Chapter 41 – Employment and Support Allowance conditions of entitlement

Contents

**Entitlement to Employment and Support Allowance**

**Introduction** 41001

Scope of this Chapter 41003

**Conditions of entitlement**

**General** 41011

**Basic conditions** 41012

Pensionable age 41014

Mixed-age couples 41015

**Additional conditions for contribution-based
Employment and Support Allowance**

Introduction 41020

Contribution conditions

 What the decision maker decides 41022

 Reference to Her Majesty’s Revenue and Customs 41023

 Meaning of terms 41024

 Modification of the meaning of relevant benefit year 41026

The first contribution condition 41029

 Relaxation of the first contribution condition 41032

The second contribution condition 41033

The first and second contribution condition 41036

 Earnings exceeding the upper earnings limit 41037

Late payment of contributions 41038

Class 2 National Insurance contributions

 Contributions paid by due date 41040

 Contributions refunded 41042

Condition relating to youth 41046

 Conditions of entitlement 41047

 Extension of upper age limit to 25 41050

 Full-time advanced or secondary education 41056

 Training 41057

 Full-time education condition 41058

 Calculation of hours of attendance 41061

 Instruction or tuition which is “not suitable” 41066

 Over the upper age limit but previously entitled 41081

 Contribution-based Employment and Support Allowance
 for claimant satisfying the condition relating to youth and
 overlapping benefits 41082

 Contribution-based Employment and Support Allowance
 for claimant satisfying the condition relating to youth and
 Child Benefit 41083

Members of Her Majesty’s Forces 41084

**Additional conditions for income-related
Employment and Support Allowance** 41091

**Waiting days**

**No entitlement to Employment and Support Allowance** 41101

**Claimants who do not have to serve waiting days** 41103

Meaning of terminally ill 41105

Meaning of member of Her Majesty’s Forces 41106

 Meaning of full-pay service 41109

Linking period of limited capability for work 41111

 Linking for work or training beneficiaries 41112

 Linking through qualifying remunerative work 41114

 Linking through training 41116

**Effect of work - claimant**

**Introduction** 41121

The general rule 41122

 Remunerative work exclusion 41123

Definitions

 Meaning of week 41131

 Meaning of work 41132

 Meaning of work as a councillor 41133

 Meaning of relative 41134

 Meaning of close relative 41135

**Exceptions to the general rule** 41141

Work 41144

 Community service 41148

Claimants who do certain categories of work 41151

 Work as a councillor 41152

 Member of the Disability Living Allowance advisory board or
 member of an appeal tribunal with a disability qualification 41155

 Domestic tasks and care of a relative 41156

 Caring for another person 41166

 Activities undertaken during an emergency 41169

Claimants receiving certain regular treatment 41176

Work in the first or last week of limited capability for work 41178

 Linking rules 41179

 Night shift workers 41180

**Exempt work**

Categories of exempt work 41186

Permitted work 41187

 Calculation of weekly earnings 41189

 Permitted work lower limit 41196

 Supported permitted work 41197

 Community Interest Companies 41201

 Permitted work 41211

 Calculating the hours for permitted work higher limit and
 permitted work (limited capability for work-related activity) 41212

Self-employed test trading 41256

Voluntary work 41257

 Magistrates 41259

Work placement 41260

**Remunerative work**

Contribution-based Employment and Support Allowance 41271

Income-related Employment and Support Allowance 41272

Work done for payment or in expectation of payment 41274

Payment to a claimant on termination or interruption of employment 41276

**Effect of work - partner**

Introduction 41301

Do claimants’ partners have employment 41306

**Meaning of remunerative work** 41316

Claimant’s partner treated as in or not in remunerative work 41317

**Work done for payment or in expectation of payment**

Introduction 41326

Work for no monetary reward 41327

Payment in kind 41328

Expectation of payment 41329

Self-employed earners 41330

Sale of goods 41331

Business start up 41332

Company directors 41334

**Establishing hours of work for a claimant’s partner**

Introduction 41341

Carers and specified occupations 41343

Counting the hours

 Flexible working schemes 41346

 Overtime 41347

 Breaks 41348

 Night duty 41349

 Evidence of hours 41350

 Company directors 41351

 Musicians 41352

 Self-employed 41353

 Teachers 41357

Calculating average hours 41371

Identifying a recognisable cycle 41372

 Permanent or indefinite contract 41373

 Fixed term contracts and casual workers 41374

 Supply teachers 41375

 Extra work 41376

 Probation 41377

Recognisable cycle established 41381

Periods when a claimant’s partner does not work 41382

 Sickness, maternity leave, paternity leave, adoption leave and
 periods of unauthorised absence 41383

 Holidays or periods of no work 41384

Calculating the number of hours for which a claimant’s partner is
engaged in work 41386

Calculating the average hours 41389

Yearly cycle with school holidays or similar vacations 41390

Ancillary school workers 41391

No recognisable cycle established

 Estimating future hours 41411

 Averaging past hours 41413

 Short-time workers 41418

Changes to the normal hours 41426

 Seasonal workers 41430

 Averaging the hours 41431

 Agency and casual workers 41432

**Claimant’s partner treated as in remunerative work**

Introduction 41441

Absence from work without good cause 41443

 Good cause 41445

Recognised, customary or other holiday 41451

Payment to a claimant’s partner on termination or interruption of
employment 41452

**Claimant’s partner treated as not in remunerative work**

Introduction 41471

Childminders 41473

Charity or voluntary workers and volunteers 41474

 Meaning of voluntary organisation 41475

 Meaning of volunteer 41476

 Meaning of relative 41477

 Meaning of close relative 41478

Engaged on a training scheme 41480

 Meaning of training allowance 41481

People receiving assistance under the self-employment route 41483

 Meaning of self-employment route 41484

Engaged in specific occupations 41485

Undertaking work as a councillor 41486

 Meaning of work as a councillor 41487

Foster parents and people providing respite care

 Foster parents 41496

 People providing respite care 41497

Sports awards 41498

 Meaning of sports award 41499

Disabled workers 41511

Claimant’s partner affected by a trade dispute 41513

Caring for another person 41514

Claimant’s partner living in a residential care home,
nursing home, Abbeyfield home or an independent hospital 41516

**Education**

**Introduction**

 Contribution-based Employment and Support Allowance 41551

 Income-related Employment and Support Allowance 41552

Income 41553

**Definitions**

Education 41556

Meaning of course of study

Meaning of course 41568

 Modular courses 41570

Meaning of sandwich course 41583

Work-related activity and education 41584

Meaning of full-time

 General 41591

 Evidence from educational establishment 41598

 Other evidence 41601

 Number of hours involved 41611

Meaning of educational establishment 41624

Meaning of last day of the course 41631

Meaning of abandons 41633

Meaning of dismissed 41646

Temporary absences 41647

Re-enrolment 41650

**Claimant treated as receiving education** 41661

Meaning of qualifying young person 41662

 Education and training condition 41663

 16 year olds (15 year olds in Scotland) 41665

 Extension period for 16 and 17 year olds 41666

 Interruptions 41669

Reasonable cause 41672

 School holidays 41673

Education received abroad 41676

Young person held in custody 41677

Cases of doubt 41678

Cases of doubt about recognised establishment or education 41679

Hours of attendance 41686

Evening courses 41687

Hours of study in education elsewhere 41688

School leavers

 Introduction 41701

 School leaving dates 41702

 Person under 16 41703

Terminal dates 41706

 Leaving school 41709

 When entitlement to income-related
 Employment and Support Allowance begins 41711

External examinations 41716

Period up to the terminal date 41717

 Person starts work or training 41718

Age 20 41719

**Claimant not treated as receiving education** 41731

**Duration of contribution-based Employment and Support Allowance**

Introduction 41800

**Further awards of contribution-based Employment and Support Allowance**

**Period of entitlement**

Contribution conditions satisfied 41810

Relevant maximum number of days 41811

Youth conditions satisfied 41815

**Which days are not included**

Claimant has, or is treated as having
limited capability for work-related activity 41820

Waiting days 41822

Days of disqualification 41823

Which days are not included 41830

**Claimant also entitled to income-related
Employment and Support Allowance** 41840

**Credits** 41841

**Repeat claim for contribution-based
Employment and Support Allowance**

Introduction 41845

Claim based on later tax year 41847

Employment and Support Allowance in youth 41850

Changes in claimant’s health condition - contribution-based
Employment and Support Allowance 41855

Health condition deteriorates 41856

Application made during current award 41860

Application made after award has terminated 41862

Deterioration identified on routine work capability assessment 41865

Date award begins 41870

Health condition improves 41875

**Appeal against time limit decision** 41900

**Appendix 1** - Savings provisions - disabled workers and people living in a residential care home, Abbeyfield home or an independent hospital

**Appendix 2** - Lower earnings limit

**Appendix 3** - Recognised customary or other holiday

**Appendix 4** - Common courses of study

**Appendix 5** - National Minimum Wage rates

Chapter 41 - Employment and Support Allowance - conditions of entitlement

Statutes commonly referred to in Chapter 41

|  |  |
| --- | --- |
| **Full Title** | **Abbreviation** |
| Education (Scotland) Act 1980 | Education (Scotland) Act 80 |
| Employment and Training Act (Northern Ireland)1950 | E&T Act (NI) 50 |
| Further and Higher Education (Scotland) Act 1992 | F & HE (Scot) Act 92 |
| Jobseekers (Northern Ireland) Order 1995  | JS (NI) Order 95 |
| Pensions (Northern Ireland) Order 1995 | Pensions (NI) Order 95 |
| Social Security (Northern Ireland) Order 1998 | SS (NI) Order 98  |
| Social Security Administration (Northern Ireland) Act 1992 | SS A (NI) Act 92  |
| Social Security Contributions and Benefits (Northern Ireland) Act 1992  | SS C&B (NI) Act 92 |
| Social Security Contributions (Transfer of Functions) Act 1999 | SS C (ToF) Act 99 |
| Social Security Contributions (Transfer of Functions etc) (Northern Ireland) Order 1999 | SS C (ToF) (NI) Order 1999 |
| Welfare Reform Act (Northern Ireland) 2007Welfare Reform (Northern Ireland) Order 2015 | WR Act (NI) 07WR (NI) Order 15 |

Statutory Rules commonly referred to in Chapter 41

| **Short description** | **Full title** | **Abbreviation**  |
| --- | --- | --- |
| Child Benefit Regulations | The Child Benefit (General) Regulations 2006 No. 223 | CHB (Gen) Regs |
| Claims and Payments Regulations | The Social Security (Claims and Payments) Regulations (Northern Ireland) 1987 No. 465 | SS (C&P) Regs (NI) |
| Decisions and Appeals Regulations | The Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999 No. 162 | SS & CS (D&A) Regs (NI) |
| Employment and Support Allowance Regulations | The Employment and Support Allowance Regulations (Northern Ireland) 2008 No. 280 | ESA Regs (NI) |
| Income Support Regulations | The Income Support (General) Regulations (Northern Ireland) 1987 No. 459 | IS (Gen) Regs (NI) |
| Student Support Regulations  | The Education (Student Support) Regulations 2008 No. 250 | Support Regs |
| Student Loan Scotland Regulations  | The Education (Student loan)(Scotland) Regulations 2007 | SL (Scot) Regs |
| Student Support Northern Ireland Regulations  | The Education (Student Support) Regulations (Northern Ireland) 2008 No. 250 | Support (NI) Regs  |
| Crediting and Treatment of Contributions and National Insurance Numbers Regulations | The Social Security (Crediting and Treatment of Contributions and National Insurance Numbers) Regulations (Northern Ireland) 2001 No. 102 | SS (Crediting etc) Regs (NI) |
| Social Security (Credits) Regulations | The Social Security (Credits) Regulations (Northern Ireland) 1975 No.113 | SS (Credits) Regs (NI) |
| Social Security and Child Support (Decisions and Appeals) Regulations | The Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999 No.162 | SS & CS (D&A) Regs (NI) |
|  |  |  |

**Chapter 41 - Employment and Support Allowance - conditions of entitlement**

Entitlement to Employment and Support Allowance

Introduction

41001 Employment and Support Allowance was introduced for new claimants on 27.10.081. It replaces

**1.** Incapacity Benefit **and**

**2.** Severe Disablement Allowance **and**

**3.** Income Support on the grounds of disability2 (see DMG 45205).

1 WR Act (NI) 07, Part 1; WR (2007 Act)(Commencement No.5) Order (NI) 2008, art 2(2);
2 ESA (Trans Provs) Regs (NI), reg 1(3)

41002 However, people entitled to

**1.** Incapacity Benefit **or**

**2.** Severe Disablement Allowance **or**

**3.** Income Support on the grounds of disability

 when Employment and Support Allowance was introduced on 27.10.08 can continue to receive those benefits until a decision is made on whether their award qualifies for conversion to Employment and Support Allowance at a later date. There are also rules allowing claims for Income Support or Incapacity Benefit to be made on or after 31.1.11 in limited circumstances (see DMG Chapter 45 for detailed guidance).

Scope of this Chapter

41003 This Chapter contains guidance on

**1.** the conditions of entitlement for Employment and Support Allowance including the maximum period of entitlement for contribution-based Employment and Support Allowance

**2.** waiting days

**3.** effect of work - claimant

**4.** effect of work - partner

**5.** education.

 Where the rules differ between contribution-based Employment and Support Allowance and income related Employment and Support Allowance this is stated in the guidance.

 41004 - 41010

Conditions of entitlement

General

41011 Claimants are entitled to Employment and Support Allowance if they

**1.** satisfy the basic conditions1 (see DMG 41012) **and**

**2.** satisfy the additional conditions for

**2.1** contribution-based Employment and Support Allowance2 (see DMG 41020 et seq) **or**

**2.2** income**-**related Employment and Support Allowance3 (see DMG 41091) **and**

**3.** make a claim4 (see DMG Chapter 2) **and**

**4.** satisfy the National Insurance number provisions5 (see DMG Chapter 2).

 **Note 1 :** When people claim income-related Employment and Support Allowance for a partner, their partner will also have to satisfy **4.**.

 **Note 2 :** See DMG 41800 et seq for guidance on where entitlement to contribution-based Employment and Support Allowance is limited to the maximum number of days.

1 WR Act (NI) 07, sec 1(2) & (3); 2 sec 1(2)(a) & Sch 1, Part 1; 3 sec 1(2)(b) & Sch 1, Part 2;
4 SS A (NI) Act 92, sec 1(1) & (4); 5 sec 1(1A)

Basic conditions

41012 Claimants are entitled to Employment and Support Allowance1 if they

**1.** have limited capability for work (see DMG Chapter 42) **and**

**2.** are aged 16 or over **and**

**3.** have not reached pensionable age (see DMG 41014) **and**

**4.** are in Northern Ireland (except for certain temporary absences abroad) (see DMG Chapter 07 Part 2) **and**

**5.** are not entitled to Income Support **and**

**6.** are not

**6.1** entitled to Jobseeker’s Allowance **or**

**6.2** a member of a couple entitled to joint-claim Jobseeker’s Allowance excluding a couple as in DMG 20023 et seq2.

 **Note 1 :** See DMG 41800 et seq for guidance on where entitlement to contribution-based Employment and Support Allowance is limited to the maximum number of days.

 **Note 2:** See DMG 41015 et seq for guidance on exceptions to the requirement not to have reached pensionable age for mixed-age couples.

1 WR Act (NI) 07, sec 1(3); 2 sec 1(6); JS (NI) Order 95, art 3(2B)

41013 A claimant is not entitled to Employment and Support Allowance if they are entitled to Statutory Sick Pay1. See DMG Chapter 44 for further guidance.

1 WR Act (NI) 07, sec 20(1)

Pensionable age

41014 See DMG Chapter 75 for guidance on the meaning of pensionable age1.

1 WR Act (NI) 07, sec 1(6); Pensions (NI) Order 95, Sch 2, Part 1, para 1

Mixed-age couples

41015 A mixed-age couple is a couple where one member of a couple has reached the qualifying age for State Pension Credit and the other member has not1. The qualifying age for State Pension Credit is2

**1.** pensionable age for a woman **or**

**2.** for a man, the age which would be pensionable age for a woman born on the same date as the man.

 **Note:** Since 6.12.18, pensionable age for a man or a woman is the same. See DMG Chapters 74 (State Pension) and 75 (Retirement Pension) for further guidance on pensionable age.

1 WR (NI) Order 15 (Commencement No 13 etc) Order 19; 2 Pensions Act (NI), sec 2(1)(a)

41016 Mixed-age couples are generally excluded from entitlement to State Pension Credit1 and may be entitled to Universal Credit instead. See DMG Chapter 77 for detailed guidance on the conditions of entitlement to State Pension Credit. However, these claimants may be restricted from claiming Universal Credit2 - see ADM Chapter M5 for further details. The conditions of entitlement to Employment and Support Allowance are amended to allow them to claim Employment and Support Allowance instead.

1 UC (TP) Regs (NI) 16, reg 2A & 2B; 2 WR (NI) Order 15 (Commencement No 13 etc) Order 19, art 8

41017 Where a mixed-age couple is

**1.** excluded from entitlement to State Pension Credit **and**

**2.** restricted from claiming Universal Credit

 the member of the mixed-age couple who has attained the qualifying age for State Pension Credit is treated as satisfying the age-related condition of entitlement in DMG 41012 **3.** for the purposes of an award of income-related Employment and Support Allowance to that member of the couple1.

1 WR (NI) Order 15 (Commencement No 13 etc) Order 19, art 8(2)

 **Example**

 Flo has limited capability for work related activity and is entitled to income-related Employment and Support Allowance and Housing Benefit for herself and her partner George. Her Employment and Support Allowance award includes the higher rate Severe Disability Premium. Flo reaches pensionable age and entitlement to income-related Employment and Support Allowance and Housing Benefit would normally terminate as she does not satisfy the age-related conditions of entitlement. As George is under pensionable age, the couple cannot be entitled to State Pension Credit. Flo and George are also prevented from claiming Universal Credit due to the Severe Disability Premium entitlement. George does not have limited capability for work so cannot claim income-related Employment and Support Allowance instead of Flo. Flo is treated as satisfying the age-related conditions of entitlement, and as not having reached the qualifying age for State Pension Credit so remains entitled to income-related Employment and Support Allowance and Housing Benefit.

41018 Where an award is made as in DMG 41017, the claimant is treated as satisfying the age-related condition of entitlement until the award of income-related Employment and Support Allowance ends. This applies even if the restrictions on claiming Universal Credit referred to in DMG 41016 are removed during the period of the award1.

1 WR (NI) Order 15 (Commencement No 13 etc) Order 19, art 8(3)

41019 Once the younger member of the couple reaches the qualifying age for State Pension Credit, they cease to be a mixed-age couple. The award of benefit made as in DMG 41017 ends and the couple are eligible to claim State Pension Credit and pension age Housing Benefit.

Additional conditions for contribution-based Employment and Support Allowance

Introduction

41020 In addition to the basic conditions (see DMG 41012), to be entitled to contribution-based Employment and Support Allowance1 a claimant must satisfy the

**1.** contribution conditions (see DMG 41022 et seq) **or**

**2.** conditions relating to youth (see DMG 41046 et seq).

**Note :** See Chapter 44 for guidance on the effect on entitlement to contribution-based Employment and Support Allowance where the claimant is entitled to statutory payments such as Statutory Sick Pay and Statutory Maternity Pay.

1 WR Act (NI) 07, sec 1(2)(a) & Sch 1, Part 1

41021 From 28.11.16 entitlement to contribution-based Employment and Support Allowance for claimants who are not in the support group is limited to a period of no more than 365 days1. This includes awards of contribution-based Employment and Support Allowance made under

 **1.** the youth conditions **and**

 **2.** the Incapacity Benefit reassessment rules2.

 See DMG 41800 et seq for guidance on where this applies to contribution-based Employment and Support Allowance and contribution-based Employment and Support Allowance relating to youth awards, and DMG Chapter 45 for guidance on awards of contribution-based Employment and Support Allowance made under the Incapacity Benefit reassessment rules.

1 WR Act (NI) 07, sec 1A; 2 Sch 4, para 7(2)(f); WR (NI) Order 15, art 57(1)

Contribution conditions

What the decision maker decides [See DMG Memo Vol 1/108, 4/136, 8/79 & 13/67]

41022 **[See DMG Memo Vol 3/95, 4/137, 8/82, 10/71 & 12/22]** There are 2 contribution conditions1. The decision maker decides whether the claimant is entitled to contribution-based Employment and Support Allowance because the contribution conditions are satisfied including

**1.** the earnings factor derived from them

**2.** which are the relevant income tax years

**3.** the years in which the contributions must have been paid or credited

**4.** the commencement of a period of limited capability for work

**5.** the start of the relevant benefit year.

1 WR Act (NI) 07, sec 1(2)(a) & Sch 1, Part 1

Reference to Her Majesty’s Revenue and Customs

41023 Entitlement to contribution-based Employment and Support Allowance depends on the contribution conditions being satisfied. In practice the National Insurance contribution record is usually obtained and any decision is based on the assumption that the record is factually correct. However where there is a dispute about the record, the matter must be referred by the decision maker to Her Majesty’s Revenue and Customs for a formal decision1.

 **Note 1:** See DMG Chapters 3, 4 and 6 for guidance on how decisions and appeals are handled after a reference to Her Majesty’s Revenue and Customs.

 **Note 2:** See DMG Chapter 1 where the dispute is about whether credits should be awarded.

1 SS & CS (D&A) Regs (NI), reg 11A & 38A

Meaning of terms

41024 When deciding whether the contribution conditions are satisfied, the decision maker should note that

**1.** “benefit year” means a period beginning with the first Sunday in January in any calendar year and ending with the Saturday immediately before the first Sunday in January in the following year1

**2.** “Class 1 National Insurance contributions” and “Class 2 National Insurance contributions” are the National Insurance contributions paid by employed earners and self-employed earners respectively2

**3.** “lower earnings limit” and “upper earnings limit” are lowest and highest amounts of earnings on which Class 1 National Insurance contributions are paid in any tax year3 (see Appendix 2 to this Chapter)

**4.** “relevant benefit year” means the benefit year which includes the beginning of the period of limited capability for work which includes the relevant benefit week4

**5.** “tax year” is the period of 12 months beginning with 6 April each year5

**6.** “relevant benefit week” means the week in relation to which entitlement to contribution-based Employment and Support Allowance is being considered6

**7.** “period of limited capability for work” means a period throughout which a person has, or is treated as having, limited capability for work, **excluding** periods which are outside the time for claiming (see DMG Chapter 2 for guidance on the time for claiming)7.

 **Note 1 :** See DMG 41026 - 41028 for guidance on when the meaning of “relevant benefit year” in **4.** is modified.

 **Note 2 :** See DMG 41048 **5.** for guidance on when the meaning of “period of limited capability for work” is modified.

1 WR Act (NI)07, Sch 1, para 3(1)(a); SS C&B (NI) Act 92, sec 21(6); 2 WR Act (NI) 07, Sch 1, para 3(1)(b);
SS C&B (NI) Act 92, sec 1; 3 WR Act (NI) 07, Sch 1, para 3(1)(e); SS C&B (NI) Act 92, sec 22 & 23;
4 WR (NI) Act 07, Sch 1, para 3(1)(f); 5 Sch 1, para 3(1)(g); 6 Sch 1, para 5; 7 ESA Regs (NI), reg 2(1);
SS (C&P) Regs (NI), reg 19(1) & Sch 4

41025 The definition of period of limited capability for work in DMG 41024 **7.** ensures that, when considering whether the contribution conditions in DMG 41029 et seq are satisfied, the relevant benefit year is decided on the basis of the date from which Employment and Support Allowance is claimed, provided it falls within the 3 months time limit for claiming Employment and Support Allowance.

Modification of the meaning of relevant benefit year

41026 Where DMG 41027 applies the meaning of “relevant benefit year” at DMG 41024 **4.** is modified so that it is any benefit year which includes all or part of the period of limited capability for work which includes the relevant benefit week1.

1 ESA Regs (NI), reg 13(1)

41027 The modification in DMG 41026 applies to a claimant who1

**1.** does not satisfy

 **1.1** the first or second contribution conditions **or**

 **1.2** both conditions **and**

**2.** would satisfy the conditions in **1.** if that modification applied.

1 ESA Regs (NI), reg 13(2)

41028 This enables a claimant to become entitled to contribution-based Employment and Support Allowance on a further claim in a subsequent benefit year where

 **1.** they now satisfy the contribution conditions **and**

 **2.** an earlier Employment and Support Allowance claim was disallowed because they did not satisfy one or both of the contribution conditions when the period of limited capability for work began.

The first contribution condition

41029 The first contribution condition is satisfied1 if

**1.** the claimant has actually paid Class 1 or Class 2 National Insurance contributions in respect of any 1 of the last 2 complete tax years before the beginning of the relevant benefit year **and**

**2.** those contributions have been paid before the relevant benefit week **and**

**3.** the claimant’s earnings for that year as determined in accordance with DMG 41030 must be at least 26 times the lower earnings limit for that year.

1 WR Act (NI) 07, Sch 1, para 1(1)

41030 For the purposes of DMG 41029 **3.** the earnings are the aggregate of the claimant’s

**1.** relevant earnings for that year on which class 1 National Insurance contributions have been paid or treated as paid **and**

**2.** earnings factors derived from class 2 National Insurance contributions1.

1 WR Act (NI) 07, Sch 1, Part 1, para 1(2)

41031 In DMG 41030 **1.**, a claimant’s relevant earnings are the amount of earnings at the lower earnings limit for the year in which the first contribution condition is satisfied. Earnings which exceed the lower earnings limit are disregarded1.

