply where the circumstances of the overpayment, e.g. where there has been an overprovision of benefit, do not provide a basis for the original awarding decision to be<sup>1</sup>

1. revised under relevant legislation<sup>2</sup> **or**
2. superseded under relevant legislation<sup>3</sup>.

*1 SS (Op & Rec) Regs, reg 5; 2 SS Act 98, s 9; 3 s 10*

## **The overpayment decision**

D1037 At the same time as or after the DM makes the new entitlement decision they must make an overpayment decision. The overpayment decision must state

1. the period during which the amount was overpaid **and**
2. the amount that is recoverable **and**
3. the person(s) from whom it is recoverable.

D1038 – D1050

## **Determination of an overpayment period**

### **Introduction**

D1051 The guidance in this section deals with when a UC, JSA or ESA overpayment period starts and ends.

### **Start date of UC overpayment period**

#### **Beginning of a UC claim**

D1052 Where evidence exists that an overpayment of UC has occurred from the beginning of a claim, the DM must revise the award from its beginning<sup>1</sup>. The overpayment period will start on the same date.

*1 SS Act 98, s 9(3)*

#### **Example**

Alison claimed UC from 4 June and declared that she held capital in the form of an inheritance to the value of £20,000. Despite providing this information, Alison is wrongly awarded UC from and including 4 June. On 9 August the DM realises that Alison's capital affects her entitlement to UC. The DM revises the award of UC from 4 June and the start date of the UC overpayment period is 4 June.

### **During an existing UC award**

D1053 Where evidence exists that an overpayment of UC has occurred during the currency of an award, the DM must supersede the award from the first day of the assessment period in which the change occurred<sup>1</sup>. The overpayment period will start on the same date.

**Note:** ADM Chapter E2 contains guidance on assessment periods for UC.

*1 UC, PIP, JSA & ESA (D&A) Regs, Sch 1, Part 3, para 20*

#### **Example**

Oscar and Ellie are a UC joint claim couple. UC has currently been paid for the monthly assessment period running from 2 May to 1 June. On 10 June Ellie reports that Oscar left the UK on 6 May to work abroad for 12 months. Oscar's absence from the UK affects their UC entitlement as a couple. The DM supersedes the award of UC, made on the basis that Oscar and Ellie were a joint claim couple, from 2 May and the start date of the UC overpayment period is 2 May.

### **End date of UC overpayment period**

D1054 Where evidence exists that an overpayment of UC has occurred, the end date of the overpayment period is the last day of the assessment period immediately before the award is corrected or terminated.

#### **Example**

Mary claimed UC on 4 June and declared that she held capital in the form of an inheritance to the value of £20,000. Despite providing this information, Mary is wrongly awarded UC for the monthly assessment periods running from 4 June to 3 July and from 4 July to 3 August. On 9 August the DM realises that Mary's capital affects her entitlement to UC. The DM revises the award of UC from and including 4 June and the UC overpayment period ends on 3 August.

### **Start date of JSA or ESA overpayment period**

## **Beginning of a JSA or ESA claim**

- D1055 Where evidence exists that an overpayment of JSA or ESA has occurred from the beginning of a claim, the DM must revise the award from its beginning<sup>1</sup>. The overpayment period will start on the same date.

*1 SS Act 98, s 9(3)*

### **Example**

Bradley claimed JSA from 4 June and declared that he was not in employment. He was awarded JSA from 7 June. Subsequently, the DM became aware that Bradley had been working on a part-time basis since 20 May. This affected his entitlement to JSA. The DM revises the award of JSA from 7 June and the start date of the JSA overpayment is 7 June.

## **During an existing JSA or ESA award – entitlement ends**

- D1056 Where evidence exists that an overpayment of JSA or ESA has occurred during the currency of an award and entitlement ends, the DM must supersede the award from the date of the change<sup>1</sup>. The overpayment period will start on the same date.

*1 UC, PIP, JSA & ESA (D&A) Regs, Sch 1, Part 1, para 4*

### **Example**

Ed has been paid ESA up to and including 21 November. He started full time employment on 4 November meaning that he no longer had LCW and was therefore not entitled to ESA. He reported the change in his circumstances by letter which was received in the local DWP office on 5 November. However, the DM does not take action to supersede the award of ESA until 22 November. The start date of the ESA overpayment is 4 November.

## **During an existing JSA or ESA award – entitlement reduces**

- D1057 Where evidence exists that an overpayment of JSA or ESA has occurred during the currency of an award, but entitlement reduces, the DM will usually supersede the award of benefit from the beginning of the week in which the change occurs<sup>1</sup>. However, the start date of the overpayment period will be the date on which the change occurs.

*1 UC, PIP, JSA & ESA (D&A) Regs, Sch 1, Part 1, para 3(a)*

### **Example**

Emma has been paid JSA up to and including 21 November. Her benefit week ends on a Thursday. She started part-time employment on 4 November meaning that her entitlement to JSA is reduced. The DM supersedes the award of JSA from 1 November. However, the start date of the JSA overpayment is 4 November.

## **End date of JSA or ESA overpayment period**

D1058 Where evidence exists that an overpayment of JSA or ESA has occurred, the end date of the overpayment period is the last day of the payment period immediately before the award is corrected or terminated.

### Example

Jessica has been paid ESA up to and including 21 November. She started full time employment on 4 November meaning that she no longer had LCW and was therefore not entitled to ESA. She reported the change in her circumstances to the local DWP office by letter which was received in the local office on 5 November. However, the DM does not take action to supersede the award of ESA until 22 November. The end date of the ESA overpayment is 21 November.

D1059 – D1070

## Calculation of an overpayment

### Introduction

D1071 The guidance in this section deals with

1. the diminution of capital **and**
2. the circumstances when a deduction is required from the amount of a UC, JSA or ESA overpayment.

### Diminution of capital

#### UC

D1072 D1073 applies where

1. there is an overpayment of UC which has occurred because of an error relating to the amount of a person's capital **and**
2. the overpayment period is 3 months or more<sup>1</sup>.

**Note:** ADM Chapter H1 contains guidance on capital for UC purposes.

*1 SS (Op & Rec) Regs, reg 7(1)*

D1073 For the purpose only of calculating the recoverable amount of the overpayment as in D1072, the DM must

1. at the end of the first 3 months of the overpayment period, treat the amount of that capital as having been reduced by the amount of UC overpaid during those 3 months **and**
2. at the end of each subsequent period of 3 months, if any, of the overpayment period, treat the amount of that capital as having been further reduced by the amount of UC overpaid during the immediately preceding 3 months<sup>1</sup>.

*1 SS (Op & Rec) Regs, reg 7(2)*

D1074 The DM cannot treat capital as reduced over any period other than 3 months, in any circumstances other than those provided for in D1073<sup>1</sup>.

*1 SS (Op & Rec) Regs, reg 7(3)*

## Circumstances when a deduction is required

D1075 When calculating the amount of an overpayment of UC, JSA or ESA, the DM must deduct<sup>1</sup>

1. any amount which has been offset under specified legislation<sup>2</sup> **and**
2. any additional amounts of UC.

*1 SS A Act 92, s 71ZB(4); SS (Op & Rec) Regs, reg 8; 2 reg 16*

## Offsetting

D1076 D1077 applies where a claimant has been paid benefit under the original decision which is subsequently

1. revised or further revised **or**
2. superseded or further superseded **or**
3. set aside on an appeal<sup>1</sup>.

*1 SS A Act 92, s 71ZF; SS (Op & Rec) Regs, reg 16(1)*

D1077 Any UC, JSA or ESA paid in respect of a period covered by the subsequent decision is to be offset against arrears of entitlement to benefit under that decision and, except to the extent that the UC, JSA or ESA exceeds the arrears, is to be treated as properly paid on account of them<sup>1</sup>.

*1 SS (Op & Rec) Regs, reg 16(2)*

### Example

Nathan has been paid UC for the assessment periods running from 5 November to 4 December and from 5 December to 4 January. Nathan becomes entitled to JSA and an arrears payment for the period from 2 December to 4 January is calculated. The amount of UC paid to Nathan for the period from 2 December to 4 January is to be offset against the arrears of JSA now payable to him.

