FOR STAFF AND STAKEHOLDERS

CITY OF WOLVERHAMPTON COUNCIL

Benefits Bulletin

ESA and Mandatory Reconsideration

4th August 2020

Issue 2 [2020]

1. Introduction

There has recently been a very important ruling from the High Court in *Michael Connor v Secretary of State for Work and Pensions* which could prove to be of tremendous significance to those who are challenging decisions that they are not entitled to Income-related Employment and Support Allowance because the Department for Work and Pensions (DWP) has decided that they do not meet the conditions of the Work Capability Assessment.

This Benefits Bulletin seeks to:

- highlight the findings of the judgement
- explain its potential implications for claimants
- set out the 'best advice' options for claimants.

If you are new to the world of benefits, or not familiar with this particular issue, do not worry - this Benefits Bulletin also provides background to the subject matter in order to help put things in some context.

The High Court has recently ruled that the practice of the DWP suspending payments of Income-related ESA during the mandatory reconsideration stage is unlawful. This means that people will no longer have to wait until appeal stage before getting any benefit or alternatively being forced to claim an alternate benefit during the relevant period.

ESA

Employment and Support Allowance

Further information and advice…

You can contact the Specialist Support Team for further information and advice on any of the issues raised in this Benefits Bulletin or any matter regarding Social Security benefit or welfare reform issues. You can contact the team by email (wrs@wolverhampton.gov.uk) or telephone (01902 555351).

2. The High Court Ruling…

When a person is refused Income-related ESA, they have a right to appeal against that decision to the First-tier Tribunal. However, the rules now provide that before a person can appeal there must be a mandatory reconsideration. That is to say that the person must ask the DWP to look at its decision again and, following this, for a fresh decision to be made on the matter.

In the case of *Michael Connor v Secretary of State for Work and Pensions* it took the DWP several months to conclude Mr Connor's mandatory reconsideration request. This delay, Mr Connor argued, was an unlawful restriction on his right of access to the First-tier Tribunal and so breached his rights under the Human Rights Act 1998. Specifically, Mr Connor argued that the mandatory reconsideration stage was a 'disproportionate interference' of his right to have his case determined by the First-tier Tribunal.

Mr Connor argued:

- that mandatory reconsideration is an 'abrogation' (meaning: an abolition of rights) relying on *R(UNISON) v Lord Chancellor* in which it was argued that charging people fees for Employment Tribunals was an abrogation; and
- that the delay brought about by the mandatory reconsideration process was contrary to the ruling in *Golder v United Kingdom* in which it was held that people should be afforded access to an independent court without justifiable and reasonable delay.

The High Court ruled that mandatory reconsideration was not an abrogation of rights on account that it did not give the DWP any 'improper control' over access to the First-tier Tribunal.

However, whilst accepting that mandatory reconsideration had a legitimate objective, namely 'improving the effectiveness of the administrative decision-making by the DWP thereby making more efficient the use of the resources of the First-tier Tribunal', the question remained as to whether the provision was 'proportionate' - was the system of decision-making capable of producing decisions within an acceptable period of time?

On this point, the DWP produced evidence which showed:

- that between August 2018 and April 2019, the average time taken in reaching decision on a mandatory reconsideration request was between 11 and 16 days; and
- in a sample audit carried out in 2017 it was found that in 96% of cases decisions were taken within 10 working days, albeit that it then took just over six weeks to communicate the outcome to claimants.

Accepting the evidence of the DWP and accepting that Mr Connor's case was viewed as out of the ordinary because the delay seemed due to a 'filing error', the High Court held that the process of mandatory reconsideration was entirely proportionate because decisions were being made in an acceptable period of time.

What the High Court went on to observe was that, under the mandatory reconsideration and appeal framework, people were not paid any Income-related ESA during the period of mandatory reconsideration. It noted that it was only when a person actually appealed that Income-related ESA (albeit at the basic rate) was put back into payment and included an award for the retrospective mandatory reconsideration period, but only in cases where the claimant was able to produce Med 3 Fit Notes / Med 5 Fit Notes from their doctor.

