Dark Matter

Robert Martin, Chamber President, delves into an erratic workload.

July 2013 proved a turning-point.

In January of that year, the monthly intake of appeals had exceeded 50,000 for the first time since a right of appeal to an independent tribunal had been created. Between January 2013 and July 2013 we received an average of 52,591 appeals each month. The migration of claimants from incapacity benefit ("IB") to Employment and Support Allowance ("ESA") was in full spate. The Work Capability Assessment ("WCA") accounted for two-thirds of the appeals.

The 70% increase in WCA appeals, compared to the corresponding period in 2012, reflected DWP's imperative to recover the ground lost through Atos spending much of 2012 "in recovery". The Department's goal was to get back on track with the original target of completing the IB-ESA migration programme within a 3 year period ending in October 2013.

Yet happenstance also played its part in the rising intake. The Tribunal Procedure (Amendment) Rules 2013 were laid before Parliament on 6.3.13. A significant new measure was the imposition of a set time-limit on DWP to file responses.[1] When it became evident that the Amendment Rules would reach the statute-book,[2] DWP decided that the only way in which it could hope to comply with the new time-limits was drastically to cut back on its "Head of Work". Typically, DWP would be holding a stock of around 110,000 appeals lodged by claimants but not yet forwarded by the Department to HMCTS. They were considered to be at "the disputes stage". A fair proportion would be revised in the claimant's favour and the appeal would thereby lapse. Some might be withdrawn. In February 2013, DWP set itself a target of reducing the Head of Work by 60,000 cases by October 2013.

Through the kind of error anyone might make, DWP misread the commencement date. The amendment imposing time-limits was actually not due to come into force until October 2014. Undaunted DWP agreed with HMCTS that, to avoid the risk of "significant reputational damage", they would act as though the start-date had, in fact, been advanced by a year. In consequence, additional Departmental resources were brought to bear on pushing appeals through the disputes stage. The effect was to bring forward some 5,000 appeals a month.

[1] The former, elastic, requirement to file a response "as soon as reasonably practicable" was changed to a duty to file a response within 42 days in child support appeals and within 28 days in all other cases. The time runs from the date on which the Department receives the notice of appeal.

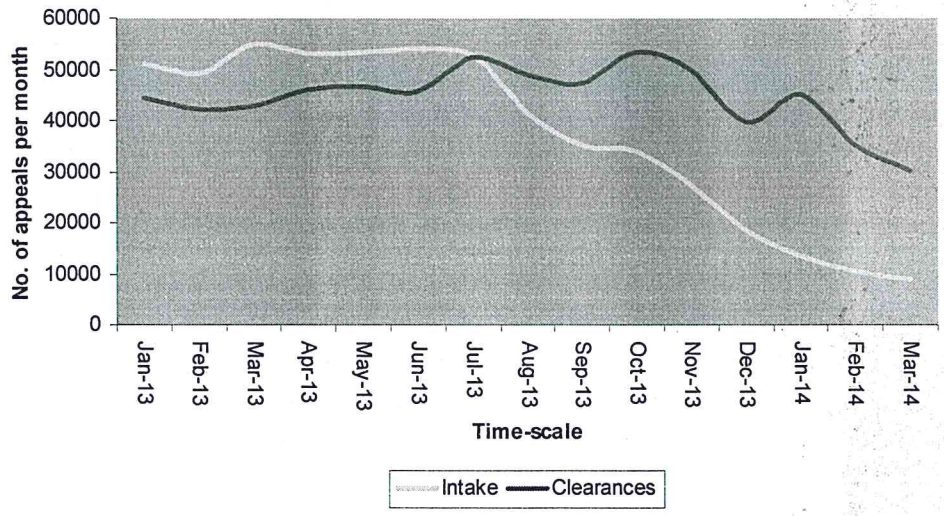
[2] DWP had been resisting the imposition of a time-limit since 2008, when the Secretary of State had surrendered to the independent Tribunal Procedure Committee his power to make the rules governing tribunal procedure.

Throughout the first half of 2013, the Tribunal faced considerable political strain. Parliamentary Questions were tabled weekly highlighting the growing waiting-times for appeals to be heard and the mounting expenditure. The delay caused hardship for claimants and forensic difficulties for judges and members in trying to delve back in time to the date of the decision under appeal.

