# DMG Chapter 06: Making appeals and staying

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# Introduction 06000 - 06039

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## Introduction

**Note:** From 28.10.13, a new appeals system was introduced changing the way appeals are made and lodged. However, the appeals system pre 28.10.13 is still relevant where a claimant appeals a decision notified before 28.10.13. The guidance in this chapter has been amended to reflect the new system and it is made clear in the text when the DM should use pre or post 28.10.13 guidance.

## Appeals lodged on decisions notified before 28.10.13

06000 For appeals lodged on decisions notified before 28.10.13, claimants can appeal to a FtT where they are not satisfied with a decision. All decisions appealed, including late appeals, should be reconsidered by the DM, so that only unresolved disputes go to appeal. This is also the point at which the DM could identify cases that are out of the FtT's jurisdiction (see DMG 06150) or that have no reasonable prospect of success (see DMG 06233) and apply to the FtT for strike out. For guidance on reconsidering decisions see DMG Chapter 03.

06001 The FtT must be confident that the DM has thoroughly looked at the decision again, and considers that it is correct. It is not simply a question of taking a more claimant-friendly line (DMs must still only revise where that is the right thing to do), but the Department has to treat, and to be seen to be treating, this aspect of decision making seriously.

06002 Where an outcome decision has been reconsidered following the receipt of an appeal, but there has been no prior application for revision, and the result of the reconsideration is no change, a decision

not to revise has **not** been made, and therefore **no** decision should be recorded. There is no need to inform the claimant; the appeal should be processed in the normal way.

06003 Although no decision has been given it is still necessary to record the result of the administrative process of reconsideration and any suitable format can be used. However, if procedural guidance prescribes a particular form or format, that is the one that should be used.

06004 However, where

**1.** an outcome decision has been reconsidered following the receipt of an appeal **and**

**2.** there has been **no** prior application for revision **and**

**3.** the reconsideration results in an advantageous or disadvantageous change,

a revised outcome decision **has** been made. The revised decision should be notified to the claimant.

06005 Where a DM revises the decision which is the subject of the appeal, the appeal lapses if the decision as revised is to the claimant's advantage[1]. For guidance on lapsing appeals see DMG 06160 - 06167.

1 SS Act 98, s 9(6); SS CS (D&A) Regs, reg 30(2)

## Appeals lodged on decisions notified on or after 28.10.13

06006 [See Memo DMG 19/20] For appeals lodged against decisions notified on or after 28.10.13, claimants can **only** appeal to a FtT where the DM has first considered an application for revision of the original decision[1] (see DMG Chapter 03: Revision). Where a claimant makes an appeal before mandatory reconsideration has been requested then the appeal should be treated as a request for a mandatory reconsideration.

1 SS Act 98, s 12(3A); SS (D&A) Regs, reg 3ZA

06007 If, following the mandatory reconsideration, the claimant wishes to pursue an appeal then they must send their notice of appeal directly to HMCTS[1]. HMCTS will then send the notice of appeal to DWP along with the mandatory reconsideration notice and any supporting documents to request that a response is prepared.

1 TP(FtT) (SEC) Rules, rule 22(2)(aa)

06008 The Secretary of State must

**1.** provide the person with the right of appeal (see DMG Chapter 01) a written notice of the decision including their appeal rights[1]**and**

**2.** tell the person with the right of appeal that where the notice in **1.** above does not include a statement of reasons, they may, within one month of the date of the notification of the decision, request that a statement of reasons is provided[2]. The statement must be provided within 14 days of the request or as soon as practicable thereafter[3].

1 SS (D&A) Regs, reg 3ZA(1); 2 reg 3ZA(3); 3 reg 3ZA(4)

06009 When making their appeal to HMCTS, the claimant must include with their notice of appeal, a copy of the notice of the result of the mandatory reconsideration issued by DWP[1]. Where the mandatory reconsideration notice has not been included, HMCTS will return the notice of appeal to the appellant and advise that the appellant either

**1.** provide the mandatory reconsideration notice **or**

**2.** contact DWP to request a mandatory reconsideration if one has not already been carried out[1].

1 TP (FtT) (SEC) Rules, rule 22(4)(a)(i)

06010 Once the DM receives the request for an appeal response from HMCTS, this is the point at which the DM should

**1.** identify cases that are out of the FtT's jurisdiction (see DMG 06150) or that have no reasonable prospect of success (see DMG 06233) and apply to the FtT for strike out **or**

**2.** revise the decision to the claimant's advantage[1] if further evidence enables them to do so and so lapse the appeal (see DMG 06161).

1 SS Act 98, s 9(6); SS (D&A) Regs, reg 30(2)

06011 DMs are reminded that, where the appeal has been sent to HMCTS, they **must** notify HMCTS if any decision under appeal is changed by revision or supersession. At the same time DMs must tell the FtT what the effect of the revision or supersession will have on their jurisdiction, for example

**1.** appeal lapsed

**2.** appeal now against unfavourable revised decision

**3.** jurisdiction limited to period/issues not covered by the supersession.

06012 An appeal to the FtT is a rehearing of the whole outcome decision. The FtT does not have to consider any issue which is not raised by the appeal. However, as the FtT exercises an inquisitorial role, it is open to them to look at the whole decision entirely afresh[1].

1 SS Act 98, s 12(8)(a)

06013 Where an issue is raised after the appeal is made, the parties to the appeal should have notice of it and a chance to deal with it.

## Changes and further claims during the period before a hearing

06014 DMs should note that the FtT may take account of evidence produced after the decision under appeal, where it provides information relevant to that decision[1]. For example, where the claimant produces a medical report showing a change of diagnosis, the FtT can consider the report.

1 R(DLA) 2/01 & 3/01

06015 Any circumstances which change after the date of the appealed decision cannot be taken into account by the FtT[1]. Any changes should be referred to the DM to consider whether supersession is appropriate.

1 SS Act 98, s 12(8)(b)

06016 The DM may supersede the decision under appeal before the appeal is heard. However, the appeal does not lapse.

06017 Where a further claim is made and has been determined, the FtT cannot consider any period after the effective date of the decision on that claim. The FtT should always be informed in a further submission where a further claim is decided before the hearing.

06018 Once the appeal is heard and the FtT has made a decision, the DM may need to revise

**1.** the decision on a further claim **or**

**2.** the superseded decision to take account of the FtT's decision[1]. See DMG Chapter 03 for further guidance.

1 SS CS (D&A) Regs, reg 3(5A)

## The rules of natural justice

06019 There is a common law requirement that tribunals should observe the rules of natural justice[1]. Natural justice is the manner in which justice is expected to be achieved. It can be described as fair play in action[2].

1 R(S) 4/82(T); 2 R(IS) 5/93

06020 Natural justice relates solely to procedural unfairness. The requirements for the rules of natural justice are

**1.** an absence of personal bias on the part of the FtT **and**

**2.** an obligation to base their decision on evidence **and**

**3.** whether or not there is an oral hearing, to consider fairly the contentions of all people entitled to be represented[1].

1 R(S) 4/82(T)

06021 The duty to ensure a fair hearing includes giving the claimant the opportunity to comment on their observations made during an oral hearing where they intend to rely on them as evidence for the decision. The FtT must not take account of observations unless they are

**1.** relevant to the issues under appeal or the time of the decision under appeal **or**

**2.** reliable as evidence of the claimant's condition[1].

1 R(DLA) 8/06

## Overriding objective

06022 The FtT rules have what is known as an overriding objective rule[1]. This contains requirements for the FtT to deal fairly and justly with a case. This means

**1.** dealing with the case in proportion to

- **1.1** its importance
- **1.2** the complexity of the issues
- **1.3** the anticipated costs
- **1.4** the resources of the parties.

**2.** avoiding formality and seeking flexibility in proceedings

**3.** ensuring all parties are able to participate fully

**4.** using any special expertise of the FtT effectively

**5.** avoiding unnecessary delay.

1 TP (FtT) (SEC) Rules, rule 2

06023 All parties to the appeal must help the FtT to further the overriding objective and must co-operate with the FtT in general[1].

1 TP (FtT) (SEC) Rules, rule 2(4)

## The Human Rights Act 1998

06024 The HR Act requires that so far as it is possible primary and subordinate legislation must be interpreted in a way which is compatible with the Convention rights[1]. The High Court, Court of Appeal and the House of Lords can make declarations of incompatibility under s 4 of the Act, but FtTs and the UT do not have such power. Where the FtT finds that it is impossible to interpret **primary** legislation as compatible it must apply that legislation as enacted. This is because incompatibility does not affect the validity or continuing effect of incompatible legislation[2]. Unlike EC law there is no doctrine of supremacy so as to give Convention law precedence over domestic law.

1 Human Rights Act 98, s 3; 2 s 4(6)(a)

06025 Regulations which are not protected by primary legislation, because their incompatibility does not arise from the primary legislation that they are made under, may be found to be incompatible by the FtT. These provisions would be outside the power conferred by the primary legislation under which they are made and therefore ultra vires. By making such regulations the relevant Minister would have acted unlawfully[1].

1 Human Rights Act 98, s 6

06026 DMs should ensure that, where the claimant raises a substantial human rights issue in his appeal, HMCTS is made aware of this issue at the outset. If such an issue is raised for the first time at an oral hearing presenting officers should request an adjournment for consideration of a further response.

06027 As with other grounds of appeal it is not sufficient for a claimant to make a general statement that the decision in question breaches the Convention on the Human Rights Act. The claimant should identify

**1.** the asserted breach of the convention

**2.** the Article which is said to be breached

**3.** the remedy sought in respect of the breach

**4.** the legal principles and authorities relied upon **and**

**5.** any error in law on the part of the DM in consequence of the breach.

See DMG Chapter 01 and Annex G to this Volume for further guidance and Convention Rights.

06028 Where a human rights issue is raised on a case and the DM requires advice on the matter, they should contact DMA Leeds without delay.

## Further information received

06029 Where further evidence is received at **any** time before the FtT gives its decision, e.g. following an adjournment, a further reconsideration of the decision under appeal **must** be carried out. This is **despite** there having already been earlier reconsiderations. See also DMG 06011.

06030 - 06034

## Failure to comply with rules

06035 The FtT has several options where a party to an appeal has failed to comply with the rules. The FtT can

**1.** waive the requirement to comply[1]

**2.** require the failure to be remedied[2]

**3.** strike out the party's case[3]

**4.** refer the matter to the UT to decide where a failure by a person to comply with a requirement imposed by the FtT[4]

**4.1** to attend at any place to give evidence

**4.2** otherwise to make themselves available to give evidence

**4.3** to swear an oath in connection with giving evidence

**4.4** to give evidence as a witness

**4.5** to produce a document

**4.6** to facilitate inspection of a document or any other thing (including premises).

1 TP (FtT) (SEC) Rules, rule 7(2)(a); 2 rule 7(2)(b); 3 rule 7(2)(c);
4 rule 7(2)(d) & 7(3); TCE Act 07, s 25

06036 The UT has the same powers as the High Court in England and Wales and the Court of Session in Scotland. They can therefore summons a person to give evidence etc. Non-compliance with such a summons could result in serious penalties.

06037 - 06039

# Which decisions can be appealed to the First-tier Tribunal 06040 - 06049

Decisions which cannot be appealed 06041 - 06042

Decisions not revised 06043

Notice of a decision against which an appeal lies 06044 - 06049

06040 Decisions which can be appealed are listed in Annex D to this Volume. They include decisions on claims and supersession whether as originally made or as revised[1].

1 SS Act 98 s 12(1) & Sch 3, SS CS (D&A) Regs, reg 26

## Decisions which cannot be appealed

06041 Claimants might make an appeal against decisions which do not carry the right of appeal (see Annex E to this Volume). These are

**1.** administrative decisions[1]

**2.** determinations necessary to an outcome decision[2].

Where the FtT has no jurisdiction to hear the appeal, it will be struck out (see DMG 06150 - 06153 and DMG 06230 - 06243).

1 SS Act 98, Sch 2; 2 s 12(2)

06042

## Decisions not revised

06043 See DMG Chapter 03 and Annex F for guidance on when a decision should not be revised and any subsequent appeal rights.

## Notice of a decision against which an appeal lies

06044 A person with the right of appeal must be

**1.** given written notice of the decision and their right to appeal the decision **and**

**2.** told that, where that notice does not include a statement of reasons, they can request one and they must do so within a month of the notification of that decision[1].

1 SS (D&A) Regs, reg 28(1)

06045 Where requested in 06045 **2.**, that statement of reasons must be provided by the Secretary of State within 14 days of the request or as soon as practicable afterwards[1].

1 SS (D&A) Regs, reg 28(2)

06046 - 06049

# Who can appeal to the First-tier Tribunal 06050 - 06059

06050 The general rule is that any claimant or person affected by a decision has the right of appeal to the FtT[1]. In practice, these are (subject to the mandatory reconsideration already having been completed as in DMG 06006 for decisions notified on or after 28.10.13)

**1.** a claimant who claims a relevant benefit[2]

**2.** a claimant or other person from whom an overpayment of benefit is recoverable[3]

**3.** a widow or dependant affected by a decision on IDB made before 11.4.98[4]

**4.** a person who seeks a declaration that an accident was an IA[5]

**5.** a claimant affected by a decision on certain contributions questions (see Annex D to this Volume)[6].

1 SS Act 98, s 12(2)(b); 2 s 8(3); 3 s 12(4); SS A Act 92, s 71 & 74; 4 SS Act 98, s 12(5); SS CB Act 92, Sch 7, Part VI; 5 SS Act 98, Sch 3, para 7; 6 paras 16 & 17

06051 Other people can act on behalf of claimants when making an appeal. An appeal should be accepted where it is made by

**1.** a person appointed by the Secretary of State to act on behalf of a claimant[1]

**2.** a person appointed on the death of a claimant to continue with a claim for benefit made before death[2]

**3.** a person appointed after death to make a claim for benefit for the deceased[3]

**4.** a person appointed to make a claim for IISB or REA for a person who has died[4]

**5.** a person who claims AA or DLA on behalf of a terminally ill claimant[5]

**6.** a representative acting with the claimant's written authority[6]. If the representative is a legal representative then written authority is not required[7].

1 SS CS (D&A) Regs, reg 25(a); SS (C&P) Regs, reg 33(1); 2 reg 25(ai); SS (C&P) Regs, reg 30(1); 3 SS CS (D&A) Regs, reg 25(aii); SS (C&P) Regs, reg 30(5) & (6); 4 SS CS (D&A) Regs, reg 25(aiii); SS (C&P) Regs, reg 30(6A) & (6B); 5 SS CS (D&A) Regs, reg 25(b); SS CB Act 92, s 66(2)(b) & 76(3); 6 TP (FtT) (SEC) Rules, rule 11(1); 7 rule 11(3)

06052 The DM does not have the right of appeal to the FtT. Where there is any doubt about a decision,

the DM may revise or supersede it instead.

06053 Where a person who does not have the right of appeal makes an appeal against a decision, see DMG 06112 et seq.

06054 - 06059

# Making an appeal to the First-tier Tribunal 06060 - 06099

Decisions notified before 28.10.13 06060 - 06069

Decisions notified on or after 28.10.13 06070 - 06074

Late appeals 06075 - 06099

## Decisions notified before 28.10.13

06060 The notice of appeal[1] must be on an approved form or some other approved format and must be signed by the appellant and must include

**1.** the name and address of the appellant and any representative

**2.** the address where documents for the appellant should be sent

**3.** details of the decision being appealed

**4.** details as to why the appellant thinks the decision may be wrong[2].

1 SS CS (D&A) Regs, reg. 33; 2 TP (FtT) (SEC), Rules, rule 23(6)

06061 Where the appeal form or letter does not give all the details required, see DMG 06112 - 06118.

06062 An appropriate office[1] is, for an appeal in

**1.** a compensation recovery case[2], the Compensation Recovery Unit of the DWP, Durham House, Washington, Tyne and Wear, NE38 7SF

**2.** a JSA case, the office of the DWP which issued the decision under appeal

**3.** a contributions decision case[3], any NI Contributions office of the HMRC, or any office of the DWP

**4.** any other case, the office of the DWP which issued the decision under appeal.

1 SS CS (D&A) Regs, reg 33(2); 2 SS (Recovery of Benefits) Act 1997; 3 SS Act 98, Sch 3, Part II

**Note:** Where an appeal is received in a different office of the DWP, and is forwarded to and received by the appropriate office, it should be treated as received in the appropriate office on the date of receipt in the different office.

06063 The requirement to give particulars of the grounds of appeal should not be applied stringently. In the majority of the cases, it should be accepted that the condition is satisfied. Where a simple unexplained disagreement with the decision is given as the ground of appeal, further information is required to ensure that the appeal is duly made - see DMG 06112 et seq.

06064

## Time limit for appealing to the First-tier Tribunal

06065 The time limit within which the claimant must make an appeal[1] is the later of

**1.** one month after the date the notification of the DM's decision was sent to the appellant **or**

**2.** if a written statement of reasons is requested within that month, 14 days after the later of

**2.1** the end of that month **or**

**2.2** the date the written statement of reasons was provided **or**

**3.** if the claimant made an in-time application for revision[2] of the decision and that application was unsuccessful, one month after the date the notification of refusal to revise was sent to the appellant.

**Note:** The decision is notified when it is posted or handed to the claimant. The time limit for appealing is calculated in the same way as the revision application period. See DMG Chapter 03 for guidance on rights to request a written statement and time limits.

1 TP (FtT) (SEC) Rules, rule 23(2); Sch 1; 2 SS CS (D&A) Regs, reg 3(1), (3) & 3A(1)

06066 Where the decision is handed to the claimant, the Department should ensure that the date of notification is recorded in the claimant's case papers. The response to the FtT should include the date notification was handed to the appellant.

## Appeals following decisions whether or not to revise

06067 Where the DM revises a decision, the right of appeal is against the original decision as revised[1]. The original decision is treated as made on the date it is revised solely for the purposes of calculating appeal time limits[2].

1 TP (FtT) (SEC) Rules, Sch 1; R(IS) 15/04; 2 SS Act 98, s 9(5)

**Example**

The DM disallows a claim for benefit on 8.9.09 and the decision is notified on the same day. The claimant applies for the disallowance to be revised. On 27.9.09 the DM revises the decision of 8.9.09 so as to award benefit. The claimant makes an appeal. The decision under appeal is the decision of 8.9.09 as revised, but the time for appealing starts on 27.9.09.

