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Appeal No. UA-2023-001615-ULCW

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IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

GEA

Appellant

- v -

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Butler
Decided on consideration of the papers, following directions for further written submissions after a hearing on 21 October 2025.

Representation:

Appellant:	Mr R. Khan, Leicester City Council
Respondent:	Ms Katharine Elliot (counsel)

On appeal from:

Tribunal:	First-tier Tribunal (Social Entitlement Chamber)
Tribunal Case No:	SC314/22/00460
Tribunal:	Judge H. Sykes
Tribunal Venue:	Leicester
Decision Date:	14 February 2023

SUMMARY OF DECISION

Universal Credit (45) and Limited Capability for work (45.3)

GEA appealed against DWP's decision to include the LCWRA element in her universal credit ("UC") award from 03 September 2021. The First-tier Tribunal decided:

(1) GEA had provided medical evidence on 03 June 2021 in connection with her request to be assessed in terms of her capability for work. Applying the three-month relevant period to her under regulation 28(2)(b) of the Universal Credit

Regulations 2013 ("the 2013 Regulations"), she was entitled to the LCWRA element in her award from 03 September 2021;

(2) However, applying regulation 41(2) and (3) of the 2013 Regulations, GEA's earnings exceeded the relevant threshold for the assessment period from 03 November 2021 to 02 December 2021, and she did not satisfy any of the exceptions in regulation 41(2)(a) and (b). She was therefore not entitled to the LCWRA element during that assessment period; and

(3) As a result, the FTT must apply a second three-month relevant period under regulation 28(2)(b) from 03 December 2021 onwards. GEA was therefore not entitled to the LCWRA element again until 03 March 2022.

The Upper Tribunal decided that the First-tier Tribunal ("FTT") made a material error of law in concluding that GEA's earnings exceeded the relevant threshold in regulation 41(3) of the 2013 Regulations. The FTT should have calculated GEA's monthly earnings using the averaging provisions in regulation 90(6)(b)(ii), because her earnings fluctuated and had no identifiable cycle. Had it done so, the FTT would have decided that GEA's monthly earnings fell below the relevant threshold and regulation 41(2) did not apply.

The Upper Tribunal also decided that, had regulation 41(2) applied to GEA, the FTT's approach about the start date for the LCWRA element would not have been consistent with regulation 28 (see paragraph 91).

The Upper Tribunal allowed GEA's appeal and remade the First-tier Tribunal's decision including the LCWRA element in her award from 03 September 2021.

As the First-tier Tribunal requested guidance about how the provisions work, the discussion in the decision also addresses:

- *the distinction between an assessment regarding limited capability for work ("LCW") and a determination made on the basis of it (paragraphs 35 to 37);*
- *the operation and effects of regulation 41(2) of the 2013 Regulations, including where an assessment about LCW has started (paragraphs 43 to 48, 55 to 61);*
- *the relationship between regulation 41 and the provisions in regulation 28 identifying the period before the LCWRA element is included in a UC award (paragraphs 80 to 90); and*
- *whether regulation 28(2)(b) relates to the date on which a claimant first provides DWP with evidence of LCW or could relate to an earlier date mentioned in that evidence (paragraphs 95 to 97).*

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a) and (b)(ii) and (4) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remake the decision as follows:

The appeal is allowed.

The Secretary of State's decision dated 01 April 2022 is set aside.

The Appellant is entitled to the LCWRA element within her universal credit award from 03 September 2021 onwards.

REASONS FOR DECISION

A. Factual background

1. GEA was awarded universal credit ("UC") on 03 February 2021. On 03 June 2021, GEA declared she had limited capability for work ("LCW") and provided the Department for Work and Pensions ("DWP") with medical evidence in support, namely a MED3 certificate from her doctor.

2. On 01 April 2022, having undertaken an assessment of her, including a medical assessment on 28 February 2022, DWP decided GEA had limited capability for work-related activity ("LCWRA"). DWP decided the LCWRA element of UC would be included in GEA's UC claim from 03 March 2022 onwards. A claimant who is determined, or treated, as having LCWRA is entitled to an additional element within their UC award.

3. GEA asked DWP to reconsider its decision and DWP produced a Mandatory Reconsideration Notice ("MRN") on 13 May 2022. This explained that GEA's LCWRA began, together with her entitlement to the LCWRA element, on 03 December 2021. DWP explained that although GEA declared her health conditions restricted her ability to work or look for it on 03 June 2021, HMRC had advised DWP that she received earnings of £1,108.15 in the assessment period from 03 November 2021 to 02 December 2021.

4. The MRN explained DWP had decided GEA's earnings exceeded the maximum permissible amount she could earn in any one assessment period to be regarded as having LCWRA. DWP described this as a Conditionality Earnings Threshold ("CET"). DWP decided the terms of the Universal Credit Regulations 2013 ("the 2013 Regulations") meant GEA could not be regarded as having LCWRA in any assessment period where her earnings exceeded the CET. DWP explained this was why it had awarded GEA the LCWRA element from the (following) assessment period starting on 03 December 2021.

B. The proceedings before the First-tier Tribunal and its decision

5. GEA appealed to the First-tier Tribunal on 16 May 2022, on the basis DWP should have paid her the LCWRA element from September 2021 onwards. Her appeal was heard by a First-tier Tribunal ("FTT") on 09 February 2023. The FTT issued its Decision Notice, partially allowing GEA's appeal, on 14 February 2023.

6. The FTT set aside DWP's decision dated 01 April 2022. It decided GEA should be paid the LCWRA element in her UC award from 03 September 2021. The FTT also decided, however, that GEA's earnings exceeded the CET in the assessment period from 03 November 2021 to 02 December 2021. The FTT observed that at this time, no work capability assessment ("WCA") had been undertaken to assess whether GEA had LCW and / or LCWRA. The FTT stated a WCA assessment is made at a single point of time when a DWP decision-maker makes a decision whether a claimant has LCW and / or LCWRA.

7. The FTT decided regulation 41(2) of the 2013 Regulations prevented DWP from undertaking a WCA assessment in relation to GEA during the assessment period when her earnings exceeded the CET and GEA was not to be treated as having LCWRA during that period. The FTT decided that while the WCA assessment was not undertaken until 01 April 2022, regulation 41(2) did not prevent DWP making a WCA assessment during the period 03 December 2021 to 31 March 2022.

8. The FTT decided GEA continued to satisfy the Social Security (Medical Evidence) Regulations 1976 during the period 03 December 2021 to 31 March 2022 by continuing to provide medical certificates in connection with her stated LCW. Applying regulation 28 of the 2013 Regulations, it decided, however, that GEA had to serve another three-month waiting period. The FTT decided that none of the circumstances allowing that waiting period to be dispensed with applied to GEA. The FTT therefore decided that GEA became entitled to the LCWRA element once again from 03 March 2022.

9. The effect of the FTT's decision was to award GEA the LCWRA element for the one AP from 03 November 2021 to 02 December 2021, remove it from 03 December 2021 and then restore it from 03 March 2022 onwards.

10. The FTT provided a Statement of Reasons for its decision on 30 July 2023. In explaining its decision, the FTT dealt with an additional argument put forward for GEA. This was that although GEA notified DWP she had LCW on 03 June 2021, the medical evidence she provided advised her to refrain from work from 15 May 2021. GEA's argument was that in these circumstances, "*the first day on which the claimant provides evidence of their having limited capability for work in accordance with the Medical Evidence Regulations*" should be read as applying to the date in the medical evidence (here, 15 May 2021).

11. At paragraph 5 of the Statement of Reasons, the FTT dealt with GEA's arguments in the following terms:

> *"The tribunal does not accept the grounds of the Appellant's appeal. Firstly, as appears below, the start of the timetable for payment in respect of LCWRA is not the date from which a fit note is said to commence. Secondly the date from which payment is made is only tangentially connected with the aspiration to undertake WCA medical examinations within 3 months. There is a fixed qualifying period for LCWRA payments of three months, whether the medical examination is undertaken within 3 days or 3 years. No doubt the qualifying period was set because of the aspiration regarding medical examinations but the qualifying period is solely defined in terms of a period*

of time. Most importantly, the WCA is not a process. It is a decision by a decisionmaker. The WCA didn't start on 15 May 2021 or 3 June 2021 or indeed when the medical examination was undertaken. The WCA occurred when a decision maker reviewed the evidence of the medical examination and all other evidence and made a decision that the Appellant satisfied Schedule 7 [to the 2013 Regulations]. That date seems to be 01 April 2022 but it is certainly no earlier than 28 February 2022."

