

# Chapter 53 - Wfl, WRA, Disqualification and Advance awards of ESA(IR)

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# **Chapter 53 - Wfl, WRA, Disqualification and Advance awards of ESA(IR)**

## **Scope of this Chapter**

- 53001 This Chapter contains guidance on
1. the requirement for certain ESA claimants to
    - 1.1 take part in a Wfl
    - 1.2 undertake WRA
  2. disqualification for misconduct and imprisonment
  3. advance awards of ESA(IR).

53002 - 53004



# Work-focused interviews

## Introduction

53005 All claimants in the WRAG who are required to take part in a Wfl will have interviews with an adviser or provider focusing on helping them back to work. The initial Wfl will take place after the first WCA, with the remaining Wfls occurring as decided by the adviser or provider.

**Note 1:** 16/17 year olds in the WRAG will be asked to attend a Wfl (known as a learning focused interview) after the WCA. They will be subject to full conditionality at age 18.

**Note 2:** Claimants who move from the support group to the WRAG, from receiving credits only to ESA(IR) due to a change of circumstances or qualifying for housing costs will be required to take part in Wfls as above.

## Meaning of support group

53006 A person is a member of the support group if the DM has made a determination that they have, or are treated as having, LCWRA<sup>1</sup>.

*1 WR Act 07, s 24(4)*

## Meaning of working day

53007 A working day is any day except Saturday, Sunday, Christmas Day, Good Friday or a bank holiday<sup>1</sup>.

*1 ESA Regs, reg 2(1) & Banking and Financial Dealings Act 1971*

## Meaning of lone parent

53008 A lone parent is<sup>1</sup> a person who

1. is not a member of a couple<sup>2</sup> **and**
2. is responsible for and a member of the same household as a person under the age of 16.

*1 WR Act 07, s 24(3A); 2 SS CB Act 02, s 137(1)*

## Treated as responsible for a child aged under one

53009 A lone parent is treated as responsible for, and a member of the same household as, a child aged under one in accordance with IS legislation<sup>1</sup> - see DMG 22031 et seq.

*1 IS (Gen) Regs, reg 15 & 16; ESA Regs, reg 2(6) & (7)*

53010 - 53012

## Requirement to take part in a Wfl

53013 The Secretary of State may require a claimant who satisfies the conditions at DMG 53014 to take part in one or more Wfls as a condition of continuing to be entitled to the full amount of ESA<sup>1</sup>. See DMG 53031 et seq for guidance on where a claimant is also required to undertake WRA.

*1 ESA Regs, reg 54(1)*

53014 The conditions<sup>1</sup> referred to in DMG 53013 are that the claimant is

1. entitled to ESA **or** an advance award of ESA<sup>2</sup> has been made (DMG 53200 et seq) **and**
2. not a member of the support group **and**
3. under the age at which a woman of the same age as the claimant attains pensionable age (see DMG Chapter 75) **and**
4. not a person who is only entitled to ESA(Cont) payable at nil rate
5. not a lone parent who is responsible for and a member of the same household as a child aged under one.

*1 ESA Regs, reg 54(2); 2 reg 146(1)*

53015 Any requirement to take part in a Wfl ceases to have effect if the claimant no longer satisfies any of the requirements of DMG 53014<sup>1</sup>.

*1 ESA Regs, reg 54(3)*

53016 Partners of claimants receiving ESA may be required to take part in a Wfl as a condition of the claimant continuing to receive the full rate of benefit<sup>1</sup>. See DMG Chapter 05 for further guidance.

*1 SS (JPIfP) Regs, reg 3*

## Purpose of a Wfl

53017 The purposes of a Wfl<sup>1</sup> are

1. assessing the claimant's prospects for remaining in or obtaining work
2. assisting or encouraging the claimant to remain in or obtain work
3. identifying activities that the claimant may undertake that will make remaining in or obtaining work more likely
4. identifying training, educational or rehabilitation opportunities for the claimant which may make it more likely that the claimant will remain in or obtain work or be able to do so
5. identifying current or future work opportunities, including self-employment opportunities, for the claimant that are relevant to the claimant's needs and abilities.

*1 ESA Regs, reg 55*

## Notification either in writing or otherwise and place of the Wfl

53018 The Secretary of State must notify the claimant of the requirement to take part in the Wfl. The claimant must be given or sent a notification specifying the time, date and, if required to attend in person, the place of a Wfl<sup>1</sup>. The notification may be in writing or otherwise<sup>2</sup> (for example by telephone). A Wfl<sup>3</sup> can take place at a claimant's home if it is determined that requiring them to attend elsewhere would cause them undue inconvenience or endanger their health.

*1 ESA Regs, reg 56(1); 2 reg 56(3); 3 reg 56(2)*

53019

## Taking part in a Wfl

53020 A claimant is regarded as having taken part<sup>1</sup> in a Wfl if they

1. if required to attend in person, attend for the interview at the place and at the date and time notified as in DMG 53018 **and**
2. if not required to attend in person, are available and respond at the date and time notified as in DMG 53018 to any contact made at that time for the purpose of carrying out the interview **and**
3. provide information, if requested, about any or all of the matters set out in DMG 53021 **and**
4. participate in discussions, to the extent that is considered necessary by the Secretary of State, about any or all of the matters set out in DMG 53022.

*1 ESA Regs, reg 57(1)*

53021 The matters referred to in DMG 53020 **3.**<sup>1</sup> are

1. the claimant's educational qualifications and vocational training
2. the claimant's work history
3. the claimant's aspirations for future work
4. the claimant's skills that are relevant to work
5. the claimant's work-related abilities
6. the claimant's caring or childcare responsibilities
7. any paid or unpaid work that the claimant is undertaking.

*1 ESA Regs, reg 57(2)*



53022 The matters referred to at DMG 53020 4.<sup>1</sup> are

1. any activity that the claimant is willing to undertake which may make obtaining or remaining in work more likely
2. any such activity that the claimant may have previously undertaken
3. any progress the claimant may have made towards remaining in or obtaining work
4. any WFHRA the claimant may have taken part in
5. the claimant's opinion as to the extent to which the ability to remain in or obtain work is restricted by their physical or mental condition.

*1 ESA Regs, reg 57(3)*

53023

### **Deferral of requirement to take part in a Wfl**

53024 The requirement to take part in a Wfl may be

1. deferred **or**
2. treated as having been deferred

if at the time the Wfl is to take place, or was due to take place, the interview would not at that time be or have been of assistance to the claimant or appropriate in the circumstances<sup>1</sup>.

*1 ESA Regs, reg 59(1)*

53025 A decision to defer may be made at any time after the requirement to take part in a Wfl has been imposed, including after the time the Wfl

1. was due to take place **or**
2. took place<sup>1</sup>.

*1 ESA Regs, reg 59(2)*

#### **Example**

Warwick was due to attend a Wfl on 25 March. However Warwick did not attend because he was taking part in a training course. On 1 April the DM decides that the requirement to attend a Wfl can be deferred.

53026 Where a requirement to take part in a Wfl is deferred or treated as having been deferred then the time the Wfl is to take place must be re-determined<sup>1</sup>.

*1 ESA Regs, reg 59(3)*

53027 It may be determined that the requirement to take part in a Wfl does not apply, or is to be treated as not having applied, if the interview would not be, or would not have been, of assistance because the claimant is or was likely to be starting or returning to work<sup>1</sup>.

*1 ESA Regs, reg 60*

## **Failure to take part in a Wfl**

53028 The DM must determine whether a claimant who is required to take part in a Wfl has failed to do so and if so, whether they have shown good cause for that failure<sup>1</sup>. The claimant must show good cause for that failure within 5 working days of the date on which the Secretary of State gives notification of that failure<sup>2</sup> or the claimant's ESA may be reduced. See DMG 53012 for the definition of working day. Any notification sent by post is to be taken as having been received on the second working day following posting<sup>3</sup>.

*1 ESA Regs, reg 61(2); 2 reg 61(1); 3 reg 65*

### **Example**

Susan is required to take part in a Wfl on 15.4.09, but fails to attend. Notification of the failure is posted on 17.4.09, and is taken as having been received on 21.4.09. Susan has until 28.4.09 to show good cause for her failure to attend.

53029 In determining whether good cause has been shown the DM must take account of all the circumstances of the case. See DMG 53052 - 53053 for further guidance on good cause.

## **Contracting out certain functions relating to Wfls**

53030 The Secretary of State may contract out<sup>1</sup> certain functions relating to Wfls. These are

1. the requirement to take part in a Wfl
2. the notification requirements
3. the taking part in a Wfl
4. the deferral of the requirement to take part in a Wfl
5. the requirement to take part in a Wfl not to apply.