1 WR Act (NI) 07, Sch 1, para 1(3); ESA Regs (NI), reg 7A

Relaxation of the first contribution condition

41032 The first contribution condition is taken to be satisfied1 if

**1.** the claimant has paid Class 1 or 2 contributions for any one tax year before the relevant benefit week2 **and**

**2.** the claimant has

**2.1** earnings at the lower earnings limit in that tax year on which Class 1 contributions have been paid or treated as paid which in total, and disregarding any earnings which exceed the lower earnings limit for that year, are not less than the lower earnings limit multiplied by 263 **or**

**2.2** earnings factors in that tax year derived from Class 2 contributions multiplied by 264 **and**

**3.** the claimant

**3.1** was entitled to Carer’s Allowance in the last complete tax year immediately before the relevant benefit year in which the first day of limited capability for work occurred5 **or**

**3.2** had been engaged in qualifying remunerative work6 for a period of more than 2 years immediately before the first day of limited capability for work and was entitled to the disability element, or the severe disability element, of working tax credit throughout that period7 **or**

**3.3** is entitled to be credited with earnings or contributions following release from prison where a conviction is quashed8, or would be if an application was made, in respect of any week in any tax year preceding the relevant benefit year9 **or**

**3.4** is entitled to be credited with earnings equal to the lower earnings limit on the grounds that they

 **3.4.a** are a spouse or civil partner of a member of Her Majesty’s Forces **and**

 **3.4.b** accompanied that member of Her Majesty’s Forces on an assignment outside the United Kingdom or treated as such by the Secretary of State

in respect of any week during the last complete tax year before the relevant benefit year10.

1 WR Act (NI) 07, Sch 1, para 1(4)(b); ESA Regs (NI), reg 8; 2 reg 8(1)(a); 3 reg 8(1)(b)(i);
4 reg 8(1)(b)(ii); 5 reg 8(2)(a); 6 reg 2(1), Tax Credit Act 2002, Part 1; 7 ESA Regs (NI), reg 8(2)(b);
8 SS (Credits) Regs (NI) 1975, reg 9D; 9 ESA Regs(NI), reg 8(2)(c); 10 reg 8(2)(ca); SS (Credits) Regs (NI), reg 9E;

The second contribution condition

41033 The second contribution condition is satisfied1 if

**1.** in the last 2 complete relevant income tax years before the beginning of the relevant benefit year the claimant has

**1.1** paid or been credited with Class 1 or Class 2 National Insurance contributions **or**

* 1. been credited with earnings **and**

**2.** the earnings factor in each of those years is not less than 50 times the lower earnings limit for those last 2 complete relevant income tax years.

1 WR Act (NI) 07, Sch 1, para 2(1)

41034 For the purposes of DMG 41033 **2.** the earnings factor is the aggregate of the claimant’s earnings factors derived1 from

**1.** the amount of earnings which did not exceed the upper earnings limit for the last 2 complete relevant income tax years in DMG 41033 **1.** on which Class 1 National Insurance contributions have been paid or treated as paid **and**

**2.** Class 2 National Insurance contributions.

 **Note :** See DMG 41037 for guidance on when earnings exceed the upper earnings limit.

1 WR Act (NI) 07, Sch 1, para 2(2)

 41035

The first and second contribution condition

41036 Where

**1.** Class 1 National Insurance contributions have been paid or treated as paid in any tax year from 1987/88 **and**

**2.** the amount paid, plus any Class 2 or Class 3 National Insurance contributions paid or credited, is not enough to make the year a qualifying year by

 **2.1** £25.00 or less for the first contribution condition **or**

 **2.2** £50.00 or less for the second contribution condition

 the earnings factor is increased by the amount required to make the year a qualifying year1.

1 Social Security (Earnings Factor) Regulations (NI) 1979, Sch 1, para 4

Earnings exceeding the upper earnings limit

41037 For the purposes of DMG 41030 **1.** and 41034 **1.** where Class 1 National Insurance contributions have been paid or treated as paid, the earnings factor is calculated on earnings that did not exceed the upper earnings limit1.

1 WR Act (NI) 07, Sch 1, para 1(3) & 2(3)

Late payment of contributions

41038 The decision maker determines whether the contribution conditions for contribution-based Employment and Support Allowance are satisfied. Contributions paid after the due date are generally treated as paid on the date of payment. However, there are circumstances in which contributions may be accepted as having been paid on an earlier date1. The decision maker will need to liaise with Her Majesty’s Revenue and Custom.

1 SS (Conts) Regs 2001, reg 60 - 65; SS (Crediting etc) Regs (NI) 2001, reg 4

41039 If there is an existing decision, the decision maker may need to consider revising or superseding it. A change of circumstances will occur on the date it is accepted that late contributions are treated as having been paid1. See DMG Chapter 3 for full

guidance on revision and DMG Chapter 4 for full guidance on supersession.

1 SS (Crediting etc) Regs (NI) 2001, reg 4 - 8

Class 2 National Insurance contributions

 **Contributions paid by due date**

41040 The deadline for the payment of Class 2 National Insurance contributions from the 2015/2016 tax year onwards is 31 January of the following calendar year; for example, Class 2 National Insurance contributions due in the 2015/2016 tax year are due to be paid by 31.1.2017. This date falls after the start of the benefit year for Employment and Support Allowance, which means there is a possibility of a claim for these benefits being made in circumstances where entitlement relies on as yet unpaid contributions, and consequently being disallowed.

41041 A decision to disallow claims to Employment and Support Allowance may be revised1 at any time where

 **1.** on or after the date of the decision a contribution that is paid by the due date is treated as paid2 before the relevant benefit week **and**

 **2.** as a result, the person now satisfies the contribution conditions.

1 SS & CS (D&A) Regs (NI), reg 3(8i);
2 SS (Crediting & Treatment of Contributions & National Insurance Numbers) Regs (NI) 2001, reg 7

 **Example**

 A claim to Employment and Support Allowance is made on 21.1.18 in respect of a period of limited capability for work starting on 14.1.18. Entitlement relies on satisfaction of the contribution conditions for the tax years 2015/2016 and 2016/2017. The claimant started self-employment in April 2015. The claimant has previously paid his Class 2 National Insurance contributions for 2015/16, but at the point of claim, has not yet filed his Self Assessment return for 2016/2017. His Class 2 liability for this year has not yet been established and no Class 2 National Insurance contributions have been paid. As a result, whilst the first contribution condition is satisfied, the second contribution condition is not, and his claim to Employment and Support Allowance is disallowed. The Department is subsequently notified that the claimant has paid his Class 2 National Insurance contributions for 2016/2017 on 31.1.18. These are treated as having been paid before 14.1.18. Both contribution conditions are now satisfied and the original decision to disallow Employment and Support Allowance is revised in the claimant’s favour.

 **Contributions refunded**

41042 A decision to award Employment and Support Allowance may be revised1 at any time where contributions are repaid or returned to the contributor where this means the person no longer satisfies the contribution conditions of entitlement to the benefit.

1 SS & CS (D&A) Regs (NI), reg 3(8F) & (8G)

 **Example**

 Employment and Support Allowance is awarded in January 2018 to a claimant who is self-employed. The award was based on Class 2 National Insurance contributions paid in respect of 2015/16 and 2016/17 tax years. Class 2 National Insurance contributions for 2016/17 were paid on the basis of profits declared on a Self Assessment return filed on 31.1.18. In March 2018 Her Majesty’s Revenue and Customs adjusts the declared profits for 2016/17 to a figure below which no liability for Class 2 National Insurance contributions actually arose. Her Majesty’s Revenue and Customs informs the claimant of this and they pursue and accept a refund of Class 2 National Insurance contributions. These are removed from the claimant’s National Insurance record. As a consequence of this the claimant does not satisfy the contribution conditions for Employment and Support Allowance. The decision to award Employment and Support Allowance is revised so as to disallow the award.

 41043 – 41044

Condition relating to youth [See DMG Memo Vol 1/108, 4/136, 8/79 & 13/67]

 **Introduction**

41045 From 17.2.16 no further claims can be made for contribution-based Employment and Support Allowance under the youth conditions1. The guidance at DMG 41046 - 41083 is retained for the purposes of

 **1.** claims made before 17.2.16 which were not decided by that date **and**

 **2.** existing awards.

 **Note :** See DMG 41800 et seq for guidance on where contribution-based Employment and Support Allowance under the youth conditions is limited to a maximum number of days.

1 WR Act (NI) 07, sec 1(3A)

41046 **[See DMG Memo Vol 8/72]** The conditions for receiving contribution-based Employment and Support Allowance relating to youth, including the age conditions, are set out in DMG 41047. In some circumstances the upper age condition can be extended (see DMG 41050). In some circumstances a claimant who does not satisfy the upper age condition can be entitled to contribution-based Employment and Support Allowance because of previous entitlement to contribution-based Employment and Support Allowance relating to youth (see DMG 41081).

41047 The conditions of entitlement1 for contribution-based Employment and Support Allowance relating to youth are that

**1.** the claimant is aged under 20 (or under 25 in the circumstances described in DMG 41050) when the relevant period of limited capability for work began (see DMG 41048)

**2.** the claimant is not receiving full time education (see DMG 41058 et seq)

**3.** the claimant satisfies the conditions of residence and presence in Northern Ireland and is not a person subject to immigration control2 (see DMG Chapter 07)

**4.** there has been a day in the relevant period of limited capability for work which was

**4.1** a day on which the claimant was aged at least 16 **and**

**4.2** preceded by a period of 196 consecutive days throughout which the claimant had limited capability for work.

1 WR Act (NI) 07, Sch 1, para 4(1); 2 ESA Regs (NI), reg 11(1)

41048 When considering whether a claimant satisfies the conditions of entitlement at DMG 41047, the decision maker should note that

**1.** the relevant period of limited capability for work means the period of limited capability for work which includes the relevant benefit week1

**2.** the effect of DMG 41047 **1.** is that a claimant who is entitled to contribution-based Employment and Support Allowance in a period of limited capability for work does not lose entitlement on becoming 20 (or where relevant 25) in the same period of limited capability for work

**3.** although Statutory Sick Pay days are not part of a period of limited capability for work (see DMG Chapter 42) a claimant may satisfy the relevant age conditions on a day in a period of entitlement to Statutory Sick Pay immediately preceding the relevant period of limited capability for work which means that any days of entitlement to Statutory Sick Pay immediately preceding the relevant period of limited capability for work are treated as days of limited capability for work for the purposes of contribution-based Employment and Support Allowance for those satisfying the condition relating to youth2

 **4.** for the purposes of DMG 41047 **4.**

 **4.1** consecutive days may be made up of days of limited capability for work which form part of a period of limited capability for work and days of limited capability for work which do not **and**

 **4.2** linking provisions cannot be used to meet this condition when days of limited capability for work are not consecutive3

 **4.3** periods of incapacity for work **cannot** be treated as forming part of a period of limited capability for work.

 **5.** the definition of period of limited capability for work at DMG 41024 **7.** does not apply. For the purposes of DMG 41047, a period of limited capability for work is a period throughout which the claimant has, or is treated as having, limited capability for work4.

 **Note :** Where **4.3** applies decision makers should consider whether a claim for contribution-based Employment and Support Allowance should be treated as a claim to Incapacity Benefit (see DMG Chapter 45). Also, the effect of **4.3** is that a claimant receiving Incapacity Benefit credits will **not** satisfy DMG 41047 **4.2** through receipt of those credits.

1 WR Act (NI) 07, Sch 1, Part 1, para 4(2) & 5;
2 ESA Regs (NI), reg 33(1); 3 reg 9(6); 4 reg 2

41049 An example of where DMG 41048 **4.1** may apply is where days for which a claimant is not entitled to contribution-based Employment and Support Allowance because of a late claim do not form part of a period of limited capability for work (see DMG Chapter 42) but may count towards the 196 day condition if there is sufficient evidence of limited capability for work.

Extension of upper age limit to 25

41050 The upper age condition can be extended to 251 if a claimant

**1.** registered on a course of

**1.1** full-time advanced or secondary education (see DMG 41056) **or**

**1.2** training (see DMG 41057)

at least 3 months before the claimant’s 20th birthday2 **and**

**2.** attended one or more such courses in the academic term after registration3.

1 ESA Regs (NI), reg 9(1); 2 reg 9(2)(a); 3 reg 9(2)(b)

41051 For the purposes of DMG 41050 **2.** the attendance must have

**1.** begun on or before a day at least 3 months before the claimant’s 20th birthday1 **and**

**2.** ended no earlier than the beginning of the last 2 complete tax years before the relevant benefit year which would have applied if the claimant was entitled to contribution-based Employment and Support Allowance because the first and second contribution conditions were satisfied2.

1 ESA Regs (NI), reg 9(3)(a); 2 reg 9(3)(b)

41052 When considering DMG 41050 decision makers should note that a claimant is attending a course on any day on which the course is interrupted by an illness or domestic emergency1.

1 ESA Regs (NI), reg 9(4)

 41053 - 41055

Full-time advanced or secondary education

41056 When considering whether DMG 41050 **1.1** is satisfied, the decision maker should note that1

 **1.** “advanced education” means education for the purposes of

 **1.1** a course in preparation for

 **1.1.a** a degree **or**

 **1.1.b** a diploma of higher education **or**

 **1.1.c** a higher national diploma **or**

 **1.1.d** a higher national diploma of the BTEC or the Scottish Qualifications Authority **or**

 **1.1.e** a teaching qualification **or**

 **1.2** any other course which is of a standard above

 **1.2.a** ordinary national diploma **or**

 **1.2.b** a diploma of the BTEC **or**

 **1.2.c** a higher or advanced higher national certificate of the Scottish Qualifications Authority **or**

 **1.2.d** a general certificate of education (advanced level)

 **2.** “full-time” includes part-time where a claimant’s disability prevents attendance at a full-time course

**3.** “secondary education” means a course of education below a course of advanced education by attendance at

**3.1** an establishment recognised by the Department as being, or comparable to, a university, college or school **or**

**3.2** another establishment where the Department is satisfied that education is equivalent to that given in an establishment at **3.1**.

 **Note 1:** Education for this purpose is **not** the same as its meaning at DMG 41551 et seq.

 **Note 2:** There is no specific requirement as to hours. If there is a doubt as to whether or not a course is full time evidence should be obtained from the education authorities.

1 ESA Regs (NI), reg 9(5)

Training

41057 When considering whether DMG 41050 **1.2** is satisfied the decision maker should note that “training” means1

**1.** training in pursuance of arrangements made under prescribed legislation2 **or**

**2.** any training received on a course which a person attends for 16 hours or more a week for the primary purpose of being taught occupational or vocational skills.

1 ESA Regs (NI), reg 2(1); 2 E&T Act (NI) 50, sec 1 or 3

Full-time education condition

41058 For the purpose of DMG 41047 **2.** a claimant is treated as receiving full-time education for any period during which the claimant

**1.** is aged 16 or over but under 19 **and**

**2.** attends a course of education for 21 hours or more a week1.

1 ESA Regs (NI), reg 12(1)

41059 In determining the duration of a period of full time education any temporary interruption of that education may be disregarded1.

1 ESA Regs (NI), reg 12(3)

41060 A claimant who is 19 years of age or over is not treated as receiving full-time education1. This applies whether or not the claimant is undergoing full-time education. Decision makers should note that a claimant is over 19 from and including the 19th birthday.

1 ESA Regs (NI), reg 12(4)

Calculation of hours of attendance

41061 In calculating the number of hours of attendance at a course of education, the decision maker should take into account time spent in following the particular course, not the time spent at a particular place of education.

41062 The decision maker should **include** time spent on

**1.** classroom instruction suitable for people of the same age with no disabilities (see DMG 41066 et seq)

**2.** supervised study

**3.** examinations

**4.** practical work

**5.** taking part in any exercise, experiment or project which is part of the course.

41063 The decision maker should **exclude** time spent on

**1.** any instruction or tuition which is not suitable for claimants of the same age who do not have a disability1 (see DMG 41066 et seq)

**2.** unsupervised private study whether

**2.1** at home **or**

**2.2** on the premises of the educational establishment

**3.** morning assemblies

**4.** normal meal and relaxation breaks.

1 ESA Regs (NI), reg 12(2)

 41064 - 41065

“Instruction or tuition which is not suitable”

41066 The words “instruction” or “tuition” cover the content as well as the method. Instruction or tuition which is not suitable for ordinary students includes

**1.** the teaching of special skills required by people with disabilities **and**

**2.** the methods of teaching, where these would not be suitable for people of the same age who do not have a disability1.

1 R(S) 2/87

41067 A course of education includes

**1.** attendance at an ordinary school or college including grammar, comprehensive and 6th form college

**2.** attendance at a special school or training centre designed specifically for people with disabilities

**3.** home tuition arranged by the education and library board.

41068 People attending special schools may be in full time education. Similarly students attending ordinary schools may not be in full time education.

41069 The decision maker should consider the circumstances of each claimant to decide whether

**1.** the course content and method of teaching for each subject is suitable for people without disabilities **and**

**2.** the course amounts to 21 or more hours a week.

41070 For the purposes of DMG 41069 **1.** it may be clear that the entire course content is either

**1.** suitable **or**

**2.** not suitable

 for people with no disabilities of the same age as the claimant. Many claimants may receive a mixture of **1.** and **2.** The decision maker should consider each lesson to determine whether the content is or is not suitable for people without disabilities.

41071 Examples of what the decision maker should exclude when calculating the time spent on the course include

**1.** activities connected with the student's disability (life skills or independence training)

**2.** curriculum levels intended for a younger person.

41072 Where

**1.** people are following the normal subject curriculum for people of that age with no disabilities **and**

**2.** the time spent is 21 or more hours

 there is no entitlement to contribution-based Employment and Support Allowance even though the number of subjects undertaken is limited by the disability.

41073 It will be clear in some cases that the method of teaching is not suitable for people of the same age without disabilities, for example

**1.** a profoundly deaf person using radio links or sign language **or**

**2.** a blind person using braille.

41074 In deciding whether the claimant is receiving full time education, the decision maker should exclude time spent on instruction

**1.** which is slower **or**

**2.** where the hours for each subject are far greater

 than would be necessary for people without disabilities.

 41075 - 41080

Over the upper age limit but previously entitled

41081 People who do not satisfy the upper age condition (see DMG 41047 and 41050) may still be entitled to contribution-based Employment and Support Allowance if

**1.** they previously ceased to be entitled to contribution-based Employment and Support Allowance as a claimant satisfying the condition relating to youth1 **and**

**2.** their previous entitlement was not ended by a determination that they did not have limited capability for work2 (apart from a determination under **5.**) **and**

**3.** the linking rules do not apply3 **and**

**4.** they are aged4

**4.1** 20 or over **or**

**4.2** 25 or over if DMG 41050 et seq applies **and**

**5.** their previous entitlement ended with a view to taking up employment or training5 **and**

**6.** their earnings factor from employment or employments pursued between the termination of the previous entitlement and the beginning of the period of limited capability for work was less than 25 times the lower earnings limit in any of the last 3 complete tax years before the relevant benefit year6 **and**

**7.** they

**7.1** in the last 2 complete tax years before the relevant benefit year had

**7.1.a** paid **or**

**7.1.b** been credited with earnings

 equivalent to 50 times the lower earnings limit in each of those years and, in the last tax year, at least 1 credit was in respect of the disability element or severe disability element of Working Tax Credit **or**

**7.2** make a claim for Employment and Support Allowance within a period of 12 weeks after the day the employment in **6.** ended7.

 **Note 1:** “Training” has the same meaning as in DMG 41057.

 **Note 2:** See DMG 41111 et seq for guidance on linking rules.

1 ESA Regs (NI), reg 10(1)(a); 2 reg 10(1)(b); 3 reg 10(1)(c); 4 reg 10(1)(d);
5 reg 10(2)(a); 6 reg 10(2)(b); 7 reg 10(2)(c)

Contribution-based Employment and Support Allowance for claimant satisfying the condition relating to youth and overlapping benefits

41082 For the purpose of overlapping benefits contribution-based Employment and Support Allowance is a contributory benefit. This applies even though contribution-based Employment and Support Allowance for those satisfying the condition relating to youth is not based on contribution conditions. For the purpose of overlapping benefits contributory benefits are those benefits prescribed in legislation1.

1 SS (OB) Regs (NI), reg 2(1); SS C&B (NI) Act 92, Part II

Contribution-based Employment and Support Allowance for claimant satisfying the condition relating to youth and Child Benefit

41083 A claimant is not entitled to Child Benefit for any week in which that claimant is entitled to contribution-based Employment and Support Allowance under the provisions for people incapacitated in youth1.

 **Note :** See DMG Chapter 9 if an offset is appropriate.

1 CHB (Gen) Regs, reg 8(2)

Members of Her Majesty’s Forces

41084 Members of Her Majesty’s Forces1 are not entitled to contribution-based Employment and Support Allowance unless they are2 members of

**1.** any prescribed territorial or reserve force3 not undergoing training or instruction continuously for longer than 72 hours **or**

**2.** the Royal Irish Regiment who are **not** also serving as members of any regular naval, military or air forces

**2.1** on the full time permanent staff **or**

**2.2** serving or undergoing training or instruction continuously for longer than 72 hours.

 **Note :** See DMG 41106 et seq for the meaning of member of Her Majesty’s Forces.

1 ESA Regs (NI), reg 2(1); 2 SS (Conts) Regs, Sch 6;
3 Social Security (Benefit) (Members of Forces) Regs 1975, reg 2

 41085 - 41090

Additional conditions for income-related Employment and Support Allowance

41091 In addition to the basic conditions (see DMG 41012), to be entitled to income-related Employment and Support Allowance1 a claimant must

**1.** have no income, or an income which does not exceed the applicable amount **and**

**2.** not have capital, or a prescribed part of capital, which exceeds the prescribed amount **and**

**3.** not be entitled to State Pension Credit **and**

**4.** not have a partner who is entitled to

**4.1** income-relatedEmployment and Support Allowance **or**

**4.2** State Pension Credit **or**

**4.3** Income Support **or**

**4.4** income-based Jobseeker’s Allowance **and**

**5.** not be in remunerative work (see DMG 41271 et seq) **and**

**6.** not have a partner who is in remunerative work (see DMG 41301 et seq) **and**

**7.** not be receiving education (see DMG 41551 et seq).

**Note 1 :** See DMG Chapter 44 for guidance on the effect on entitlement to Employment and Support Allowance where the claimant is entitled to Statutory Sick Pay.

 **Note 2 :** See DMG Chapter 44 for guidance on the applicable amount, DMG Chapters 48, 49, 50 and 51 for guidance on income and DMG Chapter 52 for guidance on capital.

1 WR Act (NI) 07, sec 1(2)(b) & Sch 1, Part 2, para 6(1)

 41092 - 41100

Waiting days

No entitlement to Employment and Support Allowance

41101 A claimant is not entitled to Employment and Support Allowance for the first 7 days of a period of limited capability for work1. These 7 days are called waiting days.

1 WR Act (NI) 07, Sch 2, para 2; ESA Regs (NI), reg 144(1)

41102 However, claimants do not have to serve waiting days where DMG 41103 et seq applies or there is a linking period of limited capability for work (see DMG 41111).

 **Note :** See DMG Chapter 42 for guidance on people undergoing certain regular treatment and the effect on waiting days.

Claimants who do not have to serve waiting days

41103 Claimants do not have to serve waiting days1 if

**1.** their entitlement to Employment and Support Allowance begins within 12 weeks of the end of their entitlement to

**1.1** Income Support **or**

**1.2** State Pension Credit **or**

**1.3** Jobseeker’s Allowance **or**

**1.4** Carer’s Allowance **or**

**1.5** Statutory Sick Pay **or**

**1.6** Maternity Allowance **or**

**1.7** Incapacity Benefit **or**

**1.8** Severe Disablement Allowance **or**

**2.** they are terminally ill2 (see DMG 41105) and have made

**2.1** aclaim expressly for that reason **or**

**2.2** an application for supersession3 or revision4 which contains a statement that they are terminally ill **or**

**3.** they have been discharged from being a member of Her Majesty’s Forces (see DMG 41106 et seq) and 3 or more days immediately before that discharge were days of sickness from duty which were recorded by the Secretary of State for Defence5 **or**

**4.** they claim Employment and Support Allowance **and
[See DMG Memo Vol 4/126, 6/87 & 8/62]**

 **4.1** they are a member of a couple **and**

 **4.2** their partner is entitled to income-related Employment and Support Allowance and has served 7 waiting days on that award **and**

 **4.3** the decision maker considers that the claimant is entitled to income-related Employment and Support Allowance **and**

 **4.4** their partner’s award ends on the date the new claim is made or treated as made6 **or**

**5.** they claim Employment and Support Allowance **and**

**5.1** an award cannot be made because the claimant or their partner has an existing award of Employment and Support Allowance, Income Support or Jobseeker’s Allowance7 **and**

**5.2** the decision maker ends that award by supersession on the day immediately before the date the award on the new claim takes effect8

**6.** they are awarded contribution-based Employment and Support Allowance after

**6.1** entitlement has previously terminated because it exceeded the maximum number of days **and**

**6.2** their health condition has deteriorated9 (see DMG 41856).

1 ESA Regs (NI), reg 144(2)(a); SS & CS (D&A) Regs (NI), reg 14A(5); 2 ESA Regs (NI), reg 144(2)(b);
3 SS & CS (D&A) Regs (NI), reg 6; 4 reg 3; 5 ESA Regs (NI), reg 144(2)(c); 6 reg 144(2)(d)
7 SS & CS (D&A) Regs (NI), reg 14A(1); 8 reg 14A(2) & (3); 9 ESA Regs (NI), reg 144(2)(e)

 **Example 1**

 Dolores was entitled to Income Support until Sunday 26.10.08. She then claims and satisfies the main conditions to be entitled to Employment and Support Allowance from and including Monday 19.1.09. Dolores has to serve 3 waiting days and is not entitled to Employment and Support Allowance on Monday 19.1.09, Tuesday 20.1.09 and Wednesday 21.1.09. To be within 12 weeks of her entitlement to Income Support coming to an end, Dolores would have had to have claimed Employment and Support Allowance and satisfied the main entitlement conditions on Sunday 18.1.09.

