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Case No: CO/3572/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/07/2020

Before:

MR JUSTICE GARNHAM

Between:

**The Queen (on the application of (1) Sharon
Pantellerisco (2-4) SN,JN and NN (Children, by their
litigation friend SP))**

Claimants

- and -

The Secretary of State for Work and Pensions

Defendant

**Richard Drabble QC and Tom Royston (instructed by Child Poverty Action Group) for the
Claimants**

**Edward Brown and Stephen Donnelly (instructed by Government Legal Department) for
the Defendant**

Hearing dates: 12th May 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and others, and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 09:30am on 20 July 2020.

Mr Justice Garnham:

Introduction

1. By these Judicial Review proceedings, Ms Sharon Pantellerisco and her three children challenge the approach adopted by the Secretary of State for Work and Pensions (“the SSWP”) to the calculation of the benefit cap in the Universal Credit statutory scheme. The Claimants’ application raised questions as to the proper construction of the Universal Credit Regulations 2013 (“the Regulations”), the legality of those regulations and the Defendant’s application of them in the Claimants’ case.
2. I heard argument on this case on 12 May 2020 and was in a position to deliver a judgment later that month. It then came to my attention that the Court of Appeal were considering very similar arguments to those I had heard in a case called *Johnson*. Judgment was handed down in that case on 22 June (*R (Johnson) v SSWP* [2020] EWCA Civ 778). It was immediately apparent that that decision might have a significant impact on the resolution of the issues in the present case. Accordingly, I invited the parties to make further written submissions on the case. I am grateful to them for their responses.
3. In its original form the claim advanced three grounds:
 - i) As a matter of statutory construction, Reg.54 and Reg.61(2)(a) of the Regulations compelled the conclusion that money earned but not paid during an assessment period was nonetheless ‘income’ from that assessment period. The Secretary of State’s contrary interpretation constituted an error of law.
 - ii) The combined effect of Reg.54 and Reg.82(1)(a) produces an unreasonable and irrational result.
 - iii) The Regulations are discriminatory in breach of Article 14 ECHR because they discriminate against UC claimants who are paid on a lunar rather than calendar monthly basis.
4. Ground 1 was founded on the decision of the Divisional Court (Singh LJ and Lewis J) in *Johnson v SSWP* ([2019] EWHC 23 (Admin)). In the light of the Court of Appeal’s decision in that case, Richard Drabble QC for the claimants properly acknowledged that he could not succeed on Ground 1. He maintains his case on the other grounds, although Ground 2 was the primary focus of his argument.

The Facts

5. The First Claimant was born on 13 March 1979. She is the sole carer of her three dependent children, SN, JN and NN. All three children live with her, as does the First Claimant’s eldest child who is now aged 19. The youngest three children are all claimants in these proceedings. They are all still at school. The eldest child has recently finished her education. They all live together in rented accommodation, paying rent of £755pcm.
6. The First Claimant is employed for 16 hours a week at the national living wage rate. In the year to March 2020 that was a rate of £8.21 per hour. She is paid her salary on a 4-

weekly cycle. The First Claimant first claimed Universal Credit (“UC”) on 4 February 2019. Universal Credit is calculated by reference to monthly assessment periods. The First Claimant’s assessment period runs from 4 February 2019, the date she first made her claim.

7. The First Claimant’s employer is a “Real Time Information” (“RTI”) employer. Information about its employees is passed from the employer to HMRC and from them to the Department for Work and Pensions (“DWP”).
8. The fact that the First Claimant is paid on a 4-weekly cycle is of crucial significance to this application. As the Claimants put it in their Statement of Facts and Grounds:

“A year has 13 4-week periods in it, but 12 monthly assessment periods. Therefore, like the First Claimant, *everyone* paid on a 4-weekly cycle will, each year, have eleven UC assessment periods in which they receive one thirteenth of their annual salary, and one assessment period in in which they receive two thirteenths of their salary.”

9. For the purposes of the Regulations, the First Claimant’s “earned income” each month is the money actually received during each assessment period, irrespective of the period for which it was paid. The consequence, the First Claimant argues, is that instead of treating her as earning 1/12 of her annual wage in each of her 12 assessment periods, (which is essentially how the weekly earnings requirement is translated into a monthly benefit cap threshold by Reg. 82(1)(a)), the Regulations treat the First Claimant as earning 1/13 of her annual wage in 11 of her 12 assessment periods, and 2/13 of her annual wage in the other.
10. The effect can be explained by reference to the period July-August 2019. The First Claimant would have received £1,862.10 in UC if her income for the month had been taken as 1/12 of her annual income. Instead, she received a capped amount of £1,398.87. The reason why that was so was because her earned income for the month of the assessment period was treated as what she earned for 28 days of it, and as a result the benefit cap was applied.

The Legal Framework

11. The Welfare Reform Act 2012 (“WRA”) sets out how Universal Credit entitlements is to be calculated:

“8 Calculation of awards

(1) The amount of an award of universal credit is to be the balance of—

(a) the maximum amount (see subsection (2)), less

(b) the amounts to be deducted (see subsection (3)).

...

(3) The amounts to be deducted are—

(a) an amount in respect of earned income calculated in the prescribed manner (which may include multiplying some or all earned income by a prescribed percentage), and

(b) an amount in respect of unearned income calculated in the prescribed manner (which may include multiplying some or all unearned income by a prescribed percentage).”

12. The 2013 Regulations provided the general principles for the calculation and the relevant detailed provisions. Reg. 21 provides that an assessment period is “a period of one month beginning with the first date of entitlement and each subsequent period of one month during which entitlement subsists” and that ordinarily each assessment period begins on the same day of each month

13. Reg.54 and Reg.61 were at the forefront of the Claimants’ argument. Reg.54 sets out the general principles for the calculation of earned income:

“(1) The calculation of a person's earned income in respect of an assessment period is, unless otherwise provided in this Chapter, to be based on the actual amounts received in that period.”

