

Editor

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DISABILITY LIVING ALLOWANCE & ATTENDANCE ALLOWANCE

MOBILITY COMPONENT

RR v Secretary of State for Work & Pensions – blackouts, alcoholism and mobility component entitlement

A person who regularly suffers blackouts is likely to meet the entitlement criteria for lower rate mobility. A failure to appreciate this, together with additional errors as to the relevance of alcoholism to DLA entitlement, led to the First Tier Tribunal's (FtT) decision in this case being set aside.

The claimant's condition

The claimant was a man with depression, epilepsy and angina. He argued that he was entitled to both care and mobility component awards. The DWP rejected the claim and the claimant appealed unsuccessfully to the FtT. For the following reasons, the Upper Tribunal ruled the FtT's decision unlawful.

Unlawful reliance on claimant's disability at date of appeal hearing

In deciding that the claimant was not entitled to the lower rate of the mobility component, the FtT relied on the fact that "by the date of the hearing" he was using unfamiliar routes on his own. This was therefore a clear breach of the rule that the FtT must only consider the circumstances as they stood on the date on which the decision under appeal was taken (s.12(8)(b) of the Social Security Act 1998).

Blackouts and entitlement to lower rate mobility

The main entitlement issue in relation to lower rate mobility component was whether the claimant could walk outdoors "without guidance or supervision from another person most of the time" (s.73(1)(d) of the Social Security Contributions and Benefits Act 1992).

The claimant argued that he met this condition due to his epilepsy causing him to suffer blackouts and 'wake up' in strange places with no memory of how he got there. So, the claimant was clearly suggesting that he needed to be supervised when out walking in case he had a blackout and put himself in danger. The FtT, however, focussed on how he recovered from any blackouts. The FtT noted that, whenever the claimant suffered one of his alleged blackouts he was, on his own account, able to get home safely.

The Upper Tribunal held that the FtT had erred in law by not asking whether a person who suffers blackouts (on the assumption that the claimant's account was true) is a person who requires guidance and supervision when walking. The FtT had focussed on what appeared to the Upper Tribunal to be an irrelevant matter, namely the claimant's ability to find a bus or taxi to take him home once he came around from a blackout.

On the remitted hearing, the key issue is likely to be whether the claimant does in fact suffer from epileptic blackouts. On the first appeal, the FtT thought it likely that the claimant was just getting so drunk that he could not remember where he was. But they went on to say that, even if they were epileptic blackouts the claimant was not entitled (and that was the error of law made by the FtT). So, the focus before the FtT to whom the case is remitted is likely to be on what is causing the claimant's periods of impaired consciousness.

Alcoholism and DLA entitlement

A further error made by the FtT in this case was its failure to assess whether the claimant's alcohol use might itself have given rise to DLA entitlement. The Upper Tribunal criticised the FtT for failing to apply the decision of a Tribunal of Social Security Commissioners in the case of *R(DLA) 6/06*. That case concerned the links between alcoholism and DLA entitlement. It is worth repeating the key findings of that important decision because there is still some ingrained resistance on the part of decision makers to accept that alcoholism may give rise to DLA entitlement:

- (i) The references to 'disability' in the DLA (and Attendance Allowance) entitlement conditions are simply references to a lack of physical or mental ability, i.e. there is no need for diagnosis of a recognised medical condition. This was the key finding of the landmark decision of another Tribunal of Social Security Commissioners in case *CDLA 1721 2004* (which we reported in issue 25).
- (ii) The key entitlement issue is always simply whether a claimant's disability in question means that the claimant cannot do the thing described as relevant for entitlement purposes (e.g. prepare a cooked main meal or walk outdoors without guidance or supervision) or requires the





care or other input described as relevant for entitlement purposes (e.g. continual supervision throughout the day in order to avoid substantial danger to the claimant or others). In other words, the focus of enquiry is on the consequences of a person's functional deficiency, and not its cause.

- (iii) Often, alcoholism gives rise to other medical conditions which themselves cause a free-standing mental or physical disability. On the mental side, examples are dementia and various psychoses. On the physical side, examples are anaemia, cirrhosis and pancreatitis and various pulmonary and vascular conditions. The relevance of such disabilities for DLA purposes is clear. It is simply a question of assessing whether those disabilities give rise to those consequences necessary in order to found DLA entitlement.
- (iv) What must, however, be ignored when assessing entitlement to DLA is the "transient and immediate effects consequent upon a person *choosing* to consume too much alcohol". How is this finding to be explained in the light of the statutory entitlement criteria? This is how the Tribunal of Social Security Commissioners explained it:

"there is no entitlement to DLA unless the disability is so "severe" that one of the statutory conditions for entitlement to benefit is satisfied. Thus...attention, supervision or watching over is not *required* if the claimant can reasonably be expected to avoid the need for attention or supervision by controlling the consumption of alcohol. Where the "cooking test" for the care component or the mobility component is in issue, the legislation does not expressly refer to a requirement for help; it refers simply to an inability to prepare a cooked main meal, an inability to take advantage of the faculty of walking without guidance or supervision or an inability, or virtual inability, to walk. However, it is implicit in the scheme of the legislation that...where either of the relevant conditions for entitlement to the mobility component is satisfied, the claimant is to be taken to require help with mobility (although not necessarily from another person in the case of the higher rate of the mobility component). Looked at from that perspective, it is quite clear that those conditions for entitlement should be approached in the same way as those where there is an express condition that attention, supervision or watching over be required. The conditions are not satisfied where the claimant does not *require* the help contemplated by the legislation because he or she can simply avoid getting drunk."

- (v) The next issue for the Commissioners was identifying the category of claimants the effects of whose intoxication may be taken into account for DLA purposes. They rejected the DWP's argument that the only claimants falling within this category were those whose desire to drink was "uncontrollable". This failed to recognise that the standard medical definitions of alcohol dependence syndrome do not include the requirement that a person's need to drink must be uncontrollable. Rather, the correct approach was described as follows:

"it is more helpful to think in terms of the degree of self-control that is realistically attainable in the light of all of the circumstances, including the claimant's history and steps that are available to him to address his dependence. A person who cannot realistically stop drinking to excess because of a medical condition and cannot function properly as a result can reasonably be said both to be suffering from disablement and to require any attention, supervision or other help contemplated by the legislation that is necessary as a consequence of his drinking. We can see no reason why the effects of being intoxicated should not be taken into account in determining his entitlement to the care component of DLA."

- (vi) The Commissioners also pointed out that this approach has practical advantages given the common co-existence of alcoholism and other physical and mental disabilities. Under this approach, there is no need to disentangle intoxication-related disabilities from other disabilities. As the Commissioners put it:

"disentangling the effects of being drunk from the effects of medical conditions such as depression (which are often coterminous) would also be difficult if not impossible...It is noteworthy that, in the appeal before us, the claimant contends that he began drinking to alleviate the pain from his back, and the consequences of depression and inability to work that resulted from his physical injuries. In this very case it would be an extraordinarily difficult task to tease out the effects of these various matters, which all ultimately stem from the claimant's aggregated medical conditions."

- (vii) The Commissioners thought that that finding was probably the most significant aspect of their decision in practical terms because:

"a person who is drunk severely enough and often enough to raise the possibility of entitlement to DLA on that ground alone is likely to be seeking the care component and have other serious problems that may themselves independently give rise to care needs. In such cases, the practical significance of our decision is that requirements for attention or supervision as a result of intoxication can be taken into account and aggregated with a claimant's other requirements, which makes it unnecessary to draw artificial distinctions between the causes of the various problems afflicting a person who is seriously disabled as a consequence of alcohol dependence"

- (viii) The Commissioners confirmed that the risk that a claimant might spend DLA on further drink was irrelevant. The task of the adjudicating authorities is only to decide whether a person's disabilities match those described in the various routes to entitlement not to make moral or therapeutic judgements.

The Upper Tribunal (Judge Levenson) gave its decision in *RR v Secretary of State for Work & Pensions* on 11 December 2009: [2009] UKUT 272 (AAC).





CARE COMPONENT

Secretary of State for Work & Pensions v PV – giving reasons for an entitlement decision on a claim made by a hearing-impaired claimant

Deconstructing a claimant's care needs in order to identifying which of them do, and do not, count for DLA purposes can be complex. However, that task must be performed. Both the claimant and the DWP have the right to understand why certain care needs have been relied on, and why others have not. A failure to appreciate this led to the decision of the FtT in this case being set aside.

The background facts

This was a claim for an award of the care component of DLA made by a man with impaired hearing. He was totally deaf in one ear and had markedly reduced hearing in the other. His case came before a First-tier Tribunal (FtT) which awarded him the middle rate of the care component on the basis that, by reference to the statutory criteria, he required "frequent attention throughout the day" in connection with the "bodily function" of hearing.

In its reasons, the FtT did not explain which activities it took into account as being attention in connection with the claimant's bodily function of hearing. Instead, it said that it considered that "globally" the claimant required frequent attention. The DWP appealed to the Upper Tribunal on the basis that the FtT had given inadequate reasons for its decision.

Needs flowing from a claimant's hearing impairment should have been identified and analysed

The Upper Tribunal allowed the appeal. The FtT had not explained how it had identified which caring acts did and did not count as attention in connection with the claimant's bodily function of hearing. Accordingly, no one could be certain whether it had properly applied the law. That law was set out in the decision of the House of Lords in the well-known case of *Secretary of State for Social Security v Fairey (aka Halliday)* [1997] 1 WLR 799, the effect of which was described as follows by the Upper Tribunal in the present case:

"in assessing entitlement to the care component of DLA on the basis of attention in connection with a sensory disability, the decision maker must take into account the attention which the claimant reasonably requires to enable him to live, as far as reasonably possible, a normal (or ordinary) life. What is reasonable depends on the age, sex, interests of the claimant and other circumstances, though the attention must 'still be reasonably required both in its purpose and in its frequency'. In particular, the decision confirms that engaging in a social life, in the sense of mixing with others, taking part in activities with others, undertaking recreation and cultural activities *can* be a part of normal life' while at the same time acknowledging that there may be some activities that may never be available to deaf people."