12. In the remainder of the Statement of Reasons, the FTT:

(a) drew a distinction between the UC assessment period ("AP") from 03 November to 02 December 2021 and the other APs before 03 March 2022;

(b) explained that during the AP from 03 November 2021 to 02 December 2021, GEA's earnings exceeded the CET, but she did not meet the exemptions in regulation 41(2)(a) or (b). The FTT decided no WCA assessment could be carried out for GEA during the AP from 03 November 2021 to 02 December 2021, she was not to be treated as having LCWRA during that AP and was therefore not entitled to the LCWRA element; and

(c) explained that for the APs from 03 December 2021 onwards, GEA's earnings did not exceed the CET, so DWP was not prevented from undertaking a WCA during this period and GEA was not treated as not having LCWRA during it.

13. The FTT stated that regulation 28(2)(a) of the 2013 Regulations did now appear to apply to GEA (paragraph 13 of Statement of Reasons). The FTT reasoned that GEA was subject to regulation 41(2) in the period 03 November to 02 December 2021, the relevant period mentioned in regulation 28 therefore ended on 02 March 2022 and applying regulation 28(1), the UC award was not to include the LCWRA element until 03 March 2022. The FTT considered, but ruled out, any of the provisions in regulation 28(3) to (5) applying to exclude the application of regulation 28(1).

14. The FTT concluded there was no basis on which to disapply a second 3 month waiting period and that GEA did not become entitled to the LCWRA element again until 03 March 2022. The FTT described this as appearing to be somewhat unfair and a lacuna in the 2013 Regulations, because if the Secretary of State had completed a WCA assessment before 02 November 2021, the problem would not have arisen. The FTT considered that in those circumstances, any further assessment would have been a review of that previous assessment and so not caught by regulation 41(2)(b).

15. A salaried First-tier Tribunal Judge granted GEA permission to appeal to the Upper Tribunal, summarising the arguable appeal grounds as:

(a) The FTT erred in interpreting the relevant three-month waiting period prescribed in regulation 28 of the 2013 Regulations as effective from the date that medical evidence is provided by the claimant, rather than the date when that evidence indicated they had limited capability for work;

(b) The FTT erred because, having applied the relevant three-month waiting period from 03 June 2021 when GEA provided medical evidence, it found regulation 41 obliged it to apply a second three-month waiting period from the end of the assessment period starting on 03 November 2021 and during which GEA's earnings exceeded the conditionality earnings threshold; and

(c) In addition, or alternatively, in finding GEA was entitled to the LCWRA element of UC from 03 September 2021, the FTT was wrong in law in superseding that decision, concluding that she was not entitled to it from 03 November 2021 to 02 March 2022.

16. The salaried First-tier Tribunal Judge also stated the guidance of the Upper Tribunal was likely to assist future First-tier Tribunals in approaching these issues and in interpreting the relevant legislation. They did not limit the grant of permission to appeal.

C. The Upper Tribunal proceedings

17. A representative for the Secretary of State for Work and Pensions ("SSWP") provided submissions. These supported the appeal and the representative invited the Upper Tribunal to remit it to a new First-tier Tribunal to decide.

18. In response, Mr Khan, who represents GEA, asked the Upper Tribunal to substitute a decision that GEA was entitled to the LCWRA element from 03 September 2021 and that regulation 41 of the 2013 Regulations does not stop a WCA that has already started and which considers a period prior to the claimant having earnings above the threshold. Mr Khan submitted that while the SSWP supported the appeal, it was not clear whether the Department was continuing to argue its original decision to pay the LCWRA element from 03 March 2022 was correct and if so, the legal reasons for this. Mr Khan requested an oral hearing of the appeal in Birmingham.

19. Given these matters, I directed the SSWP to file further submissions on specific matters, and for an oral hearing of GEA's appeal to take place in Birmingham. Following delays finding a suitable date in the external venue, I held a hearing of the appeal on 21 October 2025 in Birmingham.

20. GEA was represented by Mr Khan at the hearing. The SSWP was represented by Ms Elliot of counsel. At an earlier stage, a different barrister had settled written submissions on behalf of SSWP (dated 25 April 2025). Mr Khan raised some additional arguments at the hearing. I had questions about what previous counsel had written on behalf of the SSWP. Having explored those matters during the hearing, I adjourned GEA's appeal for the parties to provide further written submissions in response to specific questions.

21. Ms Elliot has provided these further written submissions on behalf of the SSWP and Mr Khan has provided a reply. Following receipt of those documents, this matter has been referred back to me to decide.

22. No party has asked for a second hearing in connection with this appeal. I took these preferences into account and considered the appeal file. I decided the interests of justice did not require another oral hearing. This appeal was lodged in 2023. In terms of GEA's specific appeal, the parties agree the FTT made a

material error of law and about how its decision should be remade. There is sufficient information in the papers to determine GEA's appeal without holding another hearing, and it is proportionate to take this approach.

D. The legal framework

23. Sections 12 and 37 of the Welfare Reform Act 2012 ("the 2012 Act") are relevant to this appeal. Part 5 of the 2013 Regulations and Schedules 8 and 9 to them are also relevant to this appeal. Due to the overall length of the provisions mentioned in this Decision, I have set them out in an Annex. I set out here, however, regulations 28, 39 and 41 of the 2013 Regulations, since I refer to them in detail below.

28.— Period for which the LCWRA element is not to be included

(1) An award of universal credit is not to include the LCWRA element until the beginning of the assessment period that follows the assessment period in which the relevant period ends.

(2) The relevant period is the period of three months beginning with—

(a) if regulation 41(2) applies (claimant with monthly earnings equal to or above the relevant threshold) the date on which the award of universal credit commences or, if later, the date on which the claimant applies for the LCWRA element to be included in the award; or

(b) in any other case, the first day on which the claimant provides evidence of their having limited capability for work in accordance with the Medical Evidence Regulations.

(3) But where, in the circumstances referred to in paragraph (4), there has been a previous award of universal credit—

(a) if the previous award included the LCWRA element, paragraph (1) does not apply; and

(b) if the relevant period in relation to that award has begun but not ended, the relevant period ends on the date it would have ended in relation to the previous award.

(4) The circumstances are where—

(a) immediately before the award commences, the previous award has ceased because the claimant ceased to be a member of a couple or became a member of a couple; or

(b) within the six months before the award commences, the previous award has ceased because the financial condition in section 5(1)(b) (or, if it was a joint claim, section 5(2)(b) of the Act was not met).

(5) Paragraph (1) also does not apply if—

(a) the claimant is terminally ill; or

(b) the claimant—

(i) is entitled to an employment and support allowance that includes the support component, or

(ii) was so entitled on the day before the award of universal credit commenced and has ceased to be so entitled by virtue of section 1A of the Welfare Reform Act 2007 (duration of contributory allowance).

(7) Where, by virtue of this regulation, the condition in section 5(1)(b) or 5(2)(b) of the Act is not met, the amount of the claimant's income (or, in the case of joint claimants, their combined income) is to be treated during the relevant period as such that the amount payable is the prescribed minimum (see regulation 17).

39.— Limited capability for work

(1) A claimant has limited capability for work if—

(a) it has been determined that the claimant has limited capability for work on the basis of an assessment under this Part or under Part 4 of the ESA Regulations; or

(b) the claimant is to be treated as having limited capability for work (see paragraph (6)).

(2) An assessment under this Part is an assessment as to the extent to which a claimant who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in Schedule 6 or is incapable by reason of such disease or bodily or mental disablement of performing those activities.

(3) A claimant has limited capability for work on the basis of an assessment under this Part if, by adding the points listed in column (3) of Schedule 6, each descriptor listed in column (2) of that Schedule that applies in the claimant's case, the claimant obtains a total score of at least—

(a) 15 points whether singly or by a combination of descriptors specified in Part 1 of that Schedule;

(b) 15 points whether singly or by a combination of descriptors specified in Part 2 of that Schedule; or

(c) 15 points by a combination of descriptors specified in Parts 1 and 2 of that Schedule.

(4) In assessing the extent of a claimant's capability to perform any activity listed in Schedule 6, it is a condition that the claimant's incapability to perform the activity arises—

(a) in respect of any descriptor listed in Part 1 of Schedule 6, from a specific bodily disease or disablement;

(b) in respect of any descriptor listed in Part 2 of Schedule 6, from a specific mental illness or disablement; or

(c) in respect of any descriptor or descriptors listed in—

(i) Part 1 of Schedule 6, as a direct result of treatment provided by a registered medical practitioner for a specific physical disease or disablement, or

(ii) Part 2 of Schedule 6, as a direct result of treatment provided by a registered medical practitioner for a specific mental illness or disablement.

