

(d) Jobseeker's allowance

SSCS uses the "01 ticket" label to describe a miscellany of appeals in which the composition of the tribunal is a judge sitting alone. The largest single category of cases within this grouping concerns jobseeker's allowance ("JSA"). In 2012-13 HMCTS received 112,853 01 appeals, of which 51,500 were JSA.²²

The volume of JSA appeals was expected to rise in 2013-14. The principal drivers behind the forecast increase were considered by DWP to be "increased conditionality", whereby claimants were required to undertake a higher level of job-search activities as a condition of receiving benefit, and a new sanctions regime introduced towards the end of 2012 to penalize those who failed to meet the activity requirements.

The extent (and duration) of any change in the volume of JSA appeals are notoriously difficult to gauge, since much depends upon unpredictable behavioural factors. How energetic would jobcentres be in directing claimants to undertake job search activity or engage with Work Programme agencies to increase their chances in the labour market? How resistant would claimants be to those measures? How efficient would jobcentres be in referring recalcitrant claimants to Departmental decision-makers to impose benefit penalties? Would claimants challenge adverse decisions, particularly those imposing lesser sanctions? The scale of "labour market" decisions²³ taken by DWP is vast. In 2013-14 there were just under two million such decisions. The margin of error in forecasting is correspondingly wide.²⁴

The out-turn for 2013-14 was the receipt of 134,327 appeals in the 01 category, of which 69,520 were JSA. However, this overall increase masks a falling away of the intake in the second part of the year similar to, though less dramatic than, the decline in DLA appeals. From a monthly peak of 15,263 JSA appeals received in October 2013, the intake dropped to 7,121 by March 2014.

One cause of the decline may well lie in the fact that the number of people in receipt of JSA fell by over 20% during the course of 2013-14. Some would have come off benefit through finding employment, as the economy picked up; others may simply have disappeared from the more exacting JSA regime. A second cause may be a further consequence of the constriction of WCAs, since Atos would normally have been finding a sizeable proportion of claimants in receipt of IB or ESA fit for work and so diverted onto JSA.

²² Of the rest, 12,630 were income support, 9,740 housing benefit/council tax benefit, 6,670 social fund, 4,340 tax credits, 3,700 industrial injuries, 3,460 child support, 2,650 pension credits. Other benefits generated fewer than 1,000 appeals each.

²³ *i.e.*, decisions relating to actively seeking employment, availability for work, failure to attend a job interview or training, leaving a job without just cause or being dismissed for misconduct, failing to comply with a jobseeker's direction, refusing employment.

²⁴ For example, in weighing up the impact of the new Help to Work package, DWP estimated that the resulting increase in referrals from jobcentres for labour market decisions would be somewhere in the range of 437,000 to 700,000.

(e) Universal credit

The Welfare Reform Act 2012 introduced not only PIP but also universal credit (“UC”).

UC is probably the most ambitious element in the Government’s programme of welfare reform. It aims to replace six existing income-related benefits and tax credits for working-age households²⁵ by drawing them together into a single, integrated benefit underpinned by a new system of administration heavily based on innovative IT processes.

The target is to move 12 million claimants onto UC by 2017. DWP’s position on the impact of UC is that, being a straightforward replacement of existing benefits, it will be neutral in terms of appeals generated. It is, however, inevitable that the process of conversion (if only by reason of the legal complexity of the new regime and the risk of administrative error) will leave some claimants worse off and likely to appeal.

Like PIP, the Government’s aim has been to implement UC “in a slow, safe and controlled way”.²⁶ The pace of implementation has proved quite sedate. A Pathfinder was launched in April 2013 in parts of Greater Manchester, dealing with new claims but confined to a tightly defined segment of claimants, whose personal characteristics were likely to present no untoward difficulties in determining their entitlement.²⁷

The original time-table envisaged UC being rolled out nationally in October 2013 for all new claims across the board. Instead, it was extended in that month to six more jobcentre areas and for the same narrow band of claimants. In February 2014 two more towns were added, with a third planned to enrol in April.

The unhappy development of UC has been recorded in reports from the National Audit Office and the Public Accounts Committee.²⁸ The Secretary of State has not moved from the original planned end-date of 2017 for the completion of the implementation.

In its April 2013 forecast DWP estimated that HMCTS would receive 1,355 UC appeals in 2013-14 and 77,926 UC appeals in 2014-15. By 31.3.14, HMCTS had actually received three.