14. Reg.61 identifies the information required for calculating earned income:

“(1) Unless paragraph (2) applies, a person must provide such information for the purposes of calculating their earned income at such times as the Secretary of State may require.

(2) Where a person is, or has been, engaged in an employment in respect of which their employer is a Real Time Information employer—

(a) the amount of the person's employed earnings from that employment for each assessment period is to be based on the information which is reported to HMRC under the PAYE Regulations and is received by the Secretary of State from HMRC in that assessment period; and

(b) for an assessment period in which no information is received from HMRC, the amount of employed earnings in relation to that employment is to be taken to be nil.

(3) The Secretary of State may determine that paragraph (2) does not apply—

(a) in respect of a particular employment, where the Secretary of State considers that the information from the employer is unlikely to be sufficiently accurate or timely; or

(b) in respect of a particular assessment period where—

(i) no information is received from HMRC and the Secretary of State considers that this is likely to be because of a failure to report information (which includes the failure of a computer system operated by HMRC, the employer or any other person); or

(ii) the Secretary of State considers that the information received from HMRC is incorrect, or fails to reflect the definition of employed earnings in regulation 55, in some material respect.

(4) Where the Secretary of State determines that paragraph (2) does not apply, the Secretary of State must make a decision as to the amount of the person's employed earnings for the assessment period in accordance with regulation 55 (employed earnings) using such information or evidence as the Secretary of State thinks fit.

(5) When the Secretary of State makes a decision in accordance with paragraph (4) the Secretary of State may—

(a) treat a payment of employed earnings received by the person in one assessment period as received in a later assessment period (for example where the Secretary of State has received the information in that later period or would, if paragraph (2) applied, have expected to receive information about that payment from HMRC in that later period); or

(b) where a payment of employed earnings has been taken into account in that decision, disregard information about the same payment which is received from HMRC.

...

(7) In this regulation “Real Time Information Employer” has the meaning in regulation 2A(1) of the PAYE Regulations³.”

15. Reg. 79 identifies circumstances where the benefit cap applies:

“(1) Unless regulation 82 or 83 applies, the benefit cap applies where the welfare benefits to which a single person or couple is entitled during the reference period exceed the relevant amount [determined under regulation 80A (relevant amount)].

(2) The reference period for the purposes of the benefit cap is the assessment period for an award of universal credit.”
(Emphasis added)

16. Reg. 80A defines “the relevant amount”:

“(1) The relevant amount is determined by dividing the applicable annual limit by 12.

(2) The applicable annual limit is—

(a) £15,410 for a single claimant resident in Greater London who is not responsible for a child or qualifying young person:

(b) £23,000 for—

(i) joint claimants where either joint claimant is resident in Greater London;

(ii) a single claimant resident in Greater London who is responsible for a child or qualifying young person;

(c) £13,400 for a single claimant not resident in Greater London who is not responsible for a child or qualifying young person;

(d) £20,000 for—

(i) joint claimants not resident in Greater London;

(ii) a single claimant not resident in Greater London who is responsible for a child or qualifying young person...”

17. Reg. 81 provides for reduction of universal credit where the benefit cap applies:

“(1) Where the benefit cap applies in relation to an assessment period for an award of universal credit, the amount of the award for that period is to be reduced by—

(a) the excess; minus

(b) any amount included in the award for the childcare costs element in relation to that assessment period.

(2) But no reduction is to be applied where the amount of the childcare costs element is greater than the excess.

(3) The excess is the total amount of welfare benefits that the single person or the couple are entitled to in the reference period, minus the relevant amount [determined under regulation 80A]”

18. Reg. 82 provides for exceptions to that arrangement:

“(1) The benefit cap does not apply to an award of universal credit in relation to an assessment period where—

- (a) the claimant's earned income or, if the claimant is a member of a couple, the couple's combined earned income, is equal to or exceeds the amount of earnings that a person would be paid at the hourly rate set out in regulation 4 of the National Minimum Wage Regulations for 16 hours per week, converted to a monthly amount by multiplying by 52 and dividing by 12; or
 - (b) the assessment period falls within a grace period or is an assessment period in which a grace period begins or ends.
- (2) A grace period is a period of 9 consecutive months that begins on the most recent of the following days in respect of which the condition in paragraph (3) is met—
- (a) a day falling within the current period of entitlement to universal credit which is the first day of an assessment period in which the claimant's earned income (or, if the claimant is a member of a couple, the couple's combined earned income) is [less than—]
 - (i) where the assessment period began before 1st April 2017, £430; or
 - (ii) in any other case, the amount calculated in accordance with paragraph (1)(a)];
 - (b) a day falling before the current period of entitlement to universal credit which is the day after a day on which the claimant has ceased paid work.
- (3) The condition is that, in each of the 12 months immediately preceding that day, the claimant's earned income or, if the claimant was a member of a couple, the couple's combined earned income was equal to or [exceeded—]
- (a) in any month beginning before 1st April 2017, £430; and
 - (b) in any other case, the amount calculated in accordance with paragraph (1)(a)].
- (4) “Earned income” for the purposes of this regulation does not include income a person is treated as having by virtue of regulation 62 (minimum income floor).”

Government Policy and Related Evidence

19. Carol Krahé is the Universal Credit Policy Team Leader at the DWP with responsibility for the benefit cap. She provided two helpful witness statements which explain the scheme. She explained in her first statement that UC was:

“designed as a measure with a far-reaching social purpose. In particular, it was intended to bring about significant behavioural changes, incentivise work and increased earnings and to make the system simpler and fairer. It was designed to address both the complexity and perverse incentives inherent in the legacy benefit system, which had arisen as a result of its piecemeal development over a number of years...

