



Work and Pensions Committee

Oral evidence: Employment and Support Allowance and Work Capability Assessments, HC 1212

Wednesday 7 May 2014

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Written evidence from witnesses:

- [Joint Submission from the Ministry of Justice and HM Courts and Tribunals Service](#)

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Members present: Dame Anne Begg (Chair); Debbie Abrahams; Sheila Gilmore; Glenda Jackson; Kwasi Kwarteng; Nigel Mills; Anne Marie Morris; Mr Michael Thornton
Dame Angela Watkinson

Questions 89 - 182

Witnesses: **HH Judge Robert Martin**, President of the Social Entitlement Chamber, First-tier Tribunal; **Kevin Sadler**, Director of Civil, Families and Tribunals, HM Courts and Tribunals Service; **Richard Mason**, Deputy Director for Civil Justice, Administrative Justice, Coroners, Burials, Cremations and Inquiries, Ministry of Justice gave evidence.

Q89 Chair: Can I thank you very much for being patient? We had a little business to discuss, so you have our apologies for starting slightly late this morning, but we are pleased to see you here, because obviously this is a very important part of our inquiry into the operation of Employment and Support Allowance (ESA) and the Work Capability Assessment (WCA). I wonder if we could ask you to introduce yourselves for the record, please.

Kevin Sadler: I am Kevin Sadler; I am the Director of Civil, Families and Tribunals in Her Majesty's Courts and Tribunals Service, which means I am responsible for national performance and national business processes for tribunals.

Oral evidence: Employment and Support Allowance and Work Capacity Benefits, HC

HH Judge Robert Martin: I am Robert Martin. I am the President of the Social Entitlement Chamber. I apologise for the title; it is appalling. Our Chamber is the part of the tribunal that deals with appeals relating to social security benefits.

Richard Mason: Good morning. I am Richard Mason. I am a policy official in the Ministry of Justice. I sit in that part of the Ministry of Justice that is about access to justice. Among my responsibilities is policy on tribunals, and more widely on administrative justice.

Q90 Chair: Thank you very much for coming along this morning. Bearing in mind that we have a lot of detailed questions, I was just wondering if you could very briefly give your feelings—with regard to Employment and Support Allowance in particular—about how you think the appeals system works overall, whether you think it is effective or whether you think there could be improvements to the system. Could you do that without the detail and give us a general overview? I do not know, Judge, if you would like to begin.

HH Judge Robert Martin: The focus over the last five years has been on the volumes of cases coming before the tribunal. A lot of our energy and attention has been devoted to trying to keep pace with the influx of appeals, which has escalated. It is equally important to me that the quality of decisions that we give in the tribunal is sustained, in spite of those pressures. I think we have a reasonable balance, in that the percentage of appeals from this tribunal that are overturned by the upper tribunal has consistently remained below 1% throughout that period, which is a reasonable indicator of the quality of the decisions.

Initially, we were playing catch-up with volumes, and the waiting times taken to have appeals decided reached an unacceptable level. Since July last year, we have matched the intake and since then we have made tremendous inroads in removing the backlog we had. Currently, we are much better placed to give a better quality of service, because justice delayed is justice denied.

Kevin Sadler: Speaking from the Ministry's point of view, the capacity challenge has been the big challenge for the tribunal. We have been running to catch up, effectively. The original forecast for the impact of ESA on the tribunal turned out to be way too low, and we have been working with DWP ever since to get better forecasts and better management information about how the work is going to flow through to us. Effectively, more work built up than we would have liked and we have been recruiting judges and medical members, adding venues and increasing the flexibility of the tribunal—sitting on Saturdays, for example—to make sure we have the capacity to handle the volumes expected from DWP. As Robert said, we have done that this year. We have now got capacity, if we get the appeals, to hear around 650,000 appeals a year, which is something like three times what we were getting prior to the introduction of ESA.

Q91 Chair: Obviously, we do have questions about the volumes of appeals and, also, the mandatory reconsideration (MR), which may help to explain the catch-up. In terms of the

way the system is working, however, it was an underestimation of what the volumes might be that caused some of the initial slowness.

Kevin Sadler: Yes, by a factor of 10.

Chair: By a factor of 10—my goodness.

Q92 Glenda Jackson: You spoke of the increase that you have done. Who has paid for that?

Kevin Sadler: DWP.

Glenda Jackson: So you bill DWP for that.

Kevin Sadler: We bill DWP for that.

Q93 Glenda Jackson: Was the initial estimate also from DWP, as to the number of appeals that might be coming up?

Kevin Sadler: Yes. The original transfer was for £4 million and it has reached £34 million.

Chair: I do not know if the Ministry of Justice has anything to add at this stage.

Richard Mason: I have nothing to add to what has been said.

Q94 Chair: Can I ask a question about direct lodgement? That is obviously something that is relatively new. The whole idea of direct lodgement was that it would simplify the appeals process, in that claimants no longer have to route their appeals through the DWP. Has that improved the process for claimants?

Kevin Sadler: It means that the claimant is appealing to the independent tribunal, rather than sending their appeal to the Department for Work and Pensions, which made the decision. From that perspective, it underlines the independence of the tribunal. That has been greeted quite positively. It is a different process, and it means the appellant now writes to us with a copy of the decision notice they have received as a result of mandatory reconsideration. We then write to DWP to ask for their appeal submission. That process is working generally well, but it is different and people are getting used to it.

Q95 Chair: Is it quicker?

Kevin Sadler: I don't expect it to be quicker or slower as a result of the mandatory reconsideration process. What is important for us is to get the submission from DWP, because that is when we can hear the appeal.

Q96 Chair: Is that one of the slow bits in the chain of events that has to happen?

Kevin Sadler: On average, before mandatory reconsideration, it tended to take about nine weeks from the lodging of the appeal to the arrival of the submission from DWP, and that is an average. From October, the requirement will be to do it within 28

days if it is not a child support appeal. I am hoping that that will result in speedier submission.

HH Judge Robert Martin: Direct lodgement follows on from mandatory reconsideration. I think mandatory reconsideration and direct lodgement are built on a false premise. It seems to be that there was no acknowledgement that, before mandatory reconsideration came in, the Department would reconsider every appeal that was sent to it.

Under the old system, if a claimant was dissatisfied with a decision on entitlement to benefit, they could fill in a very simple appeal form setting out why they thought it was an incorrect decision and send it to DWP. On receipt, DWP would reconsider its decision. If it revised that decision in the claimant's favour, it just substituted the new decision; the appeal would automatically lapse by operation of law—sorted. Under the new system, if a claimant is dissatisfied with a decision, they ask for a mandatory reconsideration, it goes to the Department and the Department again can change their decision or stand by it. On this occasion, if they stand by it, the ball goes back to the claimant's court; the claimant has to weigh up whether or not it is worthwhile to appeal. They have to fill in a new form, a notice of appeal form, and send it off to the tribunals service to process.