The out-turn for 2012-13 had been 507,131 appeals received – an increase of 37% over the preceding year. DWP's forecast for 2013-14 was 606,555 appeals. By July 2013 it was on course to exceed that figure. It had been manifest for some while that, notwithstanding the magnanimity of SSCS judges and members in responding to requests from the Tribunal for increased availability, judicial numbers needed to be substantially boosted. The long lead-in times on judicial recruitment meant that a series of exercises launched through the Judicial Appointments Commission in 2012 only began to deliver additional resources from the summer of 2013. 199 new fee-paid judges were closely followed by 257 new medical members.[3] Concurrently, HMCTS took on additional administrative staff and expanded the number of hearing centres used by SSCS from 135 to 177.

In July 2013 the Tribunal set its own record, clearing more than 50,000 appeals in a single month for the first time. The "live load" of appeals (which blunter tongues might call a backlog) peaked at 232,577. In August the monthly intake dropped by over 10,000 appeals from July's figure. By November it had fallen to 27,378, barely one-half of the level in the preceding Spring. As the following graph of Intake and Clearances shows, the intake has continued to plummet, reaching an unprecedented low of 8,775 in March 2014.

SSCS Appeals Intake and Clearances Jan 2013 - March 2014



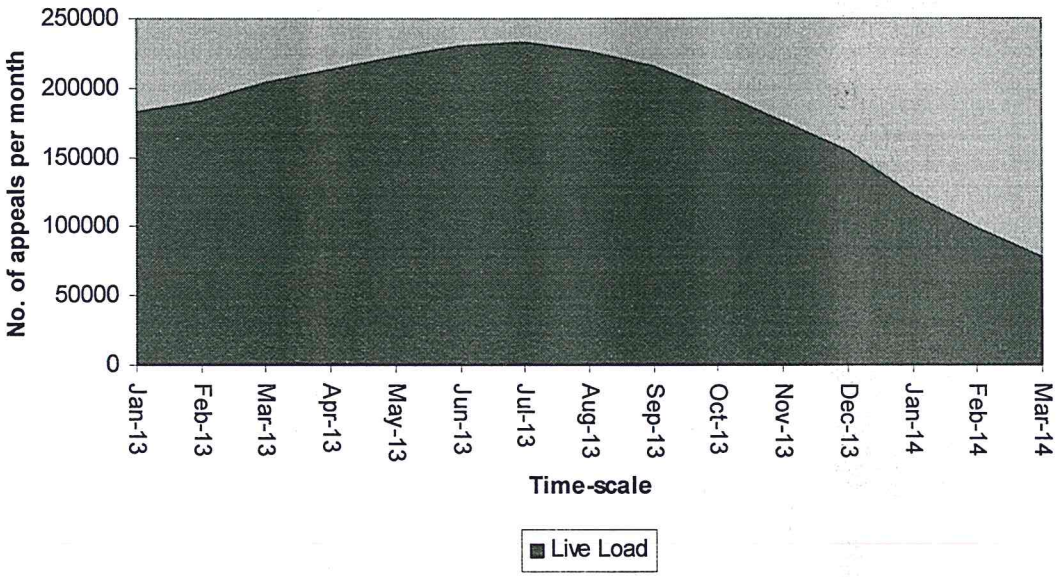
In contrast, the level of clearances held reasonably stable up to January 2014. The effects of the dramatic decline in the volume of appeals received was cushioned to some extent by the size of the live load but, by January 2014,

[3] An exercise launched in March 2013 in anticipation of the arrival of Personal Independence Payment appeals has resulted in the recent appointment of 151 new disability qualified members.

the accelerating rate of depletion of that stock in hand meant that sittings began to be cancelled for want of listable cases.

As the second graph depicts, the live load has been steadily eroded over the past eight months. By 31.3.14, it had reduced to 78,347 appeals, equivalent to some six weeks of work at the Tribunal's full capacity. It should, however, be noted that the figure for the live load is nominal. Like the assets on the balance sheet of a troubled bank, the figures appear impressive but tend to evaporate when put to the test. The GAPS record contains a number of appeals which are, in fact, dormant or duplicate entries or effectively stayed. Moreover, the distribution of the live load is not spread evenly across the country. There are some venues which have already reached the point of waiting on new appeals to arrive, while others still carry a substantial backlog.

SSCS 'Live Load' Jan 2013 - March 2014



The out-turn for 2013-14 was 402,026 appeals received, some 34% below DWP's forecast. Clearances reached 545,503.