D1078 Where an amount has been deducted as in D1081 or D1085 to D1087, an equivalent sum is to be offset against any arrears of entitlement under the subsequent decision except to the extent that the sum exceeds the arrears and is to be treated as paid on account of them<sup>1</sup>.

*1 SS (Op & Rec) Regs, reg 16(3)*

D1079 The DM should note that

1. they can make an offset decision at any time before arrears of UC, JSA or ESA are paid **and**

2. whenever possible, they should include the offset in the new entitlement decision.

The DM should ensure that any offset of benefit is dealt with before considering whether any UC, JSA or ESA has been overpaid. This is because an overpayment decision prevents the recoverable amount from being considered for offset later on<sup>1</sup>.

*1 SS (Op & Rec) Regs, reg 16(4)*

## Meaning of “subsequent decision”

- D1080 Subsequent decision means the decision referred to in D1076 **1.**, **2.** or **3.** which was taken in relation to the original decision<sup>1</sup>.

*1 SS (Op & Rec) Regs, reg 16(5)*

## Additional amounts of UC

- D1081 When calculating the recoverable amount of a JSA or ESA overpayment, the DM must deduct<sup>1</sup>

1. any amount which has been offset under specified legislation<sup>2</sup> **or**
2. any additional amount of UC which was not payable to the claimant or their partner under the original or any other determination, but which should have been determined to be payable in respect of all or part of the overpayment period, to the claimant, or the claimant and their partner jointly
  - 2.1 on the basis of the UC claim as presented to the DM **or**
  - 2.2 on the basis of that claim as it would have appeared if any change of circumstances, except a change of the dwelling which the claimant occupies as their home, had been notified at the time that change occurred **or**
  - 2.3 where the overpayment arose from a misrepresentation or failure to disclose a material fact, on the basis that that misrepresentation or failure to disclose had been remedied prior to the award being made **or**
  - 2.4 where the overpayment arose because of an error made by, or on behalf of, the Secretary of State, on the basis that that error had not been made.

*1 SSA Act 92, s 71ZB(4); SS (Op & Rec) Regs, reg 8; 2 reg 16*

## Meaning of “overpayment period”

- D1082 Overpayment period means the period over which the overpayment accrued<sup>1</sup>.

*1 SS (Op & Rec) Regs, reg 2*



## Meaning of “partner”

D1083 Partner means, where the person being referred to is a member of a couple, the other member of the couple<sup>1</sup>.

*1 SS (Op & Rec) Regs, reg 2*

## Overpayments of UC housing costs

### Meaning of “housing costs”

D1084 Housing costs<sup>1</sup> means any amount included in an award of UC in respect of rent payments as defined in legislation<sup>2</sup>.

**Note:** ADM Chapters F2, F3 and F4 contain guidance on UC housing costs.

*1 SS (Op & Rec) Regs, reg 2; 2 UC Regs, Sch 1, para 2*

## Change of dwelling

D1085 The guidance in D1086 and D1087 applies when an overpayment of housing costs has occurred in the following circumstances

1. the claimant has moved from their previous home (dwelling A) to another home (dwelling B) **or**
2. they have been awarded housing costs for dwelling A to which they are no longer entitled because they do not, or are treated as not, living there **or**
3. housing costs are paid to the same person in respect of the claimant’s occupation of dwelling B as it was paid in respect of dwelling A<sup>1</sup>.

*1 SS (Op & Rec) Regs, reg 9(1)*

D1086 When the DM is calculating the recoverable overpayment, they may at their discretion, deduct an amount equal the claimant’s entitlement to housing costs for the assessment period in respect of dwelling B for the number of assessment periods equal to the number of assessment periods during which the claimant was overpaid housing costs for dwelling A<sup>1</sup>.

*1 SS (Op & Rec) Regs, reg 9(2)*

D1087 Where a sum has been deducted as in D1086, an equivalent sum is to be treated as having been paid in respect of the claimant’s entitlement to housing costs for dwelling B for the number of assessment periods equal to the number of assessment periods during which the claimant was overpaid housing costs for dwelling A<sup>1</sup>.

*1 SS (Op & Rec) Regs, reg 9(3)*

## CSM collected by the Department

### UC

D1088 When the DM is calculating an overpayment of UC involving a case where CSM payments are being collected by the Secretary of State for the whole or part of the

overpayment period, the amount of CSM collected is to be disregarded in the calculation of the overpayment<sup>1</sup>.

*1 SS A Act 92, s 74A*

### **Example**

Louise is entitled to CSM of £150 per month. This is collected by DWP. She is entitled to UC of £583.63 per assessment period. CSM is not treated as income for the purposes of UC entitlement. A change of circumstances means that Louise is no longer entitled to UC and an overpayment has been calculated. There is no provision for reducing the amount of the overpayment on account of the CSM collected by DWP. Therefore, the overpayment is the full amount of Louise's entitlement to UC. However, although Louise would be liable to repay the full amount of overpaid UC, the Secretary of State cannot recover the overpayment twice. Louise is required to repay the gross amount of the UC overpayment **less** the amount of any CSM that has been collected.

D1089 – D1100

## **Recoverability of an overpayment**

### **Introduction**

D1101 The guidance in this section deals with

1. the meaning of a recoverable amount
2. the person(s) from whom an overpayment may be recovered
3. misrepresentation
4. failure to disclose
5. causation.

### **Meaning of “recoverable amount”**

D1102 Recoverable amount<sup>1</sup> means

1. subject to D1072 to D1087, the amount of any overpayment **or**
2. any other amount recoverable under specified legislation<sup>2</sup>.

*1 SS (Op & Rec) Regs, reg 3; 2 SS A Act 92, s 71ZE(3); s 71ZG; s 71ZH; s 115B(4); s 115C(4); s 115D(4)*

### **Person(s) from whom an overpayment may be recovered**

D1103 Overpayments of UC, JSA and ESA will normally be recoverable from the claimant. This includes overpayments that have arisen as a result of the circumstances described in D1007. However, in certain circumstances, overpayments may be

recovered from someone other than or, in addition to, the claimant. D1105 to D1111 gives guidance on deciding the person from whom an overpayment is recoverable and in which circumstances<sup>1</sup>.

*1 SS (Op & Rec) Regs, reg 4(1)*

## Meaning of “payee”

D1104 Payee means the person to whom the overpayment has been paid<sup>1</sup>.

*1 SS (Op & Rec) Regs, reg 4(9)*

## Appointee or another person acting on the claimant’s behalf

D1105 Where the payee is a person<sup>1</sup>

1. appointed under specified legislation<sup>2</sup> to act on the claimant’s behalf **or**
2. who the DM has directed that payment be made in accordance with specified legislation<sup>3</sup>

then the overpayment is recoverable from the claimant and the payee.

*1 SS (Op & Rec) Regs, reg 4(2); 2 UC, PIP, JSA & ESA (C&P) Regs, reg 57; 3 reg 58*

## Payments to Third Parties

D1106 Where the payee is a person to whom UC, JSA or ESA has been paid under specified legislation<sup>1</sup>, then, to the extent that the amount paid does not exceed the amount payable to the payee under that legislation, the overpayment is recoverable from the claimant instead of the payee<sup>2</sup>.

**Note:** ADM Chapter D2 contains guidance on Third Party deductions.

*1 UC, PIP, JSA & ESA (C&P) Regs, Sch 6; 2 SS (Op & Rec) Regs, reg 4(3)*

## Overpayments of UC housing costs

### Change of dwelling

D1107 Where the DM is satisfied that an overpayment of UC housing costs has occurred because of any change of the claimant’s dwelling, then, if the claimant and the payee are not the same person, the overpayment is recoverable from the claimant and the payee<sup>1</sup>.

*1 SS (Op & Rec) Regs, reg 4(5)*

### Misrepresentation or failure to disclose

D1108 Where the DM is satisfied that the overpayment of UC housing costs occurred because of a misrepresentation of, or failure to disclose a material fact (in either case, whether fraudulently or otherwise) by any person (“M”), then, if “M” and the

payee are not the same person, the overpayment is recoverable from “M” instead of the payee<sup>1</sup>.