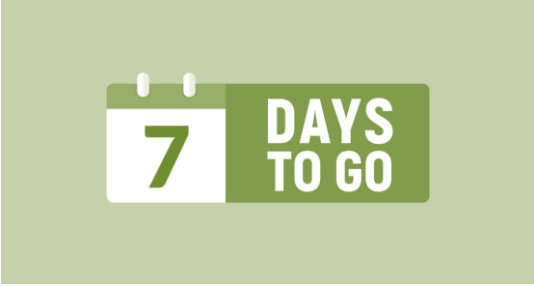
The High Court held that it was ‘anomalous’ (meaning: deviating from what is expected) that people could not get paid Income-related ESA during the period of mandatory reconsideration but could be paid during the period leading up to an appeal (known as ‘payment pending appeal’).

The High Court asked the DWP to provide evidence and an explanation as to why no equal provision existed to enable claimants to continue to be paid Income-related ESA for the duration of the mandatory reconsideration period once a mandatory reconsideration had been requested in the same way as payment could be made once an appeal had been submitted. However, in the view of the High Court what the DWP had provided was unconvincing and unsatisfactory.

The High Court concluded that the two-system anomaly was a ‘disproportionate interference’ of the right to access the First-tier Tribunal.

The High Court held that there was likely to be a practical advantage in the rules requiring a mandatory reconsideration stage prior to any appeal because it gave the DWP an opportunity to review its decisions, spot and correct errors and save further demand on the First-tier Tribunal.

However, what the High Court could not accept was, in essence, the imposition on claimants brought about by the combined effects of (a) the time it takes for the mandatory reconsideration stage; and (b) the unexplained fact that claimants are not paid Income-related ESA during the mandatory reconsideration stage. This, the High Court held, made the mandatory reconsideration process disproportionate, not least because the system offers no ‘fair balance’ between the benefit to the DWP and claimants who may wish to appeal.



The High Court held that even if the DWP made decisions within a relatively short period of time and allowing for the fact that the amount of Income-related ESA paid is modest, the absence of payment during the mandatory reconsideration stage was significant to those who claim benefits.

The High Court held that even though alternative benefits might be available to claimants during the mandatory reconsideration stage, claiming such alternatives was likely to be cumbersome and the need to do that placed the burden on the claimant.

The High Court held that there was no evidence to suggest that making Income-related ESA payable to claimants during the mandatory reconsideration stage would compromise the objectives of the mandatory reconsideration regime.

The High Court held that for the reasons outlined, and because there was no ‘fair balance’ on the side of the claimant in particular given the lack of benefit during the mandatory reconsideration period, the existing mandatory reconsideration process was an unjustified impediment to accessing the First-tier Tribunal. In consequence the application for Judicial Review succeeded.

3. Advice to Those Affected…

The people affected by this decision will be those who have been getting Income-related ESA and have been told that they no longer qualify because it has been determined that they do not meet the ‘limited capability for work’ conditions.

It is difficult to know exactly what the 'best advice' should be at the present time. This is because whilst we understand that the DWP will not be appealing the High Court's judgement, we do not know what form any new regulations may take.

Having said that, given that the DWP appears to have accepted the judgement, any rule change should, at the very least, be about enabling people to be paid Income-related ESA from the outset of the mandatory reconsideration period. This would fix the problem.

Until we have details of any new legislation, the advice should be that when making a mandatory reconsideration request, a person includes a paragraph along the lines of:

"In line with the High Court judgement in [2020] EWHC 1999 (Admin) - Michael Connor v SSWP (24.7.2020) it is requested that you pay me Income-related ESA during the mandatory reconsideration period. If it is your decision not to do this then please confirm this in writing to me together with your reasoning and explain my rights to seek a mandatory reconsideration of the decision."

If no Income-related ESA is paid, which is likely until a change is made to the rules, then the person should seek a mandatory reconsideration against that decision and make an application to appeal if the DWP still persists in refusing to make an award. Having said this, by the time all of this takes place, the person may be in the 'pending appeal' period, by which time the DWP should have reinstated their Income-related ESA and paid them the arrears of Income-related ESA during the mandatory reconsideration period.

The point of this exercise is to force home the requirements of the High Court judgement until such time as the rules are changed.

