



Note on R (K) v Secretary of State for Work and Pensions

Public Law Project's client K has succeeded in overturning the Secretary of State for Work and Pensions' (hereafter 'SSWP') decisions to recover 'official error' overpayment debt from her. Judgment in the judicial review case was handed down by Mrs Justice Steyn DBE on 7 February 2023. Paragraph references are to paragraphs in her judgment.

<https://www.bailii.org/ew/cases/EWHC/Admin/2023/233.html>

Background to official error overpayments

1. Universal Credit ('UC') overpayments, including those caused by DWP's own mistakes (called 'official error'), are routinely recovered from UC claimants. This is despite assurances made to Parliament when UC was introduced by then DWP Minister Chris Grayling that: *"we do not intend, in many cases, to recover money where official error has been made."* While DWP officials can decide on a case-by-case basis to waive overpayments, the Department very rarely does so in practice. In 2020/2021 337,000 UC official error overpayments were recorded, but just 10 (rounded to the nearest 10) were waived [see §96 judgment].

Background to the case

2. K was overpaid UC by the SSWP. She is a single mum and cares for two young adult disabled sons. She claims Universal Credit ("UC") alongside having a job. K was wrongly paid 'child element' and 'disabled child element' of UC for her youngest son A, on the basis that he was in full time education. In fact, unbeknownst to K, she was not entitled to this money, because A was carrying out a certain type of apprenticeship alongside studying. DWP had been given all the necessary details by K, who had repeatedly queried her own entitlement with officials and been incorrectly advised that her benefit was correct. Because of this 'official error' 18 months later K was told she had been overpaid £8623.20 and faced the prospect of having to pay the money back by way of deductions from her benefit. As a starting point, this would have meant losing up to 15% of her UC standard allowance each month - over £50. For K this would mean making significant sacrifices for potentially many years.
3. A Tribunal judge later found that K had taken *"all reasonable steps to repeatedly clarify her entitlement and provide information in relation to her sons but unfortunately the [DWP] appears to have repeatedly miscalculated her entitlement to universal credit"*. However, unfortunately, the Tribunal had had no power to overturn the overpayment. The DWP apologised to K for their *"profound lapse in service"* and accepted she had done nothing wrong [§1].
4. Notwithstanding that, the SSWP still decided to recover £8623.20 overpayment from her.
5. There followed repeated attempts by K to request that the SSWP waive the overpayment. These requests were tailored to the DWP's policy on overpayment waiver – chapter 8 of the 'Benefit Overpayment Recovery Guide'¹ (or 'BORG' for short). North Bristol Advice Centre wrote to the SSWP enclosing evidence as to the impact of the overpayment on her health. K

¹ <https://www.gov.uk/government/publications/benefit-overpayment-recovery-staff-guide/benefit-overpayment-recovery-guide>



sent messages via her UC journal that were “*rebuffed without consideration*” by DWP officials [§101], who wrongly denied they had a discretion to consider whether to waive the debt. As the judge held, “*this was a manifestly unlawful statement of the position*” [§73].

6. Only following pre-action correspondence did the DWP consider whether to waive the overpayment, and there followed three decisions refusing to do so based on insufficient medical and financial evidence having provided by K. (This was despite K having sent the SSWP evidence including a letter from her GP, her family social worker, and a full breakdown of her income and expenditure). Steyn J found that in each of the three decisions DWP officials failed to properly consider “(i) *how the overpayment arose; (ii) the debtor’s conduct, and in particular whether she acted in good faith, and whether and to what extent she took steps to notify the defendant of all relevant information and to query her entitlement*” [§129]. No proper thought was given to whether the recovery of the overpayment was in public interest, or whether K had relied on the decisions to her detriment (both cited in the DWP’s policy as relevant factors). The judge found that “*the reasoning process in respect of the public interest and detrimental reliance grounds was so lacking, and therefore flawed, as to rob the decision of logic*” [§138]. For this reason, the three decisions were found to be unlawful.
7. Significantly, the judge also found that failing to waive the UC overpayment would be a breach of K’s legitimate expectation. This is because she had been advised by DWP officials, having repeatedly raised queries, that her benefit entitlement was correct. It did not matter that those officials were acting on a mistaken view of the law. Giving effect to K’s legitimate expectation would not be inconsistent with the law, because the SSWP has a discretion (not a duty) to recover the overpayment [§162]. This means that now DWP should not recover this money from her.
8. As well as K’s individual case, the court considered wider issues concerning SSWP’s policies on overpayment recovery. First, it had come to light during K’s case that the SSWP had an internal (secret) policy on overpayment waiver that was different to the BORG. Their failure to publish this policy was found to be unlawful [§116].
9. The Judge also accepted the claimant’s evidence that “*there are grounds to suspect that the waiver policy may have a more severe impact on those with disabilities, particularly those with mental health problems*” [§205]. Despite this, the DWP had “*not conducted an equality analysis in respect of the waiver policy, or any monitoring of the application of the waiver policy by reference to protected characteristics.*” For this reason the court found that the SSWP failed to comply with its Public Sector Equality Duty (PSED) when making changes to the BORG in 2022 [§210].
10. The claimant also argued that the BORG itself (the DWP’s waiver policy) was unlawful, but that claim was rejected by the court. However, the case had already resulted in significant changes to the BORG both in April 2022 and December 2022, which should make it easier for claimants to apply for overpayment waivers based on official error. The Judge also agreed with the claimant’s evidence that the department’s own statistics showed that “*the waiver*



rate of both official error UC overpayments and UC overpayments more broadly is vanishingly low” [§101].

Summary of the judge’s findings

The hon. Mrs Justice Steyn DBE held:

- a. The DWP’s three decisions to refuse to waive K’s overpayment were unlawful, for failing to consider relevant factors.
- b. The DWP breached K’s legitimate expectation by promising that she was entitled to the money, and then later renegeing on this promise by trying to recover it from her as an overpayment.
- c. The DWP breached the Public Sector Equality Duty in section 149 Equality Act 2010 when updating her BORG in 2022, by failing to consider whether the waiver policy had an adverse effect on disabled people.
- d. The DWP acted unlawfully in failing to publish their internal waiver policy.
- e. However, the court rejected K’s claim that DWP’s policy (the BORG 2022) was unlawful.

Wider significance of this case for other cases of official error overpayments

11. Where a claimant has given all relevant information to the DWP but is advised they are entitled to money, and then they are overpaid benefit due to that official error, but paying the overpayment back would cause unfairness the claimant may be able to argue this would be a breach of legitimate expectation. Arguments will be stronger if the claimant has double checked their entitlement with the DWP, if they have relied on the additional money to their detriment (e.g. they have spent it on day to day living expenses), and if there are broader personal circumstances which would make repayment unfair (e.g. caring responsibilities or disability) [See §§165 – 167].
12. The judgment makes clear that if a waiver is sought in part based on the overpayment arising due to DWP’s official error and the claimant’s acted in good faith then DWP decision makers need to properly factor this information in when deciding whether to waive the overpayment [§129]. Decisions that merely address health, welfare or financial circumstances, or pay lip-service to the cause of the overpayment are not sufficient [§130 – 131]. The public interest in recovery is a discrete ground on which to request waiver of an overpayment, albeit one in which some of the relevant factors may overlap with the other grounds [§133].
13. The SSWP has been found to have breached her Public Sector Equality Duty, when updating her waiver policy in 2022, specifically for failing to have due regard to the need to eliminate discrimination on grounds of disability and to advance equality of opportunity for those with disabilities. The SSWP should now comply with her PSED by carrying out an Equality Impact Assessment in relation to her waiver policy.