

**Social Security Advisory Committee
Minutes of the meeting held on 22 July 2020**

Chair: Liz Sayce

Members: Bruce Calderwood
Chris Goulden
Grainne McKeever
Dominic Morris
Seyi Obakin
Charlotte Pickles
Kayley Hignell

Apologies: Carl Emmerson
Phil Jones
Jim McCormick

1. Private session

[PARTIALLY RESERVED]

Postal Regulations

1.5 The Chair of the Postal Regulations sub-group recommended that the following regulations be cleared by correspondence:

- *The Tax Credits Reviews and Appeals (Amendment) Order 2020*
- *The Statutory Sick Pay (General) (Coronavirus amendment) (No.4) Regulations 2020*
- *The Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) (No.2) Regulations 2020*
- *The Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) (No.2) Regulations (Northern Ireland) 2020*

1.6 The sub-group recommended that the regulations be cleared ‘postally’ without the need for officials to be present them at the meeting. In reaching that view, the sub-group had sought further clarification and/or information from the Department on some aspects of the proposals. It was noted that the regulations were beneficial, non-controversial and that the sub-group had no significant concerns, although members had asked for further information from Departmental officials on *The Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) (No.2) Regulations 2020*.¹

¹ The questions put the Department, and responses received to them, are held at annex B.

1.7 Having considered the papers, and the additional material provided by the Postal Regulations sub-group, the Committee agreed that the regulations could proceed without a requirement for formal reference and asked the Committee Secretary to notify the Department accordingly.

2. (i) The Universal Credit (Coronavirus) (Self-employed Claimants and Reclaims) (Amendment) Regulations 2020; and The Universal Credit (Coronavirus) (Self-employed Claimants and Reclaims) (Amendment) Regulations (Northern Ireland) 2020

2.1 The chair welcomed Zoe Garrett (G6, Disability Benefits, Universal Credit Policy, Cross Cutting Strategy) and Niamh Parker ((G7, Universal Credit & Employment Policy, Cross Cutting Strategy) to the meeting.

2.2 Introducing the proposals, DWP officials informed members that the regulations had been laid using the urgency provision. The regulations clarified that a grant under the Self-Employment Income Support Scheme (SEISS) was treated as income. A payment to a self-employed individual under the Coronavirus Job Retention Scheme (CJRS) to reimburse them for their furloughed staff payments was disregarded as business assets and would not affect their Universal Credit (UC) award. Claimants did not have to reclaim Universal Credit due to their surplus earnings eroding.

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

(a) Who does regulation 3, under reclaims, apply to and how were claims chosen?

It applied to all claimants and was not selective. Claimants would not have to take any action. Awards were not being closed down. At present, if surplus earnings reduced the Universal Credit claim to nil, claimants would have to reclaim. That was not the case currently, and the system was automated to stop the need for a rapid reclaim. The Department had sought to streamline the process.

(b) Following on from that, if it applied to everyone then, under regulation 3, 32A 1(b) and (2), where it states that the “The Secretary of State may...”, does this apply to a specific group, or to everyone? Could that be targeted?

That applied to everyone, but the Department would provide a more detailed written response outside of the meeting.

- (c) It was a useful provision, would the Department retain it after the Coronavirus pandemic? The system is much easier.**

The Department could not give such a commitment, but would keep the matter under review.

- (d) Information shared with the Committee before the meeting, including the EM, suggested that business assets were disregarded in entitlement. How would the Department identify business assets and personal assets? How would a self-employed person make that decision?**

Discretion was involved. The Department could ask for proof where appropriate although it would take a pragmatic approach. Guidance existed but there was no definitive list.

- (e) Was there any data on the amounts of SEISS payments made? What was the scale of the potential increase in claims?**

There was no available data. It was currently being gathered and scrutinised.

- (f) Could you clarify that SEISS grant was disregarded for 12 months, and was treated as capital?**

The SEISS grant was treated as self-employed earnings, and should be reported as income. The CJRS was paid to an employer. Any other grants were disregarded as income or earnings. The Department considered that it had taken a generous approach to some of the disregards for COVID.

- (g) What about the treatment of SEISS grant as capital?**

That was treated as self-employed income for self-employment.

- (h) What would happen if someone who had capital, and tipped over the tariff?**

Officials offered to provide a detailed written response clarifying the position outside of the meeting.²

² The questions put to the Department, and responses received to them, are held at annex B

2.4 The Chair thanked officials for responding to the Committee's questions and providing greater clarification on the points raised. Officials were informed that the Committee would notify them in writing of its decision once it had received a response to the outstanding questions.

3 & 4 Private session

[RESERVED ITEMS]

Date of next meeting

The Committee's next meeting was scheduled to take place on 9 September. The arrangements would be confirmed as soon as possible.

