

Housing Benefit Circular

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HB A3/2014

ADJUDICATION AND OPERATIONS CIRCULAR

WHO SHOULD READ	All Housing Benefit staff
ACTION	For information and immediate action
SUBJECT	Minimum Earnings Threshold

Guidance Manual

The information in this circular affects the content of the HB/CTB Guidance Manual. Please annotate this circular number against *Part C4, Annex B*.

Queries

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Minimum Earnings Threshold

Background

1. The government is implementing a package of measures to limit access to United Kingdom (UK) means-tested benefits for nationals of European Economic Area (EEA) countries.
2. A summary of the measures so far:
 - (i) Since 1 January 2014, EEA nationals entering the UK to seek work have been unable to claim income-based Jobseeker's Allowance (JSA(IB)) until they have been resident here for 3 months;
 - (ii) After they have been here for 3 months, EEA nationals will have to take a stronger, more robust Habitual Residence Test (HRT) to claim JSA(IB);
 - (iii) If EEA jobseekers pass the HRT they will be able to get JSA(IB) for 6 months only, unless they can demonstrate that they have a genuine chance of finding work.
 - (iv) These reforms will be extended so that even if an EEA jobseeker is entitled to JSA(IB), they will not be entitled to Housing Benefit (HB) from 1 April 2014.
3. Separate HB circulars setting out detailed guidance on measures (i) and (iv) will be sent to local authorities (LAs) shortly which will set out further details of the relevant legislation and the operational process.
4. As part of the package of measures, a further measure has been announced. A new Minimum Earnings Threshold will be introduced from 1 March 2014. This threshold will help to determine whether an EEA national's previous or current work can be treated as genuine and effective for the purposes of deciding whether they have a right to reside in the UK as a worker or self employed person.
5. The Minimum Earnings Threshold has been set at the level at which workers start to pay National Insurance Contributions (NICs), currently £149 a week (or £153 a week in the 2014/15 tax year). If an EEA national can prove that they have been earning at least this amount for a period of 3 months immediately before they claim HB their work can be treated as genuine and effective and they will have a right to reside as a worker or self employed person.
6. If they do not satisfy the Minimum Earnings Threshold criteria, a further assessment will be undertaken against a broader range of criteria (such as hours worked, pattern of work, nature of employment contract etc) to determine whether their employment is genuine and effective.
7. This circular provides detailed guidance on the Minimum Earnings Threshold and the additional criteria to consider, as appropriate, in determining whether an EEA

national can be considered as a worker/self employed person. It builds on the existing guidance on determining genuine and effective work in the HB Guidance Manual.

Introduction

8. Persons with certain rights to reside in the UK or the Common Travel Area are deemed not to be persons from abroad. Consequently to receive HB they do not have to satisfy the requirements to be habitually resident in the UK or the Common Travel Area.
9. Amongst those having a right to reside are EEA nationals who are:
 - workers
 - persons who retain their worker status because:
 - they are in duly recorded involuntary unemployment after having been employed in the UK, as long as he has registered as a jobseeker with the relevant employment office **or**
 - work as an employee in the UK has stopped because the person is temporarily unable to work due to illness or accident
 - self-employed persons
 - persons who retain the status of self-employed person because they are temporarily unable to pursue their activities as a self employed person as a result of illness or accident

And family members of person described in the above paragraphs.

10. It is important then for Decision Makers (DM) to understand the criteria for deciding whether a person is or was a worker or a self employed person.

Meaning of a worker – two tier approach

11. It is well established in EU law that, in order to be a worker or self employed, the person must be doing work which is genuine and effective and is not on such a small scale as to be marginal and ancillary. In order to clarify the position for DMs, and make it easier for them to focus on those cases where it is important to consider all the circumstances of the person concerned, a Minimum Earnings Threshold has been introduced, as part of a two tier process.

Tier 1 – Whether the Minimum Earnings Threshold has been met for a required period

Tier 2 – In cases where the Minimum Earnings Threshold criteria have not been met whether the EEA national was in genuine and effective work assessed against a set of secondary criteria.