06068 Where

**1.** the claimant applies for a decision to be revised during the one month application period **and**

**2.** the DM notifies that the decision is not revised

the time for appealing the original decision is extended, so that the one month period in DMG 06065 begins on the date the claimant is notified that the decision is not revised[1].

1 TP (FtT) (SEC) Rules, Sch 1

06069 Where the application is made after the one month period but within 13 months of notification of the original decision, the time for appealing is **only** extended as in

DMG 06068 where the DM admits the application, but then does not revise the original decision. The time limit is not extended where the DM does not revise following an application made more than 13 months after notification. See DMG Chapter 03 for guidance on applications for revision.

**Note:** the DM should consider supersession where the time for appealing is not extended when a decision is not revised (see DMG Chapter 04).

## Decisions notified on or after 28.10.13

06070 The notice of appeal must include[1]

**1.** the name and address of the appellant and any representative

**2.** the address where documents for the appellant should be sent

**3.** the name and address of any respondent other than the DM

**4.** details as to why the appellant thinks the decision may be wrong

**5.** whether the appellant will require an interpreter at any hearing and for which language or dialect

**6.** whether the appellant intends to attend or be represented at any hearing.

1 TP (FtT) (SEC), Rules, rule 22(3)

06071 Along with the notice of appeal, the appellant must also provide

**1.** a copy of the mandatory reconsideration notice

**2.** any statement of reasons that the appellant may have

**3.** any documents the appellant has to support their case that have not already been sent to the

Department[1].

**Note:** Where the appeal form or letter does not give all the details required, see DMG 06112 – 06118 below.

1 TP (FtT) (SEC) Rules, rule 22(4)

### Time limit for appealing to the First-tier Tribunal

06072 The time limit within which the claimant must make an appeal[1] to the FtT is one month after the date the appellant was sent the DM's mandatory reconsideration notice[1].

**Note:** The decision is notified when it is posted or handed to the claimant. For guidance on rights to request a written statement and time limits, see DMG Chapter 03: Revision.

1 TP (FtT) (SEC) Rules, rule 22(2)(d)(i)

06073 Where the decision is handed to the claimant, the Department should ensure that the date of notification is recorded in the claimant's case papers. The response to the FtT should include the date notification was handed to the appellant.

### Appeals following decisions whether or not to revise

06074 Where the DM revises a decision, the right of appeal is against the original decision as revised[1]. The original decision is treated as made on the date it is revised solely for the purposes of calculating appeal time limits[2].

1 R(IS) 15/04; 2 SS Act 98, s 9(5)

## Late appeals

### Decisions notified before 28.10.13

06075 Where an appeal is made outside normal time limits, it must include the reason why it is late[1]. If it does not then the DM will need to request this information. No appeal can be made more than 12 months after the normal time limits[2]. An appeal can be treated as made in time if the Secretary of State is satisfied that it is in the interests of justice to do so[3] (See DMG 06078 for meaning of "in the interest of justice"). If the Secretary of State does not object to the appeal being treated as made in time then they should reconsider the decision and if appropriate lapse the appeal. In practice, a late appeal will be accepted unless the Secretary of State objects.

**Note:** The "interests of justice" test is only part of the Secretary of States consideration. The FtT are not bound by this test as they have a wide general power to extend time limits.

1 TP (FtT) (SEC) Rules, rule 23(3); 2 rule 23(5) & (8); 3 SS CS (D&A) Regs, reg 32(4)

06076 If the DM does not accept that it is in the interest of justice to accept the late appeal then the DM needs to consider whether they object to the FtT using their wider powers to accept the late appeal. The sort of reasons for which the DM may consider objecting to the FtT accepting the late appeal would be where for example

**1.** the appellant says they received the notice of decision late but they had previously acknowledge the receipt at an earlier date

**2.** the appellant's condition deteriorated after the appeal decision was made and so this was irrelevant to the appeal.

06077 In other cases the appeal will be treated as having been made in time if the DM does not object[1]. The DM should refer the case to the FtT where

**1.** the DM does object to treating a late appeal as made in time **or**

**2.** the DM considers that the appeal was made more than 12 months after the normal time limits[2].

**Note:** Where the DM does object to treating a late appeal as made on time then the AT37 should be noted in the "late box" that "the Secretary of State objects".

1 TP (FtT) (SEC) Rules, rule 23(4); 2 rule 23(7)

06078 It is "in the interests of justice" where special circumstances, which are relevant to the application, have prevented the application being made on time. Special circumstances are defined as

**1.** the appellant, partner or dependant has died or suffered serious illness **or**

**2.** the appellant is not resident in the UK **or**

**3.** normal postal services were adversely affected **or**

**4.** some other special circumstances exist which are wholly exceptional and are relevant to the application[1].

1 SS CS (D&A) Regs, reg 32(5) & (6)

06079 A partner[1] is

**1.** a member of a couple **or**

**2.** where the appellant is polygamously married to two or more members of the household, any such member.

1 SS CS (D&A) Regs, reg 1(3)

06080 A “couple” means[1] two people who are

**1.** married and are members of the same household

**2.** LTAMC

**3.** civil partners of each other and who are members of the same household

**4.** not civil partners of each other, but are LTAMC.

1 SS CS (D&A) Regs, reg 1(3)

06081 The DM will take into account the time that has elapsed between the end of the one month time limit for making an appeal and the date the notice of appeal was made. The longer the delay, the more compelling should be the special circumstances[1].

1 SS CS (D&A) Regs, reg 32(7)

06082 An appeal cannot be treated as made in time in the interests of justice if the only reason for the request is that

**1.** the applicant or representative was unaware of or misunderstood the law that applied to their case **or**

**2.** the UT or Court has taken a different view of the law from that previously understood or applied[1].

**Note:** The guidance in DMG 06081 and 06082 above is relevant only for the Secretary of State. The FtT have wider powers relating to late appeals.

1 SS CS (D&A) Regs, reg 32(8)

06083 - 06084

06085 The absolute time limit for making an appeal cannot be extended any further[1]. The time limits in DMG 06065 begin when the decision is notified. It is therefore important to ensure, especially in cases where it is alleged that the decision notice has not been received, that the decision has been notified correctly. See DMG Chapter 01 for guidance on how a decision is notified

1 Denson v Secretary of State for Work and Pensions [2004] EWCA Civ 462 (R(CS) 4/04)

06086 The following are examples of other special circumstances when it might be appropriate for the DM to treat an appeal as made in time in addition to those at DMG 06073 **1.** - **3.**

**1.** difficulty in getting an appointment with a representative (especially in rural areas)

**2.** problems in writing the appeal for a blind person living alone

**3.** difficulty in obtaining an appeal form

**4.** allegation that the decision notice was not received

**5.** inability to read, write or understand English where the appellant lives alone

**6.** change of address during one month period

**7.** allegation that an earlier appeal was made

**8.** inability to understand the decision notice where the person has a mental disability or learning difficulties and lives alone.

**Example 1**

The appeal is made three months after the decision notice on a renewal claim for DLA is issued. The claim was disallowed. The claimant explained that she did not know that the decision had been made until benefit payments to her bank account stopped when the previous award expired. She said that she had not received the decision notice. The DLA file shows that she had phoned up a week before the appeal was made to ask when a decision would be made on her renewal claim. The DM accepts that she had not received the decision notice, and admits the late appeal.

**Example 2**

The claimant is in receipt of IS and IB and has mental health problems. He lives alone and does not have an appointee. Both benefits are stopped after application of the PCA. The late appeal is accompanied by a letter from the community psychiatric nurse explaining that he did not understand the significance of the decision, and had not kept appointments with the nurse due to memory problems. The DM accepts that there are special circumstances and admits the late appeal.

06087 The list at DMG 06086 is intended only as a guide to the type of circumstances when a late appeal should be treated as in time. For example, a person might not be living alone, but the other people in the house may not be willing to help. Alternatively, a person living alone may have family or friends who visit regularly to check post. Each case should be considered on its merits.

06088 - 06090

## Decisions notified on or after 28.10.13

06091 Where an appeal is made to the FtT outside normal time limits, the appellant must include a request for an extension of time and the reason why it is late[1]. If the appellant does not then HMCTS will request reasons. A late appeal will normally be treated by the FtT as having been made in time if neither the DM nor any other respondent objects[2]. In this situation the FtT will extend the time for appealing[3].

1 TP (FtT) (SEC) Rules, rule 22(6); 2 rule 22(8); 3 rule 5(3)(a)

06092 The time limits in DMG 06072 begin when the decision is notified. It is therefore important to ensure, especially in cases where it is alleged that the decision notice has not been received, that the decision has been notified correctly. For guidance on how a decision is notified see DMG Chapter 01: Principles of decision making and evidence.

06093 The following are examples of special circumstances when it might be appropriate for the DM to not object to HMCTS accepting an appeal as made in time

**1.** difficulty in getting an appointment with a representative (especially in rural areas)

**2.** problems in writing the appeal for a blind person living alone

**3.** difficulty in obtaining an appeal form

**4.** allegation that the decision notice was not received

**5.** inability to read, write or understand English where the appellant lives alone

**6.** change of address during one month period

**7.** allegation that an earlier appeal was made

**8.** inability to understand the decision notice where the person has a mental disability or learning difficulties and lives alone.

06094 The list at DMG 06093 is intended only as a guide. For example, a person might not be living alone, but the other people in the house may not be willing to help. Alternatively, a person living alone may have family or friends who visit regularly to check post. Each case should be considered on its merits.

06095 - 06099

# Action when an appeal is made 06100 - 06111

Decisions notified before 28.10.13 06100 - 06109

Decisions notified on or after 28.10.13 06110 - 06111

## Decisions notified before 28.10.13

06100 When an appeal is made, or further evidence is obtained after an appeal is made, the DM should consider whether the original decision should be revised and the appeal lapsed. This applies even if the decision has been reconsidered and not revised before the appeal was made.

06101

### Identifying the decision appealed against

06102 In most cases an appeal is made against the last decision made on a claim or application. However, claimants may make an appeal against an earlier decision which has been revised or superseded. Where the appealed decision has been

**1.** revised, the claimant should be advised that this decision has been amended by the later decision. See DMG 06160 et seq for further action **or**

**2.** superseded, the claimant has the right of appeal against the previous decision if the superseded decision does not entirely replace it. For example, there may be a limitation on payability of arrears.

06103 Where it is not clear which decision the claimant is appealing against, the DM may need to

**1.** ask the claimant for more information **or**

**2.** treat the appeal as made against more than one decision.

For example, the claimant may make a general appeal where a decision has been made superseding and terminating entitlement to a benefit, and a decision refusing to backdate a further claim to the same benefit. Where the appeal is in time for each decision, and the termination has not been reconsidered in the light of the request for backdating, the DM should treat the appeal as made against both decisions.

**Example**

A claimant in receipt of IB is found to be not incapable of work following application of the PCA, and the award terminated on supersession. He makes a new claim two weeks later, which is disallowed using the

same evidence as for the previous decision. His letter of appeal gives the date of the decision under appeal as the second decision, but his grounds of appeal refer to stopping his benefit. As no award of benefit was made on the second claim, the appeal is treated as against both decisions.

### Decisions by HM Revenue and Customs

06104 Since 1.4.99, HMRC has been responsible for making decisions on NI contributions issues previously determined by the Secretary of State[1]. A list of these, together with exceptions, is at Annex C to this volume.

**Note:** Decisions made before 1.4.99 remain the responsibility of the Secretary of State and cannot be changed by HMRC.

1 SSCC (ToF) Act 99, s 8(1)

06105 Entitlement to SS contributory benefits depends on the contribution conditions being satisfied. In practice the NI contribution record is usually obtained and any decision is based on the assumption that the record is factually correct. However, where there has been a dispute about the record, the matter must be referred by the Secretary of State to HMRC for a formal decision. See DMG Chapters 03 and 04 for guidance on references following an application for revision or supersession.

### Issue raised after appeal lodged with Her Majesty's Courts and Tribunals Service

06106 In some cases it may not be apparent that an issue should be referred to HMRC until after the appeal has been sent to HMCTS. The FtT may identify that an issue should be referred before a hearing takes place, or the issue may be raised at a hearing. In either case, the FtT

**1.** refers the appeal to the Secretary of State **and**

**2.** requires the Secretary of State to refer the issue to HMRC[1].

1 SS CS (D&A) Regs, reg 38A(1)

06107 The DM can revise or supersede the decision under appeal on any other issue while HMRC decision is awaited[1].

1 SS CS (D&A) Regs, reg 38A(2)

06108 When HMRC's final decision is received, the DM should revise or supersede the decision under appeal if appropriate[1]. The appeal should be forwarded to HMCTS unless the decision under appeal can be revised to the claimant's advantage.

1 SS CS (D&A) Regs, reg 38A(3)

06109 A final decision of HMRC includes a decision on an appeal against a decision of HMRC[1].

## Decisions notified on or after 28.10.13

06110 When an appeal is made, or further evidence is obtained after an appeal is made, the DM should consider whether the original decision should be revised and the appeal lapsed once they are passed the papers by HMCTS. This applies even though a mandatory reconsideration will have already been done.

### Identifying the decision appealed against

06111 In most cases an appeal is made against the last decision made on a claim or application. However, claimants may make an appeal against an earlier decision which has been revised or superseded. Where the appealed decision has been

**1.** revised, the claimant should be advised that this decision has been amended by the later decision. See DMG 06160 et seq for further action **or**

**2.** superseded, the claimant has the right of appeal against the previous decision as the superseded decision does not entirely replace it. For example, there may be a limitation on payability of arrears.

# Appeal not duly made 06112 - 06149

Decisions notified before 28.10.13 06112 - 06118

Decisions notified on or after 28.10.13 06119 - 06149

## Decisions notified before 28.10.13

06112 Where an appeal does not give all the details required (see DMG 06060), and they have not been provided during the reconsideration process, the DM may

**1.** return the appeal form for completion[1]**or**

**2.** request the person making the appeal to provide further information[2].

Where the form is returned, a copy should be retained by the DM.

1 SS CS (D&A) Regs, reg 33(3); 2 reg 33(6)

06113 The DM will normally give the claimant 14 days from the date the form is returned or the information is requested to reply. Exceptionally the DM can give a longer period for reply, for example, where the DM knows that the claimant lives abroad, is in hospital or that there is some other compelling reason why the claimant will need more time to provide the information. The DM must tell the claimant the date that the information is required when they request the further information.

06114 Where the claimant responds within the time given for reply the date of the appeal will be the date the form is returned or further information is provided, and the time limit for making the appeal can be extended.

**Example - appeal in time**

| | |
|---|---|
| Decision issued | 17.10.09 |
| Appeal period | 18.10.09 - 17.11.09 |
| Appeal received (not duly made) | 15.11.09 |
| Reconsideration (no change) | 18.11.09 |
| Further info requested re appeal | 19.11.09 |
| Date claimant required to respond | 3.12.09 |

| | |
|---|---|
| Further information rec'd from appellant | 30.11.09 |
| Date of appeal | 30.11.09 |

06115 Special arrangements apply where the end of the 14 days period falls within the one month time limit for making an appeal. This is likely to be rare but may happen where the claimant makes an immediate appeal and the DM actions the appeal quickly. In these cases the one month time limit takes priority. This is because the claimant has one month in which to make a duly made appeal.

**Example - appeal in time**

| | |
|---|---|
| Decision issued | 17.10.09 |
| Appeal period | 18.10.09 - 17.11.09 |
| Appeal received (not duly made) | 19.10.09 |
| Reconsideration (no change) | 19.10.09 |
| Further info requested re appeal | 19.10.09 |
| Date claimant required to respond (i.e. end of appeal period) | 17.11.09 |
| Further information rec'd from claimant | 12.11.09 |
| Date of appeal | 12.11.09 |

06116 If the claimant does not return the form or reply to the request, the papers (including a copy of the form where appropriate) should be sent to HMCTS so that the FtT can decide whether or not the appeal is duly made[1]. If the FtT accepts that the appeal is duly made, HMCTS will refer back to the Department to prepare a full response.

1 SS CS (D&A) Regs, reg 33(8)

06117 Where the claimant returns the form or provides the further information outside the 14 days (or longer period) and the papers have already been passed to HMCTS, the form or further information should be passed to HMCTS and the FtT will decide

**1.** the duly made issues **and**

**2.** if the late appeal can be accepted[1].

1 SS CS (D&A) Regs, reg 33(9)

06118 Where the claimant returns the form or provides the further information outside the 14 days (or longer period) and the papers have not been sent to HMCTS, the DM should

**1.** accept the appeal as duly made

**2.** record the date of appeal as the date the form or further information is received

**3.** apply the late appeal rules (see DMG 06075 - 06082).

## Decisions notified on or after 28.10.13

06119 It will be for HMCTS/FtT to decide whether the appeal has been duly made taking into account the information required (see DMG 06060). If it has not been duly made then HMCTS will write to the person making the appeal to provide that information. There may however, be information that HMCTS is not aware of that means the appeal would not be accepted as duly made. For example where the person making the appeal does not have written authority to do so from the claimant. In that case, DWP would have to return the papers to HMCTS to investigate.

06120 - 06149

# Appeals outside First-tier Tribunal jurisdiction 06150 - 06159

Decisions notified before 28.10.13 06150 - 06151

Decisions notified on or after 28.10.13 06152 - 06159

## Decisions notified before 28.10.13

06150 The FtT decides whether an appeal is within the tribunal's jurisdiction. Decisions or determinations that are non-appealable are listed at Annex E to this Volume. On decisions where there is no right of appeal to a tribunal[1], the DM should

**1.** refer the matter to the FtT by minute stating why the DM considers the matter outside the FtT's jurisdiction and quoting the relevant legislation

**2.** ensure that the decision in dispute is identified

**3.** complete form AT37 as appropriate.

1 SS Act 98, Sch 2; SS CS (D&A) Regs, Sch 2

06151 A notification that the DM has not revised a decision or admitted an application for supersession is not a decision with the right of appeal. Where an appeal is made giving the letter of notification as the decision under appeal, the DM should refer the appeal to HMCTS. The response to the FtT should explain that the matter is outside the FtT's jurisdiction because

**1.** in the case of revision, there is no right of appeal[1]

**2.** in the case of supersession no decision under relevant legislation[2] has been made.

1 R(IB) 2/04; R(IS) 15/04; 2 SS Act 98, s 10 & 12(1); R (DLA) 1/03; Wood v Secretary of State for Work and Pensions [2003] EWCA Civ 53

## Decisions notified on or after 28.10.13

06152 The FtT has the authority to decide whether an appeal is within the tribunal's jurisdiction. HMCTS will only send the appeal to DWP once they have accepted it. However, this does not prevent the DM from referring a case back to the FtT if the DM considers the matter outside the FtT's jurisdiction because of information they hold that HMCTS may not be aware of. Decisions or determinations that are non-appealable are listed at DMG Annex E[1].