(5) Where more than one descriptor specified for an activity applies to a claimant, only the descriptor with the highest score in respect of each activity which applies is to be counted.

(6) Subject to paragraph (7), a claimant is to be treated as having limited capability for work if any of the circumstances set out in Schedule 8 applies.

(7) Where the circumstances set out in paragraph 4 or 5 of Schedule 8 apply, a claimant may only be treated as having limited capability for work if the claimant does not have limited capability for work as determined in accordance with an assessment under this Part.

41. When an assessment may be carried out

(1) The Secretary of State may carry out an assessment under this Part where—

(a) it falls to be determined for the first time whether a claimant has limited capability for work or for work and work-related activity; or

(b) there has been a previous determination and the Secretary of State wishes to determine whether there has been a relevant change of circumstances in relation to the claimant's physical or mental condition or whether that determination was made in ignorance of, or was based on a mistake as to, some material fact,

but subject to paragraphs (2) to (4).

(2) If the claimant has monthly earnings that are equal to or exceed the relevant threshold, the Secretary of State may not carry out an assessment under this Part unless—

(a) the claimant is entitled to attendance allowance, disability living allowance, child disability payment or personal independence payment; or

(b) the assessment is for the purposes of reviewing a previous determination that a claimant has limited capability for work or for work and work-related activity that was made on the basis of an assessment under this Part or under Part 4 or 5 of the ESA Regulations,

and, in a case where no assessment may be carried out by virtue of this paragraph, the claimant is to be treated as not having limited capability for work unless they are treated as having limited capability for work or for work and work-related activity by virtue of regulation 39(6) or 40(5).

(3) The relevant threshold for the purposes of paragraph (2) is the amount that a person would be paid at the hourly rate set out in regulation 4 of the National Minimum Wage Regulations for 16 hours a week, converted to a monthly amount by multiplying by 52 and dividing by 12.

(4) If it has previously been determined on the basis of an assessment under this Part or under part 4 or 5 of the ESA Regulations that the claimant does not have limited capability for work, no further assessment is to be carried out unless there is evidence to suggest that—

(a) the determination was made in ignorance of, or was based on a mistake as to, some material fact; or

(b) there has been a relevant change of circumstances in relation to the claimant's physical or mental condition.

E. Were GEA's earnings calculated correctly for the 03 November 2021 to 02 December 2021 AP?

24. DWP did not calculate GEA's earnings correctly during the AP from 03 November 2021 to 02 December 2021. This is confirmed in the written submissions made on behalf of the SSWP on 25 April 2025. Those submissions set out the following:

(a) GEA had five APs (from 03 June 2021 to 02 November 2021) in which she received no earnings;

(b) GEA then received, respectively, £1,105.15 in the 03 November 2021 to 02 December 2021 AP and £485.60 in the 03 December 2021 to 02 January 2022 AP;

(c) GEA received no earnings in the APs for 03 January 2022 to 02 February 2022 and 03 February 2022 to 02 March 2022; and

(d) The relevant threshold at the relevant time was £617.76, based on a national minimum wage in February 2022 of £8.91 per hour.

25. Regulation 41(2) of the 2013 Regulations operates by reference to a claimant's monthly earnings. Regulation 2 defines this as having the meaning in regulation 90(6).

26. Regulation 90 deals with circumstances in which a claimant meets an individual threshold based on monthly earnings and if so, section 19 of the 2012 Act applies to prevent them being subject to work-related requirements (i.e. conditionality). This is likely to be the reason why DWP described GEA as meeting the conditionality earnings threshold when it was considering the relevant threshold under regulation 41(3).

27. Regulation 90(6) provides different ways of calculating or estimating monthly earnings. The parties consider, and I agree, that the evidence at paragraph 24 above demonstrates GEA's income fluctuated during this overall period of nine APs but contained no identifiable cycle of fluctuation. As a result, GEA fell within regulation 90(6)(b)(ii) of the 2013 Regulations, meaning that her monthly earnings needed to be averaged across a longer period, to identify the correct monthly average to use.

28. The parties have agreed that, in this particular case, GEA's earnings should be taken as a monthly average using the sum of her earnings over a period of nine APs. They agree that this would enable her monthly average to be determined more accurately. It produces monthly earnings of £177.08 per AP.

29. Given the extent of the parties' agreement, I adopt that approach. I note it is a longer period than the three months indicated generally in regulation 90(6)(b)(ii) but, as the provision explains, this period can be departed from. Even if one averaged by using a shorter three-month period including the November and December earnings, the calculation would still fall below the relevant threshold of £617.76 per AP. As a result, GEA's monthly earnings during the period from 03 June 2021 to 02 February 2022 were below the relevant threshold and regulation 41(2) did not apply to her.

30. The FTT therefore made an error of law in deciding that GEA's earnings exceeded the relevant threshold in regulation 41(3) and that regulation 41(2) applied to her. Had the FTT identified that GEA's earnings needed to be averaged across a number of APs rather than looking in isolation at the 03 November 2021 to 02 December 2021 AP, it would not have concluded that her monthly earnings exceeded the relevant threshold. This would have given GEA uninterrupted entitlement to the LCWRA element from 03 September 2021 onwards. The error of law was therefore material.

31. This is sufficient to resolve GEA's appeal. The parties have asked me to remake the FTT's decision in terms that she is entitled to the LCWRA element from 03 September 2021 onwards and I have done so.

32. As I explained, however, to the parties at the hearing on 21 October 2025, the First-tier Tribunal granted GEA permission to appeal to the Upper Tribunal on the basis it would benefit from guidance about how the legislation applies. The discussion set out below is therefore intended to assist the First-tier Tribunal in deciding appeals where a claimant has declared they have LCW and their monthly earnings meet, or exceed, the relevant threshold in regulation 41(3).

F. Analysis

(i) In the context of LCW, is an assessment the determination itself or something else?

33. The FTT addressed this question using the language of work capability assessment ("WCA"). That wording does not appear in the body of the 2013 Regulations, although it is the sub-heading for regulations 41 to 44, which deal with the assessment carried out. The statutory language in the 2013 Regulations refers to "*an assessment*" instead.

34. My analysis below specifically deals with LCW in regulation 39 of the 2013 Regulations. There are equivalent provisions dealing with LCWRA in regulation 40 (set out in the Annex to this Decision). Those provisions adopt broadly the same structure and approach and therefore the same analysis would apply.

(ii) Determination of LCW and the related assessment

35. The *determination* made is of the statutory question whether a person has LCW. Section 37(1) of the 2012 Act sets out the statutory question to address. Section 37(3) confirms it is to be determined in accordance with regulations. Section 37(4) provides for this question to be determined on the basis of an *assessment* (or repeated ones) of the claimant. These are therefore two distinct concepts, the *determination* of whether a claimant has LCW and the *assessment* undertaken, on the basis of which that determination is made.

36. The 2013 Regulations explain what is required for an assessment. This includes considering a claimant's ability to perform the activities set out in Schedule 6 to the 2013 Regulations (regulation 39(1)(a) and (2) to (5)). These activities are designed to reflect the range of activities a person might be required to undertake within different types of work in order to determine their capability for all types of work. Some activities consider the functional effects on those activities of a claimant's physical health conditions, with others addressing the functional effects of their cognitive, intellectual or mental conditions.

37. A claimant's ability to perform the activities in Schedule 6 and whether they score 15 or more points in relation to those activities, will therefore need to be considered to lead to a determination of whether they have LCW.

(iii) Treating a claimant as having LCW

38. Section 37(6) of the 2012 Act introduces a separate regulation-making power for a claimant to be "*treated as having or not having LCW*".

39. Regulations 41 to 44 of the UC Regulations set out circumstances in which a claimant may, or must, be treated as not having LCW. This is relevant to consideration of regulation 41 below.

40. Regulation 39(1)(b) and (6) of the 2013 Regulations provide for a claimant to be treated as having LCW in any of the circumstances set out in Schedule 8 to those regulations.

41. Some of the *treated as having LCW* provisions in Schedule 8 can be met without needing to carry out an assessment and make a determination under regulation 39(1)(a). These are paragraphs 1 to 3 and 6 of Schedule 8. They deal with receiving certain treatment, being a patient in hospital, being prevented from working by law and reaching the qualifying age for state pension credit and being entitled to one of a specified range of benefits.