Guidance on care component entitlement for persons with impaired hearing

The key point from the *Fairey* decision for the purposes of the present case was that not all assistance given to a person with impaired hearing will 'count' as attention in connection with bodily functions. In particular, the assistance must be reasonably required. The FtT in this case had erred by not analysing the different types of help given to the claimant and deciding whether it was reasonably required, which was a necessary condition if that help were to be converted into 'attention in connection with bodily functions'. The FtT had simply accepted that all the assistance connected to the claimant's impaired hearing must have been reasonably required. This was not necessarily the case, as the following examples given by the Upper Tribunal illustrate and which are a useful guide as to what is relevant for advisers trying to construct a DLA case for other hearing-impaired claimants:

- (i) "In a one-to-one conversation at home, for example, all that might be necessary is for the other party to face the claimant and speak more loudly. This type of assistance is unlikely to amount to attention unless it particularly strenuous";
- (ii) "On the other hand, if the situation is such that, in order to be heard and understood, the family must go substantially beyond these expedients, their efforts may be classed as assistance";
- (iii) "Ordinary activities such as watching television also require careful consideration. Text is available with many programmes, while DVDs generally have a subtitle mode. The claimant's needs may be met by turning up the sound, and the claimant stated in his claim pack that he does this or accesses text. The tribunal would also have to consider whether any oral assistance would actually be feasible or effective: *R(DLA)3/02*. How would the claimant be assisted by a family member or other person at, say, a community meeting or religious service where loudly relaying what was being said would be disruptive?"

The case was remitted back to a differently-constituted First-tier Tribunal for re-hearing.

The Upper Tribunal (Judge Lane) gave its decision in *Secretary of State for Work & Pensions v PV* on 4 February 2010: [2010] UKUT 33 (AAC).





HOUSING & COUNCIL TAX BENEFIT

LIABILITY TO MAKE PAYMENTS

SN v Hounslow LBC – rental liability genuine despite landlord having taken no action in response to non-payment of rent for two years

A claimant must be genuinely liable to make payments to a landlord, in order to be entitled to housing benefit. However, as this case shows, there are no hard and fast rules as to when there is and is not such a liability. Here, a First-tier Tribunal erred by assuming that, because a landlord was very relaxed about non-payment of rent, there could not be a genuine liability to pay rent.

Facts

This is what happened in this complex and untidy case:

- (i) Ms H made a claim for housing benefit in November 2003;
- (ii) in June 2004, Ms H was awarded housing benefit, paid to her landlord's agent and backdated to the date of claim;
- (iii) in September 2005, that award was suspended and then removed. This was because the council concerned mistakenly concluded that the property in respect of which benefit was being claimed was vacant;
- (iv) despite that removal of housing benefit, Ms H's landlord did not press her for rent. In fact, Ms H was unaware for some two years that her rent was no longer being met by housing benefit;
- (v) in November 2007, Ms H became aware that her rent was no longer being met by housing benefit. She made a fresh claim;
- (vi) the fresh claim was refused. The council concluded that the fact that Ms H had lived in the property rent-free for two years meant that she did not have a genuine liability to pay rent and, as a result, did not meet a key entitlement condition for housing benefit;
- (vi) the council also decided that the housing benefit paid to Ms H between 2004 and 2005 was benefit to which she was not entitled (because of the alleged absence of a liability to pay rent). They went on to decide that, for this period, there had been an overpayment of approximately £7,500 and that it was recoverable from Ms H.

The council's decisions were upheld on appeal by the First-tier Tribunal (FtT). Ms H brought a further appeal to the Upper Tribunal.

The Upper Tribunal's decision

The Upper Tribunal identified that the key entitlement issue in this case was whether Ms H was liable to pay rent in respect of the property for which benefit was claimed. If she were not so liable she could not be entitled to housing benefit (s.130 Social Security Contributions and Benefits Act 1992).

When this case was before the FtT it held that, because Ms H had lived in her home for at least two years without paying rent, she could not have had a genuine legal liability to pay rent. The Upper Tribunal held that the FtT had erred in law by assuming that the one fact necessarily followed from the other:

"simply because a tenant lives in a property without paying rent for a period, even an extensive period, does not of itself mean that there is no legal liability to pay rent."

The Upper Tribunal went on to hold that the landlord's inactivity did not, in the circumstances of this case, mean there was no genuine legal liability to pay rent. The Upper Tribunal noted that this case had been marked by delay throughout and the landlord may simply have been resigned to waiting a long time for housing benefit payments to come through. The Upper Tribunal also accepted Ms H's explanation that the landlord knew that she was a single mother with a number of children and as a result had shown her some degree of latitude. The Upper Tribunal judge concluded as follows:

"I am not persuaded by the City Council's argument that the landlord's apparent willingness to renew the agreements and his failure to take enforcement action is evidence either that there was no liability in the first place or that the agreement was non-commercial in nature. As the commentary in CPAG's *Housing Benefit and Council Tax Benefit Legislation* (22nd edition, 2009/2010, by Carolyn George and others) points out (at p.255), caution needs to be exercised before placing heavy reliance on such matters. The appellant is obviously a person of limited means and the landlord and his agents may well have taken a rational economic view, borne of actual experience in the present case, that they were more likely to see their money if they desisted from seeking to press for the tenant's eviction and gave her time to pursue her appeal".

In terms of consequences, this meant that:

- (i) there had been no overpayment of housing benefit between 2004 and 2005 because Ms H had at all times met the entitlement conditions for housing benefit; and





(ii) housing benefit was awarded to Ms H on her fresh claim made in November 2007.

Other points

The Upper Tribunal took the opportunity to criticise two additional aspects of the performance of the council with which this case was concerned.

(i) The Upper Tribunal criticised the council for apparently refusing to award benefit whenever a claimant did not provide the full name and address of his/her landlord:

“there is no specific requirement in housing benefit law that the claimant must provide the details of the full name and address of the landlord. Furthermore, the City Council had previously been criticized by the Local Government Ombudsman for adopting a policy of not paying housing benefit claims unless the landlord’s full details were provided (Reports 02/C/15217 & 03/C/11787)”.

(ii) It took nine months for the council concerned to submit the claimant’s appeal to the First-tier Tribunal. The Upper Tribunal hinted that such a delay might constitute a violation of Article 6 of the European Convention on Human Rights. On this point, the Upper Tribunal said:

“This sort of delay is highly unsatisfactory, especially in a case which had already dragged on for a long time. A claimant has a right under Article 6 of the European Convention on Human Rights to have their appeal heard within a reasonable time by a tribunal. There is, however, no statutory time limit within which appeals should be referred by local authorities to the Tribunals Service. I can only echo and endorse the comments...in unreported decision CH/3497/2005...that “it is wholly unacceptable to the proper operation of the system of appeals in housing benefit and council tax benefit appeals that delays of this sort should occur”..

The delay in the present case was just over 9 months, rather than the 19 months in CH/3497/2005, but this was still plainly far too long. I have not asked for an explanation for this delay, not least as I did not wish to prolong matters still further, but on the face of it the City Council needs to reconsider carefully its process for handling of appeals. As Mr Deputy Commissioner Mark observed in CH/3497/2005, “It is of crucial importance to many benefits claimants to have their appeals heard very promptly. This is clearly liable to be the case in housing benefit disputes, where delay could cost them their homes”.

The Upper Tribunal (Judge Wikeley) gave its decision in *SN v London Borough of Hounslow* on 18 February 2010: [2010] UKUT 57 (AAC).

COUNCIL TAX BENEFIT & RELATED MATTERS

Lonergan v Gedling BC – council powers to present bankruptcy petitions for unpaid council tax

In this case, the Court of Appeal confirmed that a local authority does have the power to present a bankruptcy petition for unpaid council tax. A relatively old decision, relied on by local authorities, as well as the Local Government Ombudsman, for many years, also holds that authorities have this power. In this case, however, the Court of Appeal pointed out that that decision, *Griffin v Wakefield Borough Council*, is “only reported in note form in the Rating and Valuation Reports” and, in any event, is not binding on the Court of Appeal. Accordingly, the present decision should from now on be relied on as authority for the proposition that a local authority has the power to present a bankruptcy petition for unpaid council tax.

The Court of Appeal gave its decision in *Lonergan v Gedling BC* on 9 December 2009: [2009] EWCA Civ 1569. The Court was comprised of Arden, Pill and Smith LJ. Despite the decision being given on an application for permission to appeal, the Court gave permission for it to be cited in court.

Complaint 08 014 087 (Brighton & Hove Council) – councils should check with social services whether a person is known to be vulnerable before instituting bankruptcy proceedings against them

The Local Government Ombudsman is continuing to take a close interest in the use by councils of bankruptcy as a means of recovering unpaid council tax (see issue 61 for other recent cases on the topic). In this case, the Ombudsman criticised a council for failing to have a policy of checking with social services as to whether a person was vulnerable before deciding to institute bankruptcy proceedings. Clearly, therefore, the Ombudsman expects all councils to have such procedures in place.

The facts

A council decided to bring bankruptcy proceedings against a resident who had defaulted on her council tax. Unknown to the council, the woman was experiencing a crisis in her life and had a serious mental illness. At the relevant time, the council’s bankruptcy procedure required officials to check whether a person was vulnerable before issuing bankruptcy proceedings. The policy did not say that vulnerable groups, such as persons with a mental illness, would be immune from bankruptcy proceedings but it did say that close scrutiny would be given to whether that was the most appropriate recovery. However, this policy was of limited use in practice because the council did not have a procedure for checking with its Adult Social Care Department whether an individual against whom bankruptcy proceedings were being considered was in some way vulnerable. If a check had been made, it would have revealed that the individual in question was awaiting assessment from a community mental health team.

Councils should carry out vulnerability checks before instituting bankruptcy proceedings

The Ombudsman found maladministration because the council did not, at the time of the relevant events, have a procedure in place for checking with its Adult Social Care Department prior to bringing bankruptcy proceedings:





"On balance, however, I would say that the absence of a requirement to check specifically with Adult Social Care meant that the application of the [vulnerability] policy was flawed, and was a significant failure in the procedure. It meant that the requirement to consider vulnerability was less likely to be satisfactorily achieved. For this reason I have decided that there was procedural fault which amounted to maladministration".

The complainant in the present case was in fact made bankrupt and lost her home, which the Ombudsman described as a "very serious outcome indeed". However, as the Ombudsman has tended to decide in other bankruptcy cases, he declined to conclude that the council's maladministration caused the complainant to lose her home. As a result, the Ombudsman did not recommend that the woman be compensated for loss of her home or for the distress of being made bankrupt. However, the Ombudsman did recommend £250 compensation for "a feeling of uncertainty as to whether her case might have been treated differently if the Council's procedure had required a check to be made with Adult Social Care".

