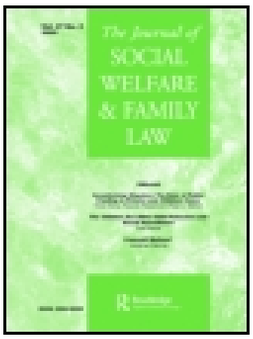

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Debt-by-design in social security: unlawful administration of 'Third party deductions'

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The largest creditor to those accessing food banks in the UK is not a private company or a bank, but the Department for Work & Pensions (DWP) (Trussell Trust 2022). Of the 4.1 million households in receipt of Universal Credit – the flagship working-age benefit in the UK – 1.8 million have money deducted by the DWP to service a debt (CPAG, 2022). Debt is built into the design of the social security system. Claimants owe money to the DWP for a range of reasons: they have had an 'advance payment' to help them through their wait for the first Universal Credit award, have been overpaid benefits (as a result of a DWP error or otherwise), been awarded a hardship loan, or they owe money to a 'third party' – such as a utility company or housing provider – who claims it back via their benefits (so-called, 'Third Party Deductions' (TPDs)).

In *R. (on the application of Timson) v Secretary of State for Work and Pensions* [2022] EWHC 2392 (Admin) the court examined whether the operation of the TPD scheme in respect of so-called 'legacy benefits' was lawful. Characterised elsewhere in this journal by Griffiths and Cain (2022) as the DWP's 'free debt collection service', under a wide-ranging scheme, the DWP can deduct up to 25% of a Universal Credit or legacy benefit award to repay arrears to utility providers (or other creditors, such as landlords). In finding that the guidance issued by the DWP to decision-makers was unlawful, *Timson* offers an insight both into the reality of the TPD process and its importance for thousands of households on legacy benefits and – by extension, given the similarity of the scheme – Universal Credit. This note outlines the decision in the case before turning to three broader points: the insight the case offers into the practical operation of the TPD scheme, its welcome interrogation of guidance in light of common law principles, and the court's acknowledgement that redress *after* a decision is not always sufficient where an adverse outcome can cause real hardship.

The claimant in Timson was unable to work as a result of significant disabling physical and mental health problems and was in receipt of means-tested benefits, including income-related employment and support allowance – a 'legacy benefit' which is being gradually replaced by Universal Credit. In common with thousands of others in receipt of means-tested support, TPDs had been made from her benefits to pay utility companies in respect of her water and fuel usage. She argued that the operation of the scheme was unlawful in two respects. First, under common law grounds, the written guidance

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provided to decision-makers rendered the scheme 'systematically unlawful' (para. 16). The guidance incorrectly directed decision-makers to ignore claimant consent, or not even to seek representations from a claimant prior to a TPD being imposed – this is contrary to both the statutory purpose of TPDs, the need to obtain necessary information (under the *Tameside* duty, so-called after *Secretary of State for Education v Tameside MBC* [1977] AC 1014), and the duty to act fairly. Second, that the operation of the scheme was a breach of her human rights under Article 1 of the First Protocol (A1P1, the Right to Property) or Article 14 (Prohibition of Discrimination, taken with A1P1).

Timson was successful on one ground: the DWP's written guidance to decision-makers was unlawful because, read as a whole, it did not make clear that claimants should be offered the opportunity to make representations to the decision-maker before a TPD was imposed (para. 214). In deciding so, the court assessed the circumstances in which written guidance to decision-makers may render the exercise of a statutory discretion unlawful. Drawing on *R(A) v Secretary of State for the Home Department* [2021] UKSC 37 and other authorities (paras. 121–141) the court considered two of the three categories of unlawfulness described in *R(A)*: (a) that the guidance includes a positive statement of law that is wrong and would induce a decision-maker who follows the policy to breach their legal duty in some way (category (i) unlawfulness in *R(A)*), or (b) that, read as a whole, the guidance purports to provide a full account of the legal position, but through misstatement or omission, presents a misleading picture of it (category (iii) unlawfulness in *R(A)*) (para. 144). Although not expressly provided for in the underpinning regulations, failing to provide claimants the opportunity to make representations or give further information before deductions were made was a breach of the *Tameside* duty and the common law obligation of fairness (paras. 209–220). As a result, the decision-maker guidance was unlawful under category (iii): read as a whole, it presented a misleading account of the true legal position (para. 226–229).

