ADM Memo 8/19

[See DMG Memo Vol 1/118]

 LATE APPLICATION FOR A MANDATORY RECONSIDERATION

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 Introduction

1. This memo provides guidance to decision makers regarding subsequent appeal rights where:

 **1.** claimants submit a late application for mandatory reconsideration on “any grounds” (outside of the absolute time limit of 13 months) **and**

 **2.** where claimants request an “any time” revision on the basis of official error (ADM A3098 - A3101).

 It applies to Universal Credit, Personal Independence Payment, new style Jobseeker’s Allowance and Employment and Support Allowance (for all other benefits, please refer to DMG Memo Vol 1/111) This guidance is issued as a result of a decision by Judge Poole QC dated 22.11.181 and replaces ADM Memo 2/17.

*1 PH & SM v SSWP (DLA) (JSA) [2018] UKUT 404 (AAC)*

 **BACKGROUND TO MANDATORY RECONSIDERATION**

2. Decisions notified on or after 23.5.16 can only1 be appealed if the claimant has applied for a revision and the notice of the decision includes a statement to that effect. This is called “mandatory reconsideration”. The time limit for requesting a mandatory reconsideration on “any grounds” is 1 month from the date of notification of the original decision2. The 1 month time limit for applying can be extended in certain circumstances up to a maximum of 13 months3. Where the application is made late (between 1 and 13 months) and the decision maker does not accept the reasons for lateness then the current guidance (ADM A3015) is to the effect that claimants have no right of appeal to the Tribunal and the claimant can only challenge the decision by means of Judicial Review.

*1 UC, PIP, JSA & ESA (D&A) Regs (NI) 16, reg 7(2); 2 reg 5(1)(b); 3 reg 6*

 **ADM MEMO 2/17**

3. ADM Memo 2/17 provided guidance to decision makers following a three-Judge panel decision1 about claimants who submit a late application for a mandatory reconsideration who are not granted an extension of time and subsequent appeal rights to the Tribunal. In their decision the Judges decided that it was possible to bring an appeal to a Tribunal when an application for a mandatory reconsideration had been made after 1 month but within 13 months after the decision maker’s original decision, even if the decision maker had declined to consider the application.

*1 R(CJ) and SG v SSWP (ESA) [2017] UKUT 0324 (AAC)*

4. The three-Judge panel acknowledged that the subject of a mandatory reconsideration requested after 13 months was not an argument before them but suggested that a revision request made after the maximum period of 13 months may not constitute an application for revision. If so, this would mean that the decision maker would refuse to give a decision and there would be no right of appeal against that refusal. However, a recent Upper Tribunal (equivalent to Commissioner in Northern Ireland) decision has changed how decision makers should now handle such applications.

 **THE RECENT GB UPPER TRIBUNAL DECISION**

5. The cases before Judge Poole QC concerned the question of whether a claimant may still appeal where a request for a mandatory reconsideration was made more than 13 months after the decision maker’s original decision. The Judge decided that whether there was a right of appeal against the original decision after a mandatory reconsideration depends on whether the application for a mandatory reconsideration was made under (a) one of the provisions that allow revision on any grounds or (b) one of the provisions that allow revision at any time.

 **“Any grounds” application**

 In “any grounds” applications for a mandatory reconsideration (for example those where the claimant’s disagreement is simply that the decision maker got it wrong and there should have been a higher award) the First Tier Tribunal (equivalent to Tribunal in Northern Ireland) will have no jurisdiction unless an application for a mandatory reconsideration was submitted within 13 months of the original decision (subject to small extensions where statements of reasons have been requested).

 **“Any time” application (specific grounds)**

 In “any time” applications for a mandatory reconsideration the claimant expressly or by implication relies on one of the provisions that allow a decision to be revised in specific circumstances (for example official error1). There is no time limit for such applications. In these cases, a First Tier Tribunal will have jurisdiction to hear an appeal even if the request for a mandatory reconsideration has been made over 13 months after the original decision.

*1 UC, PIP, JSA & ESA (D&A) Regs (NI) 16, reg 9(a)*

 **TIME LIMITS FOR MAKING AN APPEAL FOLLOWING A MANDATORY RECONSIDERATION**

6. Even where there is jurisdiction to hear an appeal, limitation periods must be complied with. The right of appeal will only be exercisable if the appeal is brought within the time limits in the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 19991. In cases where a mandatory reconsideration applies, this is within one month after the date on which the claimant was sent notice of the result of the mandatory reconsideration extendable by the First Tier Tribunal by a maximum period of 12 months. The First Tier Tribunal should only extend the 13 month time limit in exceptional circumstances and where the claimant personally has done all they can to bring the appeal timeously2.

*1 SS & CS (D&A) Regs (NI), reg 31; 2 Adesina v Nursing and Midwifery Council [2013] EWCA 818*

 **CASE 1 BEFORE THE GB UPPER TRIBUNAL**

7. In the first case the claimant requested a mandatory reconsideration almost 18 months after the original decision was notified. The claimant considered that he may be entitled to a higher rate of the mobility component of Disability Living Allowance. The decision maker refused to reconsider the decision due to lateness. The Upper Tribunal Judge considered the substance of the request and decided that this was an “any grounds” request for a mandatory reconsideration as there was nothing in the request that could reasonably be read as based on official error and there was no allegation of any error by an officer of the Department for Work and Pensions. The First Tier Tribunal and the Upper Tribunal Judge found that the mandatory reconsideration request was made after the maximum period of 13 months from the date of notification of the decision and so did not constitute an application for revision. This means the First Tier Tribunal did not have jurisdiction to hear the appeal.

