**“Fatally upsetting the computer”:**

**Universal credit, earned income, and the demands of automation**

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In *Secretary of State for Work and Pensions v Johnson* [2020] EWCA Civ 778*,* theautomated processes at the heart of Universal Credit (UC) collided with the realities of claimants’ lives. An arbitrary consequence of the design of the UC computer system led to the respondents’ income being counted twice in some months and not at all in others: a problem caused by their salary payment date shifting as a result of weekends or bank-holidays, characterized by the court as the “non-banking day salary shift” problem. Four affected UC recipients argued, *inter alia¸* that the decision of the Secretary of State for Work and Pensions (SSWP) not to implement a solution to this problem was irrational. The SSWP submissions in response were a close approximation of “computer says no”. To account for the circumstances of these claimants would undermine the coherency of the automated system in place for processing applications.

In finding the SSWP’s failure to act irrational, the decision provides a rare example of the *Wednesbury unreasonableness* standard biting in the social security context. The arguments put by the SSWP demonstrates the willingness to allow a considerable number of UC recipients – in this instance, around 85,000 in positions analogous to the respondents – to suffer solely to preserve the coherency of the UC computer system.

The four respondents in this case applied for UC and are paid by their employer at the end (or towards the end) of a calendar month. Although the UC statutory regime is infamously complex, the core arguments in this appeal revolve around regulation 54(1) Universal Credit Regulations 2013/376:

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

For claimants in receipt of UC, this “assessment period” is one month, running from the date of their application. As a result, where salary payments shift across these periods due to weekends or bank holidays, a claimant may have two payments in one assessment period and none in another, bearing on their entitlement: this is the “non-banking day salary shift” problem.

The impact of this discrepancy is threefold. First, all respondents suffer acute “oscillation” in their monthly UC awards (para. 51). In some months the claimants receive no Universal Credit support, while in others they receive more. This leads to very significant fluctuations in real month-to-month income. Evidence from the respondents indicated that managing such variations was impacting on their ability to maintain rent payments and feed themselves and their family (para. 54).

Second, for the months in which no payments fall into the assessment period, all the respondents lose access to the UC work allowance: a feature, designed to incentivise work, where claimants keep a fixed amount of their earned income. This is a significant and irretrievable loss. Four “non-banking day salary shifts” in a year would result in a £1,168 loss, based on April 2020 applicable work allowances (para. 61).

Third, in the month where no earnings fall within an assessment period, the respondents would not benefit from the exemption from the so-called “benefit cap” laid out in Regulation 82 Universal Credit Regulations 2013/376. If a claimant’s earned income in respect of an assessment period is equal or greater than 16 hours per week at the national minimum wage, they are exempted from the application of the cap. This issue did not directly impact respondents in this appeal as their receipt of relevant benefits fell below the amount required for the cap to bite, but it remained a possibility in the future (para. 64).

The SSWP accepted that the effect on the respondents is “arbitrary”, “unfortunate”, “challenging”, and furthers no policy objective of UC (para.68). Instead, they argue that the impact is a necessary consequence of maintaining an automated system without “manual intervention” and that “bright lines” are needed for the UC system to operate coherently (para. 68). They submitted that to rework the computer system to account for the circumstances of the respondents would cost at least £7.35 million and require a new version of the UC system’s in-built income calculator to be “essentially rebuilt from scratch” (para. 78). The only other alternative was to move away from the automated system to one rooted in greater manual calculation by a DWP officer: the antithesis of the UC regime.

In the divisional court, the judgment dealt principally with the interpretation of regulation 54(1), concluding that – on a proper construction, resting on the interpretation of “in respect of” and “based on” in the regulation – the circumstances of the claimants should be accounted for (*R. (on the application of Johnson) v Secretary of State for Work and Pensions* [2019] EWHC 23 (Admin) paras. 68-70). This argument was dismissed by the EWCA, determining that such an interpretation would jeopardise the automated calculation of income under the UC system to such an extent that it “substantially undermin[ed] the scheme as Parliament intended it” (para.35).