Therefore, the policy objectives of UC included:

(a) developing a system that was affordable, rewarding work and personal responsibility;

(b) establishing a fairer relationship between benefit recipients and those who pay for them, particularly between out-of-work benefits and those receiving low pay;

(c) targeting financial support more efficiently, by supporting those in vulnerable circumstances;

(d) establishing a simpler system for individuals to understand and for the Government to administer.

(e) Designing a system that will operate for all classes of case, straddling in work and out of work cases, which is essential if the system is to have strong work incentives.”

20. She provided an overview of how Universal Credit operates noting that:

“Entitlement is assessed by reference to a claimant's circumstances during a monthly assessment period. Recipients usually receive their first UC payment around five weeks after their claim - made up of a one-month assessment period and up to seven days for the payment to reach a claimant's account. Their UC entitlement is then calculated for each assessment period in the same way. Changes in circumstances can therefore be taken into account from month to month.”

21. She explained the assessment period structure:

“21. The calculation of UC in each monthly assessment period is a cornerstone of UC policy. All changes that occur in the assessment period are applied to the whole assessment period, and each policy consideration is looked at across the assessment period - such as the inclusion of disability elements, child elements, childcare costs, carer's element, conditionality arrangements, the treatment of income, capital, deductions, etc.

22. The assessment period is calculated as a calendar month. A calendar monthly basis is used as it is considered to best reflect the most common payment cycles (whether in terms of income, such as salary, or outgoings, such as bill payments).

23. The objective of workability and efficiency requires the same structure to operate for the whole population, notwithstanding that there are, of course, different types of payment cycles (such as irregular pay or weekly or lunar monthly pay).

24. The calendar month structure reflects the general position in modern working life, where individuals, even in more precarious employment, are usually paid monthly. Where claimants are unemployed, monthly assessment and payment of UC creates the discipline of budgeting and managing money on a monthly basis, which is considered to help improve skills which would reduce poverty whether in work or not. The same approach is applied whether a claimant is employed, unemployed or self-employed. This allows UC to be calculated on the same basis whether a person moves in and out of work or whether their earnings are composed of mixed employed and self-employed earnings.”

22. She referred to a statement from the responsible minister, Lord Freud, in the House of Lords during the passage of the bill that led to the WRA. He said:

“... I need to make the point about the difference between assessment periods and payment periods, which is important to bear in mind. Currently, existing out-of-work benefits are made on an assessment period of a week, with a fortnightly payment cycle. That is fairly typical. The universal credit benefit represents a new approach focused clearly on work, which encourages out-of-work households to budget on a monthly rather than a fortnightly basis in the belief that it will better prepare people for the reality of working life. The figures have already been used. Currently, 75 per cent of all those in employment and 51 per cent of those earning less than £10,000 a year receive earnings monthly. In addition, monthly direct debits for household bills are often cheaper than more frequent billing options.

Many noble Lords raised the evidence base. As noble Lords know, we are conducting qualitative and quantitative research with claimants on many issues but particularly on the payment frequency issue. As some noble Lords have pointed out, on 7 October we published a report, Perceptions of welfare reform and Universal Credit. This outlines findings from research we conducted with claimants, the public, employers and staff in December 2010 and January 2011. There were critical findings in that piece of research that we are looking at with great attention.

I understand that many people on low incomes will be used to managing the fortnightly payment of benefits, and I am determined to ensure that there will be appropriate budgeting support to meet the needs of claimants. We want families to be able to manage their financial affairs in a manner that best

reflects the demands of modern life, whether they are in work or out of work, and we are working with stakeholders and benefit experts to that end. We are setting up a series of demonstrator projects, as they are called, with housing associations and local authorities to look at how to structure the payment of rents to landlords. These demonstrator projects will look at a wide range of budgeting support. We need to make sure that budgeting advice and support is available for those who need it in order to help them manage the change.

If you separate assessment from payment, the monthly assessment is intended to reduce the burden on claimants and reduce the risk of overpayments compared with a system where benefits are reassessed on a weekly basis, so there is a separation between the assessment period and the payment period."

23. Ms Krahé also explained the process of automating universal credit:

"31. The earnings calculation involves the use of "real time information" ("RTI"). Under RTI, information about tax and other deductions under the PAYE system is transmitted to HMRC by the employer every time an employee is paid. Regulation 54(1) enables us to use RTI data feeds to establish a claimant's earnings, thereby automating the UC calculation, removing error, potential fraud and attribution rules which would result in over and under payments."

24. Under the current regulations, the calculation of the earnings cap is based, not on the number of hours worked, but on the amount of earnings received. Ms Krahé explained that that approach was preferred for the following reasons:

"a) It is based upon an assessment period, as is the case for all other aspects of the calculation.

b) It supports a fundamental principle of UC by reflecting the cash-flow of the household in the assessment period rather than the number of hours that a person is working.

c) It uses RTI, which allows for an automatic calculation and is therefore efficient. UC is not designed to collect information regarding number of hours worked.

d) It provides for additional flexibility where, for example, a person might be able to secure employment at a higher rate and therefore choose to work fewer hours.

e) A fixed amount can be changed in future with minor adjustments.

f) The original fixed amount ... was a clear comparison with the level at which lone parents could access Working Tax Credit. It

was recognised that the benefit cap would apply to lone parents to a greater extent and as such this approach would assist with smooth transition between the old and new systems.”