To my mind, it is of dubious advantage. It builds in an extra step, in that the claimant now has to make two applications: mandatory reconsideration and then appeal. It is bound to take longer. Personally, I am quite concerned that a number of claimants who may have winnable cases drop out between the mandatory reconsideration stage and deciding to make a further appeal. It seems to me to be regressive. The only value would be if mandatory reconsideration now having that “mandatory” title resulted in a much more rigorous reappraisal by the Department of its decisions than under the old scheme.

Q97 Chair: So there could be two reasons why the number of appeals would drop after mandatory reconsideration: first, because the process has just become too elongated and difficult and it is an extra barrier; or, secondly, because the mandatory reconsideration is overturning many of the decisions that would have been overturned at appeal, because the Department has actually taken a closer interest in these individual cases.

HH Judge Robert Martin: Exactly. I am very keen to see what the overturn rates are under mandatory reconsideration.

Q98 Chair: Do we not know that yet? Is it too early to know that? Do we do not know yet which of those two it is, because it is early days and there are no figures available yet?

HH Judge Robert Martin: It is crucial there should be some research into claimant behaviour. It may be that, if someone asks for mandatory reconsideration, they get a much more reasoned explanation than for the original decision. They may think, “Fair enough,” and drop out at that stage because that is a rational thing to do. We simply do not know whether people are dropping out at that stage because of weariness or because they are now persuaded or they have now been to an advice centre, which has explained that they cannot really challenge that decision.

Q99 Chair: By very definition, the cohort who are going through the mandatory reconsideration or appeals are people who have a long-term disability, illness or mental illness. The weariness you have just mentioned might be a perfectly reasonable response from individuals who just find the process—

HH Judge Robert Martin: At the moment, we simply do not know, and we will never know unless we start interviewing claimants and discovering the reasons for their behaviour.

Q100 Sheila Gilmore: Would you find it helpful, on that basis, if we saw separately published statistics on the outcomes of reconsiderations?

HH Judge Robert Martin: Yes, plus it would be necessary to have a baseline: what was the revision rate before mandatory reconsideration? In the past, this Committee has received some spasmodic evidence on overturn rates and I have seen something like the same. However, we really need to look at the overturn rates, now, benefit by benefit.

Q101 Sheila Gilmore: The problem at the moment is that the reconsideration decisions, whether it was the previous system or the current one, are simply included as original decisions, in effect. There are only decisions and appeal statistics; there is not a figure for the middle. It is not separately published at the moment.

HH Judge Robert Martin: No. Can I just add a further point in relation to whether it is taking longer? Under the old system, when a claimant lodged an appeal, at that point the tribunal had jurisdiction over it. We have had a number of instances where the appeal has languished with the Department—or, particularly, Revenue and Customs, over tax credits—and the representative for the claimant would say, “Is there anything you can do as a tribunal?” At that point, we could issue a direction: “Get on with it.” Now, we have no jurisdiction whatsoever over mandatory reconsideration; there is no statutory time limit for the time taken to reconsider. It is just in an unsupervised territory and the tribunal cannot legally intervene to move things along.

Chair: So there is no role in that for either the Ministry of Justice or anyone else, because that purely rests with the DWP and their processes.

Q102 Glenda Jackson: We get a great deal of evidence from people who suffer similar physical or mental conditions and there seems to be—this is anecdotal; please do not misunderstand me—an unnecessary repetition, as far as the DWP is concerned, of how they treat those applicants. Are you in a position to be able to pull out any figures in that sense—you see the appeals coming from people who, as I say, suffer the same condition—to be able to say to DWP, “Why do you keep doing this? These people are going to win these appeals?”

HH Judge Robert Martin: That is epitomised by a case that went to the upper tribunal, *DM v. MM*, where the issue was that the current appeals system demands an awful lot for people with mental health problems. You have to be active, engaged, able to understand decisions and fill out forms; you have to know something about the sequence, what mandatory reconsideration is and what it takes to get to an independent tribunal to

give a final decision. That identification of recurring problems and difficulty is exacerbated by cuts in legal aid for welfare rights advice and cuts in local authority grants. There is a contraction of the availability of help from advice agencies, which makes it doubly difficult for someone who, as Dame Anne says, is unwell and not particularly geared up to negotiate these shoals of administrative justice.

Q103 Chair: Does that help to explain, then, the difference between the success rates at appeal for claimants who are represented by an expert welfare rights officer and those who are not?

HH Judge Robert Martin: It is a factor. There has been some research that compares the success rate. The biggest factor is the claimant turning up to the tribunal. Simply turning up, from one analysis, more than doubles your prospects of success. It is very intelligible, because what the tribunal is doing is having that dialogue with the claimant to find out as much as possible and be better placed to then make a decision on the best evidence.

Richard Mason: Very briefly, from a policy point of view, we in DWP would probably say it is too early to say how mandatory reconsideration is working out. At the risk of jumping ahead—because I know you want to come on later to talk about the drop-down menu and how that worked—looking through some background papers for this session, I noticed one statistic or piece of data that came out of the drop-down menu work. 40.5% of DWP decisions that were overturned were overturned because of cogent oral evidence provided by the appellant. That is something that emerged from the drop-down menu point. I simply throw that in now, because that would point, potentially, to the efficacy of an MR-type approach, as that is what came out of the research on the drop-down menu.

Chair: Of course, they can only tick one box in the drop-down menu, and that is obviously one of the concerns. We are coming back to that.

Q104 Mr Thornton: Very quickly, you were mentioning that it is about turning up to the tribunal. It therefore sounds to me like it is one human being talking to another and asking questions that are not tick-box questions but actually get to the truth. If, before the tribunal—this is in your opinion; I am only asking for an opinion—the original process was done more in the way that a tribunal does its process, in other words asking proper questions, rather than tick-box questions, would that reduce considerably the mistakes that are made before they get to you?

HH Judge Robert Martin: Dr Paul Litchfield, in his most recent report, has gone into this in some depth. As a slight adjustment, Mr Thornton, it is one person talking to two people, because on the tribunal for WCA we have a doctor and a judge. One of the criticisms Dr Litchfield has made of current departmental approach is that your equivalent of the doctor, your healthcare professional, sees the claimant separately. The decision-maker might be in a different part of the country and never sees the claimant, so you do not get that combination. There is an interaction, in that the medical expertise is really good at drawing a story, particularly a medical history, out of someone. With the

judge sat next to the doctor, having previously planned “How are we going to approach this?”, you run a semi-structured interview; you are not following a protocol. Some claimants, we find, when they come into the tribunal, are so bursting with what they want to say that you just let the flow go. You are not trying to steer them, as Atos would do, through a questionnaire set by a computer; you listen. What comes out is fine; you give a little steer, a little nudge, and at the end you have all the material you want. Conversely, some just clam up and it is a real skill, then, to get them to talk about what their limitations actually are.

