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High Court rules Work Capability Assessment arguably unlawful

The High Court has today granted permission to two disabled people to bring a claim for judicial review against the Secretary of State for Work and Pensions to challenge the operation of the Work Capability Assessment (WCA).

WCAs are face to face interviews carried out by healthcare professionals (HCPs) employed by Atos Healthcare (a private contractor), to assess disabled people's entitlement to Employment and Support Allowance (a sickness benefit that has replaced the old Incapacity Benefit). Each existing recipient of Incapacity Benefit is now being assessed for eligibility for ESA, at the rate of some 11,000 people per week. WCAs have been the subject of serious criticism by all relevant stakeholders in civil society including doctors and NGOs working on behalf of disabled people.

The present case concerns some of the problems with the system as experienced by people with mental health problems. Although medically trained, Atos HCPs typically have very limited knowledge of mental health. The interviews are often hurried, and rely on applicants to explain the limitations on their ability to work.

This is a serious problem for people with mental health conditions who lack insight into their conditions, whose conditions fluctuate in seriousness, or who cannot easily talk about their disability. Such people are placed at a substantial disadvantage in navigating the system. Even if they appreciate the need to get expert medical evidence for themselves, they are often less able to navigate the system successfully and to obtain the medical report that they need. The Equality Act 2010 requires the DWP to make reasonable adjustments to avoid such disadvantage.

The reasonable adjustment to the process that the claimants seek is for medical evidence to be sought by the Atos HCP and the DWP at the very outset of the claim. This would ensure that very sick people for whom having to go through a WCA would be extremely distressing are exempted from the process, and for those that do attend a WCA, the assessment of fitness to work takes place in the correct medical context, so that dangers associated with forcing people back to work are correctly identified.

At present, the DWP do not routinely ask for expert medical report from an applicant's community-based doctor. The judge has held that it is arguable that this failure is a breach of the duty to make reasonable adjustments, and is therefore unlawful.

In granting permission to apply for judicial review, the judge stated:

> "I consider that it is reasonably arguable that the reasonable adjustments required by the [Equality Act 2010] include the early obtaining of independent medical evidence where the documents submitted with the claim show that the claimant suffers from mental health problems and that this has not been done, or at least not done on a sufficiently widespread basis".

The claimants, known as MM and DM, were granted anonymity by the court. Their solicitor, Ravi Low-Beer of the Public Law Project said:

> "The present system results in many thousands of unnecessary appeals at great public expense, with a high success rate. What is not counted is the cost in human misery for those people who should never have had to go through the appeals process in the first place. This could be avoided if doctors were involved in the assessments at the outset. The Government's policy of by-passing doctors is inefficient, unfair, and inhumane. We gain heart from the court's finding that as a matter of law, it is arguable that something has to change."

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Public Law Project (PLP)

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