*1 ESA Regs, reg 62*



# Work-related activity

## Introduction

53031 WRA is activity which makes it more likely that the claimant will obtain or remain in work, or be able to do so<sup>1</sup>. WRA includes work experience or a work placement<sup>2</sup>.

*1 WR Act 07, s 13(7); 2 s 13(8)*

53032 Where a claimant is required to undertake a work placement as part of their WRA action plan, this is **not** paid or unpaid work. The guidance in DMG Chapter 41 about work<sup>1</sup>, including exempt work<sup>2</sup> and remunerative work<sup>3</sup>, does **not** apply.

*1 ESA Regs, reg 40 & 44; 2 reg 45; 3 reg 41*

53033 Claimants will not be required to undertake work experience as part of their WRA action plan, although they can participate on a voluntary basis. DMs should note that where a claimant fails to undertake work experience, as this is not a failure to undertake WRA, the guidance about reduction of ESA in DMG 53060 et seq does **not** apply.

53034 – 53035

## Requirement to undertake WRA

53036 The Secretary of State may require claimants to undertake WRA as a condition of continuing to be entitled to the full amount of ESA<sup>1</sup> where they are

1. required to take part in or have already taken part in one or more WFIs<sup>2</sup> (see DMG 53013 – 53014) **and**
2. not a lone parent who is responsible for and a member of the same household as a child under the age of 3 **and**
3. not entitled to CA **and**
4. not entitled to a CP<sup>3</sup>.

See DMG Chapter 43 for the meaning of “child”, “lone parent”, and “member of the same household as a child”, and DMG Chapter 44 for guidance on CP. See DMG 53044 for guidance on how the requirement is notified.

*1 WR Act 07, s 13; ESA (WRA) Regs, reg 3(1) & (2); 2 ESA Regs, reg 54; 3 Sch 4 para 8*

53037 A requirement to undertake WRA must be reasonable in the view of the Secretary of State taking into account the claimant’s circumstances<sup>1</sup>. The claimant cannot be required to

1. apply for a job or undertake work, whether as an employee or otherwise **or**
2. undergo medical treatment<sup>2</sup>.

*1 ESA (WRA) Regs, reg 3(4)(a); 2 reg 3(4)(b)*

53038 “Medical treatment” means medical, surgical or rehabilitative treatment, including diet or other regimen<sup>1</sup>.

*1 ESA Regs, reg 2(1)*

53039 Where the claimant

1. is a lone parent **and**
2. in any week is responsible for and a member of the same household as a child under the age of 13

they may only be required to undertake WRA during the child’s normal school hours<sup>1</sup>.

*1 ESA (WRA) Regs, reg 3(5)*

## Requirement ceases to have effect

53040 The requirement to undertake WRA ceases to have effect if the claimant becomes a member of the support group<sup>1</sup>. See DMG 53011 for the meaning of “member of the support group”.

*1 ESA (WRA) Regs, reg 3(3); WR Act 07, s 24(4)*

53041 The requirement to undertake WRA ceases to apply where the claimant no longer satisfies any of the conditions in DMG 53036.

## Directions about WRA

53042 Where

1. a claimant is required to undertake WRA **and**
2. the circumstances in DMG 53043 apply

the Secretary of State may direct that the activity specified in a direction given to the claimant is the only activity which is regarded as WRA in that claimant’s case<sup>1</sup>.

*1 WR Act 07, s 15(1)(a)*

53043 The circumstances in DMG 53042 2. are<sup>1</sup> that

1. the claimant has been identified by the Secretary of State as having a barrier to work, and in the view of the Secretary of State has refused to address that barrier **and**
2. the Secretary of State considers that the activity specified in the direction is a prerequisite to the claimant’s ability to obtain or remain in employment.

*1 ESA (WRA) Regs, reg 4(2)*

## Notification of WRA and action plans

53044 The Secretary of State must notify the claimant of a requirement to undertake WRA by including the requirement in a written action plan given to the claimant<sup>1</sup>.

*1 ESA (WRA) Regs, reg 5(1)*

53045 The action plan must specify

1. the WRA which the claimant is required to undertake **and**
2. any other information that the Secretary of State considers appropriate (see DMG 53046)<sup>1</sup>.

*1 ESA (WRA) Regs, reg 5(2)*

53046 Examples of other information which may be included in the action plan are

1. the date and time on or by which the person is required to undertake such work-related activity
2. the evidence which the person is required to provide to show that the requirement to undertake the WRA specified has been complied with.

## Requirement to undertake WRA at a particular time not to apply

53047 Where

1. the claimant is required to undertake WRA at or by a particular time **and**
2. in the view of the Secretary of State it would be or would have been unreasonable to require the claimant to undertake the activity at or by that time

the requirement to undertake WRA still applies, but the Secretary of State may determine that the requirement to undertake the WRA at or by that time does not apply, or is treated as not having applied<sup>1</sup>.

*1 ESA (WRA) Regs, reg 6*

## Reconsideration of action plans

53048 The claimant may request reconsideration of an action plan. Where a request is received, the Secretary of State must

1. reconsider the action plan **and**
2. notify the decision in writing to the claimant<sup>1</sup>.

*1 ESA (WRA) Regs, reg 7*

53049 DMs should note that a request for reconsideration in this situation is **not** an application for revision or supersession (see DMG Chapter 03 and 04), and there is no right of appeal against the decision made on that request.

## Failure to undertake WRA

53050 Where the claimant is required to undertake WRA but fails to do so, they must show good cause for that failure within 5 working days of the date on which the Secretary of State notifies the failure<sup>1</sup>. See DMG 53007 for the meaning of working day<sup>2</sup>.

*1 ESA (WRA) Regs, reg 8(1); 2 ESA Regs, reg 2(1)*

### Good cause

53051 The DM must determine whether the claimant has failed to undertake WRA as required, and if so whether they have shown good cause for the failure<sup>1</sup>. In determining whether the claimant has shown good cause, the DM must take account of all the individual facts and circumstances of the case in consideration of what is reasonable (see DMG 53053).

*1 ESA (WRA) Regs, reg 8(2)*

53052 The following are examples of the circumstances the DM may consider when determining whether the claimant has shown good cause for a failure to undertake WRA:

1. whether the claimant's physical or mental health or condition made it impracticable to undertake WRA at or by a particular time
2. whether the claimant was prevented from undertaking WRA at or by a particular time due to unforeseen circumstances, for example
  - 2.1 attending a medical or dental appointment that could not reasonably be rearranged
  - 2.2 attending a funeral of a relative
  - 2.3 difficulties with caring responsibilities
3. whether the claimant misunderstood the requirement to undertake WRA due to
  - 3.1 a language, literacy or learning difficulty **or**
  - 3.2 any misleading information given or supplied to them by the Secretary of State
4. whether the established customs or practices of the religion, if any, to which the claimant belongs prevented them from undertaking WRA
5. whether the claimant was attending an interview for employment which prevented them from undertaking WRA at or by a particular time
6. whether any difficulty with the claimant's regular mode of transport prevented them from undertaking WRA.

This list is **not** exhaustive, and the DM should consider all the reasons given by the claimant for the failure to undertake WRA.

- 53053 Good cause is not defined in legislation, but has been considered in case law. It includes facts and circumstances which would probably have caused a reasonable person to act as the claimant did<sup>1</sup>.

**Note 1:** The DM should not just consider one factor but should consider the overall picture of the claimant's individual circumstances. The consideration is whether the reasons given for the specific failure to undertake work-related activity contributed to the claimant not complying with what we are expecting them to do and whether that was reasonable in the circumstances. DMs should also note the guidance on good cause in DMG Chapter 42.

**Note 2:** When considering good cause the DM should also be mindful of the guidance in DMG Chapter 34 on good reason. The principles set out in DMG Chapter 34 apply equally to the consideration of good cause for failures to undertake work-related activity.

*1 CS 371/49(KL); R(SB) 6/83*

- 53054 A distinction must be drawn between having a good excuse and having good cause **in law** which is not about one moment in time but about a person acting reasonably in the light of all the facts and circumstances. The general rule for taking each incidence on its own merits and considering all the facts and evidence should be applied.

- 53055 Consideration of all the evidence should be made on

1. the balance of probabilities **and**
2. whether the evidence is inherently improbable, inconsistent and implausible in the circumstances.

**Note1:** The burden of proof to show good cause is on the claimant.

**Note 2:** The DM should also take into consideration that a claimant is expected to take care in matters to do with the claiming of and receiving benefits. Failure to take such care cannot be good cause.

### **Example**

Georgia has been on the Wp for the past 12 months and is in receipt of ESA.