That combination of medical and legal sat together is really good, because the judge will contribute in a way, because the judge’s professional training is forensically to work out the credibility of what they are being told. “This does not sound right with what you might have said before; can you just explain it to us?” Going through that process gets better evidence; it gets more evidence; and it seems to meet what the claimant wants. A continuing criticism we hear from claimants of Atos is, “They did not look up from their computer. They had a list of questions to go through. They read them out one after another. I didn’t have the chance to qualify what I was saying and all the nuances went out of the window.” We try to avoid that.

If the Department wanted to try to reproduce the tribunal, that would be great, but from their point of view it would be horribly expensive, because we tend to be brought in to deal with the difficult, contentious and borderline cases. The mass of decisions taken by DWP on WCA are seen as unproblematic, but it would be useful to have that combination around the two. What we do not see, of course, are cases that do not come to appeal. There may be many decisions, either correct or incorrect, which we never see. It is only the ones where people are dissatisfied that come to appeal.

Q105 Dame Angela Watkinson: These are also questions about the appeals process and, in particular, financial support during the appeals process. When claimants lodge an appeal against an ESA decision, they are paid at the ESA assessment rate. What is the process for the Courts and Tribunals Service notifying DWP? On average, how long does that take?

Kevin Sadler: When the appeal is received, we enter it on to the system, check the appeal has been properly made—because we need them to fill in various details on the form—and then run a check and send the notification to DWP. That can take up to three days to do. That is my understanding of that.

Dame Angela Watkinson: It is fairly immediate, then.

Kevin Sadler: It is fairly immediate. We post it to DWP and it needs to go through the DWP processes. If, for some reason, that falls down somewhere in the process of getting through to the right people in the DWP and the appellant contacts us, we have an email protocol by which we can email the information directly to DWP. If people are getting caught and raise it with us, we can go to that.

Q106 Chair: Is the reinstatement of their benefit backdated to the date they lodged the appeal?

Kevin Sadler: That is my understanding.

Q107 Mr Thornton: Can I follow that up very quickly? Why do you not just do it all by email? Why on earth do you send letters? It costs more money and it takes longer.

Kevin Sadler: In an ideal world, with an IT system that did everything I wanted it to, we would. Effectively, DWP do need to see the appeal, and that is the paper appeal that we receive.

Q108 Mr Thornton: Can it not be attached?

Kevin Sadler: We would have to scan it, and then that would raise cost and processing issues.

Q109 Dame Angela Watkinson: The DWP can change its decision at any time before the hearing. There are some fairly volatile statistics we have about a huge spike in 2012-13 and then, for the last three months of 2013, a very large reduction. Would you like to comment on that?

Kevin Sadler: There are a number of things going on, which we are still working with DWP on understanding. One of the key issues for us is that DWP made a series of decisions about Atos and the processing of ESA claims, which meant that the number of appeals coming through reduced a lot. We were also expecting more Personal Independence Payment (PIP) appeals coming through than actually have come through. Again, that is to do with issues about how DWP are approaching the challenge of introducing the Personal Independence Payment. Effectively, we are seeing the effect of DWP operational decisions on the processing of their decisions, which results in appeals coming down. If they make fewer decisions, we get fewer appeals.

HH Judge Robert Martin: The figures have just fallen away remarkably. In March 2013, in a single month we had something like 37,000 Work Capability Assessment appeals. In March this year, from my enquiries of regional judges, we think probably less than 1,000 is our estimate.

Q110 Dame Angela Watkinson: To what do you attribute that sudden change?

HH Judge Robert Martin: As Kevin said, there is a block further up the line, in that, in our understanding, the volume of assessments going to Atos and emerging from Atos has shrunk dramatically. That just blocks the feed-through to us.

Q111 Chair: So it is the delays in the assessment process. Once somebody has put in an appeal, what proportion withdraw at that stage? They have got that far, even after the mandatory reconsideration. They have got as far as putting their appeal in, but they do not

proceed with the appeal to the end. Is there a high attrition rate with regard to that group of people or is it that, once they have got that far, they will eventually turn up at the tribunal?

Kevin Sadler: Since 2010-11, we have seen roughly 50,000 withdrawals a year from appellants. In 2013-14, for the first nine months of the year, which is all we have data for at the moment, there were 54,000 withdrawals.

Q112 Chair: What is the total? Out of how many is that 54,000?

Kevin Sadler: I can give you the precise number—I have it here. In 2013-14, 369,000 appeals were received. Some of those 54,000 withdrawals will probably relate to appeals that we received towards the end of the preceding year, but, effectively, you are talking about 54,000 out of 370,000.

Q113 Chair: Are those figures just for Employment and Support Allowance?

Kevin Sadler: Yes, and only up to December. No, sorry: they are not for Employment and Support Allowance. I can give you the Employment and Support Allowance figures as well. That was overall in the system. For Employment and Support Allowance, the withdrawn figure was 22,813. For receipts on Employment and Support Allowance for the same period, April to December 2013, we received 221,242.

Q114 Chair: Is that about 10%?

Kevin Sadler: It is about 10%, yes.

Q115 Chair: I know we should not do this, because our inquiry is around ESA and WCA, but you mentioned PIP, so can I tease this out very quickly? You said the DWP had anticipated a higher volume of appeals with PIP, but that has not come through. Is that because it is still only new claimants that the DWP are dealing with and they have not started the migration, where you would expect the appeals to be higher, simply because it is harder on someone who has had the money to have it withdrawn than it is on someone who has not had it at all and does not know whether they would qualify or not?

Kevin Sadler: Yes. On a similar point on ESA, DWP officials will be able to give you more detail on this, but they made an operational decision not to carry on churning through the existing caseload that had transferred from incapacity benefit. We expected a higher proportion of people who were had been receipt of benefits for a long time to be appealing anyway. The decision not to do that has meant a reduction in decisions and therefore a reduction in appeals as well.

Q116 Chair: You said “incapacity benefit.” Do you mean DLA?

Kevin Sadler: No, I was talking about ESA and incapacity benefit there.

Chair: Oh, they have slowed down the migration.

Kevin Sadler: Yes, the migration.

Q117 Sheila Gilmore: The NAO looked at the initial figures—probably up to about December—for PIP, and there appeared to be a higher level of applications for mandatory reconsideration than anticipated off a very small number of final decisions. Is there any sign of what impact that is having if that has moved from mandatory reconsideration to appeal? It actually was a higher number than they had expected.

Kevin Sadler: We have received a handful of appeals in relation to PIP. I would be very hesitant to draw any conclusions on the numbers we have received, particularly because terminally ill cases will go through faster and they have unique characteristics that are not typical of PIP cases. It is very early days on PIP.

