



Parliamentary  
and Health Service  
Ombudsman

# An investigation into the Department for Work and Pensions' handling of Ms U's migration to Employment and Support Allowance





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of the Parliamentary Commissioner Act 1967

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## The complaint

1. Ms U complains that when the Department for Work and Pensions (DWP) migrated her to Employment and Support Allowance (ESA) in 2012, it failed to pay her the income-related component for the period 23 May 2012 to 11 August 2017. DWP has now paid Ms U arrears of £19,832.55 but she complains it has failed to compensate her for the impact of these failings.
2. Ms U says this caused her extreme financial hardship in that period and she missed out on passported benefits. These are benefits, such as a Warm Home discount, that some people are entitled to because of their entitlement to other specific benefits or tax credits. She says that severely exacerbated her mental and physical health problems (Ms U suffers from paranoid schizophrenia, arthritis, hypertension, and Graves' disease). She seeks compensation for the hardship DWP's actions caused her.

## Our decision

3. We find that the DWP's failure to act in line with its and our relevant guidance was maladministration, and that maladministration caused Ms U an unremedied injustice. We therefore uphold the complaint. We recommend that DWP:
  - write to Ms U to apologise for the impact of the failings on her
  - make a payment of £7,500 to compensate her for that impact
  - apply an appropriate rate of interest to the benefit arrears payment of £19,832.55.
4. As well, we recommend that DWP:
  - says what action it will take and when to remedy all those adversely affected by the migration to ESA who were not included in its Legal Entitlements and Administrative Practices (LEAP) exercise
  - reconsiders its decision to rule out compensating people included in the LEAP exercise in a way consistent with its own and our relevant guidance, including that it should provide remedies to others who have suffered injustice or hardship as a result of the same maladministration or poor service, where appropriate
  - reports to the Work and Pensions Select Committee (copied to the Public Administration and Constitutional Affairs and Public Accounts Select Committees) on its progress and what decisions it makes about how to remedy its failings.
5. We also acknowledge that the matters complained of were distressing for Ms U and express our sympathy.

## Background

6. ESA is a benefit paid to people who have limited capability to work. There are two main types: contributory (i.e. based on national insurance contributions), and income-related (i.e. means-tested) paid on its own or as a top up to contributory ESA. In 2011 DWP began reassessing people who had been getting other benefits including incapacity benefit, and transferring those eligible to ESA. DWP accepted that it underpaid many people whom it transferred because it paid them ESA which was only based on their national insurance contributions when they should have received income-related ESA too.
7. According to a National Audit Office March 2018 report, the average underpayment was likely to be around £5,000 and was 'most likely to affect those with the most limiting illnesses or disabilities'. It said DWP had been legally obliged 'to check people's entitlement to both income-related ESA and contribution-related ESA, but in practice the Department did not always do this'.
8. According to August 2018 DWP internal guidance, DWP accepted ESA was 'a single benefit' and a decision maker was 'required to consider entitlement to both elements... when making a conversion decision and to gather information about the claimant's financial circumstances'. It accepted that the failure to do so was an official error. The guidance said DWP's Legal Entitlements and Administrative Practices (LEAP) exercise would review conversion decisions where no evidence about the claimant's financial circumstances was requested before it made a decision. It would ask the claimant for such information and where appropriate, pay arrears of income-related ESA.

## Ms U's case

9. In May 2012 Ms U, who had been getting incapacity benefit, moved to ESA. She received only the contributions-related part. In July 2017 her representative (a welfare rights adviser) prompted her to have her entitlement reassessed. In August DWP reassessed and paid her £19,832.55 arrears of income-related ESA and premium payments (about £80 a week).
10. In November Ms U's representative complained to DWP that Ms U had been living in hardship because for a sustained period she had had to live on less than the state said she should have. He said she was very vulnerable. He said she had missed out on additional support ('passport benefits') that an award of income-related ESA would have made available. He cited prescriptions, and said Ms U needed medication in order to stay well and remain in the community and had had to pay for it herself, and a warm home discount payment of £140 she had received in 2017 but not from 2012 to 2016. Her representative said she had missed out on other help such as paying for a washing machine. He asked for compensation.
11. In February 2018 DWP told Ms U that compensation was not appropriate in 'cases where the claim has been reconsidered'. The same month her representative asked DWP to reconsider the decision.
12. In April DWP staff noted colleagues had drafted a submission regarding compensating people affected by the migration to the Minister for Disabled People (the Minister). The 4 May submission to the Minister (the Submission) said DWP was conducting the LEAP exercise. It said, 'This submission provides advice on whether further redress by way of a special payment in addition to the payment of arrears may be appropriate.' The Submission said it had considered DWP's special payments scheme and noted it was discretionary.
13. The Submission set out three options:
  - Option 1 - no further financial redress;
  - Option 2 - automatic payment of interest as part of the LEAP exercise [which the submission estimated would cost about £4 million]; and,
  - Option 3 - automatic payment of interest as part of the LEAP exercise with any additional claims for actual financial loss and/or consolatory payment to be considered as usual by the Special Payments Team'.
14. The Submission recommended option one 'for the following reasons: we are undertaking a LEAP exercise and as we intend to repay appropriate ESA arrears and have already corrected our processes, we consider further redress by way of a special payment is not appropriate; payment to cases in this LEAP exercise may set a precedent for future LEAP exercises...; and, further redress would cause additional... costs'.
15. The Submission said the special payment scheme was based on guiding principles (which we assume are DWP's *Special Payment Scheme: Policy and Guiding Principles April 2012* set out below). It said it would be 'feasible to award a special payment to reflect actual financial loss...consolatory payments may also be appropriate where maladministration has had a serious and significant non-financial impact which has affected the claimant's wellbeing... To be sure of this type of impact, we would need to ask each individual claimant'.