06153 The mandatory reconsideration notice issued by the DM will state what decision the claimant can appeal to the FtT. Without this notice, HMCTS may not progress the appeal.

06154 - 06159

# Lapsing an appeal 06160 - 06179

Decision not to the claimant's advantage 06166 - 06179

06160 Where

**1.** the DM revises the decision under appeal (for decisions notified before 28.10.13) **or**

**2.** the appeal is accepted by HMCTS, the DM can still consider revising the decision under appeal (for decisions notified on or after 28.10.13)

the outcome determines whether the appeal lapses. An appeal should be lapsed where the revised decision is to the claimant's advantage[1].

**Note:** An appeal cannot be lapsed where the decision is superseded.

1 SS Act 98, s 9(6)

06161 The purpose of lapsing an appeal is to prevent unnecessary appeals going ahead. The power to revise is discretionary rather than mandatory, and should not be used in order to prevent an appeal being heard. DMs are therefore advised to consider whether a decision under appeal should be revised where

**1.** the revision does not address the issue which is the subject of the appeal **and**

**2.** it is clear that a further appeal will be made.

**Note:** Once the DM actually makes that revised decision then the appeal must lapse so it is important that the DM considers whether revision is the appropriate course of action to take.

06162 So where a revision would not give the claimant all they are asking for in the appeal, the DM will contact the claimant before revising to ask them if they would still want to appeal if the revised decision were made. If the claimant says they would

**1.** still appeal, then the decision would not be revised and the appeal goes ahead with our response including details of the revised decision and that we cannot revise the decision as this would mean the appeal would have to lapse **or**

**2.** be happy with the revised decision, the DM would make that revised decision and lapse the appeal. The claimant would be informed of their appeal rights against the revised decision.

**Note:** If the claimant cannot be contacted then the appeal should not be lapsed.

**Example 1**

The DM decides that a claim for IS should be disallowed from and including 17 January on the grounds that the claimant's income exceeds. The decision is reconsidered on appeal, the issue being whether the claimant has income. The DM notices that the date of disallowance is incorrect, and should have been 19 January. The DM does not revise the decision, and the appeal goes ahead.

**Example 2**

The DM decides that an overpayment of benefit of £10,855 is recoverable. The decision is reconsidered on appeal, the issue being whether the overpayment is recoverable. The DM notices that the amount of the overpayment has been incorrectly calculated, and should be £10,835. The DM does not revise, and the appeal goes ahead.

**Example 3**

The DM decides that an overpayment of benefit of £10,855 is recoverable. The decision is reconsidered on appeal, the issue being whether the amount of the overpayment is correct. The DM notices that the amount of the overpayment has been incorrectly calculated, and should be £10,835. The DM revises, and the appeal is lapsed.

**Example 4**

The DM makes an advance award of the lowest rate of the care component of DLA, deciding that the qualifying period was not satisfied at the date of the claim. The claimant appeals on the ground that the award should have started on the date of claim, and should have been at the middle rate. The DM accepts that the qualifying period was satisfied at the date of claim, revises the decision and lapses the appeal.

06163 Where the decision is not revised, but the DM considers it to be incorrect, the response should

**1.** advise the tribunal why the decision is not revised **and**

**2.** request that the correct decision is substituted for that of the DM.

06164 A decision is to the claimant's advantage[1] when the outcome is that

**1.** an award of benefit is made, increased or the period extended **or**

**2.** an amount of benefit is greater but is not payable, or has been suspended, or the claimant is disqualified from receiving it **or**

**3.** a decision that benefit is payable to a third party is reversed **or**

**4.** a refusal to give an IA declaration is reversed (see DMG 03300 for full guidance on revision and

supersession of accident questions) **or**

**5.** the amount of a recoverable overpayment is reduced or is no longer recoverable **or**

**6.** a sanction is lifted or the period reduced.

**Note 1:** An increase in an assessment of disablement for IISB which does not result in an award of benefit on its own or on aggregation is not advantageous.

**Note 2:** This list is not exhaustive and each case should be considered on its facts.

1 SS CS (D&A) Regs, reg 30(2)

**Example 1**

A claimant is awarded lowest rate care component and lower rate mobility component of DLA. They appeal on the grounds that they satisfy the conditions for higher rates of both components. The DM revises the decision to award the middle rate care component, but does not change the award of the mobility component. The appeal lapses.

**Example 2**

A claimant is awarded lowest rate care component and lower rate mobility component of DLA. They appeal on the grounds that they satisfy the conditions for higher rates of both components. The DM finds they could revise the decision awarding benefit at the same rates but from three weeks earlier. The DM does not revise, and the appeal goes ahead.

06165 Where an appeal is lapsed because the decision is revised, the new outcome decision carries a new dispute period and appeal rights. For decisions made before 28.10.13, the claimant, and HMCTS where the appeal has been sent to them, should be notified that the appeal has lapsed. For decisions made on or after 28.10.13, the claimant and HMCTS should be notified that the appeal has lapsed.

## Decision not to the claimant's advantage

06166 Where the revised decision is not to the claimant's advantage, the appeal should be treated as made against the decision as revised[1]. The claimant is also invited to make further representations within one month of notification of the revised decision[2]. For appeals on decisions notified before 28.10.13, the appeal is not referred to HMCTS at this stage, and the decision is implemented. If however, the appeal has already been referred to HMCTS then a further response based on the additional facts should be prepared.

1 SS CS (D&A) Regs, reg 30(3); 2 reg 30(4)

06167 If the decision is not revised following reconsideration, the reconsideration is **not** a decision. The appeal continues and the DM prepares the appeal response to be sent to HMCTS.

06168 After the end of that period, or within that period if the claimant consents in writing, the appeal to the FtT must proceed, except where

**1.** the DM further revises the decision in light of further representations from the claimant **and**

**2.** that decision is more advantageous to the claimant than the decision before it was revised[1].

1 SS CS (D&A) Regs, reg 30(5)

06169 The appeal lapses where

**1.** the claimant provides further information **and**

**2.** the revised decision can be revised again **and**

**3.** the effect of the new decision is that the conditions in DMG 06161 are satisfied for the original decision[1].

1 SS CS (D&A) Regs, reg 30(5)

**Example**

The DM awards IS of £40. The claimant appeals, and the DM revises the decision to award £35. The claimant provides more information, as a result of which the DM is able to revise again and award £40.50. The appeal lapses.

06170 Where the result of the further revision is not to the claimant's advantage, the appeal proceeds to HMCTS with a response in the normal manner.

06171 - 06179

# Appeal awaiting outcome of other proceedings 06180 - 06189

Employment or other tribunal pending 06180

Criminal proceedings contemplated or pending 06181 - 06182

Appeal on the same subject as a case before the Court 06183 - 06189

## Employment or other tribunal pending

06180 Where an claimant has already appealed to another tribunal or authority (including the FtT) on a matter connected to the present appeal, HMCTS should be asked to delay or postpone the present appeal hearing to await the outcome of the other proceedings.

## Criminal proceedings contemplated or pending

06181 If an appeal is connected to matters that may result in criminal proceedings against the claimant, no mention of this should be made in the written or oral response. However, it should be brought to the attention of HMCTS.

06182 The response should not be delayed where criminal proceedings are being brought by the Department against the claimant. The matter should be brought to the attention of HMCTS with details of how far those proceedings have progressed. The FtT decides whether the tribunal hearing should be delayed or postponed.

## Appeal on the same subject as a case before the Court

06183 An appeal to the FtT may be affected by the outcome of an appeal to the Court on the same subject. The DM can require the FtT to

**1.** not determine the appeal, but refer the case to the DM[1] **or**

**2.** stay the appeal until the appeal to the Court is decided[2] **or**

**3.** decide the appeal as if the appeal to the Court had been decided unfavourably for the claimant where the FtT considers this to be in the interests of the appellant[3].

Appeals where this might apply will be identified by DMA Leeds.
For further guidance on staying appeals see DMG 06800 et seq.

1 SS Act 98, s 26(2); 2 s 26(4)(a); 3 s 26(4)(b)

06184 - 06189

# Withdrawing an appeal 06190 - 06229

Decisions notified before 28.10.13 06190 - 06209

Decisions notified on or after 28.10.13 06210 - 06229

## Decisions notified before 28.10.13

06190 An appeal can be withdrawn by the DM or the FtT depending on when the application is made.

06191 The DM can discontinue action on an appeal (i.e. it is not forwarded to HMCTS) where

**1.** the appellant or an authorised representative gives written notification **and**

**2.** the appeal has not been sent to HMCTS[1].

1 SS CS (D&A) Regs, reg 33(10)

06192 Where the appellant or representative initially makes a verbal request to withdraw their appeal, the DM should advise them that we need their request in writing before we can discontinue the appeal. A note should be made of any response they make to this request (for example do they refuse point blank to put the request in writing or offer some explanation as to why this would not be possible). Under no circumstances must the DM express any view as to whether the appellant should withdraw their appeal. Work on the appeal will then stop to await the written confirmation that the appellant or their representative wishes to withdraw the appeal.

06193 Where

**1.** the appellant or representative sends confirmation in writing, then the DM can discontinue the appeal as per DMG 06191 above **or**

**2.** no written request is received, the case should be referred to HMCTS for the FtT to make a decision as to whether the requirement to notify withdrawal in writing can be waived. In these cases the FtT has delegated to the tribunal clerk the function of waiving the requirement for a withdrawal to be made in writing[1].

1 Practice Statement on the Delegation of Functions to Staff in Relation to the Social Entitlement Chamber of the FtT

06194 Once an appeal has been lodged with HMCTS, any appeal may be withdrawn by the claimant or representative

**1.** in writing to the FtT at any time before the appeal is determined[1] **or**

**2.** at an oral hearing but only where the FtT agree to the withdrawal[2].

1 TP (FtT) (SEC) Rules, rule 17(1); 2 rule 17(2) & (3)

06195 The withdrawal of an appeal to the FtT made

**1.** before a hearing begins **or**

**2.** during an adjournment of proceedings

takes effect automatically, unless the FtT has previously directed that any withdrawal requires its consent. So even where the proceeding are adjourned part heard for some months for example, the appeal could still be withdrawn during the adjournment period without consent of the FtT being required.

06196 HMCTS will inform all parties to an appeal when an appeal lodged with HMCTS has been withdrawn.

### Reinstatement of withdrawn appeal

06197 A party to an appeal who has withdrawn their case may also apply to the FtT for it to be reinstated[1]. Such a request must be made in writing and be received within a month after

**1.** the date the FtT received the written request to withdraw the case **or**

**2.** the date of the hearing if the withdrawal was made verbally[2].

1 TP (FtT) (SEC) Rules, rule 17(4); 2 rule 17(5)

06198 Where an appeal is accepted as withdrawn under DMG 06193 above, the appellant or representative is still able to make an application to re-instate the appeal. Any such application should be made to the FtT within one month of the date that HMCTS received the application for accepting withdrawal from DWP. This date will be on the notification that HMCTS issue to the appellant.

06199 Where the DM has discontinued action on the appeal as per DMG 06191, the claimant is still able to make an application to the FtT for re-instatement of the appeal within one month of the date the DM discontinued action on the appeal. The DM should refer any such application to HMCTS.

06200 - 06209

## Decisions notified on or after 28.10.13

06210 Once an appeal has been lodged with HMCTS, it may be withdrawn by the claimant or representative

**1.** in writing to the FtT[1] **or**

**2.** at an oral hearing but only where the FtT agree to the withdrawal[2] **or**

**3.** by telephone to HMCTS[3].

1 TP (FtT) (SEC) Rules, rule 17(1); 2 rule 17(2) & (3); 3 Practice Statement on Delegation of Functions to Staff

06211 The withdrawal of an appeal to the FtT made

**1.** before a hearing begins **or**

**2.** during an adjournment of proceedings

takes effect automatically, unless the FtT has previously directed that any withdrawal requires its consent. So even where the proceeding are adjourned part heard for some months for example, the appeal could still be withdrawn during the adjournment period without consent of the FtT being required.

06212 HMCTS will inform all parties to an appeal when an appeal lodged with HMCTS has been withdrawn.

### Reinstatement of withdrawn appeal

06213 A party to an appeal who has withdrawn their case may also apply to the FtT for it to be reinstated[1]. Such a request must be made in writing and be received within a month after

**1.** the date the FtT received the written request to withdraw the case **or**

**2.** the date of the hearing if the withdrawal was made verbally[2].

1 TP (FtT) (SEC) Rules, rule 17(4); 2 rule 17(5)

06214 - 06229

# When is an appeal struck out 06230 - 06269

The appellant 06230 - 06234

The respondent 06235 - 06239

Reinstatement of appeal 06240 - 06269

## The appellant

06230 The FtT will automatically strike out appeal proceedings if the appellant has failed to comply with a direction where the direction stated that failure to comply would result in strike out[1].

1 TP (FtT) (SEC) Rules, rule 8(1)

06231 Where the FtT have no jurisdiction to hear the appeal then they must strike out the whole or part of the proceedings unless they transfer the case to another court or tribunal[1].

1 TP (FtT) (SEC) Rules, rule 8(2)(a)

06232 The FtT have the option to strike out proceedings if the

**1.** appellant fails to comply with a direction by the FtT where the direction stated that failure to comply may result in strike out

**2.** appellant failed to co-operate with the FtT to the extent that the proceedings cannot be dealt with fairly and justly

**3.** FtT considers there is no reasonable prospect of appellant being successful[1].

1 TP (FtT) (SEC) Rules, rule 8(3)

06233 While it is only the FtT who have the authority to strike out proceedings, the DM is able to apply to the FtT for cases to be struck out. So where the DM identifies a case that they think

**1.** is outside of the FtT's jurisdiction, they should take action as per DMG 06150 for decisions notified before 28.10.13 or DMG 06152 for decisions notified on or after 28.10.13 **or**

**2.** has no reasonable prospect of success, they should send the case to HMCTS **before** writing the appeal response including details of the appeal and why they think there is no reasonable prospect of success (see CAP 2133 et seq for details of how to submit cases).

**Note:** Appendix 1 to this Chapter gives examples of the types of case that may be suitable for applying for strike out on grounds of no reasonable prospect of success.

06234 The FtT may not strike out proceedings under DMG 06231 or DMG 06232 **2.** and **3.** above before allowing the appellant the opportunity to make representations to the FtT about the matter[1].

1 TP (FtT) (SEC) Rules, rule 8(4)

## The respondent

06235 The strike out provisions described in DMG 06230 - 06233 above also apply to the respondent (i.e. DWP) except that for the respondent this means that rather than the proceedings being struck out, the respondent would be barred from taking any further part in the proceedings[1]. The respondent must be given the opportunity to make representations to the FtT on the proposed bar before it is imposed.

1 TP (FtT) (SEC) Rules, rule 8(7)(a)

06236 The DM **must** respond to a direction from the FtT as the direction can be accompanied by a warning that DWP may be barred from the proceedings if they fail to comply. When a direction is received it will include a time limit within which the DM must respond. The DM can request an extension to this time limit if they have to seek information or advice before responding. A direction should never be ignored and the DM can always refer the case to DMA Leeds for advice if they do not feel able to respond to the direction without assistance.

06237 If failure to comply with the direction does result in DWP being barred from proceedings, the FtT is then able to continue with the hearing without taking any account of the appeal response submitted by DWP. It can then determine any or all issues under appeal against DWP[1]. So it is extremely important that the direction is complied with.

1 TP (FtT) (SEC) Rules, rule 8(8)

06238 The DM does have the right to challenge a direction[1], for example if they feel it is unreasonable for DWP to provide the information requested or DWP does not have the relevant authority to obtain the information.

1 TP (FtT) (SEC) Rules, rule 6(5)

06239

## Reinstatement of appeal

06240 If proceedings have been struck out under DMG 06230 or DMG 06232 **1.**, the appellant can apply in writing to the FtT for proceedings to be reinstated[1]. Where the respondent has been barred from taking further part in the proceedings as in DMG 06234, then they can apply to the FtT for the bar to be

lifted[2]. An application for reinstatement or lifting of the bar has to be made within a month of the striking out or barring being notified[3].

1 TP (FtT) Rules, rule 8(5); 2 rule 8(7)(b); 3 rule 8(6)

# Hearings 06270 - 06285

06270 The FtT must hold a hearing, which means an oral hearing[1], before making a decision on the appeal unless

**1.** each party to the appeal has

**1.1** consented to **or**

**1.2** not objected to

the matter being decided without a hearing **and**

**2.** the FtT considers it can decide the appeal without a hearing[2].

1 TP (FtT) (SEC) Rules, rule 1(3); 2 rule 27(1)

06271 Each party to the proceedings is entitled to attend a hearing[1]. At least 14 days notice of the hearing should be given. Exceptionally this can be less with the consent of all parties or where there are urgent reasons for shorter notification[2]. Hearings should be in public unless the FtT decide otherwise[3].

1 rule 28; 2 rule 29; 3 rule 30(1)

06272 The FtT can direct that a person be excluded from all or part of the hearing where they consider that that person's

**1.** conduct is likely to disrupt the hearing **or**

**2.** presence is likely to prevent someone from giving evidence or talking freely **or**

**3.** presence would counter act the effect of withholding information likely to cause harm **or**

**4.** attendance would defeat the purpose of the hearing[1].

1 rule 30(5)

06273 The FtT can also exclude a witness from the hearing until they give their evidence[1].

1 rule 30(6)

06274 - 06285

# Evidence 06286 - 06319

Non disclosure of documents and information 06287 - 06293

Extracts from documents 06294 - 06303

Copyright 06304

Presentation of statements 06305

Overpayments 06306 - 06307

Rehabilitated offenders 06308

IfW cases 06309

ESA cases 06310

Exchange of medical reports 06311 - 06319

06286 All evidence

**1.** relevant to the appeal **and**

**2.** available to the DM

should be available to the tribunal and disclosed to the appellant or representative[1]. (see DMG Chapter 01).

**Note:** Advice on the law, such as guidance on an individual case, is not evidence and should not be disclosed to the appellant, representative or tribunal. See DMG Chapter 01 for further details.

