SANCTION DISPUTES
AND
CHALLENGES
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<td>Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI No. 991)</td>
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Section 1: introduction to challenging work programme sanctions

The jargon (or some of it)

1. “Work related activity”, “the work programme” and “work preparation” are all different incarnations of the same thing: compulsory courses or the duty to undertake such courses, which are aimed at assisting claimants to find employment and where non-attendance results in the possibility of a sanction.

2. The different terms involved can be confusing and exactly what the claimant can be required to do and how they are required to do it varies under each version of the scheme. All of the schemes are often referred to as the “work programme”:

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<th>Applies to</th>
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<td>Work related activity</td>
<td>Claimants of ESA in either assessment phase or in work related activity group under the current scheme.</td>
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<td></td>
<td>From 28/04/2014- Claimants of IS whose youngest child is aged 3 or 4.</td>
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<tr>
<td>Work preparation</td>
<td>Claimants with LCW but not LCWRA under the universal credit scheme, claimants to whom all work conditions apply and lone parents of children age 3 or 4 on the UC scheme (note we do not cover the UC system on this workshop- this is here just in case you see this jargon used)</td>
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<td>Scheme for Assisting Persons to Obtain Employment</td>
<td>For JSA claimants we refer to “schemes” The most common scheme is called the work programme (although confusingly UC, ESA and IS claimants who have to do work related activity or work preparation also participate in the work programme.</td>
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Structure for preparing challenges to sanctions

3. Whichever benefit a sanctioned claimant is getting and whatever the requirements of the scheme they are on, we can take a common approach to thinking about challenging decisions.

4. When preparing a challenge to a sanction imposed because a claimant is said to have failed to participate in the work programme it is worthwhile not to jump straight to simply considering the claimants reasons for not attending the programme. Although in many cases at the “mandatory reconsideration” stage it is arguments on good reason that seem most likely to sway decision makers, there are many other potential grounds of challenge which could succeed at Tribunal as detailed below.

5. Importantly, the burden of proof is on the Decision Maker in a sanction case. This means that it is for the Decision Maker to show that all of the legal requirements for a sanction have been met.

6. In challenging a sanction it is worth thinking through the following issues in the order shown:
   a. Is the claimant a person who can be sanctioned? Check whether or not at the date of the alleged failure the claimant was in a group of persons who could be sanctioned (eg if an ESA claimant are they responsible for a child aged under 5?). This is dealt with in Section 2 below. It involves both whether the claimant is in a group who can be sent on a scheme and, possibly, whether they have been properly selected for the scheme.
   b. Is what they have been said to have failed to do part of “work related activity” (ESA and IS claimants) or a “scheme for assisting person to obtain employment” (JSA claimants) for that claimant? See Section 3 below.
   c. If so, has claimant had sufficient information about scheme? This concerns the Reilly and Wilson point that a claimant should not be sanctioned unless before the decision to refer them to the work programme was made they were given information sufficient to allow them to make representations that might have led to a decision not to refer or to send on a different scheme. This issue is currently the subject of an ongoing appeals
d. Has the claimant been properly notified or the scheme and (for ESA/IS claimants) been given an action plan? See Section 4 below.

e. Only then does one need to consider submissions about whether a claimant has in fact breached their duties. This can be done in two stages (both considered in Section 5 below):

   i. If so, has claimant in fact failed to participate?

   ii. If so, did claimant have a good reason?

f. Finally, assuming a sanction is the only appropriate option one must check (see Section 6 below):

   i. sanction start date,

   ii. length and

   iii. amount correct?

**Time Limits for challenging sanctions decisions**

7. In general sanction decisions can be challenged at any time by way of an application for revision under section 9 of the Social Security Act 1998. This is provided for as follows:

   a. For JSA work-programme (and actively seeking work) sanctions – see section 7 below) regulation 3(6) of the D&A Regulations provides for revision of a sanction decision “at anytime”.

   b. For ESA work related activity sanctions, regulation 3(5C) and 1(3) allow for such a sanction decision to be revised at anytime if it contains an error to which the claimant did not contribute.

   c. For IS work related activity sanctions, then regulation 3(7CD) allows for revision at anytime provided that the decision contained an error to which the claimant did not materially contribute.

8. However, to avoid missing out on a right of appeal it is advisable to challenge a sanction within a one month period if possible and if applying outside this period to ask for an extension of time. The reasons for this are as follows:
a. The time-limit for bringing an appeal is one month following the decision being sent to the claimant.

b. When appealing against a decision that has been revised (or where an application for revision has been made but was refused), then technically the appeal is against the original decision.

c. The time limit will therefore in most cases run from the date on which the original decision was communicated.

d. The one exception to this is where the claimant made an application for a revision within one month (ie under regulation 3(1) of the D&A Regulations) or such longer time as was allowed under regulation 4 (ie where time is extended for special reasons).

e. Thus, if a claimant was to apply for a revision after the one month time period and was not to make an application for time to be extended (or did and time was not extended) then even though the Decision Maker must under the above rules still consider whether to revise, the time for bringing an appeal would run from the date of the original decision and not the refusal to revise (see R(IS)15/04 and Beltekian v Westminster CC [2004] EWCA 1784).

9. An example might help to illustrate the above point:

1. 20/05/2014: a decision to sanction George, a JSA claimant, for failure to participate in work programme is made.

2. 15/06/2015: Welfare Rights Adviser applies on claimant’s behalf for a revision of that decision. No application to extend time to bring the revision under regulation 3(1) is made.

3. 25/06/2015: DWP decision maker refuses to revise the decision under regulation 3(6).

4. George is now outside the 13 month time limit for bringing an appeal.
Section 2: which claimants can potentially end up on the work programme and what does it consist of?

1. Not all IS, JSA and ESA claimants can be compelled to go on the work programme. Furthermore, when on the work programme, there are differences, dependent on the benefit being claimed, about what a claimant can be required to do on the programme. There are far fewer protections for JSA claimants, as outlined below.

**Schemes for JSA claimants**

Which JSA claimants?

2. The Jobcentre can select any JSA claimant for compulsory attendance on the Work Programme (or any of the other scheme).\(^1\) Note that the decision to select a claimant for participation in the Work Programme or another scheme is a *discretionary* one. Arguably that means that the Jobcentre should not refer a claimant to a scheme automatically when they reach a certain point of their claim (although in practice that is what they do and what their guidance says they do). The regulation states:

   **Selection for participation in a Scheme**

   4.—(1) The Secretary of State *may* select a claimant for participation in a scheme described in regulation 3

   [CPAG’s emphasis]

3. In practice, the Jobcentre select all JSA claimants for participation on the Work Programme once they have been on JSA for a certain period of time (the length of time depends on the category of claimant). This is explained in the Work Programme Provider Guidance, chapter 2:

4. It is not clear whether a JSA claimant could argue, on an appeal against a sanction, that the Jobcentre had failed to exercise the discretion set out in the regulations about whether to refer and instead fettered their discretion by following the above

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1 Reg 4 Schemes Regs
guidance.

5. This is an issue which does not appear to have troubled the three-judge panel of the Upper Tribunal in *TJ v SSWP (JSA)* [2015] UKUT 56 (AAC)- they did not at any point refer to the discretionary nature of the selection process and seem to have accepted the Secretary of State’s arguments that there was no discretion in who to select.

