

Social Security Advisory Committee
Minutes of the meeting held on 5 October 2022

Chair: Dr Stephen Brien

Members: Bruce Calderwood
Carl Emmerson
Kayley Hignell
Phil Jones
Grainne McKeever
Seyi Obakin
Charlotte Pickles
Liz Sayce

1. Private session

[PARTIALLY RESERVED]

Postal Regulations

1.8 The Chair reported that, further to the Postal Regulations sub-group's recommendation that the following regulations were a suitable candidate for clearance by correspondence, the Committee had agreed ahead of the meeting that they may proceed according.

- *The Social Security (Habitual Residence and Past Presence) (Amendment) (No. 2) Regulations 2022*

2. *The Childcare Payments (Miscellaneous Amendments) Regulations 2022*

2.1 The Chair welcomed the following officials to the meeting: Phil Mattacks (HMRC Policy Directorate), Elsie Powers and Emily Clarke (both from HMRC's Legal team).

2.2 Introducing the regulations, Phil Mattacks explained that they provided an update to address a variety of issues that had arisen over time. The change to IR35 would allow those workers to access the Tax-Free Childcare (TFC) scheme by their IR35 deemed income. This came to HMRC's attention in recent years as IR35 workers became more prevalent. He noted that this should always have been in the regulations to make it so that if the Government are making the employee pay tax on their deemed IR35 income they should also recognise that deemed income as meeting the Minimum Income Test (MIT) for TFC. This may be unfortunate timing in light of the Chancellor's announcement to unwind some aspects of IR35, however there was still the need for these underlying rules to be changed, and any other changes to come in the next budget will be made then.

2.3 Continuing, Phil noted that the change to the rules on self-assessment (SA) returns, where the failure to provide the return as evidence could result in an application for TFC failing, addresses an ongoing operational problem. The claimant relies on self-employment income but they do not provide proof – which can be through an SA return or anything else which establishes income. Allowing the decision maker to fail the application in these circumstances brings some finality and certainty. The claimant is given one last chance, and if they fail to provide that evidence, they will be ineligible. HMRC try to help claimants as much as possible but there is ultimately an obligation to make decisions to determine ineligibility.

2.4 The Scottish Government's disability benefit change is just to keep up with those devolved developments and ensure that Scottish disability benefit recipients will always be treated the same as anyone else in the UK.

2.5 Additionally, these regulations deal with a couple of errors. The first concerns a clarification that when a self-employed person is in their start-up period (the first year after starting a new venture)-they do not need to demonstrate that they meet the MIT, not only in their first declaration (as the current regulations state) but also in the next three declarations. The second correction concerns how an applicant can meet the MIT if they are relying on 'mixed income' (i.e., where they receive income both from employment and from self-employment). To meet the MIT an employed claimant not relying on self-employment needs to show their expected earnings for the next three-month period will be over that threshold. For a self-employed person not relying on employment they can demonstrate they meet either the three-month prospective criteria, or that they will earn over the threshold for the full tax year (which helps where the income may be irregular over the year). For the mixed income person, it was not intended to combine these two methods - the three month and the full tax year, but rather to limit the claimant to the three-month method only. These regulations are designed to make that clear.

2.6 The Committee members raised the following main questions in discussion:

- (a) **Regarding the mixed income claimant, what is the policy prior to this regulation change occurring? Is such a claimant able to rely on both the annual tax year test and the quarterly next three-month test?**

There has been no change in policy. It has always been the policy that the mixed income person could only rely on the quarterly test. This change ensures the law mirrors the policy intent.

- (b) **Do the regulations currently allow an annual test of mixed income, even if that was not intended?**

It would be hard to interpret the regulations as they stand as allowing for the annual test. The only change being made in regulation 9 of The Childcare Payments (Eligibility) Regulations 2015, is at regulation 9(1)(c) where there is a swapping of 'or' with 'and'. If one interprets 'or' exclusively then there would still be no mixing of the annual and quarterly tests. The annual test is only in place for the self-employed. Rule 9(1)(c) only concerns the quarterly forward look. There was no desire to combine the quarterly and annual income tests.

- (c) **In the papers there is an example of a person who works self-employed as a market trader, and employed as a doorman, both being regular income streams, which only when combined are sufficient to meet the three-month prospective MIT. What if the self-employed income stream was irregular, leaving the employed doorman income as the only regular income stream? Would that person meet the annual test but as they have mixed income they can only have the quarterly test applied, thereby leaving them ineligible?**

In that scenario the quarterly forward test would have to be applied. There is a clear need for self-employed parents working in a sector with irregular income to have an annual test, so they could be eligible all year round.

- (d) **Is there not a case where someone is ineligible because they need both the self-employed income (by the annual test) and employed income (by the quarterly test) to be considered to meet the MIT? Is anything known of the cohort of those in these kinds of circumstances? Do these regulations remove a way of qualifying for such people?**

No such case has come to the attention of the policy team over the last five years and there is no knowledge of such people who have not applied. This will be kept under review, however, to see whether such cases do arise. If they do there will be a positive response to deal with the issue.

- (e) **Where there is a couple, one employed, one self-employed, or on mixed incomes, how should they be considered?**

Couples do not cause a problem. Eligibility is determined on an individual basis, so it does not matter if there is a difference between the two members of the couple.