HH Judge Robert Martin: From the appeals that we have, we see that clearly there are immense delays around the assessment phase and decision-making on PIP, compounded by the managed reassessment phase staying only with a few pathfinder areas rather than being rolled out nationally.

Chair: We have more questions on the volume of appeals, some of which we have already covered, but Anne Marie will be able to pick out which bits we have not covered.

Q118 Anne Marie Morris: Yes, you are absolutely right, Chairman: we have talked a lot about the volume of appeals. Can we first look at incapacity benefit and try to look at this on its own? Since the reassessment began in 2011, there was a huge increase in the number of appeals. Can we just look at not only the cause but how you have dealt with that? We talked a little bit about the cause already. You did, right at the start, talk about you getting more medical people and more judges. You talked about going from £4 million to £34 million. Could you say a little bit more about how you dealt with that and why it happened?

Kevin Sadler: There are three elements from the perspective of HMCTS here. It is having sufficient judges and medical members to hear the appeals; it is having sufficient venues to hear the appeals; and it is having sufficient administrative staff to process the appeals. The big challenge for us has been having sufficient medical members to hear those appeals. We have had a series of years where we have been recruiting and we have not always been able to recruit as many people as we have wanted, and the forecasts keep on going up. We ask for a certain number of medical members from the Judicial Appointments Commission, who do the appointments, and it then turns out we need more because the forecasts are going up again.

A rule of thumb is that it can take up to a year from flash to bang in terms of deciding to recruit a medical member and then actually having them in place and in work. If you do not have the right forecasts and you are only reacting to the work coming in—because that is only when we know we have got it—you are always running a year behind. Overall, in the last five years, we have recruited 1,000 extra judges and medical members, if you add them together. In the last year, there was a recruitment exercise where we actually exceeded our requirements in terms of the number of medical members, because we and Robert have been working very hard with the Judicial Appointments Commission to help them improve their recruitment processes. The general Judicial Appointments

Commission competition is lots more lawyers than there are jobs applying for jobs, whereas we want to drum up interest in working as a medical member in the tribunal. It is a different kind of approach needed to getting people to apply and helping them through the system to make sure they continue to maintain their interest while the process goes through.

In the year just gone, as I say, we believe we had the capacity to process around 650,000 appeals, which is what we were expecting from DWP. When the final figures get published in June for the full year, I think we will have received fewer than 650,000. I believe we are able to meet capacity requirements in the future, subject to not knowing everything about the future.

Q119 Anne Marie Morris: Have the challenges in recruitment impacted on the quality of the people you have recruited?

HH Judge Robert Martin: No. The big difference in the recruitment of medically qualified members was that the Judicial Appointments Commission entrusted the tribunal to do the marketing and the recruitment. We had a number of salaried medical members on our books already and we simply campaigned. We went out to local medical committees; we went out to GPs' practices; we put adverts in the main medical professional journals; we encouraged our existing members to write a little, "This is what it is like being a medical member of the tribunal: it is lovely. Come in." We just went out and we collared doctors.

Q120 Anne Marie Morris: What is the lowest level of qualification that is acceptable to become a medical member of the panel?

HH Judge Robert Martin: Formally, you simply have to be registered with the GMC. We draw mainly from GPs, but we have emeritus professors who just like doing this kind of work. It is a very broad spectrum. Someone who has just qualified medically probably would not get through the selection process. We are looking, really, for a great deal of practical experience, because we expect people to be able to span the whole breadth of claimants who walk through the door or have the ability to research that. We do not think we compromised these standards in any way.

Q121 Anne Marie Morris: That is helpful, thank you. What about delivering the venue? You cannot do that with the click of a finger either. Has that been a challenge?

Kevin Sadler: Medical members, with the longest lead times, have been the biggest challenge, but there are certainly parts of the country where we have had challenges in finding venues. However, we do have the advantage of being a part of Her Majesty's Courts and Tribunals Service, so we have been able to run social security appeal hearings in other venues, where that is suitable. Obviously, we do not want people appealing against a benefit decision sitting in a dock, but we do have civil courts and some magistrates' courts set up informally. We have managed to use external spare capacity in other parts of the estate. In some areas, we do hire hotel rooms, but, ideally, we use the existing estate as much as possible.

Q122 Anne Marie Morris: With regard to cost, right at the outset you talked about a 10-times increase. What do you think the running rate going forward is going to be in terms of the overall cost per year?

Kevin Sadler: I am expecting around 430,000 appeals this financial year. Future years will be dependent on decisions made by DWP about how they approach PIP, ESA and Universal Credit. I firmly believe we are in a position where our capacity, providing we maintain it, is in a good place to meet those challenges. The worst month we have ever had for appeals has been 54,000 appeals received in a single month and our best month for disposing of appeals was 54,000 appeals. They were not the same months, unfortunately, but we are in a much better place to handle this than we have been. Given the volatility of the forecasts and the fact we are dependent on a series of decisions by DWP, it is a little bit difficult to be firm about that.

Q123 Anne Marie Morris: Is there an average cost per appeal? I know they are all very different, but is there an average?

Kevin Sadler: The average unit cost of an appeal is currently around £248, I think. It varies between £230 and £240, depending on the composition of appeals, because, as Robert said, an ESA appeal is a judge and a medical member; a PIP appeal is a judge, a medical member and a disability qualified member; and an appeal against a benefit sanction is a judge. It depends on the composition of the caseload that is coming to us as to exactly what the cost will be.

Q124 Anne Marie Morris: If we move to ESA, the 60% reduction is kind of a good-news story. While mandatory reconsideration has been highlighted as the reason, are there other reasons other than the kind of things that have already been raised?

Kevin Sadler: We have covered the main things. It is about DWP making fewer decisions and the potential impact of mandatory reconsideration, but it is too early to call that, really.

Q125 Chair: You said your average for appeals comes out at £248 per appeal. That is obviously for all the different social security appeals. In our brief, an average unit cost for an ESA appeal was estimated at £69.59, close to £70.

Kevin Sadler: That is not my number.

Chair: No, it is from our House of Commons debates.

HH Judge Robert Martin: We were running a special offer that month.

Chair: When I read the brief, I thought, “Gosh, that is a lot less than I would have anticipated. Judges come cheap these days.”

Kevin Sadler: I am not sure of the context for that.

Q126 Chair: The £248 you mention would be about average for an ESA appeal.

Kevin Sadler: Basically, it is the whole cost of the SSCS Tribunal divided by the number of appeals we processed in that year. It is an average across PIP, ESA and other benefit appeals like Jobseeker's Allowance appeals and so on.