**What are the JSA schemes?**

6. The “Work Programme” commenced from early June 2011. It replaces all of the previous employment schemes (with the exception of qualifying courses as set out below). We refer here to the “Work Programme” (as that is the main scheme) however, the rules in fact refer to a longer list (see the Jobseeker’s Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013 No. 276- in force from 12/02/2013, as subsequently amended). All of these schemes are prescribed for the purposes of section 17A of the Jobseeker’s Act (which means failure to participate in them can lead to a sanction. The full list of schemes described in the regulations is as follows can be found in JSA (Schemes for Assisting Persons to Obtain Employment) Regulations (SI 276 2013).

7. In addition, from 24/11/2014, for a two year period, then the “18-21 Work Skills Pilot Scheme” is a prescribed scheme under section 17A. This is described in regulation 3, Jobseeker’s Allowance (18-21 Work Skills Pilot Scheme) Regulations 2014 (SI 2014 No. 3117).

**Work related activity: ESA Claimants**

8. The legal requirement to do “work related activity” is the form that the compulsion to do the work-programme takes for claimants of ESA.
Which ESA claimants?

9. The regulations provide that all claimants of ESA under the current scheme can potentially be compelled to do work related activity except:2 those who are:

   a. in the support group
   b. who have reached state pension credit age
   c. lone parents responsible for a child aged under three
   d. entitled to a carer’s allowance / carer premium
   e. Again the regulations provide a discretion as to which claimants, from the pool of those who can be selected, are in fact selected. However, again, the guidance suggests that the Jobcentre does not approach this issue on a case by case basis as one would expect with a discretionary power but instead follows a rigid set of criteria.

What can an ESA claimant be made to do on WRA?

10. There is a basic rule that any requirements imposed on a claimant must be reasonable in the view of the Decision Maker.3

11. The following limitations exist:4

   f. the claimant can never be asked to apply for a job or undertake work as part of work related activity.
   g. the claimant cannot be required to undergo medical treatment.
   h. If the claimant is a lone parent of a child aged under 13, then s/he may not be required to do work related activity outside the child’s normal school hours.

2 Reg 3 ESA(WRA) Regs 2011
3 Reg 3(4)(a) ESA(WRA) Regs 2011
4 Reg 3(4) and (5) ESA(WRA) Regs 2011
Work related activity: IS lone parent claimants

Which claimants?

12. From 28/04/2014, lone parents whose youngest child is at least 3 can be required to perform work related activity to avoid a sanction.

13. Only IS claimants who meet all of the following conditions can be forced to do work related activity:
   i. Not responsible for a child under 3;
   j. Have been asked to attend a work focussed interview previously; and
   k. Is only entitled to IS as a lone parent (eg meets no other condition of entitlement like pregnancy, carer etc).

What can an IS claimant be made to do on WRA?

14. There is a basic rule that any requirements imposed on a claimant must be reasonable in the view of the Decision Maker.  

15. The claimant can never be asked to apply for a job or undertake work as part of work related activity.  

Usefulness for challenging decisions

16. If a claimant is not in a group of persons who can be selected for participation in a programme then obviously no sanction for failure to participate can be imposed. Such cases can arise when, for example, an ESA claimant has recently had a child but the work programme provider has not been notified of this.

17. The more complex question is whether a claimant can challenge a sanction imposed on the grounds that the Secretary of State had failed to exercise his discretion on whether to refer a particular claimant. Such an argument would best be run in a case where a claimant had clear reasons why for them referral to a particular scheme was inappropriate and in particular would not serve the purposes of the scheme (ie help to obtain employment).

5 Reg 2(3)(a) IS(WRA) Regs
6 Reg 2(3)(b) IS(WRA) Regs
Section 3: was what the claimant was asked to do part of a scheme?

1. For ESA claimants then “work related activity” is defined in section 13(7) WRA 2007 as:

“(7) In this Part, “work related activity”, in relation to a person, means activity which makes it more likely that the person will obtain or remain in work or be able to do so”.

2. More specifically, something cannot be work related activity if it requires a claimant to apply for a job or perform work or is unreasonable (see above).

3. For IS claimants then “work related activity” is defined in the same terms but in section 2D(9)(d) of the SSAA 1992. Again, it will not be work related activity if it requires a claimant to apply for a job or is unreasonable.

4. For JSA claimants the various “schemes for assisting persons to obtain employment” are prescribed in regulations (see above for the list of schemes and their descriptions as prescribed). However, more generally section 17A(1) of the JSA Regs 1995 makes it clear that the schemes which are detailed in the regulations must be “designed to assist them to obtain employment”.

Usefulness for challenging decisions

5. Where it appears that the scheme a claimant is sent on would not assist them to obtain employment then it can be argued (perhaps more forcefully for ESA and IS claimants than for JSA claimants) that this is not work related activity (or for JSA a scheme for assisting that claimant to obtain employment) at all.

6. With regard to this, there are some useful comments from the Court of Appeal in the R (Reilly and Wilson) v SSWP [2013] EWCA Civ 66. The Court said:

48. A policy of imposing requirements on persons receiving a substantial weekly sum, potentially payable for life, is readily understandable. Equally, the means sought to achieve that end are understandable; claimants should be required to participate in arrangements which may improve their prospects of obtaining
remunerative employment. Provided schemes "are designed to assist [claimants] to obtain employment" and to "[improve] their prospects of obtaining employment", both expressions appearing in section 17A, sanctions for failing to participate are understandable. Whether a particular arrangement meets those statutory requirements in section 17A is susceptible to challenge by judicial review […].

Section 4: Notice issues

**JSA: notifications about the Work Programme**

1. Once they have selected a claimant the Jobcentre then have to send them a written notice which includes the following information:⁷

   (a) that the claimant is required to participate in the Scheme;

   (b) the day on which the claimant’s participation will start;

   (c) details of what the claimant is required to do by way of participation in the Scheme;

   (d) that the requirement to participate in the Scheme will continue until the claimant is given notice by the Secretary of State that the claimant’s participation is no longer required, or the claimant’s award of jobseeker’s allowance terminates, whichever is earlier; and

   (e) information about the consequences of failing to participate in the Scheme.

2. Furthermore, the Jobcentre have to send the claimant a notice when they make any changes made to what the claimant is required to do by way of participation in the scheme.⁸

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⁷ Reg 5(2) Schemes Regs
⁸ Reg 5(3) Schemes Regs
**ESA: action plans about work related activity**

3. Requirements to participate are set out in written “action plans”. There is no requirement for the action plan to include details of the sanction risk for non compliance. The action plan must be given to the claimant.\(^9\)

4. The claimant can request an action plan be reconsidered and is then entitled to receive a decision on this.\(^10\)

5. Guidance issued to providers makes the following stipulations about “action plans”:\(^11\)

   **Actions**
   3. The minimum requirements are:
      
      - All mandatory activities must be recorded in your evidence of action planning. In so doing:
        - You must make it clear to the participant where activities are mandatory;
        - The participant must understand what they are being asked to do, why they are being asked to do it and when it must be completed by;
        - All ‘live’ mandatory requirements must be held in a single document. This should include a clear explanation of what the activity is, when it occurs, when it must be completed by, and what evidence is required to demonstrate completion of the activity;
        - The evidence of action planning must be completed, dated and held for all participants; and
        - The information must be available to the participant at their request.