Her incapacity is agoraphobia and she has been placed in the work-related activity group following the WCA.



Georgia has agreed an action plan to engage in work-related activities. She has been made aware and fully understands that her benefit might be affected if she fails to undertake work-related activity when required to do so.

Georgia is issued with an appointment letter to attend a face to face Wp appointment on 18.10.14 as part of her action plan to undertake work-related activity. She does not attend the appointment stating that she did not feel she could leave the house alone and attend the appointment on that day. She has a friend that goes with her to appointments and meetings on most occasions as she has problems leaving the house but on 18.10.14 the friend was unable to go with her to the appointment as she was on holiday. Georgia contacted the provider on the morning of 18.10.14 by telephone to rearrange the appointment. The provider arranged to conduct the interview by phone.

The DM considers Georgia can show good cause for the failure to undertake work-related activity on this occasion.

A letter is issued to attend a face to face interview with the Wp provider on 27.1.15. Georgia does not attend the interview and does not phone the provider to explain why. The DM sends a letter to ask Georgia for her reasons for not attending the appointment. Person A does not reply to the letter. The DM determines Georgia cannot show good cause for the failure and imposes a sanction.

Georgia responds to say she felt that her condition was worse on this particular day and therefore she could not make it to the appointment. She stated that she has discussed with the provider her problems with attending face to face and has at times received telephone interviews but the provider insists on seeing her at face to face interviews as well.

She had attended a face to face appointment in December 2014 accompanied by a friend, which is confirmed on the action plan, but on this occasion she felt too anxious to leave the house.

Georgia confirms that she did not contact the provider on this occasion as she forgot about it because she felt so unwell worrying about leaving the house. As the good cause reason is provided out with the 5 day time limit to provide good cause the decision is not altered and the sanction stands.

A letter is issued to Georgia to attend a face to face interview with the Wp provider on 18.5.15. She does not attend and phones the provider to say she does not feel she could attend the appointment even though her friend is available to go with her. She was all prepared and ready to go to the appointment but at the last minute panicked and did not feel well enough to leave the house. She has had some bad news about a member of her family this week which has made her feel much more anxious than usual. The DM considers Georgia can show good cause for the failure

to undertake work-related activity on this occasion due to her mental health state on the day. It was reasonable in her circumstances and she contacted the provider to let them know she could not attend.

An appointment letter is issued to Georgia to attend a face to face interview with the Wp provider on 8.7.15. She does not attend and provides reasons to say she felt too ill again on this occasion to attend the interview and forgot to contact the provider as she was dealing with another phone call and became distracted and then forgot. The referral from the provider confirms that Person A did not attend the Wp appointment on 8.7.15 and there is no record of any contact regarding the reasons for her failure.

Whilst a pattern of non-compliance is emerging here for Georgia the medical condition is agoraphobia. Past non-compliance is not always an indication that the claimant doesn't have good cause for the failure under consideration.

It is important to bear in mind that people's health conditions may fluctuate frequently and vary significantly for both mental health & physical health conditions so care has to be taken when considering a failure to undertake work-related activity where health conditions are involved and the claimant raises their health condition in their reasons. Georgia may not know until the day of appointment that she cannot leave the house and actually thinking of leaving the house may exacerbate the condition.

However, being housebound does not mean that it is not reasonable to expect Georgia to ring up when she cannot attend an interview. The notification from the provider would have informed her to make contact if for any reason she could not attend, she was fully aware of and understood the consequences of failing to undertake work-related activity.

Therefore whilst it is reasonable to accept Georgia's health condition may have provided good cause for her not to attend the appointment as required on 8.7.15, it is also reasonable to have expected Georgia to inform the provider she could not attend. There is no evidence to suggest she was unable to use her phone on 8.7.15.

The DM considers Georgia cannot show she had good cause for the failure to undertake work-related activity on 8.7.15.

## **Contracting out**

53056 The following functions of the Secretary of State can be carried out by, or by employees of, any person authorised by the Secretary of State<sup>1</sup>:

1. requirement to undertake WRA
2. notification of WRA and action plans

3. requirement to undertake WRA not to apply

4. reconsideration of action plans
5. cessation of reduction.

*1 ESA (WRA) Regs, reg 9*

53057 – 53059

# Reduction of Employment and Support Allowance

53060 Where the DM has determined that a claimant has failed to attend or participate in a Wfl or undertake WRA without good cause (“a failure determination”) then where the claimant is entitled to the WRAC the amount of ESA payable to the claimant will be reduced by 100% of the prescribed amount for a single claimant in the ESA main phase<sup>1</sup>. See DMG [Chapter 44](#) for guidance on prescribed amounts.

*1 ESA Regs, reg 63(1) & (2); Sch 4, Part 1, para (1)(a)*

## Example 1

Eric is entitled to ESA(IR) of £139.60 a week, including the WRAC, for himself and his partner Julia. Eric fails without good cause to attend a Wfl. His award of ESA is reduced by £71.00 a week, leaving £68.60 in payment.

## Example 2

Mavis is entitled to ESA(Cont) of £99.15 weekly, including the WRAC. She has an occupational pension of £95 a week, and £5.00 is deducted from her ESA award leaving £94.15 in payment each week. Mavis fails without good cause to undertake WRA. Her award of ESA is reduced by £71.00 a week, leaving £23.15 in payment.

53061 In any benefit week the amount of ESA payable should not be reduced below 10p or by more than 100% of the amount of the prescribed amount for a single claimant in the ESA main phase<sup>1</sup> by virtue of the claimant failing to attend a Wfl or to undertake WRA. Only one failure determination relating to a Wfl or WRA can be in place at the same time<sup>2</sup>. However, should the claimant’s partner fail to attend a Wfl then benefit can be reduced by more than 100% of the prescribed amount for a single claimant in the ESA main phase<sup>3</sup>. Benefit is reduced by an amount equal to 20% of the IS applicable amount for a single claimant aged 25 or over as at the date the reduction begins. See DMG Chapter 05 for further guidance. Benefit cannot be reduced to a sum that is less than 10 pence a week<sup>4</sup>.

*1 ESA Regs, reg 63(3)(a) & (c); 2 reg 63(3)(b); 3 SS (JPIfP) Regs, reg 11(2) & (3); 4 reg 11(4)*

53062 Where a claimant is entitled to both ESA(Cont) and ESA(IR) then any reduction must be applied first to ESA(Cont). Only if there is any amount outstanding is it to be applied to ESA(IR)<sup>1</sup>.

*1 ESA Regs, reg 63(4)*

53063 For the purposes of determining the amount of any ESA(IR) payable, a claimant is to be treated as receiving the amount of ESA(Cont), including new style ESA<sup>1</sup>, which would have been payable but for any reduction made<sup>2</sup>.

*1 ESA Regs, reg 2(1); 2 reg 63(5); WR Act 07, s 11J*

### Example 1

Nathan is in receipt of ESA(Cont) of £84.50. He fails, without good cause, to attend a Wfl. After 4 weeks his benefit is reduced to £60.50. No ESA(IR) is payable because £84.50 would be payable but for the reduction.

### Example 2

Clark is entitled to ESA(IR). He is joined by his partner Lois, who is entitled to new style ESA including the WRAC. Her award of £100.15 a week is taken into account as income when calculating Clark's award of ESA(IR).

Lois fails with no good reason to attend a Wfl on 21.8.13. She contacts the adviser on 28.8.13 and agrees to attend a Wfl on 10.9.13. Her award of new style ESA is reduced for a total of 14 days (7 days + 7 day fixed period). The daily reduction rate is £10.20, and her award of ESA is reduced by £71.40 a week to £28.75 for two weeks. The full amount of £100.15 is taken into account as income for the purpose of calculating Clark's ESA(IR) entitlement.

53064 – 53069

## Period of reduction

### Meaning of compliance condition

53070 Where the claimant has failed to take part in a Wfl, "compliance condition" means

1. taking part in a Wfl **or**
2. agreeing with the S of S to take part in a Wfl at an agreed date<sup>1</sup>.

*1 ESA Regs, reg 63(11)(a)*

53071 Where the claimant has failed to undertake WRA, "compliance condition" means

1. undertaking the WRA specified in the action plan **or**
2. undertaking an alternative activity where notified to do so by the S of S **or**
3. agreeing with the S of S to undertake the WRA in the action plan or the alternative activity at an agreed date<sup>1</sup>.

*1 ESA Regs, reg 63(11)(b)*

### Meaning of current failure

53072 Current failure means a failure to

1. take part in a Wfl **or**
2. undertake WRA

which may lead to a reduction as in DMG 53060, but where the DM has yet to determine whether the amount of ESA should be reduced<sup>1</sup>.