 **Example 2**

 Fred is entitled to income-related Employment and Support Allowance for himself and his wife Jo. She is expecting their first child and her GP tells her that she has serious pregnancy complications and should bed rest. Jo claims Employment and Support Allowance and the decision maker awards her income-related Employment and Support Allowance after ending Fred’s entitlement from the date of her claim. Jo is treated as having limited capability for work-related activity and does not have to serve waiting days before her Employment and Support Allowance award begins.

41104 Decision makers should note that entitlement to Employment and Support Allowance can exist even though nothing is payable. An example of when this may happen is where people are entitled to contribution-based Employment and Support Allowance only but they have a pension payment that exceeds the allowable limit so no contribution-based Employment and Support Allowance is payable.

Meaning of terminally ill

41105 For the purposes of DMG 41103 **2.** people are terminally ill1 if

**1.** they are suffering from a progressive disease **and**

**2.** their death in consequence of that disease can reasonably be expected within 6 months.

1 ESA Regs (NI), reg 2(1)

Meaning of member of Her Majesty’s Forces

41106 A member of Her Majesty’s Forces1 is a person

**1.** over 16 years old **and**

**2.** who gives full-pay service (see DMG 41109) as a member of certain named establishments or organisations2 (see DMG 41107).

1 ESA Regs (NI), reg 2(1); 2 Sch 1, Part 1

41107 For the purposes of DMG 41106 **2.** a member of certain named establishments or organisations means1 any member of the

**1.** regular naval, military or air forces of the Crown

**2.** Royal Fleet Reserve

**3.** Royal Naval Reserve

**4.** Royal Marines Reserve

**5.** Army Reserve

**6.** Territorial Army

**7.** Royal Air Force Reserve

**8.** Royal Auxiliary Air Force

**9.** Royal Irish Regiment.

1 ESA Regs (NI), Sch 1, Part 1

41108 However, a person who is

**1.** recruited locally overseas in certain circumstances1 **or**

**2.** a deserter2 **or**

**3.** a person to whom DMG 41084 **1.** or **2.** applies3

 is not a member of Her Majesty’s Forces.

1 ESA Regs (NI), Sch 1, Part 2; 2 reg 2(1); 3 Social Security (Benefit) (Members of Forces) Regs 1975, reg 2

Meaning of full-pay service

41109 A member of the armed forces is giving full-pay service if normal salary continues to be paid from

**1.** a civilian employer **or**

**2.** one of the branches of the armed forces.

41110 A person on unpaid leave or less than normal salary is not giving full-pay service.

Linking period of limited capability for work

41111 Claimants do not have to serve waiting days if there is a linking period of limited capability for work. There is a linking period of limited capability for work when a period of limited capability for work is separated from another such period by not more than 12 weeks1.

 **Note :** A period of National Insurance credits only is not a period of limited capability for work. See also DMG 41841.

1 ESA Regs (NI), reg 145(1)

Linking for work or training beneficiaries

41112 **[See DMG Memo Vol 8/80]** Where a claimant is a work or training beneficiary any period of limited capability for work which is separated from another such period by not more than 104 weeks is to be treated as a continuation of the earlier period1. See DMG Chapter 42 for guidance on Welfare to Work Beneficiaries.

1 ESA Regs (NI), reg 145(2)

 41113

Linking through qualifying remunerative work

41114 **[See DMG Memo Vol 8/80]** A claimant who claims Employment and Support Allowance after ceasing to be in qualifying remunerative work1 is treated as having had limited capability for work while in qualifying remunerative work if

**1.** the period of limited capability for work began on the day immediately after the day on which the claimant ceased to be in qualifying remunerative work **and**

**2.** the claimant had been entitled to Employment and Support Allowance within the period of 104 weeks before the beginning of the period of limited capability for work in **1.** **and**

**3.** the tax credit conditions in DMG 41115 are satisfied2.

1 ESA Regs (NI), reg 2(1); 2 reg 145(3)

41115 For the purposes of DMG 41114 **3.** the tax credit conditions1 are

**1.** the claimant is entitled to the disability element of working tax credit or would have been entitled had there not been a relevant income2 **and**

**2.** either working tax credit or any element, except the family element of child tax credit is paid.

1 ESA Regs (NI), reg 145(4); 2 TC Act 2002, Part 1

Linking through training

41116 Where a person claims Employment and Support Allowance after ceasing to be engaged in training, that person will be treated as having limited capability for work for the period engaged in training if

**1.** the person was entitled to Employment and Support Allowance within the 8 weeks immediately before starting the training **and**

**2.** the person has limited capability for work on the day after finishing the training **and**

**3.** that day falls not later than the end of a period of 104 weeks beginning with the end of the last week of entitlement to Employment and Support Allowance1.

1 ESA Regs (NI), reg 145(5)

 41117 - 41120

Effect of work - claimant

Introduction

41121 This part gives guidance on entitlement to Employment and Support Allowance when a claimant works. Guidance on entitlement to income-related Employment and Support Allowance when a claimant’s partner works is at DMG 41301 et seq. What the decision maker has to consider depends on whether the claimant is entitled to

**1.** contribution-based Employment and Support Allowance **or**

**2.** income-related Employment and Support Allowance.

The general rule

41122 Unless DMG 41141 et seq applies, a claimant is treated as not entitled to Employment and Support Allowance in any week in which they work1 (the “general rule”).

1 ESA Regs (NI), reg 40(1)

Remunerative work exclusion

41123 In addition, a claimant who works is not entitled to income-related Employment and Support Allowance if the remunerative work exclusion applies1 (see DMG 41272 et seq). A claimant who is in remunerative work will usually be in work under the general rule, and therefore not entitled to income-related Employment and Support Allowance because of the general rule. Where the general rule applies, the decision maker need not consider the remunerative work exclusion.

1 WR Act (NI) 07, Sch 1, Part 2, para 6(1)(e)

 **Example**

 Moira is entitled to income-related Employment and Support Allowance. She starts work in a shop. She works 20 hours a week and earns more than £20. The decision maker decides that Moira’s work is not permitted work and does not come within any of the other exceptions to the general rule (see DMG 41141 et seq). The decision maker therefore decides that the general rule applies and Moira is treated as not entitled to income-related Employment and Support Allowance for the weeks she works in the shop.

41124 Decision makers should note that a claimant may not be working under the general rule, but may still be treated as not entitled to income-related Employment and Support Allowance because of the remunerative work exclusion, for example where they are treated as being in remunerative work. See DMG 41276 for further guidance.

 41125 - 41130

Definitions

Meaning of week

41131 Week, for the purposes of a claimant who works, is a week in respect of which a claimant is entitled to Employment and Support Allowance1.

 **Note :** Decision makers should not confuse this definition with the general definition of week2.

1 ESA Regs (NI), reg 40(7); 2 reg 2(1)

Meaning of work

41132 Work is any work which a claimant does, whether or not it is undertaken in expectation of payment1.

 **Note :** Decision makers should not confuse this definition with the definition of remunerative work (see DMG 41271 et seq).

1 ESA Regs (NI), reg 40(7)

Meaning of work as a councillor

41133 Work as a councillor1 includes work as a member of a district council or any body of which a claimant is a member by reason of being a councillor2 (see DMG 41153).

1 Local Government Act (NI) 1972, sec 1(3); Local Government (Scotland) Act 73, sec 49(1) & (1A);
2 ESA Regs (NI), reg 40(7)

Meaning of relative

41134 A relative is a close relative, grant-parent, grand-child, uncle, aunt, nephew or niece1.

1 ESA Regs (NI), reg 2(1)

Meaning of close relative

41135 A close relative1 is

**1.** a parent, parent-in-law, son, son-in-law, daughter, daughter-in-law, step-parent, step-son, step-son-in-law, step-daughter, step-daughter-in-law, brother, brother-in-law, sister, sister-in-law **and**

**2.** similar relationships arising through civil partnerships2.

1 ESA Regs (NI), reg 2(1); 2 CP Act 04, sec 246

41136 “Brother” and “sister” includes half-brother and half-sister. A child who is adopted becomes a child of the adoptive parents and the brother or sister of any other child of those parents. The adopted child stops being the child of, or the brother or sister of any child of, the natural parents. Whether an adopted person is a close relative of another person depends on the **legal relationship** not the blood relationship1.

1 R(SB) 22/87

 41137 - 41140

Exceptions to the general rule

The general rule

41141 DMG 41122 gives guidance on the general rule that a claimant is treated as not entitled to Employment and Support Allowance in any week in which they work1.

1 ESA Regs (NI), reg 40(1)

41142 However, there are exceptions to the general rule. These exceptions are claimants who

**1.** do certain categories of work1 (see DMG 41151 et seq)

**2.** are receiving certain regular treatment2 (see DMG 41176 - 41177)

**3.** do work in the first or last week of limited capability for work3 (see DMG 41178 - 41180).

1 ESA Regs (NI), reg 40(2); 2 reg 40(3); 3 reg 40(4)

41143 A claimant who is treated as not entitled to Employment and Support Allowance in any week in which they work may be treated as not having limited capability for work1 (see DMG Chapter 42). Decision makers should note that this does not apply where the claimant remains entitled to contribution-based Employment and Support Allowance, but is treated as being in remunerative work for income-related Employment and Support Allowance2.

1 ESA Regs (NI), reg 44(1); 2 reg 44(2)

Work

41144 Work1 has the meaning in DMG 41132. It is not employment and there does not have to be a legal contractual relationship.

1 ESA Regs (NI), reg 40(7)

 **Example**

 A publican hires James to conduct 2 quiz nights per week and expects to pay him for doing this. There is no written contract and James does not usually accept payment when it is offered by the publican. This is work not a hobby because it is done for the commercial enterprise of the publican and James feels morally obliged to the publican to fulfil his agreement with him.

41145 Negligible work is considered under a general principle that the law is not concerned with trivialities. This principle is called “de minimis”. Negligible amounts of work can be disregarded before the specific rules are applied so that the claimant is not regarded as working on the day or days in question.

41146 Whether work on part of a day is negligible depends on its proportion to the normal working hours, the type of work and the effort required in relation to full normal duties1. When deciding if work is “de minimis”, the decision maker should consider the relevant case law.

1 R(S) 2/61

41147 The question of negligible work can arise in self-employment when a sick person can still attend to some aspects of a business. Work cannot be considered negligible if it contributes materially to the running of the business or involves a significant amount of supervisory or administrative work. For example if the person occasionally does small jobs such as signing cheques, the contribution to the business can be disregarded as negligible1.

1 R(S) 5/51; R(S) 13/52; R(S) 24/52; R(S) 34/52; R(S) 37/52; R(S) 8/55; R(S) 2/61; R(S) 2/74; R(S) 10/79

Community service

41148 Community service should not be regarded as work. Courts will take account of a person’s limited capability and the type and extent of activities prescribed by the court should be appropriate to the limited capability.

 41149 - 41150

Claimants who do certain categories of work

41151 The general rule in DMG 41122 does not apply to a claimant who

**1.** works as a councillor1 **or**

**2.** undertakes duties on not more than 1 full day or 2 half-days a week as2

**2.1** a member of the Disability Living Allowance Advisory Board **or**

**2.2** a panel member with a disability qualification3 acting as a member of an appeal tribunal constituted under social security legislation4 **or**

**3.** undertakes domestic tasks in their own home or take care of a relative5 **or**

**4.** undertakes duties in caring for another person who is accommodated with them under arrangements for

**4.1** fostering **or**

**4.2** providing respite care

and they receive payment for doing so6 **or**

**5.** undertakes any activity during an emergency to

**5.1** protect another person **or**

**5.2** prevent serious damage to property or livestock7 **or**

**6.** does work which is exempt work8 (see DMG 41186 et seq).

1 ESA Regs (NI), reg 40(2)(a); 2 reg 40(2)(b); 3 SS & CS (D&A) Regs (NI), reg 1(2);
4 SS (NI) Order 98, Part 1, Chapter 1; 5 ESA Regs (NI), reg 40(2)(c);
6 reg 40(2)(d) & Sch 8, para 27 & 28; 7 reg 40(2)(e); 8 reg 40(2)(2)(f) & reg 45

Work as a councillor

41152 Work as a councillor1 has the meaning in DMG 41133.

1 ESA Regs (NI), reg 40(7)

41153 A councillor1 is a member of a district council.

1 ESA Regs (NI), reg 2(1)

41154 Guidance on the effect of councillors’ allowances for

**1.** contribution-based Employment and Support Allowance is in DMG Chapter 44 **and**

**2.** income-related Employment and Support Allowance is in DMG Chapter 49.

Member of the Disability Living Allowance advisory board or member of an appeal tribunal with a disability qualification

41155 A claimant who is

**1.** a member of the Disability Living Allowance Advisory Board **or**

**2.** a panel member with a disability qualification acting as a member of an appeal tribunal constituted under social security legislation

 will be exempt from the general rule only when they undertake duties on not more than 1 full day or 2 half-days a week1. If a claimant undertakes such duties for a longer period, they will be treated as not entitled to Employment and Support Allowance.

1 ESA Regs (NI), reg 40(2)(b)

Domestic tasks and care of a relative

41156 To be exempt from the general rule, domestic tasks must be carried out in the claimant’s own home. Domestic tasks is not defined but means “of the home, household or family affairs”. Examples of domestic tasks are preparing and cooking food, shopping, cleaning, washing clothes or dishes, making beds.

41157 In addition to taking place in the claimant’s own home a domestic task must relate to the claimant’s home, household or family affairs. Personal care such as attending to bodily functions or supervision or education of children, are domestic tasks if carried out for a member of the family (including a close relative). If carried out for others the tasks do not relate to the home, household or family affairs. This includes providing accommodation and food to students1 and other activities carried out in the claimant’s home, such as child minding other than of relatives, or tuition.

1 R(IB) 1/03

41158 Although child minding may include some tasks which could be said to be domestic, the activity as a whole does not relate to the home, household or family affairs.

41159 Care means to provide for or look after and should be interpreted broadly. It includes personal care, such as bodily functions but can also include domestic tasks such as cooking, shopping, cleaning and supervision of children.

 41160 - 41165

Caring for another person

41166 Caring for other people’s children or adults comes within the definition of work1 (see DMG 41132). However, claimants undertaking such caring are exempt from the general rule in DMG 411222.

1 ESA Regs (NI), reg 40(7); 2 reg 40(2)(d)

41167 The types of work will include adult placement schemes and foster parenting. Looking after a child or children other than relatives will include fostering and pre-adoption situations. In these cases the child is living as part of the family and their care will normally consist of domestic tasks in the claimant’s home unless the care includes activities which do not relate to the home, household or family affairs.

41168 Placement of difficult, mentally ill or sick children, or children with a learning difficulty will attract an allowance as well as expenses in recognition of the extra supervision, education or care necessary. However any such placement with a claimant will not prevent that claimant from being exempt from the general rule.

Activities undertaken during an emergency

41169 The general rule does not apply to any activity undertaken during an emergency to

**1.** protect another person **or**

**2.** prevent serious damage to property or livestock1.

1 ESA Regs (NI), reg 40(2)(e)

 41170 - 41175

Claimants receiving certain regular treatment

41176 The general rule does not apply to claimants who have entitlement to contribution-based Employment and Support Allowance and receive certain regular treatment1. However, unless DMG 41151 et seq applies, the general rule will apply to claimants who have entitlement to income-related Employment and Support Allowance and receive certain regular treatment.

 **Note :** See DMG Chapter 42 for guidance on certain regular treatment.

1 ESA Regs (NI), reg 40(3); reg 46

41177 Therefore claimants who have entitlement to contribution-based Employment and Support Allowance and income-related Employment and Support Allowance may remain entitled to contribution-based Employment and Support Allowance but lose their entitlement to income-related Employment and Support Allowance while they receive certain regular treatment (see DMG Chapter 42).

Work in the first or last week of limited capability for work

41178 A claimant who works in a week which is

**1.** the first week in which the claimant becomes entitled to a benefit, allowance or advantage because of limited capability for work in any period1 **or**

**2.** the last week in which the claimant

**2.1** has limited capability for work **or**

**2.2** is treated as having limited capability for work2

 is treated as not entitled to Employment and Support Allowance only on the actual day or days in that week on which the claimant works3.

 **Note :** See DMG Chapter 42 for guidance on the meaning of a benefit, allowance or advantage.

1 ESA Regs (NI), reg 40(4)(a); 2 reg 40(4)(b); 3 reg 40(4)

 **Example**

Cassandra is in receipt of Employment and Support Allowance. Her benefit week is Wednesday to Tuesday. She starts work which comes within the general rule on a Monday. The decision maker decides that Cassandra is entitled to Employment and Support Allowance until Sunday of that week, and is treated as not entitled to Employment and Support Allowance on Monday and Tuesday of the last week of Employment and Support Allowance.

Linking rules

41179 When considering DMG 41178, decision makers should note that the linking rules (see DMG 41111 et seq) does not apply for the purposes of deciding the beginning or end of any period of limited capability for work1.

1 ESA Regs (NI), reg 40(5)

Night shift workers

41180 When DMG 41178 is being considered and the claimant is a night shift worker, the decision maker should decide the day or days the claimant works under the rules for night shift workers1 (see DMG Chapter 42).

1 ESA Regs (NI), reg 40(6); reg 28

 41181 - 41185

Exempt work

Categories of exempt work

41186 The general rule (see DMG 41122) does not apply to claimants who do exempt work. The categories of exempt work are

**1.** permitted work1 (see DMG 41187 et seq)

**2.** work done whilst test trading as a self-employed earner2 (see DMG 41256)

**3.** voluntary work3 (see DMG 41257 - 41259)

**4.** work done in a work placement4 (see DMG 41260 - 41262).

1 ESA Regs (NI), reg 45(2)-(4); 2 reg 45(5); 3 reg 45(6); 4 reg 45(7)

Permitted work

41187 There are 3 types of permitted work each with its own conditions. Claimants can only be in one type of permitted work at any one time. It is not always necessary to have medical approval to do permitted work. If claimants have 2 or more jobs the hours and earnings are added together to determine if the work is exempt.

41188 The 3 types of permitted work are

**1.** permitted work lower limit1(see DMG 41196)

**2.** supported permitted work2 (see DMG 41197)

**3.** permitted work (limited capability for work-related activity)3 (see DMG 41212).

1 ESA Regs (NI), reg 45(2); 2 reg 45(3); 3 reg 45(4)(b)

Calculation of weekly earnings

41189 Weekly earnings limits apply in permitted work1. The decision maker should calculate a claimant’s earnings under some of the normal rules for calculating earnings for income-related Employment and Support Allowance purposes2 (see DMG Chapters 48 and 49). This applies even if the decision maker is considering entitlement to contribution-based Employment and Support Allowance only.

1 ESA Regs (NI), reg 45(2) - (4); 2 reg 88, reg 91(2), reg 92 - 99, reg 108(2) & (3) & Sch 7

41190 Where the weekly earnings limit is 16 x national minimum wage, this means the highest rate of national minimum wage specified in legislation1 (see Appendix 5). Where 16 x national minimum wage includes an amount less than

 **1.** 50p, the amount is rounded up to the nearest 50p **or**

 **2.** £1, but more than 50p, the amount is rounded up to the nearest £12.

1 The National Minimum Wage Regulations 1999, reg 11; 2 ESA Regs (NI), reg 45(9A)

 **Example**

 Meryl starts work on 9.5.11 for 15 hours weekly. The national minimum wage is 16 x £5.93 = £94.88. As this includes an amount which is more than 50p and less than £1, it is rounded up to £95.00. The decision maker uses this amount to consider whether Meryl’s work is exempt work.

 41191 - 41195

Permitted work lower limit

41196 Claimants can work as long as their earnings in any week are no more than £201 without the general rule in DMG 41122 applying. There is no limit to the period during which they can do this work. This is known as permitted work lower limit. Claimants move out of this type of permitted work if their earnings in any week are more than £20. The decision maker should consider whether the claimant meets the requirement for a different type of permitted work.

1 ESA Regs (NI), reg 45(2)

 **Note :** See DMG 41189 - 41190 for guidance on calculation of weekly earnings.

Supported permitted work

41197 Claimants can do supported permitted work1 as long as their earnings in any week are no more than 16 x the national minimum wage without the general rule in DMG 41122 applying. There is no limit to the period during which they can do this work as long as they continue to meet the requirements for supported permitted work.

1 ESA Regs (NI), reg 45(3)

41198 Supported permitted work is appropriate for claimants whose disability has stable and established effects with a significant impact on their ability to learn or sustain a traditional job which will

**1.** always **or**

**2.** for a number of years

 prevent them from working more than a few hours each week.

41199 To be supported permitted work, the work must be

**1.** part of a treatment programme done under medical supervision while the claimant is

**1.1** an in-patient **or**

**1.2** regularly attending as an out-patient

 of a hospital or similar institution1 (see DMG 54018) **or**

**2.** supervised by a person employed by a public authority or voluntary organisation, or a Community Interest Company which provides or finds work for persons with disabilities2.

1 ESA Regs (NI), reg 45(3)(a); 2 reg 45(3)(b)

41200 A voluntary organisation1 is any association that carries out, or proposes to carry out, activities otherwise than for the purpose of gain by the association or by individual members of the association.

1 ESA Regs (NI), reg 2(1)

Community Interest Companies

41201 A Community Interest Company as established under relevant legislation1, is a profit making organisation. However, it is restricted to using its assets and profits for the benefit of the community rather than for the benefit of the owners of the company. Decision makers should view the official Community Interest Company website for a current list of such companies ([www.cicregulator.gov.uk](http://www.cicregulator.gov.uk)).

1 The Companies (Audit, Investigations and Community Enterprise) (NI) (Order) 2005

41202 The support worker must direct and oversee the performance of the claimant regularly although the frequency of contact is not laid down. Some claimants may require daily contact, with others it may be as infrequent as, for example, monthly. The extent and the frequency of the support may vary according to the progress of each individual claimant.

41203 The supervision must be more than the normal supports put in place by employers. The support worker will, at least initially, have close involvement in the day to day routine of the claimant and, by implication, with the employer. This involvement will be ongoing at regular intervals according to each claimant’s circumstances.

 **Example 1**

 Peter’s appointee returns form PW1. Peter wants to work in a local garden centre for 4 hours on a Friday afternoon, earning £17 a week. Part 3 of the form PW1 has been completed by Peter’s support worker who works for The Cedar Foundation. It is a voluntary organisation that supports disabled people to enable them to participate in society as equal citizens.

 Peter’s support worker will visit him regularly and this support will continue. The decision maker determines that even though the work is for less than £20 a week and could be permitted work lower limit, it should be supported permitted work because the work is supported. He can do this work without the general rule applying for as long as his earnings are no more than the set weekly limit and the support continues.

 **Example 2**

 Sarah’s appointee returns form PW1. It states that Sarah who has Down’s Syndrome intends to start work on 30.3.09. The work is in a supermarket collecting trolleys from the car park and stacking shelves. She will be working for 4 hours a day each Wednesday and Thursday earning £40 a week. Sarah’s work has been arranged by Disability Action. Sarah’s support worker visits regularly and this support will continue. The decision maker determines that the work she is doing is supported permitted work. She can do this work without the general rule applying for as long as the earnings remain no more than the set weekly limit and the support continues.

 41204 - 41210

Permitted work

41211 Permitted work1 is work done for less than 16 hours, or on an average of less than 16 hours (see DMG 41213 et seq) in any week, for which the earnings do not exceed 16 x the national minimum wage.

1 ESA Regs (NI), reg 45(10)

Calculating the hours for permitted work higher limit and permitted work (limited capability for work-related activity)

41212 Where no recognisable cycle has been established, it is

**1.** the number of hours **or**

**2.** the average number of hours where the hours worked are likely to fluctuate

 a claimant is expected to work in a week1.

1 ESA Regs (NI), reg 45(8)(a)

41213 Where the number of hours a claimant works fluctuate and there is a recognisable cycle, it is over 1 complete cycle of work. This complete cycle includes periods in which the claimant does no work but excludes other absences such as holidays or sickness1.

1 ESA Regs (NI), reg 45(8)(b)(i)

41214 Where the number of hours a claimant works fluctuate and there is no recognisable cycle, it is

**1.** over the 5 week period **or**

**2.** any other period to enable the average hours to be decided more accurately

 immediately before the date of claim, or the date a supersession decision is made1.

1 ESA Regs (NI), reg 45(8)(b)(ii)

41215 Decision makers should consider the guidance at DMG 41346 - 41434 in order to decide

**1.** which hours count towards the weekly total **and**

**2.** how to identify a recognisable cycle **and**

**3.** how to calculate the hours if a

**3.1** recognisable cycle is established **or**

**3.2** recognisable cycle is not established.

 41216 - 41255

Self-employed test trading

41256 Work done whilst receiving help to become a self-employed earner is exempt work1 as long as the programme or arrangement the claimant is on is set up under certain legislation2.

1 ESA Regs (NI), reg 45(5); 2 E&T Act (NI) 50, sec 1

Voluntary work

41257 Voluntary work is where a claimant receives no payment of earnings and where that claimant is

**1.** engaged by a charity or voluntary organisation **or**

**2.** a volunteer

 where the decision maker is satisfied that it is reasonable for the claimant to provide the service free of charge is exempt work1.