42. However, the combined effect of regulation 39(6) and (7) is that two of the provisions in Schedule 8 can only be applied where there has been a determination that a claimant does not have LCW in accordance with an assessment. These are paragraphs 4 and 5 of Schedule 8. Paragraph 4 of Schedule 8 deals with risk to self or others if found not to have LCW. Paragraph 5 of Schedule 8 applies where a claimant is suffering from a life- threatening disease. As a result, neither of these *treated as having LCW* provisions can be considered until a claimant has been assessed against the activities set out in Schedule 6 and DWP has determined they have failed to score 15 points or more.

(iv) How does regulation 41 of the 2013 Regulations work?

43. Regulation 41 sets out circumstances in which the SSWP may, or may not, carry out an assessment to determine whether a claimant has LCW. Regulation 41(1) sets out the circumstances in which the SSWP may carry out an assessment, which are that LCW or LCWRA is being determined for the first time, or an existing determination is being reviewed on specific grounds.

44. Regulation 41(2) and (4) set out circumstances in which an assessment may not be carried out. Where a claimant falls within regulation 41(2), in addition to the restriction on carrying out an assessment, the claimant must be treated as not having LCW (subject to an exemption, discussed below).

45. In summary, regulation 41(2) applies where:

(a) the claimant's monthly earnings exceed the relevant threshold specified in regulation 41(3), calculated in accordance with regulation 90(6);

(b) the claimant does not receive one of the benefits specified in regulation 41(2)(a); and

(c) the assessment is being carried out for the first time (i.e. regulation 41(2)(b) does not apply).

46. A claimant who falls within regulation 41(2) and does not meet either of the exceptions in regulation 41(2)(a) or (b) will also be treated as <u>not</u> having LCW. This is, however, subject to an exemption in the closing wording of regulation 41(2). That wording follows on from, and applies to, the opening wording of regulation 41(2). It can be described as using a sandwich drafting technique.

47. The exemption in the closing wording of regulation 41(2) applies where the claimant is treated as having LCW under regulation 39(6). As explained above, however, regulation 39(6) must be read subject to regulation 39(7). The effect of

this is that the exemption does not apply to the *treated as having LCW* categories in paragraphs 4 or 5 of Schedule 8 (risk to self or others; life-threatening disease).

48. The closing wording of regulation 41(2) also creates an exception for a claimant treated as having LCWRA under regulation 40(5). The provisions in Schedule 9 allowing for this are different from Schedule 8 and add to the circumstances in which the exemption may apply. See Schedule 9 and, for example, paragraphs 1 (terminal illness), 2 (pregnancy) or 3 (cancer treatment). However, regulation 40(5) has been drafted in a similar way to regulation 39(6). It must be read subject to regulation 40(6). As a result, the exemption does not extend to the *treated as having LCWRA* provision in paragraph 4 of Schedule 9 (risk to self or others).

49. This analysis reflects the submissions Ms Elliot has helpfully provided on behalf of the SSWP and with which I agree.

50. Mr Khan accepts most of the SSWP's position about this legislative framework but disagrees with important elements of it.

51. Mr Khan states he accepts an assessment needs to be undertaken to determine whether a claimant comes within regulations 39(6) or 40(5) of the 2013 Regulations. This is, however, incorrect, for the reasons set out above. An assessment only needs to be undertaken to determine whether a claimant can be treated as having LCW under paragraphs 4 or 5 of Schedule 8 (or treated as having LCWRA under paragraph 4 of Schedule 9). It does not need to be undertaken to decide a claimant should be treated as having LCW or LCWRA under the other provisions in Schedules 8 or 9.

52. Mr Khan also argues that no claimant satisfying one of the *treated as having LCW / LCWRA* categories in Schedules 8 or 9 should be prevented from having an assessment. He argues the SSWP's reasoning for excluding people whose health would be a risk to themselves or others is irrational, the reasoning is convoluted and would lead to discrimination. Mr Khan argues the closing wording of regulation 41(2) should be read so that people who come within regulations 39(6) and 40(5) are not prevented from being assessed. He argues such claimants have severe medical conditions and may not easily be able to score points under Schedules 6 or 7. Mr Khan argues that under regulation 41(2) an assessment should be completed even if a person is working, so consideration can be given to whether regulation 39(6) or 40(5) apply.

53. Mr Khan has not particularised his arguments about irrationality or discrimination and the SSWP has not so far had the opportunity to respond to them. I do not consider it proportionate to invite the parties to make detailed submissions about these matters. It is not necessary to do so to resolve GEA's appeal, lodged in the Upper Tribunal as long ago as 2023. If a party wishes to make detailed arguments about irrationality and / or discrimination in relation to the effect of regulation 41(2), they can be addressed to the Upper Tribunal in a future case where they are relevant to the outcome of the appeal.

54. Having considered the remainder of Mr Khan's arguments about how one should interpret regulation 41, they do not change my analysis set out above.

(v) How should the SSWP apply regulation 41 in practice where a claimant has asserted they have LCW?

55. I agree with Ms Elliot's submissions about how regulation 41 should be applied in practice. My analysis is that where regulation 41(1) applies:

(a) DWP (acting on behalf of the SSWP) should consider whether the claimant should be treated as having LCW under paragraphs 1, 2, 3 or 6 of Schedule 8 and / or as having LCWRA under paragraphs 1, 2 or 3 of Schedule 9. These *treated as having* provisions do not require an assessment to be undertaken or a determination made on the basis of an assessment;

(b) If DWP considers the claimant should be treated as having LCWRA under paragraphs 1, 2 or 3 of Schedule 9, it will make a decision treating them as having LCWRA. They will become entitled to a LCWRA element within their UC award, and the date for its inclusion will be determined by regulation 28;

(c) In circumstances where DWP considers the claimant can be treated as having LCW under paragraphs 1, 2, 3 or 6 of Schedule 8 but cannot be treated as having LCWRA, or DWP decides the claimant cannot be treated as having LCW under the applicable treated as provisions, it should consider whether the claimant has monthly earnings equal to or exceeding the relevant threshold in regulation 41(3). In calculating the person's monthly earnings, DWP must apply regulation 90(6) of the 2013 Regulations;

(d) If DWP concludes the claimant's earnings <u>are not</u> at or above the relevant threshold in regulation 41(3), it should carry out an assessment to determine whether the claimant has LCW and / or LCWRA or falls to be treated as having either of these under paragraphs 4 or 5 of Schedule 8 or paragraph 4 of Schedule 9;

(e) If DWP concludes the claimant's earnings <u>are</u> at or above the relevant threshold in regulation 41(3), it should consider whether the claimant falls within any of the exceptions in regulation 41(2)(a) or (b). If DWP decides the person does come within an exception, DWP should carry out the assessment and determination described at (d) above;

(f) If DWP concludes the claimant's earnings are at or above the relevant threshold and that the claimant does not fall within any of the exceptions in regulation 41(2)(a) or (b), DWP cannot carry out the assessment and must treat the claimant as not having LCW.

56. Ms Elliot's submissions on behalf of the SSWP also indicate that before completing the assessment in paragraph 55(d) above and proceeding to make a determination, DWP should conduct a final check of the claimant's earnings to see if they equal or exceed regulation 41(3) and if they do, carry out the steps set out in paragraph 55(e) or (f) above.

57. Ms Elliot submits that where a claimant is treated as not having LCW under regulation 41(2) (see paragraph 55(f) above), they can make a fresh application

for the LCWRA element, by declaring a health condition and / or providing a MED3 fit note or equivalent. Ms Elliot submits that if the claimant's monthly earnings are assessed as below the relevant threshold in regulation 41(3), DWP will carry out the assessment in the usual way.

58. I agree with Ms Elliot's analysis summarised at paragraphs 56 to 57 above. I have considered whether regulation 41(4) would prevent DWP taking the approach summarised in paragraph 55 above. I do not, however, consider that it would. Regulation 41(4) is framed by reference to a determination on the basis of an assessment, which reads across to the wording in regulation 39(1)(a). In the circumstances described in paragraph 55(f) above, there will be no assessment and there will be no determination of whether the claimant has LCW on the basis of an assessment (under regulation 39(1)(a)). Instead, there will be a *treated as not having LCW* decision, which is not caught by the wording in regulation 41(4).

59. Ms Elliot also submits that a claimant's monthly earnings may be so high that in addition to meeting regulation 41(3), the claimant will no longer meet the financial condition for a UC award. Ms Elliot submits that in these circumstances, if the claimant's monthly earnings later fall below the relevant threshold, they make a new claim and less than 6 months have passed since the UC award ended, regulation 28(3) and (4)(b) of the 2013 Regulations mean a further assessment is not required, the claimant will be determined to have LCWRA, and their new UC award will include the LCWRA element.