6. The instruction that this information must only “be available to the participant at their request” is somewhat different to the requirement in the regulations that the action plan must be given to the claimant.

**IS: action plans**

7. Again requirements to participate are set out in written “action plans”. There is no requirement for the action plan to include details of the sanction risk for non-compliance. The action plan must be given to the claimant.\(^12\)

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\(^9\) Reg 5(1) ESA(WRA) Regs 2011
\(^10\) Reg 7 ESA(WRA) Regs 2011
\(^11\) Work Programme Provider Guidance- Chapter 3b Action Planning
\(^12\) Reg 3(1) IS(WRA) Regs
8. The claimant can request an action plan be reconsidered and is then entitled to receive a decision on this in writing.\textsuperscript{13}

\textbf{Usefulness for challenging decisions}

9. If a claimant has not been given an adequate notice or action plan (ie one which complies with the requirements) then no sanction should be imposed.

10. Even where a claimant has been given a notice or an action plan, one can still argue that it is invalid as it does not comply with the terms of the regulations. The Supreme Court in \textit{Reilly and Wilson} were clear that the notice needed to comply with the requirements in the regulations:

i. Firstly, the notice must particularise in some detail what the claimant will actually be required to do on the scheme:

55. In our opinion, there was a failure to comply with regulation 4(2)(c). The letter of 16 November 2011 merely informed Mr Wilson that he had to perform “any activities” requested of him by Ingeus, without giving him any idea of the likely nature of the tasks, the hours of work, or the place or places of work. It seems to us, therefore, that the letter failed to give Mr Wilson “details of what [he was] required to do by way of participation”. Again, it is necessary to balance practicality, in the form of the need of the Secretary of State and his agents for flexibility, against the need to comply with the statutory requirement, which was plainly included to ensure that the recipient of any such letter should have some idea of where he or she stood. A requirement as general and unspecific as one which stipulates that the recipient must “complete any activities that Ingeus asks you to do”, coupled with the information that the course will last about six months falls some way short of what is required by the words of regulation 4(2)(c), even bearing in mind the need for practicality.

m. Secondly, the Court were not persuaded the notice needed to particularise as exactly what would be the consequences of failure to participate. It seems it is enough if the letter warns that the consequence of failure to comply is a loss of benefit:

56. The alleged breach of regulation 4(2)(c) is rather different in nature, and we have concluded that it is not made out. It arises from the fact that the letter of 16 November 2011 states that Mr Wilson would lose his benefits for “up to 26 weeks” if he did not participate in the CAP. The true position was that he risked losing his jobseeker’s allowance for two weeks initially, and thereafter for a period of 26 weeks, which could potentially be continued on a “rolling” basis – see regulation 8(4) and (6) of the 2011 Regulations, set out in para 14 above. We see some force in Ms Lieven’s criticisms of the letter,

\textsuperscript{13} Reg 5 IS(WRA) Regs
but the question is whether they are sufficient to provide additional grounds for holding the notice invalid. The crucial issue is not so much one of contractual construction of the letter: it is whether Mr Wilson was (or perhaps whether a reasonable person in Mr Wilson’s position would have been) significantly prejudiced or misled by the terms of the letter so far as any sanction was concerned.

57. Regulation 4(2)(e) required the notice to contain “information about the consequences of failing to participate”, but it did not specify how detailed the information needed to be. If the letter had warned Mr Wilson in general terms that failing to participate might result in loss of benefit, we think that it would have been sufficient. The letter was more specific, in that it said that he risked losing “up to 26 weeks” loss of benefit, which was the maximum on any one occasion. This would have made it plain to Mr Wilson that he could face a lengthy period of loss of benefit if he failed to participate. Whether the issue is to be judged from the perspective of Mr Wilson or of a reasonable person in his position, we are not persuaded that the imperfections of the warning were sufficiently misleading or prejudicial that the letter should be held invalid on that account.

Section 5: sanctionable failures

**JSA: failing to participate in a Scheme under S. 17A JSA 1995**

1. A claimant is regarded as failing to participate in the Work Programme if they do not do what they have been given notice they have to do to be regarded as participating in the scheme and do not have a good reason for this. That now attracts a low level sanction (4 weeks on the first occasion and 13 weeks for subsequent failures- see below)\(^\text{14}\)

2. Note that given the Schemes are run by organisations (usually private companies) contracted to the Department this means that it will be for the scheme provider to give the Jobcentre information which they believe shows the claimant has not complied. Many of the scheme providers will be happy to speak to welfare rights advisers about a claimant’s attendance on a scheme, concerns they have raised with Jobcentre etc.

3. Good reason is not defined.

\(^{14}\) S19A(2)(b) JSA 1995
**ESA: Failure to undertake WRA**

4. If the Decision Maker thinks a claimant has failed to undertake WRA when required to do so, a notice explaining this should be sent to the claimant. The claimant then has 5 working days from the date the notice is given, to explain if they had good cause for this failure.\(^{15}\)

5. Good reason is not defined.

**IS: Failure to undertake WRA**

6. If the Decision Maker thinks a claimant has failed to undertake WRA when required to do so, a notice explaining this should be sent to the claimant. The claimant then has 5 working days from the date notice is given, (defined as 2 working days after it was sent by post) to explain if they had good cause for this failure.\(^{16}\) Further facts can also be given within a period of a month from the day the notice was sent and can be considered if the claimant could not reasonably have been brought to the attention of the DWP within the 5 day period.\(^{17}\)

7. For IS claimant’s then a failure to participate without “good cause” leads to a reduction in IS. The DWP consideration of good cause includes (but is not limited to) the following factors:\(^{18}\)

   (a) the person misunderstood the requirement to undertake work-related activity due to any learning, language or literacy difficulties of the person or any misleading information given to the person by the Secretary of State;

   (b) the person was attending a medical or dental appointment, or accompanying someone for whom they have caring responsibilities to such an appointment, and that it would have been unreasonable, in the circumstances, for the person to undertake work-related activity;

   (c) the person had difficulties with their normal mode of transport and that no reasonable alternative was available;

   (d) the established customs and practices of the religion to which the person belongs prevented the person undertaking work-related activity on that day or

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\(^{15}\)Reg 8 ESA(WRA) Regs 2011  
\(^{16}\)Regs 6 (1) and 6(4) IS(WRA) Regs  
\(^{17}\)Reg 6(3) IS(WRA) Regs  
\(^{18}\)Reg 7 IS(WRA) Regs
at that time;
(e) the person was attending an interview with an employer with a view to obtaining employment;
(f) the person was pursuing employment opportunities as a self-employed earner;
(g) the person, a dependant of the person or someone for whom the person provides care suffered an accident, sudden illness or relapse of a physical or mental health condition;
(h) the person was attending the funeral of a close friend or relative on the day fixed for the work-related activity;
(i) a disability from which the person suffers made it impracticable to attend at the time fixed for the work-related activity;
(j) the availability of childcare.

5 day rule

8. Both ESA and IS claimant face a requirement to show their “good cause” (for IS) or “good reason” (for ESA) within 5 days (see above). Until the introduction of the Schemes Regulations for JSA a similar 5 day rule applied.