*1 ESA Regs, reg 63(11)*

## Period of the reduction

53073 The period of the reduction is<sup>1</sup>

1. one week for each 7 day period during which the claimant fails to meet a compliance condition (see DMG 53070 – 53071) **and**
2. a further fixed period of 1, 2 or 4 weeks (see DMG 53075).

But see DMG 53074 for when 1. does not apply.

*1 ESA Regs, reg 63(6)*

53074 DMG 53073 1. does **not** apply where

1. a failure determination is made **and**
2. the claimant meets a compliance condition (see DMG 53070 – 53071) within one week after the date of the failure.

The claimant's ESA award is only subject to the fixed period reduction.

**Note:** Where the claimant recompiles before a sanction determination is made, the open ended period of the sanction has not started so there is nothing to lift and only the fixed period sanction can apply (see example 2).

### Example 1

Fadi fails to attend an initial Wfl on 18.1.13. He contacts the DWP on 21.1.13 to say he forgot, and agrees to attend a Wfl on 23.1.13, the next available appointment. Fadi takes part in the Wfl on 23.1.13. ESA has been paid to 24.1.13. The DM determines on 30.1.13 that Fadi had no good cause for his failure to attend on 18.1.13. but as he met the compliance condition within one week after the date of the failure on 18.1.13, his ESA award is reduced only for the one week fixed period from 25.1.13.

### Example 2

Kylie fails to attend a Work Programme appointment on 18.7.13. She recompiles and attends a rearranged appointment with her provider on 31.7.13. ESA has been paid to 3.9.13 and the DM is making a sanction determination on 10.9.13. The DM determines Kylie had no good cause for the failure to attend the appointment on 18.7.13 and imposes a one week fixed period sanction from 4.9.13.

Kylie had complied with the requirement on 31.7.13 before the DM made the sanction determination on 10.9.13 so no open ended sanction applies. It cannot be determined that she failed to meet the compliance condition up to the date the DM made the determination.

## Length of fixed period

53075 The fixed period is

1. one week, where there has been no failure that falls within DMG 53076<sup>1</sup> **or**
2. two weeks, where there has been one failure that falls within DMG 53076<sup>2</sup> **or**
3. four weeks, where there have been two or more failures (whether or not they fall within DMG 53076), and the most recent of those failures
  - 3.1 falls within DMG 53076 **and**
  - 3.2 resulted in a reduction for two or four weeks, or would have done but for the maximum reduction rules in DMG 53061<sup>3</sup>.

**Note:** The fixed reduction periods that apply are provided for in a table<sup>4</sup>. The circumstances of the failure are described in the first column of each table and has effect for the period in the second column.

*1 ESA Regs, reg 63(7)(a); 2 reg 63(7)(b); 3 reg 63(7)(c) & (8)(a) & (b);*

*4 WR Act 2007 s 11J, 12 & 13, ESA Regs, reg 63(7)*

53076 A failure falls within this paragraph if it is a failure<sup>1</sup>

1. for which a reduction
  - 1.1 was imposed **or**
  - 1.2 would have been imposed but for the fact that the maximum reduction rules in DMG 53061 apply<sup>2</sup> **and**
2. which occurred on or after 3.12.12 **and**
3. which is within 52 weeks but not two weeks of the current failure.

*1 ESA Regs, reg 63(8); 2 reg 63(3)*

### Example 1

Jeanette was placed into the ESA WRAG in January 2013. Her ESA award had been subject to a one week reduction in March 2013 for failing to attend an initial Wfl. She fails to attend a further Wfl on 2.5.13, and is notified of this failure by post on the same day. On 14.5.13 the DM determines that Jeanette had no good cause for the failure to attend the Wfl on 2.5.13. Jeanette's last ESA payment was made on 1.5.13. Her award of ESA is reduced from 9.5.13.

Jeanette phones on 20.5.13 to re-arrange her appointment, but cannot be seen until 23.5.13. She attends the Wfl on 23.5.13. The period of reduction includes a two week fixed period reduction, as she has had a previous one week reduction within the last 52 weeks. The reduction ends on 29.5.13.



### **Example 2**

Jules was placed in the WRAG in February 2013. He fails to attend an initial Wfl on 20.2.13, and on 25.2.13 makes an appointment for another Wfl to take place on 28.2.13. Jules fails to attend the Wfl on 28.2.13. He contacts the DWP and arranges a further appointment for 5.3.13, which he attends. His next ESA payment is due on 8.3.13. The DM determines on 15.3.13 that Jules had no good cause for either failure.

Jules's award of ESA is reduced for the period 9.3.13 – 15.3. Both failures are for a one week fixed period reduction, as the second failure was within two weeks of the first. As the reductions begin on the same date, they run concurrently.

### **Example 3**

Agyness is entitled to ESA including the WRAC. She has had a sanction imposed including a one week fixed period for a failure to attend a Wfl in January 2013, and a further sanction including a two weeks fixed period for a failure to undertake WRA in May 2013. On 2.8.13 she fails without good cause to attend a follow-up Wfl. The period of reduction for the latest failure will include a four week fixed period, as the latest failure was within 52 weeks of a previous two week fixed period reduction.

### **Example 4**

Ethan is entitled to ESA including the WRAC. He fails to attend a Wfl on 2.1.13. Ethan phones on 8.1.13 to say that he forgot the appointment, and a further Wfl is arranged for 14.1.13. Ethan again fails to attend. He calls the Jobcentre on 22.1.13 and arranges a further appointment for 24.1.13 which he attends. A one week fixed period sanction is imposed for the first failure, and a two week period sanction is imposed for the second failure. This includes a one week fixed period, as the second failure is within two weeks of the first.

Following the Wfl on 24.1.13, Ethan is required to undertake WRA. The provider arranges a follow-up appointment to check progress on 6.1.14, which Ethan fails without good cause to attend. When considering what fixed period reduction to apply after Ethan complies, the DM has regard to the previous failure on 14.1.13, and adds a two weeks fixed period to the period of reduction.

### **Example 5**

Julie is entitled to ESA including the WRAC. She fails without good cause to take part in an initial Wfl on 11.12.12, and the DM imposes a one week fixed period reduction after Julie phones on 13.12.12 to arrange a further Wfl. The next appointment is made for 3.1.13, and Julie again fails to attend. The DM determines that Julie had good cause for this failure, and makes another appointment for 8.1.13 which Julie attends. Julie is referred to the Work Programme and required to undertake WRA.

On 21.3.13 Julie fails without good cause to attend an interview with the provider where she was required to produce her CV, and the DM imposes a two week fixed period reduction after Julie agrees on 26.3.13 to attend a further appointment.

On 28.1.14 Julie fails without good cause to attend a further meeting with the provider. Since Julie's entitlement to ESA began, she has had two failures for which a reduction was imposed. The most recent of those failures resulted in a two week fixed period reduction and took place within the previous 52 weeks, so the DM determines that a four week fixed period reduction will apply once Julie has complied with the WRA requirement.

53077 - 53079

## When the reduction begins

53080 A decision awarding ESA may be superseded where there has been a failure determination<sup>1</sup>. A failure determination is a determination by the DM that the claimant has failed without good cause to satisfy a requirement to take part in a Wfl or undertake WRA<sup>2</sup>. The supersession (see DMG 53081) begins the period of reduction in DMG 53072.

*1 SS CS (D&A) Regs, reg 6(2)(p); 2 ESA Regs, reg 63(1)*

53081 The effective date of the supersession is<sup>1</sup>

1. the first day of the benefit week in which the failure determination is made where, on the date of the determination, the claimant has not been paid ESA since the failure to which that determination relates **or**
2. the first day of the benefit week after the end of the benefit week in respect of which the claimant was last paid ESA.

See DMG Chapter 04 for further guidance on supersession.

*1 SS CS (D&A) Regs, reg 7(36)*

53082 - 53084

## Cessation of reduction

53085 Any reduction of ESA imposed as a result of a failure determination which resulted from a failure to take part in a Wfl or to undertake WRA ceases to have effect if<sup>1</sup>

1. the claimant subsequently ceases to meet the requirements in DMG 53014 **or**
2. the claimant subsequently ceases to be subject to a requirement to undertake WRA **or**
3. the Secretary of State decides that it is no longer appropriate to require the claimant to undertake WRA<sup>2</sup>.

See DMG 53091 and Chapter 04 for guidance on supersession where a reduction ends.

