

## INCAPACITY FOR WORK - EXCEPTIONAL CIRCUMSTANCES

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### INTRODUCTION

- 1 In a recent judgment<sup>1</sup>, to be reported as R(IB) 2/09, the Court of Appeal considered the provision which allows a claimant who has failed the PCA to be treated as incapable of work if there are exceptional circumstances<sup>2</sup>. Specifically, they considered that part of the provision which applies where there would be a substantial risk to the mental or physical health of any person found capable of work.

*1 Charlton v Secretary of State for Work and Pensions [2009] EWCA Civ 42; 2 SS (IW) (Gen) Regs, reg 27*

### BACKGROUND

- 2 In this case, the claimant, suffering from alcohol dependency syndrome, was found capable of work by the DM and a subsequent AT. The claimant appealed to the Commissioner who confirmed the decision of the AT and found that there was no substantial risk in finding the claimant capable. The claimant appealed to the Court of Appeal.

## THE COURT OF APPEAL'S JUDGMENT

- 3 The judgment confirms that the provision is not limited to cases in which merely learning of the finding of capability would cause a substantial risk to a claimant's health. It also confirms that the correct interpretation requires two considerations. The first is a decision whether the claimant suffers from some specific disease or bodily or mental disablement. The second is whether by reason 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 capable of work. This endorses the approach identified in a previous decision<sup>1</sup>.

*1 CIB/360/2007*

- 4 The judgment states that the determination (of 'substantial risk') must be made in the context of the journey to or from work or in the workplace itself. In assessing the type of work for which the claimant is suitable, the judgment advises on the extent to which it is necessary for a DM to identify the type of work a claimant might be capable of. This is likely to depend on their background, experience and health condition. The judgment emphasises that

1. it is not possible or sensible to be more prescriptive **and**
2. no greater identification of the type of work is necessary other than that which is dictated by the need to assess risk arising from the work or the workplace.

- 5 The judgment continues its endorsement of previous caselaw<sup>1</sup> which states that the degree of detail required in identifying the type of work will depend on the circumstances of the case. Evidence relating to the claimant's background, training or aptitude will be appropriate.

*1 CIB/360/2007*

- 6 The judgment finds the approach adopted in two other decisions<sup>1</sup> to be wrong. It is unnecessary for the DM to speculate as to the type of job which would have been set out in a JSAG, should the claimant apply for JSA following a determination that they are capable of work.

*1 CIB/0026/2004; CSIB/33/2004*

## APPLICATION

- 7 Inclusion of risk associated with the journey to and from work as well as the workplace itself represents a widening of the provision. Yet the judgment is silent on how risk

associated with these journeys should be assessed. If a claimant does cite a risk associated with their journey, the DM will need to examine evidence of the claimant's daily life. This is to see whether their condition in any way affects their ability to travel, for example, when

1. going shopping **or**
2. visiting friends **or**
3. attending hospital appointments.

## **EMPLOYMENT AND SUPPORT ALLOWANCE**

- 8 DMs should also note that this judgment applies to claims for ESA where a determination on substantial risk is required<sup>1</sup>.

*1 ESA Regs, reg 29(2)(b)*

## **ANNOTATIONS**

The number of this memo DMG 06/09 should be noted against the following DMG paragraphs - 13625 **2.** and 42191 **2.**

## **CONTACTS**

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, GS36, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in [Memo DMG 26/08](#) - Obtaining legal advice and guidance from DMA Leeds.

**DMA Leeds: March 2009**