9. Following the judgment in TJ v SSWP (JSA) [2015] UKUT 56 (AAC), it seems that a failure to show the good cause/reason within 5 days in IS and ESA cases will mean that such good cause or good reason cannot be taken into account. The Upper Tribunal in that case were considering the then applicable JSA regulations but they are worded in similar terms to the 5 day rules for IS and ESA still in force. The Upper Tribunal dealt with the issue at paragraphs 255 to 268.

10. Claimants caught by this 5 day rule could potentially instead argue that the particular work related activity they had been asked to do was not reasonable in their situation at the time, and hence was not work related activity- thus circumventing the 5 day rule.
**Good reason and Good Cause**

Other than for income support good reason/cause is not defined. There is helpful guidance set out in the Decision Maker’s Guide as to what constitutes good reason (see attached).

**Usefulness in challenging decisions**

11. It is worth highlighting good cause / reason in challenges to these decisions. Reference to the guidance and how the claimant falls within it often leads to success.

**Section 6: sanction periods and amounts**

**JSA**

1. A first failure to participate **without a good reason** in the work programme attracts a sanction of 4 weeks of the claimant’s JSA. A second or subsequent failure attracts a 13 week sanction.

2. The failure to participate is regarded as a “first failure” if the claimant is not regarded as having done something which attracted a similar level sanction within the last 52 weeks. Repeated failures within the same 2 week period count as a single failure.

3. The amount of the sanction is the whole of the claimant’s JSA. For joint-claim couples this is modified (unless the claimants have both been sanctioned), so that the amount of the sanction leaves the claimant with (1) the cJSA amount where the non-sanctioned partner is entitled to cJSA; or (2) ibJSA calculated by reference only to a single person applicable amount.

4. The sanction should commence:

   n. On the first day of the benefit week in which the sanctionable failure occurred where at the date of the sanction decision the claimant has not been paid a JSA since the failure; or in other cases

   o. On the first day of the benefit week after the claimant was last paid JSA.
5. The failure to participate without good reason is regarded as a “first failure” if the claimant is not regarded as having done something which attracted a similar level sanction within the last 52 weeks. Repeated failures within the same 2 week period count as a single failure.

6. The sanction continues up until the claimant complies with the condition to participate (precisely for each 7 full days of non-compliance the sanction period is a week). It then continues for a further period of 7, 14 or 28 days dependent on whether it is the first, second or a subsequent (eg 3rd or more) failure.\(^\text{19}\)

7. A claimant counts as complying with the condition to participate from the earliest of the following dates:
   
   p. The claimant undertakes the activity in the action plan which they had previously failed to do.
   
   q. The claimant undertakes an alternate activity specified by the SSWP.
   
   r. The claimant makes an agreement with the SSWP to undertake either of the above activities.\(^\text{20}\)

   It is worth checking whether the above rule has been correctly applied- we have come across many cases where the Work Programme Provider has only indicated a claimant has complied once they in fact undertake work related activity.

8. The amount of the sanction is equal to the personal allowance for a single claimant over 25 (eg £73.10)\(^\text{21}\) although the claimant must be left with at least £0.10 per week.

9. The amount of the reduction is equal to 20% of the personal allowance for a single person aged 25 or over.\(^\text{22}\) More than one reduction can be made but only if the previous reduction was made at least 2 weeks ago and no reduction can be made if there is already a reduction

\(^{19}\)Reg 63 ESA Regulations

\(^{20}\)Reg 63(6) and (11) ESA Regulations

\(^{21}\)Reg 63(2) ESA Regulations

\(^{22}\)Reg 8(1) IS(WRA) Regs
for failure to participate in a work focussed interview.\textsuperscript{23} The amount of IS left to a claimant must be at least £0.10 per week.\textsuperscript{24} The reductions should cease as soon as the claimant participates in any work related activity or attends a work focussed interview.\textsuperscript{25}

10. The reduction should commence from the first day of the benefit week in which it is made and cease from the first day of the benefit week in which the claimant participates.\textsuperscript{26}

Usefulness in challenging decisions

It is worth noting the following points:

- Where a claimant has a second or subsequent sanction then even if that cannot be successfully challenged on its own terms a challenge to an earlier sanction may mean that the more recent sanction has to be reduced in length.

- The Work Programme Provider can often make a mistake about the day on which the claimant recomplied.

- Sanctionable failures occurring within 2 weeks of a previous failure should not lead to another sanction.

\textsuperscript{23} Reg 8(4) IS(WRA) Regs
\textsuperscript{24} Reg 8(3) IS(WRA) Regs
\textsuperscript{25} Reg 9 IS(WRA) Regs
\textsuperscript{26} Reg 6(2)(t) and (u) and Reg 7(41) and (42) SS&CS(D&A) Regs
Section 7: sanctions for failing to actively seek work

1. Sanctions are imposed where a decision is made that in a particular week a claimant is not available for work or was not actively seeking work (ie did not meet those basic conditions of entitlement for the benefit for JSA). The sanction length follows the 4 week and 13 week model similar to failure to participate in the work programme- as do the amounts.

Note also that a decision that a claimant is not available for or actively seeking work in a particular week has the effect that they are not entitled to JSA for that week.

For JSA group claimants a claimant who is held not to be available for work or actively seeking work in a situation where they were being treated as available for or actively seeking work and then their JSA stopped because they ceased to be so treated, may avoid the sanction if the Decision Maker decides that would be appropriate.

Structure for preparing challenges

2. When preparing a challenge against a sanction imposed because a claimant is said to have not been actively seeking work it is important to consider two issues:
   i. Is the claimant treated as actively seeking work even though s/he has not been?
   ii. What steps has the claimant taken to be actively seeking work
   iii. What steps the claimant can be reasonably expected to take in order to have the best prospects of employment

3. The burden of proof is with the Decision Maker who must show that the legal requirements for a sanction have been met.

Time limits

4. See section 1, paragraph 7, Time limits for challenging sanctions decisions, above.

JSA labour market conditions

5. There are three separate “labour market conditions” which must usually be met by a JSA claimant. The claimant must:
   • Be available for work.
   • Be actively seeking work.

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27 S. 19B JSA 1995; section 27(2) WRA 2012
28 Reg 69B(5) JSA Regs
• Have a current jobseeker’s agreement.

6. Note these three conditions are actually part of the conditions of entitlement - a claimant who does not meet them is simply not entitled to JSA (and may also be sanctioned).

The rules about “sanctions” add a further layer to the labour market conditions allowing withdrawal of JSA from claimants even where they do meet the labour market conditions but where they are deemed to have exhibited bad behaviour in relation to work or employment related activity.

**Actively seeking work**

7. The basic rule is that to count as “actively seeking work” in a particular week a claimant must take such steps as s/he can reasonably be expected to take in order to have the best prospects of securing employment.\(^ {29} \)

This is more precisely defined in regulations which seek to specify much more exactly what “steps” it is reasonable for a claimant to take to get a job.\(^ {30} \)

However, it is important to understand that although these extra rules set some minimums as to what will count as enough activity to meet the test of actively seeking work, the core test is still whether overall one can say the claimant has done what they can reasonably be expected to do in a particular week to have the best prospects of getting a job.