1 R(S) 1/58

## Non disclosure of documents and information

06287 The FtT may give an order prohibiting the disclosure or publication of

**1.** documents or information relating to the appeal **or**

**2.** any matter which would enable the public to identify any person whom the FtT considers should not be identified[1].

1 TP (FtT) (SEC) Rules, rule 14(1)

06288 The FtT may give a direction prohibiting disclosure of documents and information to a person if

**1.** the FtT is satisfied that disclosure would cause that person, or someone else, serious harm **and**

**2.** the FtT is satisfied that it is in the interests of justice and proportionate to do so[1].

1 TP (FtT) (SEC) Rules, rule 14(2)

06289 Any party to the proceedings can request that the FtT give such a direction. If they do then they must

**1.** exclude the relevant document or information from the rest of the papers provided to the person they wish the non disclosure to effect **and**

**2.** provide FtT with the excluded document or information and the reason for its exclusions[1].

1 TP (FtT) (SEC) Rules, rule 14(3)

06290 The FtT will then decide whether to give a non disclosure direction, bearing in mind the criteria in DMG 06288[1].

1 TP (FtT) (SEC) Rules, rule 14(4)

06291 If the person to whom the directive has been made has a representative, the FtT can direct that the representative can see the relevant document or information provided the FtT is satisfied that

**1.** disclosure to the representative would be in the interests of the person they represent **and**

**2.** the representative will not disclose the document or information to the person they represent unless they have the consent of the FtT[1].

1 TP (FtT) Rules, rule 14(5) & (6)

06292 The appellant is asked to produce any relevant documents, for example, business accounts, to HMCTS when they return the pre-hearing enquiry form.

06293 Evidence that is difficult to read should be typed, but the original document should be available at the hearing.

## Extracts from documents

06294 The Department may submit extracts from lengthy documents, for example, a set of accounts. The response writer should

**1.** indicate which part of the document is to be copied by the Department and ensure that the typed extract is clearly headed “Extract from...” giving the necessary identifying details

**2.** ensure that the complete document or a copy of it is available at the hearing

**3.** provide a transcript and ensure the original tape is available at the hearing where an interview has been tape recorded.

**Note:** Extracts should never be taken from interviews under caution. The whole document should be provided[1].

1 R(I) 10/58

06295 - 06303

## Copyright

06304 Permission is not needed to reproduce printed material covered by copyright for an appeal to the FtT or the UT[1]. If an extract of printed material is needed for a response, the document can be photocopied and its source noted on the copy.

1 Copyright Act 56, s 6(4)

## Presentation of statements

06305 The Department should ensure that

**1.** written statements are signed with an explanation of why they were made and signed unless the reason is self-evident[1]

**2.** all evidence that is hard to read, especially records of interviews or phone calls, is typed and signed

**3.** the original documents are available at the hearing where practicable

**4.** the advice in DMG Chapter 01 about evidence given in confidence is followed where the evidence refers to imprisonment

**5.** anonymous letters are not included

**6.** anonymous witness statements are not routinely included. Generally a witness should not be anonymous unless there are special circumstances requiring anonymity and that would be a matter for the tribunal chairman to decide

**7.** if redacted documents are included the papers, an unredacted copy in a sealed envelope should be made available to the chairman of the FtT.

## Overpayments

### Warning and instructions issued to claimants

06306 If an appeal is made against a recoverable overpayment, the evidence should include

**1.** the warnings and instructions in a printed form

**2.** a copy of any leaflet sent to the claimant if the advice in that leaflet is relevant.

If the particular print of a form or leaflet is no longer available, the nearest equivalent should be included. If there have been any changes to the warnings and instructions to the claimant then the DM should include an explanation as to the effect, if any, those changes have on the case.

### Disclosure not made to administering office

06307 Where

**1.** the appeal is against a recoverable overpayment decision **and**

**2.** the ground of appeal is that disclosure was made to another office or part of another office of the Department

the DM should include evidence of Departmental procedures for links between sections, whether by computer or otherwise, and whether they broke down during the period of the overpayment.

## Rehabilitated offenders

06308 It is a criminal offence for anyone whose official duties involve access to official records to disclose information about spent convictions of rehabilitated offenders outside the course of those duties. In this connection the response writer should note that

**1.** evidence referring to a spent conviction should only be included where justice can **only** be done by doing so

**2.** if it is essential to refer to a period when the claimant has been in prison but has not been convicted of an offence, for example on remand, this should be made clear in the response.

## IfW cases

06309 In a case where, following a second or subsequent PCA, the DM determines that the claimant is not incapable of work, the previous PCA may not have been considered[1]. However, on appeal the last PCA should be made available to the tribunal.

1 SS CS (D&A) Regs, reg 6(2)(g)

## ESA cases

06310 Where, following a second or subsequent LCW/LCWRA assessment, the DM determines that the claimant does not have LCW/LCWRA, the previous LCW/LCWRA assessment may not have been considered[1]. However on appeal the last LCW/LCWRA assessment should be made available to the FtT.

1 SS CS (D&A) Regs, reg 6(2)(r)

## Exchange of medical reports

06311 When a claimant disputes or appeals a decision and argues that a medical report produced for another benefit is more favourable to them, the DM should, if possible, obtain a copy of the other report and take it into account when reconsidering the decision. The decision may need to be revised or superseded in the light of the other report. See DMG Chapters 03 and 04 for guidance on revision and supersession.

06312 The DM may also use a report produced for another benefit as evidence, for example where it is sent by another part of the Department.

06313 If an appeal proceeds, include a copy of the other report in the appeal documents and refer to it in the appeal response.

06314 The DM should also ensure that the tribunal is made aware of any decision making and appeals process which may have followed the production of the report. For example, where

**1.** a report is produced for the purposes of the PCA **and**

**2.** the IB DM decides that an award of IB or credits should be superseded and terminated **and**

**3.** the claimant appeals the IB decision **and**

**4.** the report is used as evidence when deciding a claim for DLA

the tribunal should be informed about this, and of the result of the appeal, including where this is known after the response is sent to HMCTS.

06315 - 06319

# Witnesses 06320 - 06329

No power to compel attendance 06322 - 06324

Attendance of employers 06325 - 06327

Employer's attendance in JSA misconduct cases 06328 - 06329

06320 Any person with a right to be heard (see DMG 06395) at an oral hearing has the right to call witnesses and put questions to another person called as a witness.

06321 The FtT may issue a summons (or citation in Scotland) to any person in GB requiring them to attend a tribunal hearing as a witness or order them to answer questions or produce evidence[1]. The summons must

**1.** give 14 days notice of the hearing (or shorter period if the FtT direct) **and**

**2.** make provision for the person summonsed to be paid necessary expenses and say who will pay them, where they are not a party to the appeal[2].

1 TP (FtT) (SEC) Rules, rule 16(1); 2 rule 16(2)

## No power to compel attendance

06322 No person can be compelled to give evidence or produce any document that they could not be required to do in a court of law in the part of the UK where the proceedings are to be heard[1]. Where a summons or order has been made it must state

**1.** that the person subject to the summons or order can apply to the FtT to vary or set it aside if they have not had the opportunity to object to it **and**

**2.** the consequences of failure to comply with the summons or order[2].

1 rule 16(3); 2 rule 16(4)

06323 The following general points apply to the attendance of witnesses

**1.** a claimant does not have the right to demand the presence of an officer whose evidence is unfavourable to him or her[1]

**2.** if a claimant wants to question a witness to resolve a conflict in evidence, the presenting officer should agree to an adjournment if necessary[2].

1 R(SB) 1/81; 2 R(SB) 10/86

06324 If it is likely that the evidence obtained by a visiting officer, special investigator or other officer will be challenged, the Department should arrange for that officer to attend. Witnesses can give direct evidence and give the appellant (or representative) an opportunity to question that evidence[1].

1 R(SB) 10/86

## Attendance of employers

06325 The Department should not normally ask an employer to attend as a witness or send a representative except

**1.** where there is a material conflict between the employer's written evidence and that of the appellant **or**

**2.** where the employer could otherwise make a material contribution to the tribunal's consideration of the case **or**

**3.** in JSA misconduct cases if appropriate (see DMG 06328).

06326 Where a witness is required, the witness should have first-hand knowledge of the relevant facts. For example if the evidence of overtime disclosed on wages records is to be questioned, the witness should be the person who made up the wage records, not the office manager who was not personally involved.

06327 In II cases where the question before the tribunal is whether

**1.** there was an IA **or**

**2.** an employed earner's employment was a prescribed occupation

the DM should always consider whether a witness is required. In these cases it is important that the person attending should as far as possible have first-hand knowledge of the facts.

## Employer's attendance in JSA misconduct cases

06328 In JSA misconduct cases, the employer should be invited to attend if necessary. In some cases it is essential to have a witness from the employer who has first-hand knowledge of the matters being considered. For example, where a claimant was dismissed for using abusive language or for refusing to obey an order, the person who was actually involved in the incident should be asked to attend.

06329

# Writing the response to the First-tier Tribunal 06330 - 06359

Recommendation to the First-tier Tribunal 06335 - 06337

Completion of appeal responses 06338

Personal details 06339

The decision 06340

Claimant's letter of appeal (where decision notified before 28.10.13) 06341

Summary of facts 06342 - 06344

Law and case law 06345 - 06349

Relevant evidence 06350 - 06359

06330 The main purpose of the written appeal response is to provide the FtT and the claimant with a comprehensive explanation of the reasons for the DM's decision. DWP will provide a response within 28 calendar days after the receipt of the appeal papers from HMCTS[1]. It must always contain[2]

**1.** the name and address of the DM who made the decision against which the claimant is appealing

**2.** the name and address of the presenting officer, if one is going to attend the hearing

**3.** the name and address of the relevant DWP office where documents can be sent

**4.** the name and addresses of any other respondents and their representatives, if known

**5.** whether the Secretary of State opposes the appeal and if so the grounds for that opposition if this is not already set out in any documents the FtT has.

**6.** any further information that the FtT issues a direction for.

1 TP (FtT) (SEC) Rules, rule 24(1)(c); 2 rule 24(2)

06331 The response should

**1.** focus on the circumstances that existed at the time that the appealed decision was made **and**

**2.** deal solely with the issues raised by the appeal.

06332 The response writer should adopt the role of friend of the court[1]. This means that the response should

**1.** give proper emphasis to points in the claimant's favour **and**

**2.** deal with any unresolved points put forward by the appellant. Account should be taken of these even if they are, in the response writer's opinion, only vaguely relevant to the question at issue.

1 R(I) 4/65, Appendix

06333 Along with the appeal response, the DM must also provide

**1.** a copy of any written record of the decision and any statement of reasons for that decision, if they were not sent with the appellants notice of appeal

**2.** copies of all other relevant documents that the Secretary of State holds, including all relevant documents and information that set out the decision making history and chronology. Where relevant documents are not in the DM's possession, the DM should make the FtT aware in the appeal response of why they cannot provide the documents[1].

**3.** a copy of the notice of appeal, any documents provided by the appellant with the notice of appeal and the name and address of any representative the appellant may have[2].

1 [2016] AACR 24 (FN v SSWP (ESA) [2015] UKUT 670 (AAC); 2 TP (FtT) (SEC) Rules, rule 24(4)

06334 Unless the FtT has made an order prohibiting the disclosure of certain documents[1] (see DMG 06287 et seq), the DM must provide a copy of the appeal response and any other papers to each other party to the appeal. If the party has a representative then they must be provided with a copy of any papers and therefore there is no need to provide them to the party[2]. If they wish, the appellant can then make a written submission or supply other documents in reply to the DM's appeal response[3].

1 TP (FtT) (SEC) Rules, rule 14; 2 rule 11(6); 3 rule 24(5)-(7)

## Recommendation to the First-tier Tribunal

06335 In order to assist the FtT to take the most appropriate course of action, the response to the FtT should indicate whether, if the appeal succeeds on the issue raised, there are other issues which require determination. If so, the response should also state whether the Secretary of State considers that the FtT should deal with them, or whether they should decide the issue under appeal and refer the case to the DM for a final outcome decision to be made.

### Outcome decision required

06336 The following examples are where the response writer may wish to request that the FtT give an

outcome decision.

**Note:** If the FtT does not accept the recommendation, the DM must comply with the FtT's directions.

**Example 1**

The DM decides that a claim for IS is disallowed because the claimant has no right to reside in the UK. The claim form has given sufficient information to decide all other conditions of entitlement. The response requests the FtT to give an outcome decision on entitlement if the appeal on the issue of the right to reside is allowed.

**Example 2**

The DM disallows a claim for IIDB on the grounds that the claimant is not suffering from a prescribed disease. The response requests the FtT to assess the degree of disablement if the appeal on the issue of diagnosis is allowed.

**Example 3**

The DM disallows a DLA claim because the claimant failed to attend a medical examination without good cause. The response asks the FtT to consider whether the claimant satisfies the conditions for an award of DLA if they find that there was good cause.

**Example 4**

The DM disallows a claim for CA because the claimant is in gainful employment with earnings above the NI lower earnings limit. The DM is satisfied that all other conditions of entitlement are satisfied. The response asks the FtT to give an outcome decision on entitlement if the appeal on the issue of earnings is allowed.

**Example 5**

The DM disallows ESA following a LCW determination. The DM's response includes a recommendation that if the FtT decide that the claimant has LCW they should go on to decide whether or not they have LCWRA.

## Outcome decision not required

06337 The following examples are where the response writer may wish to request that the FtT refers the case for the DM to give an outcome decision.

**Example 1**

The DM disallows a claim for IIDB on the grounds that the claimant was not in a prescribed occupation. The response requests the FtT to remit the claim to the DM to deal with the diagnosis and disablement questions if the appeal on the prescribed occupation issue is allowed.

**Example 2**

The DM disallows a claim for JSA(IB) on the ground that the claimant has excess capital. There is no entitlement to JSA(Cont). The claim form indicates that the claimant's partner may be in remunerative work which requires further investigation. The response requests the FtT to refer the claim to the DM to make a decision on entitlement if the appeal on the excess capital issue is allowed.

**Example 3**

The DM disallows a claim for CA on the grounds that the claimant has not satisfied the prescribed conditions as to residence and presence in GB. The claim form indicates that the claimant may also be in F/T education. The response requests the FtT to refer the claim to the DM to make a decision on entitlement if the appeal on residence and presence is allowed.

## Completion of appeal responses

06338 Appeal responses are made in a standard format depending on the focus of the response. For general advice on the contents of responses see DMG 06330 et seq. Detailed guidance on the completion of appeal response templates can be found in Departmental operational guidance.

## Personal details

06339 The response should contain

**1.** the claimant's name and NI number

**2.** the date the decision appealed was made

**3.** the date the decision was notified to the claimant (see DMG 06065 - 06066)

**4.** the date the mandatory reconsideration was undertaken (for decisions notified on or after 28.10.13)

**5.** the date the mandatory reconsideration notice was sent to the claimant (for decisions notified on or after 28.10.13).

## The decision

06340 The exact wording of the decision as notified to the claimant should be included. The response writer should not paraphrase or make corrections to the decision. DMs should ensure that the outcome is recorded, and not the determination which is the issue under appeal.

## Claimant's letter of appeal (where decision notified before 28.10.13)

06341 Where the claimant's letter is legible, a copy is attached to the response. If not, the wording of the appeal should be entered exactly as written except for the omission of phrases such as "Dear Sir" and

“Yours faithfully”.

## Summary of facts

06342 The summary should

**1.** be a plain statement of facts in a simple narrative form

**2.** contain only those facts relevant to the case

**3.** exclude opinions or assumptions not supported by the evidence.

06343 The facts of the case should also include an explanation of the reasons for the decision and the reconsideration/mandatory reconsideration process as appropriate.

The explanation of the decision should cover the outcome and how the issues under appeal were decided. The reconsideration/mandatory reconsideration process should include details of information supplied by the claimant and its consideration.

06344 Where the facts refer to a particular document, an appropriate cross-reference to the page number should be made.

## Law and case law

06345 The response should list

**1.** the sections of Acts

**2.** the numbers of regulations

**3.** any European legislation, for example Regulations and Directives

**4.** relevant case law

used to make the decision about the issues under appeal.

### Use of unreported Upper Tribunal decisions

06346 The response writer should note the following points on unreported UT decisions

**1.** response writers should not normally rely on unreported UT’s decisions as authority or refer to them in responses

**2.** the response writer should take account of an unreported decision if a claimant refers to it

**3.** in exceptional cases copies of unreported decisions and advice on their application are available from

**4.** if the facts are clearly distinguishable so as to make the legal principles in the unreported case inapplicable, the response writer should say so in the response

**5.** reported decisions which clearly cover the point at issue should be included because they take precedence over unreported decisions.

06347 Where

**1.** the claimant cites an unreported decision after the response is sent to HMCTS **and**

**2.** there is insufficient time to prepare a supplementary response

the presenting officer should cover the matter in the oral presentation to the FtT, or request an adjournment.

**NB:** See Annex K (Neutral citation) for details of how reported and unreported decisions are now numbered.

### Northern Ireland Commissioners' decisions and Court of Appeal judgments

06348 Response writers should contact the Office of the Social Security Commissioners, Child Support Commissioners & Pensions Appeal Commissioners (NI) when a Northern Ireland decision is involved and there is no reported decision in GB dealing with the point at issue.

06349 Commissioners' decisions and judgments of the Court of Appeal in Northern Ireland may be persuasive but are not binding on the decision making authorities in GB[1]. However, where the relevant statutory provisions are identical, the same interpretation should be applied by the judicial authorities throughout the UK[2]. For example, where a view of the law is fully argued before the Court of Appeal in Northern Ireland, and the law is the same in GB, the FtT should follow it[3].

1 R(S) 5/85; 2 R(SB) 1/90; 3 R(IB) 4/04

## Relevant evidence

06350 The response should contain the relevant evidence that was available to the DM when the decision was made unless for other reasons it should be excluded (see DMG 06287 et seq). All the relevant evidence before the DM should be presented to the FtT. See DMG 06300 - 06309 and Chapter 01 for further guidance on evidence.

06351 The relevant evidence should be listed in a schedule, with the documents themselves numbered by page for cross-references.

