Neutral Citation Number: [2023] EWHC 233 (Admin)

Case No: CO/176/2022

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

Bristol Civil Justice Centre
2 Redcliff St, Redcliffe, Bristol BS1 6GR

Date: 07/02/2023

Before :

THE HON. MRS JUSTICE STEYN DBE

- -

Between :

THE KING (on the application of K)	**Claimant**
- and -	
SECRETARY OF STATE FOR WORK AND PENSIONS	**Defendant**

- -
- -

Adam Straw KC and Tom Royston (instructed by **Public Law Project**) for the **Claimant**
Cecilia Ivimy and Jackie McArthur (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 29 and 30 November 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 7 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

THE HON. MRS JUSTICE STEYN DBE

Mrs Justice Steyn :

A. Introduction

1. The claimant was overpaid Universal Credit ('UC') by the defendant. The claimant has two disabled sons. During the period 1 July 2019 to 31 January 2021 the defendant treated her youngest son as being in full-time non-advanced education, when he was undertaking an apprenticeship, and so mistakenly paid the claimant the "*children and disabled children element*" of UC. A tribunal found that the overpayment, in the sum of £8623.20, occurred due to "*official error*" (a defined term), in circumstances where the claimant had taken "*all reasonable steps to repeatedly clarify her entitlement and provide information in relation to her sons*" but unfortunately the defendant repeatedly miscalculated her entitlement to UC. The defendant's Complaints Team has apologised to the claimant for "*this profound lapse in service*".

2. Following the defendant's decision in January 2021 that the claimant had been overpaid, the claimant asked the defendant to waive recovery of the overpayment. The defendant refused to do so, applying a policy known as the Benefit Overpayment Recovery Guide ('BORG'). By this claim for judicial review, the claimant challenges the lawfulness of decisions made on 19 October 2021, 20 December 2021 and 28 April 2022 to refuse to waive recovery of the overpayment. The defendant temporarily suspended repayments until 28 January 2023, and will not seek to recover the UC overpayment until it has first recovered a separate, smaller overpayment of Carer's Allowance, which is not at issue in this claim.

3. The claimant has pleaded nine grounds of claim but withdrawn one ground (Ground VIII). She has been granted permission on all grounds pursued save for Ground IX (publication) and Ground VI(c) (legitimate expectation), in respect of which permission is sought. In short, the claimant contends:

   i) The defendant has unlawfully failed to publish the "*Decision Makers Guide to Waiver*" ('DMGW') (proposed Ground IX);

   ii) The Secretary of State's policy on waiver is and was an unlawful fetter on his discretion (Grounds I, II and V);

   iii) The defendant's decisions to refuse to waive recovery in the claimant's case were unlawful because (a) the defendant applied an unlawful policy; (b) the defendant unlawfully fettered his discretion, failed to take into account material considerations and the decisions were irrational; and (c) unlawfully breached the claimant's legitimate expectation (Grounds I, II, IV and VI, including proposed Ground VI(c)); and

   iv) The defendant breached the public sector equality duty in s.149 of the Equality Act 2010 when considering and formulating his policy between 2013 and 2022, and in exercising his functions regarding waiver of overpayments (Grounds III & VII).

4. These grounds give rise to the following agreed issues:

i) Has the defendant acted unlawfully by failing to publish the DMGW?

ii) Is the BORG materially inconsistent with the DMGW? If so, is the BORG unlawful to the extent it is inconsistent with the DMGW?

iii) Does the BORG 2022 (version 2.8) unlawfully fetter discretion / authorise or approve unlawful conduct?

iv) Did the BORG 2021 (version 2.6) unlawfully fetter discretion / authorise or approve unlawful conduct?

v) Are the defendant's decisions of 19 October 2021, 20 December 2021 and/or 28 April 2022 unlawful because they:

a) apply an unlawful policy?

b) apply a fettered discretion / fail to give lawful regard to all relevant considerations?

c) are irrational?

vi) Did the claimant have a legitimate expectation that the defendant would pay benefit in respect of her son, 'A'? If so, did the defendant's decision not to waive recovery of that benefit unlawfully depart from that expectation?

vii) If the 2021 decisions are unlawful in any of the above respects, but the 2022 decision is not, is the 2022 decision nevertheless unlawful for being a review rather than a fresh decision?

viii) Has the defendant failed to comply with the PSED when considering and formulating his policy on recovery and waiver of overpayments in BORG 2021 and/or revising that policy in BORG 2022?

B. The legislative and policy framework

Universal Credit

5. The Welfare Reform Act 2012 ('the 2012 Act') introduced a new benefit, UC. It is a single payment for each household, paid monthly in arrears, to help with living costs for those on low income or who are out of work. It was first introduced in 2013 and replaced six existing benefits, which are known as legacy benefits.

6. There is a UC "*standard allowance*". The standard allowance is based on age and whether the claimant is single or part of a couple. In addition to the standard allowance, "*additional elements*" may be paid as part of UC: these are additional sums to assist those with children, caring responsibilities, and limited capability to work due to ill health or disability, and to assist with childcare and housing costs: s.1 of the 2012 Act and the Universal Credit Regulations 2013 (SI 2013/376).

Official error

7. The term official error is defined in regulation 2 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013:

> "'official error' means an error made by –
>
> (a) an officer of the Department for Work and Pensions or HMRC acting as such which was not caused or materially contributed to by any person outside the Department or HMRC;
>
> (b) a person employed by, and acting on behalf of, a designated authority which was not caused or materially contributed to by any person outside that authority,
>
> But excludes any error of law which is shown to have been such by a subsequent decision of the Upper Tribunal, or of the court as defined in section 27(7) of the 1998 Act". (Emphasis added.)

Recovery of overpayments

8. Section 71(1) of the Social Security Administration Act 1992 ('the 1992 Act') provides:

> "**Overpayments – general**.
>
> (1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure –
>
> (a) a payment has been made in respect of a benefit to which this section applies; or
>
> (b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,
>
> the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose.
>
> …
>
> (3) An amount recoverable under subsection (1) above is in all cases recoverable from the person who misrepresented the fact or failed to disclose it.
>
> …
>
> (8) Where any amount paid is recoverable under –

> (a) subsection (1) above;
>
> …
>
> It may, without prejudice to any other method of recovery, be recovered by deduction from prescribed benefits.
>
> …" (Emphasis added.)

9. The benefits to which s.71 applies are listed in subsection (11). The list does not include universal credit.

10. Until 2013, the Secretary of State only had power to recover overpayments where the original award was obtained by misrepresentation or non-disclosure. There was no power under the statutory scheme to recover in cases of receipt – even knowing receipt – of an overpayment due to a mistaken award. In particular, the Secretary of State had no power to recover overpayments caused by official errors: *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2011] 2 AC 15 ('*CPAG v SSWP*'), Lord Brown JSC, [15]. That continues to be the effect of s.71 in relation to the benefits to which it applies.

11. In *CPAG v SSWP*, the Supreme Court held that,

> "section 71 constitutes a comprehensive and exclusive scheme for dealing with all overpayments of benefit made pursuant to awards": Lord Brown JSC, [12], [15], Lord Dyson JSC, [22], [35].

In doing so, the court rejected the Secretary of State's contention that he had a common law right (subject to common law defences) to seek recovery of overpayments, including official error overpayments.

12. In 2013, at the same time as introducing UC, the 2012 Act inserted a new s.71ZB into the 1992 Act which provides (so far as material):

> "**Recovery of overpayment of certain benefits**
>
> (1) T<u>he Secretary of State may recover any amount of the following paid in excess of entitlement</u> –
>
> (a) <u>universal credit</u>,
>
> (b) jobseeker's allowance,
>
> (c) employment and support allowance,
>
> …
>
> (2) An amount recoverable under this section is recoverable from –
>
> (a) the person to whom it was paid, or

> (b) such other person (in addition to or instead of the person to whom it was paid) as may be prescribed.
>
> (3) An amount paid in pursuance of a determination is not recoverable under this section unless the determination has been –
>
> (a) reversed or varied on an appeal, or
>
> (b) revised or superseded under section 9 or section 10 of the Social Security Act 1998,
>
> except where regulations otherwise provide.
>
> …
>
> (7) An amount recoverable under this section may (without prejudice to any other means of recovery) be recovered –
>
> (a) by deduction from benefit (section 71C);…" (Emphasis added.)

13. An appeal lies to the First Tier Tribunal against a decision under s.71ZB(3) revising or superseding a determination of entitlement to UC. Subject to any successful appeal, such a decision determines conclusively that the claimant has received benefit in excess of entitlement, and has the effect that the defendant has a statutory right to recover that amount. There is no right to appeal against the decision to seek recovery, or not to waive recovery, of an overpayment of UC.

14. It is plain, and there is no dispute, that the statutory power in s.71ZB to recover an overpayment of UC is wider than the statutory power in s.71 to recover overpayments. The s.71ZB power enables the Secretary of State to recover *any* overpayment of UC, irrespective of where any fault lies. It is true, as leading counsel for the defendant, Ms Ivimy, submits that s.71 is broad enough to encompass cases where the recipient has acted in good faith (as illustrated by *Plewa v Chief Adjudication Officer* [1995] 1 AC 249). Nonetheless, the claimant's description of this as a "*radically new statutory context*" seems apt. With the introduction of s.71ZB, for the first time, Parliament gave the defendant the power to recover overpayments even in cases where the fault lay entirely with the defendant's department, the benefit recipient having acted in good faith, disclosing all material facts with due diligence and making no misrepresentations.

15. As is common ground, s.71ZB is a power, not a duty, to recover UC overpayments. And that power falls to be exercised in accordance with public law principles. Given the breadth of the power in s.71ZB, and the unavailability of the defences developed by the common law to avoid injustice, the Secretary of State's discretion to waive recovery is of crucial importance. As Sedley LJ observed in *B v Secretary of State for Work and Pensions* (in the context of the narrower power in s.71),

> "…his officials will have in a variety of cases to decide whether it is right to take advantage of his entitlement to recover overpaid sums which in all probability will have been

> spent, in cases like the present, by people who do not realise that they were being overpaid.
>
> There are restrictions in the Regulations on how much can be withheld at a time from future payments by way of recoupment; but this does not touch the underlying issue whether it is fair to recover the money at all."

16. Among a number of ways of seeking recover of an overpayment of UC, the Secretary of State may do so by making deductions from an individual's future benefits. The Social Security (Overpayments and Recovery) Regulations 2013 (SI 1013/2014) ('the 2013 Regulations') make provision for this and introduce some safeguards.

17. Regulation 10 of the 2013 Regulations provides:

> "**Recovery by deduction from benefits**
>
> (1) Subject to regulations 11 to 14, the Secretary of State may recover a recoverable amount from a liable person by deduction from the benefits specified in paragraph (2) which are payable to them.
>
> (2) Those benefits are-
>
> > (a) benefits under Parts 2 to 5 of the Social Security Contributions and Benefits Act 1992;
> > (b) universal credit;
> > (c) jobseeker's allowance;
> > (d) employment and support allowance;
> > (e) state pension credit payable under the State Pension Credit Act 2002; and
> > (f) personal independence payment payable under Part 4 of the 2012 Act."

18. Regulation 11 provides (so far as relevant):

> "**Recovery by deduction from universal credit**
>
> (1) The following paragraphs apply where the recoverable amount falls to be recovered by deduction from universal credit payable to the liable person.
>
> (2) Subject to paragraphs (5) to (9), regulation 10 is to apply to <u>the amount of universal credit to which the liable person is presently entitled to the extent that there may be recovered in any one assessment period</u> –
>
> > (a) in a case to which paragraph (3) applies, an amount equivalent to not more than 8 times 5 per cent. <u>of the appropriate universal credit standard allowance</u>;

> (b) in a case to which paragraph (4) applies but paragraph (3) does not apply, an amount equivalent to not more than 5 times 5 per cent. of that allowance; and
>
> (c) in any other case, an amount equivalent to not more than 3 times 5 per cent. of that allowance.
>
> …
>
> (7) No deduction made under paragraph (2) is to be applied so as to reduce the universal credit in respect of an assessment period to less than 1 penny.
>
> …
>
> (11) In paragraph (2), 'the appropriate universal credit standard allowance' means the appropriate universal credit standard allowance included in the award of universal credit made to the liable person, or to the liable person and their partner as joint claimants, by virtue of regulation 36 of the UC Regulations." (Emphasis added.)

19. It can be seen that the amount that may be recovered in an assessment period from the individual's entitlement ranges from 15% up to 40% of their standard allowance, although as a matter of policy deductions are currently limited to a maximum of 25%. In this case, paragraphs (3) and (4) of regulation 11 are inapplicable, so the amount recoverable would be limited to 15% of the claimant's entitlement to the standard allowance element of universal credit. An overpayment may not be recovered by deduction from additional elements.

20. The Regulations impose no limit on the length of time for which deductions may be made to recover an overpayment of universal credit. Section 108 of the 2012 Act amended s.38 of the Limitation Act 1980 to specify that "*any method of recovery of a sum recoverable under (a) Part 3 of the Social Security Administration Act 1992 … other than a proceeding in a court of law*" is not an "*action*" to which any of the time limits in the Limitation Act apply.

BORG 2022: Benefit Overpayment Recovery Guide (version 2.8, published April 2022)

21. Version 2.8 of the BORG ('BORG 2022'), which was published in April 2022, is the key version of the BORG for the purposes of this case, as it was the version in force when the last of the decisions challenged in this case to refuse waiver was made. However, as the earlier decisions are also challenged, I shall also consider the terms of the policy which was in force when those decisions were made.

22. The BORG 2022 describes itself as:

> "A reference guide to the recovery of overpaid DWP administered Social Security benefits and penalties, including recovery of advances and hardship payments."

23. The introduction states:

"…This guide has been produced by the Department for Work and Pensions to provide an overview to staff regarding overpayment policy. Its contents may also be shared with external advisors whose clients include those who have either received notice of a benefit overpayment, or who are repaying a benefit overpayment.

The Benefit Overpayment Recovery Guide provides a comprehensive overview of the overpayment recovery policy that applies to overpaid Social Security benefit payments, including any associated Civil Penalties or Administrative Penalties. It is not intended however to provide a definitive statement of law and thus should not be seen to replace formal legal advice where appropriate.

…

Policy Statement

The Secretary of State has an obligation to protect public funds and to ensure that, wherever possible, overpayment and penalty debt is recovered.

Overpayment recovery is subject to various legislative limitations and safeguards.

It is the Department's policy to recover all debt where it is reasonable and cost effective to do so. Debts should be recovered as quickly and cost effectively as possible without causing undue financial hardship to debtors."

(Emphasis added.)

24. I note that the "*obligation*" to ensure that, "*wherever possible*", overpayments are recovered, is itself a statement of policy, rather than a reference to an obligation imposed by law.

25. Paragraph 1.3 of BORG 2022 identifies the causes of overpayments under social security legislation as "*mistake by the claimant*", "*deliberate fraud by the claimant*", "*interim and advance payments*", "*Universal Credit Advances*", "*overpayments due to the way in which the Direct Payment banking system operates*", and "*official error*". Recovery in the case of official error "*only applies to Universal Credit and contributory Jobseeker's Allowance and Employment and Support Allowance claims (hereafter referred to as 'New Style JSA and ESA') made on or after 29 April 2013)*". For UC and New Style JSA and ESA, any payments made in excess of entitlement are treated as recoverable overpayments: §1.21.

26. Chapter 5 is entitled "*How do we recover?*". It provides:

"**General**

5.1 The overriding principle is to recover overpayments and any associated penalties in the most efficient and cost effective way possible whilst ensuring that the debtor is not caused undue hardship.

5.2 Where the debtor is unable to repay by a single lump sum, the simplest and most effective means of recover is by ongoing deductions from the debtor's benefit.

…

5.5 Where a debtor has more than one overpayment these are usually recovered one at a time. Recovery on the second or any subsequent overpayment is suspended until the first overpayment has been fully recovered. An exception is where we are recovering DWP, LA and/or HMRC debt from Universal Credit where recovery is concurrent.

…

Recovery by deduction from benefit

5.8 Social Security legislation allows for the recovery of recoverable overpayments by compulsory deductions from most benefits. …

5.9 The deduction can be made from a different benefit to the one originally overpaid e.g. an Income Support overpayment can be recovered from a person's Retirement Pension. The rate of deduction is determined by legislative rules and policy guidelines depending on the benefit in payment. …

5.11 … For Universal Credit and New Style JSA and ESA the deductions cannot reduce the benefit entitlement to less than 1 penny in any given assessment period.

Recovery from Universal Credit

…

5.21 In all other cases for UC, the deduction rate is 3 times 5% of the appropriate UC standard allowance.

Suspension of Recovery

5.79 Where the circumstances of the debtor satisfy specific criteria, for example a benefit sanction, other higher priority deductions etc. recovery action can be suspended until they no longer apply.

Abandonment of recovery resulting in write off of the debt

5.80 Recovery of a debt is abandoned and the balance written off where the Department has been unable to effect recovery. A decision to abandon the debt is made when it is considered no longer cost effective to pursue the recovery of the debt.

…

Waiver of Overpayment – Secretary of State Discretion

5.86 In exceptional circumstances the Secretary of State can use their discretion to waive all or some of a debt, any associated penalty and recoverable hardship payments, where it is appropriate to do so.

5.87 Waiver will result in abandonment of recovery of all or part of the debt and penalty, which are then written off.

5.88 Waiver is considered on the individual circumstances of the case but is normally only considered where both current and future recovery action will result in severe issues for the welfare of the debtor or their family. See Chapter 8 and Appendix 5." (Emphasis added.)

27. Chapter 8 is entitled "*Write-off and Waiver*". The chapter addresses waiver pursuant to both s.71 and s.71ZB of the 1992 Act. It provides:

"**General**

8.1 The Secretary of State has a discretion over whether to recover overpayments and associated penalties and how to do so. … The discretion to vary the rates of recovery or to suspend recovery are detailed in Chapter 5. The discretion can also be exercised by cancelling part of, or the entire overpayment, through the process of waiver and write-off.