**Note:** D1131 et seq gives guidance on misrepresentation and failure to disclose.

*1 SS (Op & Rec) Regs, reg 4(6)*

### **Meaning of “material fact”**

D1109 Material fact means any fact which had it been known about and properly acted upon by the DM would have prevented all or part of the overpayment in question. It is a fact which is objectively material to the DM’s decision to make an award of benefit. A fact is material where, on disclosure, it would prompt further enquiries or investigations by the DM in order to decide whether an existing entitlement continued or required some change<sup>1</sup>.

*1 R(IS) 7/94*

### **Other reasons**

D1110 Where the DM is satisfied that an overpayment of UC housing costs has occurred for a reason other than as in D1107 or D1108, then, except where D1105 or D1111 applies in relation to the overpayment, if the claimant and the payee are not the same person, the overpayment is recoverable from the claimant instead of the payee<sup>1</sup>.

*1 SS (Op & Rec) Regs, reg 4(7)*

D1111 For the purposes of D1110, this refers to overpayments that have occurred due to the amount of the payment exceeding the amount of UC housing costs for which the claimant is liable<sup>1</sup>.

*1 SS (Op & Rec) Regs, reg 4(8)*

D1112 – D1130

## **Misrepresentation**

### **Introduction**

D1131 Where an overpayment of UC housing costs as in D1108 has occurred, either

1. the claimant **or**
2. both members of a joint-claim couple **or**
3. the landlord

could be responsible for the misrepresentation that caused the overpayment.

### **What is misrepresentation**

D1132 Misrepresentation occurs when inaccurate information is provided or information is omitted. It can be done either innocently or deliberately<sup>1</sup> and can be by either by

word or action. It does not matter if the person providing the information believed it to be correct – once it is shown to be incorrect, misrepresentation has occurred.

*1 R(SB) 2/92*

### **Example 1**

Eric has claimed UC and states on his on-line claim form that he is liable for rent amounting to £300.00 pw. He is awarded UC including an amount to cover his housing costs. It is later discovered that Eric's rent liability is actually £200.00 pw. This means that he has been overpaid an amount of housing costs. Eric's declaration that his rent liability amounted to £300.00 pw is a misrepresentation.

### **Example 2**

Ben is George's landlord. George is a UC claimant. In support of George's claim for UC housing costs, Ben provides a copy of George's tenancy agreement which says that he is liable for £300.00 pw in rent. UC housing costs are awarded and paid to George on that basis. It is later discovered that George is in fact liable for rent of £250.00 pw resulting in an overpayment of housing costs. Ben's declaration that George's rent liability is £300.00 pw is a misrepresentation.

## **Has misrepresentation occurred**

### **Written statements**

- D1133 Whether a misrepresentation has occurred may depend on the precise wording of any declaration that has been signed<sup>1</sup>. In principle, a person can misrepresent a fact that he is unaware of. However, if he declares that *"as far as I know, the information on this form is true and complete"* (or something similar), there will only be a misrepresentation if the person misstates or omits a fact which he knows about.

*1 R(IS) 7/94*

- D1134 However, if the person simply declares that the information he has given is *"true and complete"*, any error or omission about the facts will be a misrepresentation. It will not matter that the person did not know the fact in question.

### **Oral statements**

- D1135 If there is evidence of information provided orally by a person and that information is found to be incorrect, the DM should regard the oral statement as a misrepresentation. Oral information is commonly given to an interviewing officer and recorded in a report. However, where the DM is relying on an oral statement and the person appeals, the written record should be produced as evidence and the interviewing officer may be called to the FtT hearing as a witness.

## Circumstantial evidence of misrepresentation

D1136 If direct evidence of misrepresentation is unavailable, the DM may still consider misrepresentation where there is circumstantial evidence to support this. However, the DM

1. should not normally ask for direct evidence to be produced, or for circumstantial evidence to be sought where it is not already available **and**
2. can usually decide recoverability on the alternative ground of failure to disclose (see D1151 et seq) on the evidence already available.

## Allegation of non-responsibility

D1137 A claimant or their representative may state that an incorrectly completed form with a signed declaration is not a misrepresentation because the claimant completing the form did not know what they were doing<sup>1</sup>. This may happen where someone should have been appointed to run that claimant's affairs and the claimant completed the forms in question. That claimant may not be held responsible for the completion.

*1 R(IS) 4/06*

D1138 Where it is claimed that a claimant is not responsible, the DM should consider the following points<sup>1</sup>

1. Non-responsibility is limited to those who are blind, illiterate or do not fully understand a particular form they have signed. This may be caused by poor education, illness or mental incapacity and can be temporary or permanent.
2. Poor education, illness or mental incapacity alone is not sufficient to show non-responsibility. People are expected to take reasonable steps to understand what they sign.
3. The burden of proof rests with persons who contend that they are not responsible. Those who are merely content to sign without taking the trouble to find out the general effect of the form cannot claim to be non-responsible.
4. People may contend that they are not responsible because, having signed the form, they believe it had one effect when in fact its effect was quite different. They must show that they had taken steps or been given information which gave grounds for their belief and there was a radical, serious or very substantial difference between what they signed and what they thought they were signing.
5. People are responsible where they were merely mistaken as to the legal effect of the form, whether the mistake was their own or that of an advisor.

*1 Saunders v. Anglia Building Society [1971] AC 1004 HoL*

D1139 – D1150

# Failure to disclose

## Introduction

D1151 Where an overpayment of UC housing costs as in D1108 has occurred, either

1. the claimant **or**
2. both members of a joint-claim couple **or**
3. the landlord

could be responsible for the failure to disclose that caused the overpayment.

## DM's requirements

### Information and evidence in connection with a claim

D1152 The DM may require a claimant or where applicable, a landlord, to provide information or evidence in connection with a claim for UC that may include in the calculation of an award, an amount in respect of housing costs<sup>1</sup>.

*1 UC, PIP, JSA & ESA (C&P) Regs, reg 37(1) to (6)*

### Information and evidence in connection with an award

D1153 The DM may require a person to provide information or evidence in such a way and at such times as the DM may determine, in connection with the payment of UC housing costs that have been awarded<sup>1</sup>.

*1 UC, PIP, JSA & ESA (C&P) Regs, reg 38(1) to (3)*

## Notification of any change of circumstances

D1154 A person must notify the DM of any change of circumstances which that person might reasonably be expected to know might affect<sup>1</sup>

1. continuing entitlement to UC housing costs **or**
2. the amount of UC housing costs awarded **or**
3. the payment of UC housing costs

as soon as reasonably practicable after the change occurs.

*1 UC, PIP, JSA & ESA (C&P) Regs, reg 38(4)*

D1155 A notification as in D1154 must be given<sup>1</sup>

1. in writing or by telephone (unless the DM decides that notice must be given in another way or accepts notice given other than in writing or by telephone) **or**
2. in writing where the DM requires written notice (unless the DM accepts notice given other than in writing)

and must be sent or delivered to, or received at, the appropriate office.

**Note:** ADM Chapter A2 gives guidance on the meaning of appropriate office.

*1 UC, PIP, JSA & ESA (C&P) Regs, reg 38(5)*

## Knowledge of the material fact

D1156 Persons have a duty to disclose

1. material facts that are known to them **and**
2. material facts which they ought to know by making reasonable enquiries<sup>1</sup>.

**Note:** The burden of enquiry placed upon them, varies from case to case depending on the nature of the material fact and how easily they could have discovered it.

*1 R(SB) 28/83*

## Discharging the duty to disclosure

D1157 In order for a person to discharge their duty to disclose, a disclosure must

1. be of the material fact itself **and**
2. be made in relation to the claim for UC housing costs **and**
3. be made in the manner and to the place instructed by the DM<sup>1</sup>.

*1 R(SB) 54/83; R(SB) 15/87; Hinchy v Secretary of State for Work and Pensions; R(IS) 7/05*

D1158 Disclosure means “to reveal”<sup>1</sup> a material fact which, as far as the claimant (the discloser) knows, is unknown to the person who is owed the disclosure<sup>2</sup> (i.e. the DM).