Attendees

Guests and Officials

Item2: Zoe Garrett (G6, Disability Benefits, Universal Credit Policy, Cross Cutting Strategy)
 Niamh Parker (G7, Disability Benefits, Universal Credit Policy, Cross Cutting Strategy)

Secretariat: Denise Whitehead (Committee Secretary)
 Jaishree Patel (Assistant Secretary)

The Tax Credit Reviews and Appeal (Amendment) Regulations 2020

1. How will claimants be notified or communicated of this backdating of Tax Credit disability element?

For existing claimants there's a statutory requirement to report changes of circumstances, including the award of a disability benefit, for the claimant to benefit from the change (see paragraph 3.7 of the EM for further detail). The intention is that notification of a qualifying disability benefit award will trigger the provisions in new section 21C allowing for a review of decisions in previous tax years that finalise or terminate entitlement

For former claimants we intend to follow the normal business practice of updating guidance for HMRC staff once the regulations come into force, in line with updates to external communications and claimant guidance. HMRC will also inform representative groups of the planned changes through the Tax Credits Consultation Forum and work with DWP to cascade the information wider.

2. What about any debts, will they be recovered in the payments?

HMRCs normal business process is to offset outstanding overpayments or debt from the underpayment due and pay any remaining balance to the claimant.

3. How were these claimant's identified that they are due back payments?

Existing claimants are required to report a change in their personal circumstances in order for their tax credit award to be increased (see paragraph 3.7 of the EM). As above, we will publicise this change through established routes, including DWP to help target former claimants to inform them of the need to provide timely notification of a disability benefit award to receive arrears of tax credit disability elements.

4. Why is the legislative gap coming to light now?

The ability to make a new claim to tax credits was completely withdrawn, except for recipients of a severe disability premium and frontier workers, from 1 February 2019. Following a number of queries from external stakeholders in the context of the move to Universal Credit we re-examined the legislation on awarding tax credit disability elements following claimant notification and identified that the existing legislation did not provide a complete solution in all cases.

5. How many claimants are estimated to be affected? How many are likely to have been missing out on this since 2002?

We expect up to 300 claimants pa to benefit from this change in policy providing they meet their obligations to notify HMRC in time of DWPs decision to award a disability benefit. Prior to 6 April 2009 payment of tax credit disability elements would have been restricted to the standard 3 month backdating unless a claimant had made a protective claim i.e. first informed HMRC that they had claimed a disability benefit and then subsequently reported the award of the disability benefit in which case the tax credit disability elements could be backdated to the protective claim date. Since 2009, claimants need to report receipt of a disability benefit within one month of the award decision in order for tax credit disability elements to be backdated to the disability benefit start date. We do not hold information on the number of claimants who have been refused backdating but are only aware of one complaint on this issue. Prior to 06/04/2020 we had no way of paying backdated tax credits to claimants who reported the award of a qualifying disability benefit after their tax credit claim had ended.

6. How far back will HMRC go to correct awards? The use of discretion as a work-around is welcome, but it only applies to back-dating claims within this tax year. What about claims that closed before then (noting that the HMRC EM explains that decisions on disability benefits can take 12+, and appeals can take longer?)

The new rules are effective from when the legislation comes into force, expected to be January 2021, As you can appreciate the legislation cannot be applied retrospectively however due of the annual nature of the tax credits scheme we have sought permission to use our discretion to capture any awards from the start of the new tax year (6 April 2020). The rules will apply where HMRC is notified of the award of a qualifying disability benefit within one month of the award decision, and will cover the years in relation to which the determination applies providing that in those years the claimant was in receipt of tax credits. The onus is on the claimant to notify us of the determination of a disability award within 30 days. It would be extremely challenging, if not impossible, to identify claimants who may have reported on time but were refused previously due to their claim being closed, as previously stated we are only aware of one historic case.

7. The new para 21C, subsection 2, states that:

(2) The condition is that the applicant has had a claim for a relevant disability benefit, in respect of either the applicant or a child for whom the applicant is responsible, determined in their favour, such that they are entitled to the benefit in respect of a tax year to which the original decision related.

Should this be tax years (plural), if a TC decision is made 12+ months before a disability benefit decision is made?

No, tax year is correct. The original decision will relate to a particular tax year as a final decision is made in respect of a tax year and it is that final decision that we will be reviewing. We might of course be reviewing a number of years if the determination from DWP applies from an earlier date but we might also be covering only one year.

Additionally, section 6(c) of the Interpretation Act 1978 provides that unless the contrary intention applies, words in the singular include the plural and words in the plural include the singular. So where necessary "tax year" includes "tax years" and "original decision" includes "original decisions".