Types of discretion applicable

8.2 There are three main ways the discretion on whether to recover a debt is applied. These are:

- Write Off on the grounds of cost effectiveness …
- Write Off on the grounds of the debt being unrecoverable …
- Waiver of the debt – Waivers are only granted in exceptional circumstances and there would need to be very specific and compelling grounds to do so. A request for waiver should normally be made in writing.

Waiver

8.3 The Secretary of State has a duty to protect public funds and will therefore seek to recover debt in all circumstances where it is reasonable to do so. Waivers are only granted in exceptional circumstances where it can be clearly demonstrated that the debtor's circumstances will **only** improve by waiver of the debt. It is not sufficient that an award of DLA or PIP has been made under the special rules for the waiver request to succeed.

8.4 There are several different reasons why the department may consider waiver – and not all have to be met for a waiver to be granted. Waiver will take into consideration the debtor's entire circumstances, as far as they are known, including where it is applicable the following factors.

- The debtor's financial circumstances and those of their household
- Whether the recovery of the debt is impacting the debtor's health or that of their family
- The circumstances surrounding how the overpayment arose e.g. fraud, official error, DWP conduct
- The debtors conduct e.g. whether the debtor took steps to mitigate any overpayment, notify DWP, misrepresented or failed to disclose any matter, any fraudulent conduct etc
- Whether the debtor has relied on the overpayment to their detriment
- Whether the Department intended the claimant to have the money
- Where the debtor can demonstrate that they did not benefit from the money that was paid
- Any other factor which appears relevant to the decision maker or which indicates recovery would not be in the public interest.

8.5 This is not an exhaustive list and any factor which appears relevant in a particular case may be taken into account. It is unlikely all the above factors will be present in any individual case but all factors which appear relevant should be considered along with the individual circumstances of the case. A request for a waiver can be made for a variety of reasons or may be a combination of factors, that when brought together build the reason for the request." (Underlining added; bold in the original.)

28. The BORG 2022 addresses the evidence required to support a request for waiver in the following terms.

> "8.7 When applying for a waiver, the debtor is responsible for providing all necessary information and evidence to explain and support their application. This may include information regarding the debt itself, as well as detailing the personal circumstances of the debtor.
>
> 8.8 The evidence provided by the debtor or their representative is normally accepted in good faith, unless information or local knowledge is held which puts it in doubt.
>
> 8.9 If the decision maker considers they are missing any relevant information they should request the debtor provide it before making a decision.
>
> 8.10 Where a waiver is requested on the grounds of severe financial hardship the debtor would need to demonstrate that this has been long standing and not expected to improve in the foreseeable future. The hardship must be of such severity that it is not reasonable to expect the debtor to make even reduced payments.
>
> 8.11 Full details of the income and expenditure of the debtor, partner, dependants and any other members of the household would need to be provided along with evidence to illustrate this such as letters from creditors pursuing debts or arrears of rent/council tax/mortgage. This will include, but not limited to –
>
> - a full list of all debts and steps taken to manage the debt with those creditors
> - full details of the income and expenditure of the debtor, their family, and any other members of the household
> - bank statements for the past 6 months and
> - any other relevant information
>
> 8.12 Evidence to support a waiver on the grounds of welfare or ill health is normally required and would be expected to detail how recovery of the debt is the main or only cause of the ill health, or the reason for the escalation of the ill health. Evidence to support this should be in the form of a letter from a GP, consultant, psychiatric nurse, or support worker such as a social worker or welfare advisor etc. This evidence must be specific as to the effect the recovery is having on the claimant's health and must be the opinion of the professional writing the letter. Note that this evidence –

> - Should not simply be a list of any medical conditions
> - Should demonstrate exactly how recovery of the debt would have an excessive negative impact on the welfare of the debtor and their family
> - If the debtor is citing that their ill health is being exacerbated or caused by financial hardship, then the evidence of this should also be provided as specified above for full details of income and expenditure.
>
> 8.13 It is expected that the debtor will make any medical professional offering an opinion on the impact of debt recovery on their health aware of the full circumstances of their financial situation including if they have multiple debts.
>
> 8.14 A debt will be waived only where it can be demonstrated that by waiving the departmental debt the debtor's circumstances will improve. If the debtor has debts with other creditors, then it is possible that waiving the DWP debt will not improve the financial, health and welfare issues being experienced by the debtor. A different solution other than waiver of the debt may be required in these circumstances, for example a repayment plan involving all creditors. It might in such circumstances be appropriate to suspend deductions or reduce the rate whilst the debtor seeks a solution involving all creditors.
>
> …
>
> 8.15 It is the debtor's responsibility to provide sufficient information to support their request. Before a decision can be made the debtor may be asked to provide more information." (Emphasis added.)

Decision Makers Guide to Waiver

29. The DMGW was created in February 2022, at the same time as the BORG v.2.7 was published (which was identical, so far as relevant, to the version published two months later). However, unlike the BORG, the DMGW was unpublished guidance. It was belatedly disclosed in these proceedings on 17 October 2022, prompting an application by the claimant to amend her grounds.

30. The DMGW was part of the applicable policy framework when the decision of 28 April 2022 was made, but not when the two earlier decisions were made.

31. The introduction to the DMGW states:

> "1.1 This guidance is intended to be used by Waiver Decision Makers and forms the basis of DWP Policy on the application of Secretary of State discretion not to recover money that is owed.

> …
>
> 1.3 This guidance deals with the application of waiver in relation to statutory overpayments, Recoverable Hardship Payments and UC advances that fall to be recovered by Debt Management. The principles governing this are set out in the Benefit Overpayment Recovery Guide (BORG) BORG. Those principles and this guidance also reflect the HMT Guidance Managing Public Money (MPM) May 2021.
>
> …
>
> 1.7 This guide is not to be copied and distributed outside the team holding it. …"

32. Paragraph 2.1 identifies that the discretion can be applied to reduce the deductions, suspend recovery, write off the overpayment, or to waive the whole or part of the overpayment (including waiving one overpayment while recovering another). Paragraph 2.3 indicates that the discretion "*can be considered at any point in the debt journey which could be either when the overpayment is first discovered and* ***before it is notified*** *to the claimant or* ***after notification*** *where the claimant has asked us to look at the details surrounding their overpayment and to consider discretion*" (emphasis in the original).

33. Paragraph 2.2 of the DMGW essentially replicates §5.88 of the BORG 2022 in stating that the exercise of discretion will be considered "*on its own merits and on the individual circumstances of the case*", but it does not state that normally waiver will only be considered where both current and future recovery action will result in severe welfare issues.

34. The DMGW continues:

> "2.4 There are a number of different reasons why the department may consider waiver – and not ALL have to be met for a waiver to be granted. The BORG Chapter 8 sets out the factors which may be relevant to a waiver decision as:
>
> [The bullet points in §8.4 of the BORG 2022 are then set out.]
>
> 2.5 This is not an exhaustive list and a waiver decision should always consider all relevant circumstances.
>
> 2.6 Waivers that fall into the category of Public Interest will take into account matters such as the Department's reputation; public response; legal implications and risk of challenge and the current Government policies. Cases that could fall into this category are those that are likely to attract media attention.
>
> 2.7 Whether it would be in the public interest or not to recover a debt will be subjective, therefore cases that fall into this category may involve Policy and/or Legal in the decision-making process to ensure a consistent approach.

> 2.8 Waiver will not be dependent upon ALL of the factors above being applicable but is likely to be a combination and will be dependent upon the individual circumstances of the case. The decision should consider all the relevant factors and any other exceptional or extenuating circumstances.
>
> …
>
> 2.10 A debt does not have to be in recovery in order for DWP to consider applying SoS discretion to waive the debt. If there is sufficient evidence to show that the prospect of recovery is already having an adverse impact on the debtor then the debt may be considered suitable for waiver, even though recovery may not have commenced."

35. Paragraphs 3.1-3.2 indicates that waiver will be considered "*if the debtor specifically requests a waiver*", but not if they merely advise they cannot afford to repay the debt (in which case, reduction or suspension of recovery will be considered).

36. Paragraph 3.3 provides:

> "The reason for the decision on all waiver requests must be recorded and must be clear and in accordance with the principles set out in this guidance and the BORG. …"

37. Paragraphs 5.2-5.4 of the DMGW provide:

> "5.2 <u>Usually, the cause of the overpayment alone would not be sufficient reason for waiver to be granted</u>. It is more likely that the circumstances leading to the case of an overpayment, when considered in addition to other factors such as the debtor's circumstances, and claims of hardship or good faith, might provide sufficient reason for recovery not to be pursued. <u>It is the cumulative effect of a number of factors which makes waiver appropriate.</u>
>
> 5.3 A waiver can also be considered for individual debts or all debts owed by the individual. For example, DWP can consider waiving a specific debt that is owed by the debtor on the basis that it would not be in the public interest to recover that particular debt.
>
> 5.4 Requests for a waiver would be expected to normally come direct from the debtor or their representative. However, in exceptional cases where the overpayment has not been notified, for example in cases which are particularly distressing or involve exceptional and severe ill-health, DWP may initiate a referral for a waiver decision. Such cases are likely to be extremely rare and are <u>likely to be more appropriate in cases where the debtor took action to prevent or mitigate any overpayment</u>." (Emphasis added.)

38. Under the heading "financial hardship", the DMGW states:

> "7.2 The recovery of any debt from any person, particularly those in receipt of an income related benefit, is almost certain to cause some hardship and upset for them and their family. However, as the Secretary of State has a responsibility to protect public funds, it is the level of hardship which is taken into account when considering the application for discretion.
>
> 7.3 Where waiver is applied for on financial grounds, the financial problems would need to be over an extended period of time with no sign of change. [Reference is made to the requirement to provide financial information, in essentially the same terms as the bullet points to §8.11 of the BORG 2022]
>
> 7.4 For these debtors, the DWP debt is unlikely to be the only money they owe, and for that reason, the debtor would also need to explain why their DWP debt should be waived above other debts they may owe. If the debtor owes other parties' debts in addition to the DWP, then the waiver of their DWP debt alone is unlikely to alleviate their situation sufficiently to justify a waiver. For a waiver to be considered the debtor would need to provide evidence that they have sought other solutions with their creditors – not just DWP. Suspension or a reduction in repayment may be appropriate while the debtor seeks resolution of their debts with other creditors.
>
> 7.5 There are also other debt solutions that in some situations may be more appropriate for the debtor other than waiver (for example Breathing Space, bankruptcy, Debt Relief Order (DRO) etc.)
>
> 7.6 If the debtor can show that they are in financial hardship, and that their position is unlikely to change for the foreseeable future, then a waiver can be considered.
>
> 7.7 Waiver may <u>also</u> be considered on the grounds of financial hardship <u>where the debtor can show that they have relied on the overpayment to their detriment</u>. For example, taken on a long-term financial commitment as a result of the overpaid money." (Emphasis added.)

39. Under the heading "*welfare and/or ill health hardship*", the DMGW provides:

> "8.1 Where hardship is claimed on health grounds, it is anticipated that for the majority of cases supporting evidence will be provided to explain how or why the recovery of the overpayment would be detrimental to the health and/or welfare of the debtor or their family.

> 8.2 Evidence to support a waiver on the grounds of welfare or ill health is normally required, however it is not absolute. When making a waiver decision discretion should be applied where it is clear from all the information available that recovery of the debt will or is having an excessive negative impact on the health and wellbeing of the debtor and/or their family. The decision maker does not necessarily need to have evidence that directly links the recovery of the debt to the debtor's health in order to waive the debt. All the circumstances of the debt and the debtor should be taken into consideration when deciding whether a waiver applies.
>
> 8.3 Note that this evidence –
>
> - Should not simply be a list of any medical conditions.
> - Should demonstrate exactly how the proposed recovery plan would cause excessive hardship to the welfare of the debtor and their family and detail the impact it would have.
> - Does not necessarily have to come from a doctor or recognised medical expert (often a social worker or welfare adviser may have a clear understanding of the impact that recovery would have on the debtor).
> - If the debtor is citing that their ill health is being exacerbated or caused by financial hardship, then evidence of this should also be provided (see 7.3).
>
> 8.4 Care should always be taken in managing expectations so that debtors are not led to believe that their request for waiver will be approved simply on the production of a letter from their GP supporting their request. Waivers for this reason are only granted in exceptional circumstances and only where it can be shown that continued recovery of their departmental debt will contribute towards the deterioration of the debtors or their families' health." (Emphasis added.)

40. Paragraph 13.1 of the DMGW states:

> "All case studies in this guide are illustrative only for the purposes of demonstrating how the waiver policy should be applied. They are not exhaustive."

41. Four case studies are provided in the DMGW. The only one in which the DMGW indicates that refusal of waiver may be appropriate is the first, which states:

> "*Case Study 1*
>
> *A claimant contacts the Department to question their benefit*

> *entitlement following a change of circumstances – their partner and children left the household. They are advised that their entitlement is correct, and the claimant continues to be paid for their partner and child. Two months later the error is realised, and an overpayment is raised for £1,200. The claimant requests a waiver.*
>
> *Decision – in this case we may choose not to waiver the overpayment. Although the claimant was given the wrong information and told their claim was correct, the overpayment was particularly high over a small timeframe. It's reasonable to assume that the claimant must have known his claim was incorrect and had not been updated to reflect his change in circumstances.*" (Emphasis added.)

42. The two most pertinent cases studies are 2 and 4:

> *"Case Study 2*
>
> *Claimant in receipt of Universal Credit notifies they have started University to train as a healthcare professional and have qualified for a bursary. Claimant is a single parent with a disabled child. Claimant notified the department of the bursary and no action was taken on the claim. The claimant queried her benefit entitlement and was advised the bursary did not affect her Universal Credit. Three months later the error was notified, the claim corrected and an overpayment for £3,050 notified to the claimant.*
>
> *Decision – In this case we may choose not to recover the overpayment particularly if there were supporting factors such as evidence of hardship. The debtor was given incorrect advice and it may well not have been clear to the claimant that the advice was incorrect. Her personal circumstances are challenging as she has a disabled child. Given the incorrect advice it might be considered not to be in the public interest to recover the debt.*
>
> *…*
>
> *Case Study 4*
>
> *Claimant and his partner are disabled and claiming Universal Credit and receiving PIP. He contacts the department to advise he failed his WCA however the Department fails to act on the information and the LCWRA component continues to be paid. The claimant later contacts the Department on various occasions to query whether he is entitled to any more money, but it's not until his 4th call that the operator realises the error and an overpayment for the overpaid LCWRA is raised. Claimant requests a waiver on*

> *the grounds of hardship – welfare concerns. Claimant provides some evidence of the impact of recovery but on its own is not sufficient to meet the waiver criteria.*
>
> *Decision – The decision maker considers the request in the whole and looks at the circumstances of the overpayment, and the missed opportunities to correct the claim. The decision maker considers the potential reputational risk to the department, and that alongside the claimant's personal circumstances is sufficient to grant a waiver on the ground of it not being in the Public Interest to recover the debt.*" (Emphasis added)

BORG 2021: Benefit Overpayment Recovery Guide (version 2.6, published May 2021)

43. The BORG 2021 applied when the decisions of 19 October 2021 and 20 December 2021 were made. The passages of the BORG 2022 cited in paragraphs 22.-above were in precisely the same terms in the BORG 2021, save for minor and inconsequential differences in §5.80. In particular, §§5.86-5.88 of the BORG 2022 had appeared in the same terms in §§5.83-5.85 of the BORG 2021.

44. Chapter 8 of the BORG 2022 substantially re-wrote the chapter that had appeared in the BORG 2021. In the earlier version, chapter 8 provided:

> "8.1 The Secretary of State has a duty to protect public funds and an obligation wherever possible to ensure an overpayment is recovered. In exceptional circumstances the Secretary of State does have a discretion to waive recovery of an overpayment and any associated penalty. In addition, this discretion can also be applied to recoverable hardship payments. A number of factors are considered, including whether recovery is detrimental to the health or welfare of the debtor or a member of their family.
>
> 8.2 Discretion can therefore be applied on cost (write-off) or welfare grounds (waiver), subject to Her Majesty's Treasury Managing public Money guidelines." (Emphasis added.)

45. Paragraph 8.3 of the BORG 2021 identified the same three ways the discretion may be applied as §8.2 of BORG 2021, stating in respect of waiver:

> "Waiver the debt, by writing off all or part of the amount outstanding. This is considered only where there is reasonable evidence available that the recovery of the overpayment is detrimental to the health and/or welfare of the debtor or their family, or that recovery would not be in the public interest. Waivers are only granted in very exceptional circumstances and there would need to be very specific and compelling grounds to do so. A request for waiver should normally be made in writing."

46. I note that in the above paragraph the BORG 2021 suggested "*very exceptional circumstances*" were required for waiver, although §8.1 of the BORG 2021 refers to "*exceptional circumstances*". Whereas in the BORG 2022 the reference to "*very exceptional circumstances*" (and so that inconsistency) was removed. I also note that the public interest was specified, in terms in the BORG 2021, as one of the grounds for waiver.

47. Paragraph 8.3 of the BORG 2022 had appeared in §8.7 of the BORG 2021, save that in the earlier version the words "*in all circumstances*" appeared in the first sentence before "*where it is reasonable to do so*", and the earlier version again referred to "*very exceptional circumstances*" rather than "*exceptional circumstances*". There was no equivalent in the BORG 2021 of §§8.4-8.5 of the BORG 2022, setting out a non-exhaustive list of factors to be taken into consideration.

48. Paragraphs 8.4 and 8.8 of the BORG 2021 were in the same terms as §§8.8 and 8.15, respectively, of the BORG 2022. Paragraphs 8.5 and 8.6 of the BORG 2021 provided:

> "8.5 Where the waiver is requested on the grounds of severe financial hardship the debtor would need to demonstrate that this has been long standing and not expected to improve in the foreseeable future. The hardship must be of such severity that it is not reasonable to expect the debtor to make even reduced payments. Full details of the income and expenditure of the debtor, partner, dependants and any other members of the household would need to be provided along with evidence to illustrate this such as letters from creditors pursuing debts or arrears of rent/council tax/mortgage.
>
> 8.6 Where the waiver is requested on ill health grounds, then evidence must be shown not of the ill health itself, but that recovery of the debt is the main or only cause of the ill health, or the reason for the escalation of the ill health. Evidence to support this should be in the form of a letter from ta GP, consultant, psychiatric nurse or support worker etc. This evidence must be specific as to the effect the recovery is having on the claimant's health and must be the opinion of the professional writing the letter."