With regard to claims for, and entitlement to HB, this two tier assessment process **must** be applied with immediate effect.

Tier 1 – Minimum Earnings Threshold

12. An EEA national who has worked as an employee or in a self employed capacity in Great Britain will be **automatically** considered as a worker or self employed person for the purposes of EU law if:
- their average gross earnings were more than £646 per calendar month (£149 a week) in 2013/14, and/or £663 per calendar month (£153 a week) in 2014/15, **and**
 - the gross earnings were at, or above that level for a continuous period of 3 months immediately before the date from which benefit has been claimed.
13. If these conditions are met, DMs should accept that the work activity was genuine and effective and that while in work the EEA national had worker or self employed status, as appropriate, in EU law. In this case there is no need to apply Tier 2 assessment explained in para 15 below.
14. The level of the Minimum Earning Threshold is linked to the level of the HMRC Primary Earnings Threshold (PET), which is the point at which employees must pay Class 1 NICs. Self employed have to pay Class 2 and Class 4 NICs at this point too. As the PET level is uprated every April, DMs should ensure that they use the PET level relevant to the 3 month period of earnings under consideration. Where this period spans the April PET uprating, DMs should use the pre-uprating PET rate for the entire period.

Tier 2 – Minimum Earnings Threshold - criteria not met

15. **In all cases** where an EEA national's average gross earnings from employment of self employment fall below the Minimum Earnings Threshold and/or their earnings have not been at that level for a continuous period of 3 months. The DM will need to examine each case as a whole, taking account of all circumstances, to determine whether the EEA national's activity was genuine and effective, and not marginal and ancillary and decide whether the person is/was a worker or a self employed person, applying the guidance set out below and in Annex A (which sets out on the factors, derived from EU case law, to take into account when deciding whether an EEA national is/was a worker).
16. Where the Minimum Earnings Threshold is not met the DM will need to consider two questions:
- is the person exercising their EU freedom of movement rights as a worker (see paragraphs 17 and 18) and
 - is the work genuine and effective (see paragraphs 19 to 23)

Is the person exercising their rights as a worker?

17. In order for a person to be exercising their EU law rights of free movement as a worker, there must be a real link between that person and the labour market of the host member state. A worker must be actually pursuing activities as an employed person or seriously wish to pursue activities as an employed person. Accordingly, before considering the guidance below about whether the work itself is genuine and effective, DMs may consider the preliminary question of whether the claimant is genuinely exercising their EU rights as a worker.

De Biaisi v Secretary of State for the Home Department [2012] EWCA Civ 1015

18. In deciding this question, DMs can look at all the circumstances, including the person's primary motivation in taking up employment and whether, during periods when they were not employed, the person seriously wished to pursue employment by actively looking for work with a genuine chance of being engaged. See Annex A for further guidance.

De Biaisi v Secretary of State for the Home Department [2012] EWCA Civ 1015

Note: if a person is exercising their EU rights, their conduct before and after periods of employment (including their primary motivation) are not relevant when considering whether work is genuine and effective (see paragraphs 19 to 23).

Genuine and effective Work

19. Provided the DM is satisfied that the claimant is in fact exercising his rights as a worker in accordance with the guidance in paragraphs 17 and 18 then he can consider whether the work is genuine and effective and not marginal or ancillary.
20. The question of whether work is genuine and effective has been considered by judges in some tribunal and court cases, see Annex B. It can be seen from the case law that when determining whether or not someone is a worker, the following can be relevant considerations:
- whether work was regular or intermittent
 - the period of employment
 - whether work was intended to be short-term or long-term at the outset
 - the number of hours worked
 - the level of earnings
21. In some cases judges have weighed, for example, low hours against long duration of work as part of their overall assessment of whether work is genuine and effective. However, the case law does not identify one consistent approach to applying these and other factors: each case must be decided on its own merits.