25. She acknowledged that the arrangement might act to the disadvantage of some, including the First Claimant:

“49. It is of course the case that this particular decision will not be to the benefit of every claimant. The Claimant is an example of a person who would be in a more advantageous position under the old system which uses a different methodology (essentially hours worked per week) rather than a methodology based on received earnings.

50. The earnings threshold for UC is prescribed in regulation 82 of the Universal Credit Regulations 2013. This regulation originally provided an exemption from the benefit cap where monthly earnings were £430 or more in each assessment period. The sum of £430 was calculated by multiplying 16 hours by the expected National Minimum Wage (NMW) for October 2012 of £6.19 and rounding up the monthly equivalent (£429.17). Accordingly, even at the outset, it would in fact be necessary to work slightly more than 16 hours per week at the NMW in order for the exemption to apply.”

26. She concluded:

“66. The application of the earnings threshold to the benefit cap policy as applied to the Claimant is noted by the DWP. However, the policy and the legislation are clear that in order to be exempt from the benefit cap a prescribed level of earnings must be received in an assessment period and not a prescribed number of hours of work. The Claimant's earnings are not sufficient in each assessment period for the exemption to apply. If the Claimant were to increase her hours by a small amount (around 1.5 hours per week) the exemption would apply and the claimant would not be capped. Alternatively, if the Claimant were able to find paid employment at a slightly higher rate, the exemption also would apply. The Claimant is also entitled to apply for additional support through Discretionary Housing Payments from her local authority.”

27. During the course of the hearing, there was some debate as to whether RTI included information as to the period in respect of which the payment was made i.e. whether the Claimant was being paid for the work done on a 4-week period. At my request, at the close of the argument both parties provided further statements addressing the question as to what information was conveyed as part of the RTI.
28. Helen Hargreaves, former Associate Director of Policy at the Chartered Institute for Payroll Professionals, explained how required data is submitted to HMRC via the RTI system. She also explained what data is required. She says that “Data Item 42” relates

to pay frequency. She says that “the employer is directed to enter one of a number of options from weekly to monthly pay” and that HMRC “transmits some of the data items to DWP”.

29. Ms Krahé filed a witness statement in response. She provided an overview of RTI. She explains:

“9. DWP uses a system called Real Time Earnings (RTE) to obtain a relevant subset of earnings information from the RTI database. For the purpose of calculating UC, the DWP receives a subset of the earnings information in order to calculate a person’s UC award in each assessment period. The system is built upon the basis that all relevant information is fed into the RTE system for the calculation of UC. There are data protection issues that regulate the information that can properly be processed by DWP.

10. The information that is communicated to the UC system to calculate the UC award does not include ‘payment pattern’ or pay cycle information. This information is not routinely accessible to operational delivery staff when viewing what has been accounted for in determining the UC award”

30. She continues:

“It is not therefore possible with the current arrangements to process the ‘pay cycle’ data as part of the UC award. As I indicated in my first statement, the DWP is considering reforms in relation to pay cycles. However, this requires considerable input from policy, legal and technical stakeholders. It is not realistic to rely on the fact that HMRC is able to capture pay cycle data to conclude that UC decision makers can approach the calculations in the way suggested by the Claimants (i.e. by assuming that any salary payment which is paid with a 28-day ‘indicator’ will inevitably be paid in the same way on an ongoing basis).”

31. She concluded that:

“The fundamental problem remains the need to maintain the integrity of the monthly Assessment Period structure which underpins UC and the need to base calculations upon actual data rather than predictions as to future earnings (which, in this context, are notoriously uncertain). Any reform needs to have regard to the complications of fluctuating pay patterns, multiple employment arrangements (with different patterns), and other forms of earnings and income.”

The Court of Appeal's decision in *Johnson*

32. The leading judgment in *Johnson* was given by Rose LJ. Irwin LJ and Underhill LJ agreed. Underhill LJ added observations of his own.
33. Rose LJ pointed out that Universal Credit was a single welfare payment, paid monthly in arrears and assessed by reference to a fixed monthly assessment period which ran from the first date of entitlement. It included a standard allowance and amounts to reflect various elements. The amount paid was the maximum amount available for the various elements, less any deductions in respect of earned and unearned income. Reg.54 provided that the calculation of earned income in respect of an assessment period was to be based on the actual amounts received in that period. Reg.22 provided for the retention and deduction of earned income.
34. The system gave rise to a problem (the "non-banking day salary shift") because it did not accommodate the fact that people who were usually paid their salary on a particular day around the last banking or working day of the month would be paid on a different day if their usual payment date fell on a weekend or bank holiday. In certain circumstances, that led to two monthly salary payments falling within one monthly assessment period and no salary payment falling within the next period. The Divisional Court had held that the problem had arisen because the Secretary of State had wrongly construed Reg.54. It found that the wording of Reg.54 indicated that an adjustment had to be made where some of the income received related to a different assessment period.
35. The Court dismissed the Secretary of State's appeal but held that the Divisional Court had erred in construing Reg.54. The declaration granted by the Divisional Court was to the effect that earned income was to be based on, but not necessarily the same as, the actual receipt in that assessment period, but did not attempt to describe when the earned income would not be the same as the amount actually received. The wording of Reg.54 was designed to avoid the need for that kind of examination of the relationship between the work done and the amount received in any one assessment period. That was essential because the system of universal credit was intended to be automated.
36. In considering the irrationality argument, Rose LJ observed that the variation in the amounts of benefit awarded to claimants in the respondents' position was extreme. One might expect the fluctuations in universal credit awards would be matched by equal and opposite fluctuations in wages, so that the actual income to the household stayed roughly stable. But that was not borne out by the evidence. Those oscillations caused considerable hardship. The "work allowance" calculation provided for in Reg.22 was intended to allow claimants to keep, from their earned income, the applicable amount without suffering any reduction in the amount of their universal credit award. However, in the assessment periods in which the respondents received two salaries they could only deduct one work allowance whereas in those periods in which they received no salary there was nothing from which the work allowance could be deducted, meaning that each time the problem arose they lost one allowance ([52]-[53], [59]-[60], [62]).
37. The reason why the assessment period was set at one month, rather than one week like many legacy benefits, was because most people were paid monthly. However, it would not be inconsistent with the overall universal credit scheme to devise an exception to solve the problem. It was inevitable that in any scheme designed to simplify and reduce the cost of delivering benefits there would need to be bright lines. There would often

