

IDENTIFYING EMPLOYMENT/SELF-EMPLOYMENT FOR THE DETERMINATION OF COMPETENCY FOR CASH SICKNESS BENEFITS

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INTRODUCTION

1. The purpose of this memo is to provide guidance on the Upper Tribunal case of *JS v Secretary of State for Work and Pensions* and how decision makers should view work (both employed and self-employed) carried out by a claimant, when considering which Member State is competent for the payment of cash sickness benefits.

BACKGROUND

2. Where a claimant, coming into the United Kingdom from another Member State, makes a claim to a United Kingdom cash sickness benefit the decision maker must determine whether the United Kingdom or the previous Member State of residence is competent to pay that benefit. If the claimant was in receipt of a contributory benefit, or exporting a cash sickness benefit, it would be said that that Member State remains competent, or, if the Member State is not competent, remains responsible for continuing payment of an existing entitlement that is protected by Article 7 of Regulation (EC) No. 883/2004. However, if the claimant commences “gainful” work in the United Kingdom, competency switches. Prior to *JS*, Secretary for State for Work and Pensions only counted the work carried out by a claimant as “gainful” if they were liable to pay National Insurance contributions on that work (whether employed or self-employed). This was known as the “National Insurance Contributions test”.

JS V SECRETARY OF STATE FOR WORK AND PENSIONS

3. The claimant was in receipt of a Polish pension, but was also working as a self-employed cleaner, earning £50 per week. The Secretary of State for Work and Pensions determined that, for competency purposes, the claimant was not 'gainfully self-employed' as the low level of her earnings did not make her liable to pay National Insurance contributions. This meant that the pension she was receiving from Poland made Poland competent for the payment of Carer's Allowance.
4. At the Upper Tribunal, Judge Jacobs decided that although her earnings were below the threshold for National Insurance contributions, she was actively pursuing an activity as a self-employed person because she was working regularly, and was typical of someone who carried out a small amount of work to supplement the family income. Therefore, he decided that the United Kingdom was the competent state for payment of Carer's Allowance to the claimant. He went on to say that this was "*but one of numerous variations that may arise for decision in self-employed cases*", "*outcomes for other types of cases will depend on their individual circumstances*", and "*will have to be decided upon as and when they arise*".

APPLICATION

5. Decision makers should no longer be making enquiries to establish whether someone is liable for National Insurance contributions when deciding if the United Kingdom is competent for their cash sickness benefit; the National Insurance contributions 'test' should not be used. Instead decision makers should ask the claimant to provide 'evidence' which will then be used to determine if the claimant is pursuing an activity as an employed or self-employed person.
6. Evidence to determine whether someone is self-employed/employed include:
 1. invoices
 2. confirmation from the eNirs system
 3. receipts
 4. wage slips
 5. contract of employment
 6. evidence of advertising
 7. they have a website
 8. they can provide a business case
 9. registered as self-employed

10. contract to undertake work.

Note: This also applies to those claimants who may be self-employed, but may not have received a payment yet.

7. Decision makers may also need to consider if the claimant's employment has been temporarily interrupted by ill health, their work is seasonal or erratic, they are living off past earnings from an activity, like an author. If the claimant satisfies the above criteria they then still have to satisfy the usual benefit entitlement, in order to receive the benefit.
8. The points above are non-exhaustive and the outcome will depend on individual circumstances. It may be that in some cases the answer may be found by applying the requirement of European Union law that the claimant must be pursuing the activity. Where the decision maker is unsure on whether the claimant is carrying out employed or self-employed activities, they should refer the case to Decision Making Services for guidance.

Example 1

Jan is in receipt of a Polish pension. He puts in a claim for Personal Independence Payment Daily Living. Jan has stated that he works, self-employed as a website designer. So far he has only had two clients and been paid £60 by each of them. However, he tells the decision maker that he has contracts with those clients to update their websites annually, he has registered with Her Majesty's Revenue and Customs and advertises on various social media platforms. He has recently provided quotes and mock-ups to three other potential clients. The decision maker decides that Jan is self-employed, and that therefore, the United Kingdom is competent for the payment of cash sickness benefits to him.

Example 2

Matteus comes to the United Kingdom from Spain to live with family as non-dependant adult. He is in receipt of a Spanish pension and makes a claim to Personal Independence Payment. He tells the decision maker that he has been working in a corner shop, but on questioning he states that he has only worked there once for 5 hours. His friend runs the shop and needed someone to cover for him. There is no contract of employment, and Matteus received payment as cash in hand. There are no fixed plans for Matteus to work there again any time soon. The decision maker decides that Matteus is not employed, and that as he receives a Spanish pension, Spain are still competent for the payment of cash sickness benefits to him.

ANNOTATIONS

The number of this memo should be annotated against the following ADM paragraphs:

Paragraph 6 to Appendix 1 to Chapter C2.

CONTACTS

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DECISION MAKING SERVICES

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