60. I do not entirely agree with this submission. Regulation 28(4)(b) might apply in the circumstances Ms Elliot describes. It would depend, however, on a claimant satisfying regulation 28(3)(a), which applies where the previous UC award included the LCWRA element. Only in circumstances where a claimant had LCWRA within their earlier UC award, would regulation 28(3) and (4)(b) apply to them. Furthermore, regulation 28 does not, of itself determine whether an assessment is, or is not required.

61. It seems to me that where a claimant's UC award has ended due to their monthly earnings exceeding the relevant threshold, they would need to make a new claim but are otherwise, in principle, in the same position as if they had remained on UC but the assessment could not be carried out (paragraph 57 above). As with paragraph 57, there will have been no determination made on the basis of an assessment because no assessment will have been carried out. Regulation 41(4) would not prevent an assessment being carried out in the new UC claim. The claimant would therefore go through some, or all, of the steps set out in paragraph 55 above.

62. Mr Khan does not appear to disagree with the analysis summarised in paragraph 55(a) to (f) above. He argues that once an assessment has been initiated, it should be determined regardless of a claimant's subsequent monthly earnings. Mr Khan does not agree with what Ms Elliot described as the final check DWP needs to undertake, summarised at paragraph 56 above. Instead, Mr Khan's position is that once DWP has started the assessment process, it must not be stopped, even if regulation 41(2) applies, and it must lead to a determination being made.

63. I have considered the opening wording in regulation 41(2). This states:

> "*If the claimant has monthly earnings that are equal to or exceed the relevant threshold, the Secretary of State* ***may not carry out*** *an assessment under this Part"* [my emphasis added in bold].

64. This wording is not defined in the 2013 Regulations and bears its ordinary meaning. While there are a range of meanings given for "carry out", I consider the more likely ordinary meaning of it is "*to complete*" the assessment. This is consistent with a meaning for that phrase in the Oxford English Dictionary of: "*to bring (something) to completion or fruition; to bring to a conclusion*".

65. A contrary argument would be that the phrase is capable of other meanings as well and if Parliament had intended the wording to rule out continuing an assessment that is already underway, it would, and should, have stated this expressly.

66. Having considered this contrary argument, I consider meaning of the wording in regulation 41(2) is that it stops an existing assessment continuing or being completed, as well as preventing one from commencing. Adopting Mr Khan's interpretation would be inconsistent with the overall effect of regulation 41(2), which also mandates the SSWP to treat the claimant as not having LCW.

67. Mr Khan argued in earlier written submissions that the SSWP interpreted "*may not*" in regulation 41(2) incorrectly as "*shall not*" (11 October 2024 submissions, page 36 of UT bundle). However, the wording "*may not*" in regulation 41(2) is a clear instruction that the assessment will not be completed. In the context of regulation 41(2), this instruction can only be understood as a mandatory one, rather than offering a discretion about how to act.

68. On this basis, where an assessment cannot be carried out under regulation 41(2), the SSWP must treat the claimant as not having LCW unless the exemption in the closing wording applies. Assuming that exemption did not apply to a particular claimant, the SSWP would be left with an assessment that might recommend determining the claimant has LCW or LCWRA (or should be treated as having it) at the same time as being mandated to treat that claimant as not having LCW. This would create a significant tension within regulation 41(2). Parliament would ordinarily be presumed not to have intended a construction that simultaneously permits a claimant to be determined as having LCW or LCWRA while also requiring the SSWP to treat them as not having LCW.

69. On this basis, I am satisfied that the wording in regulation 41(2) should be read as stopping an existing assessment being completed as well as preventing a new one from being started.

70. Mr Khan also argues it is unfair to stop an assessment when a claimant has no control over how long it takes the SSWP to carry it out and the stated aim to complete this within three months is frequently breached in practice. Mr Khan argues it is unfair that a claimant whose assessment started when they did not

have monthly earnings at or above the relevant threshold in regulation 41(3) might have it ended because they later start to earn at that level.

71. I recognise the longer the assessment takes, the more scope there is for a claimant to work and have monthly earnings above the relevant threshold. I am not, however, satisfied this means it is unfair to apply regulation 41(2) to stop an existing assessment being completed as well as preventing a new one from being started. The determination of LCW must be made on the basis of an assessment. It will take time to carry out because it contains individual components, such as a questionnaire, asking for further information from a claimant's GP, the medical assessment. There are a range of different factors that may affect the length of an assessment, not all of which are in DWP's control. For example, where a claimant who takes longer to provide information (or whose GP does), or cannot attend the medical assessments offered, this will lengthen the assessment process. All of this must be considered in a context where the assessment stops (or cannot start) because the claimant is receiving a level of earnings that is, on the face of it, inconsistent with them having LCW and they do not meet an exclusion or exemption that suggests otherwise.

72. I am satisfied that in the circumstances described in paragraph 55(f) above, an assessment cannot be started. For similar reasons, in the circumstances described in paragraph 56 above, an assessment that is already underway cannot be completed. In both circumstances, the SSWP cannot make a determination under regulation 39(1)(a) that the claimant has LCW, because it would not be made on the basis of an assessment. Nor can the claimant be treated as having LCW applying paragraph 4 or 5 of Schedule 8 to the 2013 Regulations or as having LCWRA applying paragraph 4 of Schedule 9, because these provisions only apply if a claimant does not have LCW / LCWRA as determined in accordance with an assessment.

(vi) Which appeal rights exist in relation to decisions made described in paragraphs 55 to 56 above?

73. Claimants have appeal rights generally against a decision by the SSWP that they do not have LCW. This includes where the SSWP has made a determination on the basis of an assessment and / or decided the claimant does not fall to be treated as having LCW under the treated as provisions in Schedule 8 to the 2013 Regulations. The parties agree that a claimant's appeal rights extend to a decision that the claimant is to be treated as not having LCW under regulation 41(2).

74. Ms Elliot submits the appeal lies against an outcome decision that a claimant is not entitled to the LCWRA element, in each of the circumstances set out at paragraph 73 above. Ms Elliot also submits that in challenging a decision under regulation 41(2) not to carry out an assessment and to treat a claimant as not having LCW, a claimant would be able to appeal on the grounds that:

(a) their income does not equal or exceed the relevant threshold in regulation 41(3) and / or

(b) they should be treated as having LCW or LCWRA in accordance with regulation 39(6) or 40(5) of the 2013 Regulations.

75. Ms Elliot argues, however, that the ground in 74(b) above cannot include an argument that the claimant should be treated as having LCW under paragraphs 4 or 5 of Schedule 8 or as having LCWRA under paragraph 4 of Schedule 9.

76. Mr Khan agrees with the SSWP that a claimant can appeal against a decision under regulation 41(2) not to carry out an assessment (and presumably against the decision to treat the claimant as not having LCW). Mr Khan disagrees, however, with the SSWP's position that a claimant cannot argue they should be treated as having LCW under paragraphs 4 or 5 of Schedule 8 or treated as having LCWRA under paragraph 4 of Schedule 9.

77. On this issue, I prefer Ms Elliot's submissions. They are consistent with the structure of regulations 39(6) and (7) and 40(5) and (6). As previously explained, the reference to regulations 39(6) and 40(5) in the closing wording of regulation 41(2) must be read in the context of regulation 39(7) and 40(5). The FTT stands in the shoes of the SSWP and cannot take a step the SSWP could not himself have taken. Since the SSWP cannot treat a claimant as having LCW / LCWRA in the closing wording of regulation 41(2) using provisions that require an assessment to take place, it follows that the FTT cannot consider those provisions on appeal. The FTT therefore cannot go behind the restrictions imposed by regulation 39(6) and 40(5).

78. Where a claimant appeals against the decision that they are treated as not having LCW under regulation 41(2), they can therefore challenge it in terms of:

(a) whether their monthly earnings met or exceeded the relevant threshold;

(b) whether an exception in regulation 41(2)(a) or (b) applies to them; and / or

(c) whether they should be treated as having LCW or LCWRA under regulation 39(6) or 40(5) read with the meaning given by regulation 39(7) and 40(6).

79. A challenge under (c) of this list will not, however, extend to arguing that the claimant should be treated as having LCW under paragraphs 4 or 5 of Schedule 8 or treated as having LCWRA under paragraph 4 of Schedule 9.

(vii) How does regulation 28(2) work, including in the context of regulation 41 of the 2013 Regulations?