1 ESA Regs (NI), reg 45(6)

41258 A claimant who is working but does not accept a wage is not necessarily a volunteer. The work must be other than for a relative (see DMG 41134) and the only payment

**1.** received **or**

**2.** due to be paid

 is expenses reasonably incurred in connection with the work1.

1 ESA Regs (NI), reg 45(10); reg 43(4)

Magistrates

41259 Magistrates who only receive expenses should be considered as volunteers.

Work placement

41260 Claimants who work in the course of participating in a work placement approved in writing by the decision maker before the placement starts are in exempt work1.

1 ESA Regs (NI), reg 45(7)

41261 A work placement is practical work experience with an employer, which is neither paid nor undertaken in expectation of payment1.

1 ESA Regs (NI), reg 45(10)

41262 A claimant who is participating in a work placement must still provide information or evidence to show whether they have limited capability for work and are required to comply with the work capability assessment process1 (see DMG Chapter 42).

1 ESA Regs (NI), reg 21

 41263 - 41270

Remunerative work

Contribution-based Employment and Support Allowance

41271 Remunerative work does not affect contribution-based Employment and Support Allowance. If a person claiming contribution-based Employment and Support Allowance is working1, the decision maker should consider DMG 41141 et seq.

1 ESA Regs (NI), reg 40(1)

Income related Employment and Support Allowance

41272 Remunerative work1 for income-related Employment and Support Allowance purposes is any work which a claimant does for which payment is made or in expectation of payment other than2

**1.** work as a councillor3 **or**

**2.** duties undertaken on not more than 1 full day or 2 half days a week as4

**2.1** a member of the Disability Living Allowance Advisory Board **or**

**2.2** a panel member with a disability qualification5 acting as a member of an appeal tribunal constituted under social security legislation6 **or**

**3.** domestic tasks carried out in the claimant’s own home or the care of a relative7 **or**

**4.** where the claimant is undertaking duties in caring for another person who is accommodated with them under arrangements for

**4.1** fostering **or**

**4.2** providing respite care and they receive payment for doing so8

**5.** any activity done during an emergency solely to

**5.1** protect another person **or**

**5.2** prevent serious damage to property or livestock9 **or**

**6.** any of the categories of exempt work10.

 **Note 1:** See DMG 41152 et seq for full guidance on **1.** - **6.**.

 **Note 2:** Work as a councillor has the same meaning as at DMG 41133.

1 WR Act (NI), 07, Sch 1, Part 1, para 6(1)(e); ESA Regs (NI), reg 41; 2 reg 40(2); 3 reg 40(2)(a);
4 reg 40(2)(b); 5 SS & CS (D&A) Regs (NI), reg 1(2); 6 SS (NI) Order 98, Part 1, Chapter 1;
7 ESA Regs (NI), reg 40(2)(c); 8 reg 40(2)(d) & Sch 8, paras 27 & 28;
9 reg 40(2)(e); 10 reg 40(2)(f) & reg 45

41273 However, where a claimant who is entitled to income-related Employment and Support Allowance does some work, the decision maker should follow the guidance at DMG 41123 - 41124. The decision maker should consider whether the general rule applies before considering the remunerative work exclusion. If the general rule in DMG 41122 does apply, the decision maker should decide that a claimant is treated as not entitled to income-related Employment and Support Allowance because they are working, and need not consider the remunerative work exclusion.

Work done for payment or in expectation of payment

41274 Whether or not a claimant is in remunerative work is a question of fact rather than legal interpretation. The decision maker should look at all the relevant facts in each case. Regard work as remunerative if

**1.** payment is made for it **or**

**2.** it is done in expectation of payment1.

 Remunerative does not mean profitable.

1 ESA Regs (NI), reg 41; R(IS) 1/93

41275 Decision makers should consider the guidance at DMG 41327 - 41334 to decide whether work is done for payment or in expectation of payment.

Payment to a claimant on termination or interruption of employment

41276 A claimant is not entitled to income-related Employment and Support Allowance if they were, or were treated as being, engaged in remunerative work. The period of the exclusion is the period over which certain payments, paid on termination of that employment, fall to be taken into account1 (see DMG Chapter 48). Some payments are disregarded2 (see DMG Chapter 49).

1 ESA Regs (NI), reg 41(2); 2 reg 41(3) & Sch 7, para 1

 41277 - 41300

Effect of work - partner

Introduction

41301 This part gives guidance on entitlement to income-related Employment and Support Allowance when a claimant’s partner works. Guidance on entitlement to Employment and Support Allowance when a claimant works is at DMG 41121 et seq.

41302 A claimant’s entitlement to income-related Employment and Support Allowance is affected if they have a partner who is in remunerative work1. If a claimant’s partner is working but is not in remunerative work, the decision maker should calculate the amount of earnings, if any, to be taken into account (see DMG Chapters 49 and 50 for guidance on how to calculate the amount of a partner’s earnings).

 **Note :** Entitlement to contribution-based Employment and Support Allowance is not affected by a claimant’s partner being in remunerative work.

1 WR Act (NI) 07, Sch 1, Part 2, para 6(1)(f)

41303 Before decision makers apply the law to establish how many hours a claimant’s partner is working, they must decide whether or not the work is continuing.

 41304 - 41305

Do claimants’ partners have employment

41306 Decision makers should decide that claimants’ partners are not in remunerative work if they do not have any employment and are between jobs. Decision makers will need to decide whether employment has ended if someone has been engaged in remunerative work (see DMG Chapter 49).

41307 Decision makers should decide that a claimant’s partner is still in employment and not between jobs if

**1.** the contract of employment (which can be written or verbal) is still current **or**

**2.** the contract of employment ends at the beginning of what would be a period of absence even if the contract continued (e.g. a school holiday) and it is expected that the person will return to employment after that period because

**2.1** there is an express agreement (written or verbal) **or**

**2.2** it is reasonable to assume that a long standing practice of re-employment will continue.

41308 Off-shore workers are an example of those workers who may be employed on an ad-hoc basis. They may be contracted by companies to perform work for a specific period with no obligations on either party to provide work or to accept offers of work.

 **Example**

 Dennis works for an oil company as a welder on oil rigs. He does not have a recognisable pattern of work as the company request his services on an irregular basis and he is not guaranteed a specific amount of work in any period. Dennis’s partner Maureen claims Employment and Support Allowance. When she makes that claim Dennis is not working but intends to work for the company again. On looking at the facts of Dennis’s past work for the company, the decision maker is satisfied that there has been a continuing provision of employment that has been accepted by Dennis, and that it averages 24 hours or more a week. The decision maker decides that there is a continuing relationship and that Dennis continues to be in remunerative work during periods when he is not physically working.

41309 It is a question of fact for the decision maker whether the work is continuing or not. Decision makers will need to consider such things as

**1.** the type and nature of the work

**2.** the frequency and length of the contracts/periods of work

**3.** the process of securing the work

**4.** the employment situation/opportunities in the area

**5.** whether there is a continuing relationship between the claimant and the employer

**6.** whether there is evidence of the relationship between the claimant and the employer having ended, e.g. the production of a P45.

 This list is not prescriptive or exhaustive and other considerations may be equally valid in the circumstances of each case.

41310 Decision makers should also look at whether there is a mutual expectation between the person and the employer that they will resume after a period of no work. This mutual expectation should be more than just a hope of re-employment.

 **Example**

 Carol has worked in Barry’s Amusement Park in Portrush for the past 3 summer seasons (March to September). The park closes down between October and February so no work is available. There are very limited employment opportunities in the area in the winter months. In November Carol’s civil partner Ivy makes a claim for Employment and Support Allowance. The decision maker establishes that Carol has to put in her application to Barry’s Amusements every January along with other candidates. While she is hopeful of securing further work for the following season she has no guarantee from the employer that she will be successful. The decision maker decides that as there is no mutual expectation of the work resuming then Carol does not have employment in the “off” season and therefore she is not in remunerative work.

 41311 - 41315

Meaning of remunerative work

41316 Remunerative work for a claimant’s partner1 is work for which payment is made, or which is done in expectation of payment and in which the claimant’s partner is engaged for not less than

**1.** 24 hours a week **or**

**2.** 24 hours a week on average where the hours of work fluctuate.

1 WR Act (NI) 07, Sch 1, Part 1, para 6(1)(f); ESA Regs(NI) , reg 42(1)

Claimant’s partner treated as in or not in remunerative work

41317 If a claimant’s partner is engaged in remunerative work it does not necessarily mean that the claimant is excluded from income-related Employment and Support Allowance. In certain circumstances a claimant’s partner who is **actually** in remunerative work may be **treated** as **not** being in remunerative work1 (see DMG 41471 et seq).

1 ESA Regs (NI), reg 43

41318 Also, there are circumstances in which a claimant’s partner who is **not actually** in remunerative work may be **treated** as engaged in remunerative work1 (see DMG 41441 et seq).

1 ESA Regs (NI), reg 42(3) - (6)

41319 The flow chart on the following page shows the link between a claimant’s partner being

**1.** engaged in remunerative work **and**

**2.** treated or not treated as being engaged in remunerative work.

 41320 - 41325

Remunerative work exclusion - claimant’s partner

Is work done for payment or in expectation of payment? (see DMG 41326 et seq)

Partner is in remunerative work.

Claimant is excluded from income-related Employment and Support Allowance

Partner is not in remunerative work.

Yes

No

Can the partner be treated as in remunerative work? (see DMG 41441 et seq)

Can the partner be treated as not in remunerative work? (see DMG 41471 et seq)

No

Yes

No

Yes

No

Are the weekly hours of work on average 24 or more?

Yes

Work done for payment or in expectation of payment

Introduction

41326 Whether or not a claimant’s partner is in remunerative work is a question of fact rather than legal interpretation. The decision maker should look at all the relevant facts in each case. Regard work as remunerative if

**1.** payment is made for it **or**

**2.** it is done in expectation of payment1.

 Remunerative does not mean profitable (see DMG 41330).

1 ESA Regs (NI), reg 42(1); R(IS) 1/93

Work for no monetary reward

41327 A claimant’s partner cannot be in remunerative work if the work done is neither paid nor done in expectation of payment. If the only “payment” is notional earnings1 the work cannot be treated as remunerative.

1 ESA Regs (NI), reg 108(2)

Payment in kind

41328 “Payment” includes payment in kind provided it is made in return for work done. It does not matter that the definition of earnings excludes any payment in kind.

Expectation of payment

41329 Work “done in expectation of payment” means more than a mere hope that payment will be made at a future date1. There should be a realistic expectation of payment. An established author writing a book in his field has a realistic expectation of payment. A person who is not an established author and has no agreement for publication does not have a realistic expectation of payment.

1 R(IS) 1/93

Self-employed earners

41330 A claimant’s partner providing a service for payment for not less than 24 hours a week on average is engaged in remunerative work regardless of profit or loss. There can be an expectation of payment derived from profit but it must be a realistic expectation of payment for work being done at the time. The decision maker need not make detailed forecasts of profitability. Where a claimant’s partner is involved in a commercial activity it is likely that this is remunerative work, if it is for not less than 24 hours a week on average. It is for the claimant to show that their partner is working for nothing and explain why1.

1 R(IS) 22/95

Sale of goods

41331 Payment received from the sale of goods is not necessarily payment for work. Payment is made for the goods not for the work of the salesman. But where a person is paid commission on sales, the commission itself is payment for work.

 **Note :** Also that payment may be derived from takings.

Business start up

41332 An allowance payable under certain schemes to assist people to become self-employed is not payment for work1.

 **Note :** The former name of business start up scheme no longer applies generally and schemes are likely to have local names.

1 R(IS) 21/95

41333 Drawings from any business to meet living expenses, in cash or in kind, will be payment for work except where the drawings are from business capital.

 **Example**

 Annie is claiming Employment and Support Allowance. She and her civil partner Rosie run a grocery shop at a loss. The business is for sale. They are living on the stock and money taken from the till. If that money was banked it would merely reduce the business overdraft. The couple are living off the capital of the business and are therefore not working for payment or in expectation of payment.

Company directors

41334 A director of a limited company is an office holder and will usually be an employee of the company. The current or future receipts of the business are not payment to the director1. A director can own or be a shareholder in the company and receive payment or have a realistic expectation of payment in that capacity. It is possible for an office-holding director to also have a contract for service with the company and thus be a self-employed earner. In such cases DMG 41330 applies.

1 R(IS) 5/95

 41335 - 41340

Establishing hours of work for a claimant’s partner

Introduction

41341 Decision makers should establish the weekly total of hours worked. Normally, only hours for which payment is made or expected count for remunerative work purposes. These are not necessarily the same as hours of attendance. For example, if a claimant’s partner works additional hours without pay and without expectation of payment the extra hours would not count, although the question of notional earnings1 would arise. See DMG 41357 et seq for guidance on teachers.

1 ESA Regs (NI), reg 108(3)

41342 Hours worked as a carer or in certain specified occupations do not count for remunerative work purposes (see DMG 41343 et seq).

Carers and specified occupations

41343 Decision makers should take no account of the hours worked by a claimant’s partner falling within DMG 41471 **1.** to **8.** or DMG 41472 **1.** to **4.**1. Hours worked in any other occupation by a claimant’s partner who satisfies DMG 41471 **1.** to **8.** should be taken into account in the normal way.

1 ESA Regs (NI), reg 42(6)

 **Example 1**

 Margery’s partner Henry claims income-related Employment and Support Allowance. Margery minds children in her home from Monday to Friday, 8am to 1pm. She also works in the evenings in a supermarket from 7pm to 10pm, 5 nights a week. The hours she spends childminding do not count for remunerative work purposes. Margery’s total hours of work are 15 a week in the supermarket. She is not in remunerative work.

 **Example 2**

 Trevor is required at home to care for his disabled civil partner who gets Attendance Allowance and income-related Employment and Support Allowance. He also works 25 hours a week as a barman. Because he is a carer he is treated as not engaged in remunerative work and none of the hours count, not even those spent in bar work.

 41344 - 41345

Counting the hours

Flexible working schemes

41346 Most people in paid employment are required to work, and are paid for, the same number of hours each week. Flexible working hours does not affect this.

Overtime

41347 Overtime for which payment is made or expected counts towards the weekly total.

Breaks

41348 Any time allowed by the employer for meals or refreshments counts towards the total hours worked provided earnings are paid or are expected to be paid for this time1.

1 ESA Regs (NI), reg 42(2) & 45(9)

Night duty

41349 Any time spent on night duty in addition to normal daytime duties counts towards the total hours worked if payment is made or expected for that night duty. This applies even if

**1.** payment made or expected is less than for normal daytime duties **or**

**2.** the time on night duty is spent sleeping.

 **Example**

Edward makes a claim for income-related Employment and Support Allowance. His wife, Michelle, works in a care home. Her daytime working is 16 hours a week. Michelle is also contracted for night duty of 20 hours a week. For her night duty, Michelle receives a retainer which is paid at a lower hourly rate than for her daytime work. If she is called upon to deal with an emergency she is paid at the daytime rate. She is not required to perform any duties unless there is an emergency so she sleeps in the bedroom provided for her. The decision maker decides that Michelle is in remunerative work.

Evidence of hours

41350 Decision makers should accept a statement from the claimant’s partner or the employer about the number of hours worked unless it is unclear or there is reason to doubt it. They should make further enquiries where necessary. If it becomes necessary to examine the contract of employment note that it will not usually specify overtime hours. Where appropriate, decision makers should add these to the number of contracted hours.

Company directors

41351 A director of a limited company is an office holder and in that role may have only limited duties to carry out. However, where a director also has a contract for service with the company and is a self-employed earner follow the guidance at DMG 41330 to establish any additional hours worked.

Musicians

41352 Practising is not remunerative work unless the practice is necessary to do the work the claimant’s partner is engaged in.

 **Example 1**

 Paul is a musician who teaches at a school for 6 hours a week. He also practices his instrument for 20 hours a week in order to maintain his skill as a musician. He is not engaged in remunerative work.

 **Example 2**

 Emily is a musician who is engaged to perform music. The performances last for 12 hours a week. She practices the performances for 15 hours a week. She is engaged in remunerative work.

Self-employed

41353 Decision makers should include all the hours necessary to run the business, for example, time spent in

**1.** trips to wholesalers and retailers

**2.** visits to potential customers

**3.** advertising or canvassing

**4.** cleaning the business premises

**5.** cleaning and maintaining items used in the business, for example a taxi or driving school car

**6.** providing estimates

**7.** book-keeping

**8.** research work, for example where the claimant’s partner is a writer.

41354 Where a self-employed person is running a business which is

**1.** building up **or**

**2.** winding down

 it may be appropriate for the decision maker to re-determine the remunerative work issue week by week until hours of work reach a consistent level.

41355 Decision makers should accept a statement from the claimant’s partner about the number of hours worked unless there is reason for doubt. Where there is doubt, decision makers should make a decision on the basis of all the available evidence.

 **Example**

 Larry makes a claim for income-related Employment and Support Allowance. His civil partner Peter, is a window cleaner in good health and with all the necessary window cleaning equipment who claims to have worked 15 hours a week during a period of fine weather. His accounts book revealed that he operated a long-standing window cleaning round with an average of 10 customers per day, 5 days a week. He agreed that it took him about 30 minutes to clean each house plus an hours travelling in total between houses. Based on this evidence the decision maker concludes that Peter worked 6 hours a day, 5 days a week, a total of 30 hours a week.

41356 If a self-employed person has been doing undisclosed work or working more hours than is claimed, the decision maker must determine on the probable number of hours worked. Consider all the available evidence, including any reports of what times of day and for how many days that person was observed working.

Teachers

41357 The conditions of employment of most schoolteachers, in grant aided schools in Northern Ireland, are laid down in an Order1 and Regulations2. They have a contractual duty to spend whatever time is necessary to carry out their professional duties effectively in non-teaching activities such as

**1.** preparing and planning lessons and timetables

**2.** assessing and reporting on pupils

**3.** helping to administer and organise the school

**4.** advising pupils and ensuring their discipline, health and safety

**5.** discussing pupils’ progress with parents.

 Time spent in these activities should be counted. This list is not exhaustive. If the decision maker is unsure whether a teacher is obliged to do a particular activity, consult the Order or Regulations or job description.

1 Education & Libraries (NI) Order 86, art 69; Education & Libraries (NI) Order 1993, art 42(3);
2 Teachers’ (Terms and Conditions of Employment) Regs (NI) 1987 (No 267);
Teachers’ (Terms and Conditions of Employment)(Amdt) Regs (NI) (No 299)

41358 Before either the Order or Regulations came into force, teachers were generally required by their contracts to carry out the duties now laid down1. Members of the teaching profession not covered by the Order or Regulations (for example higher education lecturers and teachers in private schools) have similar obligations unless their contract provides that

**1.** they are not required to do such work **or**

**2.** any such work is included in the hours of work laid down in the contract.

1 Teachers’ (Terms and Conditions of Employment) Regs (NI) 1987, Sch 3

41359 In most cases the contract of employment will not state the amount of time to be spent in duties other than actual teaching. Decision makers should accept the person’s own evidence if it seems reasonable. If a person states that the time spent on non-teaching duties is anything up to one third of the time spent teaching, decision makers should accept this without question.

41360 It may be reasonable to accept a larger proportion than a third depending on the

**1.** teacher’s experience

**2.** subjects being taught

**3.** method of teaching

**4.** amount of homework to be marked

**5.** number of pupils.

 In these cases the decision maker should ask the person to provide a detailed list of non-teaching duties. If there is still doubt the employer may be able to provide evidence.

41361 The amount of non-teaching work may vary from week to week. For example, a teacher may need to spend more time marking examination papers or writing reports at certain times of the year.

 41362 - 41370

Calculating average hours

41371 If the claimant’s partner is engaged in work where the hours fluctuate, the decision maker should calculate the average weekly hours1.

1 ESA Regs (NI), reg 42(1)

Identifying a recognisable cycle

41372 Decision makers should see if there is any pattern of work over a period of time. This is known as a recognisable cycle1. A recognisable cycle is a recurring round of events where the end of a cycle marks the beginning of the next cycle.

 **Note :** A cycle may include weeks in which no work is done2.

1 ESA Regs (NI), reg 42(2) & 45(8)(b)(i); 2 reg 45(8)(b)(i)

 **Example 1**

 week 1 X hours

 week 2 Y hours

 week 3 X hours

 week 4 X hours

 week 5 Y hours

 week 6 X hours

 There is a recognisable cycle of 3 weeks (weeks 1 to 3 repeated in weeks 4 to 6).

 **Example 2**

 month 1 A hours

 month 2 B hours

 month 3 A hours

 month 4 B hours

 There is a recognisable cycle of 2 months.

 **Example 3**

 week 1 X hours

 week 2 X hours

 week 3 Y hours

 week 4 W hours

 week 5 V hours

 There is no recognisable cycle.

Permanent or indefinite contract

41373 A recognisable cycle of work can exist at the outset of employment. This would happen where a person has a permanent or indefinite contract that expressly provides for a cycle. The contract may expressly provide for periods of work and periods of no work, for example, school holidays for school ancillary workers are usually periods of no work.

 **Example**

 Julia works as a school clerk under an indefinite contract that provides for work during school terms and no work during school holidays. Her partner Mark makes a claim to income-related Employment and Support Allowance during the Easter holidays. The decision maker decides that Julia’s contract establishes a cycle from its outset.

Fixed term contracts and casual workers

41374 A cycle may be established after 1 or 2 years where a claimant’s partner is employed under a succession of fixed term contracts or on a casual basis (perhaps with no contract)1. Decision makers should decide each case on its facts. The decision maker will need to consider whether 2 complete cycles would be necessary if 1 year had not been sufficient to establish a cycle (e.g. in the case of relief cover or occasional work). Decision makers should consider whether there is a mutual expectation between the person and the employer that work will resume after a period of no work.

1 R(JSA) 5/02

 **Example**

Bill is a catering assistant at a secondary school. He has been working on a casual basis for just over a year. His partner Phoebe is in receipt of contribution-based Employment and Support Allowance. However, she makes a claim for income-related Employment and Support Allowance at the start of the Christmas holiday stating that Bill is unwell but has been asked to return to work after the holidays if he is well enough to do so. Phoebe tells the decision maker that Bill expects to return to work as he did the previous January. The decision maker decides that Bill has established a recognisable cycle of work and that it has not been broken. Phoebe is not entitled to income-related Employment and Support Allowance because on average Bill works 24 hours or more a week.

Supply teachers

41375 Supply teachers are likely to be employed on intermittent contracts, each of varying lengths and separated by periods of non-employment. Every case should be considered on its own facts with a view to ascertaining whether or not a cycle exists. Therefore although it is possible that a supply teacher has a recognisable cycle of work, in practice, work as a supply teacher is unlikely to give rise to a cycle.

Extra work

41376 A person may have a contract for work that specifies when they will and won’t be expected to work. If they work any additional hours during a holiday period, either for their usual employer or another employer, it does not mean that the contract does not establish a cycle1.

1 R(JSA) 5/02

 **Example**

 Celeste is employed as a shop assistant by a students union. The terms of her employment contract are “Monday to Friday, 8.15 am to 1.15 pm term time only”. Celeste agrees to do extra work stocktaking during the first week of the summer holidays. Her civil partner Justine makes a claim for income-related Employment and Support Allowance the day after Celeste finishes the extra work. The decision maker decides that Celeste’s contract establishes a cycle from the outset of the work, and that the cycle has not been broken by the extra hours of work done during the holiday period.

Probation

41377 A recognisable cycle of work can exist from the outset of the contract even if there is an initial period of probation.

 **Example**

 Harry is employed at a secondary school for 37 hours a week for 38 weeks a year as a workshop technician. His contract of employment, subject to a 6 month probationary period, specifies that he is expected to work during term times and not during school holidays. Harry’s partner Sally makes a claim to income-related Employment and Support Allowance during the school summer holidays. The decision maker decides that Harry is in a recognisable cycle from the outset of the contract and, on average, works 24 hours or more a week. Sally is not entitled to income-related Employment and Support Allowance because Harry is in remunerative work.

 41378 - 41380

Recognisable cycle established

41381 Where there is a recognisable cycle decision makers should calculate average hours over 1 complete cycle1. They should include, where the cycle involves periods where the person does no work, those periods, but disregard any other absences.

1 ESA Regs (NI), reg 45(8)(b)(i)

Periods when a claimant’s partner does not work

41382 Periods when a claimant’s partner does not work can fall into periods

**1.** of absence because of sickness, maternity leave, paternity leave or adoption leave

**2.** of unauthorised absence “without good cause”

**3.** of no work (other than holidays) during which someone is not working because work is not provided by the employer

**4.** during which someone can be properly regarded as on holiday.

Sickness, maternity leave, paternity leave, adoption leave and periods of unauthorised absence

41383 When a claimant’s partner is absent from work due to sickness, ordinary or additional paternity leave1, adoption leave2 or maternity leave the decision maker should decide that they are not in remunerative work during such absences3. See DMG Chapter 49 for guidance on the meaning of ordinary or additional paternity leave. When a claimant’s partner has a period of absence without good cause the decision maker should treat such an absence in the same way as proper holidays4 (see DMG 41384).

1 Employment Rights (NI) Order 1996, art 112A & 112B; 2 art 107A & 107B;
3 ESA Regs (NI), reg 43(3); 4 reg 42(3)

Holidays or periods of no work

41384 The decision maker should decide that a claimant’s partner (including a member of a teaching staff) should only be regarded as being on holiday for the weeks of holiday for which they are paid1. These can be ascertained from the contract of employment (which will usually be in writing but can be verbal). The fact that pay is

**1.** spread over a year in equal instalments **and**

**2.** enhanced to take account of a lack of holiday entitlement

 should not be taken into account when deciding whether someone has paid holidays.