16. The Submission said option three would have 'unquantifiable' costs. It said extrastatutory special payments where a customer had lost statutory entitlement to a benefit due to maladministration were met from the benefit budget. Other special payments were paid from the local administration budget.
17. The Submission highlighted that DWP's special payments guidance included that 'There are a variety of forms of redress of which financial is only one – for example an apology, correction of the original error, an undertaking to improve procedures/ systems, or a combination of these'. It said, 'as we are undertaking a LEAP exercise to correct any original error and have corrected our processes, further redress by way of a special payment is not appropriate'.
18. On 14 May DWP noted the Minister (and Secretary of State) 'agreed to the recommendation...and [to] make no special payments'. On 16 May DWP noted, 'having discussed the issue with the Minister, it has been agreed that they will not be making special payments on these cases'.
19. DWP sent an internal summary of 'lines to take' on requests for compensation:
  - 'We intend to repay ESA arrears where appropriate and have already corrected our processes. We consider further redress by way of a discretionary special payment is not appropriate.
  - 'Claimants with a low income in receipt of contributory ESA could have applied for income-related ESA at any time.
  - 'At no point have we actually stopped individuals from making a claim to income-related benefits.
  - 'Eligibility for pass ported benefits such as help with health costs are determined by the relevant Department.'
20. On 21 May the Public Accounts Select Committee (the Committee) heard oral evidence from the DWP Permanent Secretary as part of an investigation into ESA. When asked about compensation for people adversely affected by the migration, he said 'We are not introducing a blanket compensation scheme'.
21. In July the Committee published a report. It said DWP arrangements for transferring people to ESA were fundamentally flawed and implemented without basic checks. It said that as a result 70,000 vulnerable people were underpaid for years. It said the average underpayment was about £5,000. It said DWP did not seek legal advice to make sure the administrative process it planned complied with its own regulations. The Committee said DWP accepted that was wrong and should not have happened. It said DWP 'accepted that its letters did not make clear that people could be substantially better off if they were also entitled to ESA on income grounds' and 'Without this information, there is no reason why claimants would necessarily have known why it was important to contact the Department about their benefits. The Committee said it understood from welfare rights advisers that some people had been fined by the NHS 'for claiming passported benefits they thought they were entitled to'. The report recommended DWP 'calculate the total amount of money claimants had missed out on, including passported benefits, and report back to the Committee by end October 2018 on what it will do to ensure claimants receive appropriate remedies'.
22. In August Ms U's representative chased a response to his February complaint. DWP responded the same month and said it had declined to make a payment, and used the 'lines to take'. As well, DWP said Ms U could not complain to the last stage of its complaints procedure (the Independent Case Examiner) and did not tell her about the Ombudsman.