80. Regulation 28 is headed "*Period for which the LCWRA element is not to be included*". This reflects the intended purpose of regulation 28 - to identify a period of time before the LCWRA element can be included in a UC award.

81. Regulation 28(1) set out the general position that a UC award cannot include the LCWRA element until the AP following the end of the "*relevant period*". This is set out in regulation 28(2) as a three-month period, which starts on different dates, depending on whether a claimant falls within regulation 28(2)(a) or (b).

82. In principle, the majority of UC claimants awarded the LCWRA element will not be paid it until the three-month relevant period has ended. This resembles the 12-week assessment phase within employment and support allowance ("ESA"), which generally has to end before an ESA claimant placed into the support group can have the support component included in their award (effectively replicated by the LCWRA element in a UC award).

83. The provisions in regulation 28(3) to (6) set out exceptions to the requirement in regulation 28(1) for a relevant period to have ended before the LCWRA element can be included. For example, regulation 28(1) is not applied where a claimant is terminally ill or where they are entitled to the support component within an existing new-style ESA award. See regulation 28(5)(a) and (b). Regulation 28(7) adjusts the consequences of the relevant period applying to a UC award, where this would otherwise prevent a claimant being entitled to UC at all (see ***SC v SSWP (UC)*** [2026] UKUT 124 (AAC)).

84. Regulation 28(2)(a) fixes the start of the relevant period in cases where regulation 41(2) applies to a claimant. The relevant period starts on the date when the UC award commences or, if later, the date when the claimant applies for the LCWRA element to be included in it.

85. Regulation 28(2)(b) opens with: "*in any other case*", confirming it applies as an alternative to any case where regulation 28(2)(a) applies. Regulation 28(2)(b) fixes the three-month relevant period to start on the first day on which the claimant provides evidence of having LCW in accordance with the Social Security (Medical Evidence) Regulations 1976.

86. Dealing with these provisions in turn, a claimant whose monthly earnings exceed the relevant threshold (regulation 41(2)) will fall within regulation 28(2)(a) if:

(a) the claimant comes within one of the exceptions in regulation 41(2)(a) or (b); or

(a) the claimant does not come within an exception in regulation 41(2)(a) or (b) but they can be treated as having LCWRA under regulation 40(5) read together with regulation 40(6).

87. Some of the claimants in paragraph 86 above may be exempt from having a relevant period at all because they also fall within an exception to regulation 28(1) applying. For example, a claimant who can be treated as having LCWRA due to being terminally ill would also satisfy regulation 28(5)(a).

88. Where a claimant's monthly earnings are at, or exceed, the relevant threshold in regulation 41(3) and the claimant does not fall within paragraph 86(a) or (b) above, the SSWP cannot carry out an assessment and must treat them as not having LCW. In these circumstances, no entitlement to the LCWRA element arises. I agree with Ms Elliot's submissions that in these circumstances, the claimant will be able to apply afresh for the SSWP to consider whether they have LCWRA. As Ms Elliot argues, the claimant will be able to apply for this by declaring LCW and

providing a MED3 fit note or equivalent, or through a combination of this and self-certification as confirmed in ***KS v SSWP (ULCW) [2025]*** UKUT 015 (AAC) ("***KS***").

89. In principle, regulation 28(2)(a) explains what happens where a person's monthly earnings equal or exceed the relevant threshold in regulation 41(3). In practice, however, regulation 28(2)(a) only applies to the smaller group of claimants who, despite having those monthly earnings, fall within an exception in regulation 41(2)(a) or (b) or within the exemption in the closing wording of the provision. Any other claimant falling within regulation 41(2) will be treated as not having LCW and will never reach the point of being awarded the LCWRA element. If so, regulation 28(2)(a), which helps to fix the start date for that element in the UC award, would not have any practical application to them.

90. A claimant who is treated as not having LCW by operation of regulation 41(2) will need to make a fresh declaration of LCW and produce new evidence in support of that declaration. If the claimant does this and their monthly earnings have fallen below the relevant threshold, DWP will start the assessment process to reach the point of determining whether the claimant has LCW / LCWRA or should be treated as having it. Assuming the SSWP determines the claimant has LCWRA or treats them as having it the person does not satisfy any exception in regulation 28 for having a relevant period at all, its start date will be determined by regulation 28(2)(b), not by regulation 28(2)(a).

91. Had regulation 41(2) applied to GEA, the way the FTT applied regulation 28 to her would have been incorrect. The FTT decided it could apply a three-month relevant period to GEA under regulation 28(2)(b), start her entitlement to the LCWRA element and then interrupt it, applying another three-month relevant period to her using regulation 28(2)(a). Regulation 28 does not allow claimants to move in and out of entitlement to the LCWRA element in the way the FTT decided it could. Furthermore, had regulation 41(2) actually applied to GEA, and assuming no exceptions or exemptions were met, the start date for any relevant period before the LCWRA element could be included, would have been fixed by regulation 28(2)(b) in response to GEA declaring LCW afresh.

92. Turning to the effect of regulation 28(2)(b) generally, one of Mr Khan's arguments has been that it can apply to an earlier date than the date the claimant notifies DWP, if the evidence provided relates to an earlier date. The wording in question is: "…*the first day on which the claimant provides evidence of their having limited capability for work*".

93. Mr Khan raised this before the FTT because although GEA notified DWP on 03 June 2021 that she believed she had LCW, the MED3 certificate she produced advised GEA to refrain from work from an earlier date of 15 May 2021.

94. In GEA's case, it appears the same outcome is reached whichever date one uses under regulation 28(2)(b), namely that her entitlement to the LCWRA element should start on 03 September 2021. Resolving this issue is therefore not required to resolve GEA's appeal. However, this issue was one of the grounds on which the First-tier Tribunal granted GEA permission to appeal and my understanding is that the First-tier Tribunal would like guidance about it.

95. Regulation 28(2)(b) provides:

> *"(b) in any other case, the first day on which the claimant provides evidence of their having limited capability for work in accordance with the Medical Evidence Regulations."*

96. In my assessment, this wording is referring to the date when the claimant first supplies evidence of LCW to DWP. It does not allow for an earlier date than that. This is the ordinary meaning of: "*first day on which the claimant provides*".

97. The Upper Tribunal considered the meaning of regulation 28(2)(b) in ***KS***, which was decided while GEA's appeal was proceeding before the Upper Tribunal. Having read ***KS,*** I am satisfied my reading of regulation 28(2)(b) is consistent with Upper Tribunal Judge Church's approach. In ***KS***, Judge Church confirmed the first date referred to in regulation 28(2)(b) meant the date when KS reported to DWP that she had health problems affecting her ability to work (paragraphs 22 and 23 of that decision).

98. The FTT therefore did not make any error of law in deciding that the three-month period in regulation 28(2)(b) ran from the date when GEA reported her health condition to DWP, rather than the earlier date mentioned in her MED3 certificate.

G. Conclusion, including disposal

99. I have decided the FTT's decision involved a material error of law, as set out in paragraph 28 above. Having done so, it is appropriate to exercise my discretion to set aside the Tribunal's decision dated 14 February 2023 under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

100. Section 12(2)(b) of that Act requires me to either remit the case to the First-tier Tribunal with directions for its reconsideration or to remake the decision. I have decided to remake the FTT's decision as requested by the parties. GEA is entitled to the LCWRA element in her UC award with effect from 03 September 2021.

101. I thank the parties and their representatives for the assistance provided by their submissions in dealing with the legal issues in this appeal.

Judith Butler
Upper Tribunal Judge

Authorised for issue: 07 August 2026

Annex: Legislative provisions relevant to this appeal

1. The following provisions in the Welfare Reform Act 2012 are relevant to this appeal:

12 Other particular needs or circumstances

(1) The calculation of an award of universal credit is to include amounts in respect of such particular needs or circumstances of a claimant as may be prescribed.

(2) The needs or circumstances prescribed under subsection (1) may include—

(a) *omitted*.

(b) the fact that a claimant has limited capability for work and work-related activity;

(c) the fact that a claimant has regular and substantial caring responsibilities for a severely disabled person.

(2) Regulations are to specify, or provide for the determination or calculation of, any amount to be included under subsection (1).

(3) Regulations may—

(a) provide for inclusion of an amount under this section in the calculation of an award of universal credit—

(i) to end at a prescribed time, or

(ii) not to start until a prescribed time;

(b) provide for the manner in which a claimant's needs or circumstances are to be determined.