be hard cases with people falling on just the wrong side of the line. However, those situations were readily distinguishable from the significant, predictable but arbitrary effects on benefit of a regular monthly salary which frequently fell into different assessment periods because of the non-banking day salary shift. The benefit awards were calculated by a computer system which had cost a significant amount to build and any additional adjustments would increase that cost. However, the Court did not accept that the programme could not be modified ([70], [75], [82]).

38. Many tens of thousands of people were likely to experience the same problem as the respondents. It was unrealistic to expect employees in low-paid jobs to have the bargaining power to convince their employers to change the date when they were paid. No one had warned the respondents that the date when they made the claim might affect how much money they received, and no one had suggested that they ought to submit their benefit claims in the middle of the month. The legislative policy behind the scheme was to encourage claimants to work. However, the evidence established that there were a very substantial number of claimants who were likely to conclude that it was preferable in many ways not to work because they would then receive a stable, maximum amount of universal credit each month ([94], [96], [98], [106]).
39. Applying *R (on the application of Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), the Court observed that the threshold for establishing irrationality was very high, but it was not insuperable. This was one of those rare instances where the Secretary of State's refusal to put in place a solution to this very specific problem was so irrational that no reasonable Secretary of state would have struck the balance in that way ([50], [107], [110]).
40. The Court granted a declaration that the earned income calculation method in Chapter 2 of Part 6 of the Universal Credit Regulations 2013 is irrational and unlawful as employees paid a monthly salary, whose universal credit claim began on or around their normal pay date, are treated as having variable earned income in different assessment periods when pay dates for two (consecutive) months fall in the same assessment period in the way described in the judgment.
41. Having upheld the decision in the claimants' favour on irrationality grounds, the Court declined to rule on the discrimination ground.

The Argument after *Johnson*

42. Mr Drabble argues that the fundamental problem confronted by the First Claimant is that the method of payment of her wages – four-weekly rather than calendar monthly – means that the exception to the cap only applies in one assessment period in the year. That consequence, he says, was not foreseen and was not deliberate.
43. He argues that it was irrational not to draft the exception to the benefit cap in terms which apply equally to claimants working 16 hours per week at national living wage (“NLW”) level, but paid on four weekly basis, and those who work the same amount but paid on a monthly basis. (He would also submit that similar considerations apply to those paid on a weekly or fortnightly basis, but that is not these Claimants' case). Such patterns of payment cannot be said to be irregular. Such drafting would not be contrary to the basic architecture of the UC scheme, just as drafting a narrow exception or

amendment to deal with the non-banking day salary shift problem found in *Johnson* would not be.

44. He says that, on the one hand, the disadvantage of not fine-tuning the benefit cap exception is obvious and substantial and, on the other, that there would be no substantial disadvantages to such fine-tuning. The Claimants maintain that creating a modified exception to the benefit cap would be consistent with the nature of the universal credit regime. Adopting a sensible solution dealing with problems created by regular patterns of pay beyond the control of the claimant would be entirely consistent with the nature of the regime.
45. In response to the two remaining grounds, Mr Brown, for the Secretary of State argues that the decision of the Court of Appeal “authoritatively reaffirms the statutory purpose of the Regulations” which is relied on by the Secretary of State on the question of reasonableness. He says that the Court of Appeal’s conclusion - that the Secretary of State’s refusal to put in place a solution to the very specific problem identified in that case was unreasonable - was expressly confined to the ‘very specific problem’ of ‘non-banking day salary shift’. In that regard he points to the concurring judgment of Underhill LJ who regarded *Johnson* as a case which turned on its own particular circumstances and which had no impact on the lawfulness of the universal credit system more generally.
46. He argues that any extension of the *Johnson* approach to other pay cycles would be contrary to the clear direction of the Court of Appeal and would reintroduce precisely the uncertainty which the Court of Appeal, in overturning the Divisional Court, were concerned to remove.

Discussion

Ground 1

47. Following *Johnson* at [46] to [50], the rationality challenge here must be viewed as a *Wednesbury* challenge. The question to be addressed is whether the decision of the Secretary of State, as to the drafting of the Regulations was outside the range of reasonable decisions open to the decision maker. The particular decision in issue here is the decision not to include in the Regulations an additional express adjustment to ensure that a claimant working 16 hours per week at NLW level, but paid on a four weekly basis, receives the same UC as those who earn the same amount but are paid on a monthly basis. I will refer to that issue as the “lunar month problem”.
48. In considering the equivalent question in that case, the Court of Appeal in *Johnson* adopted the framework set out in *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin) at [113]:

“We accept that in principle it was open to the Lord Chancellor to adopt a policy response which did not directly correspond to the problem which it was designed to meet. A policy-maker may reasonably decide that the disadvantages of a finely tuned solution to a problem outweigh its advantages and that a broader measure is preferable, even if the broader measure is both over- and under-inclusive in that it catches some cases in which there is no or no significant problem and fails to catch some cases

in which the problem occurs. Such an approach is in any event consistent with the nature of the Scheme, which uses criteria such as PPE as proxies for the complexity of cases. It is inherent in the use of such proxies that they will result in under-compensation in some cases. But this does not cause unfairness if it is off-set by overcompensation in other cases. What matters is that overall a reasonable balance is struck.”