Policy on waiver prior to the enactment of s.71ZB

49. The claimant has drawn attention to the policy disclosed to CPAG in 2006, entitled "*Secretary of State Waiver*", as indicating that even in cases of claimant-induced error falling within s.71(1), the Secretary of State considered that he had a discretion to waive recovery. While that is evidently the case, it is also apparent that the policy was not only, or primarily, addressing overpayments within s.71(1); it was also concerned with other overpayments, including those caused by official error, which at the time the Secretary of State (mistakenly) considered he had a common law right to recover: *CPAG v SSWP,* [4]. For that reason, the policy addressed not only the power to waive recovery on hardship, ill health or cost effectiveness grounds, but also indicated that "*for overpayments arising due to good faith there are a number of defences against recovery*", which defences included "*change of position*" and "*estoppel*". In any

event, the Secretary of State was entitled to amend the policy, as he has done on a number of occasions since 2006.

C. The facts

The circumstances in which the overpayment arose

50. The claimant is a single parent of two young adults ('A' and 'B'), both of whom are disabled, with complex needs for which they require daily support. She has worked part-time throughout the relevant period. On 1 April 2019, the claimant claimed UC. At that time, her younger son, A, was then 17 years old and in full-time education. He was then, and has been at all times, living with the claimant. At that time, while A was in full-time education, the claimant was entitled to the Child and Disabled Child ('CDC') element of UC. In April 2019, the claimant's older son, B, was living in supported accommodation, but he returned to live with the claimant in December 2020, and continued to do so until he moved out in May 2022. At the time of all the impugned decisions, both her sons were living with the claimant.

51. In July 2019, A began an apprenticeship which combined work and college study. The claimant informed the defendant about her son's apprenticeship in June or July 2019. The defendant continued to pay her the CDC element of UC. The claimant queried her entitlement in September 2019, informing her caseworker at a meeting on 27 September 2019 of her son's apprenticeship. She was reassured that A should stay on her claim. The claimant followed up the same day by informing the defendant, via the defendant's online journal ('the DWP journal') that her younger son (whose name and date of birth she provided):

> "Finished full time education on July 5th 2019 where he was taking GCSE's & BTEC.
>
> He started a 2 year apprenticeship on 29 July 2019.
>
> Separate to the apprenticeship, he is attending college to study/complete GCSE's."

In response to further questions, she wrote that his college study involved attendance at college 35 days per year. Having received this information, the defendant continued to pay the claimant the CDC element of UC.

52. On 6 January 2020, the claimant again queried her entitlement, raising concerns via the DWP journal that she was still receiving the Child element of UC and checking whether that was right in circumstances where her son was undertaking an apprenticeship and at college. The defendant's internal records show that on 7 January 2020 a DWP official referred the matter for decision, explaining:

> "clmts son is 18 years old and no longer in receipt of CHB, he is doing an apprenticeship for vehicle maintenance earning £3.90ph and is going to college 35 days a year in blocks doing over 12 hours a week studying GCSE maths and English."

53. On 13 January 2020, a DWP official recorded:

> "This is not for a [Decision Maker's] decision, more of a question re guidance. Apprenticeships are treated as being in paid employment. In terms of universal credit and apprenticeships, it would seem her son could claim universal credit while he is on a 'recognised' apprenticeship. DWP's guidance says that this means you must:
>
> - have a named training provider
> - be working towards a recognised qualification
> - be paid at least the NMW for an apprentice
>
> Email to [Case Manager] to advise." (Emphasis added.)

54. The defendant's evidence is that it does not appear this was followed up by the Case Manager. Having raised the matter for a third time, none of the defendant's officials responded to the claimant's query and she continued to be paid the CDC element.

55. On 30 June 2020, the claimant again contacted the defendant via the DPW journal, worried that the defendant was paying for her son when he was 19 years old. A DWP official responded that she had checked with a colleague who advised that as the claimant's son was in education "*we will pay for child until course ends*".

56. In January 2021, the claimant contacted the defendant after B had moved back home, to ask for the bedroom tax element to be removed as her spare bedroom was now occupied by B. It was at this stage that a DWP official spotted the error in the calculation of the claimant's UC. Following a discussion on 18 January 2021, in which it was recorded in the journal that "*notes have made by the [Work Coach] and their manager to confirm the Cl still qualifies for this element*", referring to the "*child disability element*", on 22 January 2021, the claimant was asked by an official, via the DWP journal, to upload evidence that A was in full-time education. She initially replied that she had already provided the information to her work coach and the information had not changed, but she duly uploaded the relevant documents on 27 January 2021. On 28 January 2021, the claimant was told by a caseworker that A was not a dependant child on her claim and she would need to report a change of circumstances.

57. On 31 January 2021, the defendant stopped paying the claimant the CDC element. In early February 2021, the claimant was informed that she did not qualify for the CDC element. It is evident from her contemporaneous response that the claimant was extremely distressed by the defendant's volte face.

58. On 3 March 2021, the claimant spoke to a DWP official and was informed via the journal that she had been overpaid £8623.20. She was formally notified of the decision by a letter dated 10 March 2021 ('the overpayment decision') which stated:

> "We incorrectly paid you the child and disabled child element
>
> Because of this you have been overpaid £8623.20 and now need to pay this money back."

The letter stated that the overpayment was made in respect of the period from 1 July 2019 to 31 January 2021.

The complaint

59. The claimant made a complaint by telephone on 6 February 2021 which was determined on 24 March 2021. The response from the DWP Complaints Team stated, "*As [A] is receiving an income for his apprenticeship we should have removed his information from your claim and for this I apologise*". They advised the claimant that "*it is UC policy to recover all overpayments, even if we are at fault*", and informed her that the overpayment was with the Debt Recovery Team and she could apply for a waiver on health or financial grounds.

60. The DWP Complaints Team wrote:

> "We deeply sympathise with your situation and can only apologise that a complaint about housing has uncovered such a substantial amount in overpayment. We can assure you that it is not our intention to cause any inconvenience, confusion, misunderstanding or distress. We aim to provide our claimants with a good standard of service and <u>we are extremely sorry for this profound lapse in service</u>." (Emphasis added.)

Mandatory reconsideration and appeal

61. On 10 March 2021, the claimant made a request for Mandatory Reconsideration of the decision that she had not been entitled to the CDC element of UC from 1 July 2019. She observed that she had been "*treated appallingly*", having provided the details from the outset, and having gone through it with her work coach in person, who had checked the position with his manager, and "*they told me [A] should stay on claim*".

62. On 18 March 2021, the defendant notified the claimant that having looked again at the decision made on 10 March 2021, "*We have decided that we cannot change our original decision*".

63. The claimant submitted an appeal to the first tier tribunal ('the FTT'). The evidence filed on behalf of the defendant in the tribunal proceedings acknowledged that DWP officials had "*failed to make necessary adjustments on multiple occasions*". It was also explained that the basis for the decision that she had not been entitled to the CDC element was the definition of "*qualifying young person*" in the Universal Credit Regulations 2013, and those rules "*have not been clearly explained*" to the claimant. The official who gave evidence to the FTT noted:

> "When we spoke on 30.4.21 I apologised for all the errors that have been made on her account and acknowledged that <u>she had kept UC informed</u> of her concerns and <u>she had even actively questioned our decisions</u>.
>
> However at this stage the Decision Maker must apply the Law and the overpayment is recoverable by UC in Law …" (emphasis added).

64. On 15 June 2021, Tribunal Judge Clarkson, sitting in the FTT confirmed that as a matter of law the overpayment is recoverable, refusing the appeal and confirming the overpayment decision of 10 March 2021. Tribunal Judge Clarkson stated:

> "The Appellant has two disabled sons and provided the Respondent with all of the information they requested in relation to her sons. It appears that unfortunately the Respondent incorrectly treated her youngest son as being in full-time education leading to the overpayment. The Appellant took all reasonable steps to repeatedly clarify her entitlement and provide information in relation to her sons but unfortunately the Respondent appears to have repeatedly miscalculated her entitlement to universal credit.
>
> The overpayment occurred due to official error. Despite this the full amount of the overpayment is recoverable, 71ZB of the Social Security Administration Act 1992 and Social Security (Overpayments and Recovery) Regulations 2013. The Tribunal therefore upheld the original decision." (Emphasis added.)

65. The claimant acknowledges that these were the only decisions open to the decision maker and the FTT on reconsideration and appeal, respectively. Mr Andrew Milner, the Debt Policy Senior Manager at the Department for Work and Pensions, who has given evidence on behalf of the defendant, acknowledges that the claimant "*did inform DWP of the relevant facts that made her ineligible to receive the Children and Disabled Children element, and that was not actioned properly at the time*".

The application for waiver

66. On 22 June 2021, with the assistance of North Bristol Advice Centre, the claimant wrote to the defendant's Debt Management team, making a formal request for the overpayment of £8,623.20 to be waived in view of the exceptional facts of her case ('the claimant's first waiver application'). The letter explained that as both sons have autism and ADHD with associated complex care needs, they rely heavily on the claimant to manage daily activities and provide emotional and practical support. The letter stated, the claimant's "*role as a carer prevents her from working more hours, keeping her in a near constant state of financial hardship*". It noted that "*she regularly uses foodbanks because she simply does not have enough money coming in each month to make ends meet*", and recovery of the overpayment was "*likely to have a devastating impact on her practical ability to provide for her and her two sons*".

67. The application explained the circumstances in which the overpayment had arisen, due to repeated official errors, and the serious negative impact the overpayment decision had had on the claimant's mental health. The claimant's first waiver application was accompanied by a letter from her social worker dated 15 June 2021 in which she wrote:

> "Both of [the claimant's] adult children are dependant on her to meet all of their care and support needs. Both [B and A] have a diagnosis of Autism and ADHD. This impacts on their daily

> functioning, sleep dysregulation, mental and emotional wellbeing.
>
> … [B and A] both require a stable and supportive environment which they currently receive from their mother. Both [B and A] have significant and varied mental health issues associated with their ASD.
>
> [The claimant] is a full time carer to both of her sons, this has a significant impact on her emotional and mental wellbeing, however [the claimant] manages to work part time. Due to her caring role [the claimant] is unable to increase her working hours whilst continuing to support her sons.
>
> To enable the family to maintain their emotional well being and [the claimant's] caring role, I fully support [the claimant's] request that the overpayment being waived."

68. The first waiver application was also accompanied by an email from a friend, a solicitor for whose company the claimant had previously worked, who stated:

> "I know that [the claimant] has gone without food in order to feed her boys. She regularly visits the foodbank which I know she is embarrassed about, but she has no choice but to do so."

69. No response was received and the first waiver application was re-sent in August 2021. Further evidence, in the form of an email from Vitaminds, dated 2 July 2021, was provided in which it was stated that the claimant's score on the PH9 was 10/27 for low mood and 16/21 for anxiety, indicating she was suffering from severe anxiety and moderate depression.

70. On 23 September 2021, the claimant wrote on the DWP journal:

> "I have asked for the overpayment to be waived and request no recovery action be taken until that has been resolved."

71. A DWP official responded on 27 September 2021, via the DWP journal, noting that they had received the documentation regarding her request, and stating that as she had "*gone through both the Mandatory Reconsideration route and the Tribunal route and both of these have upheld our decision*", there are "*no further routes*" by which to challenge the overpayment and they would have to keep deducting it from payments. The claimant responded the same day:

> "Thank you for your message. What do you mean there is 'nothing you can do for me?' Your own guidance says I can ask for a waiver of my overpayment (see paras 5.83-5.85 of your own benefit overpayment recovery guide) and this route was recommended to me by Mrs S Wiggins, the complaints handler who dealt with my UC complaint. All of this was carefully outlined in my waiver letter and the supporting documents I sent with it. As I have asked you to waive my overpayment, as

> a public body, you have an obligation to consider, and make a decision on it. Neither me nor my caseworker have received such a decision, why is that?"

72. Despite the clarity of the claimant's request, drawing attention to the defendant's policy, a DWP official responded on 5 October 2021:

> "Regarding your request to have your overpayment waived, as I have stated previously the routes for you to challenge an overpayment with Universal Credit are Mandatory Reconsiderations and a tribunal following an upheld Mandatory Reconsideration.
>
> Neither myself or anyone working for Universal Credit can reconsider your overpayment as you have exhausted all appeal routes with us. The legislation you have quoted does not apply directly to the processes that we have here."

73. Fortunately, the claimant had the assistance of Public Law Project ('PLP'), and so she did not accept this manifestly unlawful statement of the position. In these proceedings, Mr Milner has acknowledged that the claimant was "*incorrectly informed that there was nothing that could be done in relation to the overpayment because her appeal against the overpayment decision had been refused*", and he has apologised on behalf of DWP for this.

74. On 8 October 2021, PLP sent a detailed pre-action protocol letter on behalf of the claimant, describing her personal circumstances, her finances, her health and that of her sons, and the circumstances in which the UC overpayment arose ('the first PAP letter'). A letter from the claimant's GP was also provided. The GP wrote:

> "[The claimant] is under significant financial and mental health stress. She reports to me that this is secondary to the over payment of her universal credit which she is now required to repay.
>
> [The claimant] is under extreme financial pressure. She is currently unable to cover her household bills or rent. Her landlord has threatened eviction. She is attending food banks regularly to try and provide for herself and her family and tells me that she often goes without food herself. …
>
> The threat of eviction and extreme financial stress has had a detrimental impact on her mental health. She feels increasingly depressed and anxious. She is having suicidal thoughts and has frequently contacted the Samaritans. She continues on medication … at night to help with her sleep and we have started her on antidepressant medication today. She is also seeking further mental health support with our talking therapies service.

> In addition to all this she is also being seen for high blood pressure which is under investigation. It is likely that her current stresses may be having a direct impact on this."

75. In the first PAP letter, PLP drew attention to the fact that on 13 September 2021 a letter from the defendant informed the claimant that her outstanding balance was £9,329.51, and on 23 September 2021 she was informed that the outstanding balance was £9,053.26. The explanation for the figure being higher than the £8,623.20 UC overpayment is that the claimant received a separate overpayment from 14 October 2019 to 1 March 2020 in respect of Carer's Allowance, amounting to £859.95 ('the CA overpayment'). From January 2021 until 19 October 2021, deductions were taken from the claimant's UC entitlement to recover the CA overpayment. The amount outstanding in respect of the CA overpayment is £410.06. The CA overpayment arose as the claimant did not realise she was required to inform the section of DWP that deals with Carers Allowance of her real time (fluctuating) earnings, in circumstances where the UC section of DWP had that information. When the decisions that are challenged in this claim were made, the claimant had not requested waiver of the CA overpayment. She has since challenged the CA overpayment, on the basis that the additional UC she would have been paid during the period she was not entitled to CA would effectively cancel out the overpayment, but that is not a matter that is in issue in this claim.

First decision on waiver: 19 October 2021

76. On 19 October 2021, the defendant for the first time gave substantive consideration to the claimant's request for waiver of the UC overpayment ('the first decision'). The letter stated:

> "[1] Firstly, it may be helpful to explain that the Secretary of State has a duty to protect public funds and it is expected that all overpayments should be recovered to protect the taxpayer and public funds. However, the Secretary of State also has the power to waive the right to recover all or part of the monies owed to the Department where there are <u>very special circumstances</u>. A waiver is only applied where the particular facts of the case warrant it.
>
> [2] Each case is decided individually, with particular attention being paid to overpayments where recovery is detrimental to the health and/or welfare of the customer.
>
> [3] Whilst each case is looked at on an individual basis, waiver has to be applied in a fair and consistent way to be sure all our customers are treated equally.
>
> [4] Where hardship is claimed on health grounds, of either the customer or their family, it is expected that sufficient supporting medical evidence will be provided to explain how and why the actual recovery of the overpayment is detrimental to the health or welfare of the customer or their family.

[5] Where hardship is claimed on financial grounds, the problems would need to be over a long period of time. Full details of the income and expenditure of the customer, their family, and any other members of the household would be needed. An application under financial difficulties usually results in a reduced rate of recovery, which is reviewed regularly.

[6] An officer acting on behalf of the Secretary of State has carefully considered this case and has decided that based on the evidence provided these overpayments cannot be waived.

[7] If someone is seeking a waiver on ill health grounds, then evidence must be shown, not of the ill health itself, but that the recovery is the main, or only cause of the ill health, or the reason for the escalation of the ill health. Evidence to support this should be in the form of a letter from a GP, consultant, psychiatric nurse or support worker. This evidence must be very specific as to the effect the recovery is having on the claimant's health and must be the opinion of the professional writing the letter.

[8] The medical assessment completed by Vitaminds, whilst providing details of the customer's mental health, does not directly link our request to repay the overpayment to the patient's medical condition.

[9] Medical evidence from the customer's GP states that 'the threat of eviction and extreme financial stress had had a detrimental impact on [the claimant's] mental health' and the letter from the customer's social worker explains how being a full time carer to her sons 'has a significant impact on her emotional and mental wellbeing'; it is not clear from the medical evidence that the actual recovery of the debt is the only cause of [the claimant's] mental health problems or that it is exacerbating these issues. In the absence of any specific evidence to explain what exact detrimental effect the actual recovery of the debt is having the waiver request is refused at this time.

[10] The letter from [the claimant's] GP also refers to the 'extreme financial stress' the customer is experiencing but no financial evidence in the form of a full Income and Expenditure breakdown has been provided. If this can be sent to Debt Management they will be able to assess the full facts and if appropriate reduce the amount [the claimant] is able to repay towards the debt.

[11] However, due to the serious nature of the customer's health at this time the Department can exercise its discretion to suspend any recovery action for an initial period of six months.