In later forecast reports, “Universal Credit appeals” had disappeared as an entry.

²⁵ Income-related ESA, income-based JSA, income support, housing benefit, working tax credit, child tax credit.

²⁶ Lord Freud, Minister for Welfare Reform, in a [DWP Press Release](#) 24.2.14.

²⁷ Eligible claimants had, for example, to be single, without dependants, fit for work, in rented accommodation, not in self-employment.

²⁸ NAO “[Universal Credit: early progress](#)” HC 621, 5.9.13. House of Commons Public Accounts Committee, 30th Report “[Universal Credit](#)”, 7.11.13.

(f) Mandatory reconsideration and direct lodgement

One innovation brought in by the 2012 Act affected not benefit eligibility but the appeals process. The former position was that claimants wishing to challenge Departmental decisions on their entitlement to benefit had a right of appeal to the Tribunal, which they could exercise by sending a notice of appeal to DWP.²⁹ The Department would then, as a matter of course on receipt of the appeal, reconsider its decision. If the Department revised the decision in the claimant's favour, the appeal would lapse by operation of law. If, on the other hand, the Department declined to change its decision, it would forward the appeal to HMCTS, together with a submission setting out the Department's case.

The 2012 Act changed the appeals process,³⁰ so that the right of appeal to the Tribunal does not arise, unless and until the Secretary of State has considered whether to revise the decision. Accordingly, a "mandatory reconsideration" stage is introduced. As before, it is open to the Department to revise or maintain its decision. Unlike before, if it elects to revise the decision in the claimant's favour, there is no appeal yet in existence which might lapse. Where the Department does not revise its decision in the claimant's favour, it will issue a mandatory reconsideration notice, which, in effect, acts as a certificate authorising the claimant to appeal, should the claimant persist. The claimant may then lodge a notice of appeal directly with HMCTS ("direct lodgement"). On receipt of the appeal, HMCTS will copy the notice to DWP and request the Department to file a response.

The rationale for this legislative change is confused. At one level it brings SSCS into line with the normal practice in courts and tribunals that a party initiates proceedings by lodging a claim with the judicial body rather than with his/her opponent. But in practical terms, there is no change from the previous arrangement whereby the Department is afforded the opportunity to reconsider and, where appropriate, revise its decision before the appeal reaches the Tribunal.

Introducing mandatory reconsideration would only be likely to have a material impact on appeals, if

- being "mandatory", the Department took reconsideration more seriously and applied the more rigorous test of whether its decision could withstand scrutiny by the Tribunal;³¹
- the additional hurdle placed upon claimants of having to lodge a formal request for a mandatory reconsideration and then, if unsuccessful, having to lodge a notice of appeal, resulted in a smaller proportion of claimants reaching the appeal stage.

²⁹ Or to HMRC, where the decision challenged related to tax credits, or to the local authority, where the decision related to housing benefit or council tax benefit.

³⁰ By s.102 and the Universal Credit etc. (Decisions and Appeals) Regulations 2013 (SI 2013/376).

³¹ So often has the Tribunal seen in the appeal papers words to the effect, "No fresh evidence. Reconsideration refused."

DWP thought that the introduction of mandatory reconsideration would have a negligible effect on the volume of appeals. HMCTS estimated that 10% of prospective appellants might drop out between receiving an adverse mandatory reconsideration decision and deciding to appeal.

Mandatory reconsideration was phased in. It applied to PIP and UC decisions from April 2013. For decisions on other DWP benefits, it applied to decisions taken on or after 28.10.13.

The slow start to PIP and UC and the later commencement date for other benefits have meant that it is only just becoming possible to try to gauge the impact of mandatory reconsideration and direct lodgement on the volume of appeals.

By 21.2.14 DWP had received 82,798 requests for mandatory reconsideration and determined 70% of them. (There is no statutory time-limit for completing a mandatory reconsideration. DWP says that it is taking 13 days on average from receipt of request to determination.)

