Neutral Citation Number: [2019] EWHC 2774 (Admin)

Case No: CO/5115/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/10/2019

Before:

MR. JUSTICE SWIFT

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Between:

The Queen on the application of SXC	**Claimant**
- and -	
Secretary of State for Work and Pensions	**Defendant**
-and-	
Equality and Human Rights Commission	**Intervener**

- -

Zoe Leventhal and Jessica Jones (instructed by **Central England Law Centre**) for the **Claimant**

Edward Brown and Jack Anderson (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 30 July 2019

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Approved Judgment

MR JUSTICE SWIFT:

A. Introduction

1. On 3 May 2019 I handed down a judgment on liability in these proceedings [2019] EWHC 1116 (Admin) – "the liability judgment". The Claimants contended that Regulations made by the Secretary of State, which made transitional provision for benefits claimants who had transferred to Universal Credit, were unlawful. The liability judgment upheld that claim.

2. When the liability judgment was handed down I made an Order quashing regulations 3(7) and 3(8) of the Universal Credit (Managed Migration Pilot and Miscellaneous Amendments) Regulations 2019 (referred to in this judgment as either "the Managed Migration Pilot Regulations" or "the Original Regulations"). Those regulations had been laid before Parliament by the Secretary of State, but by the time of my judgment had not been made and were not in force. Regulations 3(7) and 3(8)[1] had included provision for payments, referred to as "transitional payments", to be made to persons such as the Claimants – i.e. those previously in receipt of benefits paid under the Welfare Reform Act 2007 known as the Severe Disability Premium and Enhanced Disability Premium, who had (in the language of the Transitional Provisions Regulations), "migrated" to Universal Credit[2].

3. I made that Order having concluded that the decision contained in the Managed Migration Pilot Regulations to make transitional payments to the Claimants amounted to unlawful discrimination contrary to ECHR Article 14 (read together with Article 1 of Protocol 1 to the ECHR), when compared with the payments that were to be made in due course to other SDP and EDP claimants who had not yet migrated to Universal Credit, but who would migrate in future. The treatment of this latter group was determined by regulation 4A of the Transitional Provisions Regulations[3]. That regulation modified the migration provisions in the Transitional Provisions Regulations so that any SDP/EDP claimant who had not migrated to Universal Credit by 16 January 2019 would not migrate until required to do so by the Secretary of State. (so-called, "managed migration"). In my judgment I referred to this group of persons as the "Regulation 4A Group". Once they had migrated, instead of transitional payments, this group were to be provided with "transitional protection". This meant a payment equivalent to the difference between the sums previously paid as SDP and EDP, and the lower amount to which they were entitled under Universal Credit. As the value of Universal Credit increased over time, the amount paid as transitional protection would taper. However, the effect of transitional protection was that the Regulation 4A Group would suffer no immediate reduction in the benefits paid to them. By contrast the transitional payments to be made to the Claimants and others in the same position as (i.e. all those who had migrated to Universal Credit prior to 16 January 2019), were less than the difference between previous SDP or EDP payments and the Universal Credit

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1 Which would have inserted new provisions into the Universal Credit (Transitional Provisions) Regulations 2014 ("the Transitional Provisions Regulations").

2 The new system of social welfare payments established by the Welfare Reform Act 2012 and the Regulations made under that Act.

3 Inserted into the Transitional Provisions Regulations with effect from 16 January 2109 by regulation 2(3) of the Universal Credit (Transitional Provisions) (SDP Gateway) Regulations 2019).

payments. My conclusion was that that difference in treatment that the two groups were to receive was not justified because the Secretary of State had failed to explain the reason for the distinction made between the Regulation 4A Group, and those such as the Claimants who had migrated to Universal Credit prior to 16 January 2019: see the liability judgment at paragraphs 59-65.

4. SXC now seeks compensation for that discrimination: compensation for financial loss representing the difference between the Universal Credit she now receives and the transitional protection she would have received had she been a member of the Regulation 4A Group; and compensation for non-financial loss, essentially for injury to feelings for having been a victim of discrimination.

5. Two further matters have been highlighted in connection with the claim for financial loss. The first is the circumstances which led SXC to migrate to Universal Credit. As I explained at paragraph 13 of the liability judgment, SXC migrated to Universal Credit not because she was required to by the Transitional Provisions Regulations, but because she acted on incorrect advice given to her by benefit advisers at a local authority and at an advice centre, to the effect that she was required to make a claim for Universal Credit. So far as I can tell, but for the advice she was given, SXC would have remained in receipt of SDP and EDP and, as at 16 January 2019, would have fallen into the Regulation 4A Group.

