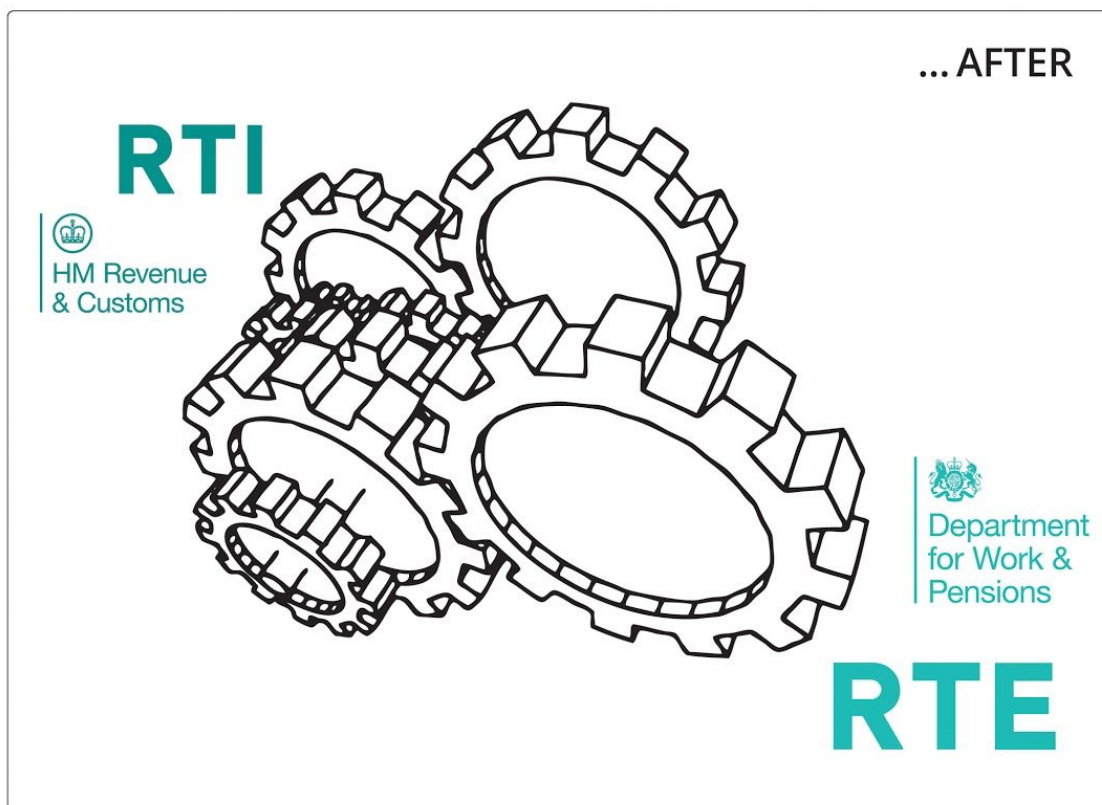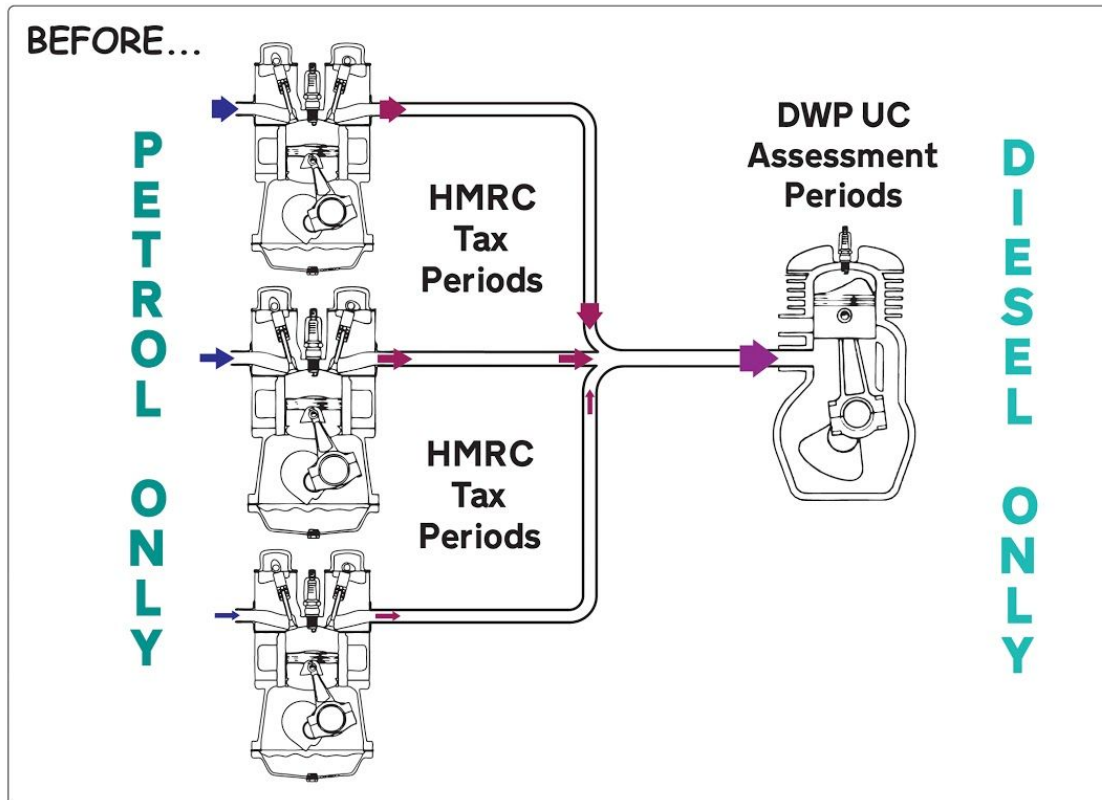# Annex 1A: Proposals for after Johnson and Pantellerisco