Obviously, the people who stand to gain most from the High Court decision are those people who make an application for mandatory reconsideration but do not go on to appeal because they should at least be paid some Income-related ESA whilst the mandatory reconsideration is being considered.

Note 1: Some benefit advisers' reading of the High Court's judgement is such that it renders the Income-related ESA mandatory reconsideration rules (Regulation 3ZA of the Social Security and Child Support (Decision and Appeals) Regulations 1998 - Statutory Instrument 1999 No. 991) unlawful. The view being that people do not need to go through the mandatory reconsideration stage at all. The view is that anyone caught in this situation can simply bypass the mandatory reconsideration stage and make an appeal application. It would then be for the First-tier Tribunal to decide whether it had jurisdiction to hear the appeal - a decision the DWP could challenge. It is acknowledged that even if someone wanted to test this option it would be advisable that they also make a mandatory reconsideration application at the same time as they submit their appeal just in case. It would then be for them to lodge an appeal against the mandatory reconsideration decision once issued. The phrase to bear in mind is - 'belts and braces', 'belts and braces'!

Do not forget that if the DWP does make a payment during the mandatory reconsideration stage, it will only be for the basic amount of Income-related ESA. Also, do not forget that for a payment to be made, the person will need to have a Med3 Fit Note covering the relevant period. If they do not have one, then they must get one and send it to the DWP. Furthermore, if there is a gap then they should ask their doctor for a backdated Med5 Fit Note to cover that period.

4. Income-related ESA: Background

Before Universal Credit, Income-related ESA was a benefit that people claimed when they were unable to work due to problems with their physical or mental health.

At that time, the alternative was to claim Income-based Jobseeker's Allowance (Income-based JSA) which was a benefit for those who were fit for work and looking for work.

Now that we have Universal Credit, people claim this either on grounds that they are incapable of work due to ill-health/disability, or on the basis that they can work and are looking for work.

However, because Universal Credit is being phased in gradually, there remains a considerable number of people living in Wolverhampton who remain on Income-related ESA (and, for that matter, Income-based Jobseeker's Allowance) and who will continue to do so until they cease to be too sick for work or until they are required to apply for Universal Credit.

In technical terms, to qualify for Income-related ESA a person must be assessed as having:

- 'limited capability for work' but not 'limited capability for work-related activity'; or
- 'limited capability for work' and 'limited capability for work-related activity'

under an assessment process known as the Work Capability Assessment, which normally involves a person having to undergo a face-to-face assessment with a Healthcare Professional.

Those with 'limited capability for work' (but not 'limited capability for work-related activity') are put into a '**WRAG Group**' and expected to attend Work-focused Interviews at the Job Centre and participate in work-related activity.

Those with 'limited capability for work' and 'limited capability for work-related activity' are considered, in essence, to be more disabled and put into a '**Support Group**' which means that they can get Income-related ESA without having to attend Work-focused Interviews or participate in work-related activity.

Moreover, those placed into the WRAG Group before 3rd April 2017 get an extra £29.55 per week 'Work-related Activity Component' in addition to their basic award. Whereas, those placed into the Support Group (either before or after 3.4.2017), may be awarded an extra £56.30 per week (£39.20 Support Component plus £17.10 per week Enhanced Disability Premium = £56.30 per week) on top of their basic entitlement.

For many it is important, where possible, that they seek to remain on Income-related ESA because if they were to lose their entitlement, it would mean having to apply for Universal Credit and in doing so they would lose the extra income provided by the additional amounts of benefit referred to above.

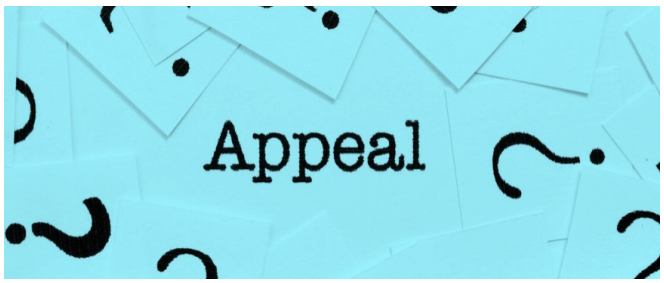
5. Income-related ESA: MRC and Appeal

People getting Income-related ESA are periodically reassessed under the Work Capability Assessment to see if the conditions for 'limited capability for work' and/or 'limited capability for work-related activity' still apply.