1 R(JSA) 5/03

41385 Most workers have a right to paid holidays. A worker is usually entitled to 4 weeks paid holiday in any leave year1.

1 Working Time Regulations (NI) 1998, No. 386, reg 13

Calculating the number of hours for which a claimant’s partner is engaged in work

41386 When the claimant’s partner is in employment (and they are not absent from work due to sickness, maternity, adoption or paternity leave) decision makers will need to calculate the number of hours for which the claimant’s partner is engaged in work.

 **Note :** If the claimant’s partner is in a recognisable cycle but found not to be in remunerative work, the normal income rules apply. Decision makers should note that there cannot be a disregard for final earnings because the work is continuing.

41387 If the claimant’s partner works the same number of hours each week when not on holiday, that is the number of hours worked in each week.

41388 If the claimant’s partner’s hours of work fluctuate, the decision maker should take an average

**1.** as per DMG 41381 if there is a cycle of work **or**

**2.** as per DMG 41411 et seq if there is no cycle of work.

Calculating the average hours

41389 Where the hours of work fluctuate, the average should be calculated by taking into account periods in which the person does not work while disregarding other absences1. Decision makers should only deduct periods of holiday, absences without good cause, sickness, maternity, adoption or paternity leave from the number of weeks in the cycle before dividing the result into the total number of hours worked in the cycle2. Periods of no work should not be deducted. Put another way, it is only periods of holiday, absences without good cause, sickness, maternity, adoption and paternity leave which are “other absences to be disregarded”.

1 ESA Regs (NI), reg 45(8)(b)(i); 2 R(JSA) 5/03

Yearly cycle with school holidays or similar vacations

41390 Where a person has a contract of employment (written, verbal or implied) which continues throughout the year, there is a recognisable cycle of 1 year. Where a person with such a contract works at a school, educational establishment or any other place of employment where there are school holidays or similar vacations, the decision maker should divide the total number of hours worked during the year by 52 weeks less any weeks of “other absence”1 (see DMG 41389).

1 R(JSA) 5/03

 **Example 1**

 Jeff, a qualified teacher, has worked as a school tutor for children with special needs since October 2003. He works on a sessional basis, completing a monthly return of the number of hours he has taught for which he is paid accordingly. He does not get paid for holidays. His partner Patricia claims income-related Employment and Support Allowance in October 2008. For the academic year 2007/2008 Jeff worked 520 hours.

 **Note :** An academic year includes the summer holidays. By the time Patricia claims income-related Employment and Support Allowance in October 2008 Jeff has completed at least 4 cycles of academic work, so the decision maker decides that his employment has not ended. Jeff has no paid holidays, so the total hours worked (520) are divided by the weeks in the cycle (52). This gives 10 hours a week, meaning that Jeff is not in remunerative work.

 **Example 2**

 Megan, a lecturer at a college of further education, has a contract of employment, which started in January 2006 for 23.5 hours of work a week during academic terms. There is no entitlement to paid holiday, but the contract states “your rate of pay allows for the fact that you have no formal entitlement to holiday with the result that the pay you receive for each hour worked is comparable to that paid to employees who are entitled to holiday”. The academic terms cover 38 weeks but Megan receives her pay over the calendar year in 12 equal monthly instalments.

 In addition to the above work, Megan is employed under additional contracts, which depend on the demand for other courses which she teaches. In the 2007/2008 academic year she has 4 other such contracts

**1.** 10.5 hours a week for 12 weeks in the Autumn term

**2.** 11.5 hours a week for 10 weeks in the Spring term

**3.** 10.5 hours a week for 4 weeks in the Summer term

**4.** 8 hours a week for 6 weeks in the Summer term

 Megan’s civil partner Geraldine is in receipt of contribution-based Employment and Support Allowance but makes a claim for income-related Employment and Support Allowance in June 2009 for the summer vacation.

 The hours of work from all Megan’s contracts have to be added together, but should they be viewed as fluctuations in the cycle of work established by the main contract and averaged over the whole year, or only added in during the periods covered by the additional contracts?

 The additional contracts are with the same employer as the main contract, involve the same type of work as the main contract and the work under them is done during the periods of work in the cycle established under the main contract. So the hours from them should be added to the hours from the main contract and taken into account over the whole cycle.

 Megan is not entitled to holiday pay. The fact that she receives her pay spread over the year in equal instalments does not affect this, nor does the fact that she receives an enhanced rate of pay.

 The “holidays” should therefore be taken into account as periods of no work and included in the averaging.

 Total number of hours is 1224. Divided by 52 equals 23.5 (i.e. below 24)

 Megan is not in remunerative work.

**Example 3**

Steve claims income-related Employment and Support Allowance. His partner Anne is employed in a student’s union shop for 37.5 hours per week term-time only. The academic year covers 31 weeks. She has an annual cycle of work from September to September. Contractually she was entitled to 30 days paid holiday. This consisted of 18 days holiday plus 12 public holidays. 4 of the public holidays fell in term-time and Anne did not have to work for those days.

The total number of hours worked during the cycle was 1132.5 (31 weeks x 37.5 hours - 30 hours of public holidays that fell in term-time).

The total number of paid holidays, 30 days or 6 weeks, should be subtracted from the number of weeks in the cycle, which gives 46 weeks. The number of hours worked, 1132.5, is divided by 46 giving an average of hours worked of 24.62. Anne is in remunerative work1.

1 R (JSA) 3/04

Ancillary school workers

41391 Ancillary school workers are members of the non-teaching staff of schools and other educational establishments. Where such workers have a yearly cycle of work during term-time only decision makers should follow the guidance at DMG 41390. Examples of ancillary school workers include

**1.** school meals services employees

**2.** domestic staff

**3.** clerical staff (such as secretaries and clerks)

**4.** laboratory workers

**5.** nursing assistants

**6.** school bus drivers.

 41392 - 41410

No recognisable cycle established

Estimating future hours

41411 Where

**1.** a claimant’s partner has just started work or is about to start work **or**

**2.** the hours of work have just changed or are about to change and the change does not form part of the normal pattern of work **or**

**3.** because of absences from work a recognisable cycle has not been established

 the decision maker should estimate the hours or the average hours the person is **expected** to work in a week1.

1 ESA Regs (NI), reg 42(2) & 45(8)(a)

41412 Decision makers should average the estimated hours over a period long enough to cover the expected pattern of work1. They should consider the case where there is sufficient evidence to average the actual hours worked.

1 R(IS) 8/95

Averaging past hours

41413 Where a claimant’s partner has been in work before the date of claim, decision or application for supersession and a recognisable cycle has not been established the decision maker should calculate average weekly hours over

**1.** the 5 weeks immediately before the date of claim or the date on which a superseding decision is made1 **or**

**2.** a longer or shorter period immediately before the date of claim, the date of decision or the date of application for supersession if this enables the average hours to be calculated more accurately.

 **Note :** “Immediately before” in this context means the end of the last complete week before the date of claim, date of decision or date of application for supersession.

1 ESA Regs (NI), reg 42(2) & 45(8)(b)(ii)

41414 The decision maker should include in the calculation at DMG 41413 any periods of non-working within the normal pattern of employment (rest periods)1. The decision maker should not include periods of non-working after the employment has ended.

1 R(IS) 12/95

 **Example**

 Victor’s partner Elizabeth works for 6 months from January to June 2009 for an average of 24.5 hours a week. The employment ends in June 2009 and she does no more work. This comes to light in August 2009 and the decision maker supersedes on 1.8.09. When calculating the average hours the decision maker must use a period immediately before 1.8.09. The decision maker averages over the period January 2009 to 31.7.09 to get the most accurate result. The period of non-working after employment ended is not included in the calculation. Elizabeth was engaged in remunerative work for the period January to June 2009 because average hours of work were more than 24 a week.

41415 Decision makers should note that examples of circumstances in which it may not be appropriate to use the 5 week period in DMG 41413 **1.** are where the

**1.** 5 weeks contain a period of absence which distorts the average **or**

**2.** 5 weeks do not show the claimant’s partner’s normal pattern of working hours, for example they include a short period of overtime which is not typical, or reduced hours because of unusual slackness in the business **or**

**3.** claimant’s partner is paid at intervals of longer than a week.

 In either of the circumstances in **1.** or **2.** a period of less than 5 weeks as in DMG 41413 **2.** might give a fairer result. Extending the period beyond the last 5 weeks would still include the distortions so in these circumstances estimate future hours as in DMG 41411.

41416 If the decision maker bases a weekly average of hours over a period of more or less than 5 weeks, as in DMG 41413 **2.**, the alternative period must still be a period immediately before the date of claim or the date the superseding decision is made. It should be either

**1.** more than the 5 week period in DMG 41413 **1.**, in which case it will include those 5 weeks **or**

**2.** less than the 5 week period in DMG 41413 **1.**, in which case it will be a part of those 5 weeks immediately before the date of claim or the date on which a superseding decision is made.

 **Example**

 Hazel’s partner Michael works for 6 months from January to June 2009 for an average of 24.5 hours a week. This comes to light in August 2009 and the decision maker supersedes on 1.8.09. From June 2009 Michael’s working pattern changes. He then worked on average for 6 hours a week up to 1.8.09. When recalculating average hours the decision maker uses a period immediately before 1.8.09. The decision maker averages over the period January 2009 to 31.7.09 to get the most accurate result. Michael is not engaged in remunerative work at any time during that period because average hours of work are less than 24 a week.

41417 The approaches outlined in DMG 41411 and DMG 41413 are alternatives. There is no provision for the decision maker to calculate an average of weekly hours over a past period of actual work and a future period of expected work.

Short-time workers

41418 Employers experiencing a fall in business may put their employees on short-time working. This can be

**1.** a reduction in hours worked each day **or**

**2.** no work on certain days of the week **or**

**3.** work restricted to certain weeks, for example week on, week off.

 Decision makers should follow the guidance in DMG 41411 - 41412 and estimate future hours1 at the start of short-time working until average hours over a past period can be calculated2. Periods of no work should be included in the average.

1 ESA Regs (NI), reg 42(2); reg 45(8)(a); R(IS) 8/95; 2 ESA Regs (NI), reg 42(2); reg 45(8)(a)

 41419 - 41425

Changes to the normal hours

41426 Once the normal hours of work have been established, a claimant’s partner may work different hours for a period falling outside the normal pattern of working. Where this happens the decision maker should determine whether the change

**1.** represents a new pattern of working hours (see DMG 41427) **or**

**2.** represents a short-term change in the normal pattern (see DMG 41428) **or**

**3.** means that the period over which average hours were calculated needs to be extended to include the period of change (see DMG 41429).

41427 If DMG 41426 **1.** applies the decision maker should re-calculate the hours of work and supersede the decision as necessary.

41428 If DMG 41426 **2.** applies the decision maker should identify the period in which abnormal hours are worked and supersede the decision based on the remunerative work for that period. In this way a claimant normally entitled to Employment and Support Allowance could be excluded under the remunerative work rules for a partner. Likewise, a claimant normally excluded could become entitled if temporary circumstances such as illness, adverse weather conditions or breakdown of equipment caused a reduction in a partner’s working hours.

41429 If DMG 41426 **3.** applies, for example where an ice-cream seller’s hours of work increase during a spell of hot weather and the decision maker decides that the previous calculation of average hours was based on an unrepresentative period, the decision maker should recalculate average hours over the

**1.** cycle of work if there is now a recognisable cycle1 **or**

**2.** 5 week period or other more suitable period immediately before the date of application for supersession2.

1 ESA Regs (NI), reg 42(2); reg 45(8)(b)(i); 2 reg 42(2); reg 45(8)(b)(ii)

Seasonal workers

41430 The normal remunerative work rules apply to self-employed seasonal workers.

Averaging the hours

41431 Decision makers should calculate average hours if there is

**1.** a recognisable cycle - over 1 complete cycle of work (this will usually be 1 year1) including periods in which the person does no work, but exclude other absences such as holidays or sickness2 **or**

**2.** no recognisable cycle - over the 5 week period, or other more suitable period, immediately before the date of claim, or the date a supersession decision is made3.

 Decision makers should include in the calculation time spent on all activities connected with the business.

1 R(JSA) 1/03; 2 ESA Regs (NI), reg 42(2); reg 45(8)(b)(i); 3 reg 42(2); reg 45(8)(b)(ii)

 **Example**

 Mary makes a claim for income-related Employment and Support Allowance for herself and her partner Ethan. For the last 5 years Ethan has been a self-employed seasonal worker as a travelling showman operating children’s rides. His on-season runs for 7 months June to December and for this period he worked 60 hours per week. He did no work in the off-season from January to May. He stated that he retained all of the equipment necessary for his work to recommence and that he would resume work the following June. The decision maker decides that Ethan had a cycle of 1 year and that the hours should be averaged over the whole cycle. The average hours worked were over 30 and the decision maker decided that Ethan was in remunerative work.

Agency and casual workers

41432 The normal remunerative work rules apply to claimant’s partners who find employment through agencies or are employed on a casual basis. Whether the employment is ongoing is relevant.

41433 Where the employment ends after each period of work, periods of unemployment should not be included in the calculation of average hours.

41434 Where employment is ongoing, periods when the claimant’s partner does no work should be included in the calculation of average hours.

 **Note :** See DMG Chapter 49 for guidance on when employment ends. If a claim is made after employment is terminated, the claimant’s partner will not be in remunerative work.

 41435 - 41440

Claimant’s partner treated as in remunerative work

Introduction

41441 For income-related Employment and Support Allowance claimants’ partners can be treated as in remunerative work even though they are absent from remunerative work. This rule does not apply where claimants’ partners are absent because they1

**1.** are ill **or**

**2.** are pregnant and have a right to return to work **or**

**3.** have given birth to a child and have a right to return to work **or**

**4.** are on paternity leave **or**

**5.** are on adoption leave.

1 ESA Regs (NI), reg 43(3)

41442 Decision makers should treat claimant’s partners as in remunerative work for any period during which they are

**1.** absent without good cause1 **or**

**2.** absent by reason of a recognised, customary or other holiday2 **or**

**3.** covered by earnings received from remunerative work3 unless those earnings are disregarded4 (see DMG Chapter 49).

1 ESA Regs (NI), reg 42(3); 2 reg 42(3); 3 reg 42(4); 4 reg 42(5) & Sch 7, para 1

Absence from work without good cause

41443 If a claimant’s partner is absent from remunerative work **without** good cause the remunerative work exclusion will still apply. It cannot apply where the work is not remunerative as in DMG 41316 et seq.

41444 If a claimant’s partner is absent from remunerative work **with** good cause the remunerative work exclusion will not apply.

Good cause

41445 "Good cause" is for the decision maker to determine. The onus is on claimants to show that their partners have good cause. Whether or not the employer has authorised the absence may be an indication of good cause but is not conclusive. Taking days off work for no apparent reason is not good cause.

41446 Examples of good cause include where the absence is due to

**1.** bereavement or sudden serious illness in the family **or**

**2.** a disaster at home **or**

**3.** suspension from work, whether or not on full pay **or**

**4.** a requirement to attend court.

 41447 - 41450

Recognised, customary or other holiday

41451 A claimant’s partner should be treated as in remunerative work for any period of absence because of a recognised, customary or other holiday1. This is the case even if there is no permanent contract of employment. However, this will not apply where the

**1.** absence is not a holiday (see DMG 41384) **or**

**2.** work is not remunerative as in DMG 41316 et seq **or**

**3.** claimant’s partner goes on holiday after employment ends.

 **Note 1:** See DMG 41452 where payments on termination or interruption of employment lead to the person being treated as in remunerative work.

 **Note 2:** See Appendix 3 to this Chapter for guidance on what is a recognised, customary or other holiday.

1 ESA Regs (NI), reg 42(3)

Payment to a claimant’s partner on termination or interruption of employment

41452 A claimant is excluded from income-related Employment and Support Allowance if their partner was, or was treated as being, engaged in remunerative work. The period of the exclusion is the period over which certain payments, paid on termination of that employment, fall to be taken into account1 (see DMG Chapter 48). Some payments are disregarded2 (see DMG Chapter 49).

1 ESA Regs (NI), reg 42(4); 2 reg 42(5) & Sch 7, para 1

 41453 - 41470

Claimant’s partner treated as not in remunerative work

Introduction

41471 In certain circumstances a claimant’s partner who is in remunerative work should be treated as not being in remunerative work1. These are where the claimant’s partner is

**1.** engaged in childminding in their home **or**

**2.** engaged by a charity or voluntary organisation or is a volunteer **or**

**3.** engaged on a training scheme for which a training allowance is paid **or**

**4.** receiving assistance under the self-employed route **or**

**5.** engaged in specific occupations (see DMG 41485) **or**

**6.** undertaking work as a councillor **or**

**7.** engaged as a foster parent or in providing respite care **or**

**8.** engaged in an activity which attracts a sports award.

 Where a claimant’s partner has an additional occupation the remunerative work rules apply in the normal way to the additional occupation.

1 ESA Regs (NI), reg 43(1)

41472 In addition, there are other circumstances where a claimant’s partner should be treated as not being in remunerative work, **regardless** of the type of work undertaken1. These are where the claimant’s partner is

**1.** disabled **or**

**2.** affected by a trade dispute **or**

**3.** caring for another person **or**

**4.** living in a residential care home, nursing home, an Abbeyfield home or an independent hospital.

**Note :** The provisions for people who satisfy **1.** or **4.** were revoked from and including 25.1.10. However, see Appendix 1 to this Chapter for guidance on savings provisions.

1 ESA Regs (NI), reg 43(2)

Childminders

41473 Claimant’s partners who are childminders are treated as not being in remunerative work as long as the childminding is done in their home1. If the childminding is done in the employer’s home the hours worked will count towards the remunerative work exclusion.

1 ESA Regs (NI), reg 43(1)(a)

Charity or voluntary workers and volunteers

41474 Claimants’ partners are treated as not being in remunerative work where they are engaged by a charity or voluntary organisation or are volunteers1 **and**

**1.** the only payment

**1.1** received **or**

**1.2** due to be paid

 is for expenses incurred **and**

**2.** they receive no remuneration or profit **and**

**3.** they are not treated as having notional earnings2 (see DMG Chapter 51).

1 ESA Regs (NI), reg 43(1)(b); 2 reg 104(2); Sch 8, para 2

Meaning of voluntary organisation

41475 A voluntary organisation is any association that carries out, or proposes to carry out, activities otherwise than for the purpose of gain by the association or by individual members of the association1.

1 ESA Regs (NI), reg 2(1)

Meaning of volunteer

41476 A volunteer is a person who is engaged in voluntary work other than for a relative and the only payment

**1.** received **or**

**2.** due to be paid

is expenses reasonably incurred in connection with the work1.

1 ESA Regs (NI), reg 43(4)

Meaning of relative

41477 A relative is a close relative, grand-parent, grand-child, uncle, aunt, nephew or niece1.

1 ESA Regs (NI), reg 2(1)

Meaning of close relative

41478 A close relative1 is

**1.** a parent, parent-in-law, son, son-in-law, daughter, daughter-in-law, step-parent, step-son, step-son-in-law, step-daughter, step-daughter-in-law, brother, brother-in-law, sister, sister-in-law **and**

**2.** similar relationships arising through civil partnership2.

1 ESA Regs (NI), reg 2(1); 2 CP Act 04, sec 246

41479 “Brother” and “sister” includes half-brother and half-sister. A child who is adopted becomes a child of the adoptive parents and the brother or sister of any other child of those parents. The adopted child stops being the child of, or the brother or sister of any children of, the natural parents. Whether an adopted person is a close relative or another person depends on the **legal relationship** not the blood relationship1.

1 R(SB) 22/87

Engaged on a training scheme

41480 Decision makers should treat claimant’s partners as not being in remunerative work where they are on a training scheme for which a training allowance (see DMG 41481 - 41482) is being paid1.

1 ESA Regs (NI), reg 43(1)(c)

Meaning of training allowance

41481 A training allowance is1 an allowance payable

**1.** out of public funds by

**1.1** a government department **or**

**1.2** on behalf of the Department for Employment and Learning

**2.** to people for

**2.1** their maintenance **or**

**2.2** a member of their family **and**

**3.** for the period, or part of the period, that they are taking part in a course of training or instruction

**3.1** provided by, or under arrangements made with, a government department **or**

**3.2** approved by that department in relation to the person **or**

**3.3** so provided or approved by or on behalf of the Department for Employment and Learning

 An example of a scheme which pays a training allowance is Training for Success.

 **Note :** An allowance paid directly or indirectly by the European Social Fund is paid out of public funds2. Decision makers will have to consider whether **2.** and **3.** are also satisfied.

1 ESA Regs (NI), reg 2(1); 2 R(IS) 10/98

41482 A training allowance does not include

**1.** an allowance paid by a government department to, or for a person who is

**1.1** following a course of full time education (unless that course is arranged under prescribed legislation1) **or**

**1.2** training to be a teacher2 **or**

**2.** an allowance paid by a Health and Social Services Board or a voluntary organisation3 **or**

**3.** an allowance paid directly or indirectly from the public funds of a foreign country4.

1 E&T (NI) Act 50, sec 1(1); 2 ESA Regs (NI), reg 2(1); 3 R(P) 13/56; 4 R(P) 5/56

People receiving assistance under the self-employment route

41483 Claimants’ partners are treated as not being in remunerative work where they are receiving assistance under the self-employment route1.

1 ESA Regs (NI), reg 43(1)(d)

Meaning of self-employment route

41484 Self-employment route means1 assistance in pursuing self-employed earner’s employment whilst participating in a programme provided or arrangements made under specified legislation2.

1 ESA Regs (NI), reg 2(1); 2 E&T Act (NI) 50, sec 1

Engaged in specific occupations

41485 Claimants partners are treated as not being in remunerative work where they are

**1.** part-time fire and rescue officers1

**2.** auxiliary coastguards for coastal rescue activities2 **or**

**3.** working part-time in the manning or launching of a lifeboat3 **or**

**4.** members of a territorial or reserve force4.

1 ESA Regs (NI), reg 43(1)(e)(i); Fire and Rescue Services (NI) Order 2006, art 3;
2 ESA Regs (NI), reg 43(1)(e)(ii); 3 reg 43(1)(e)(iii); 4 reg 43(1)(e)(iv)

Undertaking work as a councillor

41486 Claimants’ partners who undertake work as a councillor are treated as not being in remunerative work1.

1 ESA Regs (NI), reg 43(1)(f)

Meaning of work as a councillor

41487 Work as a councillor1 includes work as a member of a district council or any body of which a claimant’s partner is a member by reason of being a councillor2.

1 Local Government Act (NI) 72, sec 1(3); 2 ESA Regs (NI), reg 40(7)

41488 A councillor1 is a member of a district council.

1 ESA Regs (NI), reg 2(1)

41489 Guidance on the effect of a councillor’s allowances for income-related Employment and Support Allowance is in DMG Chapter 49.

 41490 - 41495

Foster parents and people providing respite care

Foster parents

41496 Claimants’ partners who receive payments from

**1.** a Health and Social Services Board **or**

**2.** a Health and Social Services trust **or**

**3.** a juvenile justice centre **or**

**4.** a voluntary organisation

 for fostering a child or young person are treated as not being in remunerative work1.

 **Note :** See DMG Chapter 51 for guidance on the income disregard of these payments.

1 ESA Regs (NI), reg 43(1)(g) & Sch 8, para 27

Providing respite care

41497 Claimants’ partners who provide respite care are treated as not being in remunerative work1 if

**1.** the person requiring care is being cared for in the claimant’s partner’s home **and**

**2.** the person requiring care is not normally a member of the claimant’s partner’s household **and**

**3.** the only payments received are specified payments2 from a

**3.1** Health and Social Services Board **or**

**3.2** Health and Social Services trust **or**

**3.3** juvenile justice centre **or**

**3.4** voluntary organisation **or**

**3.5** person concerned under specified legislation3.

 **Note :** See DMG Chapter 51 for guidance on the income disregard of these payments.

1 ESA Regs (NI), reg 43(1)(g); 2 Sch 8, para 28; 3 HPSS (NI) Order 1972, art 36(7)

Sports awards

41498 Claimants’ partners are treated as not being in remunerative work1 if

**1.** they are engaged in an activity for which a sports award has been or is to be made2 **and**

**2.** no other payment is made or expected to be made to them in respect of the activity3.

1 ESA Regs (NI), reg 43(1)(h); 2 reg 43(1)(h)(i); 3 reg 43(1)(h)(ii)

Meaning of sports award

41499 A sports award1 is an award made by one of the Sports Councils named in National Lottery law2 and out of sums allocated under that law.

1 ESA Regs (NI), reg 2(1); 2 National Lottery etc. Act 1993, sec 23(2)

 41500 - 41510

Disabled workers

41511 Claimants’ partners are treated as not being in remunerative work where they are mentally or physically disabled1 and as a result of that disability they

**1.** earn 75 per cent or less of what a person without that disability working the same number of hours would reasonably be expected to earn2 **or**

**2.** work 75 per cent or less of the hours that a person without that disability would reasonably be expected to do in the same work or in a similar job in the area3.

**Note :** These provisions were revoked from and including 25.1.10. However, see Appendix 1 to this Chapter for guidance on savings provisions.

1 ESA Regs (NI), reg 43(2)(a); 2 reg 43(2)(a)(i); 3 reg 43(2)(a)(ii)

41512 The claimants’ partner’s own evidence of reduced earnings or hours should normally be accepted. However, if necessary, decision makers should obtain further evidence for comparison purposes. This may include information from private employment agencies, social services departments or charities for the disabled.