06352 - 06359

# First-tier Tribunal procedures 06360 - 06416

Composition of the First-tier Tribunal 06365

Other members 06366 - 06367

Membership for certain types of appeal 06368 - 06371

Tribunal member unavailable 06372 - 06385

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Medical examination by the First-tier Tribunal 06410 - 06411

Directions 06412 - 06416

06360 The FtT's procedure is decided by the presiding member of the FtT within a framework laid down in rules[1] and in Practice Statements issued by the Senior President of Tribunals. The presenting officer should be aware of procedures. Decisions of Commissioners and UT Judges on tribunal procedures are summarized in RDD[2]. Failure to observe proper procedures or established rights may leave the FtT's decision open to challenge on grounds of natural justice (see DMG 06019 - 06021).

1 TP (FtT) (SEC) Rules; 2 Reported Decisions Digest

06361 - 06364

## Composition of the First-tier Tribunal

06365 The FtT will consist of between one and three members depending on the type of appeal and as decided by the Senior President of Tribunals[1]. Where the FtT is made up of just one member than that person must be a FtT judge[2]. Where the FtT is made up of two or more members then the Senior President of Tribunals will decide how many are to be FtT judges and how many are to be other members and will select one to be the presiding member who will chair the FtT. The presiding member has the casting vote if votes are otherwise equally divided[3].

1 FtT & UT (Composition of Tribunal) Order, arts 2 & 3; 2 art 4; 3 arts 5-8

## Other members

06366 A person who is not a judge can qualify to be a member of a Social Security of Child Support FtT[1] by being

**1.** a registered medical practitioner[2]**or**

**2.** an accountant[3].

1 Practise Statement on the Composition of Tribunals, para 7;
2 Qualifications for Appointment of Members to the FtT & UT Order, art 2(2)(a); 3 art 2(2)(i)

06367 As well as people with specific qualifications as in DMG 06366, certain other people with relevant experience with regard to social security matters can also become members of the FtT. These people are those who are not a registered medical practitioner but who have experience dealing with the physical or mental needs of disabled people because they

**1.** work with disabled people in a professional or voluntary capacity **or**

**2.** are themselves disabled[1].

1 Qualifications for Appointment of Members to the FtT & UT Order, art 2(3)

## Membership for certain types of appeal

06368 Where the appeal relates to AA or DLA, the FtT must consist of the FtT judge, a member who is a registered medical practitioner and a member who has disability qualification as in DMG 06367[1]. See DMG 06372 for exceptions.

1 Practice Statement on the Composition of Tribunals, para. 4

06369 Where the appeal relates to

**1.** PCA

**2.** LCW

**3.** LCWRA

**4.** recovery of benefits

**5.** SDA

**6.** II

**7.** Vaccine Damage Payments

the FtT must consist of a FtT judge and a member who is registered medical practitioner[1].

1 Practice Statement on the Composition of Tribunals, para. 5

06370 Where an appeal would normally be heard by a FtT judge sitting alone[1] or by a FtT constituted as per DMG 06369, the Chamber President can decide that specific types or extra members must be included where

**1.** financial matters are an issue in the appeal then the tribunal member is an accountant **or**

**2.** the appeal involves complex medical issues then an additional member is included who is a registered medical practitioner **or**

**3.** for the purposes of

**3.1** providing further experience for a FtT judge or member **or**

**3.2** monitoring decision making standards

an additional FtT judge or member is included[2].

1 Practice Statement on the Composition of Tribunals, para. 6; 2 para. 7

06371 Where an appeal which would normally be heard by the FtT constituted as in DMG 06368 or DMG 06369 but which only raises questions of law, the Chamber President can direct that a FtT Judge may hear the case or a judge and a member who has the relevant experience and qualifications for the issued raised[1].

1 Practice Statement on the Composition of Tribunals, para. 8

## Tribunal member unavailable

06372 There may be occasions where although a FtT would normally consist of more than one member (see DMG 06369 and 06370), this is not possible. So for example, because of adverse weather conditions one or more members are unable to attend the hearing. Where the hearing is otherwise able to go ahead as all other parties who are intending to be present are at the venue, it would be sensible to be able to continue with the hearing. Primary legislation does allow for an appeal to be heard in the absence of one or more but not all of the members, providing all the parties agree[1].

1 TCE Act 07, Sch 4, para 15(6)

06373 DWP has come to an agreement with HMCTS that in circumstances where

**1.** a member is, at short notice, unable to attend the venue **and**

**2.** the DWP has already told HMCTS that a PO will not be attending the hearing, or the DWP PO agrees **and**

**3.** the appellant and/or any representative agrees

the FtT will hear the appeal in the absence of one or more of the members.

06374 The FtT must however, always include a tribunal judge. So where a three person tribunal is reduced to two people, one must be a judge[1], or where reduced to one person, that person must be a judge[2]. Where a judge is not available then the hearing cannot go ahead.

1 The FtT & UT (Composition of Tribunal) Order 2008, art 6; 2 art 4(1)

06375 - 06385

## Hearings and notice given

06386 Each party to the appeal is entitled to attend the hearing. Reasonable notice of a hearing of at least 14 clear days, giving the time and place of the hearing, must be given to each party to the proceedings. The FtT may give shorter notice with consent of the parties or in urgent or exceptional circumstances[1].

1 TP (FtT) (SEC) Rules, rule 29(2)

06387 If a party to the appeal fails to attend a hearing, the FtT may decide to hear the appeal in their absenceif the FtT

**1.** is satisfied the party was notified or that reasonable steps were taken to notify the party **and**

**2.** considers that it is in the interests of justice to proceed[1].

1 TP (FtT) (SEC) Rules, rule 31

06388 A hearing means an oral hearing[1] and should be held in public unless the FtT decide otherwise[2]. It also includes a hearing conducted in whole or part by video link, telephone or other instantaneous two-way electronic communication.

1 rule 1(3); 2 rule 30(1)

06389 Where the FtT decide the hearing or part of it is to be held in private, they may also decide who can be permitted to attend the hearing, or part of it[1].

1 rule 30(4)

06390 The FtT can direct that a person be excluded from all or part of the hearing where they consider that that person's

**1.** conduct is likely to disrupt the hearing **or**

**2.** presence is likely to prevent someone from giving evidence or talking freely **or**

**3.** presence would counteract the effect of withholding information likely to cause harm **or**

**4.** attendance would defeat the purpose of the hearing[1].

1 rule 30(5)

06391 - 06394

## Right to be heard

06395 The following are entitled to be present and be heard at tribunal hearings[1]

**1.** the claimant

**2.** the DM

1 rule 28

06396 Any person entitled to be heard at a tribunal may be accompanied or represented by another person[1]. This applies whether or not the representative has professional qualifications. The representative can do anything that the party could do, except sign a witness statement[2].

1 rule 11(1); 2 rule 11(5)

06397 - 06404

## Use of experts

06405 Where the FtT considers it requires special expertise not available, it may seek assistance from a person with the relevant knowledge or experience[1].

1 TCE Act 07, s 28(1)

## Reference for medical examination and report

06406 Where an appeal is against a decision on a claim for or entitlement to a relevant benefit in DMG 06407 the FtT may refer a claimant to a HCP for examination and report where it is considered necessary to determine the appeal[1].

1 SS Act 98, s 2; TP (FtT) (SEC) Rules, rule 25(3) & Sch 2

06407

| Relevant benefit | Prescribed circumstance |
|---|---|
| AA | Disability conditions of entitlement |
| | Rate or period payable[1] |
| | 1 SS CB Act 92, s 64 & 65(1) |
| DLA | Disability conditions of entitlement |
| | Rate or period payable[1] |
| | 1 s 72(1) & (2), 73(1), (8) & (9) |
| ESA | Whether claimant has LCW or LCWRA[1] |
| | 1 WR Act 07, s 8 & 9 |
| IB | Whether claimant is incapable of work[1] |
| | 1 SS CB Act 92, s 171A |
| IISB | Assessment and extent of disablement[1] |
| | Whether claimant suffers loss of physical or mental faculty as a result of an IA[2] |
| | Prescribed disease or injury[3] |
| | 1 Sch 6; 2 s 103; 3 s 108 |
| WC | Payment[1]. |
| | 1 s 111 & Sch 8 |

06408 Except where DMG 06410 applies, where there is an oral hearing, the tribunal may not

**1.** carry out a physical examination of the appellant[1] **or**

**2.** require the claimant to undergo any physical test to determine walking ability for the purposes of the mobility component of DLA[2].

1 SS Act 98, s 20(3)(a); 2 s 20(3)(b); SS CB Act 92, s 73(1)(a)

06409

## Medical examination by the First-tier Tribunal

06410 The appropriate FtT member may carry out a physical examination[1] of the claimant where the appeal concerns

**1.** SDA where there is a question of disablement[2]**or**

**2.** IISB (except REA) where there is a question of disablement, or a prescribed disease is involved[3].

1 TP (FtT) (SEC) Rules, rule 25(2); 2 SS CB Act 92, s 68(6) & Sch 6; 3 s 105 & 108

06411 Clinical findings following such an examination are not evidence from or observations by the FtT, but part of the judicial process of deciding an appeal.

## Directions

06412 The FtT may at any time give a direction that relates to the conduct or disposal of proceedings[1]. Such a direction can include amending, suspending or setting aside an earlier decision. The types of direction the FtT can give are as follows

**1.** extend or shorten the time for complying with any rule practice directives or direction

**2.** consolidate or hear together two or more sets of proceedings or part of proceedings which raise common issues or treat a case as a lead case

**3.** permit or require a party to amend a document

**4.** permit or require a party or another person to provide documents, information, evidence or submissions to the FtT or a party

**5.** deal with an issue in the proceedings as a preliminary issue

**6.** hold a hearing to consider any matter

**7.** decide the form of any hearing

**8.** adjourn or postpone a hearing

**9.** require a party to produce a bundle for a hearing

**10.** stay proceedings (in Scotland sist proceedings)

**11.** transfer proceedings to another court or tribunal if that court or tribunal has jurisdiction over the matter **and**

> **11.1** the FtT no longer has jurisdiction due to a change of circumstances since the proceedings started **or**
>
> **11.2** the FtT considers the other court or tribunal is a move appropriate place for the determination of the case **or**

**12.** suspend its own decision until the FtT or UT has decided on

> **12.1** an application for permission to appeal against the decision **or**
>
> **12.2** any appeal or review of the decision.

1 TP (FtT) (SEC) Rules, rule 5

06413 - 06416

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## Attendance of presenting officer at oral hearing

06417 Where there is a hearing any person, including the DM, may be represented by another person at the FtT. The DM who made the decision under appeal can attend the hearing and present the case personally. However, the DM is usually represented by the presenting officer. The presenting officer as the DM's representative has all the same rights and powers as the DM who gave the decision.

06418 Decisions on attendance of the presenting officer at oral hearings are made by the relevant business unit. However, the FtT do have powers to direct a person to attend a hearing and all parties have a duty to co-operate with the FtT[1]. This can include directing that a presenting officer attend. If a FtT Judge issues such a direction then DWP is under a duty to obey that direction. If attendance is not possible, for example the presenting officer may be ill on the day of the hearing and there is nobody else who could attend in their place, then the DM should apply to the FtT as soon as possible to amend, suspend or set aside its direction as appropriate[2]. Failure to comply with such a direction could result in the FtT taking action it thinks appropriate which could include striking out the party's case[3]. This means that DWP would be barred from taking further part in the proceedings and the FtT would not need to take any account of the DWP appeal response[4]. See DMG 06035 re FtT powers on failure to comply.

1 TP (FtT) (SEC) Rules, rule 2(4)(b); 2 rule 6(5); 3 rule 7; 4 rule 8(7)(a) & (8)

## Function of the First-tier Tribunal

06419 The FtT's function is inquisitorial not adversarial[1]. It is not a matter of the DM versus the appellant. The FtT should make a full investigation into the matter under appeal and not just rely on evidence presented to them by the parties[2].

1 R(SB) 2/83(T); 2 R(SB) 12/85

06420 The FtT's jurisdiction on appeal is to make any decision the DM could have made, whether on a claim or an application for revision or supersession. However, a FtT is not required to substitute an outcome decision for that which is under appeal. The power enabling them to deal only with the issues raised by the appeal[1] does not have the effect that they have to make a decision on every issue if there is a more appropriate way of dealing with those issues.

1 SS Act 98, s 12(8)(a); R(IS) 2/08

### Options open to the First-tier Tribunal

06421 The FtT has the power to

**1.** dismiss the appeal **or**

**2.** allow the appeal on the issue **and**

**2.1** substitute an outcome decision **or**

**2.2** substitute an outcome decision subject to matters of calculation referred to the DM **or**

**2.3** refer the case back to the DM to make an outcome decision **or**

**3.** adjourn to enable further information to be obtained before making a decision as in **1.** or **2.** above **or**

**4.** make a consent order at the request of the parties and making appropriate provisions as agreed by the parties[1].

**Note:** While consent orders under DMG 06422 **4.** above are an option for the FtT, presenting officers should not agree to any suggestion of a consent order.

1 TP (FtT) (SEC) Rules, rule 32(1)

06422 When deciding which option in DMG 06422 **2.** or **3.** above applies, the FtT will take into account

**1.** the difficulty of outstanding issues

**2.** the likelihood of a further appeal

**3.** whether the Secretary of State is better placed

**3.1** to decide the issue

**3.2** to get further information

**4.** the wishes of the parties.

06423 The FtT should bear in mind that an appeal against a FtT decision cannot be made on a question of fact.

## First-tier Tribunal's power to substitute decisions

06424 The FtT has the power to substitute a decision for that of the DM, in order to correct defects or change the grounds for revision or supersession where appropriate. It can also substitute a revision for a supersession, and vice versa, within limited circumstances. (See DMG 06422 **2.1** and **2.2**). This is where a ground is required for revision, which overlaps with a ground required for supersession, i.e. in cases of ignorance of or mistake as to some material fact, and error of law or official error[1]. See DMG 06510 where a tribunal decision is incomplete.

1 R(IB) 2/04

**Example 1**

The DM superseded and terminated an award of IB on the ground of a relevant change of circumstances, that after the original award was made the claimant had started work which was not exempt. The FtT finds that the claimant was working at the date of the original decision, and had not declared this fact to the Secretary of State. A determination about working is not an incapacity determination for the purposes of revision and supersession[1]. The FtT substitutes a revised decision for the supersession decision.

1 SS (IfW) (Gen) Regs, regs 16 & 17; SS CS (D&A) Regs, regs 3(5)(b) & 7A(1)

**Example 2**

The DM revised a decision awarding DLA for ignorance of a material fact, determining that the claimant knew the fact and could reasonably be expected to know that it was relevant to the decision. Entitlement was removed from the date of claim. The FtT finds that the claimant did not and could not reasonably be expected to know the fact. The FtT substitutes a supersession decision for the revised decision.

## First-tier Tribunal's power to correct decisions

06425 Where the FtT upholds the outcome of a decision which is otherwise defective, they only need correct it if

**1.** it is wrong in some way, e.g. relying on an incorrect ground for supersession **or**

**2.** there is likely to be some practical benefit to the claimant or the decision making process in the future[1].

1 R(IB) 2/04

06426 Exceptionally, the FtT may decide that the decision is so fundamentally flawed that it cannot be corrected. In such cases the decision is invalid, and the appeal should be dismissed on the grounds that no proper decision has been made. The DM should make the decision again ensuring that the flaws are not repeated[1].

1 R(IS) 13/05

**Example**

A claimant is in receipt of IS as a lone parent. Following an investigation, the DM makes a determination that she is LTAHAW with her partner. No findings are made about whether they are entitled to IS as a couple, nor when they began to live together. The award of benefit is ended. The determination is notified with appeal rights. On appeal, the FtT decide that they have no jurisdiction to hear the appeal as no valid decision has been made, nor is it clear whether the awarding decision should have been revised or superseded.

### First-tier Tribunal's power to make less favourable decisions

06427 The FtT has the power to make a decision which is less favourable than that made by the DM. Alternatively, they could exercise their discretion and leave it to the Secretary of State to consider whether to make that decision. However, if the FtT substitutes a decision on supersession which is less favourable than that made by the DM following an application by the claimant, the FtT's decision is regarded as made on the Secretary of State's own initiative. It will take effect from

**1.** the date the claimant could reasonably be expected to report the change in disability or incapacity cases[1]**or**

**2.** the date of the change[2]**or**

**3.** the date of the DM's decision under appeal if none of the exceptions applies[3].

See DMG Chapter 03 for further guidance.

1 SS CS (D&A) Regs, reg 7(2)(c)(ii); 2 reg 7(2)(c)(v); 3 SS Act 98, s 10(5); R(IB) 2/04

## Responsibility of the appellant

06428 The primary responsibility to make a case to the FtT rests with the appellant. However as appellants, in general, are not familiar with the law, the FtT should consider the appeal without insisting that the appellant points to the precise legal provision under which the claim or application is made.

## Presenting officer's role

### Before the hearing

06429 In advance of the hearing, the presenting officer should review the case and satisfy themselves that the right decision has been reached on the evidence available. If they do not think the right decision has been made then they should reconsider the original decision, lapse the appeal where appropriate and notify the FtT.

### At the hearing

06430 The role of the presenting officer is to present the Secretary of State's case and support the FtT to make the right decision based on the conditions set out in legislation. The presenting officer should not

**1.** put questions to any appellant or witness in a hostile manner

**2.** think in terms of "winning" the case. The objective should be to assist the FtT to assess the facts, relevant law and case law relating to the case. This is done by highlighting the questions to be decided and by clarity in the presentation, evidence, argument and advice to the FtT.

## Conduct of the presenting officer

06431 The presenting officer should not

**1.** discuss the case with the FtT when a party to the appeal is absent unless directed to do so because the appeal is to proceed in the appellant's absence

**2.** address the FtT about the case before the arrival of the appellant[1]

**3.** enter the FtT room before or leave after the appellant[2]

**4.** discuss the merits of individual cases with appellants and their representatives either before or after the hearing.

Failure to observe these simple rules may result in an application being made to set aside the decision of the FtT on the grounds of a breach of the rules of natural justice.

1 CP 127/49(KL); 2 R(U) 44/52

## Order of proceedings

06432 The FtT do not have the strict rules and atmosphere of formal legal proceedings. The presiding member decides whether the appellant or the presenting officer is invited to speak first and how the presentation should be made.

## Presenting the appeal

06433 The presenting officer should not read out the response word for word unless asked to do so, but should

**1.** state, as fully as possible, the grounds for the appellant's appeal

**2.** describe the appellant's circumstances at the date of the decision, and try to ensure that all the relevant facts are made known, particularly where the appellant does not attend the hearing

**3.** explain the legal basis for the decision

**4.** assist the FtT to focus their attention on the issues raised by the appeal.

## What standard of proof of evidence is required

06434 The FtT should not require the same high standard of proof as is required in criminal cases[1]. The burden of proof usually rests on the appellant but the standard of proof required is that of a balance of probabilities. The appellant's evidence should be accepted unless it is self-contradictory or inherently improbable[2].