Part-time work

22. Work below the Minimum Earnings Threshold that is part-time or low paid is not necessarily always marginal and ancillary. A part-time worker may be considered a worker for EU purposes and retain a right to residence in the UK as long as the work is genuine and effective.
23. It is not possible to provide a formula of hours, earnings and periods of work which determine whether or not a person is a worker.

Examples

Example 1

24. An EEA national arrives in the UK and stays with a relative who has a shop. She does not have an offer of a job but helps out in the shop for an hour or two when she can, for which she is paid £20 per week. She claims HB immediately on arrival on 10 March 2014. The claimant has not been given exceptional leave to remain in the UK. As the earnings were clearly below the Minimum Earnings Threshold, the DM considered whether the work in the UK was genuine and effective. He decided that given the low number of hours, the irregularity of the work and the relationship between the claimant and the shop owner the work here is marginal and ancillary. The DM therefore decided that the claimant is not a worker.

Example 2

25. An EEA national who claims HB shows that he has been working for three hours per day, five days per week for the last four months. The DM decides that the work is genuine and effective because it is not on such a small scale as to be marginal and ancillary. The work was on a regular basis continuing for a reasonable length of time.

Example 3

26. The claimant is a German national who came to the UK on 18 June 2013. On 20 June 2013 he made an arrangement with a British family to act as an *au pair*. The agreement was that he would work 13 hours per week in return for which he would receive £35 and free board and lodging. At the outset the intention was that the arrangement would be long term but the arrangement was terminated by the family on 28 July 2013 and on 31 July 2013 a claim was made for HB. The DM considered that the claimant had not yet been in the UK for long enough for his residence here to have become habitual. However she considered whether the claimant might be exempt from that requirement as a worker who had become involuntarily unemployed. The DM decided that he had been a worker; his activities as an *au pair* had been genuine and effective; he had provided services of economic value to his employers in return for remuneration. Finally the arrangement had been intended at the outset to be long term and had terminated unexpectedly early.

Example 4

27. The claimant is a Dutch national. He worked in the Netherlands from 1995. The firm he was working for in the Netherlands closed down in June 2010 and so he came to the UK to look for work. In October 2013 he claimed HB. It emerged that in the period since June 2010 the claimant had been looking for work and that between 2010 and 2012 he had been doing unpaid voluntary work. The DM decided that the claimant was a person from abroad because he did not have a qualifying right to reside for the purposes of entitlement to HB. In particular the claimant wasn't a person who retained worker status because he had never been a worker in the UK. His activities had consisted of voluntary community work which was outside the 'economic' form of activity for remuneration which is an essential factor in being a worker.

Example 5

28. A Polish national sustained a back injury in a car accident in Poland in 2008 and, despite medical treatment, the result was that she was unable to stand for more than half an hour at a time. She came to the UK on 18 March 2013 and started work as a full-time shop assistant on 20 March 2013. The claimant worked for about 2 weeks, following which she went off work for a week due to severe back pain. The claimant then returned to work for a few days but she was unable to continue, her employment was terminated on 15 May 2013. A claim for HB was made on 2 June 2013, the DM examined whether the claimant had been a worker. He assessed all the circumstances of the case relating to the nature of both the activities concerned and the employment relationship at issue. Following Commissioner's decision CSIS/467/07, the DM held that the claimant's physical capacity for work was an issue when considering the employment relationship which was critical to the determination of whether the claimant was a worker. The DM decided that the existing nature of the claimant's condition, the lack of physical capacity to do the work, the short interrupted duration of the employment and the reasons for the claimants dismissal were compelling grounds for finding that the claimant had not been a worker. The DM therefore decided that the claimant did not have a qualifying right to reside.