> At the end of the six months a review will take place to ascertain any change of circumstances and establish whether a further suspension can be applied or whether recovery can recommence.
>
> [12] Recovery action for the customer's overpayments will therefore be suspended and a review date will be set for 19 April 2022.
>
> [13] There is no right of appeal against a waiver decision. However, if circumstances change, or further evidence becomes available, a waiver can be requested again at any time." (Paragraph numbers added for ease of reference; emphasis added.)

77. An internal DWP form completed by the decision maker on 19 October 2021 noted that waiver was sought on health and financial grounds, but marked the "*No*" box in response to the question whether there were any "*Other Reasons*" why waiver was sought.

78. Mr Milner's evidence in relation to the first decision is:

> "Waiving recovery of a substantial amount of overpaid public money requires a good evidential basis. Suspension is therefore often an appropriate response where evidence is currently lacking but, if provided, may substantiate grounds for a waiver request to be accepted. It may also be appropriate in a scenario where the applicant's situation is likely to change in the near future. In this case, the decision maker might reasonably have thought that the Claimant's assertions as to the effect of overpayment on her financial situation and on her health, if evidenced properly, could be sufficient for the claim to be waived but that the evidence was lacking at that time. Evidence had also been provided that the Claimant's employment situation was changing, which meant that there was a possibility that the effects of recovery on her in future would be less severe."

79. I note that although the claimant had only made a request for waiver of the UC overpayment, the decision to suspend recovery was made in respect of the CA overpayment (which was at that time being recovered). The UC overpayment was automatically suspended until the CA overpayment had been fully recovered, as the CA overpayment was first in time and so takes precedence. Although the claimant had only requested waiver of the UC overpayment, it is apparent that she and her representatives had not understood at the time that there were two overpayments. It is understandable that DWP officials appear to have thought, in circumstances where the claimant was asking for the deductions to stop, and those deductions were in fact being taken to recover the CA overpayment, that the claimant was asking for both overpayments to be waived.

80. On 27 October 2021, the defendant responded to the claimant's first PAP letter, acknowledging that the claimant's request for waiver had not been dealt with correctly in the first instance, but noting that it had now been fully considered and responded to, and that if the claimant wished to supply financial information the waiver request could be reconsidered.

81. PLP sent a second pre-action protocol letter ('the 2nd PAP letter') on 16 November 2021. Among other matters, the claimant contended that the defendant had unreasonably failed to take account of the circumstances in which the UC overpayment arose, and fettered his discretion. The defendant responded on 30 November 2021 denying the first decision was unlawful.

82. On 8 December 2021, PLP sent the defendant a letter enclosing further financial evidence, in the form of an income and expenditure statement, bank statements in respect of a period of just over six weeks from 25 October 2021 – 8 December 2021, a letter from the claimant's landlord dated 30 September 2021 regarding rent arrears (which had already been provided), and a letter in support of waiver from her children's social worker, dated 30 November 2021, in which she referred to having personally been buying the claimant food to feed her family. PLP's letter also explained that the claimant was due to begin a new role as an administrator in January (giving her salary and hours), having had to resign in late November 2021 from her previous role due to having sustained an injury from repetitive manual work.

Second decision on waiver: 20 December 2021

83. On 20 December 2021, the defendant made a further decision on the claimant's request for waiver, taking into account the newly submitted evidence together with that which had been submitted earlier ('the second decision'). The letter to the claimant of 20 December 2021 set out paragraphs [1] – [5], [6] and [13] of the first decision in precisely the same terms in the second decision. In addition, the letter stated:

> "[7] The letter from the customer's social worker explains how being a full time carer to her sons 'has a significant impact on her emotional and mental wellbeing', <u>it is not clear from the medical evidence that the actual recovery of the debt is the only cause [of the claimant's] mental health problems or that it is exacerbating these issues</u>. I should explain where medical evidence from a qualified Medical Practitioner is not made available or where the medical evidence does not directly link our request to repay the overpayment to the patient's medical condition, hardship on medical grounds cannot be considered.
>
> [8] Where recourse to waiver is sought on hardship grounds due to the financial situation of a customer, a full Income and Expenditure breakdown is required for the customer, their family, and any other members of the household. <u>Whilst Income and Expenditure information has been provided in respect of [the claimant], no such information has been provided for her sons.</u> It is however apparent that their finances are linked in that they live in the same household and [the

claimant] received income from them in relation to the rent. The letter from the social worker also says that [the claimant] is responsible for feeding them yet apparently receives no money from them in relation to food costs. It is not therefore clear what their total income is or what else they spend their money on.

[9] It is also noted from the evidence provided that there are a number of repayments listed including a PDSA 'personal loan', rent arrears and overdraft charge arrears, however the evidence attached does not show why our recovery should be treated differently to any other repayment of debt or whether any steps have been taken to reach arrangements with other creditors.

[10] The waiver of any debt is made in exceptional circumstances and the waiver should make a significant difference to the customer. In this instance there is insufficient evidence to provide a complete picture of [the claimant's] financial situation or to determine what effect waiving the debt would have on the household finances.

[11] The information regarding your client's changing employment situation is also noted. Recovery action for the customer's overpayments will continue to be suspended as previously agreed in the decision dated 19 October 2021 and a review date will be set for 19 April 2022. At that point your client's situation regarding her employment and other creditors may be clearer." ((Paragraph numbers and emphasis added.)

84. Mr Milner states in respect of this decision:

"The income and expenditure statement from the Claimant stated that she received £300 from 'lodgers' (presumably her sons). What was not clear is what the overall household income was, i.e., what the income of the sons was, or what their expenditure was. As noted in the decision letter, this is crucial information because there is no proper way to make any objective assessment of the Claimant's financial position and ability to repay without information about the overall financial position of the total household, given that the Claimant's evidence is that she receives money from her sons, and houses and feeds them (and is struggling to do so). It is not clear if the sons are in a position to assist in purchasing food or other expenses, or if they do in fact assist. DWP need to have a clear picture of what the overall financial position is before writing off significant sums of public money that the Claimant has been overpaid.

The decision also noted the lack of evidence supplied by the Claimant about her other debts. … The Claimant's income and expenditure statement states that she spends £345 month more

> than she receives in income (at a time when there are no deductions being made by DWP). Of the monthly expenditure in that statement, £140 is listed as being spent on financing other debts but DWP does not know how much these other debts are or what efforts have been made to try and reach a resolution with other creditors. …
>
> In most situations it will be evident that waiving a debt will improve someone's circumstances. If, however, they have large debts with private creditors which they are unable to finance then it may be of little practical assistance for the public debt to be waived in isolation."

85. Ms Vincent Miller has responded in her second statement that her cover letter, providing the Income and Expenditure statement, had explained that:

> "Income from 'lodgers' refers to the fact that the clients' sons each pay her £150 per month towards household costs. This is as much as they can each afford to pay'. Lodger is the term used on the CAB Income and Expenditure precedent which I sent to the Defendant."
>
> "The income and expenditure which I provided on 8 December 2021 did itemise each debt and stated that (a) £50 was being spent on paying back rent arrears (b) £60 was being spent on personal loans and (c) £30 per month on overdraft charges. In relation to the personal loans, my cover letter explained 'The client has a 'personal loan' from the PDSA which was taken out to cover vet bills that the client could not afford to pay. She pays back around £60 per month and this is shown in her bank statements. The bank statements which I provided showed that on 9 November 2022 £52.94 was paid by the Claimant to the PDSA (for the loan) and £50 was paid by the Claimant to the Merlin Housing Association (for the rent arrears) separately from her monthly rental payment of £453.72. The letter from her landlord, which I sent to the Defendant, confirmed the balance of her rent arrears."

86. The claimant states in her second statement:

> "The DWP had information concerning my sons' income. At the time of the waiver request both A and B were living with me (now just A is living with me). DWP knew that B was severely autistic and was in receipt of ESA (support group) and enhanced PIP. Being in the support group for ESA means DWP had assessed him as having 'limited capability for work and work-related activity'. They would therefore have been aware that his only income was from benefits (which DWP paid, so knew how much his income was).

> DWP were also aware that A was doing an apprenticeship and was in receipt of PIP. …
>
> I provided the DWP with a copy of A's employment contract which provided details of his salary (£3.90 per hour) and number of hours (40 hours per week). …
>
> I did not provide evidence of the personal additional expenditure of my sons in support of my waiver requests. In December 2021 I decided not to specifically ask A and B for financial evidence in support of my waiver request because I wanted to keep my sons' involvement in the overpayment matter to the absolute minimum. As DWP know, my sons have severe mental health issues, ADHD and Asperger's Syndrome, and the overpayment issue was, as a result of their disabilities, causing them serious distress. I explained in my 1st statement …:
>
> > 'As well as having autism and ADHD, my sons both suffer from a number of mental health difficulties. They know about the overpayment debt and have a heightened awareness of the stress the decision to recover the debt has been causing me. The overpayment decision has been particularly difficult for A because of the link between him starting his apprenticeship and the overpayment, so he blames himself. Due to his autism and ADHD, he struggles to manage his emotions and the guilt. A has self-harmed and in May 2021 he attempted to commit suicide. I think both DWP's decision and seeing how it has impacted me, on top of everything else my sons have to cope with, has made A's mental health worse.'
>
> I thought that asking A and B for details of their expenditure and evidence of that, for the purpose of the overpayment waiver application, would cause them, and A in particular, serious anxiety due to their mental health difficulties."

The Claim

87. This claim was filed on 18 January 2022, challenging the first and second decisions. The claim was supported by statements made by the claimant and Emma Vincent Miller of PLP, both dated 18 January 2022. The defendant filed an acknowledgment of service and summary grounds of defence on 9 February 2022, to which the claimant replied on 14 February 2022.

88. Permission was granted on 27 April 2022.

The third decision: 28 April 2022

89. Although the first decision had indicated that the review at the end of the six month suspension period would be to ascertain "*whether a further suspension can be applied*

or whether recovery can recommence", on 28 April 2022 the defendant made a further decision on the claimant's application for waiver of the UC overpayment ('the third decision'). The letter, which was from the same DWP official who had signed the first and second decision letters, stated:

> "[1] As you are aware your client submitted a waiver request which was considered in our letter of 19 October 2021. Although no waiver was granted your client's deductions in respect of her Carer's Allowance overpayment were suspended for a period of 6 months.
>
> [2] After the submission of further evidence, the decision was reviewed and maintained in our letter of 20 December 2021. It was noted that full details had not been provided about your client's household income or steps taken in relation to managing your client's other debts.
>
> [3] Since then your client has submitted a witness statement dated 18 January 2021 [sic]. In that witness statement, your client sets out the effect the overpayment has had on her and her family's health and wellbeing and the impact recovery would have on her finances, although <u>the details of your client's finances have still not been provided</u>.
>
> [4] Additionally in your letter of 4 February 2022, you have made clear that your client is not seeking waiver of the Carer's Allowance overpayment and is only seeking waiver of the Universal Credit overpayment. You state that to your knowledge your client has never requested a waiver of the Carer's Allowance overpayment. It should be noted that all deductions which have taken place to date were of the Carer's Allowance overpayment. No recovery of the Universal Credit overpayment has taken place to date.
>
> [5] In relation to the Universal Credit overpayment, we note that your client maintains her request for that overpayment to be waived in her witness statement of 18 January 2022. <u>We have considered the evidence in that witness statement along with the previously submitted evidence.</u>
>
> [6] Firstly, it may be helpful to explain that the Secretary of State has a duty to protect public funds and it is expected that all overpayments should be recovered to protect the taxpayer and public funds. However, the Secretary of State also has the power to waive the right to recover all or part of the monies owed to the Department for Work and Pensions (DWP) <u>where there are very special circumstances</u>. A waiver is only applied where the particular facts of the case warrant it. The Secretary of State is guided in this regard by the Benefit Overpayment Recovery Guide, as revised on 9 February 2022 (BORG).

[7] [This paragraph is in the same terms as [2] and [3] of the first decision.]

[8] [This paragraph is in the same terms as [8] of the first decision, save for the addition of the following sentence:] The BORG provides further details of the evidence that is required.

[9] An officer acting on behalf of the Secretary of State has carefully considered your client's case and has decided that based on the evidence provided, the Universal Credit overpayment cannot be waived. That consideration has been based on the policy as set out in the latest version of the BORG.

[10] We consider all the relevant circumstances when considering a waiver request, not just the customer's circumstances but the circumstances as to how the debt arose. We accept that this overpayment occurred because of DWP error and note that your client states she was not aware that she was being overpaid at the time and therefore did not budget on the basis that she may have been overpaid.

[11] The medical evidence dated 7 October 2021 from your client's GP details your client's ongoing financial and mental health struggles. It states that she is unable to cover her bills or rent and has been threatened with eviction. The GP states that 'the threat of eviction and extreme financial stress' has had a detrimental impact on her mental health and that she has been started on anti-depressant medication.

[12] As noted above, no deductions have ever been made in respect of your client's Universal Credit overpayment and waiver of that overpayment would have no immediate effect on your client's finances because the Carer's Allowance overpayment would still need to be recovered. We note however, that your client states in her witness statement that the debt looming over her and the prospect of years of repayment is causing her significant stress. In that regard, while the Universal Credit overpayment is not affecting your client's finances currently, we accept that the prospect of future recovery is of concern to her and obviously would affect her future financial position at the time the debt came to be recovered.

[13] Nevertheless, DWP have an obligation to protect public funds and, as set out in the updated BORG, we require evidence to substantiate claims that an overpayment should be waived. Based on the information we have receive from you to date, considered against the BORG, it does not appear that there is sufficient evidence for the Universal Credit overpayment to be waived. The evidence indicates that your client's current financial position appears to be the main cause

> of her stress. As explained above, if your client is not seeking waiver of the Carer's Allowance overpayment, then waiver of the Universal Credit overpayment will make no difference to your client's financial position, at least in the short term. It is of course not known what your client's future financial position might be at the time the Universal Credit begins to be recovered.
>
> [14] In relation to your client's medical evidence, although it relates the problems to the current financial position, DWP is aware that this medical information is 6 months old, and that in the meantime your client's circumstances or health may have changed. If your client wishes to submit any updated medical or financial information then she should do so and further consideration can then be given as to whether the Universal Credit overpayment should be waived. Please can any new evidence be supplied within one month from the date of this letter. Details on appropriate evidence are set out in Chapter 8 of the BORG.
>
> [15] You state that your client is not seeking a waiver of the Carer's Allowance overpayment and the DWP has a duty to recover overpaid benefits. Recovery of that debt will therefore need to recommence but it is not intended that the recovery of an overpayment should cause any customer undue financial hardship. Therefore, DWP has decided to put in a further 6 month suspension of recovery until October 2022 after which time deductions will recommence.
>
> [16] If your client is unable to afford the rate of recovery at that time, then she, or her representative should contact Debt Management within DWP to discuss her financial circumstances and a reduction in the rate of repayment may be agreed." (Paragraph numbering and emphasis added.)

90. This decision letter refers to the version of the BORG published on 9 February 2022 (v. 2.7) ([6]), although the BORG 2022 (v. 2.8) had been published just over a week before the third decision was made. However, it is common ground that there were no relevant changes to the BORG between versions 2.7 and 2.8.

91. The defendant subsequently decided to suspend recovery of the CA overpayment for a further three months until 28 January 2023. Recovery of the UC overpayment remains automatically suspended pending recovery of the CA overpayment.

The re-re-amended claim

92. On 28 July 2022, by consent, the claimant was granted permission to amend her grounds to challenge the third decision (pursuant to an application dated 1 June 2022). The order noted that the new ground (legitimate expectation) would be determined at the hearing.

93. The defendant's detailed grounds of resistance and evidence were filed on 20 July 2022 (pursuant to an application dated 6 July 2022). On 30 July 2022, in light of the defendant's evidence, the claimant served draft re-amended grounds, making further limited amendments. Permission to re-amend was granted on 12 October 2022.

94. On 31 August 2022, the claimant made a request for information under CPR Part 18. The defendant served a response on 17 October 2022, disclosing the DMGW and the "*Decision Makers Waiver Guidance Process Instructions*".

95. On 26 October 2022, the defendant filed amended detailed grounds of resistance, and the claimant filed applications to re-re-amend the grounds of claim, and to rely on further evidence in reply. On 18 November 2022, I granted the claimant's application to re-re-amend, on the basis that the question whether to grant permission in respect of Ground IX (publication of the DMGW) would be determined at the substantive hearing. I granted the claimant permission to rely on her second statement and the second statement of Ms Vincent Miller (subject to part of Ms Vincent Miller's statement being admitted without prejudice to the defendant's right to contend it is irrelevant), and I refused permission to rely on an expert report and three further witness statements.

Statistics regarding overpayments and waiver

96. A response from the DWP to a request made pursuant to the Freedom of Information Act 2000 records that in the financial year from 1 April 2020 to 31 March 2021:

i) 447,000 claimants were overpaid UC; and the total value of such overpayments was £347.5 million.

ii) 337,000 claimants were overpaid UC where the cause was classified as official error; and the total value of such overpayments was £228,355,000.

iii) The total number of UC overpayments waived is said to be "*10 (*rounded to nearest 10)*"; and the total value of such waivers is £26,000. (The figure of 10, rounded up or down, means the number is between 5 and 14. However, as the total value is higher than for (iv), the number must be between 6 and 14. This is confirmed by Mr Milner's evidence that there were 6 full waivers and 4 partial waivers in the year to 2021.)

iv) The total number of UC overpayments waived with a classification of official error is also "*10 (*rounded to nearest 10)*"; and the total value of such waivers is £22,000. (As the total value is less than for (iii), the number must be between 5 and 13.)

97. For the purposes of this claim, Mr Milner has given evidence that the figures in respect of waivers for the last three years for which statistics are available are:

Year	**UC Waiver requests**	**Fully waived**	**Partially waived**	**Refused**	**Rejected**
2019	39	2	3	34	0
2020	49	7	0	40	2

2021	102	6	4	81	11
Total	**190**	**15**	**7**	**155**	**13**

98. The "*rejected*" category includes applications for a waiver that duplicate another application for a waiver, and waiver requests that could not be considered at that time e.g. due to an ongoing fraud investigation. A total of 28 claimants who were not granted a full or partial waiver had deductions suspended during the three year period, and a further 8 had the rate of deductions reduced. In addition, in 2018/19, 16,260 claimants successfully applied for a reduction in their payment rate.