- (f) **To help gather data perhaps HMRC could use the SA forms and see whether that self-employment income is low and see whether there is an employment income?**

It is not a simple case of looking at SA returns and only seeing self-employment income as there are a range of reasons why taxpayers make SA returns and those returns include unearned income that is not relevant to the MIT.

- (g) **If a new case appeared featuring this mixed income problem what would be done with the decision? Can that be anticipated through these regulations?**

The scheme is under the management of the commissioners and any required change to correct this would be put in place in a future set of regulations and if necessary anticipated by concession. If people who should be eligible are not due to the changing world of work, then there would be a plan to correct that. But the difficulty of doing that with these regulations is how to set out a test that would take account of a slice of the self-employment income over the tax year,

as well as a slice of the employment income over the current year, especially when those two years might have different national minimum wage levels applicable to them. That would be difficult, complicated to design and write, and not desirable for a hypothetical possibility.

- (h) **Moving onto the SA evidence change, claimants are not providing HMRC with enough information to make a decision and the intent is to push them to provide that information. The regulations do not say one must file their SA, but rather give a 'confirmation' that they have done this. Why use this 'confirmation' as a proxy?**

The way the change is set out in regulations is partly determined by the fact that it gives a power to HMRC so needs to be in the Childcare Payments Regulations not the Childcare Payments (Eligibility) Regulations. Where a SA return is substantially late, it is within a commissioner's legal powers to apply their discretion to reject the stated self-employment income in the application. The amendment provides a sensible test within the regulations for commissioners to apply their discretion, which fits with the powers available from the Childcare Payment Regulations. The message to the parents is they must file this evidence or else they cannot rely on self-employment income.

- (i) **SA returns can be submitted two years late, so that information may not be accurate as to the claimant's current income - is that satisfactory?**

It may not give current income, but it gives an indication that the business is of relevant size to meet the MIT. Some meaningful evidence is certainly better than none. The test is for reasonable expectation for the future. With employed claimants there is PAYE, which is for the last quarter, but for the self-employed this is more difficult. Based on the available evidence there is an obligation to pay someone who is eligible and disallow where, on balance of probability, they are not.

- (j) **What if it is later found that the self-employment venture went out of business?**

The monies can be clawed back if there were deliberate attempts to mislead HMRC, but otherwise they will just be removed from the scheme onwards.

- (k) **Regarding the IR35 change, do the recently announced changes by the Chancellor impact what is proposed here?**

The details will be understood more fully once the budget process has been completed. There may be parts that have to be tweaked, but as long as there is an IR35 category at all it is correct to treat the deemed IR35 income as something that can be relied upon for TFC qualification. That will be looked at in due course.

- (l) **Are there people who now qualify for TFC as a result of these changes who would not otherwise?**

Theoretically, however under the current IR35 rules those parents are taxed by PAYE, so that income is already coming to the attention of HMRC. This will not lead to more people being eligible but rather will see the law catching up the position in practice.

2.7 The Chair thanked the officials for attending. After a period of deliberation, the Committee determined the regulations could proceed, but would write to HMRC setting out some ongoing concerns about eligibility for those claimants with mixed incomes.¹

3. Private Session

[RESERVED ITEM]

4. Date of next meeting

4.1 The next meeting is scheduled to take place on 9 November.

¹ Letter to HMRC attached at annex B

Attendees

Guests and Officials

Item 2: Phil Mattacks (HMRC Policy Directorate)
Elsie Powers (HMRC Legal)
Emily Clarke (HMRC Legal)

Secretariat: Denise Whitehead (Committee Secretary)
Dale Cullum (Assistant Secretary)
Gabriel Ferros (Analyst)
Richard Whitaker (Assistant Secretary)

Observer: Anna Woods



Phil Mattacks
Tax Free Childcare Legislation Lead
Welfare Policy
HM Revenue & Customs
14 Westfield Avenue
London
E20 1HZ

18 October 2022

Dear Phil,

The Childcare Payments (Miscellaneous Amendments) Regulations 2022

The Committee was grateful to you and your legal colleagues for addressing the Committee's questions on the above regulations at its meeting of 5 October 2022.

I can confirm that the Committee is content for you to proceed with the regulations which were presented to the Committee in accordance with our Memorandum of Understanding. However, as you are aware, the Committee has an ongoing concern regarding those people with mixed incomes (having some employed and self-employed income) and their eligibility for Tax Free Childcare. There may be a cohort of people who, though expected to qualify by the intent of the policy, may not on a certain reading of the regulations, and who may not apply believing they are ineligible. To assuage these concerns the Committee recommends that:

- there are communications for the mixed income group to ensure there is a very clear explanation of eligibility in their circumstances, and to encourage them to contact HMRC where there is ambiguity;
- there is a concerted effort to proactively seek out those mixed income people who may not qualify, and to gather data to understand the scale and circumstances of that cohort; and if there is a cohort who do fall outside the regulations
- to work out how the regulations would need to change in order to ensure those people are encompassed in future (if that remains the policy intent).

The Committee would be grateful if you could consider the recommendations and provide a response at the earliest opportunity.

Denise Whitehead
SSAC Secretary