One of the Local Government Ombudsman for England (Tony Redmond) published his decision on complaint 08 014 087 (made against Brighton & Hove Council) on 11 February 2010.

Complaint 09 006 694 (Thurrock council) – Ombudsman says councils have no powers to charge fees for administering payment plans entered into as an alternative to bankruptcy proceedings

A council's debt recovery contractor, a company called Vertex, started to charge a £400 fee for administering a payment plan offered as an alternative to bankruptcy proceedings against council tax non-payers. A complaint of maladministration was made to the Local Government Ombudsman. The council concerned conceded that it had no power to levy such charges and that it had acted unlawfully in doing so. The Ombudsman's report includes the independent legal advice obtained by the council on the question of whether it had the power to impose the charge:

"I am not aware of any other basis on which it could be argued that the Council has power to levy or agree the £400 charge, or any part of it. Specifically, the Insolvency Rules do not provide that the costs of a statutory demand are recoverable from the debtor unless or until the bankruptcy order is made. For these reasons, and while I appreciate why the Council would wish to recover from the debtor the costs perceived to be associated with the payment plan, I am of the clear opinion that the Council has no power to levy or seek to charge the £400 sum in respect of such arrangements".

The Ombudsman's own conclusion was as follows:

"There is no legislation which allows for the fee to be charged and independent legal advice has confirmed this. The fee was introduced without reference to officers, members or the Council's legal department and there appears to have been no scrutiny to ensure that the policy was legal".

The Council has now agreed to reimburse, or offset against arrears, everybody who has paid the £400 fee in full or in part.

One of the Local Government Ombudsman for England (Tony Redmond) published his decision on complaint 09 006 694 (made against Thurrock Council) on 11 February 2010.

INCAPACITY BENEFIT / EMPLOYMENT & SUPPORT ALLOWANCE

WORK CAPABILITY ASSESSMENT

Case [2010] UKUT 50 (AAC) – coping with social situations: interpretation of the descriptor

The Upper Tribunal is now having regularly to give rulings about the way in which the vague wording of some of the ESA Work Capability Assessment descriptors are framed. This latest decision was concerned with 'coping with social situations' and makes the point that a claimant's coping skills are to be compared with a person who suffers no abnormal fear or anxiety in everyday social situations.

Coping with social situations – the descriptor

This case was about whether an ESA claimant who said that she had depression, anxiety attacks and "intellectual limitations" met descriptor 19 in the ESA Work Capability Assessment. That descriptor reads as follows:

"19 Coping with social situations

(a) normal activities, for example, visiting new places or engaging in social contact, are precluded because of overwhelming fear or anxiety [15 points awarded if descriptor met, which means that the person has met the threshold for an award of ESA];





(b) normal activities, for example, visiting new places or engaging in social contact, are precluded for the majority of the time because of overwhelming fear or anxiety (9 points);

(c) normal activities, for example, visiting new places or engaging in social contact, are frequently precluded because of overwhelming fear or anxiety (6 points);

(d) none of the above apply (0)."

The Upper Tribunal's interpretation of the descriptor

A claimant was adjudged by a First-tier Tribunal (FtT) not to merit any score under descriptor 19. She appealed to the Upper Tribunal. The Secretary of State conceded the appeal because the FtT had not properly addressed the meaning of "normal" activities. The Upper Tribunal went on to take the opportunity to make the following general findings about the nature of this descriptor:

(i) it can be seen that the descriptor is about analysing a person's ability to carry out "normal activities" and so the meaning of that phrase is important. The Upper Tribunal said that it does not refer to activities that a particular claimant normally does but instead refers to "activities of "normal" people". Presumably, by normal people it meant people who do not have difficulty in coping with social situations;

(ii) the Upper Tribunal did not think it was necessary for a person to show that all normal activities were precluded in order to meet one of the scoring descriptions. The Upper Tribunal said:

"For example, someone who is genuinely overwhelmed about the idea of going out – and rarely does so – may not be overwhelmed when making a phone call to a friend or neighbour or answering a call on a phone which (like so many phones now) tells her or him who is calling. It is at least arguable that someone who cannot go out most of the time for this reason meets this descriptor at least at some level even though he or she is prepared to sit at home and telephone. There is a balance to be struck between different social situations. Where there is evidence of significant problems with some social situations, there may be a need to explore a wider range of those situations to make a full judgment of the extent of the limitation";

(iii) the Upper Tribunal suggested that "frequently", as used in descriptor (c), might mean the same as "often";

(iv) the Tribunal also made the important general point that the form given to ESA claimants (the ESA 50 form) does not recite the terms of the statutory descriptor. For example, rather than asking 'do you suffer overwhelming fear and anxiety when doing normal activities?' it asks questions such as 'does the thought of going to new places makes you anxious or scared?' There is a similar mismatch between the ESA 80 form used by medical practitioners to record their WCA examinations and the wording of the statutory descriptors. What this means is that decision makers must proceed with care when applying information that has not been framed by reference to the statutory descriptions. They must consider to what extent the information provided says something relevant about the extent to which a claimant meets a statutory description.

The Upper Tribunal (Judge David Williams) gave its decision in on 23 February 2010: [2010] UKUT 50 (AAC).

INCOME –RELATED BENEFITS

CAPITAL

MC v Secretary of State for Work & Pensions – tribunal erred by deciding that a claimant could not disclaim ownership of capital which represented the proceeds of crime

Shady dealings of some sort were involved when a son gave his mother money with which to buy a house. When the mother claimed Pension Credit, she argued that the house really belonged to the son and, accordingly, her 'ownership' did not disentitle her to Pension Credit. When the case came before a First-tier Tribunal it took a stance that appeared to be influenced by moral considerations and held that the son was prevented from arguing that he retained real ownership of the money. That was an error of law. The First-tier Tribunal should simply have applied the law to the facts without being sidetracked by the unsavoury nature of what went on in this case.

The first decision

The DWP discovered that a State Pension Credit recipient had, some three years' previously, transferred to her son registered ownership of a property worth at least £100,000. The DWP decided that the property had been given away for the purpose of securing entitlement to Pension Credit. As a result, it was 'notional capital' and so the claimant was treated as if she still possessed it. This took her well above the financial thresholds for Pension Credit, as a result of which her award was removed (superseded).

The claimant appealed against the supersession of her award, but her appeal was rejected at tribunal. Her argument, which was rejected by the tribunal, was that she was the owner of the property 'in name only' and that it was being held on trust for her son, who provided the purchase monies.

The second decision

The claimant made a further claim for Pension Credit. The DWP rejected the claim. Again, they decided that the claimant had notional capital in





excess of the capital limit because of the earlier gift of property to her son. Even after application of the diminishing notional capital rule, the claimant was deemed to have £70,000 in notional capital.

The claimant appealed against the refusal of this further claim, running essentially the same argument as she had run when her Pension Credit award was first removed. The First-tier Tribunal (FtT) rejected the claimant's appeal. The FtT seemingly accepted that the monies to purchase the property in question had been provided partly by the son but also decided that this was part of some unlawful activity, such as money laundering or tax evasion.

The FtT went on to conclude that, because the son was pursuing an unlawful activity, general equitable principles meant that it was not open to him to assert ownership of the monies (or the property in which the monies had been invested) in connection with his mother's pension credit claim. On this analysis, the property was effectively owned by the mother from the outset. When she later transferred legal ownership to the son by putting the property in his name she had therefore deprived herself of capital and did so, held the FtT, in order to secure entitlement to benefit. This meant that under the notional capital rules she was treated as if she still owned the property (subject to the application of the diminishing notional capital rules). The claimant appealed to the Upper Tribunal.

The Upper Tribunal's decision

The Upper Tribunal, while not expressing much sympathy for the claimant, decided that the FtT had erred in law in its analysis of the legal consequences of the son having paid for the property using money which was gained from some unlawful activity.

The FtT had misunderstood the legal rules about when a person is prohibited from asserting the existence of a trust by relying on his/her wrongdoing. The relevant person here was the son and there was nothing in the case law which prevented him from asserting that the property was held by his mother on trust for him(a). The FtT's error of law on this point meant that its decision would be set aside and the matter remitted for re-determination to a new FtT.

One further point to note is that the Upper Tribunal confirmed that the FtT had been right to conclude that it was not bound by the conclusions reached by the appeal tribunal that rejected the claimant's appeal against decision 1(b).

(a) This is how the Upper Tribunal judge described this technical and complex area of law:

"The principle which the Tribunal appears to have had in mind is the principle which in certain circumstances prevents a person putting forward evidence of his own wrongdoing in order to support a resulting or constructive trust in his favour. However, it was held by the House of Lords in *Tinsley v Milligan* [1993] 3 All ER 65 that that principle only applies where a claimant needs to put forward his own unlawful conduct in order to rebut the presumption of advancement or the presumption of resulting trust. It does not apply where the claimant is not seeking to rebut a presumption which would otherwise arise in favour of someone else, but rather is able to rely on one of those presumptions which arises in his favour: see Snell's Equity, 31st edition, para. 23-11. In other words, the principle does not apply where the claimant does not need to assert the illegality and needs to do no more than establish that he paid or contributed to the purchase price, with the consequence that the presumption of resulting trust arises in his favour. In the present case no presumption of advancement applied to the payment of monies by James [the son] into the Claimant's account, or to his permitting the money to be used to purchase the property in the Claimant's name. He would have been able to rely on the presumption of resulting trust without asserting any illegality".

(b) On this point, the Upper Tribunal judge said:

"The Tribunal rightly recognised that it was not bound by the previous tribunal's findings that the property had not been held on trust for James, and that the Claimant's transfer of the property to James in 2005 had been made with the intention of securing continued entitlement to state pension credit: see, for example, my own decision in CIS/2540/2004."

The Upper Tribunal (Judge Turnbull) gave its decision in *MC v Secretary of State for Work & Pensions* on 2 February 2010: [2010] UKUT 29 (AAC).

TAX CREDITS

CHILD TAX CREDIT

PF & SF v HMRC – child tax credit entitlement of British citizens living elsewhere in the EEA

In this case, the Upper Tribunal confirmed that, at the present time, a UK pensioner living in another EEA country is not entitled to Child Tax Credit. That will change, however, in the near future.