Q127 Glenda Jackson: This is simply on the expertise of the medical part of the tribunals. I received something from the General Medical Council arguing that a GP should not today be asked to submit an opinion as part of an appeal for an individual patient, because GPs do not have—I am paraphrasing what they said—the full range of expertise regarding the individual complaints they may have to make a decision on. They were particularly exercised about occupational therapies and things of that nature, so I was interested in your saying that you specifically look for expertise. Does that mean, in the main, that the medical element of the tribunal tends to be someone older? I cannot put it any more kindly than that, and, as I am an old person myself, I am past caring. Does that have any kind of impact? I would have thought it would be a benefit. Am I wrong in thinking that, as far as the individual claimant is concerned?

HH Judge Robert Martin: The age profile of our members is slightly higher than the medical profession at large. I would say that that is not a bad thing, because we are looking for wisdom, as well as medical knowledge. We are very concerned that, when a claimant appeals, the prospect of going into legal proceedings that are held, perhaps, in a former magistrates' court is a real deterrent, so that initial view they have when they come through the door of the tribunal is really important. If it looks like an empathetic, wise tribunal, that is powerful and goes a long way to creating the kind of conducive atmosphere where someone feels confident about explaining what are, after all, deeply embarrassing, personal facts of life.

Glenda Jackson: I am asking this only because there could be a read-back from what you do in the tribunal to the initial assessment, as far as whoever takes over from Atos is concerned.

Q128 Debbie Abrahams: I wondered if you have noticed any trends in terms of the types of conditions that may be more prevalent in the cases that you are hearing. Have you noticed that you are receiving more appeals through for particular conditions?

HH Judge Robert Martin: We do not conduct an analysis of the main conditions; DWP do. If you are asking me for impressions, there are a couple. One is what my medical colleagues call comorbidity. It goes back to people who have perhaps been on incapacity benefit and then ESA, so they have been ill and disabled for a long time. If you have long-term physical problems, you tend, unsurprisingly, to become depressed and anxious. Conversely, if you have long-term mental-health problems, you develop physical signs; you somatise, so you complain of physical ill health as well as mental. That combination locks in and a high percentage of claimants who come to see us have both mental and physical problems.

The other dimension is that we encounter—particularly through the migration from incapacity benefit—people who have been disabled for a long, long time and who can

honestly say, “I am no better than when you accepted me as unfit for work, five, 10 or 15 years ago.” We have some difficulty there in trying to get over the fact that the view they may have received, having emerged from the early stage of the process with, perhaps, zero points, does not mean that anybody is saying, “You have no disabilities whatsoever.” It is really that the goalposts have changed. You can honestly tell us, “I am no better now; I am no fitter for work than I was 10 years ago.” However, we then have that difficulty in translating those limitations into a rapidly changing set of descriptions and functions. We have that difficulty in getting that over.

Q129 Debbie Abrahams: Thank you. That is very helpful. Do any other of the panellists want to add anything to that in terms of the trend data?

Kevin Sadler: We do not routinely collect data on what conditions people present with.

Debbie Abrahams: Really?

Kevin Sadler: No, we do not. It would mean we would have to examine each appeal. As Robert said, DWP collect some data on that, but it would mean a lot of management information at a lot of cost.

Q130 Chair: Is the difficulty of doing that simply because someone who may have presented originally with a physical disability has developed a mental illness as a result of their inactivity or their physical illness—and vice versa, from what you are saying?

HH Judge Robert Martin: Yes.

Chair: It is difficult to separate those out.

Kevin Sadler: The whole essence of the appeal is the appellant saying that they disagree with what the DWP have concluded on their condition, so there are two views that we are dealing with.

Q131 Glenda Jackson: How often are you hearing people say that the actual delay in getting the appeal heard has impacted on their condition deleteriously?

HH Judge Robert Martin: It happens. One of the technical difficulties we have as a tribunal is that, by law, we have to look at the state of health a person had at the date of the Department’s decision. Often, people want to tell us, “I am much worse now.” The delay, the anxiety and the uncertainty may well be a strong factor in that. It is something that we have to explain in detail, almost: “Tell us how you are today and then we will work backwards.”

Q132 Glenda Jackson: Presumably that is where the medical expert is of value, in being able to examine that allegation that they are worse because of the delay.

HH Judge Robert Martin: Yes, so we need to unpack. It is very difficult saying to someone, “You are dying to tell us how you are today, but tell us how you were on 15 August last year.” There are techniques we have devised to do that, but for someone

who has a fluctuating condition it is a bit difficult, which is why we are so keen to drive down the waiting times.

Q133 Mr Thornton: Some of this we have probably covered endlessly, but, just to firm up some of the answers, if the average time of disposal of social security and child maintenance tribunals was 21 weeks in the last quarter of last year, can you bring that down to how long that was for ESA? Do you have data like that, Mr Sadler? Do you have data for just the ESA on that?

Kevin Sadler: I am looking for—

Mr Thornton: There we go.

Chair: If you wait long enough, there is always a bit of paper that appears from behind.

Kevin Sadler: The published data that I have from April to December 2013 is the average clearance time for appeal for ESA appeals was 20 weeks. For all appeals, it was 19.1.

Mr Thornton: To all intents and purposes, it is the same.

Kevin Sadler: It peaked in 2011-12 at 22.9 weeks.

Q134 Mr Thornton: Within that, you mentioned that a lot of delays in all of this are to do with capacity, which you have drastically improved.

Kevin Sadler: Yes.

Mr Thornton: What other road blocks are there besides capacity? What else slows things up? If your side of it has improved, you have more capacity and you have better people doing it, presumably there are other roadblocks that cause you problems, maybe with other Departments or other people.

Kevin Sadler: The only potential roadblock is a DWP delay in providing their bundle, as it were. However, in an ideal world, we would be processing appeals in around 10 weeks, which allows for the appeal to come in, for DWP to take their four weeks to produce the bundle and to give people reasonable notice of a hearing. In some parts of the country, we are now getting people ringing us up and saying, “You are arranging your hearing more quickly than I expected”, which is nice to hear, and something we have not heard for quite a while. Around 10 weeks is the best outcome you might expect.

One of the challenges for us is, if we get fewer appeals, that we need to make sure we use the tribunal efficiently. If a tribunal routinely hears four oral cases and does a written case in a morning and I only have two cases for them, it would not be cost-effective for them to sit. With lower volumes, there are different challenges. Broadly, however, it is all about capacity.

Q135 Mr Thornton: The best case is 10 weeks. Can you predict when it will be before that is the average case, rather than the best case? It is a nasty question—aren't I mean?

Kevin Sadler: I can't say anything that I could be held to, because I am entirely dependent on what DWP send me. Assuming an even flow of appeals, and with the capacity we have, I would expect to be doing that quite often in this financial year. At the moment, as the volumes have gone down, I tend to say it is a bit like the tide going out: we are now getting the time to spend on sorting out and finishing off some of the oldest and most complex cases that have adjourned for extra medical evidence or where people have not been available or whatever. Of course, a case only counts in this average when it is concluded. If there is a case that, for one reason or another, has been going for 52 weeks—the appellant may be quite happy for that to happen in the particular circumstances—that will bring the average down. One of the problems we have with this average-weeks clearance time is that it is a lagging indicator, rather than a forward indicator.