Reconsideration has resulted in the following proportions of decisions being revised in the claimants' favour:

PIP decisions	13.9%
UC	71.1%
Child Support	35.5%
Pensions	30.2%
ESA	23.0%
DLA	55.9%
JSA	30.1%

Unfortunately, it is difficult to assess whether this represents a higher rate of revision than under the previous "voluntary reconsideration" process, since there has been little published, systematic data on revision rates under the previous process to serve as a basis for comparison. What is clear is that DWP has invested considerable effort in engaging with claimants both to present a more reasoned justification of departmental decisions and to demonstrate a greater receptivity to further evidence.³²

The major process change brought about by mandatory reconsideration and direct lodgement overlapped with the decline in appeals but did not trigger it. The decline began in August 2013. Apart from PIP and UC appeals, which have been few in any event, the large volume appeals (ESA, DLA, JSA) did not go over to mandatory reconsideration and direct lodgement until much later. The new system only applied to departmental decisions taken on or after 28.10.13, which meant that appeals on those decisions would not have been expected to start arriving at HMCTS before January 2014 (whether

³² This is illustrated by the "Decision Assurance" telephone call that DWP staff are required to make to claimants where there is an adverse decision, and the detailed explanation that is typically found in PIP assessments and mandatory reconsideration notices.

lodged with DWP under the old system or lodged with the Tribunal after mandatory reconsideration under the new).

Whether the additional hurdle that claimants now face in appealing has led to a proportion dropping out wearily after mandatory reconsideration can only be ascertained, with some confidence, through research into claimant behaviour. I have been pressing HMCTS to commission such an inquiry.

It is likely that this process change has played a contributory role in the accelerated decline in the volume of appeals since January 2014.

(g) Other factors

A number of other factors have contributed to the reduction in appeals.

- The loss of jurisdiction over council tax benefit³³ appeals, which passed from SSCS to the Valuation Tribunal in England (and to equivalent bodies in Scotland and in Wales) from April 2013.
- Changes in the scope of benefits, e.g., from May 2012 payment of contribution-based ESA has been limited to 365 days only.
- The Legal Aid, Sentencing and Punishment of Offenders Act 2012 removed funding under the legal aid scheme for advice and assistance on welfare rights matters. This loss of funding, compounded by continuing cut-backs in local authority spending on advice services, has severely reduced the help and support available to claimants to pursue their legal rights in challenging benefit decisions

The latest forecast

HMCTS does not produce its own forecasts of SSCS appeals. It is entirely dependent upon data supplied by DWP. The following Table shows the latest forecast received from DWP (figures from the April 2014 forecast shown in bold), set against some of the earlier forecasts to illustrate the volatility of the predictions.

³³ Now council tax reduction

Date of Forecast

	<u>At June 12</u>	<u>At April 13</u>	<u>At Dec 13</u>	<u>At April 14</u>
2014-15	680,000	604,000	414,000	393,000
2015-16	807,000	616,000	469,000	456,000
2016-17	646,000	770,000	649,000	622,000
2017-18	n/a	738,000	587,000	553,000
2018-19	n/a	n/a	369,000	340,000

The latest forecast for 2014-15 estimates total receipts of 393,000, which represents just over 2% fewer appeals than in the preceding year. Given that the receipts in April 2014, the first month of the new accounting year, are likely to be a record low of around 7,000 appeals, the latest forecast must assume a substantial recovery later on in the year – perhaps a mirror image of 2013-14.

If not tomorrow.....

The latest forecast is buoyant. It suggests a temporary dip. A parallel may be drawn with the last time that Atos was in recovery. In 2011-12 the intake fell by 12% from the preceding year but recovered strongly in 2012-13, when it rose by 27%. If the current low intake is to be no more than a double-dip recession, then the causes of the decline should not be structural in origin, but rather transitory constrictions on the supply. It would be necessary to believe that, like Dark Matter, there are an awful lot of prospective appeals out there somewhere. Like Dark Matter, they are invisible to the eye. They make up the mass of the dispute universe. Understanding them will help us to understand the reason for our own existence.

It is not credible that the present or any succeeding Government could afford to abandon, or even to scale back, the programme of welfare reform. The NAO reported that, at 25.10.13, there were 780,000 ESA claims awaiting assessment.³⁴ The IB-ESA migration, originally due to be completed in October 2013, then by April 2014, still has over 400,000 claimants to be reviewed. PIP was expected to deliver £780 million in savings between April 2013 and March 2015, and annual savings of £3 billion from 2018-19.³⁵

The imposition of a cap on welfare expenditure by the Chancellor of the Exchequer in the budget statement on 26.3.14 is a firm reminder to DWP that

³⁴ Op cit HC 1070 at para. 3.33.

