

Benefits Bulletin

ESA / PIP: The DWP Offer...

22nd September 2020

Issue **5** [2020]

The DWP Offer...

In [Benefits Bulletin 4 \[2020\]](#) we brought news of the announcement made by the Department for Work and Pensions (DWP) to remove the need for Mandatory Reconsideration where people were seeking to challenge certain decisions relating to Employment and Support Allowance and the Work Capability Assessment.

In Benefits Bulletin 4 we also mentioned the DWP's practice of sometimes phoning people who were appealing decisions on 'limited capability for work' and Personal Independence Payment. We explained how the DWP would call, offering a deal involving the willingness on the part of the Decision Maker to revise part of the decision a person was appealing against if that person was then willing to drop the remaining grounds of the appeal.

For example, in the case of Employment and Support Allowance a person might be appealing on grounds that they believe they should be placed into the Support Group because they believe they meet the conditions for 'limited capability for work' and 'limited capability for work-related activity'.

In such cases, it has been known for the DWP to contact the person and agree to revising the decision, giving them 'limited capability for work' if they would concede any claim to having 'limited capability for work-related activity'. If they did then the appeal would lapse. If they did not agree to this, then the appeal would need to go ahead.

In cases of Personal Independence Payment (PIP) the offer would, for example, be to award the 'daily living component' if the person agreed to dropping any claim to the 'mobility component' (or vice versa).



We explained that we thought that such practice was unlawful. However, in such cases, we conceded that anyone could see why a person would take the deal. They would take the deal because it would put them into the 'Work-related Activity Group' or give them some money within a relatively short period of time without the need to attend an appeal hearing in which a First-tier Tribunal might dismiss the appeal. In consequence, the person would have 'won' nothing.

We explained that, in our view, if the DWP felt that part of a person's case was, in essence, proven then the DWP was duty bound to award them that part of their appeal and lapse the appeal. It was our view that the person should not really be given any choice in the matter. It was then up to that person whether they wished to appeal the new decision.

For example, in the case of Employment and Support Allowance, if the DWP was willing to concede that the person had 'limited capability for work' then it should revise the decision under appeal to that effect. If the person felt that they had a case for 'limited capability for work-related activity' then the onus was on them to appeal against the latest decision.

In cases of PIP, it could be that the DWP revised its decision to award the person the 'daily living component' at the standard rate. If the person believed that they were entitled to an award of the 'daily living component' at the enhanced rate then they could submit an appeal against the latest decision on those grounds.

Since Benefits Bulletin 4 we have had people contacting us on the issue, the view being that such practices are not unlawful and the DWP is not duty bound to revise and lapse appeals.



In support of this view, we had our attention drawn to the advice given in the [Advice for Decision Makers](#) guide. In this it is stated that:

"A5159 Where the appeal is accepted by HMCTS [*Her Majesty's Courts and Tribunal Service*], the DM [*Decision Maker*] can still consider revising the decision under appeal, the outcome determines whether the appeal lapses. An appeal should be lapsed where the revised decision is to the claimant's advantage...

A5161 ... where a revision would not give the claimant all they are asking for in the appeal, the DM will contact the claimant before revising to ask them if they would still want to appeal if the revised decision were made. If the claimant says they would:

1. still appeal, then the decision would not be revised and the appeal goes ahead...; or
2. be happy with the revised decision, the DM would make that revised decision and lapse the appeal...

Note: If the claimant cannot be contacted then the appeal should not be lapsed."

We also had pointed out to us information contained in the predecessor to the Advice for Decision Making guide, the [Decision Maker's Guide \(Volume 1\)](#), in which at paragraphs 06160 to 06162 much the same thing is said.

Unlawful Practice or Not?

Is the practice unlawful or not? If the DWP is minded to revise a decision only in part to the advantage of the person, is it required to do so?

In [R\(IS\)15/04](#) (unreported CIS/4/2003), a decision of a Tribunal of Commissioners, it was held (Paragraph 39(5)) that whilst it is true that the regulations state that the DWP 'may' revise (or supersede) a decision under appeal, it was implicit in the decision of the Court of Appeal in [Wood v Secretary of State FOR Work and Pensions](#) [2003] EWCA Civ 53 (reported as R(DLA)1/03) that a claimant who establishes a ground for revision (or supersession) which requires a change of the original decision is entitled to have that decision revised (or superseded).



The decision confirmed that whilst there may be a 'residual discretion' not to revise (or supersede) a decision favourably, this should only be exercised when revising (or superseding) a decision that would not be of benefit to the claimant when their overall benefit position was examined. The decision confirmed that a person was entitled to have a decision revised (or superseded) if it was ultimately less favourable to them than it should have been.

Therefore, our view is the one previously stated in Benefits Bulletin 4. If the DWP truly believes that a person's appeal or part of their appeal should succeed, then it is obliged to revise the decision even if that means that the appeal lapses. In such circumstances, should this happen and the revised decision does not give that person what they hoped to get from the original appeal, then the person can submit an appeal against the new decision. In doing so they would not have to first seek a Mandatory Reconsideration. See [Al v Secretary of State for Work and Pensions \(PIP\)](#).

Of course, in line with the findings in R(IS)15/04, when we say 'obliged to' we mean obliged to if, after consideration of the overall facts, revising the decision would not be of overall detriment to them.

In our view we cannot think of many situations where it would not be of benefit to the person to revise a decision in their favour. We appreciate that in some situations this could lead to a person not getting all they hoped for but in such cases the person would be free to make a fresh appeal on the matters which were not revised in their favour.

Guidance v The Law:
Please remember the guidance given to Decision Makers is not the law. It is only guidance and should be treated as such. The law is the regulations and case law.



There is an excellent [article](#) on this same subject in CPAGs Welfare Rights Bulletin 273.

The Best Advice

If a person accepts the DWP's offer and their appeal lapses, then they need to consider whether or not to appeal further. The best course of action will rest largely on the merits of their case. In any event, a person should be cautious. This is because at an appeal hearing anything could happen. For all the wrong reasons, the person could end up losing what the DWP had given them. This does not happen very often, but it can.

As stated in Benefits Bulletin 4, in cases where the person involved has declined the DWP's offer to revise the decision and lapse the appeal, then we would advise them to record the details of the offer. We would advise them to notify the First-tier Tribunal of the offer. We would advise them to look for details of the offer in the DWP's submission to the First-tier Tribunal when this arrives. We would advise that at the appeal, the person asks that the First-tier Tribunal make a decision in keeping with the DWP's offer as a matter of course and ask it to only consider the matter that then remains in dispute.

Further Information and Advice: If you need further information or advice on how best to proceed (or what the options are) in any particular case then do get in touch with the Specialist Support Team. You can email them at wrs@wolverhampton.gov.uk or ring them on (01902) 555351.

Welfare Rights Service
Specialist Support Team
City of Wolverhampton Council
WRS@wolverhampton.gov.uk