Q136 Mr Thornton: Perhaps it would be fairer to look at a median, rather than an average.

Kevin Sadler: Yes. The way we publish the data is that we show how many weeks it takes to deal with 50% of the cases, 75% of the cases and 100% of the cases.

Mr Thornton: That might be fairer, yes.

HH Judge Robert Martin: There is a very streamlined system under direct lodgement once the response has come in from DWP. The next stage is virtually: get it before a tribunal. We do not have case management hearings; we do not have pre-trial reviews; we do not have the normal things that characterise civil litigation. It is just: get it into the tribunal.

Q137 Mr Thornton: What I find quite interesting, from my personal experience, is, in the past, the number of cases that were overturned. You were saying that it doubles when people show up for a tribunal. It does worry me that so many cases are overturned on tribunal, because, if something is going to tribunal, it is costing money to get the result that they should have got already. It is wasting everybody's time; it is wasting taxpayers' money; and it is being extremely unfair to the claimant. That does worry me. One of the ways you are speeding everything up is by recruiting more medical members. I would be interested to know: are these people working full time on this, or are they taking time out of their normal job to do a certain number of appeals while doing their existing job?

HH Judge Robert Martin: It is a mix. As we were saying earlier, some are nearing retirement as general practitioners and are phasing down their clinical work. Most GPs are allowed one day a week for other things, and there are many active GPs who spend that day sitting on the tribunals. Many balance the demands of clinical practice with this public activity.

Q138 Mr Thornton: Could any of you three say that there was anything else that could be speeded up because of other inefficient systems? For instance, you were saying

about having to write letters, because you have to scan a report in before you can send it. I do not understand why it has to be scanned in. Is it not typed up on a computer originally? If it is typed up on a computer, it can be attached. I genuinely do not understand that, but I will take your word for it. It seems extraordinary to me. Are there any other systems that could speed the whole process up and help the claimants get an answer much more quickly?

Kevin Sadler: Speaking administratively, if there were an infinite amount of money available for investment, I would like to see an electronic appeal form, on which those able to access it through the internet could make their appeal, and a system that enabled us to avoid then having to type what they put on their appeal form into our system and enabled us to process it through. That is something we have an ambition to do, but we need the investment money to do that.

Q139 Mr Thornton: I am surprised that would cost any money to do, because there are an infinite number of commercial systems out there that people put in place in five minutes. If it simply a matter of putting a form together—I get surveys through where it is already set up—could you not get a survey form and convert it?

Kevin Sadler: It is a form that has to connect to the system we have or a replacement system. It is very easy for people to type into a form and send it to us, but we have to retype it all in and that costs us the same amount of money as if they hand-wrote it.

Mr Thornton: That is weird; that is just strange.

Kevin Sadler: It is the connection.

Chair: We are now straying into Government IT.

Mr Thornton: Yes, I will stop.

Q140 Chair: Sometimes, we are dragging ourselves into the 21st century.

As Dame Angela was saying, there must have been a bulge coming through where there was a delay, because of the introduction of the mandatory reconsideration in October last year. There would have been that delay until that went through. Is that bulge all through now? Will the volumes you have that are going through the system at the moment be something that you can extrapolate going forward, because it is now taking into account the mandatory reconsideration?

Kevin Sadler: I can only give you data up to December, because the ONS would have my guts for garters if I gave you any data for later. We will be publishing the next quarter's data on 12 June, so it is not far away.

Chair: So that will be the full year.

Kevin Sadler: I can tell you in general terms that we are seeing historically low levels of appeals at the moment. The process of implementing mandatory reconsideration plus the process of decision-making in DWP is resulting in very low numbers of appeals at

the moment. Perhaps DWP colleagues can give you more information about what is in their processes.

Chair: We will be asking about volumes.

Dame Angela Watkinson: I was going to ask about the impact of a few very long, complex cases on the figure given statistically for the average, but you have already covered it, so thank you.

Q141 Glenda Jackson: From October 2014, DWP will be subjected to a time limit for returning appeal responses. This time limit is 28 days, but is it within the context of them only working five-day weeks or it is 28 consecutive days including weekends? Do we know?

HH Judge Robert Martin: “Days” in the procedural rules is usually defined as “business days”.

Q142 Glenda Jackson: That is five working days, essentially, which is what I thought. Have these delayed appeal responses from DWP been a significant factor in contributing to delays in appeals being heard? You have already covered this, haven’t you?

Kevin Sadler: Can you repeat the question?

Glenda Jackson: Has the delayed response from DWP been a major contributory factor in the length of delay before the appellant is actually having their case heard?

Kevin Sadler: Prior to mandatory reconsideration, the average time for the bundle of papers to come from DWP was nine weeks, so that is a factor. Our inability to bring capacity in as quickly we as would have liked has also been a factor. We have had appeals ready to list that we have not been able to list, because we have had ones further up in the queue, as it were.

Q143 Glenda Jackson: I cannot remember whether we asked this question. When you say to DWP, “Why is there this delay?” is there a recurring theme in their response or is it a wide variety of excuses?

Kevin Sadler: I think they would say “reasons”.

Glenda Jackson: That is me being spiteful.

Kevin Sadler: In the same way as we get hit by increases in work, they get hit by increases in work. Certainly, there have been various stages in the DWP processing work that have led to delays, including just getting the papers printed for us. They had to unblock some delays there at one stage. Generally, however, it has taken them about nine weeks to gather it together. It has not been a figure that has changed much over the years; 28 days is a challenge for them, compared to what they have usually done.

Q144 Glenda Jackson: Just looking at ESA appeals, can you perceive this time limit having any positive effect at all?

Kevin Sadler: They are currently working to that time limit even though it does not exist.

Glenda Jackson: Really?

Kevin Sadler: It does not formally exist, but that is their aim. I do not have any precise data, but I am told that in most cases they are meeting that or, with a reminder, doing it within five weeks. There has been an improvement in the speed with which they produce the papers.

Q145 Glenda Jackson: If they fail to respond in those 28 days, what happens? Does anything happen?

HH Judge Robert Martin: It is a matter for the tribunal. There are time limits scattered throughout the procedure rules. It is probably more effective if you have delay on the part of the appellant, because the ultimate sanction is to strike out the appeal. The most the tribunal could do is, if there was unconscionable delay on the part of the Department, issue a direction barring them from further participation in the proceedings. However, that, in a way, is self-defeating. If there is no sign of a response coming from the Department, what is likely to happen is that the tribunal will say, "We will just list this before the tribunal and do without the Department."