*1 Hinchy v Secretary of State for Work and Pensions EWCA [2003] Civ 138; R(IS) 7/05; 2 R(SB) 15/87*

## Effect of a failure to disclose

D1159 Where a person has not complied with issued instructions and therefore fails to disclose information or notify a change of circumstances, any resulting overpayment of UC housing costs will be recoverable<sup>1</sup>. The recoverable amount is limited to the amount of benefit that would not have been paid if the person had actually disclosed at the correct time. However, the DM must ensure that the person was under a duty to disclose<sup>2</sup>.

*1 SSA Act 92, s 71ZB(1) & (2); 2 UC, PIP, JSA & ESA (C&P) Regs, regs 37 & 38*

## When a failure to disclose arises

D1160 A failure to disclose arises

1. when a change of circumstances occurs between written statements of circumstances, e.g. the on-line claim form and a review form, and the change is not reported **or**
2. where a written statement is inaccurate or incomplete.



## Clear and unambiguous duty to disclose

- D1161 A person must disclose a material fact where they<sup>1</sup>
1. have been clearly and unambiguously advised of the need to disclose the fact<sup>2</sup> **and**
  2. were aware of the fact **or**
  3. ought to have been aware of the fact by making reasonable enquiries<sup>3</sup>.

**Note:** The burden of enquiry placed upon the person varies from case to case depending on the nature of the material fact and how easily they could have discovered it.

*1 UC, PIP, JSA & ESA (C&P) Regs, reg 38(1) to (3); 2 R(IB) 4/07; R(IS) 9/06; 3 R(SB) 28/83*

## Instructions to notify

- D1162 Instructions to persons about the notification of information are usually given in on-line claim forms, notes that accompany claim forms and leaflets. These can be accepted as sufficient to inform the person of their obligation to disclose any change of circumstances as listed therein. However, the instructions must be clear and unambiguous<sup>1</sup>.

*1 R(IS) 9/06; R(IB) 4/07*

- D1163 The person should comply with the instructions given to them. They are not entitled to form views about how the benefit system works or what knowledge the relevant DM might have<sup>1</sup>. As claim forms and leaflets are periodically updated, the DM will need to ensure that they have a copy of the relevant version when looking at what instructions the person has been given and when.

*1 Hinchy v. Secretary of State for Work and Pensions [2005] 1 WLR 967; R(IS) 7/05*

## Modification of instructions

- D1164 Notwithstanding the person's instructions regarding their duty to disclose as discussed in D1157, it is possible for those instructions to be modified by an officer acting on behalf of the Secretary of State. The effect of this modification is that the claimant no longer has to do all or part of what they were originally required to do<sup>1</sup>. A modification can be done orally or in writing and where a duty to disclose has been modified, the DM should consider what the modified duty was. This should be based on what was said to the claimant. For example

1. if the claimant was, in effect, told that further disclosure was unnecessary, there will be no duty to disclose from that point onwards. It follows that there will be no failure to disclose from then on **or**
2. if the claimant was not, in effect, told that further disclosure was unnecessary, the DM should consider what the claimant was, in effect, still required to do. The DM should consider which parts of the previous instructions were

changed and which were not changed. The DM should then determine what the claimant still had to disclose, and when, how and to whom it had to be disclosed. This will form the claimant's new duty to disclose from the date of modification onwards. There will be a failure to disclose only if the claimant does not comply with the new duty.

*1 R(A) 2/06*

## **Additional duty to disclose**

D1165 In addition to the duty described in D1161, the person also has a duty to disclose if

1. they were aware of the material fact **and**
2. the fact represented a change of circumstances **and**
3. it was reasonable to expect the person to know that their benefit might be affected by the change in circumstances **and**
4. they did not report the change as soon as reasonably practicable after it occurred<sup>1</sup>.

*1 UC, PIP, JSA & ESA (C&P) Regs, reg 38(4)*

D1166 A notification as in D1165 must be given<sup>1</sup>

1. in writing or by telephone (unless the DM decides that notice must be given in a particular way or accepts notice other than in writing or by telephone) **or**
2. in writing where the DM requires written notification (unless the DM decides to accept notice other than in writing)

and must be sent or delivered to, or received at, the appropriate office.

**Note:** ADM Chapter A2 gives guidance on the meaning of appropriate office.

*1 UC, PIP, JSA & ESA (C&P) Regs, reg 38(5)*

## **Reasonably to be expected**

D1167 The test is what could reasonably be expected of the person concerned, having regard to their circumstances. It is not necessary for the person to understand the actual impact of the change. The DM must look at the information given to the person about

1. the conditions of entitlement to UC housing costs **and**
2. why it had been decided that the person satisfied those conditions and thus became entitled to UC housing costs **and**
3. what changes the person may have been told to notify.

## Timing of the disclosure

- D1168 Disclosure has to be made as soon as reasonably practicable to be effective. However, there is no requirement for a person who is aware of a change that is about to take place, to notify the relevant office in advance<sup>1</sup>.

*1 R(SB) 3/81*

## Person alleges that disclosure made

- D1169 Where a person alleges that the material fact was disclosed orally or in writing, but no trace of the disclosure can be found, the DM should decide whether disclosure was actually made. If the DM decides that disclosure
1. was not made, they should consider recoverability of the overpayment in the normal way **or**
  2. was made, the DM should consider whether the disclosure was sufficient as in D1157.

## Disclosure by landlord

- D1170 In the case of an overpayment as in D1108, the duty to disclose which is placed on the claimant(s) may also be placed on the landlord. Where recovery is sought from the landlord, the DM must be able to show that the landlord has a legal duty to disclose.

D1171 – D1190

## Causation

### General

- D1191 For an overpayment as in D1108 to be recoverable, the DM must establish whether the overpayment has been caused by a misrepresentation of or failure to disclose a material fact. If it has, then the necessary causal link has been established and the DM is entitled to recover the overpayment<sup>1</sup>.

*1 R(SB) 3/81; R(SB) 21/82; R(SB) 15/87*

## Causation and misrepresentation

- D1192 To determine whether an overpayment has been caused by a misrepresentation, it is necessary to consider whether, at any of the stages described at D1193 below, correcting the misrepresentation would have made any difference to the overpayment.
- D1193 When the DM is considering whether the necessary causal link exists, it is useful to establish the following
1. when, and what, if any, information was received by the Secretary of State  
**and**

2. what, if anything, happened to that information after it was received by the Secretary of State in the office where disclosure should have been made **and**
3. what, if any, action was taken by the Secretary of State in response to receiving that information.

## **Causation and failure to disclose**

D1194 To determine whether an overpayment has been caused by a failure to disclose a material fact, it is necessary to consider whether the overpayment would still have occurred if there had been proper disclosure of that fact. The DM should note that

1. if the overpayment **would not** have occurred, if there had been proper disclosure of the material fact, a failure to make that disclosure is a cause of the overpayment, **whereas**
2. if the overpayment **would have** occurred, even if there had been proper disclosure of the material fact, a failure to make that disclosure is not a cause of the overpayment.

## **Is there a causal link between the failure to disclose and the overpayment**

D1195 Where there has been a failure to disclose a material fact, the DM should consider whether the necessary causal link with the overpayment exists by establishing the following

1. when, and what, if any, information about the material fact was received by the Secretary of State **and**
2. what, if anything, happened to that information after it was received by the Secretary of State in the office where proper disclosure should have been made **and**
3. what, if any, action was taken by the Secretary of State in response to receiving that information.

D1196 If the material fact which the person should have provided has, in fact, been provided by someone else, that does not **necessarily** mean that the person's failure to disclose is not a cause of the overpayment. The DM should still establish whether, at any of the stages at D1195 **1., 2. and 3.**, disclosure from the person would have prompted the office to which disclosure should have been made, to take action that would have brought the overpayment to an end sooner than was the case.

D1197 If, at any stage, it can be shown that the overpayment would have continued regardless of the disclosure of the material fact, then the causal link is broken. The recoverable amount should not therefore include any amount overpaid after the date on which that link is broken.

## Burden of proof

D1198 It is for the DM to show that the person's failure to disclose was a cause of the overpayment. The DM should have regard to all available records and any background knowledge about office procedures and practices that the DM or other officers hold. If it is not possible to determine what would probably have happened if the person had made the required disclosure (eg. because the DM cannot establish what happened to a letter from a third party that contained the required information), the overpayment will not be recoverable.