*1 ESA Regs, reg 64(1) & (2)*

53086 A decision as in DMG 53085 **3.** must be notified to the claimant in writing<sup>1</sup>.

*1 ESA Regs, reg 64(1A)(b)*

53087 – 53089



## Revision, supersession and appeals

53090 A decision awarding ESA is superseded where the amount payable to the claimant is reduced on account of their failure to attend a WfI or to undertake WRA<sup>1</sup>. See DMG 53081 and Chapter 04 for further details.

*1 SS CS (D&A) Regs, reg 6(2)(p) & 7(36)*

53091 The supersession decision imposing the reduction can be superseded again to end the reduction where the conditions in DMG 53085 are satisfied<sup>1</sup>. It can be revised at any time if it contains an error to which the claimant did not materially contribute<sup>2</sup>. See DMG Chapter 03 for guidance on revision, and DMG Chapter 04 for guidance on supersession.

**Note:** For all other reductions, no further decision is required to end the reduction. This is because a fixed period reduction is applied on compliance (see DMG 53072).

*1 SS CS (D&A) Regs, reg 6(2)(q) & 7(37); 2 reg 3(5C)*

53092 The supersession decision imposing the reduction following the failure determination carries a right of appeal to a FtT. See DMG Chapter 06 for guidance on appeals.

*1 SS Act 98, s 12(1)(a)*

53093 - 53094



# Hardship

## Introduction

53095 Hardship payments are payments of reduced rate ESA(IR) made to ESA claimants

1. whose ESA has been reduced as in DMG 53072 **and**
2. who satisfy the conditions in DMG 53102<sup>1</sup>.

**Note:** See DMG 53152 et seq for guidance on hardship where a claimant is disqualified from receiving ESA through misconduct.

*1 ESA Regs, reg 2(1)*

53096 Hardship is not defined in the law. It should therefore be given its normal everyday meaning<sup>1</sup> of “severe suffering or privation”. Privation means a lack of the necessities of life.

*1 R(SB) 19/82*

53097 When deciding if hardship will occur the DM should consider all the circumstances of the claimant or family. There are certain factors that the DM must consider – see DMG 53111 – 53115. DMs should bear in mind that they are deciding the likelihood that hardship will occur if more ESA is not paid.

53098 – 53099

## Record of the DM’s decision

53100 DMs should record

1. the reasons why hardship will or will not occur **and**
2. the factors and evidence considered

as part of the decision on hardship payments.

53101 DMs must record their reasons for

1. rejecting any evidence **or**
2. deciding what evidence to accept if faced with conflicting evidence.

## When a hardship payment is made

53102 A hardship payment is made where **all** the following conditions are satisfied<sup>1</sup>:

1. the DM is satisfied that the claimant is or will be in hardship unless hardship payments are made (but see DMG 53110) **and**
2. the claimant’s ESA has been reduced as in DMG 53072<sup>2</sup> **and**
3. the claimant meets the conditions of entitlement to ESA(IR) – see [DMG Chapter 41](#) **and**

4. the claimant completes and submits a form approved or accepted by the DM in such manner as the DM determines **and**
5. the claimant provides such information or evidence as the DM requires, in such manner as the DM determines.

*1 ESA Regs, reg 64A; 2 reg 63*

53103 - 53109

## **When is a claimant treated as being in hardship**

53110 For the purposes of DMG 53102 1., a claimant is treated as being in hardship if

1. their partner **or**
2. a child or qualifying young person for whom they or their partner are responsible

is or will be in hardship unless a hardship payment is made<sup>1</sup>.

*1 ESA Regs, reg 64B*

## **Matters taken into account when determining hardship**

53111 The DM must take the following into account when determining whether a person is or will be in hardship<sup>1</sup>:

1. whether the claimant's partner or a person in the claimant's family satisfies the requirements for
  - 1.1 the SDP or EDP<sup>2</sup> **or**
  - 1.2 an element of CTC for a disabled or severely disabled child or young person<sup>3</sup>
2. the resources which are likely to be available to the household without a hardship payment
  - 2.1 including resources from people who are not members of the household<sup>4</sup> **and**
  - 2.2 excluding payments in DMG 53112<sup>5</sup>
3. the difference between the likely resources and the amount of a hardship payment that the claimant would receive
4. whether there is substantial risk that without a hardship payment the household
  - 4.1 will not have access to essential items (including food, clothing, heating and accommodation) **or**
  - 4.2 will have access to such essential items at considerably reduced levels



5. the length of time that the factors at 1. – 4. are likely to continue.

**Note:** See DMG Chapter 43 for guidance on membership of household, and DMG Chapter 44 for guidance on ESA amounts, including the SDP and EDP.

*1 ESA Regs, reg 64C(1); 2 Sch 4, Part 2, para 6 & 7;  
3 Child Tax Credits Regs 02, reg 8; 4 ESA Regs, reg 156; 5 reg 64C(2)*

53112 When considering resources, the DM should disregard payments of

1. CTC<sup>1</sup> or
2. CHB<sup>2</sup>

paid to the claimant or partner in respect of a child or young person who is a member of their household or family<sup>3</sup>.

*1 ESA Regs, Sch 8, para 7(1); 2 para 7(2); 3 reg 64C(2)*

53113

#### **Example**

Sean is entitled to ESA at a reduced rate from 6<sup>th</sup> February because of a failure to attend a Wfl. He and his partner Sarah have a 17 year old child Molly and foster a ten year old child Evie for whom they receive a weekly allowance from the LA.

When considering whether Sean is a person in hardship the DM disregards the CHB and CTC that Sean receives for Molly. The DM takes into account the allowance Sean receives from the LA for Evie, even though she is not a member of the household.

#### **Resources**

53114 “Resources” is not defined in the law. The word should be given its normal everyday meaning<sup>1</sup> of the means available or a stock or supply that can be drawn upon. See DMG [35175 – 35179](#) and 35182 – 35198 for further guidance on resources.

*1 R(SB) 19/82*

#### **Example**

Danny is entitled to ESA(Cont) of £99.15 weekly, including the WRAC. He has an occupational pension of £56.45 a week. Danny fails without good cause to undertake WRA. His award of ESA is reduced by £71.00 a week, leaving £28.15 in payment.

Danny applies for hardship. The DM decides that hardship is not appropriate. Although Danny would meet the conditions for ESA(IR), the DM considers that his available resources of £84.60 weekly (ESA of £28.15 + occupational pension of £56.45) are sufficient to meet his need for essential items without awarding the hardship amount of £42.60.

## Essential items

53115 For guidance on essential items, see [DMG 35210 – 35217](#).

### Example

Carolyn is a lone parent with two children aged 2 and 7. Carolyn's heating is electric, and she pays for her electricity by pre-paid meter which is partly reducing an earlier fuel debt. From 20.1.13 her award of ESA of £99.15 is reduced to £28.15 weekly after she fails without good cause to undertake WRA. Carolyn applies for a hardship payment. The DM establishes that Carolyn has no resources apart from the reduced rate ESA, as well as CHB and CTC which are disregarded. The DM determines that Carolyn's children would be at substantial risk due to inadequate heating, and awards £42.60 in addition to the £28.15 in payment.

53116 - 53119

## Amount of hardship payments

53120 [\[See DMG Memo 7/17\]](#) A hardship payment is 60% of the prescribed amount for a single claimant in the main phase<sup>1</sup>. See DMG Chapter 44 for guidance on prescribed amounts. As at April 2013, the amount is £43.02 which is 60% of £71.70.

*1 ESA Regs, reg 64D(1); Sch 4, Part 1, para (1)(a)*

53121 Where the amount in DMG 53120 is

1. not a multiple of 5p, it is rounded to the nearest multiple of 5p **or**
2. a multiple of 2.5p but not 5p, it is rounded to the next lower multiple of 5p<sup>1</sup>.

*1 ESA Regs, reg 64D(2)*

## When a hardship payment begins

53122 Hardship payments can begin from the date the claimant becomes a person in hardship by satisfying **all** the conditions in DMG 53102.

## When a hardship payment ends

53123 Entitlement to a hardship payment ends when the period of the reduction ends.

53124 - 53129

## Disqualification for misconduct

- 53130 Claimants entitled to ESA are disqualified for receiving it for a period decided by the DM up to a maximum of six weeks if they<sup>1</sup>
1. have LCW through their own misconduct (except in a case where LCW is due to pregnancy or a sexually transmitted disease) **or**
  2. fail without good cause to attend for or submit to medical or other treatment (excluding vaccination, inoculation or major surgery) recommended by a doctor with whom, or a hospital or similar institution with which, the claimant is undergoing medical treatment, which would be likely to remove the limitation on the claimant's capability for work **or**
  3. fail without good cause to refrain from behaviour calculated to retard recovery **or**
  4. are absent without good cause from their place of residence without leaving word where they may be found<sup>2</sup>.