Claimant’s partner affected by a trade dispute

41513 Where the claimant’s partner is involved in a trade dispute1, they are treated as not being in remunerative work unless payments in accordance with DMG 41452 are being taken into account2.

1 SS C&B (NI) Act 92, sec 125(1), 123(1) & 126(b); 2 ESA Regs (NI), reg 43(2)(b)

Caring for another person

41514 Claimant’s partners are treated as not being in remunerative work where they are1

**1.** regularly and substantially engaged in caring for another person and that person

**1.1** is in receipt of “Attendance Allowance” or the care component of Disability Living Allowance at the highest or middle rate2 **or**

**1.2** has claimed “Attendance Allowance” or Disability Living Allowance **or**

**1.3** has

**1.3.a** made an advance claim for **and**

**1.3.b** an award of **and**

**1.3.c** not completed the qualifying period for

“Attendance Allowance” or the care component of Disability Living Allowance at the highest or middle rate3 **or**

**1.4** has

**1.4.a** made an advance claim for **and**

**1.4.b** an award of **and**

**1.4.c** completed the qualifying period for

“Attendance Allowance” or the care component of Disability Living Allowance at the highest or middle rate and the award is in payment **or**

**2.** both entitled to and in receipt of Carer’s Allowance4 and caring for another person.

 **Note :** See DMG Chapter 20 for guidance on deciding whether or not a person is regularly and substantially caring.

1 ESA Regs (NI), reg 43(2)(c); IS (Gen) Regs (NI), Sch 1B, para 4; 2 SS C&B (NI) Act 92, sec 72(3);
3 sec 65(6)(a); SS (C&P) Regs (NI), reg 13A; 4 SS C&B (NI) Act 92, sec 70

41515 Where DMG 41514 **1.2** applies claimant’s partners are treated as not in remunerative work until the earlier of1

**1.** the date the claim for “Attendance Allowance” or Disability Living Allowance is decided **or**

**2.** 26 weeks from the date of claim for “Attendance Allowance” or Disability Living Allowance.

1 ESA Regs (NI), reg 43(2)(c); IS (Gen) Regs, Sch 1B, para 4(a)(ii) & (iii)

Claimant’s partner living in a residential care home, nursing home, Abbeyfield home or an independent hospital

41516 Claimants’ partners who

**1.** are in employment1 **and**

**2.** live in certain types of accommodation

 are treated as not being in remunerative work2.

**Note :** These provisions were revoked from and including 25.1.10. However, see Appendix 1 to this Chapter for guidance on savings provisions.

1 ESA Regs (NI), reg 43(2)(d)(i); 2 reg 43(2)(d)

41517 DMG 41516 applies only to a claimant’s partner who

**1.** lives in or is temporarily absent from

**1.1** a residential care home **or**

**1.2** a nursing home **or**

**1.3** an Abbeyfield home **or**

**1.4** an independent hospital1 **and**

**2.** requires personal care because of

**2.1** old age **or**

**2.2** disablement **or**

**2.3** past or present dependence on alcohol or drugs **or**

**2.4** past or present mental disorder **or**

**2.5** a terminal illness2.

 **Note :** See DMG Chapter 54 for guidance on the treatment of people in a residential care home, nursing home, Abbeyfield home or an independent hospital.

1 ESA Regs (NI), reg 43(2)(d)(ii); 2 reg 43(2)(d)(iii)

 41518 - 41550

Education

Introduction

Contribution-based Employment and Support Allowance

41551 Where a claimant is entitled to contribution-based Employment and Support Allowance, being in education has no effect on entitlement to benefit. But see DMG 41046 et seq for guidance on how education affects contribution-based Employment and Support Allowance for people claiming under the youth rules.

Income-related Employment and Support Allowance

 **[See DMG Memo Vol 1/102, 2/43, 3/90, 4/119, 5/95, 6/83, 8/53, 9/25, 10/58, 12/18, 13/56 & 14/53]**

41552 **[See DMG Memo Vol 4/135, 5/104, 6/89, 8/76, 9/33, 10/68, 12/21, 13/66 & 14/61]** Normally a person who is receiving education is not entitled to income-related Employment and Support Allowance1. However, the education condition does not apply to a claimant who is

**1.** in education **and**

**2.** entitled to2

 **2.1** Disability Living Allowance **or**

 **2.2** Armed Forces Independence Payment **or**

 **2.3** Personal Independence Payment.

 **Note :** See DMG 41046 et seq for guidance on how education affects contribution-based Employment and Support Allowance.

1 WR Act (NI) 07, Sch 1, Part 2, para 6(1)(g); 2 ESA Regs (NI), reg 18

Income

41553 The income of a person in education may be taken into account when deciding entitlement to income-related Employment and Support Allowance. See DMG Chapter 51 for full guidance.

 41554 - 41555

Definitions

Meaning of education

41556 For the purposes of income-related Employment and Support Allowance education is a course of study which is being undertaken at an educational establishment1.

1 ESA Regs (NI), reg 14(1)

41557 A person is regarded as undertaking a course of study1, and therefore in education, throughout the period beginning with the day the person starts the course and ending on

**1.** the last day of the course (see DMG 41631) **or**

**2.** such earlier date as the person

**2.1** abandons the course (see DMG 41633) **or**

**2.2** is dismissed from the course (see DMG 41646).

1 ESA Regs (NI), reg 17(1)(b)

41558 Also, a person undertaking a part of a modular course that would be a course of study for the purposes of DMG 41556, is regarded as undertaking a course of study1, and therefore in education, for the period beginning with the day that part of the course starts and ending on

**1.** the last day he is registered as attending or undertaking that part as a full-time course of study **or**

**2.** such earlier date as the student

**2.1** abandons the course **or**

**2.2** is dismissed from it.

1 ESA Regs (NI), reg 17(1)(a)

41559 The period in DMG 41558 includes any period1

**1.** that a person attends or undertakes the course to retake exams or a module where that person has failed

**1.1** examinations **or**

**1.2** to successfully complete a module relating to a period

 when attending or undertaking a part of the course as a course of study

**2.** of vacation falling within the period in **1.** or immediately following it except where the vacation immediately follows the last day of the final module of the course.

1 ESA Regs (NI), reg 17(2)

41560 Where DMG 41559 applies, a modular course means a course of study consisting of 2 or more modules and a person must complete a specified number of modules before they are considered to have completed the course1.

 **Note :** See DMG 41570 for further guidance on modular courses.

1 ESA Regs (NI), reg 17(3)

 41561 - 41565

Meaning of course of study

41566 A course of study1 means a full-time course of study whether or not a grant is made for attending or undertaking it or a sandwich course within the meaning of prescribed legislation2.

 **Note :** If a student attends more than 1 course the number of guided learning hours should be aggregated.

1 ESA Regs (NI), reg 14(2); 2 Support Regs (NI), reg 2(9);
Support Regs 08, reg 2(9); SL(Scot) Regs, reg 4(2)

 41567

Meaning of course

41568 A course is an arrangement of study, tuition or training. It can be academic, practical, or a combination of both. It is usually done at, or by arrangement with, an education or training establishment.

41569 It will often lead to a qualification when it is completed. Some non-advanced study, tuition, or training, may not lead to a qualification. This does not mean that it is not a course.

Modular courses

41570 Modular courses are arranged individually to meet students’ needs. Each module leads to a credit. When all the modules are successfully completed, a qualification is obtained. The course in such a case is the sequence of modules chosen.

 41571 - 41582

Meaning of sandwich course

41583 A sandwich course1 is a course, other than a course of initial teacher training, made up of alternative periods of full-time study in the educational establishment and work experience. The full-time study must be for an average of at least 18 weeks a year2.

 The average is worked out by dividing the total number of weeks attendance by the number of years in the course. For this purpose the course starts with the first period of full-time study and ends with the last period of full-time study.

1 ESA Regs (NI), reg 14(2)(b); 2 Support Regs (NI), reg 2(9); Support Regs, reg 2(9); SL(Scot) Regs, reg 4(2)

Work-related activity and education

41584 The guidance on course of study at DMG 41556 - 41583 does not apply where the claimant is required to attend a course of study as part of a requirement to undertake work-related activity1.

1 WR Act (NI), Sch 1, para 6(1)(g); ESA Regs (NI), reg 14(2A)

 41585 - 41590

Meaning of full-time

General

41591 The decision maker has to consider the meaning of full-time when deciding whether a person is in education.

 41592

41593 The term full-time applies to the course itself and not to a person's attendance on it1. It is the time spent by a notional reasonable student that is considered. A person who attends a full-time course on a part-time basis is still in education.

1 R(SB) 40/83; R(SB) 41/83

41594 Each case must be decided on its facts1. The decision maker must look at the sequence of studies and activities that make up the course itself. The nature of the course is not affected by2

**1.** a person's reasons for attending it **or**

**2.** a person's readiness to abandon it **or**

**3.** what a particular person happens to be doing.

1 R(SB) 40/83; R(SB) 41/83; 2 R(SB) 2/91

41595 In modular courses a sequence of studies is established once a person has decided which modules to take. This sequence can be distinguished from the work that the person is putting in at any given time.

41596 When deciding whether a course is full-time, decision makers should note that all of the studies and activities involved in it should be taken into account. This includes both supervised and unsupervised study and activity, whether done on or off college premises (see DMG 41611 et seq).

41597 Decision makers should not compare the total hours involved with what may be regarded as a full working week. One approach is to look at the total time the course might require of an average student. It may take up a substantial part of a week, after allowing for reasonable rest and recreation. The course might then be regarded as full-time.

Evidence from educational establishment

41598 The way educational establishments are funded may mean that they no longer classify courses as

**1.** full-time **or**

**2.** part-time.

41599 Educational establishments may still classify courses or may be able to give an opinion on their nature. Decision makers should accept evidence from the educational establishment as conclusive unless there is strong relevant evidence to the contrary1.

1 R(SB) 40/83; R(SB) 41/83

 41600

Other evidence

41601 If

**1.** educational establishments are unable or unwilling to say whether a course is full-time or part-time **or**

**2.** a classification is provided which is considered to be implausible or unreliable

 decision makers will then have to decide whether the course is full-time.

41602 The decision maker should then consider other evidence, including

**1.** the type of qualification aimed for

**2.** the number of hours a week normally required for successful completion of the course, including

**2.1** supervised study

**2.2** unsupervised study

**2.3** homework

**2.4** other work carried out on or off the college premises

**3.** the claimant's own hours of attendance and recommended hours of private study

**4.** the length of time normally required for successful completion of the course (for example 3 years)

**5.** how long the claimant will take to complete the course

**6.** how the course is funded

**7.** the course classification for other purposes, for example, grant or student loan awards

**8.** how the same course has been classified by the college in the past.

 **Note :** When considering **7.** the decision maker is not bound to investigate this point where the views of other authorities are not already known.

41603 If the claimant is taking longer than normal to complete the course, it is an indication that the course is part-time1.

1 R(SB) 41/83

41604 A course may be designed for people to attend as and when they can. With such a course the decision maker should consider what is actually happening. If the course is full-time it is of no consequence that the person could have attended it part-time.

41605 The course being taken may be new, or the nature of it may have changed. It may then be helpful to compare a similar course, that is full-time, with the claimant's

**1.** length of study **and**

**2.** eventual qualification.

41606 Decision makers should not give weight to the classification of the other course unless it is very similar to the claimant's course. Also, a classification given by the claimant's own college should normally be preferred to that given on similar courses by different colleges.

41607 A list of the more common courses and their qualifications is included at Appendix 4 to this Chapter. Decision makers should not rely on it as evidence of the nature of a particular course. It is provided for information only.

 41608 - 41610

Number of hours involved

41611 The decision maker must have regard to the hours involved. This includes both time spent

**1.** receiving instruction or being supervised **and**

**2.** in private study.

41612 The level of a course may affect the number of hours of attendance in supervised instruction or study. For example, a full-time advanced course may involve less attendance than a full-time non advanced course.

41613 In non advanced courses, hours of supervised instruction or study usually form a larger part of the course. Full-time advanced courses may involve only a few such hours. Do not consider that in isolation. Students may also have to put in many hours of private study.

 41614 - 41623

Meaning of educational establishment

41624 The term educational establishment is not defined and so must be given its ordinary everyday meaning. Schools, colleges and universities are clearly such places. But other less obvious places may also be included. For example, the training division of a large organisation specially set up for that purpose.

41625 A person is attending an educational establishment if they are receiving

**1.** training

**2.** instruction **or**

**3.** schooling

 in an organisation, or at an establishment, set up for any of those purposes.

 41626 - 41630

Meaning of last day of the course

41631 The last day of the course means1 the date of the last day of the final academic term for the course in question.

1 ESA Regs (NI), reg 2(1)

41632 A person may take their last exams before the last day of the final term. They may not then attend for the last few days of term. They are still in education until the last day of that academic term. In cases of doubt, decision makers should ask the educational establishment when the academic term officially ends.

Meaning of abandons

41633 The term abandons1 means total, final and permanent abandonment.

1 R(IS) 25/95

41634 Merely deciding to give up a course is not enough. The claimant must have actually taken enough steps to ensure that their connection with the course is permanently severed. In cases of doubt decision makers should ask for documentary evidence from the educational establishment.

41635 A person may change from a full-time to a part-time course at the same educational establishment. This can be an abandonment of the full-time course. However, the new course may be very similar to the old course.

 41636

41637 Decision makers should make sure that the course itself has changed and not simply the student's attendance on it. When considering whether one course has been abandoned in favour of another decision makers should compare

**1.** the course as it was at the time the student started on it **and**

**2.** the course as it is now.

41638 The decision maker should consider whether there has been any change in the

**1.** number of modules accessed or subjects taken

**2.** qualification being pursued

**3.** number of hours of tuition and study

**4.** length of the course

**5.** fees payable by the student.

41639 The decision maker should also take into account

**1.** whether the course could be attended full-time or part-time under the arrangements originally made with the college **and**

**2.** any information that may be gained from the college prospectus.

 41640 - 41645

Meaning of dismissed

41646 Dismissed means the total, final and permanent ending of a person's participation on a course by the educational authorities. In cases of doubt ask for documentary evidence from the educational establishment.

Temporary absences

41647 A person cannot temporarily abandon a course or be temporarily dismissed from it. They will remain in education if

**1.** they

**1.1** take a break from studies for whatever reason **or**

**1.2** have not gone on to the next year of the course because they failed their end of year exams **or**

**1.3** have either failed or not taken their final exams **and**

**2.** either

**2.1** they have a guaranteed place on the course at some time in the future **or**

**2.2** a place on the course at a future date is available to them

**2.2.a** if they undertake study at home or at the educational establishment **and**

**2.2.b** a fresh application under the normal enrolment procedures will not be required **and**

**2.2.c** the student has not refused to undertake the necessary study **or**

**2.3** they have remained continuously registered at the educational establishment **or**

**2.4** the educational establishment does not regard them as no longer being a student on the course **or**

**2.5** a final and definite decision on their status has not yet been made by the educational establishment.

41648 The fact that a grant may not cover such absences or extensions to the course is not relevant.

 **Example**

 Adrian is a University student in his final year. He failed his final exams in June. He intends to sit them in a year and is still enrolled at the University. He is still a full-time student through the summer vacation and until he has taken his exams in the following academic year.

41649 A person who has completed the last day of the final academic term may have to submit a thesis or complete course work. This may be required before a qualification can be obtained or enhanced. Such a person has passed the last day of the course. They are not in education during the period after the end of the course when they are expected to complete any course work.

 **Example**

Gemma completed her research working as a post graduate student in a laboratory at the University on 30 September 2008. She is completing a thesis for submission to the University for her PhD. Gemma does not need to attend the University to complete the thesis. She is also applying for jobs at the same time as completing the thesis. However, Gemma breaks both her legs badly and suffers other injuries in a road traffic accident and claims income-related Employment and Support Allowance. The decision maker decides that Gemma is no longer in education as she has completed her course of study. Gemma is entitled to income-related Employment and Support Allowance because she would complete the thesis on a part-time basis while recovering from her accident.

Re-enrolment

41650 A person who has completed a course of study may be going on to do further study. For example, a student with a degree may want to do a postgraduate course. Such a person is not a student in the meantime.

41651 A fresh period of study begins when the next course starts. The usual rules then apply to the new period of study.

 41652 - 41660

Claimant treated as receiving education

41661 Unless DMG 41552 applies, a qualifying young person is treated as receiving education1 and is therefore not entitled to income-related Employment and Support Allowance.

1 ESA Regs (NI), reg 15

Meaning of a qualifying young person

41662 Where any of the conditions at DMG 41663 to 41671 apply, a person is a qualifying young person and treated as in education. Where more than one of the conditions in DMG 41663 to 41671 apply, a person remains a qualifying young person until the last of them ceases to be satisfied1.

1 CHB (Gen) Regs, reg 2(2)

Education and training condition

41663 This condition applies to a person who

**1.** has not reached age 201 **and**

**2.** is undertaking a course of full-time education which is not advanced education or provided by virtue of employment or any office held but which is provided

**2.1** at a school or college2 **or**

**2.2** elsewhere but is approved by Her Majesty’s Revenue and Customs Commissioners and the full-time education was being received there when the person was a child3 **or**

**3.** is undertaking approved training that is not provided through a contract of employment4 **or**

**4.** having undertaken a course or approved training in **2.** has been accepted or is enrolled on a further course or approved training5.

 **Note :** For the purposes of **2.2** a child is a person under the age of 166.

1 CHB (Gen) Regs, reg 3(1); 2 reg 3(2)(a)(i); 3 reg 3(2)(a)(ii) & reg 3(3); 4 reg 3(2)(c);
5 reg 3(2)(b); 6 SS C&B (NI) Act 92, sec 138(1)

41664 A person aged 19 can only satisfy the conditions in DMG 41663 **2.** and **3.** if

**1.** the education or training began **or**

**2.** the person was accepted or enrolled on the education or training before they were 191.

1 CHB (Gen) Regs, reg 3(4)

16 year olds (15 year olds in Scotland)

41665 A 16 year old (in Scotland also a 15 year old) who has left education or training will still be a qualifying young person until the 31st August following their 16th birthday1.

1 CHB (Gen) Regs, reg 4

Extension period for 16 and 17 year olds

41666 The extension period1

**1.** begins on the first day of the week after that in which a 16 or 17 year old ceased to be in education or training **and**

**2.** ends 20 weeks later.

1 CHB (Gen) Regs, reg 5(3)

41667 The extension period applies to people aged 16 and 171

**1.** who have ceased to be in education or training **and**

**2.** who are registered for work, education or training with a qualifying body (see DMG 41668) **and**

**3.** who are not engaged in remunerative work **and**

**4.** whose extension period has not expired **and**

**5.** where the person who is responsible for the 16 or 17 year old

**5.1** was entitled to Child Benefit for them immediately before the extension period began **and**

**5.2** has made a written request to Her Majesty’s Revenue and Customs Commissioners within 3 months of the education or training ceasing for the payment of Child Benefit during the extension period

 and so are still a qualifying young person by virtue of being in the Child Benefit extension period.

 **Note :** Whilst a person is under age 18, Child Benefit can be extended every time the conditions are satisfied.

1 CHB (Gen) Regs, reg 5(2)

41668 For the purposes of DMG 41667 **2.** a qualifying body1 is

**1.** the Careers Service or Connexions Service

**2.** the Ministry of Defence

**3.** in Northern Ireland

**3.1** the Department for Employment and Learning **or**

**3.2** an Education and Library Board established under prescribed legislation2

**4.** any body corresponding to **1.** - **3.** in another European Union State3.

1 CHB (Gen) Regs, reg 5(4); 2 Education and Libraries (Northern Ireland) Order 1986, art 3;
3 Council Regulation (EEC) No. 1408/71

Interruptions

41669 Up to the age of 201, where

**1.** a person’s education or training has been interrupted **and**

**2.** immediately before it was interrupted a person was a qualifying young person under the conditions in DMG 41663 to 41667

 that person will remain a qualifying young person for the duration of the interruption2.

1 CHB (Gen) Regs, reg 6(1); 2 reg 6(2)

41670 Unless DMG 41671 applies, the condition in DMG 41669 will only apply where the period of interruption is

**1.** one of up to 6 months duration, even if it began before the person was 16, but only to the extent that it is considered to be reasonable in the opinion of Her Majesty’s Revenue and Customs Commissioners **and**

**2.** due to illness or disability and for a period that is considered reasonable in the opinion of Her Majesty’s Revenue and Customs Commissioners1.

1 CHB (Gen) Regs, reg 6(3)

41671 Where the period of interruption is or is likely to be immediately followed by a period during which the person

**1.** has provision made to undertake non approved training **or**

**2.** is receiving advanced education **or**

**3.** is receiving education by virtue of his employment or any office held

 they will not satisfy the condition in DMG 416701.

1 CHB (Gen) Regs, reg 6(4)

Reasonable cause

41672 Examples of reasonable cause for interruption include

**1.** individual holidays, other than official holidays, during term-time

**2.** temporary closure of the educational establishment during term-time

**3.** authorised absence following contact with an infectious disease

**4.** illness or disability (mental or physical)

**5.** absence due to illness or death in the family

**6.** disruption of normal transport with no reasonable alternative available

**7.** change of educational establishment

**8.** authorised absences to follow a course of study elsewhere, for example

**8.1** to study at home for an examination **or**

**8.2** a field course **or**

**8.3** an educational cruise.

School holidays

41673 Treat school holidays as a period of interruption due to a reasonable cause if the person intends to return after the holidays. If there is no intention to return see DMG 41706 et seq.

 41674 - 41675

Education received abroad

41676 Education received abroad should be treated in the same way as if it had been received in Northern Ireland. This is important when considering whether a person who has recently arrived in Northern Ireland is affected by the terminal date provisions.

Young person held in custody

41677 Any young person under the statutory school leaving age who is held in custody in a

**1.** remand centre **or**

**2.** detention centre **or**

**3.** youth custody centre

 will normally be in full-time education.

Cases of doubt

41678 If there is any doubt about whether a person is to be treated as receiving education the decision maker should

**1.** immediately ask the decision maker (Child Benefit Office) for an opinion **and**

**2.** deal with the claim on the assumption that the opinion of the decision maker (Child Benefit Office) will be adverse to the claimant1 **and**

**3.** when the decision maker (Child Benefit Office) opinion is received, revise the decision at **2.** if the person is not to be treated as receiving education.

1 SS & CS (D&A) Regs (NI), reg 13

Cases of doubt about recognised establishment or education

41679 In cases of doubt, the question of the recognition of

**1.** a particular establishment **or**

**2.** the education received by the claimant

 should be referred to the Education and Library Board, who will make a determination on behalf of the Department. The decision maker is bound by the opinion of the Education and Library Board on recognition of an establishment or the education.

 41680 - 41685

Hours of attendance

41686 Full-time is education undertaken in pursuit of a course which exceeds 12 hours a week. In calculating the hours of attendance, decision makers should only count time spent on

**1.** receiving tuition **and**

**2.** practical work **and**

**3.** supervised study **and**

**4.** taking examinations.

 Meal breaks or any time spent on unsupervised study should not be included1.

1 CHB (Gen) Regs, reg 1(3)

Evening courses

41687 Decision makers should include time spent on evening courses if it is a course of non-advanced education.

 **Example**

 Lynn is 17 years old. She is studying for 3 A levels. She studies for 2 of them at school during the day and for the third one at an evening class in the local college. The decision maker calculates the total hours of attendance at both school and college.

Hours of study in education elsewhere

41688 Where there are special reasons and study is done elsewhere, the method of study might be quite different from that at an educational establishment. For this reason, the 12 hour requirement in DMG 41686 is not binding but may be used as a guide in deciding if the education is full-time. Count all time spent on

**1.** all activities mentioned in DMG 41686 **and**

**2.** unsupervised study.

 If the hours in **1.** and **2.** do not exceed 12 a week, the person should not be treated as receiving education. The decision maker must consider all other cases on their merit.

 41689 - 41700

School leavers

Introduction

41701 A person who has completed full-time non-advanced education may be treated as still in education for Employment and Support Allowance until the next terminal date. The terminal date is defined in DMG 41707 and depends on the school leaving date. Decision makers may find the flow chart on the following page helpful.

School leaving dates

41702 Pupils can leave school at, but not before

**1.** 30 June in any year if their 16th birthday falls between 1 September of the previous year and 1 July of that year inclusive **or**

**2.** 30 June of the following year if their birthday falls between 2 July and 31 August (inclusive)

1 Education and Libraries (NI) Order 1986, art 46; Education Reform (NI) Order 1989, art 156

Person under 16

41703 A person who is under the age of 16 at the

**1.** date full-time non-advanced education ends **and**

**2.** terminal date next following the date in **1.**

 will not be entitled to income-related Employment and Support Allowance until the 16th birthday1 and then only if the conditions in DMG 41012 and 41091 are satisfied.

1 CHB (Gen) Regs, reg 7(2) Case 1

 41704 - 41705

School leavers aged 16-18

Education received before leaving school exceeds 12 hours a week of supervised study

Is the claimant entitled to leave school see DMG 41702

Yes

No

Does the claimant intend to continue non-advanced education elsewhere

Exclude from income-related Employment and Support Allowance for the period up to the terminal date on which the claimant is legally entitled to leave school

Yes

No

Consider whether it is a period of interruption as in DMG 41669

Was the claimant entered for external examinations as in DMG 41716

Yes

No

Exclude from income-related Employment and Support Allowance for the period up to and including the last day for which Child Benefit is payable following the terminal date after the last exam

Exclude from income-related Employment and Support Allowance for the period up to and including the last day for which Child Benefit is payable.

