

# Gatekeeper Memo / Information Alert

To: Senior Leaders in Operations                      From: XXXXXXXXX  
Benefit Delivery Business Partner  
OED

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Date: 4 December 2013

<b>Admin Use:</b>	<b>12.13.469</b>
<b>Gatekeeper Number</b>	

## WCA JUDICIAL REVIEW - COURT OF APPEAL HEARING

<b>Issue</b>	Receipt of judgement of the Court of Appeal
<b>Action</b>	For urgent cascade
<b>Who needs to read</b>	All ESA and IBR processing staff, decision makers, contact centre agents, Jobcentre advisers and other customer facing staff
<b>Timing</b>	Immediate
<b>Name and details of contact</b>	XXXXXXXXXX ESA/IBR Team Leader Service Design & Management

### Background

We have now received the judgment of the Court of Appeal on a case about the Department's procedure for obtaining further medical evidence (FME) for ESA claimants with mental health problems who are going through the WCA.

The Court of Appeal judgment was related to the Department's appeal, which was mainly on points of law. There are no directions for specific changes to process and it is **business as usual for DWP Operations**.

In May, the Upper Tribunal handed down a judgment which found that the current practice for gathering FME for ESA claimants with mental health problems means that they suffer a substantial disadvantage. They asked the Department for further evidence to help determine whether there were any reasonable adjustments to its procedure that could be made.

However, the Upper Tribunal clarified that the Department has not been found to be in breach of its duty under the Equality Act. This means that the Department has **not** been found to discriminate against claimants with mental health problems.

We appealed the Upper Tribunal's judgment and the Court of Appeal's judgment on our appeal was handed down on 4 December 2013.

The Court of Appeal's judgment does not materially change the judgment of the Upper Tribunal. The Court of Appeal's judgment addressed the Department's appeal on points of law. The judgment is being examined carefully to decide on the most appropriate way forward.

### **What does this mean for the Department?**

The Upper Tribunal did not direct us to make specific changes to the WCA process, and the Court of Appeal's judgment does not change this direction. It will be **business as usual for DWP Operations**. Individuals will apply for ESA and undergo the WCA in the normal way. Those currently on Incapacity Benefit will be reassessed as planned.

If DWP staff have any immediate questions from claimants or customers they should advise that the WCA process continues as normal. [See ESA guidance](#). Questions and answers are included at the end of this note.

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## **Q&A**

### **General**

#### **1. Does this mean the Work Capability Assessment is illegal?**

No. This case is concerned only with whether the Department's process for collecting further medical evidence relating to claimants with mental health conditions is in breach of a duty to make reasonable adjustments under the Equality Act.

The Upper Tribunal agreed with us that the overall DWP system contains appropriate safeguards, checks and balances as it determines a claimant's entitlement to benefit and stated that at this point in the case, the Department has not been found to be in breach of the duties placed on it by the Equality Act.

#### **2. Does the WCA put people with mental health conditions at a disadvantage?**

We do not believe so and this was one of the reasons we appealed the interim judgment. But we do recognise the challenges in accurately assessing people with mental health conditions, and the potential vulnerability of such claimants.

### **3. What has DWP done to address the challenges faced by people with mental health conditions?**

The WCA was designed in consultation with experts in mental health and a wide range of charities. We are committed to continuously improving the assessment and have made changes to process following Independent Reviews by Professor Harrington. This process will continue under Dr Litchfield.

As a result, the WCA process has improved for people with mental health conditions. For example, the percentage of people with mental health problems going into the Support Group has more than trebled since 2009.

### **4. What happens next with the case?**

The judgment of the Court of Appeal on our appeal against the interim judgment was handed down on 04 December 2013. The matter is now expected to return to the Upper Tribunal for a determination of whether there are reasonable adjustments to be made by the Department

In the interim, we continue to proceed with Business as Usual.

## **Operational impacts**

### **5. Will people with Mental Health Conditions who have been found fit for work be reassessed?**

No. The judgment makes clear that “the overall system provides appropriate safeguards, checks and balances in the determination of a claimant’s entitlement to benefit.”

### **6. What does the DWP appeal mean for people about to/currently going through the WCA process?**

Nothing, but we would continue to encourage all those going through the WCA to make all their evidence available to us at the earliest opportunity.

We already request claimants to supply any evidence they feel will be relevant to the assessment in the ESA50 questionnaire, and Atos HCPs will continue to seek FME in accordance with the Department’s guidelines. Additionally, Decision Makers will attempt to contact anyone who is likely to be found to be fit for work before reaching a final decision as a third opportunity for gathering any further evidence needed.

### **7. What if claimants refuse to engage with the process (complete the ESA50 and attend a WCA) on the grounds that they believe the system discriminates against them?**

The Upper Tribunal's interim judgment in May 2013 made it clear that the Department has not been found to be in breach of the duty placed on it by the Equality Act. The judgment today does not affect this statement.

Accordingly, if claimants refuse to engage with the process, existing guidance for this should be followed at this current time. At this stage, it is business as usual for DWP Operations. We will update you with relevant developments as the case progresses

**8. What is the guidance for Decision Makers who are considering evidence where claimants have not completed the ESA50 or attended the WCA on the above grounds?**

If claimants refuse to engage with the process then existing guidance should be followed. As above, it is business as usual for DWP Operations.

**9. What do I tell any claimants ringing to find out how the judgment / appeal affects them?**

Nothing has changed for claimants – it is business as usual.

The Upper Tribunal stated that the Department has not been found to be in breach of the duties placed on it by the Equality Act, and this position has not changed as a result of the appeal. Individuals should continue to apply for Employment and Support Allowance and undergo Work Capability Assessments in the normal way.

**10. What if I receive a letter from a customer or their advocate that is claiming for damages / threatening a judicial review / requesting us to obtain medical evidence “in accordance with MM & DM”?**

We do not expect individuals will be able to claim for damages on the basis of this judgment. However if you receive such a letter, you must send it **immediately** to the Treasury Solicitors Department. Please scan any documents and email them immediately to XXXXXXXXXXXXX and then send the hard copies via secure courier to XXXXXXXXXXX, Treasury Solicitors Department, One Kemble Street, London WC2B 4TS and copy to XXXXXXXXXXX at DWP Legal (XXXXXXXXXXXXXXXX) or fax to 020 7449 5090

Please forward any such letters as a matter of urgency as there are strict time limits within which we have to respond.