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STATUTORY INSTRUMENTS

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**2008 No. 794**

**The Employment and Support Allowance Regulations 2008**

**PART 12**

**DISQUALIFICATION**

**Disqualification for misconduct etc.**

**157.**—(1) Subject to paragraph (3), paragraph (2) applies where a claimant—

- (a) has limited capability for work through the claimant’s own misconduct, except in a case where the limited capability is due to pregnancy or a sexually transmitted disease; or
- (b) fails without good cause to attend for or submit to medical or other treatment (excluding vaccination, inoculation or major surgery) recommended by a doctor with whom, or a hospital or similar institution with which, the claimant is undergoing medical treatment, which would be likely to remove the limitation on the claimant’s capability for work;
- (c) fails without good cause to refrain from behaviour calculated to retard the claimant’s recovery; or
- (d) is, without good cause, absent from the claimant’s place of residence without leaving word with the Secretary of State where the claimant may be found.

(2) A claimant referred to in paragraph (1) is to be disqualified for receiving an employment and support allowance for such period not exceeding 6 weeks as the Secretary of State may determine.

(3) Paragraph (1) does not apply where the claimant—

- (a) is disqualified for receiving an employment and support allowance by virtue of regulations made under section 7 of the Social Security Fraud Act 2001<sup>(1)</sup>; or
- (b) is a person in hardship.

**Meaning of “person in hardship”**

**158.**—(1) A claimant is a “person in hardship” if the claimant—

- (a) has informed the Secretary of State of the circumstances on which the claimant relies to establish that fact; and
- (b) falls within paragraph (2), (3) or (5).

(2) A claimant falls within this paragraph if—

- (a) she is pregnant;
- (b) a member of the claimant’s family is pregnant;
- (c) the claimant is a single claimant aged less than 18; or
- (d) the claimant is a member of a couple and both members are aged less than 18.

(3) Subject to paragraph (4), the claimant falls within this paragraph if the claimant or the claimant's partner—

- (a) is responsible for a child or young person who is a member of the claimant's household;
- (b) has been awarded an attendance allowance or the care component;
- (c) has claimed either attendance allowance or disability living allowance and the claim has not been determined;
- (d) devotes a considerable portion of each week to caring for another person who—
  - (i) has been awarded an attendance allowance or the care component; or
  - (ii) has claimed either attendance allowance or disability living allowance and the claim has not been determined; or
- (e) is aged 60 or more.

(4) A claimant to whom paragraph (3)(c) or (3)(d)(ii) applies is a person in hardship only for 26 weeks from the date of the claim unless the claimant is a person in hardship under another provision of this regulation.

(5) The claimant falls within this paragraph where the Secretary of State is satisfied, having regard to all the circumstances and, in particular, the matters set out in paragraph (6), that unless an employment and support allowance is paid, the claimant, or a member of the claimant's family, will suffer hardship.

(6) The matters referred to in paragraph (5) are—

- (a) the resources which are likely to be available to the claimant and the claimant's family and the length of time for which they might be available; and
- (b) whether there is a substantial risk that essential items, including food, clothing and heating, will cease to be available to the claimant or a member of the claimant's family, or will be available at considerably reduced levels and the length of time for which this might be so.

(7) In this regulation "care component" means the care component of disability living allowance at the highest or middle rate prescribed under section 72(3) of the Contributions and Benefits Act.

### **Treating a claimant as not having limited capability for work**

**159.**—(1) Subject to paragraph (2), the claimant is to be treated as not having limited capability for work if the claimant is disqualified for receiving a contributory allowance during a period of imprisonment or detention in legal custody if that disqualification is for more than 6 weeks.

(2) Where the claimant is entitled to an amount under paragraph 3 of Schedule 5 (special cases: prisoners) during a period of imprisonment or detention in legal custody, the claimant is to be treated as not having limited capability for work from the day after the day on which entitlement ended.

### **Exceptions from disqualification for imprisonment**

**160.**—(1) Notwithstanding section 18(4)(b) of the Act, a claimant is not disqualified for receiving a contributory allowance for any period during which that claimant is undergoing imprisonment or detention in legal custody—

- (a) in connection with a charge brought or intended to be brought against the claimant in criminal proceedings;
- (b) pursuant to any sentence; or
- (c) pursuant to any order for detention,

made by a court in such proceedings, unless paragraph (2) applies.

(2) This paragraph applies where—

- (a) a penalty is imposed on the claimant at the conclusion of the proceedings referred to in paragraph (1); or
- (b) in the case of default of payment of a sum adjudged to be paid on conviction a penalty is imposed in respect of such default.