Note that a claimant who has restricted their availability for work during a permitted period counts as actively seeking work in that period if only looking for such work.\(^ {31} \)

**What is a step?**

8. A claimant is expected to take more than 2 steps (e.g. at least 3 steps) in a particular week to count as actively seeking employment.\(^ {32} \) Exactly what counts as a “step” includes (but is not limited to- so things the claimant does to find work not in this list are also steps- e.g. looking for a second hand suit in a charity shop for an interview might count):\(^ {33} \)

• Making applications for employment either orally or in writing to persons who have either advertised jobs or appear likely to be able to offer employment;

• Seeking information on the availability of employment from advertisements, people who have placed such adverts, employment agencies or employers;

• Registration with an employment agency or employment business;

• Appointment of a third party to assist the claimant in finding employment;

• Seeking specialist advice, following referral by an employment officer, on how to improve the

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29 Sec 7(1) JSA 1995
30 Chapter III of JSA Regulations
31 Reg 20 JSA Regs
32 Reg 18(1) JSA Regs
33 Reg 18(2) JSA Regs
prospects of securing employment in light of a claimant’s particular needs;

- Drawing up a CV;
- Seeking a reference or testimonial from a previous employer;
- Drawing up a list of employers who may be able to offer employment to him/her with a view to seeking information from them on the availability of employment;
- Seeking information about employers who may be able to offer employment to her/him;
- Seeking information on an occupation with a view to securing employment in that occupation.

**Step nicely!**

9. Note that a particular action will not count as a “step” if claimant taking the step does so in a violent or abusive manner, or:

- Where the step is making an application the application is deliberately spoiled;
- The claimant's appearance or behaviour undermines the claimant's prospects of obtaining the employment in question.34

**Are the steps sufficient?**

10. Can be said that the claimant has taken such steps as s/he can reasonably be expected to take in order to have the best prospects of securing employment? When making this decision the following factors must be taken into account:35

- The skills, qualifications and abilities of the claimant;
- His/her physical or mental limitations;
- The time which has elapsed since s/he was last in employment and her/his work experience;
- The steps which s/he has taken in previous weeks and the effectiveness of those steps in improving his/her prospects of securing employment;
- The availability and location of vacancies in employment;
- Any time during which s/he was:
  - Crewing a lifeboat or engaged as a fireman;
  - Attending an Outward Bound course;

34 See R(U)28/55
35 Reg 18(3) JSA Regs
- In the case of a blind person, participating in a course of training in the use of guide dogs;
- Participating in training in the use of aids to overcome any physical or mental limitations she/he has in order to improve prospects of securing employment;
- Engaged in duties as a member of any territorial or reserve military
- Participating as a part-time student in an employment-related course,
- Participating for less than 3 days in an employment or training programme for which a training allowance is not payable.

- Any time during which s/he was engaged in voluntary work and the extent to which it may have improved her/his prospects of securing employment;
- Whether s/he is treated as available for employment under regulation 14;
- Whether s/he has engaged in a course or programme the cost of which is met by the European Community and the purpose of which is to find employment; and
- Where s/he was homeless in that week and what s/he may have needed to do to secure accommodation.

The above is not a complete list of what may be taken into account. However regard needs to be had to these and any other factors relevant to the claimants situation.

**Usefulness on appeal**

11. CJSA/1814/2007 (para9-15) makes clear that the test applied to determine the appropriateness of a sanction is not whether the claimant has met the requirement of their jobseekers agreement but whether they have taken *such steps as can reasonably be expected to have to take in order to have the best prospect of securing employment*\(^{36}\) and that the test is a positive one, of what a person has done not what they have failed to do.

**Section 8: treated as actively seeking work**

1. A claimant can be treated as actively seeking work (and so will be entitled to JSA even though they are not really actively seeking work) in certain situations.

   In most situations where a claimant is treated as actively seeking work they will also be treated as available for work. In most cases you are only considered to be actively seeking work if the situation affects you for at least three days in a “benefit week”.

\(^{36}\) Section 7(1) JSA Act
People with caring responsibilities being treated as actively seeking work:

2. A claimant temporarily looking after a child full-time because the person who normally looks after the child is ill or temporarily absent from home or that person is looking after a member of his/her family who is ill, for a maximum of 8 weeks.\(^{37}\)

3. A claimant who is temporarily absent from GB because s/he is taking her/his child or young person abroad for treatment, for a maximum of 8 weeks.\(^{38}\)

4. A claimant who is a member of a couple and is looking after her/his child aged under 16 while her/his partner is temporarily absent from the UK for a maximum of 8 weeks.\(^{39}\)

5. Domestic emergencies for up to 4 weeks - see below

People with health problems being treated as actively seeking work

6. A claimant who is sick for a two week period or is temporarily absent from Great Britain for the purpose of getting hospital treatment.\(^{40}\) The claimant must make a declaration that they were sick and prove they were sick (a medical certificate will help for this). The two week period is only available on 2 occasions in each year of jobseeking.\(^{41}\)

7. A claimant who is sick for a “extended period” of sickness (for up to 13 weeks). One period of extended sickness is allowed each 12 month period. However this does not apply if it would be reasonable for you to take steps to seek employment.

8. A claimant recently found capable of work or not to have limited capability for work during the time for which claiming JSA is extended because s/he was not told his/her entitlement to IS, ESA or IB had ended and so could not claim JSA in time.\(^{42}\)

Homelessness and treated as available for work

9. From 21/07/2014, a claimant who has recently become homeless can be treated as actively seeking work (on grounds this is a domestic emergency) for as long as they are taking reasonable steps to find living accommodation and to deal with the emergency.\(^{43}\)

Domestic emergencies

10. A claimant dealing with any of the following circumstances for the time taken to deal with those circumstances (up to a maximum of a week and no more than 4 occasions allowed in any 12 month period):\(^{44}\)

   i. Death or serious illness of a close relative or close friend.

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\(^{37}\) Reg 14(1)(g) JSA Regs -treated as available; Reg 19(1)(g) JSA Regs – treated as actively seeking

\(^{38}\) Reg 14(1)(c) JSA Regs -treated as available; Reg 19(1)(c) JSA Regs – treated as actively seeking

\(^{39}\) Reg 14(1)(e) JSA Regs -treated as available; Reg 19(1)(e) JSA Regs – treated as actively seeking

\(^{40}\) Reg 14(1)(l) JSA Regs- treated as available; Reg 19(1)(l) – treated as actively seeking and Reg 55 JSA Regs

\(^{41}\) Reg 55(3) JSA Regs

\(^{42}\) Reg 14(1)(o) JSA Regs- treated as available; Reg 19(1)(s) – treated as actively seeking

\(^{43}\) Reg 14(2)(b) and (2ZC) JSA Regs- treated as available; Reg 19(1)(o) – treated as actively seeking

\(^{44}\) Reg 14(2)(a) to (d) JSA Regs- treated as available; Reg 19(1)(o) – treated as actively seeking
ii. Domestic emergency affecting him or a close relative or friend.

iii. Funeral of a close relative or friend.

iv. The person in respect of whom the claimant had caring responsibilities has died.