6. The second matter is the Secretary of State's response to the Order I made on 3 May 2019. On 18 July 2019 the Secretary of State made the Universal Credit (Managed Migration Pilot and Miscellaneous Amendment) Regulations 2019 SI 2019/1152 ("the New Regulations"). These came into force on 22 July 2019. The New Regulations were made in place of the original version of the Managed Migration Pilot Regulations[4]. The New Regulations make different provision for transitional payment to persons such as SXC. As provided for by the Original Regulations, the transitional payments to SXC would have amounted to £80.00 per month, leaving a difference of £183.48 per month between the payments she had received before migrating to Universal Credit and the amounts due to her as Universal Credit. Under the New Regulations, the transitional payment is £120.00 per month. Thus, the shortfall for SXC between the previous payments and Universal Credit is £63.48 per month. For sake of completeness I should add that transitional payments are backdated to the date of migration. For SXC that date is 15 August 2018.

B. Decision

(1) Compensation for financial loss

7. The parties are agreed that the starting point for the compensation claim is section 8 of the Human Rights Act 1998. Section 8 of that Act provides as follows:

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[4] Those original regulations, although laid before Parliament on 14 January 2019, were never made. They were subject to the affirmative resolution procedure but were never the subject of debate before either House of Parliament. I am told this was simply because the necessary parliamentary time was not then available.

> **8.— Judicial remedies.**
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> (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
>
> (2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.
>
> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—
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> (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
>
> (b) the consequences of any decision (of that or any other court) in respect of that act,
>
> the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.
>
> (4) In determining—
>
> (a) whether to award damages, or
>
> (b) the amount of an award,
>
> the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.
>
> (5) …
>
> (6) In this section—
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> *"court"* includes a tribunal;
>
> *"damages"* means damages for an unlawful act of a public authority; and
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> *"unlawful"* means unlawful under section 6(1)."

Thus, by section 8(3) damages are not available as a matter of course for breaches of Convention rights.

8. I have also been referred to a number of authorities which have considered the circumstances in which compensation may properly be awarded under the Human Rights Act, and also to cases concerning the approach taken by the European Court of Human Rights to awards of compensation. In particular, the parties have referred me

to *R(Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673, per Lord Bingham at paragraph 9; *R(Sturnham) v Parole Board and others* [2013] 2 AC 254, in the Court of Appeal per Laws LJ at paragraphs 15-18, and in the Supreme Court per Lord Reed at paragraphs 24-68; *D v Commissioner for the Metropolis* [2015] 1 WLR 1833, per Green J at paragraphs 4 -22; and *Alseran and others v Ministry of Defence* [2018] 3 WLR 95 95 per Leggatt J at paragraphs 980 – 916. Taken together, these cases address many matters relating to awards of compensation under the Human Rights Act 1998. However, two matters emerge in particular: *first* whether compensation is necessary at all in order to afford just satisfaction for the breach of Convention rights that has been found to have occurred; and *second* if compensation is necessary for the purpose of just satisfaction, whether the breach of Convention rights that has been found to have occurred was the cause of the loss and damage claimed.

9. SXC's submission on causation is that the discrimination she suffered occurred as soon as: (a) regulation 4A was put in place, to prevent the migration of SDP/EDP claimants after 16 January 2019, with the consequence that in due course that that group would receive transitional protection; and (b) the decision was taken to pay only transitional payments to those such as SXC who had already migrated. Thus, the submission continues, the correct measure of compensation for financial loss is the difference between the transitional payments she will now receive under the New Regulations, and transitional protection.

10. The strength of that argument might be called into question in SXC's case on the ground that she fell outside the Regulation 4A Group only because in August 2018 she voluntarily migrated when, acting on incorrect advice, she made a claim for Universal Credit. However, I do not consider that to be the point that is critical to the outcome to the claim for compensation in this case.

11. In my view SXC's claim for compensation fails because an award of compensation is not necessary to afford just satisfaction for the claim in this case based on Convention rights.

12. In some circumstances a claim under the Human Rights Act 1998 is the vehicle to vindicate rights equivalent to those recognised in private law. The circumstances of *Alseran* and *D* are examples of such a situation (see per Leggatt J in *Alseran* at paragraph 933). In such instances, compensation may be the primary if not sole way in which just satisfaction can be afforded for the breach of Convention rights. But the present claim is not of that nature. Rather, the circumstances of this claim are a classic example of an instance where the Human Rights Act is relied on for the purposes of a purely public law challenge. The claim was brought on the premise that when regulations 3(7) and 3(8) of the Original Regulations were given effect, they would fail to ensure lawful treatment of a class of persons including SXC who had already migrated to Universal Credit. The central objective in this case was to quash the secondary legislation on transitional payments, and require the Secretary of State to think again. The New Regulations have made new provision for transitional payments. Overall, this claim is indistinguishable from the overwhelming majority of public law claims in which one or the other of the remedies specified in section 29 of the Senior Courts Act 1981 is sought, and in which the grant of that remedy is sufficient to address the wrong alleged. In this case, those remedies are sufficient also to provide just satisfaction for the breach of Convention rights that has occurred.