99. In response to a written question tabled by Caroline Lockhart MP on 9 March 2019, asking how many times DWP "*used its discretionary waiver on health grounds in relation to universal credit over-payments as a result of Departmental error*", the DWP Minister stated:

> "… Prior to the start of 2019/20, the reason that the overpayment occurred (fraud, claimant error or Departmental error) was not recorded on waiver requests. Therefore, for the years 2017/18 and 2018/19, I have instead provided the total number of successful waivers. It is important to note that these may not all have been for overpayments arising as a result of Departmental errors.
>
> In 2017/18, there were no waivers granted for Universal Credit overpayments.
>
> In 2018/19, there were 5 waivers granted for Universal Credit overpayments, of these, 4 were granted on medical grounds. In 2019/20 year to date, there were 3 waivers granted for Universal Credit overpayments, these were all granted on medical grounds."

100. Ms Vincent Miller has also drawn attention to DWP statistics which show that in April 2021 – August 2022 there were 19 waivers on medical grounds, no waivers provided on financial grounds, no waivers on both medical and financial grounds and no waivers on any other grounds. That is, for that period, all waivers were granted on medical grounds alone. However, Mr Milner has given evidence of three instances that he can recall over the past two years for reasons other than financial hardship or a detrimental impact on health.

101. I agree with the evidence of Ms Vincent Miller that the statistics show that "*the waiver rate of both official error UC overpayments and UC overpayments more broadly is vanishingly low and has been that way for the last 4 years*". It is also evident that the number of recorded requests for waiver in respect of UC overpayments is very low compared to the number of overpayments, and in particular the number that are caused by official error. If the claimant's experience of twice having her request for waiver rebuffed without consideration is not unique to her, the number of requests in fact made may exceed the number recorded, but that is not an issue for determination in this claim.

D. Has the defendant acted unlawfully by failing to publish the DMGW? (Ground IX)

The parties' submissions

102. The claimant submits that it is made clear in §§1.1 and 3.3 of the DMGW that decision makers are required to apply the DMGW guidance when making decisions on waiver requests; it is the primary guidance for decision makers to follow.

103. The claimant acknowledges that §§8.4 and 8.5 of the BORG 2022 appear to enable any relevant considerations to be taken into account when determining a waiver application, but the claimant submits that those paragraphs have to be read subject to what she describes as "*the general conditions*" imposed by:

    i) The policy statement that the Secretary of State has an obligation to ensure that, wherever possible, overpayment and penalty debt is recovered;

    ii) The provision in §5.88 that waiver is normally *only* considered where *both current and future recovery action* will result in *severe issues for the welfare* of the debtor or their family;

    iii) The provision in §8.2 that waivers *are only granted* in exceptional circumstances and there would need to be *very specific and compelling grounds* to do so; and

    iv) The provision in §8.3 that waivers *are only granted* in exceptional circumstances where it can be clearly demonstrated that *the debtor's circumstances* will *only* improve by waiver of the debt.

104. The claimant submits the DMGW contains significantly different criteria to the BORG, which are easier for claimants to meet, compared to the published policy. For example, the claimant contrasts (i) the four general conditions for waiver in the BORG 2022 referred to above with §2.11 of the DMGW and the lack of a limitation in the DMGW to circumstances where recovery will result in severe welfare issues: (ii) the higher thresholds in §§8.10 and 8.12 of the BORG 2022 compared to §§7.3 and 8.1, respectively, of the DMGW; and (iii) the absence in the BORG 2022 of the guidance that appears in the DMGW at §§5.2, 7.7 and in the case studies.

105. The DMGW has not been published. It was disclosed for the first time in these proceedings, six weeks before the substantive hearing. The failure to publish it is, the claimant submits, unlawful. In support of that submission the claimant relies on *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, [27], [34]-[35] and [302] and *B v Secretary of State for Work and Pensions* [2005] 1 WLR 3796, [43]. The claimant contends that it is particularly important in the present context that those applying, or considering applying, for a waiver know the criteria which their applications must meet given that, as the defendant recognises, the impact of recovery of an overpayment may be severe.

106. Given that decision makers are told they must follow the DMGW guidance, albeit together with the published BORG 2022, the DMGW ought to have been published: *R (Timson) v Secretary of State for Work and Pensions* [2022] EWHC 2392 (Admin),

[223]. It cannot be said that there were any compelling reasons not to publish the DMGW policy (cf *Lumba,* [38]). This is a simple case of unlawful failure to publish a policy.

107. The defendant submits that there is no obligation to publish every detail or document which forms part of a policy. What is required is "that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made": *Lumba,* [38]. In the present case, the defendant contends that this requirement was satisfied by publication of the BORG 2022. The DMGW states (at §1.3) that the principles governing waiver are set out in the (published) BORG 2022, and refers to the guidance on waiver in the BORG at §§2.3 and 3.3.

108. The defendant contends that the BORG 2022 and the DMGW are not substantively different. Read as a whole, and in context, they express the same policy, any differences being purely linguistic, and so the claimant's reliance on *Lumba* is misplaced. The defendant submits that the claimant has misinterpreted the BORG 2022 in suggesting that the "general conditions" are hard-edged and preclude a waiver being granted in circumstances where it would be permissible in accordance with the DMGW.

109. Nevertheless, during the hearing Ms Ivimy made clear that the defendant had no objection to putting the DMGW into the public domain, and intended either to publish the DMGW as an annex to the BORG or by incorporating it into a revised version of the BORG.

Decision

110. I agree with the defendant that the "*general principles*" in the BORG 2022 identified by the claimant are not hard-edged. The policy statement makes clear that the policy is to recover overpayments where it is "*reasonable … to do so*" and "*without causing undue financial hardship to debtors*". That the policy incorporates a reasonableness criterion is reiterated in §8.3 of the BORG 2022. The statement in §5.88 expressly states that waiver is considered "*on the individual circumstances of the case*"; and the limitation to circumstances where both current and future recovery action will result in severe welfare issues is specifically qualified by the word "*normally*". Chapter 8 has to be read as a whole. A waiver will only be granted in exceptional circumstances, but the effect of §8.3, when read with §§8.4-8.5 is <u>not</u> that a waiver can only be granted by reference to "*the debtor's circumstances*" where it is shown those will only improve if waiver is granted. Such a reading of the BORG 2022 would be inconsistent with a number of the express factors in §8.4 and the clear statement that not all have to be met and each case will be considered individually.

111. In my judgment, the BORG 2022 can and should be read compatibly with the unpublished DMGW, insofar as the latter is, *prima facie*, more favourable to those seeking to have an overpayment waived. The fact that the DMGW is unpublished is not a reason to deprive applicant of the *benefit* of that guidance which the Secretary of State has chosen to adopt. For example:

i) The DMGW makes explicit that waiver may be granted on the ground that it would not be in the public interest to recover an overpayment: §§2.6-2.7; case

studies 2 and 4. This ground does not emerge clearly from the BORG 2022, but a number of the factors referred to in §8.4 of the BORG 2022 are implicitly based on the public interest, and the final bullet point of that paragraph expressly enables any factor that may indicate recovery would not be in the public interest to be taken into account. The BORG 2022 does not preclude waiver being granted in circumstances such as those identified in case studies 2 and 4, or more generally on public interest grounds.

ii) The DMGW makes clear that although the *cause* of the overpayment alone will not "*usually*" be a sufficient reason to grant a waiver, it may provide a reason to grant a waiver when combined with "*hardship or good faith*" (my emphasis), even if the evidence of hardship would not meet the threshold for the grant of a waiver on financial or health and welfare grounds *alone*: §5.2 and case studies 2 and (especially) 4. The fact that evidence of hardship can be a factor in favour of waiver even if the evidence on its own would not be sufficient to meet the waiver criteria is not clear and express in the BORG 2022, unlike in the DMGW, but it is compatible with the approach required by the BORG 2022. In particular, §§8.4 and 8.5 of the BORG 2022 make clear not only that the cause of the overpayment and the debtor's conduct may be taken into account, but also that it may be the combination of factors when brought together that build the reason for the request.

iii) It is apparent from the DMGW that the combination of the cause of the overpayment and good faith may be sufficient to merit waiver (see (ii) above); and the significance of a debtor having taken action to prevent or mitigate any overpayment is emphasised (DMGW, §5.4). The cause and the debtor's conduct are identified as relevant factors in the BORG 2022 and, in my view the BORG 2022 should not be interpreted as precluding waiver on these grounds, without more.

iv) The DMGW makes clear that even if an applicant has not adduced evidence that would be sufficient to meet the criteria for waiver on grounds of "*severe financial hardship*", waiver may be granted on the ground of financial hardship if the applicant can show they relied on the overpayment to their detriment: §7.7. Again, this point does not emerge as clearly from the BORG 2022, but it is compatible with it, and in particular with the express acknowledgment in §8.4 of the BORG 2022 that whether the debtor has relied on the overpayment to their detriment is a relevant factor.

v) The DMGW makes clear at §8.2 that when considering a request for waiver on grounds of welfare or ill health the decision maker does not necessarily need to have evidence that directly links the recovery of the debt to the debtor's health in order to waive the debt; discretion should be applied where it is clear from all the evidence available that recovery will or is having an excessive negative impact on the health and wellbeing of the debtor or their family. This guidance does not appear in the BORG 2022, but in view of the qualification of the requirements in §8.12 of the BORG 2022 by the word "*normally*", the BORG 2022 can be read compatibly with the more forgiving provisions of the DMGW.

112. The DMGW is an important statement of the Secretary of State's policy on the exercise of his discretion to waive recovery of overpayments. Decision makers are expressly required to apply the principles set out in *both* the DMGW and the BORG. In my judgment, the Secretary of State's policy can only be understood properly by having regard to both policy documents.

113. In *Lumba*, the Supreme Court held that the Secretary of State for the Home Department's unpublished policy on immigration detention pending deportation, which conflicted with and was less favourable to the claimants than the published policy, was unlawful. Lord Dyson JSC (with whom Lord Hope, Lord Rodger, Lord Walker. Baroness Hale, Lord Brown, Lord Collins and Lord Kerr agreed on this issue) held:

> "34 The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements.
>
> 35 The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see *In re Findlay* [1985] AC 318, 338e. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it. In *R (Anufrijeva) v Secretary of State for the Home Department [2004] 1 AC 604* , para 26 Lord Steyn said:
>
> > "Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice."
>
> 36. Precisely the same is true of a detention policy. Notice is required so that the individual knows the criteria that are being applied and is able to challenge an adverse decision. I would endorse the statement made by Stanley Burnton J in *R (Salih) v Secretary of State for the Home Department* [2003] EWHC 2273 at [52] that "it is in general inconsistent with the constitutional imperative that statute law be made known for the government to withhold information about its policy relating to the exercise of a power conferred by statute". …
>
> 37. There was a real need to publish the detention policies in the present context. As Mr Husain points out, the Cullen

> policies provided that certain non-serious offenders could be considered for release. The failure to publish these policies meant that individuals who may have been wrongly assessed as having committed a crime that rendered them ineligible for release would remain detained, when in fact, had the policy been published, representations could have been made that they had a case for release.
>
> 38. The precise extent of how much detail of a policy is required to be disclosed was the subject of some debate before us. It is not practicable to attempt an exhaustive definition. It is common ground that there is no obligation to publish drafts when a policy is evolving and that there might be compelling reasons not to publish some policies, for example, where national security issues are in play. Nor is it necessary to publish details which are irrelevant to the substance of decisions made pursuant to the policy. What must, however, be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made." (Emphasis added.)

114. Although Lord Phillips of Worth Matravers PSC dissented, at [302] he agreed with Lord Dyson that:

> "… under principles of public law, it was necessary for the Secretary of State to have policies in relation to the exercise of her powers of detention of immigrants and that those policies had to be published. This necessity springs from the standards of administration that public law requires and by the requirement of article 5 that detention should be lawful and not arbitrary. Decisions as to the detention of immigrants had to be taken by a very large number of officials in relation to tens of thousands of immigrants. Unless there were uniformly applied practices, decisions would be inconsistent and arbitrary. Established principles of public law also required that the Secretary of State's policies should be published. Immigrants needed to be able to ascertain her policies in order to know whether or not the decisions that affected them were open to challenge."

115. In *B v Secretary of State for Work and Pensions,* a case which pre-dates the decision in *Lumba*, the Court of Appeal specifically addressed the requirement to publish the Secretary of State's guidance on the exercise of the discretion not to recover overpayments under s.71(1) of the 1992 Act. Sedley LJ (with whom Sir Martin Nourse and Buxton LJ agreed) held:

> "41 This is not the end of the case. Although I have rejected the executive discretion not to enforce repayment as an aid to the construction of the primary provision, its availability becomes of central importance once the construction advanced by the

> Secretary of State is separately upheld. The conclusion I have reached means that his officials will have in a variety of cases to decide whether it is right to take advantage of his entitlement to recover overpaid sums which in all probability will have been spent, in cases like the present, by people who did not realise that they were being overpaid.
>
> 42. There are restrictions in the Regulations on how much can be withheld at a time from future payments by way of recoupment; but this does not touch the underlying issue whether it is fair to recover the money at all. As to this, Mr Drabble told the court that his instructing department has a written policy which could be produced if desired. …
>
> 43 It is axiomatic in modern government that a lawful policy is necessary if an executive discretion of the significance of the one now under consideration is to be exercised, as public law requires it to be exercised, consistently from case to case but adaptably to the facts of individual cases. If – as seems to be the situation here – such a policy has been formulated and is regularly used by officials, it is the antithesis of good government to keep it in a departmental drawer. Among its first recipients (indeed, among the prior consultees, I would have thought) should be bodies such as the Child Poverty Action Group and Citizens Advice Bureaux. Their clients are fully as entitled as departmental officials to know the terms of the policy on recovery of overpayments, so that they can either claim to be within it or put forward reasons for disapplying, and so that the conformity of the policy and its application with principles of public law can be appraised." (Emphasis added.)

116. In my view, it is clear that the failure to publish the DMGW was unlawful. Given the unlimited statutory power to recover *any* overpayment of UC, the policy addressing how the discretion to waive recovery will be exercised is even more important now than it was in *B v Secretary of State for Work and Pensions*, a case decided before s.71ZB was enacted. An individual, such as the claimant, who wished to apply for an overpayment to be waived would not be able fully to understand the policy, or to make representations, by reference to the BORG 2022 alone.

117. In this case, the claimant would have been able to make representations in respect of each of the five matters I have identified in paragraph above if she or her representatives had been aware of the content of the DMGW. In addition, she would undoubtedly have relied on case studies 2 and 4, which although "*illustrative*" are described as "*demonstrating how the waiver policy should be applied*", as showing that a waiver should be granted on public interest grounds in her case. Those were representations she was unable to make because of the failure to publish the policy.

118. I do not consider that the undertaking given by Ms Ivimy, on behalf of the Secretary of State, during the course of oral submissions, renders this ground academic. In my judgment, it is appropriate, in the circumstances, to grant permission to pursue this ground and to grant a declaration that the failure to publish the DMGW was unlawful.

However, I am not prepared to order the defendant to publish the DMGW in circumstances where the undertaking to which I referred was given, and the defendant has, since the hearing, published a revised version of the BORG, and withdrawn the DMGW. It follows that the whole of the current policy has now been published.

119. In correspondence following the hearing, the claimant has challenged the adequacy of the defendant's compliance with the undertaking, in circumstances where significant parts of the DMGW have not been incorporated into the revised BORG. I do not consider that there has been any breach of the undertaking given to the court. Ms Ivimy made clear that one of the two means of ensuring the policy was published in full that the defendant was considering involved bringing the two policy documents together into one new revised version of the BORG. It was clear that if a single new revised policy document were to be published following the amalgamation of the BORG 2022 and the DMGW, it would not entail publishing the entire content of the DMGW. Any wider questions as to the lawfulness of that newly revised policy are not matters for determination in this claim.

E. Is the BORG 2022 materially inconsistent with the DMGW? If so, is the BORG 2022 unlawful to the extent it is inconsistent with the DMGW? (Ground V)

120. I have addressed the question whether the BORG 2022 is materially inconsistent with the DMGW in addressing the question of publication above. For the reasons that I have given, I am of the view that the BORG 2022 is not inconsistent – in the sense that it is compatible – with the DMGW. The BORG 2022 is not unlawful, but it is not the whole policy. The defendant would be acting unlawfully if he applied the BORG 2022 on its own, rather than applying the policy encompassed in the BORG 2022 and the DMGW (insofar as the unpublished policy was beneficial to those seeking waiver of an overpayment).

F. Does the BORG 2022 unlawfully fetter discretion / authorise or approve unlawful conduct?

121. The claimant contends that s.71ZB of the 1992 Act creates no "*obligation, wherever possible*" to recover overpayments. The section envisages a broad exercise of discretion. The BORG 2022 unlawfully fetters the open discretion conferred by Parliament to circumstances where (i) a claimant makes an application; (ii) on "*very specific and compelling*" grounds; and (iii) is stated to be a discretion to be exercised only in "*exceptional circumstances where it can clearly be demonstrated that the debtor's circumstances will only improve by waiver of the debt*".

122. The claimant seeks to rely on a statement made by the Minister of State in Parliament, during the passage of the Welfare Reform Bill 2012, in response to a proposed amendment to include a requirement that in the case of official error overpayments, the claimant could reasonably have been expected to know they were being overpaid:

> "The practical reality is that we do not have to recover money from people where official error has been made, and we do not intend, in many cases, to recover money where official error has been made. There will be an absolutely clear code of practice that will govern the circumstances in which recovery

action will or will not be taken, to ensure consistent, considered decision making."