- 8. The EM states that "Paragraph 8 inserts a reference to new section 21C into section 39 so appeal rights apply to decisions reviewed under new section 21C where the appeal notice is received within 30 days of the date the outcome of the decision under 21C TCA is notified. This provision applies to Northern Ireland only." Why? Could we please have an explanation to what that is?**

Section 39(1) only applies to Northern Ireland because article 2(12) of the Tax Credits, Child Benefit and Guardian's Allowance Reviews and Appeals Order 2014 (S.I. 2014/886) revoked section 39(1) and (2) for Great Britain as from 6 April 2014.

- 9. The EM says the measures are entirely beneficial. They are certainly welcome as a means of implementing the policy intent from 2002, but could HMRC provide reassurance on whether there is any way that a revised (increased) TC award will generate debt by pushing a claimant over a financial threshold for a different benefit/entitlement which will then be clawed back from the claimant?**

We have not assessed the impact of this change on other means tested benefits, this scenario exists today in relation to cases where we add and backdate a disability element to a tax credit claim where the award is yet to be finalised or terminated. Our obligation is to pay claimants what is due and advise them to inform decision-making authorities for other entitlements/services they might receive.

- 10 We would encourage HMRC to be more proactive in making public the relevant change so that former TC claimants, who may not be in contact with either DWP or support agencies, can be informed of their entitlement. Presumably HMRC will have access to former claimant details directly and could provide a blanket communication on this?**

There appears to be some confusion over the purpose of the legislation. The legislative change will only apply to those who report the award of a qualifying disability benefit within one month of the notification by DWP of that award, in line with the current regulatory requirement. Therefore, we would expect claimants to be in touch with DWP to have received the relevant notification. The onus remains with the claimant to report receipt of the disability benefit within set time limits to receive corresponding increases in their tax credits, those who might have notified us in the past could not now make timely reports to benefit from the legislative change. Had this inability to benefit from timely reports in the past been an issue we would have expected to have received complaints from claimants or concerns raised by representative groups.

- 11. On point 5, the number of complaints is unlikely to be reliable indicator of the number of claimants who have missed out on their entitlement due to the legislative gap. On the assumption that there will be 300 claimants p.a. who will benefit going forward, that indicates a substantial number of claimants will have missed out in the past. Will HMRC consider seeking the power to make discretionary payments?**

To reiterate our previous point in order to benefit from the longer backdating rules claimants need to report receipt of qualifying benefit within one month of the award of that benefit. Our best indicator of the number of claimants that have been disadvantaged by the strict time limits that apply i.e. denied full backdating following notification of a disability benefit award are the volume of complaints we received. As previously advised we are only aware of one such case. The 300 figure is a ballpark estimate of the number of claimants expected to benefit from this change annually. This figure takes account of a number of factors including the volumes of tax credit claimants eligible for disability elements due to move of tax credits e.g. to Universal Credit and the proportion of claimants who report the award of a disability benefit on time.

- 12. Related to this, on point 6, legislation could be applied retrospectively (and has been in the past, for example, to remedy a deficiency in legislation following the Reilly "poundland" case). Could one or other of these measures be considered to facilitate the policy intent of giving full effect to the underpinning legislation?**

Secondary legislation can only be applied with retrospective effect if the power under which the secondary legislation is made permits. In this case the power in section 124 of the Finance Act 2008 does not permit us to make legislation with retrospective effect.

Thank you for drawing the case of R (on the application of Reilly and another) v Secretary of State for Work and Pensions [2013] UKSC 68 to our attention. In that case the Supreme Court noted that the Jobseekers (Back to Work Schemes) Act 2013 was plainly intended to undo the decision of the Court of Appeal in that it retrospectively validated the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011. Those Regulations had been declared by the Court of Appeal to be ultra vires (i.e. unlawful). That is not the case here.

The Statutory Sick Pay (General) (Coronavirus Amendment) (No. 4) Regulations 2020

- 1. Whether there will be equivalent regs laid for NI, for the The Statutory Sick Pay (General) (Coronavirus Amendment) (No.4) Regulations 2020.**

Yes, DfC have made equivalent Northern Ireland Regulations

The Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) (No.2) Regulations 2020

- 1. *In the Equality Analysis for the regulations, under Evidence and Analysis, number 13, "It is estimated that around 36% of those shielding who worked previously are now working from home, 36% have been furloughed, 6% have received self-employment income support and 17% have stopped working. 5% continue to work outside the home" The Committee would like to know who are the 17% that have stopped working?***

The information referred to is from a survey of shielders published here:

<https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/conditionsanddiseases/bulletins/coronavirusandshieldingofclinicallyextremelyvulnerablepeopleinengland/24juneto30june2020>

The survey didn't gather detail about who people were, apart from them being on the shielded list so, unfortunately we don't have that level of detail.