## Number of causes for an overpayment

D1199 It is possible for there to be more than one cause for an overpayment. For example, the person may have failed to disclose a material fact but argues that the Department failed to take reasonable steps on its own initiative that would have brought the material fact that had to be disclosed, to the Department's attention. Both failures helped bring about the overpayment. However, providing that one of the causes was the person's failure to disclose, then the causal link is not broken<sup>1</sup>.

*1 Duggan v CAO; R(SB) 13/89*

## When is the causal link not broken

D1200 Examples of when the causal link is not broken include:

1. wrong assumptions are made about a person's circumstances which give rise to an overpayment **or**
2. administrative duties are performed negligently in some way, eg. a failure to link two cases in the same household **or**
3. the discovery of the material fact by an office other than the one to which disclosure must be made<sup>1</sup> **or**
4. receipt by the office to which disclosure must be made, of information that does not allow a revision or supersession to be done, eg. receipt of a letter alleging fraud, but which does not contain sufficient detail to identify the relevant claimant **or**
5. the discovery of information that might allow revision or supersession but the details of which must be put to the person first, eg. the receipt of a General Matching Service (GMS) printout.

*1 Morrell v Secretary of State for Work and Pensions; R(IS) 6/03*

D1201 – D1220

## Adjustments

### Introduction

- D1221 This section gives guidance on preventing duplicate payments, specifically
1. bringing POAOB (formerly known as interim payments) into account **and**
  2. abatement and UC.

## **Payments on account of benefit**

### **Introduction**

- D1222 Under certain conditions<sup>1</sup> DMs may make discretionary payments of UC, JSA or ESA. These are called POAOB.

**Note:** Operational guidance dealing with the circumstances when a POAOB may be made, how much may be paid and repayment schedules is available.

*1 SSA Act 92, s 5(1)(r); SS (POAOB) Regs, regs 3 to 9*

### **Bringing payments on account of benefit into account**

- D1223 Where it is practical to do so and where a POAOB was made in anticipation of an award of benefit, it should be brought into account by means of an offset against the sum payable to the claimant under the award<sup>1</sup>.

*1 SSA Act 92, s 71ZG; SS (POAOB) Regs, reg 10(a)*

- D1224 Whether or not made in anticipation of an award, a POAOB which is not offset as in D1223 is to be deducted from

1. the sum payable to the claimant under the award of benefit on account of which it was made **or**
2. any sum payable under any subsequent award of that benefit to the claimant<sup>1</sup>.

*1 SS (POAOB) Regs, reg 10(b)*

D1225 – D1240

## **Abatement and UC**

### **Introduction**

- D1241 The guidance in this section concerns the recovery of UC if it would not have been paid if

1. a prescribed income **or**
2. a prescribed payment

had been paid on the prescribed date.

### **Prescribed income**

#### **General**

D1242 The DM is entitled to recover any amount of UC that would not have been paid if the prescribed income had been made on the prescribed date<sup>1</sup>.

*1 SSA Act 92, s 71ZB(5)*

## What is prescribed income

D1243 For the purposes of D1242, prescribed income is income that is to be taken into account<sup>1</sup> in accordance with specified legislation<sup>2</sup>.

**Note:** ADM Chapters H3, H4 and H5 contain guidance on income for the purposes of UC.

*1 UC Regs, Part 6, Chapters 2 & 3; 2 SS (Op & Rec) Regs, reg 6(1)*

## What is the prescribed date

D1244 The date on which income as referred to in D1243 is to be treated as paid is

1. where the payment of income is made in respect of a specific day or period, that day or the first day of that period **or**
2. where the payment of income is not made in respect of a specific day or period, the day or the first day of the period to which it is fairly attributable<sup>1</sup>.

*1 SS (Op & Rec) Regs, reg 6(2)*

### Example

Sam has been awarded UC from and including 5 November. He has been paid £450.00 for the monthly assessment period running from 5 November to 4 December. On 6 December Sam receives a letter from his former employer stating that he is entitled to an occupational pension amounting to £100.00 per month beginning on 11 November. Had the pension been paid without delay from 11 November, Sam's UC entitlement would have been £350.00 per monthly assessment period. The amount of UC to be recovered from Sam's next UC payment is £100.00 (i.e. £450.00 (the amount that Sam was paid) minus £350.00 (the amount that Sam should have been paid)).

## Prescribed payment

### General

D1245 The DM is entitled to recover an amount of UC that would not have been paid if a prescribed payment had been paid at the prescribed time. There are 2 methods of recovery. These are

1. abatement of arrears of UK benefit **or**
2. receipt from arrears of EC benefits.

## Abatement of arrears of UK benefit

D1246 The amount of the prescribed payment of a UK benefit is reduced by the amount calculated in D1249 where<sup>1</sup>

1. the prescribed payment is not made on or before the prescribed date **and**
2. it is decided that an amount of UC has been paid that would not have been paid if the prescribed payment had been made at the prescribed time.

*1 SS A Act 92, s 74(2)*

## What is a prescribed payment

D1247 For the purposes of D1246, prescribed payments are<sup>1</sup>

1. any benefit under specified legislation<sup>2</sup> (except any grant or gratuity or WPT<sup>3</sup>)
2. PIP<sup>4</sup>
3. CHB<sup>5</sup>
4. WDP or WWP which is not a gratuity and any payment which the DM accepts as similar to such a pension<sup>6</sup>
5. an allowance paid under the Job Release Act<sup>7</sup>
6. a training allowance<sup>8</sup>
7. receipts from EC benefits<sup>9</sup>
8. WPA<sup>10</sup>
9. JSA<sup>11</sup>
10. Financial Assistance Scheme payments<sup>12</sup>
11. ESA<sup>13</sup>.

*1 SS (POR) Regs, reg 8(1); 2 reg 8(1)(a); SS CB Act Parts II to V; 3 R(SB) 28/85;  
4 SS (POR) Regs, reg 8(1)(aa); 5 reg 8(1)(b); 6 reg 8(1)(d); 7 reg 8(1)(e); 8 reg 8(1)(f);  
9 reg 8(1)(g); 10 reg 8(1)(i); 11 reg 8(1)(j); 12 reg 8(1)(k); 13 reg 8(1)(l)*

## What is the prescribed date

D1248 For the purposes of D1246, the prescribed date is the date the receipt of, or entitlement to the prescribed payment, would have to be notified to the DM in time for it to be taken into account in the UC award<sup>1</sup>. This means that an amount can be recovered if

1. the prescribed payment has not been made **and**
2. the DM was notified of entitlement to the prescribed payment and the UC award could not be revised or superseded.

*1 SS (POR) Regs, reg 8(2); R(SB) 28/85*

## Calculation of amount to be recovered

D1249 The amount to be recovered should be worked out by comparing the amount of

1. UC paid **and**



2. UC which would have been paid if the prescribed payment had been made at the prescribed time.

## Receipts from arrears of EC benefits

### General

D1250 Where

1. a payment of EC benefit (made under the legislation of any Member State other than the UK) is not made on or before the prescribed date for the payment **and**
2. an amount of UC has been paid which would not have been paid

the DM is entitled to receive, from the EC benefit, the amount as in **2.**<sup>1</sup>.

**Note:** DMG Chapter 07 Part 1 contains a list of Member States.

*1 SS A Act 92, s 74(2); SS (POR) Regs, reg 8(1)(g)*

### What is the prescribed date

D1251 For the purposes of D1250, the prescribed date is the date by which receipt of, or entitlement to the EC benefit would have to be notified to the DM for it to be taken into account in the award<sup>1</sup>. This means that receipt from an EC benefit is possible only where

1. the EC benefit has not been paid **and**
2. if it were to be paid, the UC award decision would not be revised or superseded

to take it into account.

*1 SS (POR) Regs, reg 8(2)*

### Calculation of amount to be recovered

D1252 Where IPC is aware that UC is in payment to the claimant, they ask for arrears payments of EC benefits to be paid directly into the DWP's account at the Bank of England. The bank deducts charges and commission before notifying the DM of

1. the net sterling amount due to the claimant **and**
2. the period for which it is payable.

When IPC receive this information, the UC DM will be asked to determine the amount of EC benefit they are entitled to receive from the sum due to the claimant.