 **CASE 2 BEFORE THE GB UPPER TRIBUNAL**

8. In the second case the claimant’s representative requested a revision expressly on the grounds of official error and approximately 14 months after the original decision to terminate Jobseeker’s Allowance. The official error was said to be that the claimant was misadvised by an officer of the Department for Work and Pensions. The decision maker refused to revise the decision as the request was not made within 13 months of the decision being notified and because there was no official error. In contrast to the first case, the Upper Tribunal Judge considered the substance of the request for a mandatory reconsideration was a complaint of official error. It was an “any time” application which constitutes an application for revision and subject to official error being made out on the facts, the First Tier Tribunal had jurisdiction to hear the appeal.

 **APPLYING THE GB UPPER TRIBUNAL DECISION**

9. The following examples clarify the application of the guidance in this memo.

 **Example 1**

* Mandatory reconsideration requested within 13 months of notification of decision on “any grounds”.
* Decision notified on 20.3.18.
* Mandatory reconsideration requested on 29.8.18.
* Whether or not the decision maker accepts lateness, a decision should be made to revise or not revise. A mandatory reconsideration notice must be issued. If the application discloses arguable grounds for supersession, a further decision should be made to supersede or not supersede.
* There is never a right of appeal against the revision decision itself but there are appeal rights against the original decision as revised or not revised (see ADM A3006 & A3075).
* The time for bringing an appeal will start when the mandatory reconsideration notice is issued.

 **Example 2**

* Mandatory reconsideration requested outside of 13 months of notification of decision on “any grounds”.
* Decision notified on 21.5.18.
* Mandatory reconsideration requested on 19.8.19 and so approximately 15 months after notification of the decision.
* The claimant argues that they should have been entitled to a higher rate of benefit. The claimant has not argued that the decision was based on official error by an officer of the Department. The reasons given were simply that the decision was wrong on its merits.
* Therefore the substance of the request is an “any grounds” request. As the mandatory reconsideration request was made after the absolute time limit of 13 months, the request does not constitute an application for revision.
* The decision maker should refuse to give a decision and there will be no right of appeal to the Tribunal. A mandatory reconsideration notice should not be issued (see point 1 below).
* If the application discloses arguable grounds for supersession, a decision should be made to supersede or not supersede. A mandatory reconsideration notice must be issued (see point 2 below).

 **Response to the Tribunal**

 **1.** If the claimant appeals and the Tribunal waive the requirement to provide a mandatory reconsideration notice the response should focus on the lateness of the application and request that the appeal is struck out for want of jurisdiction. The appeal writer should ask the Tribunal to deal with the jurisdictional point as a preliminary issue. The response should go on to say that if the Tribunal think otherwise then they should give a direction regarding next steps.

 **2.** If a mandatory reconsideration notice has been issued for a supersession decision, the response should explain why no decision was issued in response to the application for revision and should focus on the decision to supersede or not supersede.

 **Example 3**

* Mandatory reconsideration requested outside of 13 months of notification of decision for official error but the substance of the request is “any grounds”.
* Decision notified on 29.5.18.
* Mandatory reconsideration requested on 21.7.19 and so approximately 14 months after notification of the decision.
* The claimant argues that they should be entitled to a higher rate of benefit and that the decision was based on official error. However, they fail to identify any matters that might, on proper investigation, constitute an official error. They also fail to identify any other circumstances that might allow an “any time” revision. They simply argue that the decision is wrong.
* Therefore the substance of the request is an “any grounds” request. As the Mandatory reconsideration request was made after the absolute time limit of 13 months, the request does not constitute an application for revision.
* The decision maker should refuse to give a decision and there will be no right of appeal to the Tribunal. A mandatory reconsideration notice should not be issued (see point 1 below).
* If the application discloses arguable grounds for supersession, a decision should be made to supersede or not supersede. A mandatory reconsideration notice must be issued (see point 2 below).

 **Response to the Tribunal**

 **1.** If the claimant appeals and the Tribunal waive the requirement to provide a mandatory reconsideration notice, the response should explain that the claimant has failed to identify official error and should then focus on the lateness of the application and request that the appeal is struck out for want of jurisdiction. The appeal writer should ask the Tribunal to deal with the jurisdictional point as a preliminary issue. The response should go on to say that if the Tribunal think otherwise then they should give a direction regarding next steps.

 **2.** If a mandatory reconsideration notice has been issued for a supersession decision, the response should explain that the claimant has failed to identify official error and why no decision was issued in response to the application for revision. The response should focus on the decision to supersede or not supersede.

 **Example 4**

* Mandatory reconsideration requested outside of 13 months of notification of the decision for official error or another “any time” ground.
* Decision notified on 14.9.18.
* Mandatory reconsideration requested on 12.12.19 and so 15 months after notification of the decision.
* The claimant argues that they were misadvised by an officer of the Department meaning that an overpayment of benefit occurred.
* Therefore the substance of the request is an “any time” request on the grounds of official error and so constitutes an application for revision. If the decision maker disagrees there was official error, the decision maker should give a decision that refuses to revise. A mandatory reconsideration notice should be issued. If the application discloses arguable grounds for supersession, a further decision should be made to supersede or not supersede.
* The time for bringing an appeal will start when the mandatory reconsideration notice is issued.

 **Response to the Tribunal**

 Whether or not the decision maker has accepted the allegation of official error, the Tribunal has jurisdiction and the response should effectively be a business as usual response dealing with the decision(s) under appeal.

 ANNOTATIONS

 Please annotate the number of this memo (ADM Memo 8/19) against the following ADM paragraphs:

 A3015, A3076 – A3077, A3103 and DMG Memo Vol 1/118

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