*1 ESA Regs, reg 157(2) & (1)*

- 53131 Guidance on misconduct may be relevant if the misconduct being considered would have resulted in dismissal from employment and disqualification for receiving JSA. Conduct which is blameworthy, reprehensible, wrong or wilful should be distinguished from involuntary behaviour due to other factors<sup>1</sup>.

*1 R(S) 2/64*

- 53132 Alcoholism is one example of behaviour which may be misconduct if a claimant has LCW as a result of excessive drinking on one occasion. But the mental and physical effects of alcoholism can be a condition requiring long spells of treatment, including psychiatric help.
- 53133 If a claimant has LCW as a result of an accident which occurred while intoxicated but which could have happened if the claimant was sober, LCW would not be due to misconduct.
- 53134 Drug addiction is similar to alcoholism in that the uncontrolled use of addictive drugs leads to a progressive deterioration in physical or mental condition which can be incapacitating.
- 53135 Disqualification should be applied to the exceptional cases where there is clear evidence that temporary LCW or the addiction resulted from a deliberate decision by a healthy person to experiment with drug taking.
- 53136 When deciding whether to disqualify for receiving ESA the DM should judge how far the claimant's actions have been deliberate and unreasonable rather than thoughtless.

53137 Someone who is injured or contracts a disease while committing an illegal act for which they are convicted by a court of law, is subject to being treated as not having LCW.

53138 - 53139

## Treatment

53140 Treatment as at DMG 53130 **2.** has to be for the cause of LCW<sup>1</sup>. Medical treatment means medical, surgical or rehabilitative treatment (including any course or diet or other regimen)<sup>2</sup>.

*1 R(S) 3/57; 2 ESA Regs, reg 2(1)*

53141 The claimant has to prove

1. good cause **and**
2. that a refusal of treatment was reasonable in the circumstances.

53142 If the objection to treatment is on religious grounds, evidence of a firm personal belief is needed to support good cause<sup>1</sup>.

*1 R(S) 9/51*

## Rules of behaviour

53143 One example of behaviour considered under both these rules was a person with influenzal bronchitis, who drove 60 miles from home to business and was not well enough to return for several days. It was decided that the person had

1. undertaken a journey calculated to delay recovery **and**
2. also been absent from home without leaving word.

In view of certain circumstances the period of treating as capable of work was limited to two weeks<sup>1</sup>.

*1 R(S) 21/52*

53144 In DMG 53130 **3.** the word “calculated” does not mean that the claimant deliberately intends to delay recovery. The question is whether the delayed recovery is likely to result from the behaviour<sup>1</sup>.

*1 R(I) 26/51*

53145 Good cause for the behaviour was not proved by a person who had dermatitis of the hands and was whitewashing the kitchen, because the doctor had advised against getting wet<sup>1</sup>. Ignorance of the rules of behaviour is not good cause<sup>2</sup>.

*1 R(I) 26/51; 2 R(S) 21/72*

## Absence

53146 DMG 53130 **4.** does not apply unless the claimant has somewhere to live. Once the relevant facts are established the claimant has to prove good cause such as a genuine difficulty in leaving a message<sup>1</sup>.

*1 R(S) 7/83, R(S) 6/55*

## Period of disqualification

53147 The length of the period of disqualification can be from one day to six weeks. The length of the disqualification depends on the circumstances of the case. The DM has to give reasons for the choice of period<sup>1</sup>.

*1 R(U) 8/74, R(S) 1/87, R(U) 4/87*

53148 For misconduct the period of disqualification can begin on

1. the day following the date of the act of misconduct **or**
2. from the date of the decision if benefit has continued in payment<sup>1</sup>.

If the misconduct is repeated, a fresh period of disqualification may be imposed.

*1 R(U) 12/59, R(S) 4/61*

53149

53150 The period of disqualification for failure to observe the rules of behaviour depends upon the number of times, and the period over which the failure has occurred. Any extenuating circumstances can be taken into account even though good cause has not been proved<sup>1</sup>.

*1 R(S) 21/52*

53151 If, during the period of disqualification, a claimant

1. submits a closed doctor's statement **and**
2. then makes a further claim

any disqualification continues for the outstanding part of the original period, unless the determination has been set aside on supersession or appeal.

53152 Disqualification does not apply if the person is a "person in hardship" or is disqualified for receiving ESA under certain legislation<sup>1</sup> (loss of benefit provisions).

*1 ESA Regs, reg 157(3) & Social Security Fraud Act 2001, s 7*

## Person in hardship

- 53153 A claimant is a “person in hardship”<sup>1</sup> if they have informed the DM of the circumstances on which they rely to establish that fact and
1. the claimant is pregnant **or**
  2. a member of the claimant's family is pregnant **or**
  3. the claimant is a single person aged less than 18 **or**
  4. the claimant is a member of a couple and both members are aged less than 18 **or**
  5. the claimant or their partner is responsible for a child or young person who is a member of the claimant's household **or**
  6. the claimant or their partner has been awarded
    - 6.1 an “AA” **or**
    - 6.2 DLA care component (higher or middle rate)<sup>2</sup> **or**
    - 6.3 AFIP **or**
    - 6.4 PIP **or**
  7. the claimant or their partner has claimed either
    - 7.1 “AA” **or**
    - 7.2 DLA **or**
    - 7.3 AFIP **or**
    - 7.4 PIPand the claim has not yet been determined (see DMG 53154) **or**
  8. the claimant or their partner devotes a considerable portion of each week caring for another person who has been awarded
    - 8.1 “AA” **or**
    - 8.2 the higher or middle rate care component of DLA **or**
    - 8.3 AFIP **or**
    - 8.4 PIP
  9. the claimant or their partner devotes a considerable portion of each week caring for another person who has claimed
    - 9.1 “AA” **or**
    - 9.2 DLA **or**
    - 9.3 AFIP **or**
    - 9.4 PIP

and the claim has not been determined (see DMG 53154) **or**

10. the claimant or their partner has reached the qualifying age for SPC (see DMG Chapter 77).

**Note 1:** For a definition of “AA” see DMG Chapter 44.

**Note 2:** The guidance at 9. applies from 6.4.10. Before that date the claimant or their partner has to be aged 60 or more.

*1 ESA Regs, reg 158(2) & (3); 2 reg 158(7)*

53154 A claimant who is a “person in hardship” **only** because they or their partner

1. have claimed any of the benefits in DMG 53153 7. and the claim has not yet been determined **or**
2. devote a considerable portion of each week caring for another person who has claimed any of the benefits in DMG 53153 9. and the claim has not been determined

can only be a “person in hardship” for a maximum of 26 weeks from the date of the claim<sup>1</sup>.

*1 ESA Regs, reg 158(4)*

53155 A claimant is also considered to be a “person in hardship” if the DM, having regard to all the circumstances and in particular those at DMG 53156, is satisfied that the claimant or a member of the claimant's family will suffer hardship unless ESA is paid<sup>1</sup>.

*1 ESA Regs, reg 158(5)*

53156 The circumstances referred to in DMG 53155 are

1. the resources which are likely to be available to the claimant and their family and the length of time for which they might be available **and**
2. whether there is a substantial risk that essential items such as food, clothing and heating will
  - 2.1 cease to be available to the claimant or a member of the claimant's family **or**
  - 2.2 only be available at considerably reduced levels **and** the length of time that this might be so<sup>1</sup>.

*1 ESA Regs, reg 158(6)*

53157 The amount of ESA payable in hardship cases is reduced by 20% of the claimant's applicable amount<sup>1</sup>.

*1 ESA Regs, Sch 5, para 14*

53158 - 53159





# Disqualification for imprisonment - ESA(Cont)

## Introduction

53160 A claimant is disqualified for receiving ESA(Cont) for any period during which they are undergoing imprisonment or detention in legal custody

1. in connection with a charge brought or intended to be brought in criminal proceedings **and**
2. pursuant to any sentence **or**
3. pursuant to any order of detention.

**Note:** See DMG Chapter 54 for guidance on how imprisonment affects ESA(IR).

*1 WR Act 07, s 18(4)(b)*

53161 Payment of ESA(Cont) is suspended from the first day of imprisonment or detention in legal custody. If a decision is subsequently made to disqualify the claimant for receiving ESA(Cont), that decision will apply from the first day of imprisonment or detention in legal custody.

## Treating a claimant as not having limited capability for work

53162 The claimant is to be treated as not having LCW if they are disqualified for receiving ESA(Cont) during a period of imprisonment or detention in legal custody if that disqualification is for more than 6 weeks<sup>1</sup> (see DMG Chapter 42).