**Note:** A claimant with caring responsibilities for a child to whom either of the first two sub-bullet points above applies can be treated as actively seeking in that situation for up to 8 weeks but only once per 12 month period\(^45\). For a claimant who is homeless and seeking accommodation effectively the period is not fixed (see above) and this can happen on more than 4 occasions a year.

**People studying being treated as actively seeking work:**

11. A claimant spending at least three days on a government sponsored for which they are NOT paid a training allowance (not including the work programme and similar schemes).

12. A claimant participating as a full-time student in an employment-related course where participation has been approved by an employment officer but only for a maximum of 2 weeks and for one such course in any period of 12 months.\(^46\)

13. A claimant attending a residential work camp, for a maximum of 2 weeks in any period of 12 months.\(^47\)

14. A claimant following an Open University course and who is attending as a requirement of that course, a residential course for a maximum of one week per course.\(^48\)

15. A claimant attending a “qualifying course”* with the approval of the employment officer is treated as available for work in all weeks.\(^49\)

**People in prison or court etc. being treated as actively seeking work:**

16. For a one week period after discharge from detention in a prison, remand centre or youth custody institution.\(^50\)

17. For up to 96 hours (eg 4 days) before release from police custody (but not if you were actually a sentenced prisoner during that time).\(^51\)

18. A claimant required to attend court of a tribunal as a party to the proceedings, a witness or a jury member (or indeed as a justice of the peace).\(^52\) This lasts only for 8 weeks and the claimant must give notice to an employment officer (in writing if requested) of the requirement before he or she attends.\(^53\)

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\(^{45}\) Reg 14(2) (a) and (b) with (2ZA) and (2ZB)

\(^{46}\) Reg 14(1)(a) JSA Regs -treated as available; Reg 19(1)(a) – treated as actively seeking

\(^{47}\) Reg 14(1)(b) JSA Regs -treated as available; Reg 19(1)(b) – treated as actively seeking

\(^{48}\) Reg 14(1)(f) JSA Regs -treated as available; Reg 19(1)(f) – treated as actively seeking

\(^{49}\) Reg 17A JSA Regs -treated as available; Reg 21A – treated as actively seeking

\(^{50}\) Reg 14(1)(h) JSA Regs - treated as available; Reg 19(1)(h) – treated as actively seeking

\(^{51}\) Reg 14(1)(s) JSA Regs- treated as available; Reg 19(1)(w) – treated as actively seeking

\(^{52}\) Reg 14(1)(r) JSA Regs- treated as available; Reg 19(1)(v) – treated as actively seeking

\(^{53}\) Reg 14(2B) JSA Regs - treated as available; Reg 19(2A) – treated as actively seeking
**Other times when treated as actively seeking work:**

19. During any part week at the beginning of a claim if in respect of all the days concerned the claimant is available for work in line with any agreed restrictions on your availability and:
   
   i. Has an agreed pattern or availability; or
   
   ii. Does not have an agreed pattern of availability but is available for work for at least 8 hours per day.

20. During any part week at the end of the claim.

21. A claimant engaged in crewing or launching a lifeboat or in the performance of duty as a part-time member of the fire brigade or engaged during an emergency in duties for the benefit of others.\(^{54}\) Note that, for the purposes of whether they can be treated as available for work, a person is engaged in duties for the benefit of others where he or she is, as a member of a group of people organised wholly or partly for the purpose of:
   
   i. Providing assistance to any person whose life may be endangered or who may be exposed to the risk of serious bodily injury or whose health may be seriously impaired.
   
   ii. Protecting property of substantial value from imminent risk of serious damage or destruction.
   
   iii. Assisting in measures being taken to prevent a serious threat to the health of the people.

22. A claimant who is temporarily absent from Great Britain to attend an interview for employment and has given notice to an employment officer, in writing if required, that he will be absent for a maximum of one week.\(^{56}\)

23. A claimant who is a member of a couple where both claimant and partner are absent from Great Britain and the partner of the claimant is eligible for a pensioner premium or a disability premium, for a maximum of 4 weeks.\(^{57}\)

24. A claimant who is taking active steps to set themselves up as self-employed under a scheme to assist people to do so (for up to eight weeks)

25. A claimant who is laid off or working short time counts as actively seeking work.

26. A claimant can be treated as actively seeking work during an absence from home. In such situations the claimant still has to be available for work. In any 12 month period then the following absences are allowed:\(^{58}\)
   
   i. A maximum of 2 weeks; or
   
   ii. A maximum of 3 weeks during which attending an Outward Bound course on at least

\(^{54}\) Reg 14(1)(d) JSA Regs - treated as available; Reg 19(1)(d) – treated as actively seeking

\(^{55}\) Reg 14(5)(a) JSA Regs - treated as available; not defined in respect of actively seeking work rule

\(^{56}\) Reg 14(1)(m) JSA Regs - treated as available; Reg 19(1)(m) – treated as actively seeking

\(^{57}\) Reg 14(1)(n) & (nn) JSA Regs - treated as available; Reg 19(1)(n) & (nn) – treated as actively seeking

\(^{58}\) Reg 19(2) JSA Regs
3 days for each week;

iii. In the case of a blind person a maximum of 6 weeks if during at least 4 of those weeks doing a guide dog training course at least for 3 days each week.

Section 9: Sanction periods and amounts

Length of sanction period

1. A sanction given because a claimant’s entitlement to JSA is ended when they ceased to be actively seeking work is imposed for:
   i. Four weeks if entitlement has only ended once for this reason
   ii. 13 weeks if entitlement has ended two or more times for this reason and the other incidents occurred between two and 52 weeks from the most recent incidence.

Reduced sanction Period

2. The sanction period is reduced by the number of days you were not paid JSA – from the first day of the benefit week following the benefit week in which you were last paid and
   i. the date of your new claim; or
   ii. the date any JSA suspension because of doubts over your actively seeking work, is lifted

When the period starts

3. The sanction period starts on the day of your new claim (or if your JSA is suspended because of doubts over your actively seeking work, the day the suspension is lifted.

Amounts

4. See section 6 Sanction periods and amounts, paragraph 3 JSA.
Section 10: sanctions and housing benefit

Work programme sanctions

1. Sanctions for the work programme should not lead to housing benefit being effected:
   a. For ESA and IS this is because the claimant will always be left with at least £0.10.
   b. For JSA this is because a claimant is to be treated as still in receipt of JSA during a sanction for failure to participate in a scheme.\(^{\text{59}}\)

2. Nonetheless errors do occur- claimants should be able to challenge any decision stopping HB in these circumstances on official error grounds.

Failure to actively seek work sanctions

3. An actively seeking work sanction is applied when a disallowance decision is made and so the claimant should tell the local authority benefit office about their income on days when they are not entitled to JSA.

\(^{\text{59}}\) Regulation 2(3)(a) of the Housing Benefit Regulations 2006 (SI No. 213).
Sanctions disputes and challenges
Robbie Spence and Dan Norris

SECTION 1

Introduction to challenging work programme sanctions
Section 1: some jargon

- **ESA and IS claimants**: the duty to participate in the work programme (and other schemes) is called “work related activity”
- **JSA claimants**: the duty is to attend “schemes for assisting persons to obtain employment”
- **UC claimants**: the duty is to do “work preparation”
- In general we will refer to the “work programme” when we mean any of the schemes claimants have to perform. However, this is actually just the most common of a number of schemes....