### Conversion of foreign currency

D1253 When working out the amount of EC benefit that the DM is entitled to receive, they should

1. use the sterling figure obtained when the EC benefit was converted **and**
2. allow any banking charges or commission (if not already deducted)<sup>1</sup>.

*1 SS (POR) Regs, reg 10*

## Recovery otherwise than by way of abatement

D1254 Where an amount could have been recovered by way of abatement but has not been so recovered, the DM may recover it otherwise than by way of abatement from the person to whom it was paid<sup>1</sup>.

*1 SS Act 92, s 74(4)(a)*

D1255 – D1270

## Civil Penalties

### Introduction

D1271 The guidance in this section relates to the imposition of a CPen where there is an overpayment of UC, new style JSA or new style ESA. The CPen was introduced on 01.10.12 and is part of the strategy to reduce fraud and error within the benefit system. A CPen<sup>1</sup> can be imposed in cases where

1. there is **no** benefit fraud involved **and**
2. there is a recoverable overpayment amounting to £65.01 or more **and**
3. the overpayment period begins on, or falls wholly after, 29.04.13.

**Note:** CPens cannot be imposed in relation to overpayments arising **solely** from official error.

*1 WR Act 12, s 116*

### Prescribed amount of a Civil Penalty

D1272 The prescribed amount of a CPen is £50.00<sup>1</sup>.

*1 SS (CPen) Regs, regs 2, 3 & 4*

### When to impose a Civil Penalty

#### **Negligently makes an incorrect statement or representation or negligently gives incorrect information or evidence**

D1273 The DM may impose a CPen where they are satisfied that

1. a person has negligently made an incorrect statement or representation or has negligently given incorrect information or evidence<sup>1</sup>
  - 1.1 in or in connection with a claim for a relevant social security benefit<sup>2</sup> **or**
  - 1.2 in connection with an award of a relevant social security benefit<sup>3</sup> **and**

2. the person fails to take reasonable steps to correct the error<sup>4</sup> **and**
3. the error results in an overpayment<sup>5</sup> **and**
4. the person has not, in respect of the overpayment, been<sup>6</sup>
  - 4.1 charged with an offence **or**
  - 4.2 cautioned **or**
  - 4.3 given a notice under relevant legislation<sup>7</sup>.

*1 SSA Act 92, s 115C(1)(a); 2 s 115C(1)(a)(i); 3 s 115C(1)(a)(ii); 4 s 115C(1)(b);  
5 s 115C(1)(c); 6 s 115C(1)(d); 7 s 115A*

## **DM's consideration**

D1274 Once it is established that the claimant has either

1. made an incorrect statement or representation **or**
2. given incorrect information or evidence

and which resulted in an overpayment, the DM is required to decide if a CPen should be imposed in accordance with the circumstances described in D1273.

D1275 Before imposing the CPen, the DM must establish that the claimant

1. has acted negligently **and**
2. has not taken any reasonable steps to correct the error that lead to the overpayment.

## **Meaning of “negligently”**

D1276 DMs should note that negligently should be taken to mean acting carelessly, not paying sufficient attention to the task in hand or disregarding the importance of what is required to be done in relation to the claim or an award.

D1277 In some cases, the DM may decide that the claimant has made a simple mistake. In these circumstances it may not be appropriate to impose a CPen. However, much will depend on the individual circumstances of the case.

D1278 In deciding whether the claimant has acted negligently, the need for further enquiries (either by telephone or letter) and the precise nature of those enquiries will depend on the circumstances of the case. Where further evidence is required, it will usually be sufficient to simply ask the claimant to explain why they acted as they did. It may be useful to preface the question with a description of the claimant's actions that have resulted in the overpayment.

## **Meaning of “reasonable steps”**

D1279 DMs should note that taking reasonable steps means taking sensible or practicable actions or interventions to correct an error.

D1280 In deciding whether the claimant took any reasonable steps to correct the error, the need for further enquiries (either by telephone or letter) and the precise nature of those enquiries will depend on the circumstances of the case. However, it will usually be sufficient to simply ask the claimant to describe what, if any, steps they took. If it has not already been done, again it may be useful to preface the question with a description of the claimant's actions that have resulted in the overpayment. It should be noted that if the claimant can show that they took reasonable steps, then they will avoid the imposition of a CPen even if they acted negligently in the first instance.

### **Claimant alleges reasonable steps were taken**

D1281 Despite the fact that an overpayment has occurred, sometimes a claimant will say that certain steps were taken. In such cases, the DM may need to investigate the reasonableness of these steps before deciding whether it is appropriate to impose a CPen.

### **No response to written enquiries**

D1282 Sometimes no response will be received to written enquiries made to the claimant as described in D1278 and D1280. In such cases, DMs should note that the mere fact that there is no response does not constitute sufficient grounds for imposing a CPen. The DM should consider what evidence they do have before them before deciding whether it is appropriate to impose a CPen.

**Note:** DMs should refer to operational guidance relating to time limits for responding to enquiries.

### **Meaning of “overpayment”**

D1283 Overpayment<sup>1</sup> is defined in specified legislation<sup>2</sup>.

*1 SSA Act 92, s 115C(6); 2 s 115A(8)*

### **Meaning of “relevant social security benefit”**

D1284 Relevant social security benefit<sup>1</sup> is defined in specified legislation<sup>2</sup>.

*1 SSA Act 92, s 115C(6); 2 s 121DA(7)*

### **Example**

Lucy has been receiving UC since May 2013. After a short period of receiving benefit, she returns to full time employment. The Benefit Centre receives information that Lucy has capital which came into her possession in November 2012. A check of Lucy's claim form shows that she did not declare that she held this

capital. Had she done so, it would have affected her entitlement to UC. Lucy is shown a copy of her claim form and asked why she did not declare the capital when making her claim and to describe what steps she has taken to correct this error. Lucy explained that she was in a rush when she filled the claim form in and didn't realise she had made the error so she didn't take any steps to correct it. The DM decides that the overpayment has arisen due to Lucy's negligence at the time of making her claim and that she has not taken any reasonable steps to correct the error. A CPen is imposed on Lucy.

### **Fails to provide information**

D1285 A CPen<sup>1</sup> may be imposed on a person by the DM where<sup>2</sup>

1. the person, without reasonable excuse, fails to provide information or evidence in accordance with requirements imposed on the person by the appropriate authority in connection with a claim for, or an award of, a relevant social security benefit<sup>3</sup> **and**
2. the failure results in the making of an overpayment<sup>4</sup> **and**
3. the person has not, in respect of the overpayment, been<sup>5</sup>
  - 3.1 charged with an offence **or**
  - 3.2 cautioned **or**
  - 3.3 given notice under relevant legislation<sup>6</sup>.

*1 SS (CPen) Regs, reg 3; 2 SSA Act 92, s 115D(1); 3 s 115D(1)(a); 4 s 115D(1)(b); 5 s 115D(1)(c); 6 s 115A*

### **DM's consideration**

D1286 Once it has been established that a claimant has failed to provide information or evidence, the DM is required to decide whether there is a reasonable excuse for that failure and if not, they must impose a CPen in accordance with the circumstances described in D1285.

### **Meaning of "reasonable excuse"**

D1287 DMs should note that having a reasonable excuse means having a credible reason or justification for a person failing to do what was required of them, or for doing it late.

D1288 In deciding whether the claimant has a reasonable excuse, the need for further enquiries (either by telephone or letter) and the precise nature of those enquiries will depend on the circumstances of the case. However, it will usually be sufficient to simply ask the claimant to describe why they failed to provide the required information or evidence or, if applicable, why they provided it late. It may be useful

to preface the question with a description of the failure that has resulted in the overpayment.

### **No response to written enquiries**

D1289 Sometimes no response will be received to written enquiries made to the claimant as described in D1288. In such cases, DMs should note that the mere fact that there is no response does not constitute sufficient grounds for imposing a CPen. The DM should consider what evidence they do have before them before deciding whether it is appropriate to impose a CPen.

**Note:** DMs should refer to operational guidance relating to time limits for responding to enquiries.

### **Meaning of “appropriate authority”**

D1290 Appropriate authority means the Secretary of State<sup>1</sup>.