In terms of the recent fall-off of tribunal work, this stark turn-around from feast to famine may well be seen as a poor reward for the exceptional industry and conscientiousness of judges and members in tackling an enormous accumulation of cases. I am very grateful to everyone for an achievement that was, I am confident, secured without any sacrifice of the quality of judicial decision-making. In this article, I will try to analyse the collapse of the appeals intake and gauge how long it might last.

The causes of the fall in intake

There are multiple factors, some unique to a single benefit, others more pervasive.

(a) WCA

In the month of March 2013 the Tribunal had received 37,766 WCA appeals. In March 2014 the corresponding figure was a mere 741.

The role played by Atos Healthcare in the process for determining whether a claimant has limited capability for work or limited capability for work-related activity has not been free from controversy.[4] The Government's plan to migrate 1.5 million recipients of IB to ESA over a three year period from October 2010 may have been excessively challenging. (Migrated cases were, of course, additional to the steady flow of new ESA claims.) The process was the subject of repeated changes. The recruitment of health care professionals to carry out the assessment proved a continual constraint, despite the widening categories of professions deemed suitable by the Secretary of State.

On 22.7.13 DWP acknowledged that cracks had begun to show. In a Written Ministerial Statement Lord Freud, the Minister for Welfare Reform, announced:

> "A recent DWP audit identified a reduction in the quality of written reports which are produced by Atos following assessments and are then used by the Department to form part of the decision making process on benefit entitlement. This is contractually unacceptable. The Department is considering all its options under the contract and will apply all appropriate contractual remedies to ensure quality and value."

The Minister said that Atos has been instructed by the Department to enact immediately "a quality improvement plan". All Atos healthcare professionals were to be retrained and re-evaluated, with those not meeting the required standard being subject to 100% audit.

The Minister also signalled that in the longer term, the Department would be seeking "increased provider capacity".

Initially, DWP advised HMCTS that the measures required of Atos would actually lead to an increase in the level of appeals, anticipating that a number of previous assessments would have to be reworked and that there would be an increased level of challenge by unsuccessful claimants. However, it was difficult to reconcile that stance with the reported immediate impact of the fact that the volume of assessments completed by Atos had dropped from 200,000 per month to 100,000.

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[4] See, for example, the annual "Independent Reviews of the Work Capability Assessment" produced by Professor Malcolm Harrington from 2010-2012 and subsequently by Dr Paul Litchfield (HMSO); Reports of the Select Committee on Work and Pensions and the Public Accounts Committee (most recently the PAC Report, "DWP: Contract management of medical services" (HC 744)); and for a judicial perspective, **MM & DM v SSWP** [2013] 259 (AAC). Perhaps one of the roots of the difficulties is that, whereas the ESA Regulations 2008 say that a claimant may be called for a "medical examination" to determine limited capability for work (reg. 23), the Secretary of State has always maintained that Atos carries out not a medical examination but a "functional assessment".

As the full import of Atos' difficulties was established,[5] HMCTS was informed that the effect on WCA appeals was likely to be a reduction of 9,500 per month from September to December 2013, while the remedial measures were put in place. Thereafter, HMCTS was advised to expect a "bow-wave" of increased appeals, as Atos not only regained its former rate of throughput but also began to eat into the backlog that would have accumulated while it was in recovery.

The advice from DWP was unduly sanguine. The disclosure on 23 November that the Secretary of State was considering recasting ESA by abolishing the work-related activity group was perceived as a realisation that radical changes were necessary if the WCA was to be made manageable.

By the start of 2014 there was no sign of the promised recovery.

In February the extent of the Department's disenchantment with Atos began to leak out. There was a clear drive to look for, not additional, but alternative assessment providers. For its part, Atos let it be known that it, too, was seeking a way out of its contract. DWP had quietly stopped making "repeat referrals" to Atos in January.[6] Anecdotally, it appeared that an increasing proportion of ESA claimants, both on new claims and IB-ESA reassessments, were simply being assigned to the support group without a face to face assessment.

On 27 March Mike Penning, the newly appointed Minister for the Disabled,[7] announced that the Department would be terminating its contract with Atos for the supply of health assessments for WCA purposes. Atos is expected to wind up its services under the contract by February 2015.

The virtual collapse of the WCA process is the biggest single factor in the decline of the appeals intake.

(b) Personal independence payment

Personal independence payment ("PIP") was introduced by the Welfare Reform Act 2012 as a replacement benefit for disability living allowance ("DLA").[8] A key part of the Government's programme to replace DLA was the migration of 1.75 million recipients of DLA to PIP over a three year period commencing in October 2013. On 13.12.12 the Under-Secretary of State for

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[5] DWP had called in Pricewaterhouse Coopers to advise on the measures required to strengthen the quality assurance process.