23. In October DWP responded to the Committee's recommendations. It said it had assigned staff to work out and pay arrears to those affected (i.e. the LEAP exercise). On the recommendation that DWP calculate the value of missed passported benefits, DWP said it 'does not consider it practical to implement....Every case will be different, and the Department would need claimants to submit evidence of their eligibility and in some cases evidence of their actual expenditure'. The Committee said it was disappointed because although DWP said it agreed with the recommendation, it planned to pay out only arrears: 'We referred to compensation for wider losses'.
24. On 21 December DWP's Permanent Secretary wrote to the Committee. On passported support, he said, 'my officials have been engaging with a number of the authorities who are responsible for passported benefits, to see if a way forward can be found'. DWP told us staff were engaged with authorities responsible for passported benefits to support them when considering the impact of the ESA underpayment exercise and passported benefits.
25. In August 2020 DWP said Ms U sought and was paid arrears before its LEAP exercise and accepted that the Minister's 2018 decision applied only to cases dealt with under that exercise. DWP referred Ms U's case to its special payment team. The special payment decision included the comment that 'the Minister's steer' was 'we should pay the arrears but not any special payments'. It said 'DWP's failure to look at ESA(IR) entitlement as well as ESA(C) is accepted as maladministration'. It said the effect of what happened was 'The reduced income since 2012 has meant that she had an income lower than the government says someone in her circumstances needs to live on for a sustained period of time'. However, the decision was 'though this case was cleared before the LEAP exercise started and the ministerial steer cannot be used to refuse a Special Payment, I believe the rationale behind the steer still applies'. It summarised DWP's 'lines to take'.

## Evidence

26. The relevant evidence we have considered includes DWP's records and information from Ms U's representative. All information relevant to our findings is in this report.
27. Ms U's representative has been supporting her since 2017 and is well informed as to her personal circumstances and the way in which DWP's error affected her. He told us that for five years Ms U received only around half the amount in legislation as the minimum requirement for a person with severe disability needs meant she could not afford to heat her property and could not afford to buy appropriate food to keep healthy. He said Ms U had poor mental health during that period and highlighted links between paranoid beliefs and depression and economic deprivation. As far as her physical health was concerned, her hair fell out and she lost a lot of weight. Her representative said that since 2012, Ms U's health had declined markedly: she had recently had a bypass operation, had deep vein thrombosis and poor blood flow in her legs and was due to have a toe amputated.
28. As well, Ms U's representative said diet was an important part of managing Ms U's Graves' disease (Graves' disease is an autoimmune condition. Common symptoms include anxiety and irritability, heat sensitivity, a fast metabolism and weight loss despite normal eating habits, enlargement of the thyroid gland and fatigue). He said Ms U was at risk of hypothermia as she was not able to heat her home, which also affected her arthritis. Her representative said not being able to access passported benefits meant Ms U was not able to have urgently needed dental treatment, and did not receive free prescriptions essential for treating her health conditions or about £700 in Warm Home Discounts.

## Relevant standards and guidance

29. We use related or relevant law, policy, guidance and standards to inform our thinking. This allows us to consider what should have happened. In this case we have referred to the following.

### Our standards

30. *The Ombudsman's Principles 2009: the Ombudsman's Principles of Good Administration, of Good Complaint Handling and for Remedy* are broad statements of what public organisations should do to deliver good administration, provide good customer service and respond properly when things go wrong.
31. The Principle of Good Administration relevant to this complaint is 'Getting it right', which includes that public bodies must comply with the law and have regard for the rights of those concerned; and provide effective services, and should plan carefully when introducing new procedures; and that decision making should take account of all relevant considerations, ignore irrelevant ones and balance the evidence appropriately.
32. *The Principles for Remedy* say that for public bodies, there is a balance between responding appropriately to people's complaints and acting proportionately within available resources but that 'finite resources should not be used as an excuse for failing to provide a fair remedy'. The *Principles for Remedy* accord with HM Treasury's guidelines set out in *Managing Public Money* (set out below).
33. The Principles for Remedy particularly relevant to this complaint are:
- 'Getting it right', which includes that:
    - a. Where maladministration has led to injustice or hardship, the public body should consider all relevant factors when deciding the appropriate remedy and take steps to provide a remedy.
    - b. The public body should ideally return complainants and, where appropriate, others who have suffered injustice or hardship as a result of the same maladministration or poor service, to the position they were in before the maladministration or poor service took place, and if that is not possible, compensate them appropriately.
    - c. In many cases, an apology and explanation may be sufficient, and in putting right any injustice or hardship, the public body should assess all the relevant circumstances in a balanced way.
    - d. In some cases, the remedy will be easy to work out; in others, it will be more difficult because of the number of factors to take into account.