Section 1: “Work programme schemes” - JSA

- Day One Support for Young People
- Derbyshire Mandatory Youth Activity Programme
- Full-time Training Flexibility
- New Enterprise Allowance
- Sector-based work academy
- Skills Conditionality
- Work Programme
- Community Work Placements
- Traineeships
- 18-21 Work Skills Pilot Scheme

*(see paper at point 6 and 7 for the brief description of each in the regulations)*
Section 1: WP sanctions- some basics

• Challenges WORK!
• Escalating nature of sanctions for multiple offences – can always challenge the earlier ones – success reduces length of current sanction.
• HB – should not be effected by WP sanction (for JSA see reg 2(3) HB Regs, for IS and ESA then always left with £0.10). If HB is affected likely to be amenable to official error revision.
• There are good reasons to think of other issues than “good reason”- in many sanction cases then there are other arguments than simply challenging a decision on basis claimant had a good reason for not participating
• Can seek revision at anytime

Methods of avoiding WP sanctions

• **Tactic 1:** Getting claimant into a group who cannot be required to participate in WP.
• **Tactic 2:** Persuading DWP not to require a claimant to participate.
• **Tactic 3:** Reducing what claimant is required to do by way of participation.
• **Tactic 4:** Keeping the WP provider informed.
TACTIC 1: Getting claimant into non-participant group

• (for IS/ESA) check the claimant is a person who can be required to participate.
• (in the longer term) to get the claimant moved to a group of persons who cannot be so required:
  – support group for ESA claimant
  – onto ESA for a JSA or IS claimant as will be left alone for a while
  – See chapter 2 of the Work Programme Provider Guidance for who the SSWP mandates.

Getting an ESA claimant into support group

• Consider Reg 35 of the ESA Regulations:
  – (2) A claimant [...] is to be treated as having limited capability for work-related activity if—
    – (a) the claimant suffers from some specific disease or bodily or mental disablement; and
    – (b) by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity.

• Following Charlton v SSWP [2009] EWCA Civ 42 the test must include consideration of what work related activity the claimant would be asked to do if they had to do it.
• Given the DWP “black box” approach to the “work programme” it must be difficult for their Decision Maker to take a view on what work related activity a claimant might be asked to do.
• Advisers may wish to draw up witness statements based on experience from a range of ESA clients as to what work programme locally means to assist tribunals.
**TACTIC 2(JSA): Persuading DWP to not send claimant on scheme**

- The Decision Maker has a discretionary power to send any JSA claimant on a scheme:
  - Reg 4 JSA (Schemes for Assisting Persons to Obtain Employment) Regulations 2013 SI No. 276
- Like all such discretionary powers this should be exercised rationally, reasonably and based on the circumstances of each individual case.
- Remedy if power not used as above is judicial review. EG SSWP must demonstrate he has given consideration to claimants individual circs before referring to WP.
- Potentially difficult to argue given *SSWP v TJ (JSA)* [2015] UKUT 56 (AAC)

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**TACTIC 2(ESA/IS): Persuading to not send an ESA claimant to scheme**

- Again the power to send a claimant on a scheme is discretionary.
- The regulations state clearly that this requirement cannot be imposed if unreasonable in view of Secretary of State.
- Action:
  - Write and explain limitations on claimant. (For ESA claimant the ESA85 or tribunal decision is often a good source of evidence (eg if claimant cannot get to familiar place without accompaniment))
  - Ensure those documents are taken to the WFI and presented to adviser.
TACTIC 3(IS/ESA): Reduce what required to do - review of Action Plan

• Reg 7 of ESA (WRA) Regs gives right to review of Action Plan. Decision on this should be in writing.
• When seeking a review concentrate on:
  – What WRA is allowed to be as set out in law.
  – From that argue why WRA suggested in current plan does not meet that standard. Again make use of ESA50 evidence etc.
• WRA in law defined as follows:
  – Sec 13(7) WRA 2007: “Activity which makes it more likely that the person will obtain or remain in work or be able to do so”
  – For ESA- from 03/12/2012 a new Sec 13(8) added so Work Related Activity “includes work experience or a work placement.”
  – A requirement cannot include applying for a job or undertaking work. However, DWP view is that a “work placement” does not involve work (although “work experience” does)- DMG Memo 41/12. Position is therefore that: (1) claimant can be asked to do a work placement or work experience but (2) not if it includes “work”. It may be arguable that a “work placement” does involve work?
  – Requirement must be reasonable

TACTIC 4: Keeping WP provider informed

• Many examples of WP sanctions involve claimants desperately trying to inform WP provider they will not be able to attend but not getting the message through.
• Claimant should seek to obtain a way of contacting WP advisor (email is best).
• Ideally claimant should send email that cannot attend or if phoning to say cannot attend write to WP provider to confirm that conversation.
Section 1: Time limits for challenges

• WP sanctions can be challenged at anytime:
  – ESA: reg 3(5C) (see definition of “failure determination” in reg 1(3)).
  – IS: reg 3(7CD).
• However, it is advisable if seeking revision after 1 month but before 13 months to apply for extension of time under reg 4 to ensure time for appealing runs from refusal of revision (see R(IS)15/04 and Beltekian v Westminster CC [2004] EWCA Civ 1784

Section 1: Structured approach

LOGICAL ORDER IS TO CONSIDER:
• GROUP WHO CAN BE SANCTIONED?
  – Is claimant a person who can be sanctioned? Have they been properly selected. SECTION 2
• MADE TO DO A SCHEME?
  – Is what they are being asked to do “work related activity” (ESA/IS) or a “scheme for assisting persons to obtain employment” (JSA)? SECTION 3
• PRIOR INFORMATION GIVEN?
  – Has the “prior information requirement” been met?
• NOTICE CONDITIONS?
  – Have the notice requirements been met? SECTION 4
• ACTUALLY FAILED/ GOOD REASON?
  – Has the claimant in fact failed to participate and if so did they have “good reason” (JSA/ESA) or “good cause” (IS)? SECTION 5
• LENGTH AND AMOUNT:
  – Sanction start date, length and amount? SECTION 6
Section 2: which claimants?

• It is always worth checking that the claimant is actually someone who can be compelled to participate.
• Claimants who can be required:
  – JSA – all claimants
  – ESA – not support group, not SPC age, not lone parent with child under 3, not entitled to CA or CP
  – IS lone parents – no child under 3, no other route to IS entitlement

Section 2: when is a claimant referred

• See the Work Programme Provider Guidance Chapter 2: Work Programme Claimant Groups
  – e.g: JSA claimants aged 25+ referred after 12 months
  – e.g: irESA claimants with less than 12 months prognosis
Section 2: Discretionary power to select

- The regulations all make clear that the power to select a claimant is a discretionary power (e.g., reg 4(1) JSA (SAPOE) Regs 2013).
- The DWP guidance (and witness statements in *TJ v SSWP (JSA)* [2015] UKUT 56 (AAC)) makes clear that SSWP selects all claimants who meet certain criteria and will not consider individual circumstances.
- Arguably this is an unlawful fettering of discretion.
- A sanctioned claimant could attempt to argue on appeal that their unlawful selection meant the notice was void.