Why was the child tax credit award stopped upon the recipients' move to Sweden?

The case concerned two British citizen pensioners with four dependent children. When they were living in the UK they received child tax credit. They then moved to Sweden. Initially, their child tax credit award continued but HMRC then said that this was a mistake and removed the award. The couple appealed and eventually the matter came before the Upper Tribunal, whose analysis of what had happened in law was as follows.

(i) Initially, HMRC took the view that child tax credit was a "family allowance" for the purposes of EC Council Regulation 1408/71. Under this view, child tax credit would, given the requirements of that Regulation, remain payable to persons like the claimants even if they ceased to reside in the UK and instead began to reside in another EU/EEA country.





- (ii) By Ministerial announcement of February 2009, the HMRC said that, having taken legal advice, they now had a different view of the status of child tax credit for the purposes of Regulation 1408/71. They now viewed it as a "social advantage" for the purposes of Regulation 1408/71, the effect being that it was payable to EEA nationals working in the UK but not to UK nationals residing in a different EEA country. HMRC considered that child tax credit, unlike child benefit, could not fall within the Regulation's definition of "family allowance" because it takes full account of the income of a claimant.
- (iii) The Upper Tribunal held that the HMRC's revised view of the law was correct. Accordingly, HMRC had acted correctly by removing the claimants' child tax credit award.

The impending change in the law

The harshness of this decision for the claimants will soon be mitigated. As a result of a change in European law which will occur in May 2010, the claimants will regain entitlement to child tax credit. In that month, a new European law, Regulation 883/2004, will replace the provisions of Regulation 1408/71 that were applied in this case. The new regulation operates by reference to a new concept of the "family benefit" which the Upper Tribunal in the present case was satisfied did encompass child tax credit. Indeed, HMRC conceded that, once the new Regulation is in force, UK pensioners living elsewhere in the EEA will be able to claim child tax credit.

The Upper Tribunal (Judge David Williams) gave its decision in case *PF & SF v HMRC* on 22 February 2010: [2010] UKUT 49 (AAC).

WELFARE BENEFITS – GENERAL ISSUES

TRIBUNALS

RF v CMEC – directions for the attendance of a presenting officer must be complied with

In this child support case a tribunal directed that a presenting officer should attend the hearing. The Child Maintenance and Enforcement Commission, however, failed to send a presenting officer. This was an error of law and would also be an error of law in a welfare benefits case given that the same procedural rules apply.

The Upper Tribunal explained why the Commission had been duty bound to comply with the direction to send a presenting officer as follows:

"The tribunal had given a direction and the parties were under a duty to obey it. That duty is now incorporated into the duty on all parties 'to co-operate with the Tribunal generally' under rule 2(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008...They do so by complying with the direction. If a party is unable to comply or finds it difficult to do so, the proper course is to apply under rule 6(5) for the tribunal to amend, suspend and set aside its direction. A party is not entitled to disregard a direction".

The DWP has responded rapidly to this decision, issuing an update to its Decision Makers Guide (DMG) stressing that a Tribunal direction to send a presenting officer is mandatory and must be complied with. That update to the DMG is available at www.dwp.gov.uk/docs/m-13-10.pdf.

The Upper Tribunal (Judge Jacobs) gave its decision in case *RF v CMEC* on 10 February 2010: [2010] UKUT 41 (AAC).

MH v Pembrokeshire CC – Upper Tribunal gives guidance as to when the First-tier Tribunal may determine an appeal on the papers

In this case, the Upper Tribunal made the important point that the First-tier Tribunal (FtT) should not assume that, simply because a claimant has said s/he does not want an oral hearing, the FtT is able to determine an appeal as soon as it has read the papers. The FtT should be alive to the possibility that, at that stage, it might not have sufficient material before it to dispose of a case fairly and justly.

Background

A housing benefit claimant wanted to have his award backdated for around 2 months from the date of claim. This meant that he had to show "good cause" for not having made an earlier claim. He said that he had good cause because, for a while, his mother was not able to help him with his claim forms and that, as a vulnerable adult with ADHD, he could not fill the forms in himself. He also said that he had not received some relevant correspondence from the local authority concerned.

The local authority decided that the claimant had not shown 'good cause'. The claimant appealed to the FtT but said he did not want an oral hearing. The FtT decided to proceed with an appeal 'on the papers'. Having noted that the claimant had not produced any medical evidence to support his argument that his medical condition lay behind his failure to submit an earlier claim, the FtT held that he had not persuaded them that he had 'good cause'. The claimant brought an appeal to the Upper Tribunal.

When should the First-tier Tribunal proceed to hear an appeal 'on the papers'?

The first issue dealt with by the Upper Tribunal was to give guidance to First-Tier Tribunals as to when it is right to proceed with an appeal solely





'on the papers'. The relevant legislative provision is reg.27(1) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008. This enacts a general rule that a hearing must be held on an appeal. However, it goes on to disapply that general rule (so that an appeal may be determined on the papers without a hearing) if two conditions are met:

- (i) each party has consented to, or at least not objected to, the matter being decided without a hearing; and
- (ii) the FtT considers that it is "able to decide the matter without a hearing".

The Upper Tribunal judge gave the following guidance about how reg.27 should operate:

- (i) the FtT must always consider, at the start of its consideration, whether the first condition is met, that is consider whether any party has "asked for an oral hearing". The Upper Tribunal went on to say that if such a request has been made, it has no power to proceed and must adjourn and direct an oral hearing";
- (ii) the Upper Tribunal said that the FtT should then go on to consider the case on the papers. However, this does not mean it is inevitable that that consideration will result in a decision on the appeal. The Upper Tribunal went on:

"[the FtT] must then decide whether to give a decision or to adjourn. The adjournment may be to allow an oral hearing to take place or to give directions to a party on evidence that is required. If an oral hearing is directed, this is a judicial decision under rule 27(1)(b). If the case is adjourned with directions, this is a judicial decision under rule 5(3)(h) (case management power to adjourn). In either case, the decision must be made in the light of the overriding objective [that is dealing with a case fairly and justly]."

Why should this Tribunal not have made a decision after considering the matter on the papers?

The Upper Tribunal went on to hold that the FtT in the present case had erred in law by concluding that it was able to make a decision after considering the matter on the papers. There were effectively two options open to the FtT, given that the claimant had said that he did not want an oral hearing. The first was to decide the matter there and then, which is what the FtT did. The other option was to adjourn with a direction to the claimant that he submit medical evidence relevant to the key issue in the case which was whether his medical condition meant that he had good cause for his late claim for housing benefit.

The Upper Tribunal held that the FtT should have adjourned and directed further evidence. Its decision to determine the matter there and then was an error of law. An adjournment with directions would have had the following benefits:

- (i) it avoids the formality of an oral hearing;
- (ii) it is flexible;
- (iii) it helps the claimant to participate more fully in the proceedings;
- (iv) it makes effective use of the tribunal's legal expertise to help the claimant".

By contrast, the course taken by the FtT did not accord with the overriding objective of dealing with cases fairly and justly. It had little to commend it other than that perhaps, overall, less tribunal resource would be devoted to this relatively simple case. The Upper Tribunal concluded as follows:

"The factors in favour of an adjournment are overwhelming. Essentially, they focus on what has become known as the enabling approach to tribunal procedure. This approach allows the tribunal to assist parties, especially those who are not represented, to make effective use of the proceedings. This may require, as in this case, guiding a party on the adequacy of the evidence and the nature of the evidence required".

The claimant did have good cause for his late housing benefit claim

The Upper Tribunal proceeded to determine the matter for itself. It held that the claimant had shown good cause for having failed to make an earlier claim:

"I accept that the claimant has difficulties with the delivery of post as a result of problems of access. As a result, mail may not be delivered or reach the wrong flat. Given the nature of his accommodation, that is plausible and there is no evidence to cast doubt on what he says. As a result of those problems, he did not receive all the correspondence from the local authority. He also has attention deficit hyperactivity disorder. He has difficulties with attention and focusing on problems. His mother is his main carer and responsible for all his paperwork. There is now medical evidence on those matters. Obviously, his mother has her own life to lead as well as caring for her son. I consider that the combined effect of those circumstances provided continuous good cause throughout the period in issue".

The Upper Tribunal (Judge Jacobs) gave its decision in *MH v Pembrokeshire CC* on 29 January 2010: [2010] UKUT 28 (AAC).





HUMAN RIGHTS

Humphreys v HMRC – Court of Appeal holds that the Child Tax Credit main responsibility rule does not violate European Convention on Human Rights

The 'main responsibility' test for determining which of two competing separated parents is to receive Child Tax Credit will continue to apply as a result of this Court of Appeal decision.

A father looked after his children for three days a week and their mother looked after them for four days a week. Due to the application of the 'main responsibility' rule in regulation 3 of the Child Tax Credit Regulations 2002, only the mother received an award of child tax credit in respect of the children. The father argued that regulation 3 was indirectly discriminatory on the grounds of sex (against men who tend to be over represented amongst the ranks of minority carers) and so contravened Article 14 of the European Convention on Human Rights taken with Article 1 of Protocol 1 to the Convention (see issue 54 and its report of the decision of the Law Lords in *R (RJM) v Secretary of State* [2008] UKHL 63 for an analysis of how these Articles of the Convention may be deployed to challenge differences of treatment as regards access to benefits).

The case came before the Court of Appeal. Not without some hesitation, the Court of Appeal rejected the father's case and upheld the main responsibility rule. HM Revenue & Customs had shown an objective justification for the main responsibility rules for determining which of two separated parents is to receive child tax credit, despite the fact that those rules prejudice far more men than women. The Court said:

"There may well be a better or fairer way of distributing CTC, but a particular policy choice has been made and it cannot in our judgment be characterised as unreasonable or as being manifestly without reasonable foundation".

The Court of Appeal gave its decision in *Humphreys v the Commissioners for HM Revenue & Customs* on 11 February 2010: [2010] EWCA Civ 56. The Court was comprised of The President of the Queen's Bench Division, Richards and Goldring LJ.