- 'Acting fairly and proportionately', which requires:
  - a. Remedies to be fair, reasonable and proportionate to the injustice or hardship suffered.
  - b. The public body to consider how the circumstances of the case have affected the complainant in all ways.
  - c. The public body to consider whether it has acted fairly and how its decisions have affected not only the complainant but where appropriate, others who have suffered injustice or hardship as a result of the same maladministration or poor service, even if an offer of a remedy is not legally required.
  - d. Each case to be considered on its own merits. Any guidance or procedure that public bodies use to decide remedies should be flexible enough to enable the public body to consider fully the individual circumstances.
  - e. That people should be treated consistently. Decisions on remedies should take proper account of previous decisions made on similar facts.
  - f. Public bodies to bear in mind the proper protection of public funds.
- 'Putting things right', which includes:
  - a. Where maladministration or poor service has led to injustice or hardship, public bodies should try to offer a remedy that returns the complainant to the position they would have been in otherwise. If that is not possible, the remedy should compensate them appropriately. Remedies should also be offered, where appropriate, to others who have suffered injustice or hardship as a result of the same maladministration or poor service.
  - b. An appropriate range of remedies will include: an apology, explanation, and acknowledgement of responsibility; remedial action, including revising procedures; and financial compensation for direct or indirect financial loss, loss of opportunity, inconvenience, distress, or any combination of these.
  - c. In relation to financial compensation, public bodies should: calculate payments for financial loss by looking at how much the complainant has demonstrably lost or what extra costs they have incurred; apply an appropriate interest rate to payments for financial loss, aimed at restoring complainants to the position they would have been in if the maladministration or poor service had not occurred; and consider what interest rate to pay and explain the reasons for the chosen rate. Factors to consider when deciding the level of financial compensation for inconvenience or distress should include the impact on the individual – for example whether the events contributed to ill health, or led to prolonged or aggravated injustice or hardship; the length of time taken to resolve a dispute or complaint; and the trouble the individual was put to in pursuing the dispute or complaint.

## DWP Guidance

34. DWP's *Special Payment Scheme: Policy and Guiding Principles April 2012*<sup>1</sup> (the Guiding Principles) said:

- d. Remedy can include any combination of an apology, an explanation, putting things right and a special payment.
- e. Special payments are discretionary.
- f. If it is unclear whether an assertion is true special payment officers must decide whether it is 'more likely than not' to be true.
- g. Under 'Guiding principles', that 'Individuals should not be disadvantaged as a result of maladministration' and it is not necessary for an individual to request a special payment. DWP should consider it even without a request in cases of maladministration.
- h. The purpose of a special payment is 'wherever possible, to return the individual to the position they would have been in but for the maladministration. In the event that this cannot be achieved the aim is to provide redress that is reasonable and proportionate in light of the individual circumstances of the case'.
- i. 'Injustice and hardship...should be considered on a case by case basis. Each case should be considered on its own merits. Consideration should be given to the circumstances of the individual and the impact any maladministration has had on them (for example: the impact on an individual with a pre-existing health condition may be more severe than for someone with no health problems). The individual who experienced the maladministration

should be given the opportunity to provide evidence (oral or written) to inform the special payment decision making process'.

- j. There are three special payment categories: payment for loss of entitlement to statutory benefit payments; payment for actual financial loss or costs which resulted directly from maladministration; and 'consolatory payments' where injustice or hardship has been suffered as a result of maladministration.
35. DWP's 2013 *Financial Redress for Maladministration: A Guide for Special Payment Officers* (the Guide) includes that 'The scheme is discretionary, so this guide should not be read as a rigid set of rules or a blueprint for every situation. Each case must be considered on its own merits, having regard to the guiding principles... In making decisions, special payment officers must consider all relevant/available evidence, and apply the Department's policy and guiding principles'.
36. Under delay, the Guide says that 'Where payments are accepted as having been delayed as a result of maladministration, a special payment can be considered for any impact'. It continues, 'award of certain benefits (linked benefits) is dependent on the customer being in receipt of an associated benefit... When maladministration results in delay determining entitlement to a qualifying benefit or in the payment of a qualifying benefit, this can have a knock-on effect on the award of any linked benefit. A special payment should be considered for the impact of the delay in respect of both'. It says, under interest, 'where DWP maladministration has caused a significant delay [the guidance says a significant delay

<sup>1</sup>The April 2012 guide was replaced in November 2020, after the events in the complaint and DWP's special payment decision in relation to Ms U. The 2020 guide includes very similar guidance to that set out here.

is more than a year] in paying benefit... it may be appropriate for the special payment to include an additional element in recognition that the value of the money has been eroded because of the passage of time'.

37. The Guide says it may be necessary to consider 'the customer's age and/or health', and, 'Poor service will impact upon the health of different people to different extents. For special payment purposes, it is the degree and duration of the impact that is normally more important than the scale of the error. The more serious the impact, the greater the payment is likely to be...The customer should normally be asked to provide objective evidence of the impact on their physical and/or mental health'. The Guide says 'Special exercises are set up to identify customers affected by a particular error and provide a remedy. The following might result in a special exercise: A systemic failure which affects a number of similar cases'. The Guide and Guiding Principles include the Principles for Remedy guidance that the public body should ideally return complainants and, where appropriate, others who have suffered injustice or hardship as a result of the same maladministration or poor service, to the position they were in before the maladministration or poor service took place, and if that is not possible, compensate them appropriately.