*1 SSA Act 92, s 115C(6)*

#### **Example 1**

Mustafa makes a claim for new style JSA. He declares that he receives a private pension and explains that he expects to receive an increase in the amount of that pension in the near future. Mustafa is awarded new style JSA taking into account his current rate of pension. Mustafa is told to advise the Benefit Centre when the pension increase comes into effect. Three months later, a routine check is performed and a member of staff notices Mustafa's statement about the expected pension increase. The DM writes to Mustafa to ask for details of the pension increase. Mustafa reveals that the pension did in fact increase and this has resulted in an overpayment of new style JSA. When asked why he didn't provide the relevant information at the right time, Mustafa explained that he had simply forgotten. The DM decides that, without reasonable excuse, Mustafa failed to provide information in connection with the award of new style JSA. A CPen is imposed on Mustafa.

#### **Example 2**

Liz makes a claim for UC and declares that she receives a private pension. She provides further information that she expects to receive an increase in the amount of her private pension in the near future. Liz is awarded UC taking account of her current rate of pension. Liz is told to send in evidence of her new rate of pension when received. However, when the increase comes into effect, she couldn't get the evidence because it was at her former marital home. Liz had fled from her marital home and it was unsafe for her to return to get the evidence. As a result, Liz had to write to the pension company for copies of relevant papers and this took longer than expected. By the time Liz sent the evidence to the Benefit Centre, she had been overpaid UC. The DM determined that Liz had a reasonable excuse for the delay in notifying the pension increase. A CPen is not imposed on Liz.

## **Fails to notify a change of circumstances to the appropriate authority**

- D1291 A CPen<sup>1</sup> may be imposed on a person by the DM where<sup>2</sup>
1. the person, without reasonable excuse, fails to notify the appropriate authority of a relevant change of circumstances in accordance with requirements imposed on the person under relevant legislation<sup>3</sup> **and**
  2. the failure results in the making of an overpayment<sup>4</sup> **and**
  3. the person has not, in respect of the overpayment, been<sup>5</sup>
    - 3.1 charged with an offence **or**
    - 3.2 cautioned **or**
    - 3.3 given a notice under relevant legislation<sup>6</sup>.

*1 SS (CPen) Regs, reg 4; 2 SSA Act 92, s 115D(2); 3 s 115D(2)(a); UC, PIP, JSA & ESA (C&P) Regs, reg 38; JSA Regs 13, regs 31 to 33; 4 SSA Act 92, s 115D(2)(b); 5 s 115D(2)(c); 6 s 115A*

### **DM's consideration**

D1292 If a CPen is to be imposed in the circumstances described in D1291 the DM must first be satisfied that the claimant has been made aware of their obligation to report a relevant change of circumstances. In doing so, it may be necessary, particularly in the event of an appeal to the FtT, to identify when the claimant was made aware of their obligation and how they were made aware of it, i.e. by the issue of an information leaflet or by signing a declaration to that effect on the claim form, on a certain date.

D1293 Once the DM is satisfied that the claimant was under an obligation to report a relevant change of circumstances, they must then consider their reasons for failing to report the change as required. The need for further enquiries (either by telephone or letter) and the precise nature of those enquiries will depend on the circumstances of the case. However, it will usually be sufficient to simply ask the claimant to explain why they have failed to report the change as required. It may be useful to preface the question with a description of the requirement to notify that has been placed on the claimant and how and when it was placed. Even if a claimant provides no reasonable excuse for their failure to notify a change in their circumstances the DM must show that they have considered whether it is appropriate to impose a Civil Penalty<sup>1</sup>.

*1 [2016] AACR 42*

### **Claimant denies being under an obligation to report or maintains that they have reported as required**

D1294 Where a claimant denies being under an obligation to report or maintains that they have reported the relevant change of circumstances as required, the DM will need

to investigate the circumstances further before deciding whether it is appropriate to impose a CPen.

### **No response to written enquiries**

D1295 Sometimes no response will be received to written enquiries made to the claimant as described in D1293. In such cases, DMs should note that the mere fact that there is no response does constitute sufficient grounds for imposing a CPen. The DM should consider what evidence they do have before them before deciding whether it is appropriate to impose a CPen.

**Note:** DMs should refer to operational guidance relating to time limits for responding to enquiries.

### **Meaning of “relevant change of circumstances”**

D1296 Relevant change of circumstances<sup>1</sup> means a change of circumstances which affects entitlement to any benefit, other payment or advantage under relevant social security legislation<sup>2</sup>.

*1 SSA Act 92, s 115D(6); 2 s 121DA(7)*

#### **Example 1**

Kate was awarded UC and given information about the requirement to report changes of circumstances straightaway to the Benefit Centre. The Benefit Centre conducts a telephone review with Kate on 04.04.14 reminding her of her obligations to report relevant changes of circumstances which she signed on her claim form. At this point, Kate mentions that she has been abroad visiting relatives from 17.12.13 to 31.01.14 but that she spoke to Steve at the Benefit Centre on 13.12.13 about this. Steve is identified and a record of his conversation with Kate is found, but no action taken. Consequently, an overpayment of UC occurred. The DM decides that Kate had reported the change in accordance with the instructions. A CPen is not imposed on Kate.

#### **Example 2**

Helen was awarded new style JSA and given information about the requirement to report relevant changes of circumstances straightaway to the Benefit Centre. One of those changes relates to starting full time work. The Benefit Centre conducts a telephone review with Helen on 04.04.14 reminding her of her obligations to report changes. At this point, Helen mentions that she has done some full time work from 17.12.13 to 31.01.14. Helen is informed that the Benefit Centre holds no record of the work having been done and an overpayment of new style JSA has occurred. Helen explains that when she started work she asked her boss to inform the Benefit Centre on her behalf. When asked why she chose this course of action instead of informing the Benefit Centre herself in accordance with her obligation to report



changes of circumstances, Helen said that she thought it would be easier for her boss to report the change when she received her first wage. The DM decides that Helen has not reported the change in accordance with her obligations and that she has no reasonable excuse for her actions. A CPen is imposed on Helen.

## On whom to impose a Civil Penalty

D1297 Unless D1298 applies, a CPen<sup>1</sup> may be imposed by the DM<sup>2</sup>

1. in any case, on the person<sup>3</sup> who made the incorrect statement, who failed to provide information or who failed to notify the change of circumstances **or**
2. in a case where person A is making, or has made, a claim for the benefit for a period jointly with person B, on B instead of A<sup>4</sup>.

*1 SS (CPen) Regs, reg 2; 2 SSA Act 92, s 115C(2); 3 s 115C(2)(a); 4 s 115C(2)(b)*

### Example

Paul (person A) makes a claim to UC for himself and his wife Linda (person B). Paul declares that they have 3 joint bank accounts with total capital of £6,000. Two months after payment of UC commences, a further unused joint bank account surfaces in the house and which was not included in the original claim information. However, it means that they have been overpaid UC, due to the additional savings held within the unused bank account. Linda notifies the local office of the error. Both Paul and Linda are considered to be jointly negligent for the wrong information, even though Paul (person A) completed the original claim form. This regulation allows for the CPen to be imposed upon either person A or person B, where the claim has been made jointly. In this case, the DM may impose the CPen on either Paul or Linda. In the event, the CPen is imposed on Paul as he is the current benefit payee.

### Exception

D1298 D1297 does not apply if person B was not, and could not reasonably be expected to have been, aware that person A had

1. negligently made the incorrect statement or representation **or**
2. given the incorrect information or evidence<sup>1</sup>.

*1 SSA Act 92, s 115C(3)*

### Example

Philip (person A) makes a claim to UC for himself and his wife Ann (person B). Philip declares Ann's part time earnings from the outset of their claim. Although Ann

told Philip that her earnings have increased due to a recent pay rise, Philip forgets this and does not declare the correct amount, instead declaring the old amount of earnings. Afterwards, Philip realises his error and notifies the local DWP office. Ann was completely unaware that Philip had made this error due to him not paying sufficient attention to recording the correct amount. This regulation allows for a CPen not to be imposed upon person B (in this case, Ann) if they had not and could not reasonably be expected to have been, aware that person A (in this case, Philip) had been negligent. The DM considers that as Ann could not have reasonably been expected to know that Philip had entered the wrong amount of (Ann's) earnings, the CPen cannot be imposed on Ann. However, a CPen is imposed on Philip.

