

PIP and psychological distress

The DWP is reviewing personal independence payment (PIP) decisions, following a High Court decision that found changes to mobility descriptors in March 2017 unlawfully discriminated against claimants with mental health problems.

The background

Schedule 1 to the PIP regulations¹ outlines the PIP activity descriptors. Mobility activity 1, 'planning and following journeys', initially included the following descriptors:

- c. Cannot plan the route of a journey;
- d. Cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid;
- e. Cannot undertake any journey because it would cause overwhelming psychological distress; and
- f. Cannot follow the route of a familiar journey without another person, assistance dog or orientation aid.

These descriptors respectively scored eight, 10, 10 and 12 points.

Resolving a dispute in the caselaw, Upper Tribunal judges Rowland, Rowley and Hemingway held in *MH*,² dated 28 November 2016, that descriptors 'c', 'd' and 'f' could be satisfied by claimants by virtue of 'overwhelming psychological distress'.

Unhappy with this interpretation, the government amended the PIP regulations from 16 March 2017, replacing the word 'cannot' in descriptors 'c', 'd' and 'f' with the phrase: 'For reasons other than psychological distress, cannot'.³

Crucially, this meant that claimants whose ability to plan and follow journeys was impaired by mental, rather than physical, health problems could only score a maximum of 10 points under descriptor 'e'⁴ – it precluded them from entitlement to the enhanced rate of the PIP mobility component.

Unlawful discrimination

In *RF*,⁵ the High Court held on judicial review that this was 'blatantly discriminatory' on the basis of disability, in breach of Articles 1, 8 and 14 of the European Convention on Human Rights (ECHR), as it treated people with mental health problems less favourably than people with physical health problems.

Mr Justice Mostyn did not accept the government's submission that this discrimination was objectively justified by its policy intention of saving nearly £1 billion a year. He therefore quashed the amendments, reinstating the original wording.

Government review

The Secretary of State for Work and Pensions confirmed that the government would not appeal against the outcome in *RF*, and that the DWP would review 'all affected cases'.

The Minister for Disabled People went on to state that the government would be 'going through all cases in receipt of PIP and all decisions made since the judgment in *MH* to identify anyone who may be entitled to more as a result of the judgment', estimating that 1.6 million claims would be reviewed.

The 'anti-test case rule'

As the DWP has indicated it will link the review to the ruling in *MH*,⁶ it is implicit that it is applying the 'anti-test case rule',⁷ whereby the outcome of a test case is only applied to other similar cases from the date of the test case judgment.

Consequently, arrears under the review are being limited to, at most, the date of the decision in *MH* – ie, 28 November 2016.

MH approach

The Secretary of State now seems to accept the approach taken in *MH* – although she had lodged an appeal to the Court of Appeal against that decision, it is understood that that appeal has now been withdrawn.

MH actually referred to 'overwhelming' psychological distress. Although this wording may appear to be set a high- or difficult-to-meet threshold, in practice, if someone's psychological distress impairs her/his ability to mobilise outdoors to such an extent s/he cannot plan where s/he is going, or go there unaccompanied, it should be self-evident that the level of her/his distress is 'overwhelming'.

Advising affected claimants

The DWP is engaging on a review programme in the light of the decision in *RF*.

Parliament was told that:

'We will be going through all cases in receipt of PIP and all decisions made since the judgment in *MH* to identify anyone who

may be entitled to more as a result of the judgment... The effective date will be either the date of the claim or the date of the *MH* judgment (November 2016), whichever is the later date. Claimants do not need to write to DWP in order to receive the correct award'.⁸

It has also been confirmed that the DWP will be 'reviewing people who had zero points in their original claim. We are currently considering the best way to handle an appeals process'.⁹

A DWP 'frequently answered questions' document issued to stakeholders in April 2018 indicated that guidance would be completed and the review process would begin in 'early summer 2018'.¹⁰ The document includes that those disallowed PIP before 28 November 2016 but who might benefit from the decision in *MH* should 'consider making a new claim'. Those disallowed on or after that date will (like those with an award) have that decision considered as part of the review, and the DWP will write to the claimant if s/he is 'identified as affected'.

At the moment, there is a lack of clarity about how long the DWP review process will take, or what it will entail in terms of decision making – it has not been stated that everyone who has their claim reviewed to ascertain whether they should have scored points under mobility activity 1 descriptors 'c', 'd' or 'f' will be notified of the outcome of the review, and given appeal rights. It has simply been stated that it is currently 'considering the best way to handle an appeals process'.¹¹

At the time of writing, it was possible that only positive review decisions will be notified, meaning people whose claims are reviewed but who are still not awarded points under one of these descriptors are not given the opportunity to challenge that review decision.

In the absence of clarification of such matters, claimants may therefore want to consider whether to proactively challenge relevant PIP decisions in the light of *RF* and *MH* – ie, without waiting to be contacted under the DWP review programme. The usual rules concerning mandatory reconsideration and appeal time limits, including the 'absolute' time limits for late applications, would apply.

The basic argument in all proactive challenges would be that the government now accepts that, where applicable, points should be awarded for psychological distress from the date of the decision in *MH* (28 November 2016) or, if later, the date of claim. People can argue that failure to award points under one of these descriptors because the cause of their impairment was mental health disability rather than physical should now be regarded as wrong.