## HM Treasury guidance

38. HM Treasury's 2019 guidance *Managing Public Money* sets out the main principles for dealing with resources in UK public sector organisations. Its Annex 4.14 on Remedy says 'If their services have been found deficient, public sector organisations should consider whether to provide remedies to people or firms who complain...so that, as far as reasonably possible, they restore the wronged party to the position that they would be in had things been done correctly'. It goes on to say that when a public sector organisation recognises 'it needs a scheme for a set of similar or connected claims after maladministration or service failure, it should ensure that the arrangements chosen deal with all potential claimants equitably. It is important that such schemes take into account the PHSO's Principles of good administration...designing a compensation scheme is no different from designing other services. Good management, efficiency, effectiveness and value for money are key', and then lists issues to consider. It says Departments need to consult the Treasury 'about cases which...could set a potentially expensive precedent'.

## Passported and other benefits

39. Gov.uk guidance on DWP budgeting loans includes 'To get a Budgeting Loan you must have been getting one or more of these benefits for the past six months: Income Support; income-related Jobseeker's Allowance; income-related Employment and Support Allowance'. Guidance on cold weather payments says much the same.
40. According to NHS guidance, a person is entitled to free prescriptions if s/he is receiving income-related ESA. Guidance on the NHS low income scheme includes that 'If you have a low income, you may be able to get help with' prescription and dental costs: 'you can get help with health costs even if your income is too high for a means-tested benefit'. Guidance on the warm home discount scheme says 'you may be able to apply directly to your electricity supplier for help if...you're on a low income' or 'get certain means tested benefits'.
41. Housing benefit is help paying rent for people who are unemployed, on a low income or claiming benefit. Gov.uk guidance includes that 'You may get help with all or part of your rent'. Council Tax Reduction (sometimes called Council Tax Support) replaced council tax benefit in 2013 and is help for people on a low income or claiming certain benefits to pay their council tax. Guidance on it includes that 'Your bill could be reduced by up to 100%'.
42. Disability living allowance is paid to help disabled people cover the cost of care and mobility. It is made up of the 'care component' and the 'mobility component'. Gov.uk guidance says 'You might get the care component of DLA if you: need help with things like washing, dressing, eating, using the toilet or communicating your needs; need supervision to avoid putting yourself or others in danger; need someone with you when you're on dialysis; cannot prepare a cooked main meal...You might get the mobility component of DLA if, when using your normal aid, you: cannot walk; can only walk a short distance without severe discomfort; could become very ill if you try to walk'.



# Our findings

## Preliminary issues

43. When considering a complaint, we must first consider whether conditions included in our legislation are satisfied, in particular those relating to the availability of an alternative legal remedy for the complainant and to time limits.
44. Section 5(2) of the *Parliamentary Commissioner Act 1967* says the Ombudsman 'shall not conduct an investigation under this Act in respect of...any action in respect of which the person aggrieved has or had a right of appeal, reference or review to or before a tribunal' unless he is 'satisfied that in the particular circumstances it is not reasonable to expect him to resort or have resorted to it.' Section 6(3) of the Act says people should make their complaint to an MP within a year of becoming aware of the problem in the complaint. If we receive a complaint outside the time limit, we cannot investigate unless we see special circumstances to justify doing so.
45. Ms U complains that when DWP migrated her to ESA, it failed to pay her the income-related component for the period 23 May 2012 to 11 August 2017 and failed to compensate her for the impact. We do not know what DWP told Ms U in 2012 about its decision and challenging it but from an example notice it sent us, it seems likely it did not tell her it had made a decision about the income-related component that she might appeal against. Ms U could have challenged DWP's failure to migrate her to ESA properly or its position on compensation by judicial review. However, Ms U's representative told us she did not have the resources to pursue legal action. He said given her vulnerability (as a single lady with a long history of severe mental impairment and paranoid schizophrenia who feels unable to contact government agencies herself) it would not be reasonable to expect her to take such action. We consider it is not reasonable to expect Ms U to have taken legal action.
46. As to the time limit, Ms U became aware of the problem in her complaint in August 2017, when DWP paid the arrears, and she complained to the MP in April 2019. Her complaint was therefore made one year and eight months after she became aware of the problem and eight months outside the time limit.
47. Ms U relied on her only representative in her complaint to DWP and the Ombudsman. He first complained to DWP in November 2017, and again in February 2018. DWP took about six months to respond to that complaint. The representative told us that after that, he did not involve the Member until 2019 due to his caseload. While delay by a representative may not itself persuade us to put the time limit aside, we have also considered the difficulty and seriousness of the subject matter, the vulnerability of the complainant, including whether it would be reasonable to expect her to have instructed another representative because of mindfulness of the time limit, and the limited contribution of his delay to the time it has taken for the complaint to come to the Ombudsman. Taking all that into account, we consider there are special circumstances that justify considering the complaint outside the usual time limit.