(3) Notwithstanding section 18(4)(b) of the Act, a claimant is not to be disqualified for receiving a contributory allowance, for any period during which the claimant is undergoing detention in legal custody after the conclusion of criminal proceedings if it is a period during which the claimant is liable to be detained in a hospital or similar institution in Great Britain as a person suffering from mental disorder unless—

- (a) the claimant is detained or liable to be detained under section 45A of the Mental Health Act 1983(2) (hospital and limitation directions) or section 59A of the Criminal Procedure (Scotland) Act 1995(3) (hospital direction); or
- (b) the claimant is detained or liable to be detained under section 47 of the Mental Health Act 1983(4) (removal to hospital of persons serving sentences of imprisonment, etc.) or section 136 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (transfer of prisoners for treatment for mental disorder); or
- (c) section 136 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (transfer of prisoners for treatment for mental disorder).

(4) Where—

- (a) paragraph (3)(a) or (b) applies, in relation to a claimant; and
- (b) a certificate given by or on behalf of the Secretary of State or Scottish Ministers shows the earliest date on which that claimant would have been expected to be discharged from detention under the sentence or order if the claimant had not been transferred to a hospital or similar institution,

those paragraphs are to be treated as not satisfied in relation to that claimant from the day following that date.

(5) For the purposes of this regulation—

- (a) “court” means any court in the United Kingdom, the Channel Islands or the Isle of Man or in any place to which the Colonial Prisoners Removal Act 1884(5) applies or any naval court-martial, army court-martial or air force court-martial within the meaning of the Courts-Martial (Appeals) Act 1968(6) or the Courts-Martial Appeal Court;
- (b) “hospital or similar institution” means any place (not being a prison, a young offender institution, a secure training centre, secure accommodation in a children’s home or a remand centre, and not being at or in any such place) in which persons suffering from mental disorder are or may be received for care or treatment;
- (c) “penalty” means a sentence of imprisonment or detention under section 90 or 91 of the Powers of Criminal Courts (Sentencing) Act 2000(7), a detention and training order under section 100 of that Act, a sentence of detention for public protection under section 226 of the Criminal Justice Act 2003(8) or an extended sentence under section 228 of that Act or, in Scotland, under section 205, 207 or 208 of the Criminal Procedure (Scotland) Act 1995;

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(2) 1983 c. 20. Section 45A was inserted by the Crime (Sentences) Act 1997 (c. 43), section 46 and amended by the Criminal Justice Act 2003 (c. 44), Schedule 32, paragraphs 37 and 39 and Schedule 37, Part 7.

(3) 1995 c. 46. Section 59A was inserted by the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp. 13), Schedule 4, paragraph 8(6).

(4) Section 47 was amended by the Crime (Sentences) Act 1997, section 49(3).

(5) 1884 c. 31.

(6) 1968 c. 20.

(7) 2000 c. 6. Section 90 was amended by the Criminal Justice and Court Services Act 2000 (c. 43), section 60(2) and (3).

(8) 2003 c. 44.

- (d) in relation to a person who is liable to be detained in Great Britain as a result of any order made under the Colonial Prisoners Removal Act 1884, references to a prison must be construed as including references to a prison within the meaning of that Act;
- (e) criminal proceedings against any person must be deemed to be concluded upon that person being found insane in those proceedings so that the person cannot be tried or that person's trial cannot proceed.

(6) Where a claimant outside Great Britain is undergoing imprisonment or detention in legal custody and, in similar circumstances in Great Britain, the claimant would, by virtue of this regulation, not have been disqualified for receiving a contributory allowance, the claimant is not disqualified for receiving that allowance by reason only of the imprisonment or detention.

### **Suspension of payment of a contributory allowance during imprisonment**

**161.**—(1) Subject to the following provisions of this regulation, the payment of a contributory allowance to any claimant—

- (a) which is excepted from the operation of section 18(4)(b) of the Act by virtue of the provisions of regulation 160(2), (3) or (6); or
- (b) which is payable otherwise than in respect of a period during which the claimant is undergoing imprisonment or detention in legal custody,

is suspended while that claimant is undergoing imprisonment or detention in legal custody.

(2) A contributory allowance is not to be suspended while the claimant is liable to be detained in a hospital or similar institution, as defined in regulation 160(5), during a period for which in the claimant's case, the allowance is or would be excepted from the operation of section 18(4)(b) by virtue of the provisions of regulation 160(3).

(3) Where, by virtue of this regulation, payment of a contributory allowance is suspended for any period, the period of suspension is not to be taken into account in calculating any period under the provisions of regulation 38 of the Social Security (Claims and Payments) Regulations 1987<sup>(9)</sup> (extinguishment of right to sums payable by way of benefit which are not obtained within the prescribed time).

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(9) S.I. 1987/1968.