37 Capability for work or work-related activity

(1) For the purposes of this Part a claimant has limited capability for work if—

(a) the claimant's capability for work is limited by their physical or mental condition, and

(b) the limitation is such that it is not reasonable to require the claimant to work.

(2) For the purposes of this Part a claimant has limited capability for work-related activity if—

(a) the claimant's capability for work-related activity is limited by their physical or mental condition, and

(b) the limitation is such that it is not reasonable to require the claimant to undertake work-related activity.

(3) The question whether a claimant has limited capability for work or work-related activity for the purposes of this Part is to be determined in accordance with regulations.

(4) Regulations under this section must, subject as follows, provide for determination of that question on the basis of an assessment (or repeated assessments) of the claimant.

(5) Regulations under this section may for the purposes of an assessment—

(a) require a claimant to provide information or evidence (and may require it to be provided in a prescribed manner or form);

(b) require a claimant to attend and submit to a medical examination at a place, date and time determined under the regulations.

(6) Regulations under this section may make provision for a claimant to be treated as having or not having limited capability for work or work-related activity.

(7) Regulations under subsection (6) may provide for a claimant who fails to comply with a requirement imposed under subsection (5) without a good reason to be treated as not having limited capability for work or work-related activity.

(8) Regulations under subsection (6) may provide for a claimant to be treated as having limited capability for work until—

(a) it has been determined whether or not that is the case, or

(b) the claimant is under any other provision of regulations under subsection (6) treated as not having it.

(9) Regulations under this section may provide for determination of the question of whether a claimant has limited capability for work or work-related activity even where the claimant is for the time being treated under regulations under subsection (6) as having limited capability for work or work-related activity.

2. The following provisions in the Universal Credit Regulations 2013, in force at the date of DWP's decision on 01 April 2022, are relevant to this appeal. A number of these provisions have since been amended, with effect from 05 April 2026:

27.— Award to include LCWRA element

(1) An award of universal credit is to include an amount in respect of the fact that a claimant has limited capability for work and work-related activity ("the LCWRA element").

(2) The amount of that element is given in the table in regulation 36.

(3) Whether a claimant has limited capability for work and work-related activity is determined in accordance with Part 5.

(4) In the case of joint claimants, where each of them has limited capability for work and work-related activity, the award is only to include one LCWRA element.

28.— Period for which the LCWRA element is not to be included

(1) An award of universal credit is not to include the LCWRA element until the beginning of the assessment period that follows the assessment period in which the relevant period ends.

(2) The relevant period is the period of three months beginning with—

(a) if regulation 41(2) applies (claimant with monthly earnings equal to or above the relevant threshold) the date on which the award of universal credit commences or, if later, the date on which the claimant applies for the LCWRA element to be included in the award; or

(b) in any other case, the first day on which the claimant provides evidence of their having limited capability for work in accordance with the Medical Evidence Regulations.

(3) But where, in the circumstances referred to in paragraph (4), there has been a previous award of universal credit—

(a) if the previous award included the LCWRA element, paragraph (1) does not apply; and

(b) if the relevant period in relation to that award has begun but not ended, the relevant period ends on the date it would have ended in relation to the previous award.

(4) The circumstances are where—

(a) immediately before the award commences, the previous award has ceased because the claimant ceased to be a member of a couple or became a member of a couple; or

(b) within the six months before the award commences, the previous award has ceased because the financial condition in section 5(1)(b) (or, if it was a joint claim, section 5(2)(b) of the Act was not met).

(5) Paragraph (1) also does not apply if—

(a) the claimant is terminally ill; or

(b) the claimant—

(i) is entitled to an employment and support allowance that includes the support component, or

(ii) was so entitled on the day before the award of universal credit commenced and has ceased to be so entitled by virtue of section 1A of the Welfare Reform Act 2007 (duration of contributory allowance).

(7) Where, by virtue of this regulation, the condition in section 5(1)(b) or 5(2)(b) of the Act is not met, the amount of the claimant's income (or, in the case of joint claimants, their combined income) is to be treated during the relevant period as such that the amount payable is the prescribed minimum (see regulation 17).

39.— Limited capability for work

(1) A claimant has limited capability for work if—

(a) it has been determined that the claimant has limited capability for work on the basis of an assessment under this Part or under Part 4 of the ESA Regulations; or

(b) the claimant is to be treated as having limited capability for work (see paragraph (6)).

(2) An assessment under this Part is an assessment as to the extent to which a claimant who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in Schedule 6 or is incapable by reason of such disease or bodily or mental disablement of performing those activities.

(3) A claimant has limited capability for work on the basis of an assessment under this Part if, by adding the points listed in column (3) of Schedule 6, each descriptor listed in column (2) of that Schedule that applies in the claimant's case, the claimant obtains a total score of at least—

(a) 15 points whether singly or by a combination of descriptors specified in Part 1 of that Schedule;

(b) 15 points whether singly or by a combination of descriptors specified in Part 2 of that Schedule; or

(c) 15 points by a combination of descriptors specified in Parts 1 and 2 of that Schedule.

(4) In assessing the extent of a claimant's capability to perform any activity listed in Schedule 6, it is a condition that the claimant's incapability to perform the activity arises—

(a) in respect of any descriptor listed in Part 1 of Schedule 6, from a specific bodily disease or disablement;

(b) in respect of any descriptor listed in Part 2 of Schedule 6, from a specific mental illness or disablement; or

(c) in respect of any descriptor or descriptors listed in—

(i) Part 1 of Schedule 6, as a direct result of treatment provided by a registered medical practitioner for a specific physical disease or disablement, or

(ii) Part 2 of Schedule 6, as a direct result of treatment provided by a registered medical practitioner for a specific mental illness or disablement.

(5) Where more than one descriptor specified for an activity applies to a claimant, only the descriptor with the highest score in respect of each activity which applies is to be counted.

(6) Subject to paragraph (7), a claimant is to be treated as having limited capability for work if any of the circumstances set out in Schedule 8 applies.

(7) Where the circumstances set out in paragraph 4 or 5 of Schedule 8 apply, a claimant may only be treated as having limited capability for work if the claimant does not have limited capability for work as determined in accordance with an assessment under this Part.

40.— Limited capability for work and work-related activity

(1) A claimant has limited capability for work and work-related activity if—

(a) it has been determined that—

(i) the claimant has limited capability for work and work-related activity on the basis of an assessment under this Part, or

(ii) the claimant has limited capability for work related activity on the basis of an assessment under Part 5 of ESA Regulations; or

(b) the claimant is to be treated as having limited capability for work and work-related activity (see paragraph (5)).

(2) A claimant has limited capability for work and work-related activity on the basis of an assessment under this Part if, by reason of the claimant's physical or mental condition,—

(a) at least one of the descriptors set out in Schedule 7 applies to the claimant;

(b) the claimant's capability for work and work-related activity is limited; and

(c) the limitation is such that it is not reasonable to require that claimant to undertake such activity.

(3) In assessing the extent of a claimant's capability to perform any activity listed in Schedule 7, it is a condition that the claimant's incapability to perform the activity arises—

(a) in respect of descriptors 1 to 8, 15(a), 15(b), 16(a) and 16(b)—

(i) from a specific bodily disease or disablement; or

(ii) as a direct result of treatment provided by a registered medical practitioner for a specific physical disease or disablement; or

(b) in respect of descriptors 9 to 14, 15(c), 15(d), 16(c) and 16(d)—

(i) from a specific mental illness or disablement; or

(ii) as a direct result of treatment provided by a registered medical practitioner for a specific mental illness or disablement.

(4) A descriptor applies to a claimant if that descriptor applies to the claimant for the majority of the time or, as the case may be, on the majority of the occasions on which the claimant undertakes or attempts to undertake the activity described by that descriptor.

(5) Subject to paragraph (6), a claimant is to be treated as having limited capability for work and work-related activity if any of the circumstances set out in Schedule 9 applies.

(6) Where the circumstances set out in paragraph 4 of Schedule 9 apply, a claimant may only be treated as having limited capability for work and work-related activity if the claimant does not have limited capability for work and work-related activity as determined in accordance with an assessment under this Part.

41. When an assessment may be carried out

(1) The Secretary of State may carry out an assessment under this Part where—

(a) it falls to be determined for the first time whether a claimant has limited capability for work or for work and work-related activity; or

(b) there has been a previous determination and the Secretary of State wishes to determine whether there has been a relevant change of circumstances in relation to the claimant's physical or mental condition or whether that determination was made in ignorance of, or was based on a mistake as to, some material fact,

but subject to paragraphs (2) to (4).