## Joint-claim couples

- D1299 Where a person has made a joint-claim for benefit and either or both of them fail to disclose information<sup>1</sup> or a relevant change of circumstances<sup>2</sup>, where they have both been advised of their obligation to do so, only one CPen may be imposed in respect of the same overpayment<sup>3</sup>.

*1 SS A Act 92, s 115D(1); 2 s 115D(2); 3 s 115D(3)*

### Example

Cathy makes a claim to UC for herself and her partner, Annie. UC is awarded from 23 October. Annie accepts an offer of employment abroad and leaves the country on 2 December. Cathy does not report the change until 2 January, explaining that the reason for the delay was her distress at Annie accepting employment abroad. She also wrongly reports that Annie left the country on 23 December. Although Annie left the country on 2 December both members of the joint-claim had a duty to report the change. The DM determines that both are liable and the CPen is imposed jointly on Cathy and Annie.

## Appointee cases

- D1300 Where an appointee is in place and that person has acted negligently as in D1273 or failed to disclose information as in D1285 or failed to report a relevant change of circumstances as in D1291 and an overpayment has resulted, the CPen will be imposed on (and recovered from) the appointee. This will be the case, even though the overpayment may be recoverable from the claimant.

## Recovery of Civil Penalty

D1301 A CPen imposed under specified legislation<sup>1</sup> is recoverable by the appropriate authority from the person on whom it is imposed<sup>2</sup> in the same way as an overpayment.

**Note:** Responsibility for the recovery of a CPen rests with Debt Management.

*1 SS A Act 92, s 115C(2); s 115D(1) & (2); 2 s 115C(4); s 115D(4)*

## Right of appeal

D1302 The decision to impose a CPen will be made at the same time as the overpayment decision. The amount of the CPen will be added to the amount of the recoverable overpayment. This will produce an outcome decision<sup>1</sup> and will give appeal rights to any part of that outcome decision including the overpayment, the CPen or both. There is no right of appeal against the amount of a CPen<sup>2</sup>.

*1 SS Act 98 s 8(1); 2 [2016] AACR 42*

D1303 – D1350

# Recoupment – payments under the Employment Protection Acts

## Introduction

D1351 The Secretary of State can recover UC from certain Employment Tribunal awards<sup>1</sup>. Recovery is made from the claimant's employer who deducts it from the amount awarded by the Employment Tribunal before payment. This is called recoupment.

*1 Employment Tribunals Act 96; EP (Recoupment of Benefits) Regs, reg 2(1)*

## Recoverable awards

D1352 Recovery can be made from the following Employment Tribunal awards

1. guarantee payments<sup>1</sup>
2. guarantee payments under a collective agreement or wages order for which an exemption order has been made<sup>2</sup>
3. remuneration on suspension on medical grounds<sup>3</sup>
4. unfair dismissal payments under an order for reinstatement or re-engagement, or an award of compensation<sup>4</sup>
5. unfair dismissal payments under an interim order for reinstatement or re-engagement, or an order for the continuation of the contract of employment or for compensation<sup>5</sup>
6. remuneration in pursuance of a protective award<sup>6</sup>
7. payments under an order made following the employer's failure to pay remuneration due to the employee under a protective award<sup>7</sup>.

D1353 The Secretary of State issues a notice to the employer stating the amount to be recouped<sup>1</sup>. A copy of the notice is also sent to the claimant<sup>2</sup>.

*1 EP (Recoupment of Benefits) Regs, reg 8 & 9; 2 reg 8(4)*

## **Monetary awards**

D1354 In the case of monetary awards the appropriate amount shall be whichever is the less of the following two sums<sup>1</sup>

1. the amount of the prescribed element (less any tax or social security contributions which fall to be deducted therefrom by the employer) **or**
2. in the case of an employee entitled to UC for any period ("the UC period") which coincides with any part of the period to which the prescribed element is attributable, any amount paid by way of or on account of UC for the UC period that would not have been paid if the person's earned income for that period was the same as immediately before the period to which the prescribed element is attributable.

*1 EP (Recoupment of Benefits) Regs, reg 8(2)*

## **Protective awards**

D1355 In the case of remuneration under a protective award the appropriate amount shall be whichever is the less of the following two sums<sup>1</sup>

1. the amount (less any tax or social security contributions which fall to be deducted therefrom by the employer) accrued due to the employee in respect of so much of the protected award as falls before the date on which the Secretary of State receives from the required information<sup>2</sup> from the employer **or**
2. in the case of an employee entitled to UC for any period ("the UC period") which coincides with any part of the protected period falling before the date described in 1. above, any amount paid by way of or on account of UC for the UC period that would not have been paid if the person's earned income for that period was the same as immediately before the protected period.

*1 EP (Recoupment of Benefits) Regs, reg 8(3); 2 reg 6*

## **Meaning of "earned income"**

D1356 For the purposes of D1354 2. and D1355 2. earned income<sup>1</sup> has the meaning specified in legislation<sup>2</sup>.

*1 EP (Recoupment of Benefits) Regs, reg 8(12); 2 UC Regs, reg 52*

## **Action by the DM**

D1357 The case is referred to the DM if

1. the claimant disagrees with the amount of the recovery<sup>1</sup> **or**
2. recoupment has been made and the award of UC is revised or superseded.

In these cases the DM needs to calculate the exact amount of benefit paid in the period of the award. Any amount recovered in excess of the DM calculation is refunded to the claimant<sup>2</sup>.

*1 EP (Recoupment of Benefits) Regs, reg 10(1); 2 reg 8*

## **Claimant does not accept amount notified**

D1358 If the claimant does not accept the amount shown on the recoupment notice the DM is asked to decide the amount of benefit paid<sup>1</sup>. The DM should calculate the exact amount of UC paid to the claimant in the prescribed period.

*1 EP (Recoupment of Benefits) Regs, reg 10*

## **Prescribed period**

D1359 The prescribed period is for awards listed at

1. D1352 **1. to 5.** - the period of the award<sup>1</sup> **or**
2. D1352 **6. to 7.** - the part of the protected period which falls before the date of termination of employment or the date on which the Secretary of State receives details of the employees affected by the award from the employer whichever results in the lower amount being recouped<sup>2</sup>.

*1 EP (Recoupment of Benefits) Regs, reg 2(3); 2 reg 8(3)*

D1360 The prescribed period ends when the decision of the Employment Tribunal is given verbally at the hearing or afterwards in writing<sup>1</sup>.

*1 EP (Recoupment of Benefits) Regs, reg 2(3)*

## **Claimant raises other questions on recoupment**

D1361 An award of UC can be revised or superseded if the claimant raises any question affecting the amount to be recouped<sup>1</sup>. The DM should revise or supersede the awarding decision as if

1. the employer had paid the Employment Tribunal award for the prescribed period **and**
2. any UC which is to be recouped had not been paid and was not payable.

*1 EP (Recoupment of Benefits) Regs, reg 10(1)*

## **Revision or supersession after recoupment action completed**

D1362 Recoupment action ends when the

1. amount of benefit paid in the prescribed period has been recovered **or**
2. time limit<sup>1</sup> has ended and the Secretary of State has not issued a recoupment notice.

*1 EP (Recoupment of Benefits) Regs, reg 8(5)*

D1363 The DM should revise or supersede the award of UC and take into account the effect of the Employment Tribunal award on entitlement to benefit. The Secretary of State will repay to the claimant any amount which has been recovered in excess of the amount recoupable<sup>1</sup>.

*1 EP (Recoupment of Benefits) Regs, reg 10(3)*

## **Partner or dependant entitled to Employment Tribunal award**

D1364 UC cannot be recouped from an Employment Tribunal award payable to a claimant's dependant or partner<sup>1</sup>.

*1 EP (Recoupment of Benefits) Regs, reg 8(2)*

## **Employment Tribunal decision varied**

D1365 The DM may need to give a further decision if the Employment Tribunal award is revised by the Employment Tribunal.

D1366 – D1999

**The content of the examples in this document (including use of imagery) is for illustrative purposes only**