The decision is significant in three respects. First, as official statistics are not routinely published on deductions or the TPD scheme specifically, the judgment offers a revealing insight into how the TPD scheme had operated for utility providers. In practice, 'applications are made in bulk': utility providers send an excel spreadsheet, sometimes generated automatically by their internal systems, listing claimants to be subject to a TPD (paras. 97, 210). The construction of these spreadsheets is interrogated in detail by the court: they did not include any information on whether a claimant had been informed a TPD was to be made and/or if they objected to it, or space for detailing any relevant personal circumstances (paras. 88–89). In the course of proceedings and as a direct response to the case, a revised spreadsheet was put in place by the DWP (paras. 100–104).

Second, *Timson* underscores that the 'purpose of the [decision-maker guidance]' for TPDs was to 'give a detailed description of the legal duties that apply to decision-makers', not, as the DWP argued, to operate as merely advisory guidance when exercising a discretion (para. 223). This is a welcome recognition that, in a social security context, guidance can be king: front-line decision-makers 'seldom' utilise legislation, relying heavily on policies and guidance, perhaps best illustrated by O'Brien's memorable case study featuring a decision-maker proclaiming, 'we don't look at the law, just the guidance' (O'Brien 2017, p. 207). The court's reasoning has far-reaching implications elsewhere in the social-security system. Decision-maker guidance covers a range of legacy benefits decisions and the arguments in *Timson* surely

apply to the equivalent guidance for Universal Credit decision-makers. *Timson* is welcome confirmation, post *R(A)*, that the courts will intervene where guidance is insufficient to meet common law obligations (para. 217).

Third, the court is clear that the availability of the 'mandatory reconsideration' process – a form of internal appeal within the DWP – cannot, by itself, 'render the scheme fair' (para. 216). The availability of appeals – either Mandatory Reconsiderations or ultimately to the First Tier Tribunal – cannot be sufficient as they do not allow a claimant to make representations *before* a decision is taken in respect of a TPD. This is particularly acute because, as the court notes, 'many claimants will be close to the breadline and, if a deduction is wrongly made, a delay of even a few weeks could cause real hardship' (para. 217). As if to further demonstrate the limitations of such a reliance, in the course of proceedings, it became clear that some decision-makers were unaware that there was even a power to reconsider a decision at the request of a claimant, rather than at the request of a utility company (para 92), and – in practice – mandatory reconsiderations of these decisions were rare (para 91).

As low-income households continue to face dramatically increasing utility costs, many more will fall into arrears with their providers (JRF, 2022). The operation of TPDs – and the broader deduction scheme – will pull thousands of households below a subsistence level of support. In co-ordination with other charities and campaigning organisations, Step Change (2022) has called for fundamental reforms of the deductions process: improving their affordability (including by changes to deductions rates and caps), doing more to consider individual circumstances prior to their imposition, and improved access to hardship measures. In this context, *Timson* provides a welcome recognition of two fundamental points. First, that the principles in *R(A)* bite in the social security context – where decision-maker guidance falls short of common law obligations, the court will intervene. Second, that the mere availability of mandatory reconsideration is not sufficient to correct an otherwise unfair scheme. This is significant because pointing to the availability of mandatory reconsideration is an argument adopted routinely by the DWP (for a recent example in respect of benefit sanctions, see HC Deb 13 December 2022). In recognising the reality of the operation of the TPD scheme and underscoring these two fundamental points, the decision has implications for the thousands of households affected by the policy at a time when a record number are likely to be pulled into its remit.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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