## Our findings on the complaint

48. Ms U complains that when DWP migrated her to ESA in 2012, it failed to pay her the income-related component for the period 23 May 2012 to 11 August 2017. The National Audit Office said DWP did not check people's entitlement to both income-related ESA and contribution-related ESA as it should have. The Committee said arrangements for transferring people to ESA were fundamentally flawed and implemented without basic checks.
49. DWP said in August 2018 internal guidance that a decision maker was 'required to consider entitlement to both elements... when making a conversion decision and to gather information about the claimant's financial circumstances', and said that the failure to do so was an official error. DWP's special payment decision in Ms U's case said its 'failure to look at ESA(IR) entitlement as well as ESA(C) is accepted as maladministration'.
50. We consider that DWP is right to say that its failure was maladministration. According to the *Principles of Good Administration*, DWP should have provided effective services, and planned carefully when introducing new procedures. Its approach was so far below that standard, we find DWP's handling of Ms U's (and potentially thousands of other customers') migration to ESA was maladministrative.
51. Ms U also complains DWP failed to compensate her for the impact of that error. The reasons DWP gave for refusing to do so in August 2020, despite acknowledging its maladministration, were:
  - a. 'though this case was cleared before the LEAP exercise started and the ministerial steer cannot be used to refuse a Special Payment, I believe the rationale behind the steer still applies...the Minister's steer [was] that we should pay the arrears but not any special payments'.
  - b. The Submission that led to the 'steer' argued special payments should not be made 'for the following reasons: we are undertaking a LEAP exercise and as we intend to repay appropriate ESA arrears and have already corrected our processes, we consider further redress by way of a special payment is not appropriate; payment to cases in this LEAP exercise may set a precedent for future LEAP exercises...; and, further redress would cause additional...costs' for this LEAP exercise.
  - c. The Submission said that given the LEAP exercise 'further [our emphasis] redress by way of a special payment is not appropriate'.
52. We find DWP's approach to be maladministrative generally and specifically in relation to Ms U's case for the following reasons.
53. First, a blanket recommendation not to compensate people was inconsistent with the *Principles for Remedy* guidance that any guidance or procedure that public bodies use to decide remedies should be flexible enough to enable the public body to fully consider the individual circumstances.
54. The Submission, which sets out DWP's reasoning, said to understand the impact on an individual, 'we would need to ask each individual claimant how our maladministration affected them'. DWP decided what an appropriate remedy would (or would not) be without knowing what

the injustice that the remedy was meant to put right was. That was inconsistent with the *Principles for Remedy* guidance that public bodies should 'consider fully the individual circumstances'; and its own Guide, which says, 'Injustice and hardship resulting from maladministration should be addressed on a case by case basis'. Furthermore, the Guide says 'Poor service will impact upon...different people to different extents. For special payment purposes, **it is the degree and duration of the impact that is normally more important** [our emphasis] than the scale of the error...The customer should normally be asked to provide objective evidence of the impact'. DWP took the view that it could rule out compensatory payments without considering the degree and duration of the impact of its error on those affected and without attempting to obtain the relevant evidence. The Submission did not identify that was inconsistent with DWP guidance.

55. DWP's Submission cited the likely cost of making special payments to the people affected. The Submission did not acknowledge the fact that the *Principles for Remedy* guidance says 'finite resources should not be used as an excuse for failing to provide a fair remedy'. According to the *Managing Public Money* guidance it might have consulted the Treasury for advice about 'cases which...could set a potentially expensive precedent'. We have seen no evidence that DWP considered doing that.
56. Secondly, because it took the above approach DWP failed to consider Ms U's individual circumstances and reached a decision that was inconsistent with the relevant standards. DWP's Guiding Principles include that 'Individuals should not be disadvantaged as a result of maladministration'. The special payment

decision in Ms U's case acknowledged that 'The reduced income since 2012 has meant that she had an income lower than the government says someone in her circumstances needs to live on for a sustained period'. Yet because DWP had adopted the above approach it did not take steps to remedy that.