*1 ESA Regs, reg 159(1)*

## Exceptions to the disqualification provisions

53163 There are exceptions to the provisions disqualifying ESA(Cont) on imprisonment or detention in legal custody<sup>1</sup>. These are where

1. no penalty is imposed (DMG 53164) **or**
2. the person is suffering from mental disorder (DMG 53176).

*1 ESA Regs, reg 160(2) & (3)*

## No penalty imposed

53164 There is no disqualification for receiving ESA(Cont) for imprisonment or detention in legal custody unless at the end of criminal proceedings the court imposes

1. a penalty **or**
2. a penalty for fine default<sup>1</sup>.

*1 ESA Regs, reg 160(2)*

## Meaning of court

53165 Court means<sup>1</sup> any

1. Court in
  - 1.1 UK
  - 1.2 Channel Islands
  - 1.3 Isle of Man
  - 1.4 any place to which certain legislation applies<sup>2</sup> **or**
2. Court-Martial within the meaning of certain legislation<sup>3</sup> **or**
3. Courts-Martial Appeal Court.

*1 ESA Regs, reg 160(5)(a); 2 Colonial Prisoners Removal Act 1884; 3 Courts-Martial (Appeals) Act 1968*

## Meaning of penalty

53166 Penalty<sup>1</sup> is

1. a sentence of imprisonment
2. detention in a young offenders institution
3. an order for detention in a young offenders institution
4. detention in GB as a result of any order made under certain legislation<sup>2</sup>.

*1 ESA Regs, reg 160(5)(c); 2 reg 160(5)(d); Colonial Prisoners Removal Act 1884*

53167 - 53170

53171 The term penalty includes a suspended sentence of imprisonment at the end of criminal proceedings, even if it has not taken effect<sup>1</sup>.

**Note:** A suspended sentence does not disqualify a claimant who is not in prison or detained in legal custody.

*1 R(S) 1/71*

53172 The following are not penalties and so no disqualification is imposed for the period before the end of criminal proceedings during which the person is remanded in custody when

1. a fine is imposed (see DMG 53175)
2. the charge is withdrawn
3. there is a conditional or absolute discharge or acquittal
4. the claimant is detained in hospital by court order following conviction
5. an order putting a person under guardianship is made
6. a Community Rehabilitation order is made.

**Note:** This list is not exhaustive

## Penalty cancelled

53173 Where a penalty has been imposed, a Higher Court can later

1. quash the conviction **or**
2. substitute another penalty

with an order which is not a penalty. The effect is as though no penalty had been imposed.

53174 Disqualification will therefore be removed for any relevant period of imprisonment or detention in legal custody. See DMG Chapter 04 for further guidance on supersession for a relevant change of circumstances and when the decision takes effect.

## Imprisonment for non-payment of fines

53175 Imprisonment for non-payment of a fine can be the result of civil proceedings. The DM should consider the nature of the original offence if a person is imprisoned for non-payment of a fine. If the original offence was a criminal action, the DM should

1. regard the imprisonment as a criminal offence **and**
2. disqualify from benefit.

*1 ESA Regs, reg 160(2)(b)*

## Mentally disordered persons detained in legal custody

53176 Subject to the exceptions in DMG 53182 disqualification does not apply<sup>1</sup> for any period during which a person is detained in legal custody at the end of criminal proceedings, if it is a period during which that person is liable to be detained in a hospital or similar institution as a person suffering from a mental disorder.

*1 ESA Regs, reg 160(3)*

53177 Hospital or similar institution means<sup>1</sup> any place in which people suffering from mental disorder may receive care or treatment but not at or in a

1. prison
2. young offenders institution
3. secure training centre
4. secure accommodation in a children's home
5. remand centre.

*1 ESA Regs, reg 160(5)(b)*

53178 - 53180

53181 If a person is found to be insane during criminal proceedings so that they cannot be tried or their trial cannot proceed, those proceedings will be treated as completed<sup>1</sup>. There will be no disqualification.

*1 ESA Regs, reg 160(5)(e)*

53182 The exceptions referred to in DMG 53176 are where the person is

1. detained<sup>1</sup> (or liable to be detained) under specific legislation<sup>2</sup> which allows a court, which has imposed a term of imprisonment, to direct that the offender be detained in a hospital or similar institution instead of a prison where that offender suffers from a psychopathic disorder.
2. serving<sup>3</sup> a sentence of imprisonment and is then detained in a mental hospital under specific legislation<sup>4</sup> which allows the Secretary of State for Justice or Scottish Ministers to order that an offender, suffering from mental disorder, be transferred from prison to detention in a mental hospital.

*1 ESA Regs, reg 160(3)(a); 2 MH Act 83, s 45A; Criminal Procedure (Scotland) Act 95 s 59A*

*3 ESA Regs, reg 160(3)(b) & (c); 4 MH Act 83, s 47*

53183 Where there is a hospital direction as in DMG 53182 **1.** or where the person is transferred from prison to a mental hospital as in DMG 53182 **2.** the person will be disqualified for receiving ESA(Cont)<sup>1</sup>.

*1 ESA Regs, reg 160(3)(a), (b) & (c)*

53184 A person who is transferred to a mental hospital as in DMG 53182 may recover and be sent back to prison; the normal rules disqualifying prisoners from receiving benefits will apply.

53185 Where a person has been disqualified and is transferred to

1. a hospital **or**
2. similar institution

the disqualification will apply up to the date when the person is expected to be released, had the transfer not been made<sup>1</sup>.

*1 ESA Regs, reg 160(4)*

53186 Where a prisoner is transferred to a mental hospital and detained under certain legislation<sup>1</sup> the disqualification as in DMG 53183 will continue until the date when they would have been released.

*1 MH Act 83, s 45A; s 47; Criminal Procedures (Scotland) Act 1995, s 59A;*

*MH (C & T) (Scot) Act 03 s 136*

53187 In England and Wales, where applicable, the earliest date on which the prisoner would have been expected to be discharged from prison will be notified in a certificate. Where the prisoner was sentenced to life imprisonment the certificate issued is not endorsed with a release date.

53188 In Scotland certificates are not issued on any case because the terms of the prisoner's transfer to mental hospital cease at the point that their sentence would have ended<sup>1</sup>. Any further detention would require a fresh order which would not be made under the relevant legislation<sup>2</sup>.

*1 CSS/239/07; MH (C & T) (Scot) Act 03 s 136; s 217; 2 s 136*

53189 In DMG 53187 - 53188 it is enough to know under what legislation the prisoner is being held in mental hospital. They will be disqualified if it is under the relevant legislation and there is no certificate.

## Technical Lifers - England and Wales only

53190 A High Court judgment<sup>1</sup> dealt with the issue of whether there was unequal treatment under Human Rights legislation between those persons

1. sent to hospital for treatment<sup>2</sup> without having been given a prison sentence and who **are** eligible for benefit **and**
2. those given a prison sentence and are either –
  - 2.1 sent directly to hospital for treatment<sup>3</sup>
  - 2.2 transferred to hospital from prison<sup>4</sup>

who are **not** eligible for benefit.

*1 Regina (EM and others) v Secretary of State for Work and Pensions [2009] EWHC 454 (Admin);*

*2 MH Act 83, s 37 & 41; 3 s 45A; 4 s 47*

53191 The Court found that the difference in treatment of those persons termed 'technical lifers' could not be justified.

53192 A 'technical lifer' is an administrative classification. It involves the Secretary of State for Justice accepting that the criminal court that heard the individual's case would have given an order for hospital treatment rather than impose a sentence of imprisonment, if, for example, a suitable bed had been available.

53193 The effect of this is that a person given the status of a 'technical lifer' should be treated, for the purposes of benefit entitlement, as though they had been sent to hospital for treatment without having been given a prison sentence (see DMG 53190 1. above).

**Note:** The practice of awarding 'technical lifer' status to eligible prisoners was abandoned in 2005.

## Imprisonment or detention in legal custody abroad

53194 When a person is imprisoned or detained in legal custody abroad<sup>1</sup>, the same benefit rules apply for

1. disqualification
2. exception from disqualification.

**Note:** UK benefit rules apply only for imprisonment for a criminal offence. The DM should decide whether the offence for which the claimant is convicted in the other country would be a criminal offence in the UK. A person detained abroad without trial is not disqualified for receiving benefit but see DMG 53195 if they are detained abroad pending trial.

*1 R(S) 2/81; ESA Regs, reg 160(6)*

## Suspension of payment of ESA(Cont) during imprisonment

53195 The payment of ESA(Cont) to those claimants who are not disqualified for receiving it whilst undergoing imprisonment or detention in legal custody as a consequence of DMG 53163 or DMG 53194 is suspended<sup>1</sup>. The suspension covers the period of imprisonment or detention in legal custody and any benefit payable during that period even if it is not in respect of that period.