**Note:** Where the revision or supersession was requested by the Agency, the burden of proof is with the DM.

1 R(I) 32/61; 2 R(I) 2/51

## What evidence is admissible

06435 The FtT may consider any evidence, direct or circumstantial, first-hand or second-hand (hearsay), directly or indirectly relevant to the question for determination. But note that

**1.** a bald assertion of fact, unsupported by personal knowledge is not evidence. This includes an assertion by a presenting officer

**2.** presenting officers can only give evidence if they have some personal knowledge of the facts which they obtained when acting for the Secretary of State, for example by interviewing the appellant. The presenting officers would then assume the role of a witness[1] and would be open to questioning

**3.** an assertion of fact by an appellant's representative is not evidence unless backed up by a witness with personal knowledge. Often that witness is the appellant in which case the presenting officer should get confirmation of the assertion. The appellant then becomes a witness and is open to questioning[2].

1 R(SB) 10/86; 2 R(I) 36/61

## Questioning witnesses

06436 A presenting officer should not question any witness in a hostile or disbelieving manner. The presenting officer should be calm, polite and unruffled. Courtesy is proper before the FtT; any other approach is unlikely to be effective in obtaining helpful answers from the witness.

06437 The presenting officer should never accuse a witness of giving untruthful evidence but should suggest that

**1.** the witness is mistaken

**2.** the FtT might find it difficult to reconcile the witness's statement with the other known facts or statements.

06438 Where

**1.** the FtT does not give the presenting officer the chance to question the appellant **or**

**2.** the presenting officer does not accept the oral evidence

the presenting officer should ask the FtT for permission to put questions. If the evidence obtained differs substantially, the FtT may pursue the matter themselves. If they do not, the presenting officer

may need to question the witness more closely to resolve discrepancies and test the truth of the evidence.

06439 If, despite a request to question an appellant or witness, the presenting officer is not allowed to exercise that right, the presenting officer should not pursue it further at the hearing but should ask the FtT to include in the record of proceedings a note of the request and of the refusal.

## Recall of witnesses

06440 A witness may be recalled to give further evidence by

**1.** the presenting officer or any other party

**2.** the FtT even after the parties have retired and the FtT has begun its deliberations.

Where the FtT has recalled a witness, all parties should return to the FtT before the further evidence is heard.

## Introduction of new material

### By the presenting officer

06441 The presenting officer should avoid raising completely new points or introducing new evidence not included in a written response. If the presenting officer is forced to do so at the hearing, they should

**1.** explain the reason and suggest an adjournment for the appellant to have an opportunity to consider the matter

**2.** seek an adjournment if the appellant does not attend. This will allow a further written response to be made and give the appellant an opportunity to respond to the fresh points.

### By the appellant

06442 The presenting officer should not object to new evidence or points being introduced by the appellant. However, it should be pointed out that such submissions and further evidence should normally be provided to the FtT within a month after the date on which the DM sent their response[1].Documents submitted as evidence by an appellant, employer or other witnesses, for the first time at a hearing should be included in the FtT record or copied. The presenting officer should ask the FtT, if the appellant does not attend, to record the contents of the document and if possible have it copied before returning it to the person who produced it.

1 TP (FtT) (SEC) Rules, rule 24(6) & (7)

06443 If the new evidence raises issues of fact or law not reasonably foreseeable at the time the response was prepared, the presenting officer should establish details of the new material and its

precise legal effect. The presenting officer should then

**1.** decide whether a response can be made at the hearing on the basis of the new material or legal position arising **or**

**2.** seek an adjournment to give the presenting officer the opportunity to deal with the fresh material[1].

1 R(F) 1/72

06444 If the material produced concerns a matter that is outside the jurisdiction of the FtT, for example where the evidence does not relate to the condition of the claimant at the time the decision appealed against was made, the presenting officer should submit that the FtT should disregard it[1].

1 SS Act 98, s 12(8)(b)

06445

## Unreported decision produced at the hearing

06446 If an unreported decision is produced without warning at the hearing, the presenting officer and the FtT should read and consider it. See DMG 06346 - 06347 for guidance on the use of unreported decisions. If the appellant or the FtT member merely quoted an unreported decision not available to the FtT, an adjournment should be sought so that a copy can be obtained and made available to all parties.

## Summing up

06447 In the summing up the presenting officer should

**1.** remind the FtT of the questions for determination

**2.** readily suggest a change in the ground of the original decision if further evidence or argument has been put forward justifying that approach

**3.** submit the appellant's appeal should succeed if the new evidence or argument justifies this.

## Adjournments - presenting officer at the hearing

06448 The FtT decides whether to adjourn a hearing. The presenting officer, or the appellant, can request an adjournment.

06449 Since a presenting officer is expected to prepare in advance the ground for an effective hearing, the FtT is usually slow to grant an adjournment. There are a number of facts it normally takes into account

**1.** there has to be a new relevant issue arising in the course of the hearing (or exceptionally just before it)

which could not reasonably have been foreseen and needs further enquiries or consideration

**2.** whether the adjournment would cause any of the other parties to the proceedings hardship or prejudice their case.

06450 A presenting officer might ask initially for a very short adjournment, for example to read an unreported UT's decision produced by the appellant for the first time at the hearing. This may lead to a request for further adjournment to another date. If the presenting officer's request for an adjournment is refused the FtT should be asked to note the request on the record of proceedings.

## Action following adjournment

06451 Following an adjournment, the FtT judge/presiding member must direct on the record of the adjournment notice the enquiries to be made. The notice should clearly set out all the FtT's requests and directions including who should obtain the relevant information.

## Reconsideration following adjournment

06452 Where further evidence is submitted after the hearing is adjourned, it may be sufficient to enable the DM to

**1.** revise[1] the decision **or**

**2.** supersede[2] the decision.

1 SS CS (D&A) Regs, reg 3(4A); 2 reg 6

### Decision revised

06453 If the decision is revised in the appellant's favour, the appeal lapses (see DMG 06160 - 06162).

06454 Where the decision is revised but not to the appellant's advantage, the appellant and HMCTS should be notified of the decision as revised. The appeal continues but is treated as though it was against the decision as revised.

### Decision superseded

06455 If the decision is superseded, the appellant and HMCTS should be notified of the new decision. The appeal against the previous decision continues.

06456 - 06459

## Resumed hearings

06460 A resumed hearing before a single FtT judge can usually be heard by the same person. When a

two or three member FtT has adjourned, it is rarely possible to arrange for the appeal to continue before the same members. If at the subsequent hearing the FtT is differently constituted, the proceedings are a complete rehearing of the case.

06461 The following general points apply to resumed hearings

**1.** all evidence should usually be heard again and recorded by the FtT judge/presiding member

**2.** oral evidence need not be given again at the rehearing. Although the matter is considered again the FtT can accept the recorded evidence of a witness from the original hearing, provided the rules of natural justice are not infringed[1]

**3.** the FtT judge/presiding member may ask questions based on the notes of evidence given at the previous hearing, but it is not sufficient to simply read over the record of the decision and ask the appellant to confirm that it is correct[2]

**4.** all members of the new FtT should have the opportunity to ask questions about the evidence presented.

1 R(U) 3/88; 2 R(S) 1/87

06462 A further response should be made to the FtT if

**1.** the presenting officer or DM wishes to comment on further evidence received

**2.** there are other aspects that the presenting officer or DM wishes the FtT to consider.

06463 - 06469

## Appeal outstanding at appellant's death

06470 When an appellant dies while an appeal is outstanding, the Secretary of State may appoint someone to act in the place of the appellant[1].

1 SS CS (D&A) Regs, reg 34

06471 If the Secretary of State does not appoint a person to proceed with the appeal and any executors or personal representatives do not wish to proceed, the FtT judge/presiding member should decide how the appeal should be dealt with. The presenting officer should suggest the following

**1.** where there are executors to the deceased's estate, the appeal should be determined even though the executors have refused to proceed with it[1]

**2.** where there are no executors the appeal should be abated[2]. The appeal is then suspended but can be

revived[3].

1 R(P) 2/62; 2 R(SB) 25/84; 3 R(1) 2/83

06472 The FtT also has power make a direction to substitute a party where circumstances have changed since the start of the proceedings[1].

1 TP (FtT) (SEC) Rules, rule 9

06473 - 06479

## Report of any exceptional incidents

06480 When the hearing is completed, the presenting officer should make a note of any exceptional incidents, for example where the FtT does not allow the presenting officer to question a witness. The presenting officer should draw the attention of the DM who prepared the response to any difficulties met at the hearing. This may help the DM to decide whether an appeal to the UT is appropriate when the FtT decision is received.

06481 - 06499

# The First-tier Tribunal's decision 06500 - 06514

Decision notice 06500 - 06502

Statement of reasons 06503 - 06507

Record of proceedings 06508 - 06514

## Decision notice

06500 The FtT may give a verbal decision at the hearing. Whether they do this or not, they must also provide all parties with a written decision notice which should include notification of

**1.** the right to apply for a written statement of reasons **and**

**2.** any appeal rights and time limits[1].

1 TP (FtT) (SEC) Rules, rule 33

06501 The FtT's decision notice should explicitly record what it has decided and make it clear whether

**1.** an outcome decision has been made (including those subject to calculation by the DM) **or**

**2.** the final decision on entitlement has been remitted to the DM[1].

1 R(IS) 6/07

06502 The decision notice may be sent by electronic mail. When calculating time limits for

**1.** requesting a statement of reasons

**2.** requesting the record of proceedings

a decision notice is sent when it is properly addressed and sent by electronic mail[1].

1 TP (FtT) (SEC), Rules, rule 13

## Statement of reasons

06503 The FtT may give reasons for a decision which disposes of the proceedings

**1.** verbally at the hearing **or**

**2.** in a written statement of reasons[1].

1 rule 34(2)

### Late application for statement of reasons

06504 Within a month of the written decision notice being issued, any party to the appeal can make a written application for a written statement of reasons if one has not already been provided as in DMG 06500. This can be requested even if the reasons were given verbally at the hearing. The FtT must then issue the written statement of reasons within a month of receipt of the application or as soon after as is reasonably practicable[1]. There is no specific provision for a late application for a written statement of reasons, however the FtT does have a wide ranging power to extend the time for complying with any provisions in the rules[2].

**Note:** The DM should not request a statement unless the case is being considered as a potential appeal to the UT.

1 TP (FtT) (SEC) Rules, rule 34(3)-(5); 2 rule 5(3)

06505 - 06507

## Record of proceedings

06508 The FtT judge or presiding member is required to make a record of the hearing sufficient to indicate the evidence taken. It can be in whatever form the FtT member may direct[1].

1 Practice Statement on Record of Proceedings, para 2 & 3

06509 The FtT must keep a copy of

**1.** the record of proceedings

**2.** the decision notice

**3.** any written reasons for the FtT's decision

for a period as in DMG 06510[1].

1 para. 4

06510 The period is[1]

**1.** six months from the date of

**1.1** the FtT's decision

**1.2** any written reasons for the FtT's decision

**1.3** any correction of the decision notice[2]

**1.4** a refusal to set aside the decision for procedural reasons[3]

**1.5** a determination of an application for permission to appeal to the UT **or**

**2.** until the date when the documents in DMG 06509 are sent to the UT in connection with an appeal or an application for permission to appeal if that is within the six months in **1.**.

1 Practice Statement on Record of Proceedings, para. 5; 2 TP (FtT) (SEC) Rules, rule 36; 3 rule 37

06511 Any party to the proceedings may apply in writing for a copy of the record of proceedings within the time limit in DMG 06510, and a copy must be sent to the party[1].

1 Practice Statement on Record of Proceedings, para. 6

06512 - 06514

# Consideration of the First-tier Tribunal decision 06515 - 06599

Decision incomplete 06515

Case remitted to DM 06516 - 06517

Liberty to apply 06518 - 06519

Where a party thinks the decision is wrong 06520

Accidental error 06521 - 06529

Setting aside First-tier Tribunal decisions on procedural grounds 06530 - 06549

Decisions that cannot be implemented 06550 - 06556

Potential appeals to the Upper Tribunal 06557

Late applications 06558 - 06563

First-tier Tribunal consideration of application for permission to appeal 06564 - 06569

Suspension of payment of benefit 06570 - 06584

Appeals remitted by the Upper Tribunal 06585 - 06591

Supersession of the First-tier Tribunal decision 06592 - 06599

## Decision incomplete

06515 Where the FtT decision is incomplete the DM should refer the case back to the FtT immediately for a decision to be made. The DM should explain that all matters raised by the appeal have not been decided[1]. However the DM should be aware that FtT does have the power to just decide on certain issues (see DMG 06422 **1.**, **2.1** and **2.2**).

1 R(S) 9/81

## Case remitted to DM

06516 If the case is remitted to the DM, a new outcome decision should be made incorporating the FtT's decision. The FtT's decision is binding on the DM, subject to supersession or appeal. (See DMG Chapter

01 for guidance on finality of decisions and Chapter 04 for guidance on supersession).

06517 The DM's new decision will itself have a right of appeal. However, the claimant cannot use this appeal to re-open the issue decided by the FtT, unless there are grounds to supersede.

**Example**

A claim for IS is disallowed on the grounds that the claimant has capital in excess of £16,000. On appeal, the FtT decides that the capital is £9,500, and remits the claim to the DM. The DM makes a further decision on the claim taking into account the amount of capital as decided by the FtT, which results in a further disallowance as income exceeds the applicable amount. On a further appeal, the claimant cannot raise the issue of the amount of capital as decided by the FtT, unless they can show that the FtT was ignorant of material facts.

## Liberty to apply

06518 Where the FtT allows the appeal, but remits calculation to the DM, any dispute about further calculation by the DM should be referred back to the same FtT. This is known as "liberty to apply"[1]. See the Code of Appeals Procedure for further information. There is no further right of appeal against the DM's calculation, but the FtT's decision about the calculation can be appealed to the UT.

1 R(IS) 2/08

06519

## Where a party thinks the decision is wrong

06520 There are a number of options available to the appellant and DM if they think the FtT's decision is wrong. The decision notice issued by the FtT includes information to the appellant to encourage him to choose the correct option. The different options open to appellants and the DM are set out below.

## Accidental error

06521 The FtT may, at any time, correct accidental errors or omissions in a decision, direction or any document produced by it. If corrected, all parties must be sent a copy of the corrected decision notice, direction or document[1]. The time limit for then applying for a written statement of reasons would only be extended if an entirely new decision notice is issued. If the original decision notice is just corrected then the time limit runs from the date the original decision notice was issued.

1 TP (FtT) (SEC) Rules, rule 36

06522 - 06529

## Setting aside First-tier Tribunal decisions on procedural grounds

06530 Any party to the appeal can apply for the FtT decision to be set aside where

**1.** a document relating to the appeal was not

**1.1** sent to or received at an appropriate time by

**1.1.a** a party to the proceedings **or**

**1.1.b** the party's representative **or**

**1.2** sent to the FtT at an appropriate time **or**

**2.** a party to the proceedings or a party's representative was not present during the hearing **or**

**3.** there has been some other procedural irregularity in the proceedings[1].

1 rule 37

06531 The FtT may set aside a decision, or part of a decision and re-make the decision, or relevant part of it if

**1.** the FtT considers that it is in the interests of justice to do so **and**

**2.** one or more of the conditions in DMG 06530 **1.** to **3.** applies[1].

1 rule 37(1)

06532 Where an application for set aside is made it must be in the form of a written application received by the FtT no later than a month after the date on which the FtT sent notice of the decision to the party[1]. The FtT has the power to extend this time limit as appropriate[2].

1 TP (FtT) (SEC) Rules, rule 37(3); 2 rule 5

06533 - 06549

## Decisions that cannot be implemented

06550 There may be instances where it is impossible to implement the decision of the FtT. In these cases, the DM should consider whether the decision can be corrected or set aside by the FtT.

06551 If

**1.** the decision cannot be corrected or set aside **or**

**2.** there has been no factual mistake which gives grounds for supersession

the only course open to the DM is an appeal, with permission, to the UT. See DMG 06557 - 06563 for guidance on potential appeals and time limits.

06552 In some cases the FtT refer cases back to the DM, for example to recalculate a recoverable overpayment. If there is then a dispute between the DM and the appellant, the DM should put the case before the FtT again so that they can finally determine the appeal[1].

1 R(SB) 11/86

06553 - 06556

## Potential appeals to the Upper Tribunal

06557 An appeal to the UT can be made only on a point of law[1], with the permission of the FtT, or the UT. The time limits for applying for leave to appeal are

**1.** to the FtT - within one month of the latest of the dates that the FtT sends the applicant

**1.1** written statement of reasons **or**

**1.2** notification of amended reasons for or correction of the decision following a review **or**

**1.3** notification than an application for the decision to be set aside is unsuccessful[2]**or**

**2.** to the UT - within one month of the date that the FtT's decision refusing permission or rejecting the application was sent to the applicant[3].

1 TCE Act 07, s 11(1); 2 TP (FtT) (SEC) Rules, rule 38(3); 3 TP (UT) Rules, rule 21(3)

## Late applications

06558 If the application made to the FtT as in DMG 06557 **1.** is sent after the one month limit or after any extension of that limit[1] then the application must include a request to extend the time limit and why the application was not provided in time[2].

1 TP (FtT) (SEC) Rules, rule 5(3)(a); 2 rule 38(5)(a)

06559 Where the FtT does not extend the time limit as in DMG 06558 then they must not allow the application[1].

1 TP (FtT) (SEC) Rules, rule 38(5)(b)

06560 Where the DM thinks that the FtT's decision is wrong on a point of law, the case should be identified as a potential appeal to the UT and sent to DMA Leeds as soon as possible. Before sending the case, the DM should obtain the statement of reasons from HMCTS. The request must be made in writing on the appropriate form within one month of the decision notice being given or sent. See DMG 06501 - 06504 for further guidance.

**Note:** Where suspension is appropriate, see DMG 06570 et seq.

06561 Applications for permission to appeal on behalf of the DM are made by DMA Leeds. DMs, appeals officers and presenting officers should note that only officers of the Department employed at DMA Leeds are authorized to make applications on behalf of the Secretary of State. For further guidance see DMG 06600 et seq.