If a person is held to have failed the Work Capability Assessment, they can challenge that decision. This is done by first asking for a 'mandatory reconsideration' and then, if necessary, asking for an 'appeal'.

The problem is that during the period in which the DWP is considering the mandatory reconsideration, any potential Income-related ESA payment is suspended. It is only when a person submits an appeal that Income-related ESA is put back into payment (albeit at the basic rate) pending the appeal and only then if they produce a Med 3 Fit Note from their doctor stating that they are too sick to work.

Whilst at this point (i.e. the point when the person makes the appeal) the person may also be awarded any arrears of unpaid Income-related ESA for the period during which it was suspended (i.e. the period during which the mandatory reconsideration was being considered), to get this the person must have provided a Med3 Fit Note throughout (or provide a backdated Med5 Fit Note covering the period) and it still means that there has been a period during which the person received no benefit. Our experience of things is that it takes the DWP between 6 to 8 weeks to undertake a mandatory reconsideration.



Note 2: House of Commons - Hansard (16th December 2013) Col 486W: Esther McVey (then Secretary of State for Work and Pensions) stated "Following the completion of Mandatory Reconsideration of the decision, if the claimant subsequently appeals then ESA may be paid at the assessment phase rate pending the appeal being heard. Provided medical evidence is provided, this payment can cover the period while reconsideration was carried out but entitlement cannot be assessed until the claimant has lodged an appeal."

Note 3: If a person has had their entitlement to Income-related ESA withdrawn by the DWP on grounds that they failed to complete an ESA50 form or failed to take part in a face-to-face assessment with a Healthcare Professional then they cannot get Income-related ESA during the mandatory reconsideration or appeal stage, even if they were to produce Fit Notes from their doctor. Therefore, in these types of cases, it is more certain that a person will have to apply for Universal Credit unless they have savings and/or other benefits (e.g. PIP / Carer's Allowance) that they can live off in the meantime. We would advise that you seek further information and advice in such cases.

Historically, the solution to this was for people to apply for Income-based JSA during the relevant period. What would then happen is that once they had lodged their appeal they would switch back on to Income-related ESA, at least until their appeal had been heard.

However, this is no longer possible for the majority of claimants since the introduction of Universal Credit. Now, if someone wants to get any benefit during the suspension period, they must apply for Universal Credit.

The problem with this is that because of the way the rules operate, once a person makes a successful application for Universal Credit they cannot, even if they then later win their Income-related ESA appeal, return to Income-related ESA. They must remain on Universal Credit.

For those who resist applying for Universal Credit but then lose their appeal, there is often no alternative but to apply for Universal Credit. Many people do not want to be on Universal Credit. This is because they do not like the fact that it is paid monthly and that they have to pay their own rent from out of the overall award. In the vast majority of cases, if a person is awarded Universal Credit, any Housing Benefit that was previously in payment would stop. In place of Housing Benefit the person gets an amount for their rent included in their Universal Credit award.

Note 4: Severe Disability Premium (SDP) If someone has been getting the SDP included in their Income-related ESA and the DWP stops their Income-related ESA, then because of the 'SDP gateway' rules, they might be entitled able to apply for Income-related JSA (or even Income Support) and not Universal Credit. We would advise that you seek further information and advice as necessary in such cases.

Note 5: Support Group If someone has been assessed as having 'limited capability for work' and 'limited capability for work-related activity' (and they are NOT receiving the Severe Disability Premium) then they could be £22.60 per week 'better off' under Universal Credit than Income-related ESA. This is because of the way the different benefits are calculated. Do seek further information and advice as necessary.

Please note that by *clicking* on the following links you can access copies of our current:

- Benefit Information Guides
- Benefit Fact Sheets

together with past copies of our Benefit Bulletins which provide a wide range of information on benefits, welfare reform and topical issues.

Further Information and Advice: You can contact our Specialist Support Team for further information and advice on any of the issues raised in this Benefits Bulletin or any matter regarding Social Security benefit or welfare reform issues. See the front page of this Benefits Bulletin for the relevant contact information.

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