[6] *i.e.*, referrals where a claimant had been accepted as having limited capability for work but would be routinely required to return periodically for further assessments. In 2012 the Tribunal began to add a recommendation on its decision notices in allowed WCA appeals that the claimant should not be reassessed within a specified period. Although this initiative was introduced against DWP's wishes, there is evidence that it has gained acceptance. In his 2013 report, Dr Litchfield stated, "Any Tribunal recommendations on review periods should be applied as the default and should only be altered (by DWP) where there is strong justification" (at p.43). Dr Litchfield had observed some tribunal hearings in July 2013, shortly after his appointment.

[7] On 23 January, shortly after his appointment, Mike Penning had observed some WCA appeals at Fox Court.

[8] Though not for attendance allowance, which will continue to provide disability related benefit for those over pensionable age.

Work and Pensions announced in Parliament that the starting date of the migration programme would be put back to October 2015 to allow the Department to "undertake a significantly slower reassessment timetable to ensure that we get this right".[9]

The announcement was made in the same week that the Judicial Appointments Commission had planned to launch a major exercise to recruit 314 disability qualified members to help meet the influx of PIP migration appeals expected to start arriving towards the end of 2013. The exercise which had been planned some six months earlier, in reliance on the Government's initial time-table, was postponed and redesigned. The modified recruitment plan agreed by the Tribunal with the Commission was to proceed to recruit a first tranche of 150 new members in order to boost the judicial resources required to deal with the "natural reassessment" PIP appeals expected from early 2014, with a second tranche of recruitment provisionally booked for 2015 in anticipation of the migration appeals now expected to begin arriving in early 2016.[10]

In keeping with the degree of caution that has recently characterised the introduction of new benefits, PIP was gradually phased in. From 8.4.13 a few "Pathfinder areas" were designated in the North West and the North East of England. In those areas, no fresh claims to DLA were permitted: the claimant had to apply for PIP instead. From 10.6.13 the bar on fresh claims to DLA was extended nationally.

From 28.10.13 natural reassessment was introduced across Wales and the Midlands and East Anglian regions of England.[11] A claimant in that area with an existing award of DLA which was coming up for review found that the review would be carried out under PIP rules, not DLA.

On 13.1.14 natural reassessment was extended to some parts of Scotland. Five English towns[12] were added on 3.2.14. It had been expected that natural reassessment would be rolled out nationally from 28.2.14 but HMCTS has been advised by DWP that "no firm decisions" have been taken on when natural reassessment might be extended.

Problems in the delivery of PIP had begun to appear as early as August 2013. In a nutshell, the medical examination/ functional assessment, which in PIP is called "a consultation",[13] proved to take twice as long as the suppliers had

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[9] Hansard 13.12.12: Col. 464.

[10] DWP distinguishes between "natural reassessment" and "managed reassessment". The former refers to DLA awards which "naturally" come up for review due to the expiry of a fixed term award or a change of circumstances (including the claimant reaching the age of 16) or where the claimant asks to transfer to PIP. "Managed reassessment" refers to the obligatory review of existing DLA awards under the migration programme.

[11] Drawing on its experience of ESA, the Government was keen not to rely upon a single supplier of health assessments. It therefore invited tenders for three separate contracts for PIP assessments, each for a geographical zone. As it turned out, Capita was awarded the contract for the central zone (Wales, Midlands, East Anglia), while Atos picked up the contracts for the northern zone (Scotland and Northern England) and the southern zone (the South of England).

[12] Carlisle, Lancaster, Darlington, Harrogate and York.

[13] Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377), reg. 9.

calculated when submitting their tenders.[14] To give DWP due credit, its prediction of the volume of new claims to PIP was reasonably accurate. Similarly, its assumptions on the proportion of claims that were unsuccessful (a key influence on the volume of appeals) were reasonable.[15] Atos acknowledged that it had recruited only half of the resources it turned out to need.[16] Capita, which had intended to carry out most of its consultations by home visit, also found that it had significantly under-estimated the amount of work required.