³⁵ However, UC, which was heralded by DWP (see Press Release of 19.2.14) as delivering £35 billion of savings, might prove just too impracticable to implement in full.

the savings to which it is committed under welfare reform have to be delivered.³⁶

The Department's immediate and urgent objective is to find a health assessment provider to replace Atos in undertaking ESA assessments. On 27.3.14 it was announced that Atos would be leaving its contract early. On 2.4.14 DWP invited tenders on its website from new suppliers.³⁷ The aim is that a contract will be awarded between September 2014 and the end of 2014, followed by an "implementation period" of up to six months, then an operational period of three years, with an option to renew. The intention appears to be that the successful bidder will take on existing Atos personnel and estate as a going concern. Realistically, it is difficult to see how the recent level of throughput of ESA assessments by Atos could substantially increase during the tendering and handover period, which is unlikely to be completed before the end of 2014, even with willing bidders.

Although Atos has not withdrawn from its contracts to carry out assessments for the purposes of PIP, both Atos and Capita have experienced mounting backlogs. The volume of PIP claims is up to the forecast level but they are taking longer to reach a decision and, potentially, an appeal. Administrative measures are being explored by DWP to streamline the process. One significant step is for DWP decision-makers to reclaim the initial stage of dealing with claims, so that a greater proportion can be decided on the papers without an assessment. At present, all claims have been referred by DWP immediately on receipt to Atos or Capita to decide whether an assessment is appropriate. A second measure has been to scale back on the benefit-matching checks, which had originally been assumed to affect only 20% of PIP claims but which had, in practice, affected 83%.

DWP agreed a recovery plan with Capita, which was intended to tackle its backlogs by May 2014.³⁸ Any time-line agreed with Atos has not been disclosed.

It seems to me that the intake of appeals in 2014-15 will fall substantially short of DWP's latest forecast. I cannot see a significant increase in WCA appeals before the end of 2014. If a new supplier is found, presumably at a premium, the company will have to address the chronic shortage of health care professionals which has dogged Atos and which is now exacerbated by the need for additional resources to deal concurrently with PIP. The strategy adopted by Atos in tendering for PIP of sub-contracting with NHS trusts would have to be taken to a new level.

The prospect of an increase in PIP appeals is, perhaps, better, due to the acknowledged need to streamline the assessment process. That might address the backlog but it is unlikely that the scope of natural reassessment

³⁶ See the evidence of the DWP Permanent Secretary to the Public Accounts Committee, op cit. at Qs. 200-205

³⁷ For the idly curious or budding entrepreneurs, visit www.gov.uk/govern/organisations/departments-for-work-pensions/about/procurement and click on Contracts Finder.

³⁸ NAO, HC 1070 at para. 2.12.

will be widened to other areas of the country until capacity has been demonstrably improved.

For SSCS judges and members, the prognosis is quite gloomy in the short-term. The present minimal level of sessions is, in my opinion, likely to persist for most of 2014, with perhaps some marginal increase in PIP towards the end of the year. In the medium term, say from early 2015, a recovery may be expected to be underway with a major backlog of claims to fuel a bow-wave through to the arrival of PIP managed reassessment appeals from early 2016. I can only express the hope that you will not lose interest in the Tribunal in the meanwhile.

A Heartfelt Thank You

The editors of the JIB would like to express their special thanks to Robert Martin for all the incisive, imaginative and informative articles (always of course with a touch of irony thrown in) that he has written for the JIB over the years, and for the support for the JIB, and indeed for judicial information resources generally, that he has always shown. We wish him a very long and contented retirement.

Below Knee Amputation - assessing the loss of function in the benefit context

By Dr Sarah Chin, Medically Qualified Member and Regional Medical Appraiser, Central Region¹ and David Turrell, District Tribunal Judge, Eastern Region²

Background

In the latest U.K. hospital inpatient data, which is for 2009/10, it showed there were 5,061 finished consultant episodes for leg amputations. This rate has remained relatively constant over the last decades. The average age for lower limb amputations in the UK is approximately 70 years - 60% are male, 40% female. Vascular disease accounts for 90%, trauma 5%, neoplasm 1%,

¹ In 1972, a bomb exploded at the Abercorn restaurant in Belfast. 14 limbs were amputated that day. In 1991, a 20lb Semtex bomb exploded in the service tunnel of Musgrave Park Hospital in Belfast. The hospital is the site of the Regional Limb Fitting Service. I trained and worked in Belfast during the Troubles against a background of blast and bullet injuries of which 40% of the 30,000 injuries over 20 years involved limbs. The infamous knee capping form of "community summary justice" led to amputation in 10% of the cases.

² David's wife is a high end lower limb amputee and in consequence he has developed a specific interest in this area of law.