Annex 1A: DWP lost in court, twice[1], and what it can do about it

DWP lost both of the recent judicial review cases which looked at Universal Credit and HMRC / PAYE data, the topic of Annex 1. The approach we suggest here at times overlaps both cases, while appreciating that they are separate – even if DWP's response to the root cause can, and should, be integrated.

The first case, known as 'Johnson', looked at the problems caused when the normal payday for someone who is employed but receiving Universal Credit falls on a weekend or bank holiday – "a non-banking day" – and where them being paid early results in UC 'thinking' that they have been paid twice.

The court characterised DWP's approach in this to be both "irrational" and "unreasonable":

> *"The threshold for establishing irrationality is very high, but it is not insuperable. This case is, in my judgment, one of the rare instances where the **SSWP's refusal to put in place a solution to this very specific problem is so irrational that I have concluded that the threshold is met because no reasonable SSWP would have struck the balance in that way**."* [2]

The second case, known as 'Pantellerisco', looked at the consequences of related choices in UC. While there are indeed twelve months across the 52 weeks of the year, DWP has so rigidly fixed its Assessment Periods to (lunar) months – officially deeming each month to consist of four weeks – that, if you are paid weekly or fortnightly, those months that spread over five *calendar* weeks can result in someone being kicked off Universal Credit because the system 'thinks' their income went up, when what actually happened was that month had five weeks not four.

In this case, and agreeing with 'Johnson', on the matter of lunar vs calendar months the court concluded DWP's approach was also "irrational and unlawful" and unreasonable:

> *"In those circumstances, in my judgment, the Claimants are entitled to a declaration to the effect that **the earned income calculation is irrational and unlawful in respect of employees paid on a four-weekly basis**."* [3]

While these two cases are legally separate, they both relate to the same parts of Universal Credit's systems. Changes to one part will involve changes to the other, and so it is easier to consider both cases as part of the same conceptual change.

Of course, all algorithms are human designed – which includes the DWP algorithms that are causing these problems. The algorithms can therefore be changed.

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[1] At least...
[2] paragraph 107, https://www.bailii.org/ew/cases/EWCA/Civ/2020/778.pdf
[3] paragraph 88, https://www.bailii.org/ew/cases/EWHC/Admin/2020/1944.pdf

What we would do about it

We recognise that UC is a large series of moving parts, so here we suggest the minimally invasive approach – which is that the HMRC-to-DWP data feed is updated in such a way that UC simply cannot make the 'Johnson' mistake – and then to add some additional automation, so as to address the rest of 'Pantellerisco' issue.

Unlike DWP's Assessment Periods, HMRC makes everything work together – despite different employers having different payment periods, and people being employed in a variety of ways. HMRC can and does cope with a person who works three jobs, one of which pays them monthly, one weekly, and one fortnightly; HMRC's systems are *designed* to make that work.

It should be noted that HMRC only allows a single payment per employer, per payment period – but that payment amount can be updated if needed, and this is usually handled automatically by payroll software. HMRC can and does make everything as consistent as it needs to be.