Claimants with an existing award will need to think carefully about such a proactive request. On the one hand, it provides at least a chance of getting a quicker decision (and, potentially, arrears) than under the DWP review programme, which does not have a clear timetable. On the other hand, the Department may simply respond by telling the claimant that the request will be dealt with as part of the review programme. Moreover, as is usual when requesting an increase to an existing award, a request for a decision to be looked at again creates the possibility that the award will be reduced rather than increased. While such decisions can, of course, themselves be challenged, the stress of potentially needing to do so may be off-putting. In such cases, a proactive request may only be advisable if there is specific, supportive medical evidence, covering the period in question. The DWP says that the review programme itself will not lead

to claimants seeing a reduction in their award. It says 'decision makers will not be reducing PIP awards as a result of applying the *MH* judgment.'¹²

- 1 The Social Security (Personal Independence Payment) Regulations 2013, SI No.377
- 2 *MH v SSWP (PIP)* [2016] UKUT 531 (AAC)
- 3 The Social Security (Personal Independence Payment) (Amendment) Regulations 2017, SI No.194
- 4 It is also notable that the threshold is also higher in descriptor 'e' – only claimants who cannot go out at all can satisfy it, in contrast with descriptors 'd' and 'f', which can be satisfied by people who can go out, if accompanied.
- 5 *RF v SSWP and Others* [2017] EWHC 3375
- 6 *Personal Independence Payment: Mental Health*, Written question 124307, Hansard, 29 January 2018
- 7 s 27 Social Security Act 1998
- 8 *Personal Independence Payment: Mental Health*, Written question 124307, Hansard, 29 January 2018
- 9 House of Commons, *Hansard*, 30 January 2018, cols 703–4
- 10 FAQs document issued to PIP stakeholders by DWP PIP Forums, 5 April 2018
- 11 House of Commons, *Hansard*, 30 January 2018, cols 703–4
- 12 FAQs document issued to PIP stakeholders by DWP PIP Forums, 5 April 2018

The project can only assist, however, where the claim relates to a provision of the Equality Act 2010. This means that the case must relate to potential discrimination, harassment or victimisation related to one or more of the 'protected characteristics'. These are:

- age;
- disability;
- gender reassignment;
- marriage or civil partnership status;
- pregnancy/maternity;
- race (including colour, nationality or ethnic origins);
- religion or belief;
- sex; and
- sexual orientation.

The project is therefore unable to assist with general housing or social security matters, such as appeals concerning entitlement to a benefit, unless the case raises a complaint under the Equality Act 2010. It also cannot assist if the claim relates solely to the public sector equality duty.

Assistance offered

The EHRC is able to assist by providing funding for front-line advice from solicitors, funding legal representation in the courts/tribunals, and providing funding for disbursements, such as counsel's fees or expert reports. Applications for assistance are accepted from solicitors and the advice sector. Funding cannot be offered retrospectively and can only be provided following the acceptance of a formal application, so if you think you have a case that would benefit from the project's support, get in touch with the EHRC as soon as possible.

Some examples

Examples of cases the project has supported or is currently considering include:

- funding a judicial review of a landlord's decision not to soundproof a flat;
- challenging failures to make reasonable adjustments in the provision of advice to social security claimants;
- providing legal advice and representation to a disabled child of Traveller heritage who was excluded from school; and
- bringing a challenge in the county court about a school uniform policy which indirectly discriminates against non-white children.

Essential criteria

The essential criteria are that the claim raises a complaint under the Equality Act 2010, and that it is related to one of the areas described above. It also must appear likely that the client will not be able to access justice without assistance from the EHRC, and the case must appear to

Legal Support Project launched

Eirwen Plerrot of the Equality and Human Rights Commission (EHRC) describes its Legal Support Project. The project launched in September 2017 and provides funding for legal representatives in England and Wales in claims concerning discrimination in education, housing or social security. In Scotland, the project is able to provide funding for legal representatives acting in Equality Act 2010 claims concerning education, housing and the provision of services.

What is the aim of the project?

The project's objective is to increase access to justice for:

- victims of discrimination under Part 6 of the Equality Act 2010 – ie, discrimination claims against schools, further and higher education providers, or general qualifications bodies;
- victims of discrimination under Part 4 of the Equality Act 2010 – ie, discrimination claims concerning the disposal and management of premises; and
- victims of discrimination under Part 3 of the Equality Act 2010 concerning the provision

of services or public functions. In England and Wales, applications are limited to cases related to housing and access to social security benefits. In Scotland, applications are limited to cases related to housing and the provision of services.

Because the aim is to assist those who may otherwise not be able to access justice, the project only provides funding where it is satisfied that this will help someone access justice in circumstances where s/he might not otherwise be able to do so. Funding is not therefore available if the individual is eligible for legal aid.

What kinds of cases does the project fund?

The project considers applications for funding for discrimination claims against schools, colleges, universities, qualifications bodies; and discrimination claims relating to the provision of housing or social security benefits against local housing authorities, housing associations, private landlords, the DWP, HMRC, Jobcentre Plus, and private sector companies providing services on behalf of these bodies. In Scotland, applications for claims against other service providers are considered.