13. Further, the specific claim of discrimination made by SXC – a claim of discrimination on grounds of "other status" – does not correspond to any recognised private law wrong. Discrimination contrary to the provisions of the Equality Act 2010 is properly described as a statutory tort, but the protected characteristics under that Act do not extend to the circumstances relied on by SXC in these proceedings as the reasons for the less favourable treatment afforded to her. This does not necessarily rule out the possibility that just satisfaction could include an award of damages, but such cases are likely to be more rare than common.

14. Next, Miss Leventhal on behalf of SXC, in support of her submission that compensation equivalent to the difference between transitional payments and transition protection ought to be paid, has taken me to the judgments of the European Courts of Human Rights in *Willis v United Kingdom* [2002] 35 EHRR 21, *Wellar v Hungary* (Application No. 44399/05, judgment 31 March 2009), and *Ribac v Slovenia* (Application No. 57101/01, judgment 5 December 2017). All these are cases where claims based on discriminatory exclusion from welfare benefits resulted in decisions ordering payment of compensation for financial loss: in *Willis*, a widower had not been paid benefits that would have been paid to a widow in like circumstances; in *Wellar*, a maternity benefit paid to support persons raising new born children, had not been paid to the father of new born children; and in *Ribac*, a state pension was not paid on grounds of nationality. In each instance the European Court of Human Rights awarded compensation for financial loss based on the value of the benefits that had been claimed but not paid to the applicant.

15. Quite apart from the reasons above at paragraph 12, and at paragraph 13, I do not consider that these cases provide a guide to what is required as just satisfaction in the present case, because in this case there has been no comparable historic failure to pay a benefit.

16. The issue at the liability hearing was whether the difference between the transitional payment provision in the Original Regulations and the transitional protection arrangement for the Regulation 4A Group was justified. My conclusion was that no sufficient explanation had been provided for the difference. But it was no part of my conclusion in the liability judgment that the only lawful outcome must be to treat the group including SXC the same way as the regulation 4A group.

16. The level of transitional payments has now been reconsidered by the Secretary of State, and the New Regulations have been made containing different provision for transitional payment. Those payments will still fall short of transitional protection. However, since it was no part of the conclusion in the liability judgment that parity was required to meet what is required by Convention rights, there is no reason why, for the purposes of this judgment, I need or should assume that the provision now made for transitional payment is unlawful. The legality of the New Regulations is not an issue in these proceedings. On the assumption that the new provisions for transitional payment are lawful, and given that payments under the new regulations are backdated to the date each relevant benefits claimant migrated to universal credit, there is no room for a conclusion that SXC has suffered any financial loss as a result of the discrimination she suffered.

17. Drawing these matters together, an award of damages is not necessary in this case to afford SXC just satisfaction. The breach of Convention rights complaint has been

appropriately addressed for the purposes of section 8 of the Human Rights Act 1998 by the Order made when the liability judgment was handed down. Further, since there is nothing inherently inconsistent between my reasons in the liability judgment for the conclusion that the original regulations were unlawful, and the provision now made for transitional payment in the New Regulations, for this reason too, there is no sufficient reason to make an award of compensation for financial loss.

(2) Compensation for non-financial loss

18. My primary conclusion above, that an award of compensation is not necessary in this case to provide SXC with just satisfaction for the breach of her Convention rights, is also sufficient to dispose of the claim for compensation for non-financial loss. If I had not reached that conclusion, I would have awarded only a modest amount as compensation for non-financial loss.

19. SXC's submission was that £10,000 should be awarded as non-financial loss. Both parties referred me to the guidelines set out by the Court of Appeal in *Vento v Chief Constable of West Yorkshire Police* [2003] ICR 318, in the context of discrimination claims arising from employment. In that case, and by reference to the authorities as they stood at that time, the Court of Appeal stated as follow (per Mummery LJ at paragraphs 65 – 66)

> "65. Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.
>
> i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
>
> ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.
>
> iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.
>
> 66. There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case."

20. These bands, updated in accordance with guidance issued in 2017 by the President of Employment Tribunal (England and Wales) and the President of Employment

Tribunals in Scotland (see *Durrant v Chief Constable of Avon and Somerset Constabulary* [2018] IRLR 263 per Sales LJ at paragraph 8), have been relied on in claims for damages for non-financial loss under the Human Rights Act 1998: see for example, by Leggatt J in *Alseran* at paragraph 953.

21. Had I made an award of compensation for non-financial loss, that would have been on the basis that the facts of the present case were within *Vento* Band 3. SXC suffered discrimination only as a member of the class of benefits claimants previously entitled to SDP and EDP who had migrated to universal credit. The treatment afforded to her was not in any sense personalised or directed to her. An appropriate award would have been no more than £1,000.

C. Conclusion

22. In the premises, I make no award of compensation to SXC consequent upon the finding of discrimination contrary to the provisions of the Human Rights Act 1998 set out in the liability judgment.