06562 An application for leave to appeal against the FtT decision that would be supported by the DM before the UT cannot be made, even though the DM may wish to obtain authority in an area of the law that is open to dispute[1].

1 R(I) 68/53(T)

06563 Where the FtT decision is not in the appellant's favour, but the DM believes that the decision is in error of law, the DM should consider sending the case to DMA Leeds, who will then decide whether to make an application for permission to appeal in order that

**1.** the appellant's interests are protected **or**

**2.** the law on a particular point is established.

**Note:** This only applies where the error of law is significant. DMs should ensure that the claimant does not intend to make an application for permission to appeal.

## First-tier Tribunal consideration of application for permission to appeal

06564 The first thing that the FtT should do on receiving an application for permission to appeal is to consider whether to review the decision[1]. If the FtT decides not to review or reviews but decides to take no action on all or part of the decision, the FtT must still decide whether to give permission to appeal for all or part of the decision[2].

1 TP (FtT) (SEC) Rules, rule 39(1) & 40; 2 rule 39(2)

06565 The FtT must send a record of its decision on the application to all parties as soon as possible. If the FtT refused permission to appeal then with the record of decision it must also send

**1.** a statement of reasons for refusal

**2.** notification of the right to make an application to the UT and the relevant time limits for doing that[1].

1 TP (FtT) (SEC) Rules, rule 39(4)

06566 Where the FtT has given permission to appeal on limited grounds it must still provide the information as in DMG 06565 for those aspects for which permission was refused[1].

1 TP (FtT) (SEC) Rules, rule 39(5)

06567 - 06569

## Suspension of payment of benefit

06570 The DM can suspend payment of benefit awarded by the FtT whilst an appeal to the UT is considered[1]. The suspension is imposed on receipt of the FtT's decision notice. See DMG Paragraphs 04818. The circumstances when the suspension must be lifted are described at DMG paragraph 04822. This includes when the DM does not apply for a written statement of reasons within one month of the day he receives notice of the FtT's decision.

1 SS Act 98, s 21; SS CS (D&A) Regs, reg 16 & 20

06571 The suspension is maintained if, within one month of receiving the statement of reasons, the DM informs the appellant that an application for permission to appeal to the UT has been made. The written notice must be

**1.** issued after the application for permission has been sent to the chairman of the FtT **and**

**2.** posted to the appellant within the time limit.

06572 Where such an application is made, the suspension may continue until the application and any consequent appeal are decided.

06573 For further guidance on suspension, see DMG Chapter 04.

06574 - 06584

## Appeals remitted by the Upper Tribunal

06585 Where the UT decide that the FtT's decision is erroneous in point of law[1], the UT may (but not must) set it aside[2] and if it does must either

**1.** remit the case to another FtT with different members to the first with directions for its reconsideration[3]**or**

**2.** re-make the decision by making any decision which the FtT could make if it were re-making the decision and make any appropriate findings of fact[4].

**Note:** The UT need not set aside a decision, even where there is an error of law, if the error makes no difference to the outcome

1 TCE Act 07, s 12(1); 2 s 12(2)(a); 3 s 12(2)(b)(i) & (3); 4 s 12(2)(b)(ii) & 4

06586 When the UT sets aside the FtT's decision, but does not replace it, the effect is to remove the FtT decision. The only decision remaining is the disputed decision by the DM.

06587 The UT's decision and a copy of all the documents available to the UT is sent to the DM via DMA Leeds. The decision may contain directions from the UT to the new FtT to help them decide the appeal.

06588 A new response is only required if the Agency is directed to produce one by a FtT or the UT, or on the advice of DMA Leeds.

06589 Whether or not a new response has been requested, the DM should inform the FtT of any events such as a decision on a claim or supersession made since the decision went under appeal.

06590 The proceedings should be by way of a complete rehearing and all the evidence should be taken again (see DMG 06460 - 06462)[1].

1 R(S) 1/87

06591 Where the DM receives an application to reconsider the disputed decision before the rehearing, the application should be considered as in DMG 06452.

## Supersession of the First-tier Tribunal decision

06592 The DM can supersede the decision of the FtT in the same way as a decision of another DM, with one important exception[1]. This is where the DM considers the FtT's decision was erroneous in law. In such cases, the DM should consider whether an application for leave to appeal to the UT is appropriate (see DMG 06600 et seq). For guidance on supersession see DMG Chapter 04.

1 SS Act 98, s 10(1)(b)

06593 - 06599

# Appeals to the Upper Tribunal and the Courts 06600 - 06619

06600 DMs should note that all action on these appeals is taken or directed by DMA Leeds. No other officer of the Department is authorised to represent the Secretary of State by making or commenting on applications for leave at any stage.

**Note:** See Appendix 2 re process for seeking permission to appeal to the UT.

06601 An application for permission to appeal to the UT can only be made on the ground that the decision of the FtT is erroneous in point of law[1].

1 TCE Act 07, s 11(1)

06602 The FtT considers whether to review the decision (see DMG 06564 et seq). If the FtT does not review the decision, the FtT decides whether or not to give permission to appeal.

06603 Where

**1.** the claimant **and**

**2.** DMA Leeds on behalf of the Secretary of State

apply for permission to appeal, or otherwise expresses the view that the decision was erroneous in point of law, the FtT shall set aside the decision for rehearing without considering whether it is erroneous in law[1].

1 SS Act 98, s 13(3)

06604 The FtT sends a copy of the decision to each party to the appeal.

06605 - 06619

# Who can appeal to the Upper Tribunal 06620 - 06639

06620 An appeal may be made with leave from the decision of the FtT by

**1.** a DM[1] (but see DMG 06564)

**2.** a claimant claiming relevant SS benefits[2]

**3.** any trade union or association that has the right of appeal[3] (see DMG 06621)

**4.** the person from whom an amount is recoverable where a recoverable overpayment is involved[4]

**5.** a person whose right to II benefit is, or may be, affected by the decision appealed against[5]

**6.** a partner required to take part in a work-focused interview[6].

1 SS Act 98, s 14(3)(a); 2 s 14(3)(b); 3 s 14(3)(c); 4 s 14(3)(d); 5 s 14(4); 6 SS A Act 92, s 2AA(7), 2B(2A) & (6); SS CS (D&A) Regs, reg 58A

06621 A trade union or association has the right of appeal where

**1.** the claimant is a member at the time of the appeal and was a member immediately before the question arose[1]

**2.** the question relates to a deceased person who was a member of the union at the time of death[2]

**3.** in II cases the claimant, or for IDB, the deceased, was a member of the union at the time of the relevant accident[3].

1 SS Act 98, s 14(5)(a); 2 s 14(5)(b); 3 s 14(5)(c)

06622 Any association which exists to promote the interests and welfare of its members has the same right of appeal as a trade union[1].

1 s 14(6)

06623 - 06639

# Application for permission to appeal to the Upper Tribunal 06640 - 06684

Application to the Upper Tribunal 06640 - 06642

Late applications 06643 - 06644

Decision on permission to appeal 06645 - 06646

Notice of appeal 06647 - 06659

Composition of Upper Tribunal 06660

Withdrawal of applications and appeals 06661 - 06662

Reinstatement of withdrawn applications and appeals 06663

Consideration of decision under appeal 06664 - 06669

Death of appellant 06670 - 06679

Striking out of proceedings 06680 - 06682

Power to extend time limits 06683 - 06684

## Application to the Upper Tribunal

06640 If the FtT refuse permission to appeal or do not admit it, an application can be made direct to the UT (see DMG 06565). Such an application should be in writing and should be received by the UT no later than a month after the date the FtT sent to the appellant its refusal of permission to appeal or refusal to admit the application for permission to appeal[1]. Where the UT receive an application for a decision to be corrected, set aside or reviewed, or for permission to appeal against a decision, they may treat it as an application for any one of those things[2].

1 TP (UT) Rules, rule 21(3); 2 rule 48

06641 The application must include[1]

**1.** the name and address of the appellant

**2.** the name and address of any representative of the appellant

**3.** an address where the documents for the appellant should be sent

**4.** details of the decision being challenged

**5.** grounds on which the appellant is relying

**6.** whether the appellant wants a hearing.

1 rule 21(4)

06642 The appellant must also provide with the application[1] a copy of

**1.** any written record of the decision being challenged

**2.** any separate written statement of reasons for the decision **and**

**3.** if the application is for permission to appeal against the decision of another FtT

**3.1** the notice of refusal of permission to appeal **or**

**3.2** the notice of refusal to admit the application for permission to appeal.

1 rule 21(5)

## Late applications

06643 If the application to the UT is made later than the time in DMG 06640 or any extension of time allowed by the UT[1] then the application must include a request for extension of time and reasons why it was not on time[2]. The UT can only admit the application if they have extended the time limit[3].

1 rule 5(3)(a); 2 rule 21(6)(a); 3 rule 21(6)(b)

06644 If the application to the UT is for permission to appeal against the decision of another FtT which was refused due to not being made on time, then the application to the UT must include reasons why the application was late. The UT may then only admit the application if it considers it to be in the interests of justice[1].

1 TP (UT) Rules, rule 21(7)

## Decision on permission to appeal

06645 If the UT refuses permission it must send a written notice of the reason for refusal to the appellant[1].

1 rule 22(1)

06646 If the UT gives permission

**1.** it must send written notice of permission to all parties

**2.** a copy of the application should be sent to all parties (this becomes the notice of appeal)

**3.** it may determine the appeal without any further response if the appellant and each respondent consent[1].

1 rule 22(2)

## Notice of appeal

06647 The appellant must still provide a notice of appeal to the UT within a month of the notice of permission from the FtT being sent to the appellant where

**1.** another FtT gave permission for a party to appeal to the UT **or**

**2.** the UT give permission and in doing so directed that the application was not to stand as a notice of appeal[1].

1 rule 23(1) & (2**)**

06648 The notice of appeal should contain the information as per DMG 06641 **1.** to **5.** and where the UT has given permission to appeal, the UT case reference should also be provided[1].

1 rule 23(3)

06649 If another FtT granted permission to appeal, the appellant must provide with the notice of appeal a copy of:

**1.** any written record of the decision being challenged

**2.** any separate written statement of reasons for that decision

**3.** the notice of permission to appeal[1].

1 rule 23(4)

06650 If the notice of appeal is provided to the UT later than the time limit in DMG 06647 or any extension granted by the UT[1] the notice should include a request for an extension and the reason why the notice was not provided on time. The UT may only admit the notice of appeal if it has extended the time[2].

1 TP (UT) Rules, rule 5(3)(a); 2 rule 23(5)

06651 The UT must send a copy of the notice and any other documents to each respondent[1].

1 rule 23(6)

06652 - 06659

## Composition of Upper Tribunal

06660 The UT must consist of at least one UT Judge, however, the Senior President of Tribunals can decide that an UT can consist of up to three members[1]. Where there are two or three members of the UT then the Senior President of Tribunals must select one of the Judges to be the presiding member and chair the UT. The presiding member has the casting vote if votes are equally divided[2].

1 FtT & UT (Composition of Tribunal) Order, art 3; 2 arts 7 & 8

## Withdrawal of applications and appeals

06661 A party may withdraw its case or any part of it at any time before it is decided by sending the UT a written notice of withdrawal or orally at a hearing[1]. However, the content of the decision under appeal is not "part" of the party's case; it is what the case is about. So where a decision contains several determinations, for example in ESA cases where a decision consists of a determination on capability for work and a determination on work-related activity, it is still one decision. So if an appeal is withdrawn then all determinations that make up that decision are withdrawn[2].

1 TP (UT) Rules, rule 17(1); 2 AE v SSWP (ESA) [2014] UKUT 5; AACR 23

06662 An appeal to the UT can only be withdrawn with the approval of the UT. Withdrawal of an application for permission to appeal does not require such approval[1].

1 rule 17(2)

## Reinstatement of withdrawn applications and appeals

06663 A party that has withdrawn its case can apply to the UT for it to be reinstated[1]. This must be received by the UT within one month after the date

**1.** the UT received the withdrawal request **or**

**2.** the date of the hearing if the withdrawal was made orally.

(See DMG 06683 for applications outside the time limit.)

1 rule 17(3) & (4)

## Consideration of decision under appeal

06664 If the DM considers the FtT's decision should be superseded[1], DMA Leeds should be contacted urgently.

1 SS Act 98, s 10(1)(b)

06665 - 06669

## Death of appellant

06670 The death of an appellant does not automatically stop an appeal to the UT. A personal representative or an appointee can pursue an appeal. A personal representative is

**1.** an executor, where there is a will

**2.** an administrator, appointed by the Court.

If there is no personal representative or the Secretary of State is unable to appoint a person to proceed with the appeal, the UT decides whether the appeal should be decided or abated. An appeal which is abated may be revived if the Secretary of State subsequently appoints someone to act, otherwise the matter is regarded as closed[1].

1 R(I) 2/83; R(SB) 25/84

06671 - 06679

## Striking out of proceedings

06680 Proceedings

**1.** will automatically be struck out if the appellant has failed to comply with a direction of a UT which said that failure to comply would result in proceedings being struck out[1]

**2.** must be struck out[2] if the UT

**2.1** does not have jurisdiction **and**

**2.2** does not transfer the proceedings to another court or tribunal

**3.** may be struck out[3] if

**3.1** the appellant failed to comply with a directive of a UT which said failure to comply with lead to the proceedings being struck out **or**

**3.2** the appellant has failed to co-operate with the UT so that the UT cannot deal with the proceedings fairly or justly **or**

**3.3** the proceedings are not an appeal from another FtT or judicial review proceedings and the UT considers there is no reasonable prospect of the appellant's case succeeding.

1 TP (UT) Rules, rule 8(1); 2 rule 8(2); 3 rule 8(3)

06681 The appellant must be given an opportunity to make representations before the UT can strike out the proceedings[1].

1 rule 8(4)

06682 Once struck out, the appellant may apply for the proceedings to be reinstated[1]. Such an application must be in writing and received by the UT within one month after the date that the UT sent notification of the striking out to the appellant[1]. (See DMG 06683).

1 rule 8(5) & (6)

## Power to extend time limits

06683 The UT has general powers to extend time limits for complying with the rules[1] so a person outside the normal time limits would need to apply for an extension of time.

1 rule 5(3)(a)

06684

# The Upper Tribunal's decision 06685 - 06699

Parties to an appeal 06689

Correction and setting aside 06690 - 06699

06685 UT Judges may form their own views on the issues arising from appeals and are not restricted to what is said by the appellant, representatives of the appellant, or the DM where they are not the appellant[1].

1 R v Deputy II Commissioner ex parte Moore [1965] IQB 456; R(I) 4/65 Appendix

06686 The UT who holds that the decision of the FtT was wrong in law may, but does not have to, set aside the FtT's decision. If it does then the UT must either

**1.** remit the case to the FtT, giving directives for its reconsideration **or**

**2.** re-make the decision[1].

1 TCE Act 07, s 12(2)

06687 If the UT remit the case to the FtT then it may

**1.** direct that the FtT which reconsiders the case is not made up of the same members as those on the FtT whose decision has been set aside

**2.** give procedural directives to the FtT who reconsider the case[1].

1 s 12(3)

06688 If the UT decide to re-make the decision then it may make

**1.** any decision which the FtT could make **and**

**2.** findings of fact that it considers appropriate[1].

1 s 12(4)

## Parties to an appeal

06689 The principal parties to an appeal are

**1.** the DM

**2.** the claimant in cases involving social security benefits, labour market questions and contributions questions

**3.** the person from whom an amount is recoverable where a recoverable overpayment is involved

**4.** a person whose right to II benefit is affected by the decision appealed against[1].

1 SS Act 98, s 13(4)

## Correction and setting aside

06690 A UT Judge may correct or set aside his own decision at any time. A decision may be corrected if it contains an accidental error[1] and may be set aside if the UT considers that it is in the interest of justice to do so and that one or more of the following conditions are satisfied

**1.** a document relating to the proceedings was not sent to or received at the appropriate time by a party or a party's representative **or**

**2.** a document relating to the proceedings was not sent to the UT at an appropriate time **or**

**3.** a party or representative was not present at an oral hearing **or**

**4.** there has been a procedural irregularity.

1 TP (UT) Rules, rule 43(1) & (2)

06691 Any application to set aside a decision given by the UT must be

**1.** in writing **and**

**2.** received no later than one month after the date on which the UT gave notice of the decision[1].

1 rule 43(3)

06692 - 06699

# Appeals to Court of Appeal or Court of Session 06700 - 06799

Who may apply for leave 06701

Leave to appeal 06702 -06705

Time limits 06706

Suspension of benefit 06707 - 06799

06700 An appeal against a decision of the UT on a question of law should be made to the Court of Appeal or, in Scotland, the Court of Session[1]. All action on appeals to the Courts will be taken by DMA Leeds.

1 SS Act 98, s 15

## Who may apply for leave

06701 An application for leave to appeal from a decision of the UT may be made by

**1.** any person who was entitled to appeal against the FtT's decision

**2.** any other person who was a party to the FtT proceedings[1].

1 SS Act 98, s 15(3)

## Leave to appeal

06702 Appeals to the Court of Appeal or Court of Session can be made only

**1.** with the permission of the UT[1]**or**

**2.** with permission of the appropriate court[2].

1 TCE Act 07, s 13(4)(a); 2 s 13(4)(b)

06703 It is for the UT to specify the appropriate court to which appeal should be made[1].

1 TCE Act 07, s 13(11)

06704 If the UT refuses leave to appeal the application can be renewed before the Court of Appeal or

the Court of Session[1]. There is no right of appeal against a refusal of a UT to accept an application made out of time, and it cannot be renewed before the Court[2].

1 TP (UT) Rules, rule 45(4)(b); 2 R(SB) 12/83; R(S) 8/85

06705

## Time limits

06706 The applicant has three months from the date of notification of the written UT's decision to apply for leave to appeal[1].

1 TP (UT) Rules, rule 44(3)

## Suspension of benefit

06707 As with FtT decisions, the DM can suspend payment of benefit resulting from a UT decision. For further guidance, see DMG Chapter 04.