49. Rose LJ applied that approach to the case before her. She said (at [50]):

“That, I believe, provides a helpful framework for how to approach irrationality in this case too. We need to consider what are the disadvantages of deciding not to “finetune” the Regulations thereby allowing the non-banking day salary shift problem to persist unresolved; what are the disadvantages of adopting a solution to the nonbanking day salary shift problem; would a solution be consistent or inconsistent with the nature of the universal credit regime; and has a reasonable balance been struck by the SSWP - or rather is it possible to say that no reasonable Secretary of State would have struck the balance in the way the SSWP has done in this case?”

50. I approach the issue in this case in the same way. I deal with the first three issues identified by the Court of Appeal first. I then address the “other factors” relevant to the rationality of not creating an exception to which Rose LJ referred at [92]. I then consider the final, and determinative issue; whether it should be concluded that no reasonable Secretary of State would have struck the balance in the way that it was struck here. In addressing that last crucial issue, I remind myself that the “*threshold for establishing irrationality is very high, but not insuperable*” ([107]).

The disadvantages of allowing the lunar month problem to persist unresolved

51. There seems to me a number of obvious disadvantages in the operation of the present arrangement.
52. First, the First Claimant is in continuous and regular employment, earning regular amounts of money throughout every assessment period. However, in 11 out of 12 assessment periods the Regulations treat her (and others in her position) as having earned less income for that period than is in fact the case, because of the dates on which she was paid. The result is that she receives substantially less UC, perhaps some £400 per month or 20%, less, than would be the case if she was paid monthly. That is, self-evidently, a very significant reduction for somebody of modest means. As Mr Drabble correctly puts it, the First Claimant is treated as if she were not working enough, when in fact she is. Then, once a year, the Regulations treat her as having almost double the income she has actually earned in that period.
53. Second, the legislative policy, evident from s8(3) WRA 2012 and Reg.22 and Reg.82 of the 2013 Regulations, is to encourage work. But the impact of the regime contained in the Regulations discourages work when the work available is paid on a lunar month basis. In such cases, for the majority of months the Regulations subject the First Claimant to the benefit cap as if she were not working, resulting in her receiving an arbitrarily reduced overall UC award. The scheme is said to be designed to be

responsive to changes in earned income, and to make work pay to the fullest possible extent. But in these circumstances, it is neither.

54. Third, the scheme causes the First Claimant's household income to fluctuate dramatically once a year, making it difficult to budget. A similar phenomenon was described by the Court of Appeal in *Johnson* (at [52-55]). The Court noted that fluctuations in universal credit awards might be expected to be matched by equal and opposite fluctuations in wages, so that the actual income to the household stayed roughly stable. But that was not borne out by the evidence in *Johnson* and it is certainly not borne out of the evidence in the present case. It is apparent from the statement of the First Claimant that the "oscillations" in UC cause considerable hardship to her family.
55. Fourth, the effect of the Regulations is to produce different levels of cap depending on the claimant's payday and the payment cycle chosen by the employer. Mr Brown suggested to me that claimants could speak to their employers to ask for their salary pattern to be altered. That seems to me wholly unrealistic. The First Claimant explains the problem in her case in her statement. She says she has asked her employers, a care provider, "whether they can pay me monthly rather than 4-weekly but for a number of reasons this is not possible for them. The main reason is that the local authority only pay them every 4 weeks, therefore if they were to change to monthly payments to me they would effectively be working on a deficit each month and not have funds to cover the payments."
56. That, as a likely approach of many employers, seems to me entirely understandable and foreseeable. In my view, few employees will be able to persuade, or require, their employers to change their payment pattern and the idea of having to choose employment based, not on the nature of the work, but on the particular pay cycle operated by the employer seems to me absurd. The consequence is to give the UC scheme an appearance of arbitrariness. As this point was put in *Johnson*:

"It is ... no part of the policy underlying universal credit to encourage claimants to base their employment choices on the salary payment date offered by a prospective employer. Yet that is what is happening for these Respondents."

The disadvantages of adopting a solution to the lunar month problem

57. The disadvantages of establishing an exception to cater for these cases are the same as those identified in *Johnson* at [68]:

"i) The supposed irrationality is based on a misconception because it aligns the assessment period with the period of a calendar month.

ii) There is a need for bright lines to ensure that the universal credit system operates in a coherent way.

iii) It is important to ensure that the calculation of the monthly award of universal credit can take place in an automated way without the need for

"manual intervention" by a DWP officer carrying out an individual calculation of the amount of the award."