123. I agree with the defendant that this statement is inadmissible. It does not meet the three conditions set out by Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593, 640: *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2022] 2 WLR 343, Lord Hodge DPSC, [32]. In particular, s.71ZB is not ambiguous, or obscure and nor does it lead, on a conventional interpretation, to absurdity. It makes plain that the Secretary of State has the power to recover *any* overpayment of UC (and certain other benefits). Nor does the Hansard passage relied on make a clear and unequivocal statement on the interpretation of that provision.

124. The claimant submits that the restrictions on the discretion imposed by the BORG 2022 are unlawful in the sense described in *R (A) v Secretary of State for the Home Department* [2021] UKSC 37, [2021] 1 WLR 3931 at [46], in that they represent "*a positive statement of the law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way*". In this case, the claimant contends the decision maker would be induced to fail to exercise the discretion lawfully.

125. The claimant's contentions are based on interpreting the BORG 2022 as not permitting an overpayment to be waived by reference to the factors in §§8.4-8.5 unless the claimant can establish that (i) both current and future recovery action will result in severe welfare issues for her or her family, (ii) that her case is "*exceptional*" and based on "*very specific and compelling grounds*", and (iii) that her circumstances will only improve by waiver of the debt. The claimant contends that those provisions preclude waiver (where §§5.88, 8.2 and 8.3 of the BORG 2022 are not satisfied) in cases of official error, where the claimant acted transparently, in good faith, and did all she reasonably could to confirm her entitlement. The claimant also contends that those provisions preclude waiver (where the three criteria are not met) to give proper effect to a claimant's legitimate expectation.

126. For the reasons I have already given, I accept the defendant's submissions that the criteria are not as hard-edged, and the BORG 2022 does not fall to be interpreted as narrowly, as the claimant contends. The protection of the public purse, in circumstances where an individual has been erroneously paid more than their statutory entitlement to benefits, is a factor the Secretary of State is entitled to regard as weighty and warranting a policy of only waiving recovery in "*exceptional circumstances*" where there are compelling grounds in the individual case. Errors are bound to be made. Given the number of payments the defendant makes, it is perhaps unsurprising that a large number of recoverable overpayments are made each year. The defendant has a limited budget and it is clearly open to him to have a policy of seeking to recover these wherever reasonably, and cost effectively, possible to do so.

127. However, properly understood, as I have explained, the policy does not preclude waiver in the circumstances the claimant cites. Accordingly, I reject the contention that the BORG 2022 unlawfully fetters discretion or approves unlawful conduct, and so the claim based on ground V fails.

G. Is the third decision unlawful because it (a) applies an unlawful policy? (b) applies a fettered discretion / fails to give lawful regard to all relevant considerations? Or (c) is irrational? (Grounds VI(b), II and IV)

128. The claimant's contention that the third decision is unlawful by reason of the decision maker having applied an unlawful policy was dependent on the submissions that I have rejected above. Accordingly, I reject Ground VI(b).

129. In my judgment, the claim based on failure to have regard to material considerations must succeed. In accordance with the defendant's policy, the following matters were relevant considerations: (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. The third decision only addressed these matters to the very limited extent set out in [10]. This is manifestly inadequate.

130. First, an acknowledgement that the overpayment was "*because of DWP error*" does not capture the circumstances in which it arose. This was not a mere case of official error. It was one in which, as the defendant has acknowledged, and the FTT found, the defendant *repeatedly* miscalculated her entitlement over a prolonged period, in what was a "*profound lapse in service*".

131. Secondly, the third decision notes that "*your client states she was not aware that she was being overpaid at the time*", without specifying whether her statement was accepted or not. Whereas, in fact, the issue of the claimant's conduct did not depend on, and was not limited to, an assertion by the claimant that she was unaware she was being overpaid. It was clear from the defendant's acknowledgments, the FTT's findings, and the contemporaneous evidence, that (i) the claimant acted in good faith; (ii) the claimant timeously provided all the information required to the defendant; (iii) the claimant took all reasonable steps both to clarify her entitlement and to prevent any UC overpayment by actively querying her entitlement on at least four occasions.

132. It does not appear from the decision letter that these relevant considerations were taken into account. If they had been, it is impossible to see on what basis the decision maker could have considered the claimant's circumstances to be less compelling than case study 2 (which bears a striking close resemblance to this case) or case study 4 (in which there were fewer "*missed opportunities*" than in this case, and they did not arise – as in this case - when the claimant was querying whether she was *wrongly being paid* the element that resulted in the overpayment).

133. The third decision considered the request for waiver on financial and health/welfare grounds but there is no reference in the letter to show that any consideration was given to whether it was in the public interest, having regard to all the circumstances, to recover the UC overpayment. As I have explained above, it is clear that the public interest is a discrete ground for waiver, albeit one in which some of the relevant factors may overlap with the other grounds.

134. The policy makes clear that a ground on which a waiver may be granted is that the debtor has relied on the overpayment to their detriment. No consideration was given in the third decision to the evidence that the claimant had relied on the overpayment to her detriment. First, she had done so by spending the extra money on day-to-day

living expenses; the overpayment was irretrievably lost. The DMGW gives an example of taking on a long-term financial commitment, but there is nothing to indicate that it would not encompass – as the common law defence of change of position would (see *Goff & Jones*, §27-13) - a person who normally has very straitened finances and who relaxes the constraints on her ordinary living expenditure to the extent of spending what she reasonably believed to be the means at her disposal. Secondly, there was evidence that the claimant had foregone opportunities to make gains, to her detriment, in reliance on the overpayment: claimant's first statement, §38. A number of possibilities would have been open to her if she had been made aware when she first informed the defendant of A's apprenticeship that she would no longer be entitled to the CDC element, including considering an alternative course for A which would not have had the same effect on her UC entitlement or applying for other financial support. (I note the possibility of A applying for UC was not raised prior to the third decision.)

135. The matters I have referred to above are material considerations that the defendant failed to take into account, rendering the decision unlawful.

136. As regards rationality, when assessing whether a decision is irrational, it is not for the court to stand in the shoes of the decision-maker and substitute its own view. A decision may be held to be irrational where the decision is outside the range of reasonable decisions open to the decision-maker. Or a decision may fail the test of rationality because the reasoning process is flawed so as to rob the decision of logic.

137. In my view, the decision to suspend recovery rather than waive the overpayment on the discrete grounds of severe financial hardship or health/welfare grounds was not irrational. By the time the third decision was made the information relevant to those grounds (especially the health ground) was somewhat dated, and it was not irrational for the defendant to suspend deductions while offering the claimant an opportunity to provide fuller and more up-to-date information. I accept Ms Vincent Miller's evidence that the financial evidence provided was fuller than Mr Milner has suggested, but the defendant did not have a statement of the claimant's sons' expenditure, and no request for a reasonable adjustment had been made by the claimant's representatives. In his oral submissions, Mr Straw indicated that the claimant does not pursue the contention that, in rejecting the adequacy of the financial evidence, the decision was irrational.

138. But for the reasons that I have given, I consider 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. In particular, there is no apparent logical distinction between the claimant's case and case study 2. Case study 2 indicates that the combination of (i) notifying the DWP of the material fact (a bursary), (ii) querying entitlement and receiving incorrect advice, and (iii) challenging circumstances (being a single parent with a disabled child), particularly if (iv) there is also evidence of hardship, would lead to a decision to waive on the ground it would be contrary to the public interest to recover the debt. In this case, as in case study 2, the claimant notified the DWP of all the material facts; queried her entitlement and received incorrect advice; is a single parent with two disabled adult children for whom she has daily caring responsibilities; and, on any view, there is evidence of hardship. Moreover, insofar as the claimant's case differs from case study 2, it is more compelling in that the claimant *repeatedly* queried her entitlement and the DWP

repeatedly miscalculated her entitlement, a factor that case study 4 shows is highly material in determining whether recovery of the debt is in the public interest.

139. Accordingly, I conclude that the third decision is unlawful, the claim succeeds on Grounds II and IV, and accordingly the decision to refuse to waive the UC overpayment should be quashed.

H. Did the claimant have a legitimate expectation that the defendant would pay benefit in respect of her son, A? If so, did the defendant's decision not to waive recovery of that benefit unlawfully depart from that expectation? (Ground VI(c))

140. The applicable legal principles are agreed, save for one aspect which I identify below.

Clear and unambiguous promise, devoid of relevant qualification

141. In *Re Finucane* [2019] UKSC 7, [2019] 3 All ER 191, the Supreme Court considered the appellant's claim that she had a legitimate expectation that a public inquiry into her husband's death would be held. Having reviewed the Court of Appeal authorities at [55]-[61], Lord Kerr (with whom Lady Hale, Lord Hodge and Lady Black agreed) held:

> "62 From these authorities it can be deduced that where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so. The court is the arbiter of fairness in this context. And a matter sounding on the question of fairness is whether the alteration in policy frustrates any reliance which the person or group has placed on it. This is quite different, in my opinion, from saying that it is a prerequisite of a substantive legitimate expectation claim that the person relying on it must show that he or she has suffered a detriment.
>
> …
>
> 64 The onus of establishing that a sufficiently clear and unambiguous promise or undertaking, sufficient to give rise to a legitimate expectation, is cast on the party claiming it – see, for instance, *Re Loreto Grammar School's Application for Judicial Review* [2012] NICA 1; [2013] NI 41, at [42] et seq. In *Paponette v Attorney General of Trinidad and Tobago* [2012] 1 AC 1, at [37], Lord Dyson said:
>
> > 'The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too.'

> …
>
> 72 I would disagree with any suggestion that it must be shown that the applicant suffered a detriment before maintaining a claim for frustration of legitimate expectation for a fundamental reason. A recurring theme of many of the judgments in this field is that the substantive legitimate expectation principle is underpinned by the requirements of good administration. It cannot conduce to good standards of administration to permit public authorities to resile at whim from undertakings which they give simply because the person or group to whom such promises were made are unable to demonstrate a tangible disadvantage. Since the matter does not arise, however, it is better that the point be addressed in a future case when it is truly in issue." (Emphasis added.)

142. As the claimant acknowledges, in this case, she bears the onus of showing that the defendant made a clear and unambiguous promise or representation (whether in the form of a statement or practice) that was devoid of relevant qualification.

143. In *R (Patel v General Medical Council* [2013] EWCA Civ 327, [2013] 1 WLR 2801, the Court of Appeal held that the appellant had a substantive legitimate expectation that his primary medical qualification, once awarded, would be an acceptable overseas qualification for the purpose of provisional registration with the GMC. Lloyd Jones LJ (with whom Lord Dyson MR and Lloyd LJ agreed) observed:

> "44 The question for consideration is how, on a fair reading of the statement, it would have been reasonably understood by those to whom it was made: see *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397, para 56, per Dyson LJ. In the present context the question is whether it would reasonably be understood as an assurance that the qualification would be recognised in the case of the claimant if he obtained it in a reasonable time.
>
> 45 The statement has to be considered in the context in which it was made. … The matter is put very clearly by the claimant in his email of 8 November… The fact that the claimant went back repeatedly in an attempt to obtain a clear answer to his question is also highly relevant as part of that context. First, it shows the importance he attached to the information he was legitimately seeking from the GMC. Secondly, it shows that he was trying his utmost to provide a clear statement of his intentions and to obtain a clear unequivocal response to his question." (Emphasis added.)

144. In this case, the question is how, considered in context, the claimant would have reasonably understood the statements and conduct of the defendant on which she relies.

145. The claimant contends that the facts demonstrate that DWP officials represented to her, in clear terms, and she reasonably understood them to mean, that she was entitled to the CDC element of UC during the period A was combining an apprenticeship with college study. She relies on the cumulative effect of:

i) The advice she was given in around June or July 2019, after informing the defendant about A's apprenticeship, "*that I could keep my son on my UC claim*" (claimant's first statement, §12; request for mandatory consideration);

ii) The reassurance that she was given by her DWP caseworker at a meeting on 27 September 2019, after he had checked with a manager, "*that A should stay on my claim because he was in education*". The caseworker's reassurance was subject to a statement that "*DWP may need more information from me*", and the requested information was duly provided. (Claimant's first statement, §§13-14; DWP journal.)

iii) The continued payment of the CDC element after the claimant raised concerns about her entitlement to it, as A was doing an apprenticeship and in college, via the DWP journal on 6 January 2020 (defendant's evidence to the FTT; claimant's first statement, §15).

iv) The advice from a DWP caseworker, given to the claimant on 30 June 2020 when she again contacted the defendant to raise her concern that she was receiving the CDC element for A, after the caseworker checked with a colleague, that "*as her son is in education we will pay for child until course ends*" (defendant's evidence to FTT; claimant's first statement, §17).

v) The continued payment of the CDC element until 31 January 2021.

vi) The fact that she notified the defendant of all the material facts and, as the FTT held, "*took all reasonable steps to clarify her entitlement*".

146. The defendant submits that insofar as the claimant relies on statements that her son "*should remain on claim*" or that the defendant would "*pay for child until course ends*", the defendant did pay that benefit, so her expectation was met. Insofar as the claimant seeks to establish a legitimate expectation that she was *entitled* to the CDC element – which Mr Straw confirmed is her case – the defendant submits a representation to that effect is not capable of giving rise to an expectation that is legitimate. I address that legal issue below.

147. As regards the facts, Ms Ivimy noted that the exchange regarding A's hours in 2019 appears to have been inconclusive on the documentary evidence, and submitted the evidence is not particularly strong as to the precise words used by DWP officials. Nevertheless, she confirmed that the defendant accepts DWP officials told the claimant she was entitled to the CDC element.

148. In my judgment, by 30 June 2020, the defendant had made a clear and unambiguous representation to the claimant that she had been entitled to the CDC element since A began his apprenticeship in July 2019, and would remain entitled to it until the end of his course. The representations made to her have to be understood in the context of the claimant's repeated attempts to clarify her entitlement. It would have been clear to

the DWP officials the claimant spoke to what she was asking, and on two occasions officials understood the significance of giving the correct answer sufficiently to check the position with colleagues. The continued payment of the CDC element provided confirmation of the express representations.

149. I reject as unrealistic the defendant's contention that the claimant had a mere expectation, which was met, that she would be paid the CDC element. The claimant was not asking whether potentially recoverable payments would reach her bank account. Plainly, she was querying her *entitlement* to those payments, and the representations made have to be understood in that context.

Is the claimant's expectation 'legitimate'?

150. The issue of principle on which there was disagreement between the parties concerned the question whether a statement by the defendant to the effect that the claimant was entitled to the CDC element, which was admittedly wrong in law, is capable of founding a *legitimate* expectation.

151. In *R v Inland Revenue Commissioners, ex p. MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1568-1569, in a passage cited by Lord Kerr in *Re Finucane* at [55], Bingham LJ described the concept of legitimate expectation in this way:

> "So if, in a case involving no breach of statutory duty, the [public authority] makes an agreement or representation from which it cannot withdraw without substantial unfairness to the [citizen] who has relied on it, that may found a successful application for judicial review." (Emphasis added.)

In *ex p MFK* it was common ground that if the revenue could not lawfully make the statements or representations which it was said to have made, the legitimate expectation claim would fail. However, the court considered that the assurances the revenue was said to have given fell within the revenue's managerial discretion as to the best way of facilitating collection of taxes, and so were not inconsistent with the revenue's statutory duty.

152. In *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115, the claimant contended that she had a legitimate expectation that the Secretary of State would exercise his discretion to allow her to enjoy the benefit of her assisted place at an independent school until the conclusion of her education at that school. *Ex parte Begbie* raised the question whether the *correction* of the representation relied on was an abuse of power, and whether *holding the public authority to its promise* would entail requiring a breach of statutory duty.

153. Peter Gibson LJ accepted that the statements relied on, in fact, gave rise to an expectation that children on the assisted places scheme would continue to receive support in their education until it was completed. However, he held at 1125D-G:

> "But the question for the court is whether those statements give rise to a legitimate expectation, in the sense of an expectation which will be protected by law.

> I do not think that they did. As Mr Havers, appearing with Mr Garnham for the Crown pointed out, the starting point must be the Act of 1997. It is common ground that any expectation must yield to the terms of the statute under which the Secretary of State is required to act. … As Mr Havers submitted, if the Teed letter promise is implemented, virtually all children receiving primary education at 'all through schools' would have to be allowed to keep their assisted places till the end of their secondary education. It is not in dispute that if Heather were allowed to keep her assisted place, so must all others in the like circumstances. To treat the Secretary of State as bound to implement the promise in the Teed letter for all in Heather's position would plainly be outside the contemplation of the section, and contrary to what must have been intended by section 2(2)(b)."

154. In the context of a misstatement that was corrected five weeks later, and not relied on by the claimant's parents in the interim to change their position, Peter Gibson LJ observed at 1127B-C:

> "Where the court is satisfied that a mistake was made by the minister or other person making the statement, the court should be slow to fix the public authority permanently with the consequences of that mistake."

However, he emphasised that a mistaken statement *may* give rise to a legitimate expectation.

155. Laws LJ stated at 1129E-F:

> "I agree that this appeal should be dismissed on the short ground that to give effect to Mr Beloff's argument would entail our requiring the Secretary of State to act inconsistently with section 2 of the Education (Schools) Act 1997."

However, he also observed at 1131G that if there had been reliance and detriment he would have held that it would be abusive for the Secretary of State not to make the earlier representations good. The Secretary of State had a discretion under the statute which could be exercised on the individual circumstances of the case: the breach would have occurred if he had been required to exercise it in respect of a whole cohort: see per Sedley LJ at 1132B (who agreed with the reasons given by both Peter Gibson and Laws LJJ).

156. In *United Policyholders Group v Attorney General of Trinidad and Tobago* [2016] UKPC 17, [2016] 1 WLR 3383, Lord Neuberger of Abbotsbury PSC, giving the judgment of the Board, summarised the law relating to legitimate expectation at [37]-[38], observing at [38]:

> "Secondly, the principle cannot be invoked if, or to the extent that, it would interfere with the public body's statutory duty:

> see e.g. *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, 636, per Lord Fraser of Tullybelton".