- 2. *In the Keeling Schedule, 5A has been deleted, should this be replaced with another ref to 5A, or does 5B become 5A.***

5A is repealed and not replaced – to avoid cross-referencing going wrong, when we repeal a regulation (as opposed to replacing it) we don't use the same provision number, we just repeal the relevant regulation and it is marked as repealed.

3. Given that 17% have stopped working, does DWP see them as a priority group for investigating what extra support they might need?"

DWP is committed to supporting all people get back into work, this includes those who have fallen out of work because they were shielding as a result of coronavirus:

- The Work and Health Programme and Intensive Personalised Employment Support are available to help those clinically extremely vulnerable individuals (who have been shielding) and who are out of work find and keep a job. We have recently introduced an option for people to refer themselves to this provision, and more information can be found at <https://jobhelp.campaign.gov.uk/extra-support/>
- Our work coaches deliver tailored support and signposting, using our current core support offer of national programmes and health-led support; supplemented with local provision where available to all customers.

The Universal Credit (Coronavirus) (Self-employed Claimants and Reclaims) (Amendment) Regulations 2020

1. For a S/E employer (UC claimant) with employees, would timing of receipt of the CJRS grant have an impact? Specifically, if that employer paid wages out in April deducting these as a business expense via their UC journal, their UC entitlement may have increased for that month as a result. If CJRS money came through in say May/June, would that timing have an impact?

The CJRS grant goes straight to cover wages of furloughed staff, so would have zero affect on claimant's UC. The regulations make it clear it is effectively ignored for UC purposes. It will be treated as capital but will not count towards the UC capital limits for 12 months, (during which it will either have been applied to cover the wages or returned to HMRC) and these claimants may not deduct those wages paid as a business expense in UC. Guidance has been issued on this.

In this specific example, it's likely that claimants would have acted in good faith when declaring business expenses in April, whilst awaiting confirmation of receipt of CJRS grant. Legislation and guidance on the treatment of these grants was not yet available at that time. UC legislation on the treatment of

the SEISS and CJRS came into force on 21st May and guidance made available shortly afterwards.

We, therefore, would not declare any overpayment in these specific circumstances.

2. What is UC's decision on the treatment of other (Covid-19) grants, or will they be treated on a discretionary basis?

Business grants and loans currently available to provide support during the Coronavirus outbreak will be treated as payments of capital but will not count towards the capital limits in UC, in the same way as business assets are not counted.

This would include things like the Small Business Grant Fund (SBGF) and the Retail, Hospitality and Leisure Grant Fund (RHLGF). The Advice for Decision Makers (ADM) guidance has been published on the treatment of Covid-19 grants.

3. Is there a timing issue in payment of SEISS grant, for instance if they get a large SEISS payment now and UC is reduced, then when the MIF is probably back in play they have a big tax bill to pay out?

Annual taxation is for HMRC consideration.

We believe that our approach to disregard many Covid-19 grants but take SEISS into account as earnings is fair/reasonable for UC claimants. If a UC claimant has set funds aside for tax purposes, and can prove that, we will disregard those funds in calculating their UC award (as business assets). Indeed, the SoS publicly spoke about disregard of business assets on Peston (8 April) and advised that "Guidance has gone out to staff up and down the country that people who've put money aside in their business and for paying their tax, that will be considered to be a business asset and not personal savings so that will no longer be an issue for them."

4. Is there any data on the volumes of people affected by surplus earnings?

Usually less than one per cent of people on Universal Credit who are working are affected by the surplus earnings provisions. Data is not yet available about whether this proportion has changed as a consequence of how SEISS payments are being paid.

5. *This applies to regulation 3, 32A (1) (b) entitlement to an award of universal credit ceases because that condition is not met.*

2) The Secretary of State may, subject to any conditions the Secretary of State considers appropriate, treat the claimant (or joint claimants) as making a claim on the first day of each subsequent month, up to a maximum of 5, that would have been an assessment period if an award had been made or, as the case may be, if the award had continued.”

Does this apply to a specific group or everyone, could this be targeted to a particular group?

This provision confers a broad discretion on SOS to adapt the procedure for bringing claimants back onto UC after losing entitlement due to earnings. It could be targeted to particular group if SOS decided to do so but is currently applied to all claimants.

6. The regulations are clear that SEISS payments are treated as income. Are SEISS payments also treated as capital or are they disregarded for the purpose of calculating capital on an award?

We believe these are payments replace the claimant’s earnings from the business (equivalent to the CJRS replacement of wages) and not specifically SEISS payments as earnings for UC purposes.

However, it is possible that, if the SEISS payment is unspent after the AP in which it was received it could become capital in accordance with the general rules. It is the same as if the person had made a profit in that month (or received a large bonus in their salary).