58. Those disadvantages are discussed in the judgment of Rose LJ at [69] to [83]. I do not propose to echo what was said there, and instead only pick up points of particular importance on the facts of the present case.
59. As to the first suggested disadvantage, it was argued in *Johnson* that "the problem arises because the Respondents are examples of many kinds of people who receive their pay "irregularly"". The irregularity there was that caused by the fact that many monthly payments of salary are not paid on precisely the same date each month. The Court of Appeal rejected the suggestion that such a pattern could fairly be described as "irregular". The position is stronger still here where the First Claimant is undoubtedly paid regularly, once every four weeks.
60. As to the second disadvantage, the need for a bright line, Rose LJ observed at [73]:
- "In my judgment that argument was a strong point when construing the wording of the general principle in regulation 54 but has less merit when considering the rationality of failing to make an exception for this particular group of people. In fact, there are already several exceptions to the bright lines set out in the Regulations where it is clear that a policy imperative has overridden the need for simplicity. Regulation 76 provides that where a person receives a payment from an approved scheme providing compensation or support such as that given to people diagnosed with variant Creutzfeldt-Jacob disease or who suffered forced labour during the Second World War or who were victims of the Manchester bombing on 22 May 2017, such payment whether it is capital or income is to be disregarded when calculating unearned income."
61. She concluded at [75]:
- "It is inevitable that in any scheme designed to simplify and reduce the cost of delivering benefits there will need to be bright lines. I agree that there will often be hard cases with people falling just on the wrong side of the line where their needs and circumstances are otherwise indistinguishable from those falling just on the right side - the requirement that the claimant be 18 years old is an obvious example. It may well be rational to introduce such a requirement on the ground that the benefits outweigh the disadvantages arising from those bright lines. In my judgment, however, those situations are readily distinguishable from the significant, predictable but arbitrary effects on benefit of a regular monthly salary which frequently falls into different assessment periods because of the non-banking day salary shift."
62. In my judgment the same "significant, predictable but arbitrary effects" are found here.
63. The Court of Appeal in *Johnson* regarded the third disadvantage, the need for automation, as similarly unconvincing on the facts of the case then before the court. It is true that at [39], when discussing the proper construction of Reg. 56 Rose LJ said:

“In my judgment the wording of regulation 56 is designed to avoid the need for that kind of examination of the relationship between the work done and the amount received in any one assessment period. That is essential because...the system of universal credit is intended to be automated so that the calculation of the monthly amount can be performed by a computer rather than a DWP officer able to make an evaluative determination.”

64. However, at [83] when addressing the issue of rationality, she concluded:

“...It must be the case that the computer programme is sophisticated enough to enable that to happen. If this problem had emerged for the first time as a result of the experience of some of the first migrated cohort of 10,000, I cannot accept that the Department would have responded by saying that it was now too late to modify the scheme and that nothing could be done to resolve it without throwing away all the money so far spent.”

65. On the evidence in the present case, it is plain that some, at least, of the necessary computer software is in place and can readily be utilised. As noted above at [28] – [31], the data provided by employers to HMRC includes pay frequency. Presently, the DWP routinely receives only a subset of that data which does not include pay frequency; it is said that that information “is not routinely accessible to operational delivery staff”. However, it is not suggested that other staff do not have access to that data or that it could not be made available.

Would a solution be consistent or inconsistent with the nature of the universal credit regime?

66. I set out at paragraph 19 above, the policy and intent behind the UC scheme as described by Ms Krahé, the DWP’s Policy Team Leader. “It was intended to bring about significant behavioural changes, incentivise work and increased earnings and to make the system simpler and fairer. It was designed to address both the complexity and perverse incentives inherent in the legacy benefit system.”

67. One important element of the UC regime was to align the assessment period with monthly payment and charging cycles. Rose LJ said at [56]:

“... It is no part of the policy underlying universal credit to encourage claimants or employers to adopt a non-monthly salary cycle; on the contrary the choice of monthly assessment periods was based in part on the increasing prevalence of that salary cycle amongst the working population and because many household bills are payable monthly. Indeed, the alignment of the duration of the assessment period with household outgoings is intended to encourage responsible budgeting by low income claimants.”

68. I accept that accommodating a four-weekly salary cycle would not advance the behavioural change of encouraging people to plan their working lives around a monthly work and payment pattern, and that is a consideration in favour of the Secretary of State’s present stance. But first, the weight to be attached to that consideration is somewhat reduced by the evidence discussed at [64] above to the effect that the data

needed to manage four-weekly payments is already collected by HMRC. And second, that is not the only behavioural change in prospect. A solution to the lunar month problem would encourage people for whom the only employment available, or likely to become available, was paid four-weekly to take and keep such work, a central element in the UC regime.

69. I accept too that introducing a solution to the lunar month problem would make the UC process technically more complicated, although for the reasons discussed, it seems to me unlikely to be unmanageable. Furthermore, in my view, such a solution would make UC conceptually much simpler.
70. For the reasons discussed above, a solution to the lunar month problem would reduce disincentives to work, make the system fairer and reduce perverse incentives. In those respects, a solution of the lunar month problem would be consistent with the nature of the UC regime.
71. Ms Krahé says in her witness statement that the fundamental problem remains the need to maintain the integrity of the monthly assessment period structure which underpins UC and the need to base calculations upon actual data. But in my judgment the collection and deployment of the “actual data” provided to HMRC would enable calculations to be made that not only respect the integrity of the monthly assessment period structure but enhance it by ensuring the calculation of income in each assessment period accurately represents actual receipts.

Other relevant factors

72. There are here, as there were in *Johnson*, a number of other factors relevant to the rationality of the decision.
73. First, it is relevant to consider whether the possibility of solving the lunar month problem was considered and rejected when the Regulations were adopted. This issue was addressed in *Johnson* at [84] to [91] where the Court of Appeal concluded that there was nothing to suggest that the problem of advance payment of monthly salary was highlighted to the Minister. The lunar month problem, similarly attracted little attention in the contemporaneous evidence.
74. It was the Secretary of State’s case, as explained in Ms Krahé’s statement and noted above, that the “objective of workability and efficiency required the same structure to operate for the whole population, notwithstanding that there are different types of payment cycles”, including lunar monthly pay. The Minister expressed the view that monthly assessment would reduce the burden on claimants by reducing the risk of overpayments compared with weekly assessments (see [21] above). Ms Krahé’s statement discusses the options for calculating the sum referred to in the exemption from the benefit cap. But there was no evidence that specific consideration was given to solving the lunar month problem as it is identified in the present proceedings.
75. The second point of potential relevance is the “size of the cohort” (cf *Johnson* [93]). I was told that payment in four-weekly periods is not uncommon: the 2017 statistics show something like 13% of new UC claimants were in their last job paid 4-weekly (with a further 58% paid on other non-monthly but regular patterns which could be vulnerable

to the same problem.) This problem affected, and continues to affect, a great number of claimants to UC.