HMRC also knows when a 'payment period' for a particular claimant ends, because those dates are entirely predictable; tax year dates, and the derived 'month 1' or 'week 1' being the most obvious examples, but also fortnightly / etc. periods. It was DWP's choice to create an entirely new period of assessment for UC – and to leave it entirely disconnected from all of the payment periods that are used by all UK employers, i.e. HMRC's selection.

One option on which DWP should provide 'expert opinion' (given it knows its own systems...) is whether UC could take no action to reduce a claimant's payments if their 'PAYE payment period' is not complete at the point when UC is making a particular calculation. This would likely require changes to UC that might be complex, and could therefore take a long time – and DWP might not only drag its heels in executing such a change, as it has done in others, but could also exercise a strong sway over such an approach. There are, however, alternate methods to achieve the same end.

First step: change the data UC receives from HMRC, not UC itself

DWP has said how 'difficult and expensive' it is to change UC, and its actions during the pandemic have shown that it wishes to change UC as little as possible. By contrast, HMRC has responded very flexibly in the pandemic, and speaks openly[4] about how its technical systems allowed it to respond as it did. While SSWP (the Secretary of State for Work and Pensions) is the respondent in both cases, this does not mean that Minister is the only available actor in the UC data sharing agreement – after all, HMRC provides the data that DWP says that it wants. And DWP can say (or be told) that it wants something else...
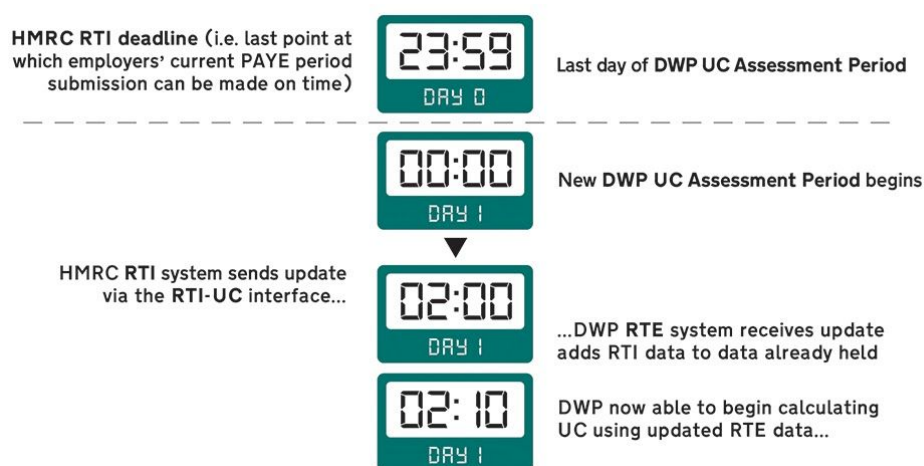
SSWP could effectively resolve the most complex parts of this problem by appending a single new paragraph to the end of Section 4 of DWP's MoU with HMRC:[5]

> *"HMRC shall provide no data covering payment periods which end on or after the date on which data is provided."*

This would be a relatively minor technical change on HMRC's part, since it already knows the payment periods for each employee at a particular employer – and an HMRC change like this requires no technical changes at DWP's end, it is purely a policy change in the agreement between HMRC and DWP.

As UC must already be able to cope with 'late' submissions to RTI, *this should require no new system development by DWP*; it would simply be using systems that DWP has plainly already built. This first move would also begin to address Pantellerisco, even if it is mostly focussed on Johnson.

In effect, this part of the workflow[6] turns into:

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[4] e.g.
https://www.civilserviceworld.com/in-depth/article/inside-hmrcs-coronavirus-response-jim-harra-on-how-the-furlough-scheme-was-created-in-a-month

[5] https://www.whatdotheyknow.com/request/564681/response/1354866/attach/2/MoU%20UA%20P0006%20Redacted.pdf

[6] See Appendix 1 for full version

Second step: automated checks to implement the rest of Pantellerisco

Building upon the first step which ensured predictability in payment periods for tax, Assessment Period dates that cause problems for those who are paid fortnightly, weekly, etc. become easy to detect by *fully automated* means. DWP chose not to automate this check (possibly due to the complexities of Johnson); now it can start.

It is entirely straightforward to (automatically) calculate for any person's given assessment date and for any given person's PAYE payment periods, detect whether an 'extra' payment is merely an artifact of the calendar effect, or whether someone's income may actually have gone up. (The human / manual approach here would be to say "look at a calendar!" – which is the manual equivalent of the below, and is a step that can be automated.)

medConfidential have produced a machine-readable file for DWP, so that for every date in the next 3 months (or the next decade[7]) UC would have a reference to check automatically for which dates and assessment periods DWP's model of a 'month' conflicts with the way the world of work actually pays people, i.e. based around weeks.