157. In *R (Alliance of Turkish Business People Ltd) v Secretary of State for the Home Department* [2020] EWCA Civ 553, [2020] 1 WLR 2436, Flaux LJ (with whom Newey and Rose LJJ agreed), stated at [49]:

> "Equally, I do not consider that there is any force in the submission by Sir James Eadie that it is extremely difficult to build a legitimate expectation on a wrong view of the law. The authorities on which he relied all recognise in terms that, even where a statement or representation has been made by a public authority on a mistaken view as to what the law is, if the requirements of the doctrine of legitimate expectation are satisfied, it will apply and its application will not be rendered impossible or more difficult because the statement or representation was made on a mistaken view of the law."

158. The claimant submits that what these authorities show is that a legitimate expectation can be founded on a statement that was an error of law, but when determining whether to require the defendant to fulfil the expectation that has been engendered, or to permit him to resile from it, the court cannot require the defendant to act in a way which would conflict with the defendant's statutory duty.

159. Whereas the defendant relies on *ex p Begbie* in support of the contention that an expectation of entitlement to a particular benefit, based on a legally erroneous representation, must yield to the statutory entitlement. The defendant cannot legally be bound by such a mistaken representation because DWP officials have no power to override the legislative scheme under which (i) the claimant had no right to the CDC element and (ii) any error in making a UC payment was not irrevocable.

160. The defendant submits that a finding that the claimant has a legitimate expectation, based on mistaken statements as to her entitlement, would be inconsistent with the statutory scheme. It is clear that Parliament intended to enable the Secretary of State to recover overpayments, even in cases of official error. The defendant contends that if the claimant were right, any (erroneous) statement by an official that a claimant was entitled to a benefit payment could be taken as founding a legitimate expectation that the benefit would not be recovered. The defendant submits that to succeed the claimant has to establish that a different representation was made, to the effect that if the officials were mistaken in their assessment that she was entitled to the CDC element, the defendant would not seek to recover the overpayment. But there is no factual basis on which such an expectation could be asserted.

161. In my judgement, the clear and unambiguous representations that the claimant was entitled to the CDC element are capable of founding a legitimate expectation. The fact that the representations were based on a mistaken view of the law does not preclude the expectation to which they gave rise from being regarded as legitimate: *R (Alliance of Turkish Business People Ltd) v Secretary of State for the Home Department,* [49]. Both *ex p Begbie* and *United Policyholders Group v Attorney General of Trinidad and Tobago* demonstrate that the focus should be on whether invoking the principle of legitimate expectation would interfere with the defendant's statutory duty.

162. In this case, it would not do so. The claimant has been overpaid. She has not invoked the legitimate expectation to *secure* the overpayment: it has already occurred. She relies on the legitimate expectation to assert that the defendant is not entitled to resile from it by seeking to recover the UC overpayment. The defendant has a power, not a duty, to recover the claimant's UC overpayment: s.71ZB of the 1992 Act. So a decision that the defendant is not entitled to resile from the claimant's legitimate expectation would not interfere with his statutory duty.

163. The position would be different if the claimant sought to rely on her expectation to assert that she is entitled to be paid the CDC element in respect of the period from when the overpayments ceased until the end of her son's course. Such a contention would interfere with the defendant's duty to pay the claimant her statutory entitlement in respect of that period, as correctly calculated. But unsurprisingly no such claim is made.

164. I do not accept the defendant's contention that a finding that the claimant has a legitimate expectation based on the facts of this case is inconsistent with the statutory scheme. The fact that the claimant has been able to establish a clear and unambiguous representation on the remarkable facts of her case, does not begin to show that that high threshold would be met in all or a significant tranche of official error overpayment cases. That will depend on the facts of each individual case. In any event, establishing a legitimate expectation would not automatically prevent the defendant from resiling from it: whether that is so involves a consideration of the public interest, which includes the statutory context in which Parliament has given the Secretary of State the power to recover overpayments caused by official error.

Should the defendant be permitted to resile from the claimant's legitimate expectation?

165. Once the claimant has established that she has a legitimate expectation, the question is whether it is fair to allow the defendant to depart from it, as he has sought to do by refusing to waive recovery. As Lord Neuberger put it in his summary of the principles in *United Policyholders Group v Attorney General of Trinidad and Tobago*, at [38]:

> "Thirdly, however much a person is entitled to say that a statement by a public body gave rise to a legitimate expectation on his part, circumstances may arise where it becomes inappropriate to permit that person to invoke the principle to enforce the public body to comply with the statement. This third point can often be elided with the second point, but it can go wider: for instance, if, taking into account the fact that the principle applies and all other relevant circumstances, a public body could, or a fortiori should, reasonably decide not to comply with the statement."

166. The question whether it is fair for the defendant to override the claimant's legitimate expectation is for the court to determine (*Re Finucane* at [62]), having regard to all the circumstances. Those circumstances include the public interest in seeking to recover overpayments of benefit which have mistakenly been paid, so as to ensure such public resources are not lost, and are available to spend elsewhere in the public interest.

167. Nevertheless, in the circumstances of this case, fairness clearly compels the conclusion that the claimant's legitimate expectation should be protected. She has relied on the legitimate expectation to her detriment both by spending the money on the understanding she was entitled to do so (and so she has changed her position), and also by failing to take steps that would otherwise have been open to her, such as seeking an alternative course for A, or investigating whether he was entitled to UC in his own right, or investigating alternative sources of funding for herself and her family. If the defendant were permitted to resile from the claimant's legitimate expectation, it would have the effect that she would receive less than her entitlement to benefits, while the UC overpayment is recovered, for a period of many years, perhaps as long as 15 years, depending on the rate of recovery. Given the claimant's family, health and financial circumstances, and having regard to how the overpayment arose, and the strenuous efforts the claimant made to clarify and query her entitlement, it would be unfair and unjust for the defendant to repudiate the claimant's legitimate expectation.

168. Accordingly, I grant permission and allow the claim on Ground VI(c).

I. The BORG 2021 and the first and second decisions (Grounds I, II, IV and VI(a))

169. Although the claimant has maintained her challenge to the first and second decisions, and the BORG 2021, the focus of the parties' submissions was, rightly, on the live policies (the BORG 2022 and the DMGW) and the extant decision (the third decision). In my judgment, in light of the conclusions that I have reached on the other issues in the claim, it is unnecessary to address the lawfulness of the earlier policy, or the question whether the third decision is unlawful by reason of being a review decision based on unlawful predecessors.

170. As the first and second decisions were superseded by the third decision, and in any event cannot stand in light of my conclusion that the claimant's legitimate expectation must be respected, I can deal very shortly with the lawfulness of those earlier decisions.

171. A ground on which an overpayment could be waived expressly identified in the BORG 2021 was that recovery would not be in the public interest: §8.3. The claimant's request for waiver clearly needed to be considered by reference not only to the discrete grounds of "*severe financial hardship*" and "*ill health*"/"*welfare*", but also, and most obviously, by reference to the public interest ground. The first and second decisions did not address the public interest. Nor did they make any reference to the circumstances in which the overpayment arose or to the claimant's conduct in disclosing all material facts and repeatedly querying her entitlement. Nor did those decisions address the evidence that the claimant had relied on the defendant's repeated representations to her detriment. Those were obviously material considerations.

172. I do not accept that it should be assumed the decision maker took those matters into account, given that the request drew attention to them, in circumstances where no reference was made to them; and the internal form underlying the first decision clearly indicates the decision maker (mistakenly) considered that no "*other reason*" than financial and health grounds had been put forward. I conclude that in the first and

second decisions the defendant unlawfully failed to have regard to material considerations, and so the claim succeeds on Ground II.

J. Has the defendant failed to comply with the PSED when considering and formulating his policy on recovery and waiver of overpayments in BORG 2021 and / or revising that policy in BORG 2022? (Grounds III and VII)

173. Section 149 of the Equality Act 2010 creates a public sector equality duty ('the PSED'). The section provides:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to –
>
> > (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
> >
> > (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
> >
> > …
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –
>
> > (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
> >
> > (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> …"

The relevant characteristics include "disability": s.149(7) of the Equality Act 2010.

174. Schedule 2 to the Equality Act 2010 includes the following provision:

> "(5) Being placed at a substantial disadvantage in relation to the exercise of a function means –
>
> > (a) if a benefit is or may be conferred in the exercise of the function, being placed at a substantial disadvantage in relation to the conferment of the benefit, …"

The claimant's case

175. The claimant's pleaded case in respect of Ground III in the re-re-amended grounds, omitting references to the position of women, as the claim has only been pursued in respect of people with a disability, is:

> "[The PSED] is relevant in this case in relation to the protected characteristics of disability ... There is statistical evidence to suggest that disabled people … are particularly likely to be victims of overpayments [Ms Miller's first statement, §§31-43]. It is also a likelihood of which judicial notice can be taken, on the basis that disabled people are more likely to claim benefit than others because of their additional living costs and reduced earning capacity;…
>
> The BORG constitutes a direct reversal of the Defendant's historic approach to recovering overpaid benefit resulting from official error. Previously where an overpayment was the Defendant's fault, it could never be recovered. Now it is, in all but a statistically negligible proportion of cases, always recovered.
>
> There is reason to believe that this change in approach does not affect all sections of society equally, on the basis that households containing disabled people … are more likely than others to be overpaid benefit. That means a policy change which markedly increases the circumstances in which overpaid benefit is recovered will have a disproportionate impact on disabled people … in comparison with others, by causing affected households to have to live on incomes below the basic benefit minimum subsistence level for long periods of time, reducing their opportunity to enjoy a reasonable standard of living.
>
> In formulating the BORG, the Defendant had no regard to that potential equality impact of her policy about-turn." (Emphasis added.)

176. Ground VII of the claimant's re-re-amended grounds first relies on the points made under Ground III in support of the argument that the decisions to revise the BORG in February and April 2022 breached the PSED. Then the pleading continues (again, omitting the references to women which are no longer relied on):

> "There is evidence to indicate that the Defendant's policy (of automatically recovering all overpayments in the first instance, subject to a very high waiver threshold defined in §5.88 and chapter 8 of the 2022 BORG) has an adverse impact on disabled people … The Defendant has produced no evidence to show she has had due regard to the needs specified in s.149(1)(a)-b) EA 2010. For example, she has failed to demonstrate that she had due regard to the need to make reasonable adjustments to the policy, pursuant to s.20, 21 and 29 EA 2010. The Defendant has failed to monitor and/or inquire into the impact

> of the policy on disabled people … For example, she has failed to monitor or publish data on the extent to which the policy has a disproportionately adverse effect on disabled people. She thereby breached s.149 EA 2010." (Emphasis added.)

177. In written and oral submissions, the claimant has contended that there are grounds to suspect that the policy (a) of recovering UC overpayments in all cases, subject to a very high threshold for waiver; and (b) of requiring the provision by the application of considerable amounts of supporting evidence (§§8.7 to 8.15 of the BORG 2022), may have an adverse impact on disabled people. The claimant relies on four bases for asserting that these policies may have an adverse impact, but submits it is only necessary to show one. Those bases are that there is evidence that: (i) disabled people are more highly represented among recipients of UC than those without a disability; (ii) a greater proportion of disabled people have deductions made from their benefits than those without a disability; (iii) deductions may have a worse impact on those with disabilities; and (iv) the burden placed on an applicant by §§8.7 to 8.12 of the BORG 2022 may put those with disabilities at a substantial disadvantage.

178. In my judgment, the defendant is right to point out that the claimant does not have permission to pursue a PSED claim in respect of the policy of requiring the applicant for a waiver to provide evidence in accordance with the provisions in chapter 8 of the BORG 2022; or to rely on the evidential burden imposed on applicants as a basis for showing the defendant's policy may have an adverse impact on disabled people. The claimant has not applied to amend her grounds to pursue such a claim. It would not be fair on the defendant, or in the interests of justice, to permit the claimant to pursue that new ground, in circumstances where it has not been pleaded, and the defendant has had no opportunity to adduce evidence in response, for example regarding the separate reasonable adjustments policy. Accordingly, I shall not consider that aspect of the claimant's submissions further.

179. However, contrary to the defendant's submissions, the claimant's allegation that the defendant failed to have due regard to equality considerations with respect to the waiver policy in promulgating the BORG 2022 is not new. That is the essential allegation pleaded in Ground VII.

180. In addition, the claimant no longer puts the case in the way in which she had done in Ground III (which was adopted in respect of the BORG 2022 in Ground VII). I agree with the defendant's submissions that in Ground III the claimant conflated the change introduced by Parliament in the 2012 Act, when s.71ZB was introduced, with issues of policy. It is inapt to describe as a "*policy change*" the extension of the waiver policy in the BORG to overpayments caused by official error: that was a function of the legislation. It is true that it would have been *open* to the defendant to have a adopted a different waiver policy, nonetheless, the "*reversal*" of the defendant's historic approach of not recovering overpaid benefit resulting from official error was brought about by legislation. The PSED does not apply to primary legislation: *R (Adiatu) v Her Majesty's Treasury* [2020] EWHC 1554 (Admin), [2021] 2 All ER 484, Bean LJ and Cavanagh J, [236]-[237]. Accordingly, I reject the claim based on Ground III.

The legal principles

181. In *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [2014] EqLR 60, McCombe LJ drew together the authorities and summarised the applicable principles at [25]:

> "(1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213; [2006] EWCA Civ 1293 at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
>
> (2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).
>
> (3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26 – 27] per Sedley LJ.
>
> (4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a 'rearguard action', following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at [23 – 24].
>
> (5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), as follows:
>
> > i) The public authority decision maker must be aware of the duty to have 'due regard' to the relevant matters;
> >
> > ii) The duty must be fulfilled before and at the time when a particular policy is being considered;
> >
> > iii) The duty must be 'exercised in substance, with rigour, and with an open mind'. It is not a question of 'ticking boxes'; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;
> >
> > iv) The duty is non-delegable; and

v) Is a continuing one.

vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) '[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.' (per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [84], approved in this court in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at [74-75].)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be 'rigorous in both enquiring and reporting to them': *R (Domb) v Hammersmith & Fulham LBC* [2009] EWCA Civ 941 at [79] per Sedley LJ.

(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) as follows:

(i) At paragraphs [77-78]

'[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is <u>a proper appreciation of the potential impact of the decision on equality objectives</u> and the desirability of promoting them, then as Dyson LJ in Baker (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

[78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, <u>the decision maker must be clear precisely what the equality implications are when he puts them in the balance</u>, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review

on substantive merits grounds almost all aspects of public decision making.'

(ii) At paragraphs [89-90]

'[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and <u>the duty of due regard under the statute requires public authorities to be properly informed before taking a decision.</u> <u>If the relevant material is not available, there will be a duty to acquire it</u> and this will frequently mean than some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in Brown (para [85]):

> '….the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.'

[90] I respectfully agree…'" (Emphasis added.)

182. That passage was approved by the Supreme Court in *Hotak v Southwark London Borough Council* [2015] UKSC 30, [2016] AC 811, [73], and both parties agree it reflects the principles to be applied.

183. The defendant acknowledges that, in principle, promulgating or revising a policy as to the exercise of a discretion may be a "*function*" to which the PSED applies. The only issue of law on which there was dispute concerned the threshold for engagement of the PSED. The claimant submits that it is sufficient to show that the policy *might* have equality impacts or that there are *grounds to believe or suspect* that it may do so, for the duty of enquiry to be engaged. Whereas the defendant contends the test is whether such impacts are *obvious*.

184. The claimant relies on *R (C) v Secretary of State for Justice* [2008] EWCA Civ 882, [2009] QB 657 in which, the Court of Appeal observed at [39], referring to the judgment of the Divisional Court that was under appeal:

> "Second, it was accepted that the effect of section 71(1) of the Race Relations Act 1976 was to require a race equality impact assessment ('REIA') where it was proposed to change policy in a matter that <u>might raise issues about racial equality</u>. …" (Emphasis added.)

The duty in s.71 of the Race Relations Act 1976 was subsequently expanded to embrace other protected characteristics, and now finds its place in s.149 of the

Equality Act 2010: *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058, [2020] 1 WLR 5037, [177]-[178].

185. In addition, the claimant also cites *R (Bapio Action Ltd) v Royal College of General Practitioners* [2014] EWHC 1416 in which Mitting J observed at [29]:

> "All cases up to now have been concerned with the need for a public authority to apply its mind to the section 149 duty when proposing to take a decision which will have an impact on the users of existing services provided by the authority, for example a library, or of the financial terms on which people can make use of them, for example student fees. This case is different. It concerns what needs to be done to address a long-established state of affairs. I do not accept Ms Monaghan's submission, faintly made, that a duty to conduct a formal assessment of the differential impact of the Clinical Skills Assessment arose annually because the assessment was approved annually. I am dealing in reality, as is the Royal College, with a continuing method of assessment that, apart from a change in the method of marking, has remained in place for the last seven years. Nor do I accept Mr Oldham's proposition that the duty only arises when major change is contemplated. The duty is to have regard to the need to eliminate discrimination and advance equality of opportunity in the exercise of public functions, whether or not it is contemplated that there will be a change in the manner in which those functions are exercised. <u>If there are grounds to believe that the manner in which public functions is being exercised is not fulfilling the statutory goals, then due regard must be had to exercising them in a manner which does.</u> I consider, therefore, and hold that the Royal College was and remains under a continuing duty to have regard to the need to eliminate discrimination and advance equality of opportunity in the exercise of its public functions of granting Certificates of Completion of Training and in setting and administering assessments which lead to the grant of that certificate and that it can only discharge that duty by conscientiously applying its mind to that need." (Emphasis added)

186. The claimant submits this lower threshold properly reflects the purpose of the PSED to put the burden on public authorities to address potential equality impacts proactively. As the Court of Appeal (Sir Terence Etherington MR, Dame Victoria Sharp P and Singh LJ) observed in *Bridges* at [178]-[179]:

> "The background is explained by Karon Monaghan QC in Equality Law, 2nd ed (2013), para 16.06:
>
> > 'The first of the modern equality duties was found again in section 71 of the RRA [the Race Relations Act], but following amendments made to it by the Race Relations (Amendment) Act 2000 (enacting the general race equality

> duty). The general race equality duty in the amended section 71 of the RRA required that listed public authorities had 'due regard' to the need 'to eliminate unlawful racial discrimination' and 'to promote equality of opportunity and good relations between persons of different racial groups'. The Race Relations (Amendment) Act 2000 and the general race equality duty within it were enacted to give effect to the recommendations in the Stephen Lawrence Inquiry Report and the inquiry's findings of 'institutional racism'. The purpose of the general race equality duty was to create a strong, effective, and enforceable legal obligation which placed race equality at the heart of the public authority's decision making. The new duty was intended to mark a major change in the law. It represented a move from a fault-based scheme where legal liability rested only with those who could be shown to have committed one or other of the unlawful acts. Instead, the duty-bearer, the public authority, was to be required to proactively consider altering its practices and structures to meet this statutory duty. This was considered important in light of the findings of the Stephen Lawrence Inquiry.' (Emphasis added.)