06708 - 06799

# Staying where an appeal is pending before a Court in another case 06800 - 06899

Stayed decisions 06800 - 06809

When is an appeal pending 06810 - 06829

Which courts are involved 06830

Cases where the DM should stay making a decision 06831 - 06839

Staying decisions where the likely outcome of the lead case would result in no entitlement to benefit or credits 06840 - 06849

Staying where the likely outcome of the lead cases would affect the benefit decision in some other way 06850 - 06859

Stayed appeals 06860 - 06869

Look-alike appeals not yet lodged with Her Majesty's Courts and Tribunals Service 06870 - 06874

Look-alike appeals already lodged with Her Majesty's Courts and Tribunals Service 06875 - 06879

What happens if the claimant challenges the decision to stay a look-alike claim or appeal 06880 - 06884

What happens when the lead case is decided 06885 - 06889

Action by DMs 06890 - 06899

## Stayed decisions

06800 The DM may decide not to make a decision where an appeal is pending before a Court in another case if the DM is considering

**1.** determining an application for benefit or credits

**2.** revising a claim to benefit

**3.** superseding a claim to benefit **and**

**4.** is aware that there is an appeal pending before a court in another case **and**

**5.** that the outcome of the appeal may affect the decision in some way[1].

1 SS Act 98, s 25(5)

06801 The case on appeal at a Court is known as **the lead case.** The case that is stayed is known as **the look-alike case.**

06802 - 06809

## When is an appeal pending

06810 An appeal is pending where

**1.** an appeal has been made, but has not yet been decided **or**

**2.** an application for permission to appeal has been made, but a decision on whether leave is to be granted has not yet been made **or**

**3.** an application for leave to appeal has been granted, but the appeal has not yet been made and the time limit for making it has not expired **or**

**4.** the Secretary of State certifies in writing that he is considering an appeal against a decision **and**

**5.** the DM considers that such an appeal may affect the decision in the look-alike case

**6.** the time limit for making an application has not yet expired[1].

1 s 25(5); SS CS (D&A) Regs, reg 21

06811 DMA Leeds will identify lead case appeals that are pending and will issue notifications detailing the point of law in dispute and the type of benefits which are affected by the decision. DMA Leeds will also issue a certificate where the Secretary of State is considering an appeal.

06812 - 06829

## Which courts are involved

06830 The courts before which relevant applications for permission to appeal or appeals can be pending are

**1.** the High Court

**2.** the High Court in Northern Ireland

**3.** the Court of Appeal (England and Wales)

**4.** the Court of Session (Scotland)

**5.** the Court of Appeal in Northern Ireland

**6.** the Supreme Court

**7.** the ECJ.

## Cases where the DM should stay making a decision

06831 The DM may stay making a decision, because an appeal is pending in another case, when considering

**1.** a claim to benefit **or**

**2.** an application for credits **or**

**3.** revising or superseding an existing award of benefit or credits

and the DM considers that the effect of the likely outcome of the appeal is that there would be no entitlement to benefit or credits or the likely result of the appeal would affect the benefit decision or credits in some other way[1].

1 SS Act 98, s 25(2)

06832 - 06839

## Staying decisions where the likely outcome of the lead case would result in no entitlement to benefit or credits

06840 If the outcome of the lead case is likely to mean that there would be no entitlement to benefit or credits, the DM will stay the decision until the outcome of the lead case is known[1].

1 SS Act 98, s 25(3)

06841 In exceptional circumstances, a DM may decide cases where staying would otherwise be appropriate. This is where the claimant would suffer hardship as a result of staying the decision. For example where

**1.** the amount of benefit involved is likely to be significant, **or**

**2.** the lead case will not be resolved for some considerable time.

**For advice on issues to be taken into account when considering hardship - see benefit specific guidance.**

06842 - 06849

## Staying where the likely outcome of the lead cases would affect the benefit decision in some other way

06850 In deciding whether the lead case will affect the decision in some other way, the DM must determine the claim or application as if the lead cases had already been decided and that the outcome was most unfavourable to the claimant[1].

1 SS CS (D&A) Regs, reg 21(3)

**Example**

The lead case concerns the payment of DP. A DM has before him a look-alike case that involves the same premium. Using staying provisions he identifies that even if the lead case were decided in most unfavourable terms, the claimant would be entitled to a personal allowance, but not the premium. Only the payment of the premium is in doubt.

The DM decides and awards the personal allowance. The decision on the DP will be stayed until the lead case is decided.

06851 - 06859

## Stayed appeals

06860 The arrangements for staying also apply to look-alike appeals that depend on the outcome of a lead case on appeal to the Courts.

06861 The Secretary of State can direct a FtT or UT not to hear a look-alike appeal. In these cases the appeal is returned to the DM to hold pending the outcome of the lead case[1].

**Note:** In practice, the Secretary of State does not exercise this power. Please see CAP 4751 for the procedure to be followed in look-alike appeals.

1 SS Act 98, s 26(2)

06862 Where the Secretary of State decides that the look-alike appeal should not be returned the FtT or UT may

**1.** stay the decision on the look-alike case pending the outcome of the lead case **or**

**2.** where it is in the interests of the claimant, determine the look-alike case as if the lead case had been decided in the most unfavourable terms for the claimant[1].

1 SS Act 98, s 26(4)

06863 - 06869

## Look-alike appeals not yet lodged with Her Majesty's Courts and Tribunals Service

06870 Appeals officers should check all submissions for potential look-alike appeals. Where a look-alike appeal is identified the appeals officer will refer the appeal response to HMCTS in the normal way and note the AT37 asking for the appeal hearing to be deferred pending the decision on the lead case. HMCTS will notify all PTTP if the hearing is deferred. This guidance applies to cases where

**1.** the outcome of the lead case is likely to mean that there will be no entitlement to benefit

**2.** the issue or issues raised in the look-alike appeal relate wholly to the point(s) of law in dispute in the lead case **or**

**3.** the additional issues raised in the appeal are non-appealable decisions.

06871 - 06874

## Look-alike appeals already lodged with Her Majesty's Courts and Tribunals Service

06875 DMA Leeds will send HMCTS and The Upper Tribunal Office a copy of the lead case certificates. In practice this is done by issue of an informal request rather than a formal certificate. Separate arrangements have been agreed with HMCTS for the handling of look-alike appeals that have already been lodged with them. (See CAP Chapter 4.)

06876 - 06879

## What happens if the claimant challenges the decision to stay a look-alike claim or appeal

06880 There is no right of appeal against a decision to stay a look-alike claim or a look-alike appeal[1].

1 SS CS (D&A) Regs, Sch 2, para 7

06881 The DM can reconsider the decision in the light of all the available facts that may be presented by the claimant, and if appropriate make a decision on the case (see DMG 06841 for guidance on hardship).

06882 - 06884

## What happens when the lead case is decided

06885 DMA Leeds will notify the outcome of the lead case.

06886 Claimants might approach the DM for a decision on their stayed appeal immediately following the Court's decision. DMs should not take any action to decide the stayed case until they have received formal notification and guidance on the outcome of the lead case.

06887 - 06889

## Action by DMs

06890 DMs should identify all look-alike cases and appeals returned to them by HMCTS.

06891 DMs decide the claim where the decision was stayed in full.

06892 Where the lead case has been decided in a way which changes the interpretation of the law, DMs should revise or supersede the decision[1]. The decision will be revised where

**1.** only part of the decision was stayed[2]

**2.** the appeals officer decided not to forward a look-alike appeal to HMCTS

**3.** HMCTS returned a look-alike appeal on the request of the DM (see DMG Chapter 03 for guidance on revision).

1 SS Act 98, s 25(4); 2 s 26(3)

06893 Where the look-alike appeal was forwarded to the FtT and they decided the appeal, the DM should supersede the decision[1] (see DMG Chapter 04 for guidance on supersession).

1 SS Act 98, s 26(5)

06894 DMA Leeds will give guidance following the determination of lead cases on whether revision or supersession is required.

06895 - 06899

# Judicial review 06900 - 06999

Judicial review of an Upper Tribunal decision 06903

Action on receipt of a claim for judicial review 06904 - 06999

06900 The decision making authorities are subject to judicial review, that is the controlling jurisdiction of the High Court, because the High Court has legal authority to decide questions affecting peoples' rights[1].

1 [1924] 1KB, 171, 205

06901 The result of judicial review differs from that of an appeal. An appeal

**1.** examines the decision under appeal, and decides whether it is one which could be made on the basis of the facts found and the relevant law **and**

**2.** if the decision is found to be erroneous, either refers it back to be made again, or substitutes a fresh decision.

06902 A judicial review considers a case to find out if there is a fault in the decision making process. If a fault is found the Court usually

**1.** quashes the decision, **and**

**2.** makes an order for the decision making authority to consider the question again.

In exceptional cases, the Court may make its own decision.

## Judicial review of an Upper Tribunal decision

06903 The Court exercises its jurisdiction to quash an UT decision by way of judicial review only if there are compelling reasons in the interest of justice[1]. In approaching such cases the Court takes account of

**1.** the existence of the right of appeal on a question of law to the Court of Appeal

**2.** the fact that Parliament has set limits to this right.

1 RA 5/83, Appendix; R(SB) 12/83, Appendix; [1892] 1QB609

## Action on receipt of a claim for judicial review

06904 All action on claims for judicial review is taken by DWP Legal Advisors, Government Legal Department, Caxton House, 3-12 Tothill Street, London, SW1H 9NA. Where a claim for judicial review, including a proposal to bring a claim for judicial review, is received, it should be forwarded to the above address immediately.

06905 - 06999

# Appendix 1 - Examples of the types of case suitable to request strike out of appeal on the basis of no reasonable prospect of success - DMG 06233

Employment and Support Allowance

Disability Living Allowance/Attendance Allowance

Carers Allowance

Jobseekers Allowance

Income Support

Industrial Injuries Disablement Benefit

Social Fund

Retirement Pension

Bereavement Benefit, Widowed Parent's Allowance, Bereavement Allowance & Bereavement Payment

State Pension Credit

This list is not exhaustive but is a selection of situations that have been identified as the type of case that may be suitable for the DM to request strike out. It covers as many benefits as possible but where a benefit is not listed, this would not necessarily mean that DM requested strike out was not possible. It would be up to the DM to decide whether any other type of case was suitable using the principles set out in this appendix.

## Employment and Support Allowance

### Work Capability Assessment

Evidence indicates a physical medical condition where the claimant cannot score 15 points under the physical descriptors. Suitable referrals would mainly focus on those claimants that have been deemed by the DM only to satisfy one or two physical descriptors due to their physical medical condition. The available evidence should support the view that the claimant cannot score 15 points. No case where the claimant has indicated that there are mental health issues should be put forward for consideration.

### Contribution condition

Appellant does not dispute their earnings but they believe they should be entitled to the contributory based element of the benefit. These conditions are laid out in law and must be met for a contributory based payment to be made. This would only be suitable where HMRC have made a decision confirming that the NI record is correct.

### Age limitation

Decision not to pay IB/ESA cases where the appellant has attained State Pension age and therefore the benefit cannot be paid beyond that date.

## Disability Living Allowance/Attendance Allowance

### Age limitation

DLA Higher rate mobility for children under 3 years of age

DLA Lower rate mobility for children under 5 years of age

DLA Main meal test for people under 16 years of age

Over 65 and DLA is requested

### Age

A decision not to award DLA to a claimant who is over 65 (no recourse to DLA unless previously in receipt of DLA on 65$^{th}$ birthday and claims again within one year, could be entitled to mobility component).

### Backdating

A decision where there is no entitlement before the date of claim (i.e. no claim was made); or where there is no indication of a previous claim (i.e. no alleged earlier claim). This does not include instances when a renewal claim is received late as the FtT may wish to look at the appropriateness of closing the previous claim.

### Residence and presence

Disallowances re eligibility. Dates or other information (including exportability rules) may need clarifying before deciding it is appropriate to apply for appeal to be struck out on grounds of no reasonable prospect of success.

### No physical disability

Claiming higher rate mobility when there is no evidence of a physical disability (i.e. mental health issues only) when deeming provisions do not apply.

### Payability

**Imprisonment** - claimant is appealing against payability decision. Issues relating to dates, type of conviction etc - establish that there is no dispute as to the primary facts before deciding it is appropriate to apply for appeal to be struck out on grounds of no reasonable prospect of success.

**Hospital/residential care** - claimant is appealing against payability. Issues in respect of admittance, discharge dates, types of hospital funding, residential care funding arrangements - establish that there is no dispute as to the primary facts before deciding it is appropriate to apply for appeal to be struck out on grounds of no reasonable prospect of success.

#### Change of circumstances/deterioration

Only if the change of circumstances or deterioration has occurred after the date of the decision being appealed.

## Carers Allowance

### Qualifying benefit

No qualifying benefit in payment on a new claim.

## Jobseekers Allowance

### Good cause

Decision not to consider good cause where the claimant appeals against the specified time limit (5 days) in which they must provide an explanation for failure to attend a mandatory interview (usually fortnightly job review) and they are not disputing that they did not respond within 5 days but the only reason they provide is that they forgot their appointment.

## Income Support

### Conditions of Entitlement

Lone parents claiming IS when they do not satisfy the “lone parent” conditions anymore due to the changes in ages for youngest child.

### Deductions

Decision to implement deductions at set rates. For example, fines that are deducted at a fixed rate cannot be changed and claimants may appeal the amount being deducted because they consider it too high.

### Occupational Pension income

Benefit is terminated because the claimant has reached pension age and receives occupational pension

that is higher than there is entitlement. Appeals may be received because there is a disregard for occupational pensions for those receiving IB whereas in IS the whole amount of an occupational pension is taken into account.

## Industrial Injuries Disablement Benefit

### Cannot claim within 3 years of a disallowance

Claimant disallowed PD A10 and advised they cannot claim again within 3 years but does claim again. Unless it can be waived to satisfy the 5 year time limit for making a claim, the 3 year period is set in law and cannot be altered.

### Not on prescribed list

A decision where the claimant is claiming with an illness not on the prescribed illness list and who had been disallowed.

## Social Fund

### Winter fuel payments

A decision not to award a payment because

**1.** the person applying has not attained the qualifying age

**2.** the person is in legal custody under sentence imposed by a court

**3.** the appeal is against the amount which is prescribed for the specific circumstances of the claimant.

### Sure-start maternity grants

A decision not to award a payment because

**1.** the claimant (or partner) does not have an award of qualifying benefit in respect of the date of claim and that is not in dispute

**2.** the claim is made outside the prescribed time limits

### Funeral payments

A decision not to award a payment because

**1.** the claimant (or partner) does not have an award of qualifying benefit or is not a person in respect of whom CTB (second adult rebate) could be awarded in respect of the date of claim

**2.** the claim is outside the prescribed time limits

## Retirement Pension

### NI Contribution disputes

Appeals against decisions which are based on NI qualifying conditions and where HMRC has given a formal decision confirming that the NI record is correct.

### Disputes involving paydays

The claimant disputes non payment of RP for a part week from the date they attained state pension age to the beginning of their first benefit week.

## Bereavement Benefit, Widowed Parent's Allowance, Bereavement Allowance & Bereavement Payment

### Qualifying conditions not met

A decision not to award benefit because

**1.** there was no marriage

**2.** there were no/insufficient contributions and that is not disputed

**3.** the cessation of widowed parent's allowance where the qualifying child has attained the age at which there would be no entitlement to child benefit.

### 52 week maximum period

Appeals against the 52 week maximum period of an award of bereavement allowance.

## State Pension Credit

### Conditions of entitlement

A decision that there is no entitlement because the appellant has not reached the qualifying age for SPC.

# Appendix 2 - Aide memoire for DMs seeking a Secretary of State's application for permission to appeal to the Upper Tribunal (DMG 06600)

Introduction

Action to take

## Introduction

1 All applications for permission to appeal to the UT on behalf of the S of S are made only by DMA Leeds. If it is considered that an appeal might be appropriate, take the following action to notify DMA Leeds immediately.

2 It is very important that anyone considering requesting that DMA Leeds apply for permission to appeal to the UT, does so within the timescales described below. Many potential Secretary of State appeals have to be returned because they are late. Administrative delays are **almost never accepted** by the FtT or the UT as a reason for a late application. Cases must be sent to DMA Leeds **within one month of the date the FtT send the written statement of reasons (WSoR)**. As DMA Leeds have to work within the same timescales sufficient time must be allowed for DMA Leeds to work through the necessary processes **within the same one month deadline**.

3 In most instances, the FtT's decision should not be implemented if the case is referred to DMA Leeds. As soon as an application for permission to appeal to the UT is being considered

**1.** suspend benefit **and**

**2.** send the claimant a DL/Susterm 6 (found in the Suspension and Termination Guide on the DMA Leeds part of the intranet). This tells the claimant that the FtT's decision is not being implemented as an application for permission to appeal the FtT's decision to the UT is being considered).

## Action to take

4 Once a case is identified as one where permission to appeal the FtT's decision may be appropriate, the following action should be taken

**1.** request a written statement of reasons (WSoR) from the FtT within one calendar month of the date that the decision notice was issued to all parties.

**2.** when the WSoR is received, consider if an application to the UT is still appropriate. It must be remembered that an appeal can only be made where we consider that the FtT's decision is erroneous in law, e.g. consider whether

**2.1** the provisions of the act or regulations/rules have been misinterpreted or misapplied

**2.2** the decision is not supported by evidence

**2.3** the decision is such that no person acting judicially and properly instructed about the relevant law could have reached it

**2.4** there has been a breach of natural justice

**2.5** there are other errors of law, e.g.

**2.5.a** taking irrelevant evidence into account **or**

**2.5.b** giving reasons for decisions which imply faulty reasoning **or**

**2.5.c** ignoring relevant evidence

**Note:** This list is not exhaustive.

5 If an application is considered appropriate

**1.** refer the case to **DMA Leeds**, having first checked payments systems (such as JSAPS) and confirm that full payment has **not** been made for the period which the appeal covers

**2.** all documents referred **must be clearly marked with office/business unit address and contain**

**2.1** an AT64 proforma stating clearly the grounds for appeal and where appropriate an estimate of the amount of benefit involved

**2.2** the DM's written response to the FtT and numbered enclosures **and**

**2.3** any other written response made, received from, or handed in, by any party to the appeal on the day of the FtT hearing **and**

**2.4** the FtT's decision **and**

**2.5** the WSoR for the decision **and**

**2.6** papers relating to any action taken after the FtT's decision has been made; for example, if an application is made to set aside the FtT's decision

**2.7** set a three monthly reminder to await the outcome **and**

**2.8** set further three monthly reminders if the case is still outstanding when the BF matures

6 When DMA Leeds has decided whether or not to seek an application to appeal, they will inform the DM by e mail. The DM must then send DL/SUSTERM 7 to the claimant to inform them of what further action will be taken.

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