Carson & Others v the United Kingdom – failure to up-rate pensions of persons living outside the UK did not violate European Convention on Human Rights

A number of pensioners were entitled to a UK state pension on account of their National Insurance contributions records. However, they lived outside the UK in countries with which the UK had either not entered into reciprocal social security agreements or had entered into an agreement which did not provide for pension up-rating. This meant that, following the individuals' departures from the UK, their pensions were not annually up-rated to keep pace with inflation. They argued that they had been discriminated against on the grounds of their place of residence contrary to Article 14 of the European Convention on Human Rights taken with Article 1 of Protocol 1 to the Convention.

The challenge failed before the House of Lords and so a further case was taken to the European Court of Human Rights in Strasbourg. It eventually came before a Grand Chamber of that Court which said that "in order for an issue to arise under Article 14, the first condition is that there must be a difference in the treatment of persons in relevantly similar situations". The pensioners argued that there were in a relevantly similar situation to UK-resident pensioners who had also paid the necessary National Insurance contributions and whose state pension has been up-rated. However, the European Court did not agree and as a result the claim fell at this initial hurdle:

"the applicants' argument misconceives the relationship between National Insurance contributions and the State pension. Unlike private pension schemes, where premiums are paid into a specific fund and where those premiums are directly linked to the expected benefit returns, National Insurance contributions have no exclusive link to retirement pensions. Instead, they form a source of part of the revenue which pays for a whole range of social security benefits, including incapacity benefits, maternity allowances, widow's benefits, bereavement benefits and the National Health Service. Where necessary, the National Insurance fund can be topped-up with money derived from the ordinary taxation of those resident in the United Kingdom, including pensioners...The variety of funding methods of welfare benefits and the interlocking nature of the benefits and taxation systems have already been recognised by the Court...This complex and interlocking system makes it impossible to isolate the payment of National Insurance contributions as a sufficient ground for equating the position of pensioners who receive up-rating and those, like the applicants, who do not".

A Grand Chamber of the European Court of Human Rights gave its decision in *Carson & Others v the UK* on 16 March 2010 (app'n no. 42184/05).

OVERPAYMENTS AND THEIR RECOVERY

EW v Secretary of State for Work & Pensions – failure to disclose increased State Pension meant that £5,000 in overpaid Carers Allowance was recoverable

Modern computer systems are capable of ensuring that one part of the benefits system knows information held by another part. While systems are capable of operating in that way, it appears that they do not. This is the latest in a series of cases which show that claimants cannot assume, for the purposes of their duties to disclose information, that one part of central government will share relevant information with another.





The facts

A Carers Allowance recipient received a payment in excess of entitlement. This occurred for the following relatively common reason:

- (i) the claimant began to receive Carers Allowance in respect of her husband in 1999;
- (ii) the husband turned 65 in May 2006 and became entitled to State Retirement Pension;
- (iii) commencement of the husband's Pension led automatically to an increase in the claimant's State Retirement Pension to the extent that it exceeded her Carers Allowance;
- (iv) once State Retirement Pension exceeds Carers Allowance, the recipient is no longer entitled to payment of Carers Allowance: sections 20(1)(f) and 63(c) of the Social Security Contributions and Benefits Act 1992 and regulation 4(4)(a) of the Social Security (Overlapping Benefits) Regulations 1979.

The claimant did not inform the Carers Allowance Unit of the DWP that her State Retirement Pension had increased. As a result, Carers Allowance remained in payment. When the Carers Allowance Unit discovered the Pension increase, they stopped the Carers Allowance award. They also decided that the approximately £5,000 in Carers Allowance paid subsequent to the pension increase was an overpayment of benefit that was recoverable from the claimant.

The legal issues

The claimant challenged the decision that the overpayment was recoverable from her. In order for an overpayment of a social security benefit such as Carers Allowance to be recoverable, a claimant must have either failed to disclose or misrepresented a material fact (s.71(1) Social Security Administration Act 1992). The argument in this case was that the claimant had failed to disclose a material fact (the increase in her State Retirement Pension). This meant that the DWP had to establish two things:

- (i) that the claimant was under an obligation to disclose the fact that her Retirement Pension had increased. The DWP had to prove the existence of such an obligation because it has been held that, without such an obligation, a person cannot be said to have failed to disclose anything (see *B v the Secretary of State for Work and Pensions* [2005] EWCA Civ 929 which we considered in issue 29); and
- (ii) that there had been a failure to comply with that obligation to disclose.

The decision – the overpaid Carers Allowance was recoverable

The First-tier Tribunal held that the DWP had established both of the above requirements, and that decision was upheld on appeal by the Upper Tribunal as follows:

- (i) the Carers Allowance instructions sent out to the claimant each year clearly stated that she was required to notify the office dealing with her Carers Allowance claim if there was an increase in her pension. Thus, she was under an obligation to disclose that fact;
- (ii) as regards whether there had been a failure to disclose, the claimant argued that, because one part of the DWP was obviously aware of her increased pension entitlement (it was paying it to her), all emanations of that organisation were to be taken to be aware of that information. As the organisation was already aware of that information, argued the claimant, she could not be said to have failed to disclose that information because, she said, you cannot fail to 'disclose' information to an organisation if it already has the information. This argument was unsustainable in the light of it having already been rejected by the Law Lords in *Secretary of State for Work and Pensions v Hinchy* [2005] UKHL 16. Accordingly, the claimant had failed to comply with her duty of disclosure.

The result was that the claimant was liable to repay the £5,000 overpayment of Carers Allowance.

The Upper Tribunal (Judge Lane) gave its decision in *EW v Secretary of State for Work & Pensions* on 16 February 2010: [2010] UKUT 45 (AAC).

BENEFIT FRAUD

R v Lancaster – the offence of false accounting arising out of dishonest benefit claims

This was a case in which, as well as standard benefit offences, a man was charged with the more serious offence of false accounting. He was convicted of that offence and appealed to the Court of Appeal. The Court rejected his appeal and, in so doing, gave a decision which suggests that it may be easier to prove the serious offence of false accounting than to prove less serious offences under the social security legislation.

The facts

A man claimed and was awarded housing and council tax benefit. His local authority subsequently considered that, when he claimed, he was actually running a lucrative business from his home, the success of which was shown by its bank account containing £70,000. Criminal charges were brought. Somewhat unusually, the man was not merely charged with offences under the social security legislation. He was also charged with the offence of 'false accounting' under s.17 of the Theft Act 1968. This is a serious offence attracting a maximum penalty of seven years' imprisonment.





By reference to the relevant statutory criteria in s.17 of the Theft Act 1968, the prosecution argued that the man was guilty of the offence of false accounting for the following reasons:

- (i) he had falsified a document made for an "accounting purpose" by omitting material particulars from it, namely that he was running a business from home and that he was in effective control of at least two companies;
- (ii) he had furnished information by making use of that document even though he knew it to be "misleading, false or deceptive" in a material particular;
- (iii) in so doing, he had acted dishonestly with a view to gain for himself.

The man was convicted of false accounting and sentenced to 15 months' imprisonment. He appealed to the Court of Appeal against his conviction for the offence of false accounting.

False accounting and benefit claims

The Court of Appeal rejected the appeal, ruling as follows

- (i) the Court of Appeal said that "there is no dispute that a claim form for housing benefit and council tax benefit is a document made or required for an accounting purpose";
- (ii) the main issue was whether the man had omitted a "material particular" from the benefit form. He argued that, in order for a particular to be material, its omission must have caused the local authority to award benefit. The man went on to claim that there had been no finding by the court below that the omissions on the claim form had caused housing and council tax benefit to be paid. This argument was rejected by the Court of Appeal. The man's argument might be relevant to offences under the social security legislation, but the 'false accounting' offence operates in a different way, as the Court of Appeal explained:

"the mischief aimed at by s 111A of the Social Security Administration Act 1992 is not falsification of documents but dishonest failure by a recipient of public benefits to notify the relevant authority of a change of circumstances which would make a difference to the computation of his benefit [*Passmore* (2007) EWCA Crim 2053]. Section 17 of the Theft Act applies generally to the falsification of accounting documents for the purpose of obtaining financial gain or causing financial loss. It does not require that such gain or loss should in fact result";

- (iii) the Court of Appeal went on to consider further what is meant by omitting a material particular. It said that "in a non-disclosure case the omission will be material if it has the effect that the document is liable to mislead in a way which is significant". The Court went on to say that it was "plain beyond doubt" that the man had omitted to mention a material particular:

"It was obviously a matter of significance for the local authority to know what money the appellant and his wife had access to, what money they were expecting to receive, and whether they were in work, for the purpose of investigating whether he was entitled to benefit and likely to continue to be so. For those reasons we do not consider his convictions to be unsafe and this appeal is dismissed."

The Court of Appeal (Criminal Division) gave its decision in *R v Lancaster* on 2 March 2010: [2010] EWCA Crim 370. The Court was comprised of Tolson LJ, Cox J and HHJ Barker QC.

Croydon LBC v Shanahan – notification obligations upon a housing benefit recipient commencing employment

Starting work often has multiple income consequences. Often, it will lead to additional tax credits being paid as well as wages. In this case, the Court of Appeal considered whether each income stream or change resulting from commencement of employment must be notified to a council paying housing benefit to a claimant.

The facts

The relevant facts of this case were as follows:

- (i) in 2001, the claimant was awarded housing benefit and council tax benefit. At this time, she was not working (but she was receiving some £400 per month in child maintenance);
- (ii) in May 2004, the claimant began to work;
- (iii) the claimant's work actually gave rise to three separate income changes: (a) she began to receive wages of around £1,100 per month; (b) about two days after she began work, her child tax credit was increased from £1,900 per annum to £4,000 per annum; and (c) also two days after beginning work, she began to receive for the first time working tax credit at a rate of £1,800 per annum;
- (iv) the claimant said that she promptly informed her council that she had begun work, but they failed to respond to this information by adjusting her housing benefit. As a result, she continued to receive full housing benefit;
- (v) the claimant accepted that she did not tell the council that, as well as her wages, her income had been further increased by additional tax credits;





(vi) when the council discovered the claimant's employment, they revised (terminated) her award of housing benefit. They also brought criminal proceedings against the claimant in which they alleged that she had committed an offence under s.111A(1A) of the Social Security Administration Act 1992. An essential element of that offence is that a person has failed to notice a change of circumstances "affecting entitlement" to benefit.

The claimant opted for a Crown Court trial. She was charged with three counts of having committed the s.111A(1A) offence. The first count related to the alleged failure to notify the council that she had started work. The second related to the failure to notify an increased award of child tax credit. The third related to the failure to notify the award of working tax credit.