Section 3- when a scheme is not a scheme

- Is what the claimant has been asked to do “work related activity” (ESA/IS) or a “scheme for assisting persons to obtain employment” (JSA)?
- For both ESA and IS “work related activity” can only be “in relation to [that claimant] [...] activity which makes it more likely that the person will obtain or remain in work or be able to do so”
- An ESA or IS claimant could argue that in their situation the activity they were asked to do was not likely to meet that goal.
Section 3: reasonableness

• For ESA and IS then the requirement must be reasonable and cannot involve work or applying for work.
• Claimant could argue what they failed to do was not reasonable etc.

Section 4: JSA notice requirements

• Claimant must be sent a notice which states:
  – that the claimant is required to participate in the Scheme;
  – the day on which participation will start;
  – details of what C is required to do by way of participation in the Scheme;
  – that the requirement to participate in the Scheme will continue until the claimant is given notice that participation is no longer required, or the award of jobseeker’s allowance terminates, whichever is earlier;
  – information about the consequences of failing to participate in the Scheme.
• Furthermore, new notice needed when any changes made to what the claimant is required to do by way of participation in the scheme.
Section 4: ESA/IS notice issues

• Requirements should be set out in a written “action plan”.
• This should be given to the claimant.

Section 4: points to take on notice

• Where no notice is given then no sanction. Has anyone ever seen an ESA “action plan”?
• If notice is inadequate then no sanction:
  – Supreme Court in Reilly and Wilson held “[Ingeus] merely informed Mr Wilson that he had to perform “any activities” requested of him […] without giving him any idea of the likely nature of the tasks, the hours of work, or the place or places of work. It seems to us, therefore, that the letter failed to give Mr Wilson “details of what [he was] required to do by way of participation”.
  – Supreme Court were not however persuaded that notice needed to do more than say benefit would be affected in terms of notifying of consequences of failure to comply.
• Look out for ESA claimants sent letters which quote the JSA rules…
Section 5: sanctionable failures

- Failing to do what is set out in the notice = failure to participate
- For JSA must show **good reason** (not defined) or get sanctioned
- For ESA must show **good reason** (not defined) in 5 days from when *sent*
- For IS must show **good cause** (partially defined – see page 18) in 5 working days from when *given*

*... always check if claimant has actually done what they were asked....*

Section 5: 5 day rule

- *TJ v SSWP (JSA)* [2015] UKUT 56 (AAC) paras 255 to 268 suggests failure to show good cause/reason within 5 days for ESA/IS prevents claimant from later being able to argue this.
- *Could claimants in this situation instead argue the requirement was not reasonable in their circumstances at that time? Thus getting round the 5 day rule.*
Section 5: Good cause for IS

- There is a partial definition- reg 7 IS(WRA) Regs.
- Remember can always rely on other things as good cause as well.

Section 5: Good cause/reason generally

- Worth seeing the DWP guidance in the Decision Maker’s Guide.
- Worth looking at what points a claimant was awarded for WCA in any ESA case - note the LMDM does not get to see this!
Section 6: Length and amount - differences

- **Length:**
  - **JSA:** 4 weeks for first and 13 weeks second and subsequent.
  - **ESA:** (reg 63 ESA Regs) one week for each full 7 days claimant is not compliant (eg open ended until compliance) plus a punishment period of 1, 2 or 4 weeks dependent on number of failures. Note once agreement made to undertake action on specific date claimant is compliant, WATCH OUT FOR THIS ONE!
  - **IS:** until the claimant complies

- **Amount:**
  - **JSA:** whole of claimant’s JSA.
  - **ESA:** £73.10 (claimant must be left with at least 10p).
  - **IS:** 20% of personal allowance (can stack) (must be left 10p)

Section 6: Sanction length

- **For ESA:**
  - check when claimant agreed to participate- it is this that determines sanction end date and not the actual participation- reg 63(6)(a) and (11)(b)(iii) ESA Regs.
  - Note under reg 63(6)(a) you get 1 week sanction for each full 7 days non participation.

- **Can claimant challenge earlier sanction if that causes present one to be longer?**
Actively seeking work (1)

• Definition:
  – Taking such steps as s/he can reasonably be expected to take in order to have the best prospects of securing employment

• “steps”- must take more than 2

• Must “step” nicely

What counts as a ‘step’?

• Applying for jobs in writing/in person/by phone
• Seeking information from agencies, employers, advertisers
• Calling or visiting employers
• Registering with an agency
• Asking a previous employer for a reference
• Preparing a list of employers who may be able to offer you a job
• Getting specialist advice following referral by an employment officer
• Searching for jobs using government’s ‘Universal Jobmatch’
• Making enquiries about jobs via internet/email.
Actively seeking work (2)

• Were the steps sufficient to achieve the goal. Look at:
  – Skills and abilities of claimant;
  – Physical or mental limitations;
  – Time since last in a job;
  – Steps in previous weeks and effectiveness;
  – Effect of employment related course;
  – Voluntary work;
  – Homeless

Treated as available/actively seeking: carers

• Temporarily looking after child F/T as usual person ill or away- max 8 weeks
• Has “caring responsibilities” and looking after child during school holidays (or an excluded child) if cannot make get other childcare
• 4 times in 12 months then domestic emergency affecting claimant/close friend or relative for 1 week or if claimant “caring responsibilities” 1 time for 8 weeks
• Temporarily absent GB as taking child for treatment, or looking after child as partner gone abroad for treatment- max 8 weeks
Treated as available/actively seeking: sick

- 2 weeks sick twice per year on JSA

- A claimant who is sick for a “extended period” of sickness (for up to 13 weeks). One period of extended sickness is allowed each 12 month period. However this does not apply if it would be reasonable for you to take steps to seek employment

- Up to 1 month if late claiming JSA as just thrown off IS (sickness), IB or ESA and did not know

Treated as actively seeking

- DOMESTIC EMERGENCY:
  - For up to 1 week x 4 times a year.
  - For caring responsibilities one of the 4 times can last 8 weeks.
  - For recently homeless trying to find accommodation then no time limits or number limit,

..... You won’t remember them all – use the handbook
Sanctions for failing to actively seek/be available for work

- 4 or 13 weeks
- Whole of claimant’s JSA
- Remember also a condition of entitlement

Jobseeker's Agreements

- In writing, signed, copy to claimant
- Main relationship to other conditions is contains pattern or availability
- Can only restrict availability in line with that unless caring responsibility or restrictions due to health

A CLAIMANT CANNOT BE SANCTIONED FOR NOT DOING WHAT IS IN AGREEMENT- WHATEVER THE DWP THINKS....
Sanction and HB

Work programme sanctions
• Sanctions for the work programme should not lead to housing benefit being effected:
  – For ESA and IS this is because the claimant will always be left with at least £0.10.
  – For JSA this is because a claimant is to be treated as still in receipt of JSA during a sanction for failure to participate in a scheme.
• Nonetheless errors do occur- claimants should be able to challenge any decision stopping HB in these circumstances on official error grounds.

Failure to actively seek work sanctions
• An actively seeking work sanction is applied when a disallowance decision is made and so the claimant should tell the local authority benefit office about their income on days when they are not entitled to JSA.
• Regulation 2(3)(a) of the Housing Benefit Regulations 2006 (SI No. 213).