Q146 Glenda Jackson: Is this 28-day timetable regressive or does it only apply to new cases? I mean cases lodged in October 2014.

HH Judge Robert Martin: Yes, it will only apply to decisions taken after that date. It will have a lead-in time before it begins to apply.

Glenda Jackson: That 28-day rule will not apply to those that are already in the pipeline.

HH Judge Robert Martin: Correct.

Q147 Debbie Abrahams: I think it was Mr Sadler who mentioned, in terms of costs of the overall appeal process, that they had escalated from £4 million to £34 million; is that right?

Kevin Sadler: Yes.

Debbie Abrahams: Can you give me a time period that that relates to?

Kevin Sadler: The original estimate in 2008-09 was that it would be £4 million that we would need in 2009-10. I should say that that £34 million is unaudited and may change in HMCTS's accounts. I should have given you last year's figure, which was £30 million.

Richard Mason: Chair, while we are clarifying things, with further assistance from colleagues, I understand that it is 28 calendar days.

Chair: It is not 28 working days, so the DWP has four weeks to respond.

Richard Mason: It is not business days.

Q148 Glenda Jackson: Could I just ask who decided on 28 days and why? Is there any reasoning behind this?

HH Judge Robert Martin: The rules are made by something called the procedure committee, which is an independent body. It has representatives of users on it. This has a long history, however, going back to negotiations between MoJ, DWP and representatives of the procedure committee. Before 2008, there was no time limit whatsoever. That carried forward and then it was a long process of drawing DWP into recognising that you are within the ambit of legal proceedings; there must be time limits. It is no good saying, “Do it whenever you can or whenever it is reasonable.”

In the end, it seemed to be conceded that, with direct lodgement, there was in effect no possible further argument to resist. Many of the time limits in those rules are 28 days or one month.

Glenda Jackson: It was tradition, essentially.

HH Judge Robert Martin: Yes. It is the result of compromise, I guess, and negotiation. The time limit for child support is 42 days, because the Department said, “It can be very complex and we may need to do more investigation.” There is a slightly more generous provision for child support.

Q149 Glenda Jackson: Is there any financial tag to this 28-day period? Will it make things—I do not mean “cheaper”, but will there be any kind of money saving if they actually meet this target?

Chair: That might be a question for the DWP, if they are able to actually deal with it.

Kevin Sadler: There are issues for DWP. Generally, as a matter of principle, the longer an appeal takes, the more it costs us, because we get more phone calls, more letters and things can change. Anything that enables it to go faster is helpful to us, but it is not an amount of money we would be able to take away from a budget. The DWP cost issue is more around the fact that, if they take nine weeks and have to get down to four weeks, it means a spurt of effort to get there. Once they are there, it is alright.

Q150 Glenda Jackson: They are not going to come to you and say, “Do not put in these big cheques anymore, because we are doing it faster.”

Kevin Sadler: No, they are not.

Chair: On overall cost, can we come back to Debbie, who was interrupted there?

Q151 Debbie Abrahams: That’s fine, don’t worry. To follow on from that, it was £30 million for the last financial year.

Kevin Sadler: That was for the last audited year, which was 2012-13.

Debbie Abrahams: You have no more up-to-date figures for 2013-14.

Kevin Sadler: No, not until we publish our accounts in July.

Q152 Debbie Abrahams: What about projected costs for 2014-15?

Kevin Sadler: That is under discussion with DWP at the moment. One of the challenges for us is, because we are getting fewer appeals than we had originally been led to expect by the forecasts, but we know we will probably get those appeals later on, we have to make sure we do not lose so much capacity that we are running to catch up when the work comes through again. There is a point of live discussion with DWP about how much it costs us to keep that capacity even if it is not fully utilised.

Q153 Debbie Abrahams: When do you anticipate concluding those discussions and having a public outcome?

Kevin Sadler: We concluded the discussions for last financial year around Christmas. It is an ongoing thing. We never quite get to it by the end of the year. Partly, it is a result of what we get, because if we do not get as many appeals we will obviously not run as many sessions with the tribunal panels. We do have to watch it in year and just be careful about that.

Q154 Debbie Abrahams: So there will be nothing in the public domain for a number of months.

Kevin Sadler: No—July.

Q155 Debbie Abrahams: That is very disappointing. Are you able to split up, in terms of the overall appeal process, the different levels of tribunal and so on?

Kevin Sadler: Costs?

Debbie Abrahams: Yes.

Kevin Sadler: We do not. What we are adding up is not only the direct costs of the tribunal, but the overhead costs of running HMCTS and the overheads the Ministry of Justice charges to us for its services. We do not go into any more detail than the overall cost of an appeal. That is all my financial colleagues can provide me.

Debbie Abrahams: Of course, that does not include the mandatory reconsideration process.

Kevin Sadler: No, that would be DWP's costs.

Debbie Abrahams: That is on top of that, and there is no public figure on the collective costs.

Kevin Sadler: Hopefully, DWP can provide you some information on that. All I count is what is within HMCTS.

Oral evidence: Employment and Support Allowance and Work Capacity Benefits, HC

Debbie Abrahams: That is probably about as much as we can cover at the moment.

Chair: We are now going on to the outcomes of appeals and feedback.

Q156 Nigel Mills: Before we start on that, can you tell me what the threshold is for your decision? Is it a straight, full reconsideration or do you overturn only clearly wrong decisions?

HH Judge Robert Martin: No, we look at things afresh, not limited to errors or oversight. We decide cases on the balance of probabilities, which is the usual civil standard.

Q157 Nigel Mills: How many people are there on each tribunal?

HH Judge Robert Martin: There is always a judge. Whether there are other people on the panel depends on the nature of the benefit. As we have said, for Work Capability Assessment there is a judge and a medical member. For Disability Living Allowance and Personal Independence Payment, there are three: a judge, a medical member and a disability expert. Disability experts are people who either have experience of the needs encountered by people with disabilities professionally, such as occupational therapists, or are disabled themselves. We have just recruited 150 additional disability-qualified members in anticipation of PIP coming down the line. Of that 150, 50 are profoundly disabled to the extent that they need reasonable adjustments to sit as tribunal members. There is an immense wealth of understanding of disability. In child support cases, the judge may sit with one of our accountants who we have on the books. Often, the challenge in child support is to go behind the presented income and see whether, actually, that is masked by shell companies or other things, so we have accountants on our books as well.

Q158 Nigel Mills: Do those two or three have to reach the same verdict or can there be a majority? Does somebody have a casting vote?

HH Judge Robert Martin: It can be a majority. It is extremely rare that that happens. Through the process of deliberation at the end, it is invariably a unanimous decision.

Q159 Nigel Mills: Do you monitor that some people are a bit harder-line and some are a bit softer? Do you try to match up harder and softer-line people or is it just completely random?