Public concern about the relationship between the police and BAME communities has not diminished in the years since the Stephen Lawrence Inquiry Report. The reason why the PSED is so important is that it requires a public authority to give thought to the potential impact of a new policy which may appear to it to be neutral but which may turn out in fact to have a disproportionate impact on certain sections of the population." (Emphasis added.)

187. In support of the contention that s.149 only requires a decision maker to understand the obvious equality impacts before adopting a policy, the defendant relies on *R (Parkin) v Secretary of State for Work and Pensions* [2019] EWHC 2356 (Admin), *Adiatu* and *R (Sheakh) v Lambeth London Borough Council* [2022] EWCA Civ 457, [2022] PTSR 1315.

188. In *Parkin,* Elisabeth Laing J held at [88], with reference to the many decisions about the scope of section 149:

"There are four key features of those decisions which are relevant to this case:

> i. Section 149 does not require a substantive result.
>
> ii. It implies a duty to make reasonable inquiry into the obvious equality impacts of a decision.
>
> iii. It requires a decision maker to understand the obvious equality impacts of a decision before adopting a policy.

> iv. Complying with it is not a box-ticking exercise." (Emphasis added.)

189. In *Adiatu* Bean LJ and Cavanagh J observed at [209]-[210]:

> "There must be some reason to think that the exercise of the functions might in some way relate to a particular aspect of the PSED, in order for any obligation for consideration to arise. It cannot be the case that the decision-maker has to focus on equalities considerations in relation to the exercise of functions which simply will not engage the equalities duties; *R (Hurley) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201, [2012] HRLR 13 (at para 95). If it is plain and obvious that a particular exercise of a function could have no adverse effect on those with a protected characteristic, 'due regard' may mean 'no regard': *R (Bailey) v Brent London BC* [2011] EWCA Civ 1586, [2012] LGR 530, [2012] EqLR 168 (at para [91]).
>
> In *R (Parkin) v Secretary of State for Work and Pensions* [2019] EWHC 2356 (Admin), Elisabeth Laing J said that s.149 implies a duty to make reasonable enquiries into the obvious equality impacts of a decision, and it requires a decision maker to understand the obvious equality impacts of a decision before adopting a policy. …" (Emphasis added.)

190. In *Sheakh*, Sir Keith Lindblom SPT, Males and Elisabeth Laing LJJ held at [10]:

> "There is ample authority on the meaning and effect of section 149. Five points are especially relevant here. First, section 149 does not require a substantive result … Second, it does not prescribe a particular procedure. It does not, for example, mandate the production of an equality impact assessment at any particular moment in a process of decision-making, or indeed at all… Third, like other public law duties, it implies a duty of reasonable enquiry (see *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014). Fourth, it requires a decision-maker to understand the obvious equality impacts of a decision before adopting a policy (see the judgment of Pill LJ, with which the other members of this court agreed, in *R (Bailey) v Brent London Borough Council* [2011] EWCA Civ 1586; [2012] Eq LR 168, paras 79, 81 and 82). And fifth, courts should not engage in an unduly legalistic investigation of the way in which a local authority has assessed the impact of a decision on the equality needs …" (Emphasis added.)

191. In the exercise of its functions, a public authority must have 'due regard' to the relevant matters. The duty implies a duty of reasonable enquiry: see, e.g., *Sheakh*. The nature and extent of the duty of reasonable enquiry will turn on the context and the function being exercised. In my judgment, in light of the decision of the Court of

Appeal in *Bridges*, it is clear that the duty of reasonable enquiry may be engaged even if it is not obvious that the exercise of the function will have an adverse impact on those with one or more of the protected characteristics. On its face, it may appear that a proposed measure or policy would have a neutral impact, but the importance of the PSED is that it requires a public authority to assess the risk and extent of any adverse impact (*Bridges*, [179], *Bracking*, [25(4)]). In my view, there is no inconsistency on this issue between *Bridges* and *Sheakh* (both of which were decided after *Parkin*, and are of course binding on this court). In particular, I note that the Court of Appeal in *Sheakh* (unlike Elisabeth Laing J in *Parkin*) did not qualify the duty as being to make reasonable enquiry "*into the obvious equality impacts of a decision*".

192. I agree with the claimant that the public authority has a duty to make reasonable enquiries into the impact of a proposed measure or policy where there are grounds to suspect it might have an equalities impact, not just where it is obvious there will be such an impact.

Application of the legal principles

193. In promulgating and amending the BORG, which contains a policy addressing the exercise of the statutory discretion to waive the recovery of benefits overpayments, the Secretary of State was exercising a "*function*" to which the PSED applies. This is not disputed.

194. In support of the contention that there were grounds to suspect that the proposed policy might have a disproportionately adverse effect on disabled people, such that the defendant had a duty to make reasonable enquiry into the impact, first, the claimant submits the court can take judicial notice of the fact that disabled people are more highly represented among those claiming benefits (and so at risk of receiving an overpayment). Ms Vincent Miller states that as "*disabled people are less likely to be in employment, work fewer hours on average and are more likely to be low paid it is fair to assume that this group are overrepresented in the social security system*".

195. But the claimant has also adduced evidence to support that first point, in the form of a report published by the Joseph Rowntree Foundation entitled "*UK Poverty 2019/20*" which records:

> Table 5: A family with disability is more likely to claim income-related benefits

Income-related benefits	**Someone disabled within the family**	**No-one disabled within the family**
In receipt	30%	9%
Not in receipt	70%	91%

196. Secondly, Ms Vincent Miller states in her second statement, §41:

> "…DWP statistics released on 10 June 2022 suggest that families with a disabled individual were more likely to experience deductions: [exhibit] (the statistics are not specific as to the type of deductions). Being assessed as 'unfit for work'

> is used [as] a proxy for disability in the absence of data on disability. 56% of those with Limited Capability for Work (LCW) had a deduction and 52% of those with Limited Capability for Work Related Activity (LCWRA) had a deduction, compared to 42% of households with neither LCW nor LCWRA."

197. The DWP statistics that Ms Vincent Miller has exhibited support her analysis of the figures. In further support of the submission that disabled people are, at least may be, disproportionately the subject of recovery of overpayments, Ms Vincent Miller states:

> "Analysis by the National Audit Office of UC claims due for payment from January to September 2019 found that disabled claimants or claims including a disabled child were more likely to have existing debts to repay through UC deductions (67% of claims that include a limited capability for work element and 70% of claims which included the disabled child element had deductions in place as compared to 61% of all claims). Although it is not clear what proportion of such deductions are for overpayment debt." (Ms Vincent Miller's first statement, §41)
>
> "Data collected by JRF in their 2022 survey of low-income families shows that those with disabilities are more likely to have deductions from benefits (44% of households with a disabled person fell into this category compared to 30% of households with no disabled person). Those with mental health difficulties were also more likely to have deductions taken from benefits (46% of those with mental health difficulties fell into this category compared to 33% without).
>
> Step Change's report found that clients in receipt of UC with tax credit or benefit overpayment debt were more likely to face an additional vulnerability than clients overall: 'Over two-thirds have an additional vulnerability, such as mental or physical health problems, along with their financial difficulties compared to just over half of clients overall.'" (Ms Vincent Miller's second statement, §§42-43.)

198. Thirdly, the claimant contends that there is reason to believe that deductions from benefits to recover overpayments are liable to have a worse impact on disabled people, including those with mental health difficulties. In support of this submission, the claimant refers to the particular problems faced by those with mental health difficulties as a group, identified in *R (MM) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1365, [2014] 1 WLR 1716, [31]. Ms Vincent Miller states:

> "Trussell Trust found that those with existing mental and or physical health conditions 'tended to feel less equipped to cope with the debt, and the debt itself exacerbated and intensified their condition'. Their report concluded '[w]hilst many participants did enter the system with pre-existing mental health issues, there is no

> doubt debt worsened these significantly and correlated with new mental health struggles for others'. (Ms Vincent Miller's second statement, §44)

199. The defendant submits that the claimant is making the wrong comparison in asserting that disabled people are disproportionately represented among those in receipt of benefits and overpayment. The correct comparison is between persons affected by the relevant policy with a protected characteristic and persons affected by the relevant policy who do not share that characteristic i.e. between UC claimants in receipt of a recoverable overpayment who have a disability and UC claimants in receipt of a recoverable overpayment who do not have a disability. The defendant submits the policy operates equally on all debtors by deduction from the UC standard allowance (with additional elements being protected from deductions), and cannot be described as discriminatory.

200. In addition, the defendant relies on a document entitled "*Equality Analysis for UC Third Party Deductions*", dated 15 September 2020. Mr Craig Dutton, a Policy Team Leader at the DWP has given evidence regarding this document:

> "On 15 September 2020 an equality analysis ('the 2020 EA') was prepared by DWP officials in my team to consider the impact of the deductions policy as a whole, that is to say, to consider whether there were any equalities impacts arising from all possible deductions from UC. Deductions may be made for a range of debts, including third party debts and benefit overpayments of UC. The decision to undertake the 2020 EA was spurred by a legal challenge to the Defendant's policy specifically with respect to third party deductions for court fines and is referred to and considered in the judgment of Mr Justice Kerr in the joined cases of *R (Blundell) v Secretary of State for Work and Pensions and R (Day) v Secretary of State for Work and Pensions.*
>
> The 2020 EA is headed "Equality Analysis for UC Third Party Deductions". I can confirm, however, that the 2020 EA considered the impact of the deduction policy as a whole, i.e. not just deductions to pay third party debts, but all deductions from UC, including deductions to recover benefit overpayments of UC."

201. The 2020 EA records that, using receipt of DLA, PIP or LCW as a proxy for claimants with disabilities (while recognising that this would not catch all claimants who identify as disabled):

> "31 About 20% of claims in payment in any given month are flagged as disabled …
>
> 32 The proportion of these claims with deductions has been similar to GB overall when sanctions are included in the deductions total. <u>When sanctions are excluded, the proportion has been slightly higher for those with disabilities, until around</u>

> November 2019 when the deduction limit was lowered from 40% to 30%. This difference in the two measures is driven by a higher likelihood of sanctions in those claims not classed as disabled, as there is more conditionality. The application of sanctions can prevent other deductions being taken or only leave room for small amounts to be deducted within the maximum deductions limit.
>
> 33 The average amount deducted as a proportion of UC Standard Allowance has been lower for disabled claimants than overall when sanctions are included, again driven by a lower proportion of the cohort having sanctions. Although only a small proportion of total deductions are due to sanctions, the amount sanctioned can be up to 100% of the Standard Allowance – much higher than the limit for all other deduction types.
>
> 34 When sanctions are excluded, the average deduction for those with disabilities is similar than those without. However, when taken as a proportion of the Standard Allowance – which deduction amounts are based on – the proportion deducted is lower for those with disabilities. …
>
> 33 The slightly larger proportion (~2 percentage points) of disabled claimants with deductions appears to be driven by a higher likelihood of third party deductions (21% in February 2020) than those not flagged as disabled (14%). It is logical that this may be in part due to those with disabilities being unlikely to receive earnings, as most of the third party deductions cannot be implemented if a claimant has earnings during that assessment period.
>
> 34 The proportion of disabled claimants having the other types deductions (advance repayments and other deductions) is similar to non-disabled claimants." (Emphasis added; erroneous numbering in the original.)

202. In contrast to the DWP statistics referred to in paragraph above, the 2020 EA appears to show that while, among the recipients of UC who have a deduction from their entitlement, the proportion of those who are disabled is slightly (about 2%) higher than the overall caseload, with respect to non-third party reductions (including in respect of overpayments) the proportion of claimants with and without a disability is similar.

203. The defendant submits that there is no obvious reason why application of the waiver policy, which is a mitigation of the effect of recovery of overpayments, should have any equality impact, in particular on grounds of disability. The defendant draws attention to the requirement in the waiver policy to have regard to the individual circumstances, and the fact that the policy builds in consideration of health and welfare issues, as well as financial hardship.

204. However, for the reasons I have given, I reject the defendant's contention that the duty is only engaged where there are *obvious* equality impacts. In my judgment, the claimant has established that there were reasonable grounds to suspect that the waiver policy might have an adverse effect on disabled people such that the defendant had a duty to make reasonable enquiry. First, there is evidence that the proportion of UC claimants having recoverable overpayments deducted who are disabled claimants is higher than those who are not disabled, albeit there is some evidence to the contrary. Having regard to the importance of the waiver policy, and the context that a higher proportion of those in receipt of benefits have a disability (albeit that would not suffice on its own), in circumstances where the overall statistical picture is unclear, in my view the PSED was engaged and the defendant had a duty to make reasonable enquiries.

205. In addition, I agree with the claimant 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, but potentially also those with other forms of disability who may be less well equipped to cope with such deductions to their entitlement. Although I have accepted that the waiver policy is not as rigid as the claimant contends, it imposes a high hurdle for any applicant to surmount, as reflected in the minuscule number of waivers that have been granted in recent years compared to the very high numbers of overpayments that are recovered. This is a discrete basis on which I consider that the threshold for engagement of the PSED was met.

206. The final question is whether that duty has been met on the facts of this case. In her first statement, Ms Vincent Miller said (at §§31, 33-34):

> "There is a lack of publicly available data on the equalities impacts of official error overpayments. DWP do not publish data on the rates of UC official error overpayment based on … disability.
>
> As far as I am aware, the Defendant has not carried out an Equality Impact Assessment (EIA) in relation to the change [to] its approach to the recovery [of] official overpayment policy following the Welfare Reform Act. …
>
> The Defendant carried out various EIAs relating to the Welfare Reform Act, including an EIA for the Bill and specific EIA for Fraud and Error, but none of them specifically address the Defendant's policy on official error overpayments."

207. In her second (reply) statement, Ms Vincent Miller said (at §36):

> "As far as I am aware there has still been no equalities analysis carried out by the Defendant into its overpayment recovery policy: that is, its policy to make automatic deductions of overpayments, subject to the claimant's ability to apply for reduction or waiver as described in the BORG. In §34 of my 1st statement I described the requests I made for this information in pre-action correspondence. No equality analysis (or equivalent) has been disclosed by the Defendant to date.

> …
>
> The DWP does not publish data about whether the BORG has a disproportionate impact on protected groups. For example, it does not publish data about the number of claimants, broken down by protected characteristic, who have (a) received a deduction of an overpayment, (b) applied for a waiver of that deduction, and/or (c) received a waiver. On 27 July 2022 Samuel Willis made a freedom of information act request to the DWP which stated:
>
> '*I would be grateful if you could clarify whether you hold data (albeit across multiple systems) on each of;*
> *a) ethnicity;*
> *b) age;*
> *c) gender;*
> *d) disability status;*
> *e) lone parent status; and*
> *f) UC Claimants in receipt of DLA [Disability Living Allowance], PIP [Personal Independence Payment] or the LCW [Limited Capability for Work] element of UC, of UC claimant who have;*
> *1. Received an official error overpayment*
> *2. Requested a reduction in rate of recovery, suspension or waiver of that recovery*
> *3. Have been granted a reduction in rate of recovery, suspension or waiver*'
>
> DWP's response on 25 August 2022 was that 'We do not hold robust customer level data on overpayments by Ethnicity, Disability Status, Lone Parent Status or UC Claimants in receipt of DLA, PIP.' A further response from DWP on 27 September 2022 confirmed that the Department did not hold data on overpayments based on LCW."

208. The defendant did not assert in the amended detailed grounds of resistance that, if the PSED was engaged, it had been fulfilled. However, the 2020 EA to which I have referred in paragraphs 200.-above was discovered late in the proceedings and disclosed. I granted the defendant permission to rely on it, and on Mr Dutton's statement of 8 November 2022. That document addresses the equality implications of the policy of recovering a variety of types of debt (including third party debts and overpayments of benefits) by way of deductions from a claimant's benefit entitlement in accordance with the applicable regulations.

209. As the defendant acknowledges, he has 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. The defendant submits that the 2020 EA is sufficient. There is nothing to warrant a separate analysis by reference to specific types of benefit or causes of overpayment. The scheme is complex and it would be possible to break it down into any number of components but if each required an equality analysis it would be a monumental task, and not one that s.149 requires.

210. The waiver policy is important. The Secretary of State was given a very broad discretion by the 2012 Act enabling, but not requiring him, to recover any overpayment of UC (the single benefit to help with living costs which replaced six legacy benefits). In my judgment, s.149 of the Equality Act 2010 required the defendant, prior to promulgating or amending a waiver policy addressing how that discretion would be exercised, to have due regard to the need to eliminate discrimination on grounds of disability, and to advance equality of opportunity for those with disabilities. In order to fulfil that duty, the Secretary of State had to assess the risk and extent of any adverse impact and the ways in which such risk might be eliminated. It is clear, in my view, that the defendant has not complied with the PSED in amending the waiver policy in February and April 2022. Accordingly, I conclude that the claim succeeds on ground VII.

K. Conclusion

211. The claim is allowed. The defendant's decisions to refuse to waive the claimant's UC overpayment are unlawful and breach the claimant's legitimate expectation. In addition, the defendant's failure to publish the DMGW was unlawful and he has failed to comply with the PSED. However, I reject the claims that the BORG 2022 is unlawful. I will hear the parties on the precise terms of the order to be made in light of this judgment.