Self employment

29. An Upper Tribunal has held that, in order for a person to be regarded as self employed for the purposes of the right to reside, the activity as a self employed person must be genuine and effective rather than marginal or ancillary.
Bristol City Council v FV (HB) [2011] UKUT 494 (AAC), CH/2859/11

30. The Minimum Earnings Threshold described in paragraph 12 may not always be easy to apply in the case of self employed persons but in general if:

- average profits (before tax and NI) are more than £646 per calendar month (£149 per week) **and**
- average profits have been at or above that level for a continuous period of 3 months, the DM should accept that the self employment is genuine and

effective and they can be considered as self employed persons under EU law.

31. If average profits are less than £646 per calendar month (£149 per week) and/or have not been at or above that level for a continuous period of 3 months the DM will need to examine the case under the Tier 2 process in paragraphs 15 and 16 with a view to determining whether the self employment is genuine and effective.
32. DMs should exercise care in applying the guidance on EU case law in paragraphs 17 and 18 on the meaning of worker to the question of whether self employment is genuine and effective. Account must be taken of the different nature of self employment; it may include periods of relative inactivity and there will be period particularly as a business is starting up when the person may be working long hours but not yet receiving much profit.
33. In an Upper Tribunal decision about HB the Judge dealt with a claim by a Romanian national who had arrived in the UK in 2007. The First Tier Tribunal had found that the claimant had been working as a Big Issue seller for about 3 years. She worked for about 16 hours per week, rising later to 24. Profits for August to November 2010 averaged £45 per week. For November and December 2010 this rose to £150 per week, giving an average weekly profit of £90 per week for August to December 2010. The Upper Tribunal judge confirmed the First Tier Tribunal's decision that this amounted to genuine and effective self employment.

Bristol City Council v FV (HB) [2011] UKUT 494 (AAC), CH/2859/11

Examples of self employment

Example 1

34. The claimant was a Czechoslovakian national who came to the UK in 4 January 2014. He claimed HB on 11 February 2014. The claimant said that he had a right to reside as a self employed person. He had a contract with a local business under which he provided book-keeping services for a local business. The contract was for 2 hours work per month, at a fee of £25 an hour and the claimant had completed the work for January 2014 on 1 February 2014. He had not advertised his services nor had he sought any other contracts. On 14 February 2014 a DM considered the claim and decided that the claimant's self employment activities were marginal rather than genuine and effective and so the claimant did not have a right to reside as a self employed person.

Example 2

35. The claimant was a French national. She came to the UK on 6 January 2014 and claimed HB on 17 February 2014. It emerged that the claimant had been working on a self employed basis as an interpreter. Since arriving she had worked for 12 hours per week on average charging a fee of £15 per hour. The DM decided that the claimant's activity as a self employed person was genuine and effective and that consequently the claimant had a right to reside as a self employed person and was therefore not a person from abroad. As she had a right to reside as a

self employed person she was deemed in law not to be a person from abroad and so did not have to satisfy the HRT.

Contacts

36. If you have any queries about this circular, please send an email to iu.crosscutting@dwp.gsi.gov.uk

Annex A

Deciding if a person is/was a worker – factors to take into account

Article 45 of the Treaty on the Functioning of the European Union (TFEU) says that freedom of movement for workers shall be secured within the EU and the Imm (EEA) Regs define “worker” as meaning a worker within the meaning of Article 451.

Imm (EEA) Regs, reg 4(1)(a)

The following principles can be derived from EU case law to decide if a person is/was a worker:

