



Discrimination Law Association

Briefings 1001-13

DWP still discriminating against severely disabled people

R (TP, AR, AB and F) v Secretary of State for Work and Pensions [2022] EWHC 123 (Admin); January 21, 2022

Implications for practitioners

This case has potentially important implications for anyone advising adults who are or were in receipt of Severe Disability Premium (SDP) ('severely disabled adults') and who have gone through or are planning to go through a change in personal circumstances which might require them to start claiming Universal Credit (UC). It is especially important for severely disabled adults who are or were previously in receipt of Enhanced Disability Premium (EDP) or who qualify for disabled child support under Child Tax Credit. The approach of the High Court to the claimants' claims is also of some wider interest to practitioners considering discrimination challenges to government rules about social security entitlements.

Facts

Two of the claimants, TP & AR, are severely disabled adults who were required to move from 'Legacy Benefits' (the 'old' system of benefits) to UC after they moved house across a local authority boundary. They suffered significant financial losses on UC because UC has no equivalent to the SDP or to the EDP to which they were entitled under Legacy Benefits.

TP & AR had previously brought two successful judicial review claims arguing that the failure to provide any transitional payments to cushion against the loss of SDP and EDP after they moved onto UC violated their right not to suffer discrimination as protected by Article 14 of the European Convention on Human Rights (ECHR): see *R (TP and Ors) v SSWP* [2018] EWHC 1474 (Admin), Briefing 909, November 2019; *R (TP & AR) v SSWP* [2019] EWHC 1116 (Admin); *R (TP & AR) v SSWP* [2020] EWCA Civ 37.

In this case, TP & AR brought a further judicial review challenge arguing that, notwithstanding the introduction of increased transitional payments (£120 per month, an increase from £80 per month) to compensate severely disabled people for loss of SDP, the DWP was still unlawfully discriminating against them because they still received no compensation for the element of the loss attributable to EDP.

The third and fourth claimants, AB & F, are a severely disabled mother (AB) and her disabled child

(F). AB was required to move from Legacy Benefits to UC after her partner, F's father, moved into the family home. AB suffered very significant financial losses because she lost access to SDP and EDP, but also because support for disabled children under UC (the UC 'lower' disabled child element) is much lower than the equivalent under Legacy Benefits (the disabled child element of Child Tax Credit). At current rates the UC lower disabled child element is £157.36 per month lower than the Child Tax Credit disabled child element (per eligible child). AB did begin to receive transitional payments compensating her for the loss of SDP (only) following the earlier TP & AR judicial reviews.

AB & F brought a judicial review challenge arguing that they were the victims of discrimination contrary to Article 14 ECHR on the basis that the DWP had failed to provide any transitional payments to cushion against the loss of EDP or against the loss of disabled child support.

All the claims were heard together.

High Court

Holgate J, sitting in the Administrative Court, upheld the claimants' claims.

There was no dispute that the claims fell within the 'ambit' of Article 1 of Protocol 1 ECHR, so that Article 14 ECHR (the right not to suffer discrimination) was engaged. In summary, the HC held that:

1. The claimants (severely disabled people who had moved onto UC) had been treated differently from their comparators (essentially, severely disabled people who had not moved onto UC). The difference in treatment was that the claimants had lost EDP and, in the case of AB and F, they had also lost substantial sums in disabled child support.
2. The claimants and their comparators were in an 'analogous' situation.
3. The difference in treatment of the claimants compared with their comparators was based on a qualifying 'status' for the purposes of Article 14 ECHR, meaning that the difference in treatment between them had to be justified.
4. There was no lawful justification for treating the claimants differently from other severely disabled

claimants who had not transferred to UC.

On the first three questions, Holgate J found that there was no basis to reach different findings from those reached by the HC in the earlier TP & AR judicial reviews.

On the issue of justification, Holgate J accepted that he ought to apply ‘a low intensity of review’, or in other words offer a ‘wide margin of appreciation’ to the Secretary of State [para 195]. Nevertheless, he concluded that there was no proper justification for treating the claimants differently. In particular, the changes in circumstances, or ‘trigger events’, which led the claimants to claim UC did not justify the differential treatment.

Holgate J dismissed a wide range of arguments advanced by the Secretary of State (who bore the burden of justifying the difference in treatment). He noted that much of the material, and many of the arguments, used by the Secretary of State were no different to those she had used in the earlier judicial review challenges brought by TP & AR [paras 161, 166, 188]. Insofar as the Secretary of State sought to rely on arguments to do with the supposed administrative burden and cost of implementing transitional support for severely disabled adults, Holgate J was highly critical of the lack

of detail in her evidence, particularly bearing in mind that this was the third judicial review focusing on the same issues.

Comment

The success of the claimants’ claims represents the third time in four years that the HC has found that the lack of transitional protection for severely disabled adults who migrate to UC (and therefore lose critical financial support) violates Article 14 ECHR. This most recent judgment is significant in particular because it is the first time that Article 14 ECHR discrimination has been found in relation to the loss of disabled child support under UC. It is to be hoped that the government responds to the judgment by putting in place an enhanced scheme of transitional protection which compensates severely disabled adults not only for the loss of SDP but equally for the loss of EDP and disabled child support.

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Briefing 1011

Service provider should have made reasonable adjustments and provided BSL interpretation for deaf customers at live music event

Reynolds & others v Live in the UK (Creditors in Voluntary Liquidation) Ltd
Central London County Court, Case no E89YJ500, September 16, 2021

British Sign Language (BSL) has received increasing attention over the past year with the participation and eventual crowning of Rose Ayling-Ellis, a Deaf BSL using actor, as champion of Strictly, the ‘Where’s the Interpreter’ campaign and the subsequent judgment in *R (on the application of Rowley) v the Cabinet Office* [2021] EWHC 2108 (Admin); July 28, 2021; Briefing 1000, November 2021.

Last year also saw a county court hand down a detailed judgment, for the first, time, with significant ramifications for deaf people’s access to music events. Unusually, the claimants had continued their claim despite the original defendant having gone into liquidation during the pandemic (although this was

after the exchange of witness statements and other preparations for trial) as they were determined to seek a judgment which could make a difference.

Facts

The claimants are three deaf BSL users. They have hearing daughters and decided to take them to an open-air Little Mix concert in September 2017, organised by the defendant Live in the UK Limited, for the birthday of one of their daughters. They purchased the tickets in June, and in July emailed the chief executive officer of Live in the UK to ask what provision would be made for disabled people; they indicated their need for BSL, as well as specific requirements for a successful