Should DWP fail to resolve what the court has now found to be the unlawful processing of UC, other third parties could offer to send DWP a new calendar each year with the assessment dates where the problem happens marked up (since they are all entirely predictable).[8]

If DWP has always intended UC to remain partly manual – thereby avoiding Data Protection Act obligations for fully automated decision making? – we are sure there will be plenty of third parties keen to ensure its officials have a calendar on their wall which shows them the unlawful consequences of their Department's decisions. Indeed, such calendars could be designed with photos of a different victim of DWP's monster factory[9] for every month...[10]

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[7] We're happy to do 3 months for free as part of our funding to look at UC. Given DWP tends to be slow in fixing problems, 10 years may not be long enough – so we'd be perfectly happy to generate the list for the next 20 or 30 years if DWP thinks it will take that long. See also Appendix 2.

[8] We assume the approach we outlined in this document has been taken for Johnson, as it makes it easier to resolve Pantellerisco, although it does not require that change, as without such a change, DWP will be handling flows from which it can never be sure what the 'right' answer may be.

[9] https://medconfidential.org/2020/universal-credit/

[10] Indeed, if DWP has not fixed this by Christmas, medConfidential might just send one to Neil Couling as his Xmas present.

A less monstrous approach – not kicking people off UC at the first opportunity
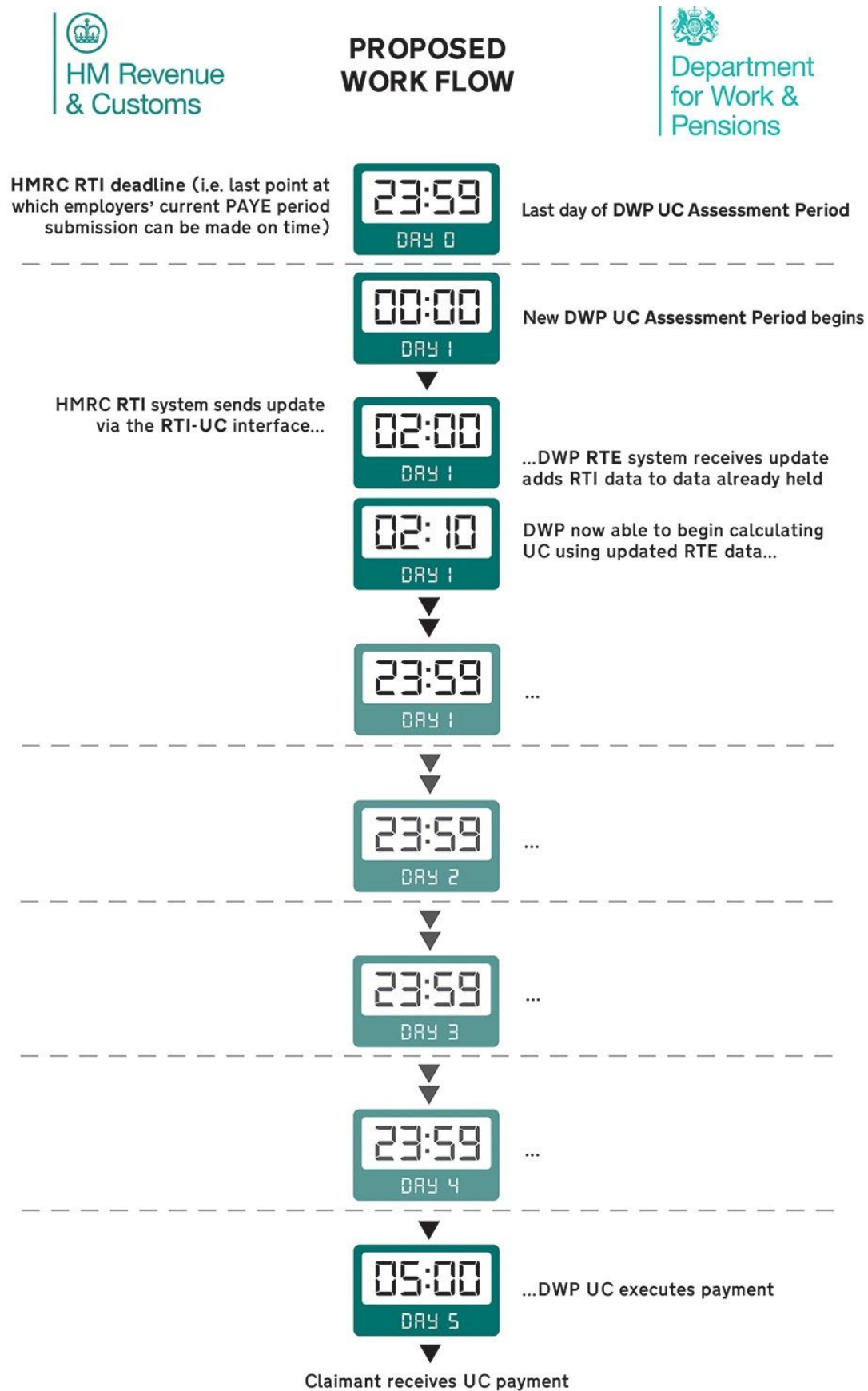
An alternative approach to fixing 'Pantellerisco' – albeit one requiring more changes to UC and DWP processes – would be for DWP to not cancel someone's UC claim until they have exceeded the threshold for *three consecutive months*. We say three because, in some combinations of employment, there could quite possibly be two consecutive months of dates that DWP finds complex, e.g. over Christmas or Easter.