1. The term worker has an EU law meaning¹ and may not be interpreted restrictively²
2. The term worker applies to employees rather than the self employed. In EU law terms the essential characteristic of an employment relationship is that a person performs services for and under the direction of another person in return for which he receives remuneration³
3. In deciding whether a person is a worker account should be taken of all the occupational activities the person has undertaken in the host member state³
4. As a worker must receive remuneration, unpaid voluntary activity is not work⁵
5. The mere fact that there is a legally binding employment relationship is not of itself conclusive of whether the employee is a worker⁶
6. A person working part-time can be a worker provided that the work undertaken is genuine and effective but not where activities are on such a small scale as to be regarded as purely marginal or ancillary⁴
7. As long as the work is genuine and effective it is irrelevant whether it yields an income lower than the amount considered the minimum required for subsistence in the host Member State⁷ (in the case of the UK, the relevant applicable amount for an income-related benefit)
8. The fact that a person seeks to supplement the remuneration from his work by means of financial assistance drawn from public funds does not preclude him from being regarded as a worker⁸
9. Once it has been established that the person is genuinely exercising his right of free movement as a worker, the motives which have prompted the worker to work in another Member State are irrelevant⁹ provided the work is genuine and effective
10. A person employed under an ‘on-call’ or ‘zero-hour’ contract is not precluded from being a worker provided the work is genuine and effective
11. An employee undertaking genuine and effective work is a worker even if the person is employed under a contract that is performed illegally¹⁰
12. A commissioner has held that a claimant’s physical incapacity to do the work she had undertaken and the fact that she had been dismissed from it after a short period **were** relevant to the issue of whether the work was genuine and effective¹¹.

¹Case C-75/63 *Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*; ²Case C-53/81 *D.M. Levin v Staatssecretaris van Justitie*; ³Case C-357/89 *Raulin (1992) ECR 1027*; ⁴Case C-53/81 *D.M. Levin v Staatssecretaris van Justitie (para 17)*; ⁵CIS/868/08 & CIS/1837/06 ; ⁶Case C-344/87 *Bettray v Staatssecretaris van Justitie*; ⁷Case C-53/81 *D.M. Levin v*

Staatssecretaris van Justitie; ⁸*Case C-139/85 Kempf v Staatssecretaris van Justitie*; ⁹*Case C-53/81 D.M. Levin v Staatssecretaris van Justitie (para 23)*; ¹⁰*JA v SSWP (ESA) [2012] UKUT 122 (AAC)*, *CE/2190/11*; ¹¹*CSIS/467/07*

Deciding if a person is/was in genuine and effective work

Details of how judges have considered, in relevant tribunal or court cases, whether work is genuine and effective are set out below.

1. In a case (*NE v SSWP[2009] UKUT 38 (AAC), CIS/1502/07*) before an Upper Tribunal judge, the claimant was an EEA national who had entered the UK in 2004. He claimed Income Support in July 2005. The evidence of the claimant's work record was not entirely clear but he produced a pay slip dated 31 December 2004 showing payment of £90 for one week's work comprising of 15 hours. In addition there was evidence from an employment agency confirming that the claimant had undertaken temporary bookings on behalf of the agency over the period 7 January 2005 to 4 February 2005.
2. The Upper Tribunal judge said that the issue before him could be said to be whether the claimant had genuinely and effectively become a worker rather than a workseeker. The Upper Tribunal judge said (at paragraph 13):

“Where work is undertaken for periods which can be expected from the outset to be for a very short period and is known to be temporary, the person concerned is obliged to keep looking for work and often he or she cannot realistically be said to have become established in work and to have ceased to be a workseeker.”
3. The Upper Tribunal judge accepted that there is a distinction between temporary employment for a brief period and indefinite employment that has been curtailed prematurely. However, it is not the case that all agency workers remain workseekers. There will be cases where temporary work is nonetheless for a prolonged period and many agency workers will be able to show that the agency has regularly found them work albeit for short periods and that they have become established members of the national workforce. On the other hand the judge holds (in paragraph 13):

“Where a person has worked only intermittently for very short periods, as in CIS/1793/2007 the claimant is more likely to have remained a workseeker because the work performed has been marginal.”
4. In another case (*CIS/1793/2007*), a Social Security Commissioner decided that the claimant, an EU national who came to the UK in 2001, had not been a worker at any time prior to his claim for Income Support in August 2005. He listed the following factors leading to that judgement:
 - I. the claimant had only worked for a total of 10 weeks in a period of 3 or 4 years
 - II. 4 of those weeks comprised work found by an agency which was temporary and known to have been temporary at the time
 - III. work had been intermittent **and**

IV. the number of hours in the employment relationships was so small as to be marginal or ancillary.