(2) If the claimant has [monthly][1] earnings that are equal to or exceed the relevant threshold, the Secretary of State may not carry out an assessment under this Part unless—

(a) the claimant is entitled to attendance allowance, disability living allowance, child disability payment or personal independence payment; or

(b) the assessment is for the purposes of reviewing a previous determination that a claimant has limited capability for work or for work and work-related activity that was made on the basis of an assessment under this Part or under Part 4 or 5 of the ESA Regulations,

and, in a case where no assessment may be carried out by virtue of this paragraph, the claimant is to be treated as not having limited capability for work unless they are treated as having limited capability for work or for work and work-related activity by virtue of regulation 39(6) or 40(5).

(3) The relevant threshold for the purposes of paragraph (2) is the amount that a person would be paid at the hourly rate set out in regulation 4 of the National Minimum Wage Regulations for 16 hours a week, converted to a monthly amount by multiplying by 52 and dividing by 12.

(4) If it has previously been determined on the basis of an assessment under this Part or underpart 4 or 5 of the ESA Regulations that the claimant does not have limited capability for work, no further assessment is to be carried out unless there is evidence to suggest that—

(a) the determination was made in ignorance of, or was based on a mistake as to, some material fact; or

(b) there has been a relevant change of circumstances in relation to the claimant's physical or mental condition.

90.—Claimants subject to no work-related requirements – the earnings thresholds

(1) A claimant falls within section 19 of the Act (claimants subject to no work-related requirements) if the claimant's monthly earnings are equal to or exceed the claimant's individual threshold.

(2) A claimant's individual threshold is the amount that a person of the same age as the claimant would be paid at the hourly rate applicable under regulation 4 or regulation 4A(1)(a) to (c)2 of the National Minimum Wage Regulations for—

(a) 16 hours per week, in the case of a claimant who would otherwise fall within section 20 (claimants subject to work-focused interview requirement only) or section 21 (claimants subject to work-preparation requirement) of the Act; or

(b) the expected number of hours per week in the case of a claimant who would otherwise fall within section 22 of the Act (claimants subject to all work-related requirements),

converted to a monthly amount by multiplying by 52 and dividing by 12.

(3) A claimant who is a member of a couple falls within section 19 of the Act if the couple's combined monthly earnings are equal to or exceed whichever of the following amounts is applicable—

(a) in the case of joint claimants, the sum of their individual thresholds; or

(b) in the case of a claimant who claims universal credit as a single person by virtue of regulation 3(3), the sum of—

(i) the claimant's individual threshold, and

(ii) the amount a person would be paid for 35 hours per week at the hourly rate specified in regulation 4 of the National Minimum Wage Regulations,

converted to a monthly amount by multiplying by 52 and dividing

by 12.

(4) A claimant falls within section 19 of the Act if the claimant is employed under a contract of apprenticeship and has monthly earnings that are equal to or exceed the amount they would be paid for—

(a) 30 hours a week; or

(b) if less, the expected number of hours per week for that claimant,

at the rate specified in regulation 4A(1)(d) of the National Minimum Wage Regulations, converted to a monthly amount by multiplying by 52 and dividing by 12.

(5) A claimant falls within section 19 of the Act if they are treated as having earned income in accordance with regulation 62 (minimum income floor).

(6) A person's monthly earnings are —

(a) the person's earned income calculated or estimated in relation to the current assessment period before any deduction for income tax, national insurance contributions or relievable pension contributions; or

(b) in a case where the person's earned income fluctuates (or is likely to fluctuate) the amount of that income, calculated or estimated before any deduction for income tax, national insurance contributions or relievable pension contributions, taken as a monthly average —

(i) where there is an identifiable cycle, over the duration of one such cycle, or

(ii) where there is no identifiable cycle, over three months or such other period as may, in the particular case, enable the monthly average to be determined more accurately,

and the Secretary of State may, in order to enable monthly earnings to be determined more accurately, disregard earned income received in respect of an employment which has ceased.

Schedule 8

Circumstances in which a claimant is to be treated as having limited capability for work

1. Receiving certain treatments

The claimant is receiving—

(a) regular weekly treatment by way of haemodialysis for chronic renal failure;

(b) treatment by way of plasmapheresis; or

(c) regular weekly treatment by way of total parenteral nutrition for gross impairment of enteric function,

or is recovering from any of those forms of treatment in circumstances in which the Secretary of State is satisfied that the claimant should be treated as having limited capability for work.

2.— In hospital

(1) The claimant is—

(a) undergoing medical or other treatment as a patient in a hospital or similar institution; or

(b) recovering from such treatment in circumstances in which the Secretary of State is satisfied that the claimant should be treated as having limited capability for work.

(2) The circumstances in which a claimant is to be regarded as undergoing treatment falling within sub-paragraph (1)(a) include where the claimant is attending a residential programme of rehabilitation for the treatment of drug or alcohol dependency.

(3) For the purposes of this paragraph, a claimant is to be regarded as undergoing treatment as a patient in a hospital or similar institution only if that claimant has been advised by a health care professional to stay for a period of 24 hours or longer following medical or other treatment.

3. Prevented from working by law

(1) The claimant—

(a) is excluded or abstains from work pursuant to a request or notice in writing lawfully made or given under an enactment; or

(b) is otherwise prevented from working pursuant to an enactment,

by reason of it being known or reasonably suspected that the claimant is infected or contaminated by, or has been in contact with a case of, a relevant infection or contamination.

(2) In sub-paragraph (1) *"relevant infection or contamination"* means—

(a) in England and Wales—

(i) any incidence or spread of infection or contamination, within the meaning of section 45A(3) of the Public Health Control of Disease) Act 1984 in respect of which regulations are made under Part 2A of that Act (public health protection) for the purpose of preventing, protecting against, controlling or providing a public health response to, such incidence or spread, or

(ii) tuberculosis or any infectious disease to which regulation 9 of the Public Health (Aircraft) Regulations 1979 (powers in respect of persons leaving aircraft) applies or to which regulation 10 of the Public Health (Ships) Regulations 1979 (powers in respect of certain persons on ships) applies; and

(b) in Scotland any—

(i) infectious disease within the meaning of section 1(5) of the Public Health etc (Scotland) Act 2008, or exposure to an organism causing that disease; or

(ii) contamination within the meaning of section 1(5) of that Act, or exposure to a contaminant,

to which sections 56 to 58 of that Act (compensation) apply.

4.— Risk to self or others

(1) The claimant is suffering from a specific illness, disease or disablement by reason of which there would be a substantial risk to the physical or mental health of any person were the claimant found not to have limited capability for work.

(2) This paragraph does not apply where the risk could be reduced by a significant amount by—

(a) reasonable adjustments being made in the claimant's workplace; or

(b) the claimant taking medication to manage their condition where such medication has been prescribed for the claimant by a registered medical practitioner treating the claimant.

5. Life threatening disease

The claimant is suffering from a life threatening disease in relation to which—

(a) there is medical evidence that the disease is uncontrollable, or uncontrolled, by a recognised therapeutic procedure; and

(b) in the case of a disease that is uncontrolled, there is a reasonable cause for it not to be controlled by a recognised therapeutic procedure.

6. Disabled and over the age for state pension credit

The claimant has reached the qualifying age for state pension credit and is entitled to disability living allowance, personal independence payment or adult disability payment.

Schedule 9

Circumstances in which a claimant is to be treated as having limited capability for work and work-related activity

1. Terminal illness

The claimant is terminally ill.

2. Pregnancy

The claimant is a pregnant woman and there is a serious risk of damage to her health or to the health of her unborn child if she does not refrain from work and work-related activity.

3. Receiving treatment for cancer

The claimant is—

(a) receiving treatment for cancer by way of chemotherapy or radiotherapy;

(b) likely to receive such treatment within 6 months after the date of the determination of capability for work and work-related activity; or

(c) recovering from such treatment,

and the Secretary of State is satisfied that the claimant should be treated as having limited capability for work and work-related activity.

4. Risk to self or others

The claimant is suffering from a specific illness, disease or disablement by reason of which there would be a substantial risk to the physical or mental health of any person were the claimant found not to have limited capability for work and work-related activity.

5. Disabled and over the age for state pension credit

The claimant has reached the qualifying age for state pension credit and is entitled to attendance allowance, the care component of disability living allowance at the highest rate or the daily living component of personal independence payment at the enhanced rate or the daily living component of adult disability payment at the enhanced rate in accordance with regulation 5(3) of the Disability Assistance for Working Age People (Scotland) Regulations 2022.