The Crown Court judge refused to allow counts 2 and 3 to proceed. The judge said that the tax credit awards could not have "affected" the claimant's entitlement to housing benefit. This was because, once her wages were taken into account of, she had no entitlement to housing benefit – her income already exceeded the income threshold. As a result, entitlement to housing benefit had disappeared and so the claimant's receipt of tax credits could not "affect" any entitlement for the purposes of the s.111A(1A) offence.

The jury were therefore only left with count 1 to consider, the charge that the claimant had not given notice of the fact that she had started work. The jury acquitted the claimant of that offence, therefore presumably accepting her account that she had in fact notified the council that she had started work and that the council had mistakenly failed to stop paying her housing benefit.

The council appealed to the Court of Appeal. They did not seek a re-trial but they considered that the Crown Court judge had been wrong in law to hold that the claimant could not possibly have committed any offence as a result of her failure to notify her tax credits. They wished to have that alleged legal error corrected so that it would not be followed in other first instance criminal cases.

The Court of Appeal's decision

The Court of Appeal held that the Crown Court judge had been mistaken in his analysis of the nature of the offence under s.111A(1A) of the Social Security Administration Act 1992. The Court reasoned as follows:

- (i) it said that "there is no doubt that the receipt of increased tax credit is a notifiable change of circumstances": *Eyson v Milton Keynes Council* [2005] EWHC 1160 (Admin);
- (ii) a previous sitting of the Court of Appeal has ruled that "a change of circumstances will not "affect" an entitlement to benefit unless upon computation the entitlement to benefit would be altered by the change": *Passmore* [2007] EWCA Crim 2053. The present sitting of the Court of Appeal was of the opinion that this meant that a change of circumstance had to be "capable of resulting" in a change in entitlement. And the change in *Passmore* was not capable of resulting in a change of entitlement because it was merely the setting up of a company by a claimant but without any income having been generated by the company for the claimant;
- (iii) the Crown Court had therefore been wrong to conclude that the tax credit awards could not affect the claimant's entitlement. They were "capable of resulting" in a change in entitlement:

"Each of the elements of the respondent's increased income, either alone or in tandem, would have made a difference upon computation to the respondent's entitlement to benefit. Each, therefore, "affected" the respondent's entitlement to benefit and was notifiable under section 111A(1A)(a) of the 1992 Act...At the time the change of circumstances occurred each of the new and increased payments received "affected" the respondent's entitlement to benefit."

In the circumstances, however, the Court of Appeal refused to allow the appeal. The Crown Court had concluded independently that counts 2 and 3 added nothing to the prosecution case. Everything turned on whether the jury believed that the claimant had notified the council that she had commenced employment, as the Court of Appeal explained:

"The issue joined in count 1 was whether the [claimant], as she said in interview, may have telephoned Croydon council to notify them of her income from employment. If the jury concluded that she had or may have done, then in respect of counts 2 and 3, there would have been no obligation to notify Croydon of the receipt of tax credits since, under the construction of section 111A(1A)(a) approved and confirmed in *Passmore*, they would, on further computation, have had no effect upon the entitlement to benefit; the entitlement would already have been extinguished by the notification of earned income. If, on the other hand, the jury were to convict of count 1, it would add nothing to the [claimant's] culpability that she had also failed to notify Croydon of her tax credits because the count 1 failure alone would have been enough to extinguish the entitlement to benefit. As the judge observed, there were good practical case management reasons for confining the jury's consideration to count 1. He could have achieved the same result by discharging the jury from reaching verdicts on counts 2 and 3. We have no criticism of the judge for his pragmatic approach to those counts".

The Court of Appeal (Criminal Division) gave its decision in *Croydon LBC v Shanahan* on 5 February 2010: [2010] EWCA Crim 98. The Court was comprised of Pitchford LJ, Penry-Davey J and the Recorder of London.





THE WELFARE REFORM ACT 2009

OVERVIEW

The Welfare Reform Act 2009 received Royal Assent on 12 November 2009, although most of it is not yet in force. This article summarises the likely implications of the Act, once it is implemented, and indicates which parts of the Act have already been implemented.

So far as social security benefits are concerned, the main purpose of the Act is significantly to extend 'conditionality' – the linking of benefit entitlement to compliance with conditions designed to help a person get back to work. Connected to this, the Act also provides for the abolition of income support once all claimants have been transferred to either JSA or Employment and Support Allowance. These aspects of the Bill are intended to implement the findings of Professor Paul Gregg's review *Realising potential: A vision for personalised conditionality and support* and the Government White Paper *Raising expectations and increasing support: reforming welfare for the future (Cm 7506)*.

The Act also provides a framework for contracting out the operation of the discretionary social fund. This follows on from the consultation document *The Social Fund: A new approach*, which sought views on whether credit unions, and similar organisations from the 'third sector' ought to be allowed to make social fund loans under contract to the Department for Work and Pensions.

JOBSEEKER'S ALLOWANCE

Section 1 of the Welfare Reform Act 2009 inserts provisions into the Jobseekers Act 1995 under which regulations may establish a new 'work for your benefit scheme'. The Act also re-works the JSA legislation in anticipation of the abolition of Income Support so that some persons who are not seeking work may nevertheless be entitled to JSA.

As is always the case with welfare benefits, only part of the story is told by provisions in primary legislation. Much of the detail is left to be worked out later in regulations.

How will 'work for your benefit' operate?

Section 1 of the Act adds new sections 17A and 17B to the Jobseekers Act 1995. Regulations made under these sections could require JSA recipients to take part in 'work for your benefit schemes'. Such schemes could include a requirement to undertake either work, or work-related activity "with a view to improving...prospects of obtaining employment". The Act also creates powers for the Secretary of State (i.e. DWP/Jobcentre Plus) to contract with third parties for the delivery of 'work for your benefit' schemes.

How will 'work for your benefit' requirements be enforced? Regulations under the new s.17A will be able to provide that an "appropriate consequence" will follow if a JSA recipient fails to take part in a 'work for your benefit scheme'. The meaning of an "appropriate consequence" is given by new s.17A(7) of the Jobseekers Act 1995. JSA will not be paid for a period to be specified in regulations, although the maximum period of non-payment is set at 26 weeks and the minimum at one week. There is, however, provision for hardship payments to be made during a period of non-payment.

The "appropriate consequence" will be avoided if the recipient is able to show (within a period to be set out in regulations) that s/he had "good cause" for the failure (s.17A(5)). There will be a right of appeal to the First-tier Tribunal against the imposition of the 'appropriate consequence'. Accordingly, on such an appeal the tribunal will decide whether a person did or did not have good cause for not participating in 'work for your benefit'.

When will it start?

First of all, pilot schemes are planned, following which a decision will be taken as to national roll-out. On this point, the Explanatory Notes to the 2009 Act say:

"The intention is to pilot 'work for your benefit' schemes in limited geographical areas from 2010 in order to assess their effectiveness. This would be achieved by making regulations using the powers in section 29 (pilot schemes) of the Jobseekers Act 1995...Subsequent implementation would be subject to the outcome of the pilots and affordability".

Who will be affected by the pilot schemes?

Not all JSA recipients will be expected to take part in 'work for your benefit' schemes. The Explanatory Notes to the 2009 Act say that the Government's intention is for regulations to:

"require a proportion of long-term unemployed claimants who reach the end of a Flexible New Deal programme without finding work to take part in a 'work for your benefit' pilot scheme. The Government envisages that Jobcentre Plus personal advisers will be able to require other jobseeker's allowance claimants to take part in a pilot scheme if the adviser considers that participation would benefit the individual concerned...The Government envisages that claimants may participate in 'work for your benefit' pilot schemes for up to six months."





Will any claimants be exempt?

The 2009 Act anticipates that, if 'work for your benefit' schemes are rolled-out nationally, some categories of claimant will be exempt. What this is really about is the anticipated abolition by the 2009 Act of income support. It is envisaged that the exempt claimants will be those who (following the abolition of Income Support) are not required to comply with the usual jobseeking conditions (such as being available for work, having a current jobseeker's agreement and actively seeking employment). In this respect, the 2009 Act's Explanatory Notes say that "the Government envisages the precluded groups will include lone parents with younger children who are moved to jobseeker's allowance after the abolition of income support."

In other words, once the 2009 Act is implemented we will have the potentially confusing situation that some Jobseeker's Allowance recipients will not actually be expected to seek work.

Contributory JSA

When in force, section 12 of the 2009 Act will alter the contribution conditions for contributory JSA, described as follows by the Explanatory Notes to the Act:

"This clause amends the contribution conditions for jobseeker's allowance. It amends the Jobseekers Act 1995 so that the first contribution condition for jobseeker's allowance is met by the claimant having paid, or being treated as having paid, at least 26 weeks of Class 1 contributions on relevant earnings at the base year's lower earnings limit (£90 per week in 2008/09) in one of the two tax years prior to the claim. Class 1 national insurance contributions are those paid on earnings from employment. Relevant earnings are those upon which contributions have been paid and which count towards establishing entitlement."

Violent conduct towards Jobcentre Plus staff

Section 25 of the Welfare Reform Act 2009 inserts new sections 20C and 20D into the Jobseekers Act 1995. These allow for sanctions to be imposed on certain JSA claimants who are convicted of or (in England and Wales) cautioned for violent or threatening behaviour towards Jobcentre Plus or contracted-out staff. In order to count for sanctioning purposes, the offence must have taken place on Jobcentre Plus premises or those of contracted out providers while the offender was there for the purpose of a jobseeker's allowance claim.

The sanction is that:

- (i) benefit is not payable for a period of one week; and
- (ii) the period of any other sanction is extended by five weeks on the first occasion that the other sanction applies to the claimant. 'Other sanction' means any other sanction arising as a result of the Jobseekers Act 1995 under which jobseeker's allowance is not to be payable.

Provision is also made so that regulations can allow hardship payments to be made during a sanctioning period. There is also a right of appeal against a decision to impose a sanction.

Victims of domestic violence

Section 29 of the Welfare Reform Act 2009 amends the Jobseekers Act 1995 so that regulations have to provide that victims of domestic violence will, for a period of 13 weeks, be able to start or continue a claim to jobseeker's allowance without: being available for employment; having to enter into a jobseeker's agreement; or actively seeking employment.

