

Draft Order laid before Parliament under paragraph 2(a) of Schedule 2 to the Human Rights Act 1998, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2019 No.

SOCIAL SECURITY

**The Jobseekers (Back to Work Schemes)
Act 2013 (Remedial) Order 2019**

Made - - - - *******
Coming into force - - *******

The Jobseekers (Back to Work Schemes) Act 2013⁽¹⁾ has been declared⁽²⁾ under section 4 of the Human Rights Act 1998⁽³⁾ to be incompatible with a Convention right⁽⁴⁾.

The Secretary of State considers that there are compelling reasons for proceeding by way of remedial order⁽⁵⁾ to make such amendments to the Jobseekers (Back to Work Schemes) Act 2013 as she considers necessary to remove the incompatibility.

In accordance with paragraph 2(a) of Schedule 2 to the Human Rights Act 1998, a draft of this instrument was laid before Parliament and was approved by resolution of each House of Parliament, a document containing a draft of this instrument having previously been laid before Parliament in accordance with paragraph 3(1)(a) of that Schedule.

Accordingly, the Secretary of State makes the following Order in exercise of the powers conferred by section 10(2) of, and paragraph 1(1), (2) and (3) of Schedule 2 to, the Human Rights Act 1998.

Citation, commencement and extent

1.—(1) This Order may be cited as the Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019 and comes into force on the day after the day on which it is made.

(2) This Order extends to England and Wales and Scotland.

(1) 2013 c. 17.

(2) By the Court of Appeal in the case of *R (on the application of Reilly and another) v Secretary of State for Work & Pensions; Jeffrey and another v Secretary of State for Work Pensions* [2016] EWCA Civ 413.

(3) 1998 c. 42.

(4) See section 1 of the Human Rights Act 1998 for the definition of “the Convention rights” and section 21(1) of that Act for the definition of “the Convention”.

(5) See section 21(1) of the Human Rights Act 1998 for the definition of “remedial order”.

Amendment of the Jobseekers (Back to Work Schemes) Act 2013

2. In the Jobseekers (Back to Work Schemes) Act 2013, after section 1 (regulations and notices requiring participation in a scheme) insert—

“1A Certain appeals against penalties under the 2011 Regulations

(1) This section applies where—

- (a) the Secretary of State has made a decision imposing on a claimant for jobseeker’s allowance a penalty for failing to comply with the 2011 Regulations (“the penalty decision”), and
- (b) the claimant lodged an appeal against the penalty decision before 26 March 2013, and the appeal had not been finally determined, abandoned or withdrawn before 26 March 2013.

(2) If the Secretary of State revises the penalty decision under section 9 of the Social Security Act 1998, in making the revised decision, the Secretary of State must disregard subsections (1) to (6) of section 1 of this Act and subsection (12) of section 1 so far as it relates to those subsections.

(3) Subsection (4) applies where a tribunal has decided the appeal before this section comes into force.

(4) In a case where the tribunal decided to uphold the penalty decision (in whole or in part), the Secretary of State must make a decision superseding the tribunal’s decision.

(5) In making a superseding decision under subsection (4), the Secretary of State must disregard subsections (1) to (6) of section 1 and subsection (12) of section 1 so far as it relates to those subsections.

(6) Section 10(1)(b) of the Social Security Act 1998 (power of the Secretary of State to supersede a tribunal decision) does not apply in a case where subsection (4) applies.

(7) A superseding decision made under subsection (4) is to be treated for all purposes as if it were a superseding decision made under section 10 of the Social Security Act 1998.

(8) Subsection (9) applies where, after this section has come into force, a court or tribunal is considering—

- (a) the appeal mentioned in subsection (1)(b),
- (b) an appeal against a revised decision made under section 9 of the Social Security Act 1998 by virtue of subsection (2), or
- (c) an appeal against a superseding decision made under subsection (4).

(9) In considering the appeal, the court or tribunal must disregard subsections (1) to (6) of section 1 and subsection (12) of section 1 so far as it relates to those subsections.

(10) A revised decision made by virtue of subsection (2) and a superseding decision made under subsection (4) are to be treated as having effect from the date on which the penalty decision had effect (other than for the purposes of any rule as to the time allowed for bringing an appeal).

(11) In this section—

“the 2011 Regulations” has the same meaning as in section 1;

“court” means the Court of Appeal, the Court of Session or the Supreme Court;

“tribunal” means the First-tier Tribunal or the Upper Tribunal.

1B Certain appeals against penalties under the Mandatory Work Activity Scheme Regulations

(1) This section applies where—

- (a) the Secretary of State has made a decision imposing on a claimant for jobseeker's allowance a penalty for failing to comply with the Mandatory Work Activity Scheme Regulations ("the penalty decision"), and
- (b) the claimant lodged an appeal against the penalty decision before 26 March 2013, and the appeal had not been finally determined, abandoned or withdrawn before 26 March 2013.

(2) If the Secretary of State revises the penalty decision under section 9 of the Social Security Act 1998, in making the revised decision, the Secretary of State must disregard subsections (7) to (9) of section 1 of this Act and subsection (12) of section 1 so far as it relates to those subsections.

(3) Subsection (4) applies where a tribunal has decided the appeal before this section comes into force.

(4) In a case where—

- (a) the tribunal decided to uphold the penalty decision (in whole or in part), and
- (b) the Secretary of State decides that subsection (7), (8) or (9) of section 1 or subsection (12) of section 1 so far as it relates to those subsections may be relevant to the tribunal's decision,

the Secretary of State must make a decision superseding the tribunal's decision.