57. Thirdly, DWP's reliance on the Minister's 'steer' ignored that that concerned LEAP exercise claimants and that Ms U was not one of them. *The Principles of Good Administration* include that decision making should take account of all relevant considerations and ignore irrelevant ones. *The Principles for Remedy* include that public bodies should consider all relevant factors when deciding the appropriate remedy. A concern about a precedent for a LEAP exercise was not relevant to Ms U's case. DWP thus took irrelevant factors into account and as a result reached the wrong decision. In its response to our provisional views, DWP accepted it had got the ESA conversion process wrong for some claimants, including Ms U, and agreed it had used its special payments guidance incorrectly in Ms U's case. DWP said it therefore broadly agreed with our recommendations concerning her.
58. For all these reasons, we find that DWP's failures to act in line with its and our relevant guidance was maladministration.

## Injustice

59. But for the maladministration we identify, DWP would have investigated and appropriately remedied the impact of the maladministration. We have therefore considered that impact.
60. As far as financial hardship is concerned, Ms U was about £80 a week worse off than she should have been, roughly halving her ESA income, for five years. That will self-evidently have had a substantial impact on her quality of life. For example, her representative told us Ms U could not afford to heat her property or buy appropriate food to keep healthy. As well, she lost the use of the money for five years. Taken together, that amounts, in our view, to a significant injustice.
61. DWP has said in its comments on our provisional views document that despite its error, Ms U's benefit did in fact increase after migration to ESA. As well, DWP said she continued to receive disability living allowance, housing and council tax benefits that increased annually. That does not change our view. As far as the comparison is concerned, Ms U's representative confirmed she was about £6 a week better off. However, the key point is that Ms U was about £80 a week worse off than she should have been post-migration and, as DWP says, 'had an income lower than the government says someone in her circumstances needs to live on for a sustained period'. As to the other benefits Ms U received, they are intended for specific purposes. We do not think Ms U should have had to use those benefits to offset DWP's error. As well, annual uprating also increased the income-related ESA Ms U was missing out on.
62. In respect of passported benefits, Ms U's representative said she did not receive free prescriptions for her several health problems, or about £700 in Warm Home Discounts, meaning she was not able to heat her property.
63. In response to our provisional views DWP was concerned we had not addressed other bodies' responsibility for passported benefits. We note that in 2018 DWP told the Committee it was engaging with 'authorities who are responsible for passported benefits, to see if a way forward can be found', but there is no outcome to that. We accept the position on passported benefits is not straightforward because different organisations (including DWP) administer them and different entitlement rules apply. But in Ms U's case it is clear that, but for DWP's maladministration she would have been eligible for passported benefits.
64. Ms U's representative told us that her inability to heat her home and to eat healthily meant there was an impact on her already poor mental and physical health. He added that she was not able to have urgent dental treatment. We find that the stresses and impacts of the hardships described in paragraph 62 and by her representative in paragraphs 27 and 28 are likely to have exacerbated Ms U's poor mental and physical health. We note DWP's comment that we have not provided medical evidence to support the assertion that its failings caused or contributed to her deteriorating health. However, we have no reason to dispute Ms U's representative's evidence and on balance, we consider that as a result of DWP's maladministration, and given the nature and severity of her medical conditions, Ms U is likely to have suffered from poorer health than she otherwise would have.

65. DWP also said, in response to our provisional views, that we should take into account the fact DWP provided Ms U (and others) with information relating to income-related benefits. DWP sent us a copy of the notice it says it would likely have sent Ms U in 2012, saying it included information on income-related ESA and how to claim. The notice is five pages long and tells the recipient their benefit is changing to ESA. It says DWP has 'ticked the boxes that apply to you'. We do not know whether DWP ticked a box to say Ms U was or might be entitled to income-related ESA. But that seems unlikely given DWP had decided not to pay it to her. The Committee said DWP 'accepted that its letters did not make clear that people could be substantially better off if they were also entitled to ESA on income grounds' and 'Without this information, there is no reason why claimants would necessarily have known why it was important to contact the Department about their benefits'. We are not persuaded the example notice is evidence Ms U had the information she would have required to make a claim for income-related ESA in 2012.
66. We find that DWP's maladministration had a very significant impact on Ms U's living standards and quality of life. DWP's actions have caused her an unremedied injustice.