Terminal dates

41706 A person continues to be treated as a qualifying young person and entitled to Child Benefit where they have left relevant education or approved training up to and including

**1.** the week including the terminal date **or**

**2.** if they attain the age of 20 on or before that date, the week including the last Monday before they were 201.

1 CHB (Gen) Regs, reg 7(2), Case 1.1

41707 For the purposes of DMG 41706 the terminal dates are

**1.** the last day in February

**2.** the last day in May

**3.** the last day in August

**4.** the last day in November

 whichever occurs first after they have ceased education or approved training1.

1 CHB (Gen) Regs, reg 7(2), Case 1.2

 41708

Leaving school

41709 Leaving school is not necessarily the same as ceasing education. Education can cease when the hours of attendance reduce to 12 hours a week or less (see DMG 41686). In this case the date of leaving school is irrelevant.

41710 See DMG 41669 if a school leaver intends to resume education at the same or another educational establishment.

When entitlement to income-related Employment and Support Allowance begins

41711 Entitlement to income-related Employment and Support Allowance begins on the Monday following the terminal date. From the Monday following the terminal date the person is no longer a qualifying young person for Child Benefit purposes1 and ceases to be treated as a member of the parent's family.

1 CHB (Gen) Regs, reg 7(2) Case 1

 41712 - 41715

External examinations

41716 Where a person has ceased to receive education and

**1.** was entered for external examinations before education ceased **and**

**2.** was still entered for those examinations when education ceased **and**

**3.** the examinations are in connection with the education received

 treat them as a qualifying young person up to the first terminal date, as described in DMG 41707 and 41708, after the last examination1.

1 CHB (Gen) Regs, reg 7(2), Case 2

Period up to the terminal date

41717 In the period up to the terminal date young people are not entitled to income-related Employment and Support Allowance because they are treated as

**1.** a child for Child Benefit purposes1 **and**

**2.** receiving education2

 unless they come within the exception3 in DMG 41552.

1 CHB (Gen) Regs, reg 7(1); 2 ESA Regs (NI), reg 15; 3 reg 18

Person starts work or training

41718 Child Benefit ceases when a young person starts work or training but the terminal date still applies. If work or training ends before the terminal date is reached Child Benefit can be reinstated on application.

Age 20

41719 A person who reaches 20

**1.** whilst still receiving full-time non-advanced education **or**

**2.** before reaching the terminal date

 is no longer treated as receiving relevant education but may be in education for the purposes of DMG 41556 et seq.

 41720 - 41730

Claimant not treated as receiving education

41731 A person who is under age 19 but not a qualifying young person (see DMG 41662) is not treated as receiving education where the course of study (see DMG 41566 - 41567) is not1

**1.** a course leading to a

**1.1** postgraduate degree or comparable qualification **or**

**1.2** first degree or comparable qualification **or**

**1.3** diploma of higher education **or**

**1.4** higher national diploma **or**

**2.** any other course which is a standard above

**2.1** advanced General National Vocational Qualification or equivalent **or**

**2.2** General Certificate of Education (A level) **or**

**2.3** Scottish National qualification (higher or advanced higher).

1 ESA Regs (NI), reg 16

 41732 - 41799

Duration of contribution-based Employment and Support Allowance

Introduction

41800 From 28.11.16 entitlement to contribution-based Employment and Support Allowance for claimants who are not in the support group will be limited to a period of no more than 365 days1. This includes awards of contribution-based Employment and Support Allowance made under

 **1.** the youth conditions **and**

 **2.** the Incapacity Benefit reassessment rules2.

 See DMG Chapter 45 for guidance on duration of contribution-based Employment and Support Allowance awards under the Incapacity Benefit reassessment rules.

1 WR Act (NI), sec 1A; 2 Sch 4, para 7(2)(f); ESA (TP, HB & CTB) (EA) (No.2) Regs (NI), Sch 2, para 1(a)

Further awards of contribution-based Employment and Support Allowance

41801 There are special provisions allowing claimants to become entitled to a further award of contribution-based Employment and Support Allowance after a previous award has ended due to time limiting where

 **1.** they satisfy the contribution conditions **and**

 **2.** in relation to the second condition, at least one of the relevant income tax years is later than those used for the previous period of entitlement.

See DMG 41847 for further details.

1 WR (NI) Order 15, Art 57(1); WR Act (NI) 07, sec 1A(3)

41802 Awards made under the youth conditions are not based on tax years. Any further claim after entitlement is terminated because of time limiting must be based on the normal conditions of entitlement (but see DMG 41803 where the claimant’s health condition deteriorates).

41803 A further provision also allows claimants whose contribution-based Employment and Support Allowance has ceased as a result of time limiting to qualify for a further award of contribution-based Employment and Support Allowance where their health condition deteriorates to the extent that they have, or are treated as having limited capability for work-related activity, provided certain conditions are satisfied1. See DMG 41856 - 41870 for further details.

1 WR Act (NI) 07, sec 1B

 41804 - 41809

Period of entitlement

Contribution conditions satisfied

41810 Entitlement to an award of contribution-based Employment and Support Allowance where

 **1.** the first and second contribution conditions are satisfied1 (see DMG 41021 - 41039) **and**

 **2.** entitlement is based on the same two tax years

cannot exceed the relevant maximum number of days2.

 **Note :** See DMG 41820 - 41823 for days which do not count towards the maximum number of days.

1 WR Act (NI) 07, sec 1(2)(a) & Sch 1, part 1 - 2; 2 WR (NI) Order 15, Art 57(1); WR Act (NI) 07, sec 1A

Relevant maximum number of days

41811 The relevant maximum number of days is1

 **1.** 365 **or**

 **2.** a greater number of days where specified by order of the Department.

At present no order has been made, and the maximum number of days is therefore 365.

1 WR Act (NI) 07, sec 1A(2)

 41812 - 41814

Youth conditions satisfied

41815 Entitlement to an award of contribution-based Employment and Support Allowance where

 **1.** the youth conditions are satisfied **and**

 **2.** the claim was made before 17.2.16

cannot exceed 365 days1. See DMG 41046 - 41083 for guidance on the youth conditions.

 **Note :** See DMG 41820 - 41823 for days which do not count towards the maximum number of days.

1 WR Act (NI) 07, sec 1A(4)

 41816 - 41819

Which days are not included

Claimant has, or is treated as having, limited capability for work-related activity

41820 When calculating the period of entitlement for the purposes of DMG 41810 or 41815, days where the claimant is

 **1.** a member of the support group1 **or**

 **2.** not a member of the support group, but is entitled to the support component2 **or**

 **3.** in the assessment phase3, when this is immediately followed by a determination that the claimant is a member of the support group and entitled to the support component

 are **not** included4.

 **Note :** See DMG 41875 - 41878 for guidance on where the claimant’s health condition improves.

1 WR Act (NI) 07, sec 24(4); 2 sec 24(4); 3 sec 24(2); 4 sec 1A(5)

41821 A claimant is a member of the support group from the date the determination is made that they have, or are treated as having, limited capability for work-related activity1. This determination may be made before or after the effective date of entitlement to the support component.

 **Example**

 Miranda has been entitled to contribution-based Employment and Support Allowance at the assessment phase rate since 15.2.16. On 6.6.16, after application of the work capability assessment, the decision maker determines that Miranda has limited capability for work and limited capability for work-related activity. Miranda is a member of the support group from 6.6.16. The decision maker then supersedes the decision awarding contribution-based Employment and Support Allowance and awards the support component from 16.5.16, the 14th week of entitlement. None of the days when Miranda is entitled to contribution-based Employment and Support Allowance count towards the relevant maximum number of days. Miranda continues to be entitled to contribution-based Employment and Support Allowance for as long as she has limited capability for work and limited capability for work-related activity. If her health improves to such an extent that she is later found to have limited capability for work but no longer has limited capability for work-related activity, the 365 day count would begin from the date of that determination.

Waiting days

41822 A claimant is not entitled to Employment and Support Allowance for the first seven days of a period of limited capability for work1, known as waiting days (see DMG 41101). Waiting days are therefore not included in the period of entitlement at DMG 41810 or 41815.

1 WR Act (NI) 07, Sch 2, para 2; ESA Regs (NI), reg 144(1)

Days of disqualification

41823 DMG 53112 gives guidance on treating the claimant as not having limited capability for work if they are disqualified for receiving contribution-based Employment and Support Allowance during a period of imprisonment of more than six weeks1. These days are not days of entitlement to contribution-based Employment and Support Allowance, and are therefore not included in the period of entitlement at DMG 41810 or 41815.

1 ESA Regs (NI), reg 159(1)

 41824 - 41829

Which days are included

41830 When calculating the period of entitlement for the purposes of DMG 41810 or 41815, **all** days of entitlement, both before and after 28.11.16, **except** those in DMG 41820 - 41823, are included in the count1. This also includes days where the claimant is entitled to contribution-based Employment and Support Allowance paid at the assessment phase rate pending an appeal against a disallowance following application of the work capability assessment (see DMG 42450 et seq).

 **Note :** From 3.4.17 the work-related activity component is no longer included in an award of Employment and Support Allowance for claims made on or after that date. See DMG Chapter 44 for further details, including where transitional provisions apply.

1 WR Act (NI) 07, sec 1A(6)

 **Example 1**

 John has been entitled to contribution-based Employment and Support Allowance since 17.1.11. As at 27.11.16, this exceeds 365 days. He is not a member of the support group. John’s entitlement to contribution-based Employment and Support Allowance is terminated from and including 28.11.16. He remains entitled to National Insurance credits for as long as he would have limited capability for work if he had remained entitled to contribution-based Employment and Support Allowance.

 **Example 2**

 Sally has been entitled to contribution-based Employment and Support Allowance at the assessment phase rate since 11.12.15. She is not entitled to income-related Employment and Support Allowance. On 12.8.16 after application of the work capability assessment the decision maker determines that Sally does not have limited capability for work, and terminates her entitlement to contribution-based Employment and Support Allowance from the same date. Sally appeals to the Appeal Tribunal, and is awarded contribution-based Employment and Support Allowance at the assessment phase rate from 12.8.16 pending determination of the appeal. As none of these days is excluded from the 365 day period, her last day of entitlement is 9.12.16, the 365th day, if the appeal is still outstanding at that time.

 If the Appeal Tribunal subsequently allows Sally’s appeal, but finds that she does not have limited capability for work-related activity. Sally is entitled to arrears of the work-related activity component from the 14th week of entitlement for the period 18.3.16 - 9.12.16 only. The decision terminating contribution-based Employment and Support Allowance from 9.12.16 stands.

 If the Appeal Tribunal allows the appeal, and finds that Sally has limited capability for work-related activity, the decision terminating contribution-based Employment and Support Allowance from 12.8.16 should be revised to reinstate entitlement, and arrears of the support component paid as normal. As Sally is in the support group her contribution-based Employment and Support Allowance is not time limited for as long as she has limited capability for work and limited capability for work-related activity. None of the days from 11.12.15 count towards the 365 day time limit.

41831 The period of 365 days includes all days of entitlement, including previous periods of entitlement, which are based on the same two tax years1. This may be where the 12 week linking provisions apply2, or where two awards for claims made in the same relevant benefit year. See DMG 41111 for guidance on linking periods of limited capability for work.

1 WR Act (NI) 07, sec 1A(1); 2 ESA Regs (NI), reg 145(1)

 **Example**

 Roberto was entitled to contribution-based Employment and Support Allowance from 20.8.16. He was found to have limited capability for work, but was not placed in the support group, so was awarded the work-related activity component. He returned to work on 5.12.16, and his award of Employment and Support Allowance was terminated from that date. On 8.1.17 Roberto makes a repeat claim for contribution-based Employment and Support Allowance. The periods of limited capability for work link, and he is awarded contribution-based Employment and Support Allowance including the work-related activity component from 8.1.17. Roberto’s entitlement to contribution-based Employment and Support Allowance will end on 20.9.17, the combined 365th day of entitlement, unless he is found to have limited capability for work-related activity before that date.

41832 Decision makers should note that the number of days of entitlement includes days where contribution-based Employment and Support Allowance is not payable, but entitlement continues. This includes days where Employment and Support Allowance is not payable

 **1.** for periods of disqualification, for example for imprisonment (see DMG 53071 et seq) **or**

 **2.** because the overlapping rules apply (see DMG Chapter 17) **or**

 **3.** because it is reduced to nil through pension payments or councillor’s allowances (see DMG 44561 et seq).

 **Note :** See DMG 41823 where days of disqualification due to imprisonment exceed six weeks.

 **Example**

 Kylie has been entitled to contribution-based Employment and Support Allowance since 10.12.16. She is not a member of the support group. On 20.4.17 she is sentenced to a period of imprisonment, and the decision maker decides that Kylie is disqualified from receiving contribution-based Employment and Support Allowance which is therefore not payable. Kylie is released on 19.12.17. Her entitlement to contribution-based Employment and Support Allowance terminates on 9.12.17, even though on that day it is not payable.

 41833 - 41839

Claimant also entitled to income-related Employment and Support Allowance

41840 Where the contribution-based Employment and Support Allowance claimant

 **1.** is also entitled to income-related Employment and Support Allowance1 **or**

 **2.** would be entitled to income-related Employment and Support Allowance but for the rules about amounts payable2 (see DMG 44049) **or**

 **3.** would be entitled to income-related Employment and Support Allowance once entitlement to contribution-based Employment and Support Allowance terminates

 the decision maker may need to reassess entitlement from the date that contribution-based Employment and Support Allowance terminates. This includes pending appeal awards and converted awards of contribution-based Employment and Support Allowance.

1 WR Act (NI) 07, sec 6(5); 2 sec 6(4)

 **Example 1**

 Mervyn is entitled to contribution-based Employment and Support Allowance and income-related Employment and Support Allowance, including the work-related activity component, for himself and his partner Keira. His entitlement to contribution-based Employment and Support Allowance ends on 16.1.17 as it reaches 365 days. Mervyn and Keira have no other income. As the overall amount of Employment and Support Allowance Mervyn is entitled does not change once contribution-based Employment and Support Allowance ends, the decision maker does not supersede the decision awarding Employment and Support Allowance.

 **Example 2**

 Aisha is entitled to contribution-based Employment and Support Allowance including the work-related activity component. Her underlying entitlement to income-related Employment and Support Allowance is less than the amount of contribution-based Employment and Support Allowance awarded. Aisha’s entitlement to contribution-based Employment and Support Allowance ends on 27.11.16 as she has been entitled since 2.3.15, which is more than 365 days as at 28.11.16. She has an occupational pension of £55 a week which is disregarded for the purposes of contribution-based Employment and Support Allowance as it is below the £85 threshold. She has no other income, and there have been no changes since the award of contribution-based Employment and Support Allowance began. When her contribution-based Employment and Support Allowance terminates, the decision maker supersedes the last awarding decision to award income-related Employment and Support Allowance, taking the occupational pension into account as income.

Credits

41841 A person whose entitlement to contribution-based has been terminated after 365 days remains entitled to National Insurance credits for any day which would have been a day of limited capability for work if the Employment and Support Allowance award had not been terminated1.

1 SS (Credits) Regs (NI), reg 8B(2)(a)(iva)

 41842 - 41844

Repeat claim for contribution-based Employment and Support Allowance

Introduction

41845 Where

 **1.** an award of contribution-based Employment and Support Allowance has terminated as in DMG 41810 or 41815 **and**

 **2.** a further claim for contribution-based Employment and Support Allowance is made

the decision maker should firstly consider whether the guidance on establishing a further 365 days entitlement based on a later tax year in DMG 41847 applies. If not, the decision maker should next consider whether the guidance on deterioration in the claimant’s health condition in DMG 41856 - 41870 applies.

41846 If neither of those circumstances apply, the claimant cannot be entitled to contribution-based Employment and Support Allowance. The decision maker should consider whether the claimant is entitled to income-related Employment and Support Allowance as normal.

Claim based on a later tax year

41847 A further claim for contribution-based Employment and Support Allowance where the claimant has already been entitled for 365 days on the basis of the contribution conditions can succeed if

 **1.** the claimant satisfies the first and second contribution conditions (but see DMG 41032 for guidance on relaxation of the first contribution condition) **and**

 **2.** in relation to the second contribution condition, at least one tax year is later than the second of the two years on which the previous entitlement was based1.

 **Note :** See DMG 41875 - 41878 where an award is made and the claimant’s condition improves.

1 WR Act (NI) 07, sec 1A(3)

 **Example 1**

 Nicholas has been entitled to contribution-based Employment and Support Allowance since February 2015. He is not a member of the support group. His entitlement was based on 52 paid contributions for the tax year 2013/2014 in relation to the first condition, and a combination of paid contributions and National Insurance credits for unemployment for the tax years 2012/2013 and 2013/2014 in relation to the second condition. Nicholas’s last day of entitlement to contribution-based Employment and Support Allowance is 27.11.16. He is not entitled to income-related Employment and Support Allowance, as his partner is in full-time remunerative work. He remains entitled to National Insurance credits on the basis that, if he had remained entitled to contribution-based Employment and Support Allowance, he would have limited capability for work.

 Nicholas makes a further claim for contribution-based Employment and Support Allowance on 26.2.17. There has been a break of more than 12 weeks in the periods of limited capability for work for benefit purposes so the contribution conditions can be considered afresh in the later benefit year. He satisfies the first condition with paid contributions for the tax year 2015/2016. In relation to the second contribution condition, the tax years are 2014/2015 and 2015/2016. As one of these years is later than the years on which his previous period of entitlement was based, Nicholas is entitled to a further 365 days of contribution-based Employment and Support Allowance as long as he continues to satisfy the conditions of entitlement.

 **Example 2**

 Zelda has been entitled to contribution-based Employment and Support Allowance since she took ill-health retirement in October 2009, based on the tax years 2006/2007 and 2007/2008. She is not a member of the support group, and has a partner in full-time remunerative work. Her last day of entitlement is 27.11.16. Zelda finds work on 12.12.16, but gives this up when her condition deteriorates in March 2018. She makes a further claim from 10.3.18 and the decision maker determines that the tax years are 2015/2016 and 2016/2017. Zelda satisfies the first and second conditions, and the tax years are later than her previous award of contribution-based Employment and Support Allowance.

 On application of the work capability assessment, the decision maker determines that Zelda has limited capability for work and limited capability for work-related activity. Zelda is entitled to contribution-based Employment and Support Allowance, with the support component payable from week 14. None of the days when Zelda is entitled to contribution-based Employment and Support Allowance count towards the relevant maximum number of days. Zelda continues to be entitled to contribution-based Employment and Support Allowance for as long as she has limited capability for work and limited capability for work-related activity. If her health improves to such an extent that she is later found to have limited capability for work but not limited capability for work-related activity, the 365 day count would begin from the date of that determination.

 41848 - 41849

Employment and Support Allowance in youth

41850 Where an award of contribution-based Employment and Support Allowance based on the claimant satisfying the youth conditions terminates

 **1.** as in DMG 41815 **or**

 **2.** for any other reason

 any further claim must be based on the normal conditions of entitlement. The claimant cannot benefit from the youth conditions again, even if the periods of limited capability for work link. But see DMG 41856 - 41870 where the claimant’s health condition deteriorates.

 **Example 1**

 Fran has been entitled to contribution-based Employment and Support Allowance since January 2014 as a result of an accident while she was a student. Her entitlement was based on the youth conditions, and she is not a member of the support group. She continues studying on a part-time basis. Her entitlement terminates on 27.11.16. Fran is not entitled to income-related Employment and Support Allowance due to excess capital. She remains entitled to National Insurance credits. On 25.6.17, after finishing her part-time studies, Fran makes a further claim for Employment and Support Allowance. She has never worked, and the decision maker determines that she does not satisfy the contribution conditions. Fran can only be entitled to Employment and Support Allowance if she satisfies the conditions for income-related Employment and Support Allowance.

 **Example 2**

 Dipesh has been entitled to contribution-based Employment and Support Allowance since March 2009 when he reached age 16. He has limited capability for work, but is not a member of the support group. His entitlement terminates on 27.11.16. He has capital of £20,000, and is not entitled to income-related Employment and Support Allowance. He remains entitled to National Insurance credits. Dipesh finds work from 6.1.17, and is treated as not having limited capability for work for the purposes of National Insurance credits. On 13.1.19 he makes a further claim for contribution-based Employment and Support Allowance after his health deteriorates, and is found to have limited capability for work but not limited capability for work-related activity. Dipesh is entitled to contribution-based Employment and Support Allowance for a further 365 days because he now satisfies the relevant contribution conditions for the tax years 2016/17 and 2017/18. The award will continue for as long as he continues to have or to be treated as having limited capability for work until the 365 day time limit is reached. If during this time he becomes a member of the support group the 365 day count would stop.

 **Example 3**

 Jasmine’s award of contribution-based Employment and Support Allowance based on the youth conditions began on 23.1.12. She is not entitled to income-related Employment and Support Allowance as she has savings which exceed the capital limit. The award is terminated from 14.5.12 when she starts full-time work. Jasmine makes a further claim for Employment and Support Allowance on 6.8.16 after the job contract comes to an end. She provides evidence of limited capability for work. Her claim cannot be considered under the contribution-based Employment and Support Allowance youth as it was made after 16.2.16, and she has not worked for long enough to satisfy the contribution conditions. Jasmine’s claim can only succeed if she satisfies the conditions of entitlement to income-related Employment and Support Allowance.

 41851 - 41854

Change in claimant’s health condition -
contribution-based Employment and
Support Allowance awards

41855 During the period of an award, the claimant’s health condition may deteriorate or improve to the extent that the decision maker determines that they

 **1.** have, or are treated as having limited capability for work-related activity **or**

 **2.** no longer have, or are treated as having limited capability for work-related activity.

These changes can occur more than once throughout the period of entitlement.

Health condition deteriorates

41856 Where the claimant’s health condition deteriorates, this can affect further entitlement to contribution-based Employment and Support Allowance. The action to take depends on whether an award of contribution-based Employment and Support Allowance has already terminated before it is determined that the claimant has, or is treated as having limited capability for work-related activity. Decision makers are reminded that they should always firstly consider whether a claim could succeed because one of the tax years for the second contribution condition is later than those on which the earlier award was based, before consideration is given to a further award solely based on deterioration in their health.

 **Example**

 Amy’s entitlement to contribution-based Employment and Support Allowance began on 22.9.15, and ended on 27.11.16, as her entitlement exceeded 365 days and she was not in the support group. Entitlement was based on tax years 2012/2013 and 2013/2014. She is not entitled to income-related Employment and Support Allowance as she has excess income from an occupational pension, but entitlement to National Insurance credits continues. On 6.1.17 she makes a further claim for contribution-based Employment and Support Allowance stating that her condition has deteriorated since her previous entitlement ended. The relevant tax years are 2014/2015 and 2015/2016, and Amy satisfies both the first and second contribution conditions, with a later tax year for the second contribution condition. The decision maker awards contribution-based Employment and Support Allowance at the assessment phase rate from 13.1.17.

 Following application of the work capability assessment, the decision maker determines that Amy has limited capability for work and limited capability for work-related activity. The award is superseded to award the support component from week 14. The deterioration rule does not apply.

 41857 - 41859

Application made during current award

41860 A claimant who is already entitled to contribution-based Employment and Support Allowance on the basis that they have limited capability for work may apply for supersession on the basis that they consider they have limited capability for work-related activity. If, following application of the work capability assessment, the decision maker determines that the claimant has, or is treated as having, limited capability for work-related activity, the decision that the claimant has, or is treated as having, limited capability for work should be superseded1 as normal to award the support component. See DMG Chapter 04 for guidance on the effective date rule.

 **Note :** From 3.4.17 the work-related activity component is no longer included in an award of Employment and Support Allowance for claims made on or after that date. See DMG Chapter 44 for further details, including where transitional provisions apply.

1 SS&CS (D&A) Regs (NI), reg 6(2)(r) & 7(39)

41861 The award of contribution-based Employment and Support Allowance may have terminated as in DMG 41810 or 41815 before the determination of limited capability for work-related activity has been made. In this case the decision maker should revise1 the decision ending entitlement to contribution-based Employment and Support Allowance, and supersede the previous decision awarding contribution-based Employment and Support Allowance as in DMG 41860.

1 SS&CS (D&A) Regs (NI), reg 3(51)

Application made after award has terminated

41862 Where

 **1.** entitlement to contribution-based Employment and Support Allowance, including under the youth provisions, has been terminated as in DMG 41810 or 41815 because it exceeded 365 days **and**

 **2.** the claimant

 **2.1** reports a deterioration in their health condition **or**

 **2.2** makes a further claim for contribution-based Employment and Support Allowance **and**

 **3.** the claimant had, or is treated as having had, limited capability for work since the previous entitlement ended **and**

 **4.** the claimant satisfies the basic conditions of entitlement (see DMG 41012) **and**

 **5.** the decision maker determines that the claimant has, or is treated as having, limited capability for work-related activity

the claimant is entitled to an award of contribution-based Employment and Support Allowance, even though they do not satisfy the contribution conditions1. The award is regarded as an award of contribution-based Employment and Support Allowance for all other purposes, for example amounts payable2.