Mandatory interviews

Section 33 of the Welfare Reform Act 2009 creates harsher punishments for JSA recipients who fail to attend mandatory interviews. This section came into force on 6 April 2010 (by virtue of Statutory Instrument 2010/293).

Previously, section 8 of the Jobseekers Act 1995 provided for entitlement to JSA to cease for between one and five days if a recipient (a) failed to attend a mandatory interview and (b) subsequently made contact with Jobcentre Plus within a prescribed period from the date of the mandatory interview and (c) did not show good cause for the failure to attend. Regulations set out that the prescribed period was five working days. Under that system, because entitlement had ceased a fresh claim was required.

Section 33 of the 2009 Act allows regulations to alter and tighten up these requirements. In fact, regulations have now been made to provide for the detailed operation of the new arrangements. As a result of the Jobseekers Allowance (Sanctions for Failure to Attend) Regulations 2010 (S.I. 2010/509), which amend the Jobseekers Allowance Regulations 1996:

- (i) where contact is made within five days following the interview date, a first failure to attend a mandatory interview without good cause will attract a sanction of one week's benefit. However, underlying entitlement will remain thus removing the need to make a fresh claim;
- (ii) similar subsequent failures during the same claim will attract sanctions of two weeks' benefit;
- (iii) where a recipient does not contact Jobcentre Plus within 5 days of the date of the mandatory interview, the claim will be "closed". Accordingly, a fresh claim will be required in order to revive entitlement.





INCOME SUPPORT

As a result of section 2 of the Welfare Reform Act 2009, conditionality could be extended to all income support recipients. This section inserts a new section 2D into the Social Security Administration Act 1992 for this purpose. As the Government's long-term aim is to abolish Income Support, the new conditionality provisions will have a limited lifespan. As mentioned above, the long-term plan is for all Income Support recipients to move to either JSA or Employment and Support Allowance.

Requirement for lone parents to take part in work-related activity

Under section 2D of the 1992 Act, regulations could require certain persons (identified below) in receipt of income support to take part in work-related activity as a condition of continuing to receive full benefit. This is said by the Explanatory Notes to the Act to be "part of their progression to work". But it should be noted that, unlike in the case of JSA recipients, income support recipients cannot be required to actually take part in work.

The new section 2D of the Social Security Administration Act 1992 allows regulations to require lone parents in receipt of income support (except where there is a child aged under three in the parent's household) to undertake work-related activity. However, certain additional protections have been put in place restricting the extent to which 'conditionality' may be imposed on lone parents (see the 'Lone Parents' section below). The DWP have said that the new requirements for lone parents on income support with children aged between 3 and 6 to undertake work-related activity will start to be implemented in October 2010. This coincides with the date from which work-capable lone parents with a child aged 7 or above will be expected to claim JSA instead of income support.

So, a lone parent falling within the category mentioned above may be required, in accordance with regulations that have yet to be made, to undertake work-related activity as a condition of receiving full income support. Work-related activity means "activity which makes it more likely that the person will obtain or remain in work or be able to do so". The regulations must provide for lone parents to restrict the periods during which they are able to undertake work-related activity, for example to ensure that they do not conflict with childcare responsibilities.

Consequence of failure to comply with requirement to do work-related activity

As with the new Jobseekers Allowance provisions discussed above, what the 2009 Act calls an "appropriate consequence" (a reduction in benefit for a specified period) will follow if a person in one of the above groups fails to take part in the required work-related activity. The consequence will not, however, follow if a claimant can show good cause for a failure to take part in work-related activity and there is also a right of appeal to a tribunal against a decision to apply the 'appropriate consequence'. New section 2G of the Social Security Administration Act 1992 would prohibit the staff of external bodies contracted to provide welfare benefits services from exercising the function of deciding whether a person has failed to comply with a requirement to undertake work-related activity, whether that person had good cause for such a failure or whether benefit should be reduced as a result of that failure. These functions are reserved to DWP/Jobcentre Plus officials.

New section 2F of the 1992 Act allows the Secretary of State (Jobcentre Plus officials) to give "reasonable" directions about work-related activity. Under regulations which could be made under that new section, a direction could be issued to specify (a) the *only* activity, in that case, which will be regarded as work-related activity, or (b) activity which, in that person's case, will *not* be treated as work-related activity.

Thus, the purpose of such directions is to ensure that recipients of income support do not choose to undertake 'work-related activity' that could not possibly help them prepare for work. Directions will have to be "reasonable, taking into account an individual's circumstances", must be included in an action plan given under new section 2E (see below) and may be varied or brought to an end by a subsequent direction. It should also be noted that, under new section 7F of the 1992 Act, directions may be given by staff of external contractors under arrangements made with the DWP.

Abolition of Income Support

As mentioned above, one effect of the 2009 Act is to provide a framework for the transfer of claimants from Income Support to ESA or Jobseeker's Allowance. As a result, Income Support is likely to become redundant. For this reason, section 9 of the 2009 Act gives the Secretary of State powers to abolish Income Support. The section is described as follows by the 2009 Act's Explanatory Notes:

"This section provides for the abolition of income support and the repeal of its associated references when, as a result of changes made in this Act or otherwise, there are no longer any groups of people that require income support. There is scope in *subsection (4)* to provide any transitional protection necessary".

As already mentioned above, in connection with the anticipated abolition of income support, section 4 of the 2009 Act modifies the Jobseekers Act 1995 so that it will be possible for some groups, such as lone parents with a child under seven, to qualify for JSA even though they do not meet the statutory jobseeking conditions.

EMPLOYMENT AND SUPPORT ALLOWANCE

The Welfare Reform Act 2009 does not make radical changes to the ESA legislation contained in the Welfare Reform Act 2007. However, what it does do, in common with its key theme, is tighten up conditionality requirements for ESA recipients who are not in the ESA support group.





Conditionality

Section 10 of the 2009 Act gives the DWP / Jobcentre Plus greater control over conditionality requirements for ESA recipients (other than the minority who are so disabled that they have been adjudged to be incapable even of carrying out work-related activity: the ESA support group).

In short, as a result of section 10 of the 2009 Act ESA recipients can, in accordance with regulations, be required to carry out specified work-related activity. It is noted that, while the Bill which became the Welfare Reform Act 2007 was proceeding through Parliament, the Government relied heavily, in order to persuade wavering legislators to back the Bill, on the fact that ESA recipients could not be required to do particular work-related activity as evidence of the fairness of the ESA system. So, times have changed.

Previously, then, the ESA legislation, contained in the Welfare Reform Act 2007, only permitted benefits officials to direct that an activity proposed by an ESA recipient does not amount to work-related activity. The 2009 Act has amended the ESA legislation so that ESA claimants can, in accordance with regulations, be required to carry out specific work-related activity. Control has therefore shifted from the claimant to Jobcentre Plus. There are, however, some protections for claimants. Any direction must be reasonable, having regard to the claimant's circumstances, and a claimant cannot be required to undertake medical or surgical treatment to meet a work-related activity requirement. A direction must also be included in an ESA recipient's action plan and a failure to undertake the specified activity without showing good cause for this within the allowed time would be sanctionable.

Statutory Sick Pay

The interface between ESA and Statutory Sick Pay is altered by the 2009 Act in the light of the proposed abolition of Income Support. This is achieved by section 6 of the Act which amends s.20 of the Welfare Reform Act 2007. Its effect is described as follows by the Explanatory Notes to the 2009 Act:

"This clause amends section 20(1) of the Welfare Reform Act 2007 which prevented eligibility for employment and support allowance by those entitled to statutory sick pay. That section is amended to include a regulation-making power to allow people who are receiving statutory sick pay to claim income-related employment and support allowance, instead of income support. Currently people may receive income support in addition to statutory sick pay. In order to abolish income support, alternative provision needs to be made for this group of people."

Contributory ESA

When in force, section 13 of the 2009 Act will alter the contribution conditions for contributory ESA. Briefly, it will do this by reducing from three to two the number of tax years in which a person can pay national insurance contributions and qualify for ESA. This aligns the contributions period for ESA with that for jobseeker's allowance. The Explanatory Notes to the 2009 Act provide further explanation of the changes as follows:

"[Section 13] further amends the Welfare Reform Act 2007[the Act which creates ESA] to provide that the first contribution condition for employment and support allowance is met by the claimant having paid, or being treated as having paid at least 26 weeks of Class 1 or Class 2 contributions on relevant earnings at the base year's lower earnings limit (£90 per week in 2008/09) in one of the two tax years prior to the claim. Class 1 national insurance contributions are those paid on earnings from employment. Class 2 national insurance contributions are those paid on earnings from self-employment. Relevant earnings are those upon which contributions have been paid and which count towards establishing entitlement".

ACTION PLANS

Section 2 of the Act inserts a new section 2E into the Social Security Administration Act 1992. This concerns persons in receipt of various benefits (income support, income-based jobseeker's allowance or an income-related employment and support allowance), and their partners, who are required to attend work-focussed interviews.

The purpose of the new section is to require the DWP/Jobcentre Plus to provide (in circumstances to be set out in regulations) the persons just mentioned with an action plan. This links to the requirements under the new section 2D of the Social Security Administration Act 1992 (see above) to undertake work-related activity. The action plan will contain details of the activities which will allow that requirement to be met. The regulations will also allow a person provided with an action plan to ask for it be reconsidered. In preparing any action plan the impact on the well-being of any child (under 16) should be taken into account when fixing work-related activities for a parent.

DRUG AND ALCOHOL USE

One of the most controversial elements of the Welfare Reform Act 2009 is that it takes the first steps towards using the benefits system to discourage substance misuse.

Jobseekers Allowance

Section 11, together with Schedule 3, of the 2009 Act allows the Secretary of State to make regulations (under an amended Jobseekers Act 1995)





which would create a scheme for sanctioning JSA claimants whose drug use impairs their employability, and for otherwise incentivising cessation of drug use. Recognising that these provisions are controversial, the 2009 Act requires the Secretary of State to report to Parliament on the operation of any regulations made under Schedule 3, within 30 months of their coming into operation. At the same time as doing that, the Secretary of State must decide whether or not the regulations are to continue in force or whether the scheme will be abandoned.