## Recommendations

67. Ms U seeks compensation for the hardship she was caused. In considering our recommendations, we have referred to our *Principles for Remedy*. They say that where poor service or maladministration has led to injustice or hardship, the organisation responsible should take steps to put things right.
68. In order to determine a level of financial remedy, we review cases where similar injustice has arisen. We also consider the impact on an affected person. When determining severity, we consider, among other things: how long the failures impacted on the person affected; what that impact was; any ongoing/long term impact; and the extent that that affected the person's ability to live a 'normal' life (that is to go about life unhindered). We also consider physiological impacts, including long-term pain or illness.
69. We find that the injustices set out are evidence of a lasting impact that affected Ms U's ability to live a relatively normal life, and impacted on her physiologically over a prolonged period. Our view is that a financial remedy for those injustices is appropriate.
70. We recommend that within a month of the final report, DWP:
- write to her to apologise for the impact of the maladministration on her
  - make a payment of £7,500 to compensate her for that impact
  - apply an appropriate rate of interest to the benefit arrears payment of £19,832.55.
71. In its response to our provisional views DWP said it agreed to our recommendations to apologise, pay interest, and pay compensation to Ms U, but it queried the amount of compensation we have recommended. £7,500 is in level five of our six-level severity of injustice scale (with six representing the most severe). As set out we find that the impact on Ms U was consistent with the circumstances considered necessary to warrant a payment at that level. We also considered information from other cases.
72. As well, the *Principles for Remedy* say that acting fairly and proportionately includes providing remedies to others who have suffered injustice or hardship as a result of the same maladministration where appropriate, that people should be treated consistently and that decisions on remedies should take proper account of previous decisions made on similar facts. Ms U was one of a large number (over 100,000 according to a DWP estimate in 2020) of people affected by the migration, some of whom received arrears payments via the LEAP exercise. We provisionally find that DWP should seek to remedy all those who suffered an injustice as a result of the maladministration we identify. We recommend that, within three months of the final report, DWP:
- says what action it will take and when to remedy financial and non-financial losses caused to those people adversely affected by the migration not included in the LEAP exercise
  - reconsiders its decision to rule out compensating people included in the LEAP exercise for financial and non-financial losses and does so in a way consistent with its own and our relevant guidance
  - reports to the Work and Pensions Select Committee (copied to the Public Administration and Constitutional Affairs and Public Accounts Select Committees) on its progress and what decisions it makes about how to remedy its failings.

73. DWP does not agree to our recommendations concerning others affected by the same error. It says the unfortunate handling of Ms U's case was a simple misunderstanding and there is no evidence that other non-LEAP exercise claimants were affected. If Ms U's decisions were typical, DWP will have declined to make others special payments on wrongly applied grounds, will have told them they could not complain to its Independent Case Examiner and will not have told them about the Ombudsman. That means that likely routes for such evidence were closed off. As well, among the papers DWP sent the Ombudsman were internal messages where staff were seeking guidance on 'conversion to ESA' and were told 'a decision has been made in relation to special payments for IBR/ESA conversion cases...Ministers have stated no special payments will be made'. DWP special payments staff said during the investigation 'We have never paid compensation for these cases'. None of that communication drew a distinction between LEAP and non-LEAP exercise claimants.
74. Secondly, turning to the LEAP exercise, DWP said the special payment scheme 'applies to redress for the impact of maladministration on an individual' and not to large scale corrective exercises, which are aimed at correcting cases and paying the right amount of benefit. DWP cited the *Managing Public Money* principle that departments should not create precedents that put the taxpayer at risk to support its approach.
75. The *Guide for Special Payment Officers* includes 'Special exercises are set up to identify customers affected by a particular error and provide a remedy. The following might result in a special exercise: 'A systemic failure which affects a number of similar cases'. The guide and DWP's *Financial redress for Maladministration Policy and Guiding Principles* include the *Principles for Remedy* guidance that the public body should ideally return complainants and, where appropriate, others who have suffered injustice or hardship as a result of the same maladministration or poor service, to the position they were in before the maladministration or poor service took place, and if that is not possible, compensate them appropriately. The introduction to the *Principles for Remedy* says it 'accords with HM Treasury's guidelines on remedy as set out in *Managing Public Money*'. *Managing Public Money* says 'When a public sector organisation recognises that it needs a scheme for a set of similar or connected claims after maladministration or service failure, it should ensure that the arrangements chosen deal with all potential claimants equitably'. We accept *Managing Public Money* aims for Departments to consider the financial context, but also seeks fairness in the design of schemes. We therefore consider that *Managing Public Money* does not rule out what we recommend and instead gives guidance about how to do it.
76. We think it is extremely disappointing that having accepted the maladministration we identified, DWP has not accepted our recommendations to do something proactive about others it knows must be in the same position as Ms U.











## Parliamentary and Health Service Ombudsman

Citygate  
Mosley Street  
Manchester  
M2 3HQ  
United Kingdom

Telephone: 0345 015 4033

Fax: 0300 061 4000

Email: [phso.enquiries@ombudsman.org.uk](mailto:phso.enquiries@ombudsman.org.uk)

[www.ombudsman.org.uk](http://www.ombudsman.org.uk)

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