1 WR Act (NI) 07, sec 1B(1); sec 1B(2)

 **Example**

 Bogdan’s award of contribution-based Employment and Support Allowance ended on 27.11.16 as it exceeded 365 days. Entitlement was based on tax years 2008/2009 and 2009/2010. He is not entitled to income-related Employment and Support Allowance as he has a partner in full-time remunerative work. He remains entitled to National Insurance credits. Bogdan makes a further claim to contribution-based Employment and Support Allowance from 10.1.17 on the grounds that his condition has deteriorated. As the periods of limited capability for work link, the tax years on which entitlement could be based do not change. The claim cannot be decided until the decision maker determines whether or not Bogdan has, or is treated as having, limited capability for work-related activity. Following application of the work capability assessment, the decision maker determines that Bogdan has limited capability for work-related activity. He is entitled to contribution-based Employment and Support Allowance and the support component from 10.1.17. He does not have to serve waiting days or the assessment phase.

41863 Where the claimant reports a change in their condition other than by making a claim, the decision maker should consider whether the contact satisfies the conditions for claiming Employment and Support Allowance1 (see DMG 02153 et seq).

1 SS (C&P) Regs (NI), reg 4G & 4

 41864

Deterioration identified on routine work capability assessment

41865 The guidance at DMG 41862 also applies where the decision maker determines that the claimant has, or is treated as having, limited capability for work-related activity after application of the work capability assessment where the claimant is entitled to National Insurance credits.

 **Example**

 Mina’s entitlement to contribution-based Employment and Support Allowance began on 18.11.08 and terminated on 27.11.16 as it exceeded 365 days. She is not a member of the support group, and remains entitled to National Insurance credits on the basis that she would have limited capability for work if her entitlement to contribution-based Employment and Support had not ended due to time limiting. She is not entitled to income-related Employment and Support Allowance as she has a partner who is entitled to income-based Jobseeker’s Allowance for her. On 18.1.17, following a routine work capability assessment, the decision maker determines that Mina has limited capability for work and limited capability for work-related activity, and invites her to make a further claim for Employment and Support Allowance. Mina’s claim for contribution-based Employment and Support Allowance, stating she wishes to claim from 10.1.17, is received on 14.2.17. The decision maker determines that she does not satisfy the contribution conditions, but is entitled under the deterioration rule. Mina is awarded contribution-based Employment and Support Allowance including the support component from 10.1.17.

 41866 - 41869

Date award begins

41870 Where an award is made as in DMG 41862 - 41865, the claimant does not have to serve waiting days before entitlement begins1. The support component is payable from the first day of entitlement2. See DMG 41875 - 41878 where an award is made and the claimant’s condition then improves.

 **Note :** This does not apply if the claimant is entitled to contribution-based Employment and Support Allowance on the basis of a later tax year as in DMG 41847. See DMG 41877 for further details.

1 ESA Regs (NI), reg 144(2)(e); 2 7(1)(d)

 41871 - 41874

Health condition improves

41875 Claimants who

 **1.** are awarded contribution-based Employment and Support Allowance **and**

 **2.** are not subject to time limiting for all or part of their award because they are a member of the support group

can receive a total of 365 days of contribution-based Employment and Support Allowance if, on a further application of the work capability assessment, they are found to have limited capability for work but no longer have limited capability for work-related activity.

 **Note :** From 3.4.17 the work-related activity component is no longer included in an award of Employment and Support Allowance for claims made on or after that date. See DMG Chapter 44 for further details, including where transitional provisions apply.

 **Example**

 Lily has been entitled to contribution-based Employment and Support Allowance including the support component since 20.4.11. Following a routine work capability assessment, the decision maker determines that Lily has limited capability for work but no longer has limited capability for work-related activity. The award of contribution-based Employment and Support Allowance is superseded to award the work-related activity component instead of the support component from 2.1.17. As long as Lily continues to have limited capability for work, her entitlement to contribution-based Employment and Support Allowance will terminate on 1.1.18 unless she is subsequently found to have limited capability for work-related activity again.

41876 Where entitlement to contribution-based Employment and Support Allowance is based on the same tax years, and the claimant’s health condition changes, the claimant can only be entitled for a maximum of 365 days during the period of the award, excluding days as in DMG 41820 - 41823.

 **Example**

 Liam’s entitlement to contribution-based Employment and Support Allowance began on 9.12.16. On 20.1.17 the decision maker determines that Liam has limited capability for work but does not have limited capability for work-related activity. Liam is awarded the work-related activity component from 10.3.17.

 Following an accident, Liam reports a change in his health condition on 9.8.17. After a further application of the work capability assessment, the decision maker determines that Liam has limited capability for work-related activity. The support component is paid from 9.8.17.

 Liam’s condition improves following surgery. On 10.1.18 the decision maker determines that Liam no longer has limited capability for work-related activity. Taking into account the 243 days already paid before 8.8.17, Liam’s last day of entitlement to contribution-based Employment and Support Allowance will be 11.5.18.

41877 Claimants who are awarded contribution-based Employment and Support Allowance because

 **1.** they satisfy the conditions in DMG 41847 (entitlement based on later tax year) **and**

 **2.** their award includes the support component

can receive a further 365 days contribution-based Employment and Support Allowance if, on a further application of the work capability assessment, they are found to have limited capability for work but no longer have limited capability for work-related activity.

 **Example**

 Jessica’s award of contribution-based Employment and Support Allowance including the work-related activity component began on 22.9.15, and terminated on 27.11.16 as her entitlement exceeded 365 days. She makes a further claim to contribution-based Employment and Support Allowance on 24.2.17, and the decision maker determines that she satisfies the contribution conditions based on different tax years. She is awarded contribution-based Employment and Support Allowance at the assessment phase rate pending the work capability assessment. On application of the work capability assessment, Jessica is found to have limited capability for work-related activity. She is awarded the support component from week 14. None of the days count towards the relevant maximum number of days, as the assessment phase is immediately followed by payment of the support component.

 On 14.11.17 after a further routine work capability assessment, the decision maker determines that Jessica has limited capability for work but no longer has limited capability for work-related activity. As long as Jessica continues to have limited capability for work but not limited capability for work-related activity, all days of entitlement from and including 14.11.17 count towards the 365 days maximum.

41878 Where the claimant becomes entitled to an award of contribution-based Employment and Support Allowance as in DMG 41862 - 41865 and their condition improves to the extent that they no longer have, or are treated as having, limited capability for work-related activity, entitlement to contribution-based Employment and Support Allowance terminates from the date of the decision makers decision. The claimant is not entitled to a further 365 days of contribution-based Employment and Support Allowance even though they may still have limited capability for work. This is because they no longer satisfy the condition at DMG 41862 **5.** i.e. that they have or are treated as having limited capability for work-related activity1.

1 WR Act (NI) 07, sec 1B(1)(c)

 **Example**

 Marvin’s award of contribution-based Employment and Support Allowance ended on 27.11.16 as his entitlement exceeded 365 days. He is not entitled to income-related Employment and Support Allowance, as his partner is entitled to Income Support for him. He remains entitled to National Insurance credits on the grounds that he would have limited capability for work had he remained entitled to contribution-based Employment and Support Allowance. On 13.6.17 he makes a further claim to contribution-based Employment and Support Allowance. He does not satisfy the contribution conditions. The decision maker determines that Marvin has limited capability for work-related activity and awards contribution-based Employment and Support Allowance including the support component from 13.6.17 under the deterioration rule.

 Following a routine work capability assessment, the decision maker determines that Marvin has limited capability for work, but no longer has limited capability for work-related activity. The award of contribution-based Employment and Support Allowance is terminated from the date of the decision. Entitlement to National Insurance credits continues as long as Marvin would have limited capability for work if his contribution-based Employment and Support Allowance entitlement had not ended.

 41879 - 41899

Appeal against time limit decision

41900 Claimants have a right of appeal against a decision terminating contribution-based Employment and Support Allowance, including converted awards, after 365 days, and are entitled to argue on such an appeal that the award should be extended on the grounds that, on the effective date of that decision, they had limited capability for work-related activity.

41901 The decision maker is not required to make a further determination about limited capability for work-related activity when making a decision terminating contribution-based Employment and Support Allowance after 365 days. They can rely on any previous determination made that the claimant does not have limited capability for work-related activity.

 **Note :** See DMG 41855 et seq for guidance where the claimant states that their condition has deteriorated since the previous determination was made.

41902 The Appeal Tribunal is at liberty to consider whether the claimant has limited capability for work-related activity when hearing an appeal against the decision to terminate contribution-based Employment and Support Allowance, even if the issue is not raised by the appeal, provided that the decision maker is given the opportunity to consider any further evidence.

41903 The decision maker can apply for an appeal against a decision to terminate contribution-based Employment and Support Allowance to be struck out where there is no dispute about the calculation of the 365 days, and no arguments are made about whether the claimant is a member of the support group. See DMG Chapter 06 for guidance about strike out.

 **Example 1**

 Bradley is awarded contribution-based Employment and Support Allowance from 12.6.14, and following application of the work capability assessment on 14.1.15 the decision maker determines that Bradley has limited capability for work but not limited capability for work-related activity. Bradley is placed in the work-related activity group from 11.9.14. Bradley is notified on 11.6.15 that his entitlement to contribution-based Employment and Support Allowance is to terminate from 12.6.15 as he has received Employment and Support Allowance for 365 days. Bradley applies for reconsideration of the decision of 11.6.15, on the grounds that he should be in the support group. The decision maker refuses to revise, as the evidence provided does not show a change in Bradley’s health condition since the previous limited capability for work-related activity determination was made, or indicate that it was incorrect.

 **Example 2**

 Miranda is awarded contribution-based Employment and Support Allowance from 13.8.14. Following application of the work capability assessment, on 11.12.14 the decision maker determines that Miranda has limited capability for work but not limited capability for work-related activity, and places her in the work-related activity group from 12.11.14. On 12.8.15 Miranda is notified that her entitlement to contribution-based Employment and Support Allowance terminates from 13.8.15 as she has now received this for 365 days. Miranda applies for reconsideration of the decision of 12.8.15, on the grounds that she should be in the support group. Medical Services advises that the evidence shows a change in Miranda’s health condition, and she is referred for the work capability assessment. The decision maker determines that Miranda now has limited capability for work-related activity. The supersession decision terminating entitlement is revised, and Miranda is entitled to the support component from 13.8.15, the date from which the original decision took effect.

 41904 - 41999

Appendix 1

 **Savings provisions - disabled workers and people living in a residential care home, Abbeyfield home or an independent hospital**

 **Introduction**

1 From and including 25.1.10, amending legislation1 removed the provisions allowing claimant’s partners who are

 **1.** disabled workers **or**

 **2.** living in

 **2.1** a residential care home **or**

 **2.2** an Abbeyfield home **or**

 **2.3** an independent hospital

 to be treated as not in remunerative work for income-related Employment and Support Allowance purposes. However, the legislation revoking these provisions also contained savings provisions and this Appendix gives guidance on when those savings provisions should be applied.

1 SS (Misc Amdts) Regs (NI) 2010

 **Background**

2 From and including 25.1.10, claimants’ partners who are

 **1.** disabled workers **or**

 **2.** living in

 **2.1** a residential care home **or**

 **2.2** an Abbeyfield home **or**

 **2.3** an independent hospital

 are removed from the list of those who are treated as not in remunerative work for income-related Employment and Support Allowance purposes.

1 SS (Misc Amdts) Regs (NI) 2010, reg 4(1)

 **Savings provisions**

3 Where paragraph 2 applies to an income-related Employment and Support Allowance claimant’s partner for a period including 24.1.10, they shall continue to be treated as not in remunerative work until

 **1.** they first cease to fall within paragraph 2 **or**

 **2.** the claimant ceases to be entitled to income-related Employment and Support Allowance

 whichever date is the earlier1.

1 SS (Misc Amdts) Regs (NI) 2010, reg 4(3) & (6)

Appendix 2

Lower earnings limit

|  |  |  |
| --- | --- | --- |
| **From** | **To** | **Amount (£)**  |
| 6.4.89 | 5.4.90 | 43 |
| 6.4.90 | 5.4.91 | 46 |
| 6.4.91 | 5.4.92 | 52 |
| 6.4.92 | 5.4.93 | 54 |
| 6.4.93 | 5.4.94 | 56 |
| 6.4.94 | 5.4.95 | 57 |
| 6.4.95 | 5.4.96 | 58 |
| 6.4.96 | 5.4.97 | 61 |
| 6.4.97 | 5.4.98 | 62 |
| 6.4.98 | 5.4.99 | 64 |
| 6.4.99 | 5.4.00 | 66 |
| 6.4.00 | 5.4.01 | 67 |
| 6.4.01 | 5.4.02 | 72 |
| 6.4.02 | 5.4.03 | 75 |
| 6.4.03 | 5.4.04 | 77 |
| 6.4.04 | 5.4.05 | 79 |
| 6.4.05 | 5.4.06 | 82 |
| 6.4.06 | 5.4.07 | 84 |
| 6.4.07 | 5.4.08 | 87 |
| 6.4.08 | 5.4.09 | 90 |
| 6.4.09 | 5.4.10 | 95 |
| 6.4.10 | 5.4.11 | 97 |
| 6.4.11 | 5.4.12 | 102 |

Appendix 3

Recognised customary or other holiday

Recognised or customary holiday

1 Recognised or customary holidays1 are days which employers and employees have agreed shall be non working days. They become a normal and recurring event in the employment and are an implied term of a contract of service. They can only be changed by further agreement2. This does not mean that every agreed non working day is a recognised or customary holiday3. There may be other reasons for employees not having to work.

1 R(SB) 7/84; 2 R(U) 11/53; 3 R(U) 8/64; R(SB) 7/84

2 Agreements about recognised or customary holidays may be express or implied. They can be changed or replaced by further agreement. This may be either permanently or for once only1. There may be more than one agreement involved. For example, an express agreement may provide for certain holidays. An implied agreement may then provide for extra holidays.

1 R(U) 3/53

Express agreement

3 An express agreement can be written or oral. It may cover all details or may leave some to be settled for each holiday, for example, the precise dates of the holiday.

Implied agreement

4 If there is no express agreement for the days being considered, consider whether there is an implied agreement. An implied agreement is where the employer and employees have come to recognise and accept the days as being days of holiday.

Period of observance

5 A day may have been observed as a non working holiday for many years. The effect is that there is an implied agreement that it is a day of recognised or customary holiday. That inference stands unless there is evidence to disprove it. The period of observance may also be short. For example, a holiday may be of very recent origin. Even so, the recognition of it as a holiday may be proved. A long period of observance makes it easier to establish that a day has been recognised. But it does not in itself create a recognised or customary holiday1.

1 R(SB) 7/84 (App)

 **Example 1**

 A factory closes for 2 weeks in August. The 1st week is a holiday with pay covered by express agreement. The 2nd week is not. The factory has been doing this for the past 5 years.

 The 2nd week is recognised as a holiday by the employer and employees. There is no evidence to the contrary. The employees are on recognised or customary holiday for the full 2 weeks. They are still in employment for that period.

 **Example 2**

 A mill closes for Easter Monday and Tuesday. These are paid holidays by express agreement. It also closes on Good Friday, but this is not covered by the agreement and is not paid. This has happened for the past 5 years.

 Employees who have to work on holidays get paid time and a half. Those working on Good Friday only get ordinary time. There is no pressure for pay at the rate for working on a holiday. Good Friday is not a holiday in the district generally. It is not a day of recognised or customary holiday.

 **Example 3**

 A pottery is closed on Easter Monday, which is a paid holiday by express agreement. It is also closed on Good Friday and Saturday. These are not covered by the agreement and are not paid. The pottery has closed on these days for the past 30 years.

 It is the practice for the employees to ask for these days off each year. This request has always been granted by the employer.

 Good Friday and Saturday are days of recognised or customary holiday.

 **Example 4**

 Rhona works for 4 hours each evening, Monday to Friday. For several years her employer has closed down at 5pm on the Friday before the August Bank Holiday. Rhona is on a recognised or customary holiday on that day.

 **Example 5**

 Ivor’s standard working week is Monday to Friday, with some liability to work on Saturday. He has not worked on a Saturday for 18 months but other employees have.

 It has been the custom and practice for many years to close the factory on the Saturday of the week before the annual summer holidays. That Saturday is a recognised day of holiday.

Practise within the establishment concerned

6 There may be an agreement or practise observed at the claimant’s place of employment. The decision maker should always take this into account when determining whether there is a holiday.

7 As well as considering a claimant’s own position, consider the arrangements for the

**1.** establishment as a whole **and**

**2.** various departments and grades of workers involved.

8 A day may be said to be a general holiday. But a lot of employees may carry on their ordinary work at ordinary pay. Such a day cannot be a general holiday. It could be that employees take their holidays at different times. This may be as individuals or in groups. It may be under a rota system or by individual arrangement. A holiday taken in these circumstances is a recognised or customary holiday for the employees concerned.

9 Employees who are not working may not be on holiday. For example, they may have been laid off due to shortage of work. Other employees may have to work, even during a general holiday, for example, maintenance and repair workers. This does not stop it being a day of recognised or customary holiday for those who are not working. Those employees who have to work may get extra pay, or time off in lieu, for working. The effect is that the day is a holiday for those not working. But there may be another reason for the extra pay. For example, it may be payment for doing different work or for doing extra work.

10 There may be no extra pay. That does not necessarily mean that the day is not a recognised or customary holiday. But it is important if the employees are normally entitled to extra pay for work during holidays. Without evidence to the contrary, the inference would be that the day is not a holiday1.

1 R(U) 11/53; R(SB) 7/84 (App)

Comparison with practise at other establishments

11 There may be no agreement or practise observed at the claimant’s place of employment. Or there could be some doubt about the position. It may then be helpful to consider the practise in other firms in the district. It might also be helpful to consider the practise within the same industry. The practise might be more definite at other firms. That practise can then be regarded as a sign of what might be expected at the claimant’s place of employment. If there is little or no evidence about where the claimant works the question may have to be decided by looking at what happens elsewhere.

 **Example 1**

 A factory closes for 2 weeks in August. The 1st week is a holiday with pay covered by an agreement. The 2nd week is not. The 2nd week is recognised as a holiday by the employer and employees.

 The practise is the same elsewhere in the industry but the position is no more definite. The practise elsewhere is of no help in this case.

 **Example 2**

 A mill closes for Easter Monday and Tuesday. These are paid holidays by express agreement. It also closes on Good Friday, but this is not covered by the agreement and is not paid.

 Good Friday is not a holiday in the district generally. That is a sign that Good Friday is not a day of recognised or customary holiday.

Dissension among employees

12 All employees may take the same period of holiday, determined by agreement between the employer and the majority of the employees. Any revision of such an agreement must also be between the employer and the majority of the employees. A minority of the employees cannot make such an agreement or alter it. They are bound by the terms of any agreement made by the majority1. This applies even if days of holiday agreed by the majority are not wanted by an employee.

1 R(U) 3/53

13 An agreement, or reviewed agreement, may be made between the employer and the employees representatives. For example, between the employer and a trade union. The representatives are assumed to have the backing of the majority of the employees. A recognised or customary holiday may be waived by an agreement between the employer and employees. They may agree that some days are to be worked and not taken as holidays.

14. If the majority of the employees still take the holiday the agreement to work is ineffective. The days stay days of recognised or customary holiday for

**1.** those who want the holiday **and**

**2.** those who want to work but do not because the other employees are away.

Holiday during closure

15 A day of recognised or customary holiday may fall when no work would be available because of short time working1. Such days are still days of holiday.

1 R(U) 12/54; R(U) 16/54; R(U) 2/64

16 Employees are on holiday where a period of shortage of work is part of a holiday1

**1.** arranged **or**

**2.** extended **or**

**3.** altered

 by agreement between the employer and employees.

1 R(U) 3/53

17 Employers may lay employees off or extend an existing holiday for economic reasons. They may refer to the period of lay off or extension as being a holiday. There is no express or implied agreement by which the days are days of recognised or customary holiday1. But they may be regarded as other holidays.

1 R(U) 11/53; R(SB) 7/84

18 The practice may be continued for a number of years. The days might then become days of recognised or customary holiday. This could be as a result of an express agreement to that effect. It could also be by implied agreement based on the actions of those involved1.

1 R(U) 11/53; R(SB) 7/84

Dates of holiday

19 The exact dates of a holiday may be in doubt. If so consider the terms of the express or implied agreement covering it.

20 An agreement may refer to a public or religious holiday whose date changes from year to year, for example Easter or the August bank holiday. Such a reference usually recognises that these holidays will fall on different dates in different years.

21 The Boxing Day bank holiday is the first week day after Christmas Day. It may fall on 26 December or, when Christmas Day is a Saturday, on 27 December. An agreement may say that the holiday is 25 and 26 December, rather than Christmas Day and the bank holiday. When Boxing Day falls on 27 December it is not a holiday under such an agreement.

22 A public or religious holiday may fall at a weekend or other non working day. Another day may then be substituted as the day of holiday. In such a case the substituted day is the day of holiday. The original day is not a day of holiday1 (except where it becomes a holiday by implied agreement).

1 R(U) 16/55

23 A substitution can only be made by agreement between employer and employees. It may be covered by a standing agreement or agreed as and when necessary. The employer cannot substitute one day for another without agreement.

24 An agreement about annual holidays may

**1.** state the dates of the holiday **or**

**2.** authorise the employer alone to decide the dates each year **or**

**3.** allow for the dates to be decided each year by negotiation and agreement.

25 No matter how the dates are fixed, they can be changed later by further agreement1.

1 R(U) 3/53

Shift workers

26 Shift workers may be off work for different lengths of time when their employer closes for holidays. Even so, they are on holiday for the whole of the holiday period1.

1 R(U) 20/52

 **Example**

 A holiday in a steel works lasts from Monday evening until Thursday morning. Day shift workers are on holiday for 2 shifts, Tuesday and Wednesday. Night shift workers are on holiday for 3 shifts, Monday, Tuesday and Wednesday nights.

 The night shift is from 10pm to 6am. A night shift worker starts work again at 10pm on Thursday. He is on holiday on Tuesday, Wednesday and Thursday.

Claimant with 2 employments

27 A day of recognised or customary holiday must be in connection with the claimant’s employment as a whole. A claimant may sometimes have 2 jobs. Benefit may then be claimed for a day which is a holiday in only one job. The decision maker should

**1.** take account of both employments **and**

**2.** consider whether either job represents a substantial part of the claimant’s whole employment.

28 If the job without the holiday represents a substantial part, the claimant is not on holiday. This is so even though the day is a holiday in the other employment. If one employment is not a substantial part of the whole, there may be a day of recognised or customary holiday in the other1.

1 R(U) 7/63

Seeking other employment during holiday

29 A person may be free to look for other work during holidays. This does not prevent the days in question being days of recognised or customary holiday1.

1 R(U) 2/51

Other holidays

30 The term other holiday is not defined. So it has to be given its ordinary everyday meaning. The word holiday is also not defined. But for many years it has been used and considered in the term recognised or customary holiday. It has gained a specific meaning by doing so.

31 The specific meaning is a day which is a non working day by agreement between employers and workers. Such a day is a holiday no matter what use workers make of it. How they actually spend the time they have at their disposal is not normally relevant. An exception is where the employee is absent from work with good cause. See DMG 41443 et seq for guidance on absence with good cause.

32 A holiday can include a person’s individual holidays as well as time off as annual leave. It may be with pay or without pay. Other holidays are often without pay.

 **Example 1**

 Heidi works at a factory that closes for Easter Monday and Tuesday. These are paid holidays by express agreement and are recognised or customary holidays. Good Friday is not a holiday in the district generally. The factory does not close on Good Friday. Employees working on Good Friday are paid at ordinary time.

 Heidi has problems arranging a childminder for Good Friday. She asks her employer if she can take it as a day off. The employer agrees but says that it will be without pay. Good Friday is an “other” holiday for Heidi.

 **Example 2**

 Arnold works at a pottery that closes for 2 weeks in July every year. Both weeks are holidays with pay covered by an express agreement. They are both recognised or customary holidays.

 At the end of the first week, the management and workforce agree that for economic reasons, the holiday should be extended to 3 weeks. The 3rd week is without pay and is an “other” holiday for Arnold.

 **Example 3**

 Stephen works at a firm of accountants. He has taken all his holiday entitlement and will not be due to any more until the New Year. In early December, Stephen wins an all expenses paid 2 week holiday, which must be taken before the end of the year. His employer agrees to let him have time off, without pay, to take the holiday. The time he is allowed off is an “other” holiday for Stephen.

Appendix 4

Common courses of study

BTECs

BTEC First Certificates and Diplomas

 This is normally a 1 year programme and is considered equivalent to several GCSEs - the Certificate is usually studied part-time and the Diploma full-time.

BTEC National Certificates and Diplomas

 This is normally a 2 year course and is considered equivalent to 2 or 3 A levels - the Certificate is usually studied part-time and the Diploma full-time.

BTEC Higher National Certificates and Diplomas

 This is normally a 2 year course and is considered equivalent to a degree - the Certificate is usually studied part-time and the Diploma full-time.

GNVQs and NVQs

 These are work-related qualifications introduced in 1993. They are gradually replacing existing BTEC qualifications in selected subjects. BTEC Firsts will be replaced by BTEC Intermediate, GNVQs and BTEC Nationals by BTEC Advanced GNVQs. NVQs/SVQs relate to existing qualifications as shown below

 SVQ/NVQ level 2 = Intermediate GNVQ, BTEC and GCSEs

 SVQ/NVQ level 3 = Advanced GNVQ, BTEC Nationals and A levels

SVQ/NVQ level 4 = BTEC Higher Nationals and Degrees.

Appendix 5

National Minimum Wage rates

 **Date Hourly rate**

1.10.10 £5.93

 1.10.11 £6.08

 1.10.12 £6.19

 1.10.13 £6.31

 1.10.14 £6.50

 1.10.15 £6.70

 1.4.16 £7.20

 1.4.17 £7.50

 1.4.18 £7.83

 1.4.19 £8.21