(5) In making a superseding decision under subsection (4), the Secretary of State must disregard subsections (7) to (9) of section 1 and subsection (12) of section 1 so far as it relates to those subsections.

(6) Section 10(1)(b) of the Social Security Act 1998 (power of the Secretary of State to supersede a tribunal decision) does not apply in a case where subsection (4) applies.

(7) A superseding decision made under subsection (4) is to be treated for all purposes as if it were a superseding decision made under section 10 of the Social Security Act 1998.

(8) Subsection (9) applies where, after this section has come into force, a court or tribunal is considering—

- (a) the appeal mentioned in subsection (1)(b),
- (b) an appeal against a revised decision made under section 9 of the Social Security Act 1998 by virtue of subsection (2), or
- (c) an appeal against a superseding decision made under subsection (4).

(9) In considering the appeal, the court or tribunal must disregard subsections (7) to (9) of section 1 and subsection (12) of section 1 so far as it relates to those subsections.

(10) A revised decision made by virtue of subsection (2) and a superseding decision made under subsection (4) are to be treated as having effect from the date on which the penalty decision had effect (other than for the purposes of any rule as to the time allowed for bringing an appeal).

(11) In this section—

"the Mandatory Work Activity Scheme Regulations" has the same meaning as in section 1;

"court" has the same meaning as in section 1A; and

"tribunal" has the same meaning as in section 1A."

Date

One of Her Majesty's Principal Secretaries of
State
Department for Work and Pensions

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the Jobseekers (Back to Work Schemes) Act 2013 (“the 2013 Act”) to remedy the incompatibility of the 2013 Act with a Convention right. The 2013 Act removed what would otherwise have been a conclusive ground of appeal from Jobseeker’s Allowance claimants (“JSA claimants”) who had pending appeals against a penalty imposed for failing to comply with the Jobseeker’s Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 (“the 2011 Regulations”) at the time that the 2013 Act came into force. This Order extends to England and Wales and Scotland.

In the case of *R (on the application of Reilly and another) v Secretary of State for Work & Pensions; Jeffrey and another v Secretary of State for Work Pensions* [2016] EWCA Civ 413, the Court of Appeal on 29th April 2016 made a declaration under section 4 of the Human Rights Act 1998 that the 2013 Act is incompatible with article 6(1) of the European Convention on Human Rights, as given effect by section 1 of the Human Rights Act 1998, in the case of a claimant in the proceedings and “in the cases of all other JSA claimants who had filed appeals against sanctions imposed under the 2011 Regulations prior to its [the 2013 Act’s] coming into force”.

In order to remove the incompatibility, article 2 of this Order inserts section 1A into the 2013 Act.

In the case of appeals against a penalty imposed on a JSA claimant for a failure to comply with the 2011 Regulations (a “penalty decision”) which were pending appeals as at 26th March 2013 the Secretary of State may revise the penalty decision and, if the Secretary of State does so, this must be done on the basis that the 2011 Regulations were invalid or the notices sent to JSA claimants advising them that they were required to take part in a programme within the Employment, Skills and Enterprise Scheme were inadequate. This is the effect of providing that the Secretary of State must disregard subsections (1) to (6) of section 1 and subsection (12), because these are the provisions of the 2013 Act that validate the 2011 Regulations and provide for the adequacy of the notices.

Where a tribunal has already heard an appeal against a penalty decision and upheld the sanction (in whole or part) by the time that this Order comes into force, the Secretary of State must supersede the tribunal’s decision, on the same basis. This power of supersession is similar to an existing power in section 10 of the Social Security Act 1998, and a decision made under this power is treated for all purposes as if it had been made under section 10 of the Social Security Act 1998. Where the Secretary of State does not revise the penalty decision or supersede the tribunal’s decision, or where a claimant appeals that revision or supersession, a court or tribunal is able to overturn the penalty decision on the same basis.

The 2013 Act also affects appeal decisions made under the Jobseeker’s Allowance (Mandatory Work Activity Scheme) Regulations 2011 (“the MWA Regulations”), by correcting any inadequacies in the notices given to claimants requiring their participation in the Mandatory Work Activity Scheme. This Order therefore also inserts section 1B into the 2013 Act, to remove the effects of the 2013 Act from appeals against a penalty imposed on a JSA claimant for a failure to comply with the MWA Regulations which were pending appeals as at 26th March 2013.

As with pending appeals for failures to comply with the 2011 Regulations, the Secretary of State may revise the decision. If the Secretary of State does so, this must be done without taking account of subsections (7) to (9) of section 1 and subsection (12). These are the provisions which provide for the adequacy of notices given under the MWA Regulations.

Draft Legislation: This is a draft item of legislation and has not yet been made as a UK Statutory Instrument.

Where a tribunal has already heard an appeal against a penalty decision made in relation to the MWA Regulations and upheld the sanction, the Secretary of State must decide whether or not the 2013 Act was relevant to that appeal decision. If the Secretary of State decides that it was relevant, then the Secretary of State must supersede the tribunal's decision.

A revised penalty decision or superseded tribunal decision relating to either the 2011 Regulations or the MWA Regulations will enable the entire penalty imposed to be repaid. An appeal against a penalty decision which is revised will lapse as a result of section 9(6) of the Social Security Act 1998.