The focus of the EWCA was instead on the irrationality ground. “Entirely agreeing” with the respondents’ characterisation of the anomaly as “odd in the extreme” (para.46), Rose LJ considered that the *Wednesbury reasonableness* threshold should be applied, drawing on the formulation in *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin) that asks “whether the decision is outside the range of reasonable decisions open to the decision-maker” (para.48). The decision at issue was:

“…the initial and ongoing failure of the SSWP to include in the Regulations a further express adjustment to avoid the consequence of the combination of the non-banking day salary shift and the application of regulation 54” (para.47).

The court concluded that, although threshold for “establishing irrationality is very high” this case was “one of the rare instances” that passed it. The SSWP’s refusal to put in place a solution to the problem is so irrational that “no reasonable SSWP would have struck the balance in that way” (para. 107).

This argument of the SSWP that such an accommodation would jeopardise the coherency of the computer system was rejected. Rose LJ concluded that: “I cannot accept that the programme cannot be modified to ensure that the computer can recognize that the end of date of a particular claimant’s assessment period coincides with their salary date” to avoid two payments within one assessment period (para. 82). Indeed, the UC regulations bears the scars of multiple, complex amendments. As Rose LJ noted, surely there must be a solution “without fatally upsetting the computer” (para. 83).

In applying the threshold for *Wednesbury unreasonableness* the court considered a series of other factors, particularly: the significant numbers affected (approximately 85,000 UC claimants), (ii) the permanent nature of the effect (a claimant cannot, for instance, simply stop their current claim and start a new one), and (iii) that it runs counter to the UC system’s aims by disincentivising work (paras. 92-105).

This judgment is one of a series that have confronted the functioning of UC computer systems and their respective algorithms with a public law irrationality test. The recent decision of the EWHC in *R. (on the application of Caine) v Secretary of State for Work and Pensions* [2020] EWHC 2482 (Admin) is another example of the impact of the monthly assessment period leading to perverse outcomes: in this instance, the algorithm for calculating housing costs failing to reflect full annual rental liability (albeit, the threshold for irrationality was not met (para. 210-218)). The SSWP’s arguments in *Johnson* and similar cases like *Caine* are striking in their frank assessment of the trade-off at play between securing automation and the imposition of perverse consequences for UC recipients. The imperative to convert the reality of a claimant’s circumstances into “clearly defined inputs which are simple to understand and administer” (para.72) is worth the resulting hardship for those captured arbitrarily by the system’s blind spots.

This subservience to a computerized black box is made more acute by clear indications of failings in the policy process. The evidence provided to the Court in *Johnson* underscores that ministerial understanding of the capability of the UC computer system was found wanting at its development stages. The SSWP had sought to argue that the current approach to “assessment periods” had been considered at the point of the system design, but the court concluded that the minister had been “assured that the computer might be programmed to recognise unexpected and significant fluctuations so that they could be investigated” (para. 91), though, in practice, it never was.

The court’s assessment that “it cannot be impossible to draft an exception to cover the particular problem highlighted in this case” has been borne out by Government’s stated intention to bring forward legislation to address the issue and not appeal this decision. (HC Deb (25 June 2020) vol. 677 col. 1456). As the role of automated systems in the administration of the welfare state continues to gather pace – catalyzed by the effects of the Covid-19 crisis – the *Johnson* decision demonstrates that in the most egregious cases the principles of administrative law are still capable of penetrating their underpinning processes. As the Department for Work & Pensions continues to hire “Robotic Process Automation Engineers” to join 100 colleagues in their “Digital Automation Garage”, the balance between the demands of computerization and the complex realities of claimants’ lives will only become more acute. As noted by O’Neil, there is a “disturbing pattern where human discretion is used for decisions regarding wealthy people, and artificial discretion is used for decisions regarding poor people” (2016).

**References**

O’Neil, C (2016) *Weapons of math destruction: How big data increases inequality and threatens democracy* (New York: Penguin).

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