The National Audit Office ("NAO") examined the operational performance of DWP in the first six months of delivering PIP.[17] It reported:

> "By the end of August 2013 the Department realised that significant backlogs had developed and continued to grow. By 25 October, the Department had decided 16,000 claims, 16 per cent of the number it expected. Over 92,000 claims were outstanding with assessment providers, nearly three times the level the Department originally expected.... Contractually, assessment providers should complete 97 per cent of assessments within 30 days. By the end of October, Atos and Capita had completed 55 per cent and 67 per cent (respectively) of assessments within the required timeframe."[18]

NAO found delay at every stage of the process for claiming PIP and questioned the Department's decisions to roll out new claims nationally in June 2013 and introduce natural reassessment from October 2013, before it had fully appreciated, let alone begun to address, the problems being encountered in carrying out the assessment process.

The delays by DWP both in rolling out the programme of natural reassessment and in reaching decisions on the fresh claims it had actually received fed through to the appeals stage. The Departmental forecasts had assumed that the first appeals would begin to arrive at HMCTS in small numbers around three months after the introduction of PIP and thereafter build up rapidly. About 1,000 appeals were predicted to arrive by October 2013. In fact, three had arrived by then.[19]

As late as June 2013, DWP was forecasting that HMCTS would receive over 40,000 PIP appeals by the end of March 2014. The actual PIP receipts by the end of March were just over 1,000.

The shortfall of PIP appeals is the second largest factor in the low intake.

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[14] See the Oral Evidence to the Public Accounts Committee, HC 1116, 20.3.14.

[15] DWP policy advisers had assumed that 29% of DLA claimants would be better off on PIP, 16% would see no change and 55% would receive a lower amount of benefit or be excluded entirely. The early results of PIP claims showed a high level of awards but this was distorted by DWP fast-tracking "special rules" claims (*i.e.* by terminally ill claimants), which are generally successful. The proportion of new PIP claims resulting in an award has settled at around 40%.

[16] See Oral evidence to PAC, op cit.

[17] NAO "Personal Independence Payment: early progress", HC 1070, 27.2.14.

[18] Ibid. para. 2.5

[19] The trickle of PIP appeals meant that it was not until 7.1.14 that the first PIP tribunal session could be held.

(c) DLA

The levels of PIP appeals and DLA appeals might be expected to correlate inversely.

In 2012-13, the last full year before the introduction of PIP, the number of DLA appeals received was 74,506. The Department's initial forecast for 2013-14 was that the volume of DLA appeals would reduce to around 48,000, as PIP was phased in. Its forecast for an intake of 29,200 DLA appeals in 2014-15 assumed that, by then, few fresh awards of DLA would be made and most supersessions would be dealt with under PIP rules.[20]

The actual volume of DLA appeals received in the first half of 2013-14 was about 33,000. That was consistent with the slow start to PIP from April 2013. In the second half of 2013-14 just under 17,000 DLA appeals were registered. Although the decline of DLA appeals had been expected to accelerate during the course of the year, as DLA was increasingly displaced by PIP, the rate of decline towards the end of the year was dramatic. By way of illustration, the number of DLA appeals received in the month of March 2014 dropped by 80%, compared to the number in March 2013 (1,202 cf. 5,568).

The scale of the reduction in DLA appeals over recent months is difficult to explain, given that natural reassessment under PIP rules has only been extended to 30% of the country instead of nationally, and given that deciding DLA claims is not dependant on Atos (or Capita) carrying out an assessment. It becomes even more curious in the light of the most recent forecast from DWP (April 2014), which has revised the level of DLA appeals expected in 2014-15 upwards - from 29,200 to 33,150.

One possible explanation is this. The Secretary of State presciently reserved a power, where a fixed-term award of DLA is expiring, to extend the period of the award by such further period as he considers appropriate.[21] The power is exercisable regardless of whether the claimant has claimed PIP. There is anecdotal evidence from welfare rights advisers that claimants whose DLA award is running out have simply received an extension. DWP has not disclosed the extent to which this may be happening.

It is, of course, possible that there is a (smallish) backlog of DLA appeals somewhere in the system, perhaps awaiting "mandatory reconsideration" and their release would account for the Department revising its forecast for 2014-15 upwards. If so, that information is not being shared with HMCTS.

So, while a decline in the volume of DLA appeals in 2013-14 had been anticipated, the rapid (and unaccounted for) tailing off towards the end of the year has been a contributory factor in the overall drop in intake.

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[20] Even when PIP is fully operational, there will still be a number of DLA appeals arriving, because children under 16 will still be eligible to claim DLA, not PIP.

[21] Personal Independence Payment (Transitional Provisions) Regulations 2013 (SI 2013/387), reg.19.