76. Third, the duration of the impact on the Claimants. As was the case in *Johnson*, at “present there is no way for the Respondents themselves to put matters right once the start and end dates of their assessment periods are fixed by the date on which they submit their claim”. In *Johnson*, the problem would arise in several months each year; in the Claimants’ case it arises in 11 out of every 12 months. As in *Johnson*, the problem will last throughout the years of the claimant’s period of entitlement. It cannot be solved by a claimant stopping and restarting their claim because, as Rose LJ observes at [95], Reg. 21(3C) “provides that where a new claim is made within six months of the closure of an earlier claim, then if the claimant continued to meet the basic conditions for universal credit throughout those six months, the assessment period for the new claim begins on the same day as the assessment period of the old claim.”
77. Fourth, the arbitrary nature of the occurrence. There is no evidence that the First Claimant was warned at the time she made her claim for UC of the potential effect of the fact that her employers paid her on a four-weekly basis. She says that:

“at the beginning of May I received a letter saying that I had been overpaid because the benefit cap had not been applied and that DWP would seek recovery of that overpayment. I could not believe it. ... I disputed the fact that the benefit cap was being applied to me given that I was working 16 hours at national minimum wage ... Ultimately, DWP's position remained that .. despite working 16 hours at national minimum wage, I did not earn enough to meet the exemptions threshold... At the same time given that I am working exactly the same number of hours and earning the same amount as somebody working 16 hours at national minimum wage who happens to be paid monthly I do not understand why my family's budget should be subject to the cap. It is difficult to explain to somebody not in my situation just how devastating an impact it has had and continues to have.”

78. I have dealt above with the issue of disincentivising work and asking employers to change payment cycles.

Can it fairly be said that no reasonable Secretary of State would have struck the balance in the way the SSWP has done in this case?

79. The consequence of the lunar month problem is that for 11 months out of 12 the First Claimant’s earned income is treated as being her earnings for just 28 days. The result of that is that the benefit cap is applied, and her UC is reduced, by perhaps as much as 20%. As discussed above, the disadvantages of allowing the lunar month problem to persist are manifest and serious. By contrast, the principle suggested disadvantages cannot survive the analysis of the Court of Appeal in *Johnson*.
80. The importance of ensuring that the payment system can be automated is clear and not in dispute. During the hearing, much the most powerful consideration in favour of maintaining the status quo was the suggested difficulty in collecting and deploying the data necessary to enable the calculation of earned income in relevant assessment periods to be carried out automatically when payment had been made on a four-weekly

basis. But that difficulty substantially disappeared when the further evidence was obtained from Ms Hargreaves and Ms Krahé. There was little evidence that the SSWP ever focused on the lunar month problem, as opposed to the general benefit of a universally applicable monthly assessment period, and nothing to suggest the possibility of solving that problem was ever considered and rejected.

81. In those circumstances, it seems to me that the outcome of the balance is obvious and irresistible. I cannot see how any reasonable Secretary of State could have struck the balance in the way the SSWP has done in this case.

An objectionable extension of *Johnson*?

82. The question then arises whether that conclusion is properly open to me in the light of the judgments in the Court of Appeal in *Johnson*.

83. It is right to say that the Court of Appeal's conclusion in *Johnson* was expressly and deliberately confined to the specific problem of 'non-banking day salary shift'. Rose LJ said at [107] that 'the SSWP's refusal to put in place a solution to this very specific problem' was unreasonable. That conclusion was confined to the 'very specific problem' of 'non-banking day salary shift'. At [86] Rose LJ said, 'We are not concerned here with making an exception for people who are paid at frequencies other than monthly.'

84. In his concurring judgment Underhill LJ added, at [116],

‘...I regard this as a case which turns on its own very particular circumstances. It has no impact on the lawfulness of the universal credit system more generally.’

85. Mr Brown argues, against that background that any extension of the *Johnson* approach to other pay cycles would reintroduce precisely the uncertainty which the Court of Appeal, in overturning the Divisional Court, were concerned to remove.

86. It is plain that the Court of Appeal was anxious, whilst correcting the unfairness and irrationality in cases such as Ms Johnson's, to preserve intact the structure and tenets of the UC scheme as approved by Parliament. But in my view, the principles the Court identified, and the essential logic of the argument they accepted, apply with equal force to cases of claimants paid on a four-weekly basis.

87. In fact, it can fairly be said that the logic applies with even greater force. First, four-weekly payments are genuinely and consistently regular; they do not incorporate the inevitable, if occasional, irregularity that comes with monthly payments as described by the Court of Appeal. Second, in monthly payment cases the difficulty arises in a few months each year; with lunar monthly cases such as the First Claimant's, it arises in 11 months out of 12. In those circumstances, it seems to me that the case for the Regulations making an exception for such claimants is even stronger than it was in *Johnson*. The one substantial ground on which a Secretary of State might reasonably decline to make such an exception is if the availability of data by RTI threatened the integrity of the automated processing of claims. And such evidence as there is points in the opposite direction on that issue.

88. In those circumstances, in my judgment, the Claimants are entitled to a declaration to the effect that the earned income calculation is irrational and unlawful in respect of employees paid on a four-weekly basis.

Ground 2

89. In *Johnson*, the Court of Appeal held that, given the Court's finding on rationality, the alternative ground relied on by the Claimants that the Regulations discriminate against them contrary to Article 14 ECHR in conjunction with A1P1 did not arise for consideration. I adopt the same approach here.

Conclusion

90. This claim succeeds. I will hear Counsel on the terms of the appropriate relief.