The likely nature of the scheme can be deduced from the way in which the Secretary of State's power to make regulations has been framed by the Act:

- (i) Regulations could require JSA claimants to answer questions, at a specific time and place, about their use of drugs and whether it affects their chances of finding work. They could also be required to answer questions about any treatment they may be receiving.
- (ii) Regulations could also require JSA claimants to undertake two-stage substance-related assessments, an initial assessment followed by an interview. Such assessments will be possible where there are reasonable grounds for suspecting a claimant has a drug problem that is affecting their prospects of finding work.
- (iii) A claimant who failed to take part in a substance-related assessment, without good cause, could be required by regulations to take part in one or more drugs tests.
- (iv) Regulations could provide for claimants to have the jobseeking conditions suspended and for them also to receive a treatment allowance if they agree to receive treatment in accordance with a voluntary rehabilitation plan.
- (v) The clear intention is to encourage drug-using claimants to 'agree' to voluntary rehabilitation plans. This is shown by the fact that, in respect of drug-using claimants who do not agree to treatment in accordance with a voluntary rehabilitation plan, regulations could require compliance with mandatory rehabilitation plans.
- (vi) The mandatory element of the scheme is that regulations may provide for benefit sanctions, of between one and 26 weeks, to be imposed on claimants who (a) fail to comply with the requirements described above, for example a failure to follow a mandatory rehabilitation plan, and (b) cannot show good cause for that failure. There will be a right of appeal to the First-tier Tribunal against a decision to impose a sanction.

Employment & Support Allowance

The Welfare Reform Act 2009 allows a similar sanctioning system to that described above in relation to JSA to be established in relation to drug-misusing ESA recipients. However, this would only apply to ESA recipients who are not in the ESA support group (the support group contains more disabled ESA recipients who are not, for that reason, required to take part in work-related activity). The main difference as compared with the JSA scheme is that sanctions could not be a complete withdrawal of benefit, they could only ever be a reduction in benefit.

Alcohol misuse

The 2009 Act also contains a power to extend the above provisions to JSA and ESA claimants who misuse alcohol.

LONE PARENTS

Section 3 of the Act contains a number of provisions which ensure a minimum level of protection for lone parents from the imposition of 'conditionality':

- (i) Regulations must always provide that lone parents with a child under 7 fall within a category of persons entitled to income support (this is achieved by way of amendment to s.124 of the Social Security Contributions & Benefits Act 1992).
- (ii) Regulations cannot be made which would have the effect of requiring a lone parent on income support with a child aged under 1 to take part in a work-focused interview (this is achieved by way of amendment to s.2A of the Social Security Administration Act 1992).
- (iii) Various amendments are made to the Employment and Support Allowance provisions of the Welfare Reform Act 2007. These ensure that lone parent ESA recipients with a child aged under one will not be required to take part in work-focused interviews and those with a child under three will not be required to undertake work-related activity. The amendments also allow lone parents on ESA to restrict the hours for which they are required to undertake work-related activity, for example to limit their availability to times when their children are at school.

COUPLES

The Welfare Reform Act 2009 also provides for greater conditionality requirement to be imposed on partners of claimants.

Partners and work-related activity

New section 2D of the Social Security Administration Act 1992 (inserted by the 2009 Act) allows for conditionality to be imposed on the partners of persons in receipt of certain benefits where the benefit is payable at a higher rate on account of the partner. The benefits in question are:





- (i) Income support;
- (ii) Income-based Jobseekers Allowance;
- (iii) Income-based Employment and Support Allowance.

The conditionality requirements that may be imposed mirror those that may be imposed upon recipients of income support, as discussed above. So, the partner may be required to take part in work-related activity and the 'appropriate consequence', in the form of a benefit reduction, may follow if the requirement is not met.

Couples with a work-ready member

The purpose of section 5 of the 2009 Act is to remove entitlement to income support and income-related employment and support allowance from couples one of whose members is capable of work. The Explanatory Notes to the 2009 Act say that "this will mean that the only route to income-related support for such couples will be through income-based jobseeker's allowance and the member of the couple who is work ready will be required to fulfil the jobseeking requirements in section 1 of the Jobseekers Act 1995".

CARERS ALLOWANCE

The Act repeals, on 6 April 2010, section 90 of the Social Security Contributions and Benefits Act 1992. That section makes provision for Adult Dependency Increases (ADIs) to be paid with Carers Allowance, where the claimant has an adult dependant. This section will abolish the payment of ADIs for all new claims to carer's allowance at the same time as they cease to be available on new claims to state pensions in April 2010. The Explanatory Notes to the Act set out the Government's plans for phasing out of ADIs in payment at the abolition date (6 April 2010):

"ADIs in payment with carer's allowance at the time of change will be phased out between 2010 and 2020. This will be in line with the arrangements for phasing out the existing ADIs paid with the state pension."

Note, ADIs for maternity allowance will also cease to be available in respect of claims for that benefit made after the abolition date. However, no phasing arrangements are considered necessary given the short-term nature of that benefit.

The DWP Decision Maker's Guide has been updated with new guidance to decision makers about the phasing out of ADIs. The guidance, which contains worked examples, is available at www.dwp.gov.uk/docs/m-14-10.pdf.

DISABILITY LIVING ALLOWANCE

Section 14 of the 2009 Act amends the Disability Living Allowance legislation (s.73 of the Social Security Contributions and Benefits Act 1992) in order to create a new category of person aged under 65 who is entitled to the higher rate of the mobility component of DLA. The amendments do not actually describe this new category, instead they give the Secretary of State power to set out in regulations the type of "severe visual impairment" which will attract entitlement to higher rate mobility component.

PAYMENTS ON ACCOUNT

As a result of the Welfare Reform Act 2009, it should become easier to persuade benefits officials to make payments on account before a decision has been taken as to a person's entitlement to a particular social security benefit. Section 22 of the 2009 Act amends Social Security Administration Act 1992 so that regulations may be made permitting payments on account on the basis of need. The Explanatory Notes to the 2009 Act describe the new provision as follows:

"The new subsection broadens the range of situations in which a payment on account may be made before an award has been made. It enables these payments to be made on a need basis rather than in situations where it is impracticable to make a claim, determine a claim or pay benefit. It provides the Secretary of State with improved flexibility to address short-term hardship."

SANCTIONS FOR BENEFIT OFFENDERS

The Welfare Reform Act 2009 tightens up the rules on sanctioning benefit fraudsters, by adding a 'one strike' to the existing 'two strikes' rule. This is done by section 24 of the 2009 Act which amends the Social Security Fraud Act 2001. This section came into force on 1 April 2010 (by virtue of Statutory Instrument 2010/45).

To put the changes in context, a brief description of the current position is required. Section 7 of the Social Security Fraud Act 2001 enables certain specified benefits to be withdrawn, or reduced payments to be made, for a period of 13 weeks (known as the disqualification period) where:





- (i) a person is convicted of benefit fraud on two occasions, and
- (ii) the second offence was committed within five years of the date of the first conviction.

These loss of benefit provisions are commonly referred to as the 'two strikes' rule. The 2009 Act creates an additional sanctioning scheme following a first conviction for benefit fraud, or following a first (or subsequent) agreement to pay a administrative penalty under s.115A of the Social Security Administration Act 1992 or acceptance of a caution for benefit fraud.

Under the new provisions, the disqualification period is set as four weeks (so, significantly shorter than the disqualification under the current 'two strikes' rules). The amount of benefit reduction for income-related benefits during the disqualification period will be set out in regulations. The DWP have said that the amounts will be the same as the current reductions under the 'two strikes' provisions. Certain other benefits will not be payable during the disqualification period.

SOCIAL FUND AND RELATED MATTERS

External Provider Social Loans

Sections 16 to 18 of the Welfare Reform Act 2009 provide for a scheme of 'external provider social loans'. They do this by inserting a number of new sections in the main social fund legislation, the Social Security Contributions and Benefits Act 1992. Under this scheme, the external providers will actually be funded by sums drawn from the Social Fund itself, as provided for by new section 140ZA(7) of the 1992 Act. The Government has said that it hopes that Credit Unions and "similar organisations from the third sector" will administer social fund loans in specific areas, but there is nothing in the Act that prevents other organisations from being contracted to act as external providers of social loans.

Key features of these provisions are:

- Regulations will set out who is eligible for an external provider social loan, defined by reference to a person being in receipt of particular benefits or having certain needs.
- Regulations will also set out details of how external providers are to decide to whom to make loans, e.g. regulations may set out persons to whom loans may not be made, the criteria to be applied in determining whether to make a loan and for information and advice about budgeting to be given to borrowers.
- A social fund loan 'proper', which is outstanding when the arrangements come into force, could be transferred to the external provider so that repayments are to be made to it.
- A new section 78A of the Social Security Administration Act 1992 would allow regulations to be made enabling the Secretary of State (DWP) to collect repayments due on an external provider social loan (by way of deduction from benefit or other methods) and to pay these over to the lender.
- A new section 138 of the Social Security Contributions and Benefits Act 1992 will enable access to crisis loans or budgeting loans from the social fund to be restricted in any area in which external provider social loans are available. So, it appears likely that, where an external provider is operating in a particular area, applicants will have to approach that provider.
- A new section 122G of the Social Security Administration Act 1992 allows regulations to provide for the exchange of information between the Secretary of State and an external provider with whom arrangements have been made under new section 140ZA, and for the use or disclosure of such information including provision for a criminal offence for unauthorised disclosure.

Community Care Grants

The effect of section 19 of the Welfare Reform Act 2009 is that community care grants could in certain cases always be paid to the supplier of goods, rather than to the applicant for a grant. The Explanatory Notes to the 2009 Act described the intended use of this new form of community care grant as follows:

"Under the existing law, successful applicants for community care grant may be provided with cash to obtain the goods or services that the award covers. At the discretion of the appropriate officer, a payment may be made to a third party to provide the goods or services. These amendments to the Social Security Contributions and Benefits Act 1992, taken with those in section 20, enable the Secretary of State [DWP] to require that, where the goods or services are covered by arrangements the Secretary of State has made with a supplier, the award made must relate to specified goods or services and the payment would be made to the supplier. It is expected that these arrangements will involve the supply of white goods and furniture at a discounted rate."

It should be noted that, under section 20 of the 2009 Act, review rights are excluded in relation to community care grants awarded under section 19. Accordingly, a person who is dissatisfied with the goods and/or furniture to be supplied under the grant will have no right to a review of the award by a social fund inspector under section 38 of the Social Security Act 1998.





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