**Finding a test case**

**to challenge inappropriate work-related activity**

Tom Royston

Garden Court North

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troyston@gcnchambers.co.uk

1. There appears to be a serious and widespread problem with inappropriate prescription of work-related activity and work-focused interviews for ESA claimants. In particular, ESA claimants in the work related activity group are being directed to undertake activities which a separate decisionmaker has already decided that they cannot do.
2. The problem seems to be that information already held by DWP, for example the ESA85 medical report which is produced in the course of most work capability assessments, is systematically ignored when deciding upon work related activity.
3. This arguably demonstrates public law error: a failure to have regard to material considerations, and a failure to make reasonable adjustments for disability in the performance of a public function.
4. Individual decisions could be challenged in the FTT, or through private law discrimination claims in the county court. But the problem does not really seem to be error in individual decisions. Rather, there appears to be a policy approach which excludes, in decisions made about work related activity, the use of information already held by DWP about claimants’ disabilities. The appropriate legal route to challenge that may well be through judicial review.
5. The **perfect** test case would, I think, contain something like the following features. However, it would be useful to hear of **any** case which contains the first **two** of the features:
	1. **The ESA claimant [‘C’] is (or was) in the WRAG and has been required by the Secretary of State for Work and Pensions [‘SSWP’] to engage in work related activity[[1]](#footnote-1) and/or work focused interviews.[[2]](#footnote-2)**
	2. **Engagement in that work related activity or the work focused interviews would require C to do things which a decision maker has, for defensible reasons, found C unable to do, in that:**
		1. **points were awarded for those activities in the most recent work capability assessment [‘WCA’]; and**
		2. **a reasonable evidential basis for the award of those points is apparent from the ESA85 or other medical evidence held by SSWP.**
	3. **C attempted to engage in the work related activity or work focused interviews but could not (or suffered significant difficulty in doing so) because of her/his disability.**
	4. **C or her/his representative contacted the work related activity provider or DWP to express concern about the nature of the work related activity or work focused interviews.**
	5. **C has been required by SSWP to show good cause for failing to engage in work related activity and/or work focused interviews and C responded.**
	6. **C has been sanctioned for failing to engage in the work related activity.**
	7. **The decision to prescribe work related activity has been made within the last two months.**
	8. **There is no evidence that C’s health has improved or could reasonably be expected to have improved since the most recent WCA.**
1. Reg 3(1) Employment and Support Allowance (Work- Related Activity) Regulations 2011. [↑](#footnote-ref-1)
2. Reg 54 Employment and Support Allowance Regulations 2008. [↑](#footnote-ref-2)