*1 ESA Regs, reg 161(1)*

53196 ESA(Cont) is not suspended while the claimant is detained in a hospital or similar institution as a person suffering a mental illness unless DMG 53182 applies<sup>1</sup>.

*1 ESA Regs, reg 161(2)*

53197 If ESA(Cont) is suspended for any period, the period of suspension is not to be taken into account in calculating any period in respect of the extinguishment of the right to sums payable which are not obtained within the prescribed time<sup>1</sup>.

*1 ESA Regs, reg 161(3) & SS (C&P) Regs, reg 38*

53198 Where a person who is held in custody on remand is given a prison sentence which is less than the time already spent in custody (and is immediately released) they are disqualified for the entirety of the time spent in custody. No benefit is refunded to the value of the extra time spent in prison<sup>1</sup>.

### Example

Kenneth is detained in legal custody on 1.2.10. The DM suspends payment of his ESA(Cont). On 1.4.10 the DM is notified that Kenneth was given a custodial sentence. Therefore, the DM decides that Kenneth should be disqualified for receiving ESA(Cont) from 1.2.10.

*1 WR Act s 18(4)(b)*

53199

# Advance awards of ESA(IR)

## General

53200 DMs may make advance awards of ESA(IR) when certain conditions are met. These advance awards are unique to ESA(IR)<sup>1</sup>. DMs should not confuse them with other advance claims and awards<sup>2</sup>, including other advance awards of ESA(IR) (see DMG Chapter 02 for full guidance).

*1 WR Act 07, s 5; ESA Regs, reg 146; 2 SS (C&P) Regs, reg 13*

## When to make an advance award of ESA(IR)

53201 DMs may make an advance award of ESA(IR)<sup>1</sup> when the claimant

1. is not entitled to ESA(IR) because income exceeds the applicable amount **and**
2. would be entitled to ESA(IR) if there was entitlement to
  - 2.1 the support component **or**
  - 2.2 the WRAC **and**
3. is not entitled to ESA(Cont).

*1 WR Act 07, s 5(1)*

53202 Where DMG 53201 applies and DMG 53204 is satisfied

1. the claim is treated as made for a period from the relevant day<sup>1</sup> (see DMG 53205) **and**
2. the DM may award ESA(IR) from the relevant day<sup>2</sup>.

*1 ESA Regs, reg 146(1)(a); 2 reg 146(1)(b)*

53203 Where DMG 53202 applies the DM should make a decision on the original claim. That decision will be that the claimant

1. is not entitled to ESA from the date of claim **and**
2. is entitled to ESA(IR) from the relevant day.

When making that decision the DM will not be able to specify the amount of the claimant's ESA(IR) entitlement. However, the DM does not need to make another decision in order for the claimant to receive payment under the award from the relevant day.

53204 For an advance award of ESA(IR) to be made

1. the DM must be of the opinion that unless there is a change of circumstances the claimant satisfies
  - 1.1 the basic conditions except having LCW **and**
  - 1.2 the additional conditions for ESA(IR)when ESA(IR) becomes payable under the award<sup>1</sup> **and**
2. claimants must be treated as having LCW because they
  - 2.1 are terminally ill **or**
  - 2.2 receive treatment by way of intravenous, intraperitoneal or intrathecal chemotherapy or are recovering from that treatment **or**
  - 2.3 suffer from a specific disease **or**
  - 2.4 are a carrier or have been in contact with a person suffering from a relevant disease **or**
  - 2.5 are pregnant and satisfy certain conditions **or**
  - 2.6 are a hospital in-patient **or**
  - 2.7 receive regular treatment **or**
  - 2.8 are treated as having LCW until a determination about LCW has been made **or**
  - 2.9 may have entitlement to ESA(IR) while in education because they receive DLA

for the period before ESA(IR) becomes payable under the award<sup>2</sup>.

**Note 1:** See DMG Chapter 41 for guidance on the basic conditions and the additional conditions for ESA(IR).

**Note 2:** See DMG Chapter 42 for guidance on being treated as having LCW.

**Note 3:** Claimants are terminally ill if they are suffering from a progressive disease and their death in consequence of that disease can reasonably be expected within six months<sup>3</sup>.

*1 ESA Regs, reg 146(3)(a); 2 reg 146(3)(b); 3 reg 2(1)*

#### **Example 1**

Tanya makes a claim for ESA. She is not entitled to ESA(Cont). She receives a LRP which exceeds her applicable amount. However, the DM is satisfied that Tanya would be entitled to ESA(IR) if she had entitlement to the support component or the WRAC. She is also treated as having LCW before the period ESA(IR) would become payable. The DM makes an advance award of ESA(IR).



### Example 2

Paul makes a claim for ESA. He is not entitled to ESA(Cont). His partner Alison works part-time. The amount of Alison's earnings that are taken into account exceed Paul's applicable amount. The DM is not satisfied that Paul would be entitled to ESA(IR) if he had entitlement to the WRAC. However, the DM is satisfied that Paul would be entitled to ESA(IR) if he had entitlement to the support component. Paul is also treated as having LCW before the period ESA(IR) would become payable. The DM makes an advance award of ESA(IR).

### Example 3

Samantha makes a claim for ESA on 1.12.08. She is not entitled to ESA(Cont). Her civil partner Ella works part-time. The amount of Ella's earnings that are taken into account is £135.00. They exceed Samantha's applicable amount of £94.95 and would still do so even if Samantha had entitlement to the support component of £29.00 or the WRAC of £24.00. The DM does not make an advance award.

## Meaning of relevant day

53205 The relevant day is the day after the end of a period of 13 weeks beginning on the first day on which the claimant would be entitled to ESA(IR) if the claimant did not have income which exceeded the applicable amount<sup>1</sup>.

*1 ESA Regs, reg 146(2)*

### Example

Sergio makes a claim for ESA(IR) on 24.11.08. His wife Marta has part-time earnings which exceed his applicable amount until either the support component or the WRAC becomes payable. The DM decides that the relevant day for Sergio's advance award is 26.2.09.

## Applicable amount when ESA(IR) becomes payable under an advance award

53206 When ESA(IR) becomes payable under an advance award, claimants do not have to serve another assessment phase as it will have been served already. Instead, they will enter the main phase when the award of ESA(IR) becomes payable. That is the date on which the claimant would have been entitled to main phase if income had not exceeded the applicable amount before the relevant day<sup>1</sup>.

**Note:** See DMG Chapter 44 for full guidance on the assessment phase and the main phase.

*1 ESA Regs, reg 146(4)*

53207 - 53209

## Changes of circumstances

53210 Except for income exceeding the applicable amount, claimants have to continue to satisfy the conditions of entitlement for ESA(IR) until the relevant day (see DMG 53205). If there is a change of circumstances which means that the claimant no longer satisfies one of those conditions of entitlement, the DM should supersede the advance award (see DMG Chapter 04 for full guidance).

**Note:** See also DMG Chapter 03 for guidance on revision.

53211 Also, if there is a change of circumstances which means that the claimant's income no longer exceeds the applicable amount, the DM should

1. supersede the advance award **and**
2. decide entitlement to ESA(IR) in the normal way (see DMG Chapter 04 for full guidance).

However, DMs should note that the assessment phase does not start again. Instead, claimants receive the assessment phase rate of ESA(IR) until the day before the relevant day.

### Example

Cecilia makes a claim for ESA(IR) on 15.12.08. Her civil partner Alison has an income from a credit insurance policy which necessitates an advance award. The DM decides that the relevant day is 19.3.09. On 2.2.09 Cecilia reports that Alison received the final payment from the credit insurance policy on 31.1.09. Cecilia's entitlement to ESA(IR) at the assessment phase rate begins the day after the final payment from the credit insurance policy is taken into account under the attribution rules (see DMG Chapter 48) and ends on 18.03.09.

## Waiting days

53212 Where a claimant has to serve waiting days, there is no entitlement to ESA for the first three days of a PLCW<sup>1</sup> (see DMG Chapter 41). When an advance award of ESA(IR) is made, the period before the relevant day (see DMG 53205) is a PLCW. Therefore, claimants do not have to serve waiting days when ESA(IR) becomes payable under the advance award.

*1 WR Act 07, Sch 2, para 2; ESA Regs, reg 144(1)*

## Linking

53213 DMG Chapter 41 gives guidance on linking rules. These rules also apply to advance awards of ESA(IR) under DMG 53201.

53214 – 53999

**The content of the examples in this document (including use of imagery) is for illustrative purposes only**