The cost of implementation aside, this latter approach would also reduce the burden on DWP, through generating fewer repeat applications and their associated administration costs – one of the key benefits of automation that DWP repeatedly cites as important. Changes for COVID may provide additional opportunities.

medConfidential
        October 2020

Appendix 1 - Proposed work flow

HM Revenue & Customs — **PROPOSED WORK FLOW** — **Department for Work & Pensions**

HMRC RTI deadline (i.e. last point at which employers' current PAYE period submission can be made on time)
— **23:59 DAY 0** — Last day of **DWP UC Assessment Period**

00:00 DAY 1 — New **DWP UC Assessment Period** begins

HMRC **RTI** system sends update via the **RTI-UC** interface...
— **02:00 DAY 1** — ...DWP **RTE** system receives update adds RTI data to data already held

02:10 DAY 1 — DWP now able to begin calculating UC using updated RTE data...

23:59 DAY 1 — ...

23:59 DAY 2 — ...

23:59 DAY 3 — ...

23:59 DAY 4 — ...

05:00 DAY 5 — ...DWP UC executes payment

Claimant receives UC payment

Appendix 2 – Problematic dates in calendar year 2020 and in tax year 2020/21:

```
// dates in 2020 for tax year 2020-21
{
    "2weekly" : {
        "2020-11-21" : 3,
        "2020-06-14" : 3,
        "2020-12-20" : 3,
        "2020-07-13" : 3,
        "2020-06-29" : 3,
        "2020-05-31" : 3,
        "2020-10-08" : 3,
        "2020-08-26" : 3,
        "2020-05-16" : 3,
        "2020-10-23" : 3,
        "2020-09-24" : 3,
        "2020-08-11" : 3,
        "2020-12-05" : 3,
        "2020-11-06" : 3,
        "2020-07-28" : 3,
        "2020-09-09" : 3
    },
    "4weekly" : {
        "2020-05-16" : 2,
        "2020-06-14" : 2,
        "2020-12-05" : 2,
        "2020-08-11" : 2,
        "2020-07-13" : 2,
        "2020-09-09" : 2,
        "2020-11-06" : 2,
        "2020-10-08" : 2
    },
    "1weekly" : {
        "2020-12-27" : 5,
        "2020-10-01" : 5,
        "2020-08-11" : 5,
        "2020-09-24" : 5,
        "2020-12-05" : 5,
        "2020-11-06" : 5,
        "2020-07-28" : 5,
        "2020-09-09" : 5,
        "2020-08-19" : 5,
        "2020-10-23" : 5,
        "2020-10-30" : 5,
        "2020-06-29" : 5,
        "2020-07-13" : 5,
        "2020-05-31" : 5,
        "2020-05-24" : 5,
        "2020-05-09" : 5,
        "2020-09-17" : 5,
        "2020-11-21" : 5,
        "2020-12-13" : 5,
        "2020-08-04" : 5,
        "2020-06-07" : 5,
        "2020-06-22" : 5,
        "2020-05-16" : 5,
        "2020-11-28" : 5,
        "2020-07-06" : 5,
        "2020-07-21" : 5,
        "2020-08-26" : 5,
        "2020-10-08" : 5,
        "2020-10-16" : 5,
        "2020-06-14" : 5,
        "2020-12-20" : 5,
        "2020-09-02" : 5,
        "2020-11-14" : 5
    }
}

// The date to check is the first day of a new AP
// Not all people will be paid in a way which causes
//    alignment problems each time
```