HH Judge Robert Martin: The tribunal is part of the system of courts and tribunals in the country. If someone was hard-line to the extent that they were not evaluating the evidence properly and leaning one way because of preconceived ideas, that, if it influences the decision, will be challengeable. A person who is dissatisfied and feels they have been treated unfairly—either in the way in which the tribunal conducted the proceedings or if the outcome was skewed by bias—can challenge that by appeal to the tribunal.

Internally, we have a system of appraisal. All the judges and members are subject to an appraisal where a more experienced judge or medical member will observe their performance in tribunals. Obviously, this is reinforced by mentoring and training. As part of the appraisal system, we look at a sample of decisions that have been taken so that we are in a position, internally, to monitor whether there might be the kind of unjudicial behaviour that you touched upon.

One thing we also used to have was the Administrative Justice and Tribunals Council. It used to send observers regularly to tribunals, picked at random, and they would turn up, observe how the cases were conducted, how the tribunal treated claimants and how they approached the decision-making, and produce a report, which was very helpful as an informed outsider's observation of the tribunal. Unfortunately, as you know, the AJTC has now been abolished.

Q160 Nigel Mills: Is this all done on observation or is there data tracked and monitored about how many appeals are overturned by each judge or each medical expert? Is that kind of work done?

HH Judge Robert Martin: Statistically it is a bit difficult, because, where you have combinations of people on the three-person tribunal, it might be difficult to isolate the influence of one member. You can never quite be sure whether you are controlling for other variables. For example, the level of representation of appellants varies throughout the country. You are never quite sure whether the mix of cases coming before someone is the same. It would be very difficult to do, because of all the variables involved. What we try to do is understand, influence and make sure that it is as professional as possible, and that the approach is based on making sound findings of fact so that the decision at the end is evidence-based.

Q161 Nigel Mills: How often are medical experts or judges removed from the list for this kind of work? Does that ever happen?

HH Judge Robert Martin: They are removed, but misconduct is the main ground for removal. That is not quite the same as what you are saying, which is, "Are they approaching this with the right degree of objectivity and professional judgment?" It would be difficult to remove a judge in that way. What we might do is follow up the appraisal with an action plan, which would focus on a different approach and encourage them to observe other judges or medical members and how they approach it, and deal with it that way.

Q162 Nigel Mills: As far as you can be, however, you are optimistic that, whatever panel I have my appeal heard by, they will come to the same decision in the majority of cases. I do not need to get lucky on a particular day or something like that.

HH Judge Robert Martin: No. One of the things that would stop me from saying "of course" to you is that in some cases there is not a single right decision. This is one of the criticisms that both Malcolm Harrington and Paul Litchfield have made of the Work Capability Assessment: it seems, on the face of it, objective and scientific; you can

only come to one answer, because you are, in effect, converting everything into numbers; you add the numbers up and that tells you whether to allow or refuse the appeal. However, so much depends on what evidence you accept. In many cases, it is down to the credibility of the claimant. If there is a claimant who says, "I cannot do this, because it is too much pain", there is no objective, scientific test that can say, "Yes, that person is absolutely right on that." It is about weighing up what we make of humans and what they say. There is a degree of variability in that.

Q163 Debbie Abrahams: I wanted to pick up on what the judge said about representation and how that varied. How much does that influence the outcome of the process and how much is the change in access to legal aid also going to affect the appeals process?

HH Judge Robert Martin: It has a major effect, but not one that is necessarily visible in the tribunal room. The real power of representatives takes place before the tribunal, or even before the appeal. Good advice can filter out cases that are hopeless, which would just add to the distress of the claimant and get nowhere. They can encourage someone who is not sure about appealing by saying, "We think this is a very winnable case." Medical evidence is important, and being able to persuade a GP to provide a letter of support for the claimant in some cases may be influenced because the advice centre would be able to offer a modest fee under legal aid, which is obviously no longer available, to get that evidence. A lot of good work is done by the advice centre before the appeal actually begins.

Once it is under way, the value is that the representative can explain what is likely to happen in the tribunal, build people's self-confidence and give them assurance. It is seldom that, in the tribunal hearing, the tribunal itself is swayed by great advocacy. It does not happen like that. Most representatives that actually accompany their clients to the tribunal do not say an awful lot, because they appreciate that what the tribunal wants to do is have that dialogue, face to face, with the person who knows best about their limitations.

Q164 Sheila Gilmore: A pilot was started, looking at summary decisions rather than drop-down menus. There seems to be a distinction there. How has that been going? What are the plans for that? How, perhaps, does it differ from the previous system in place?

HH Judge Robert Martin: It is evolving; that is an accurate description. It is important to recognise that, once upon a time, the tribunal issued a full explanation, a full exposition of the reasons for its decision, and they did that in every case. In 1996, the Secretary of State changed the rules and said, "That is not necessary, because many people are happy with your decision, so just give a bare decision notice." If someone wants to have that full, reasoned written explanation, they then have to ask for it afterwards. We find at the moment that, in about one in nine or one in 10 cases, someone will ask for that full written explanation: "Why has the tribunal reached its decision?" Only about one in 20 of those requests comes from the Department. The Department does not take up the availability of a full reasoned explanation in more than 1% of cases.

These full statements are expensive to produce. What was seen as the goal was, "Is there a way in which the tribunal can give a flavour of why it has reached a decision?"

Following a suggestion from Professor Harrington, this drop-down menu came in, which was using standardised, codeable phrases, so the tribunal could give that hint of why it overturned the Department's decision. The drop-down menu hit a big snag in this way. Most tribunal decisions are a balancing exercise. "That seems impressive evidence on one side, so we attach more weight to that. The corollary is that the evidence on the other side is not so valuable." It is that balancing act of many different variables. We were trying to work out how a drop-down menu could work. We hit the snag that the Department said its computer could only handle one reason. It was then almost a lottery, as to which reason the tribunal selected as the explanation. In some cases it was, "We really believe the claimant because of his very credible evidence." In another it might be, "We didn't really find new facts. We just put a very different interpretation on the facts that were before the healthcare professional or the Department." That fundamental flaw, that you could only select one of a complex of reasons, resulted in the view—which is my view—that you cannot place any value whatsoever in the drop-down menu results.

We were back to the drawing board. "Can we do more than the drop-down menu?" In negotiations between the tribunal judiciary, DWP and MoJ, we said, "How about if we expand them? Instead of just being a single sentence, it could be a paragraph or two paragraphs." That seemed to be more promising, because we could include more reasons; we could say a bit more about it. However, this was a time when appeals were going up and up. So that we were still able to make best use of the tribunal's time, we needed to have those available on a computer with a degree of standard text, but it could be free text.

We rolled out what we could call one of our pathfinders last June in four centres to see how it was working. For an eight-week period, we generated something like 7,000 sets of summary reasons in WCA cases, which the Department then went away and analysed. They said it was a rich source of information. We thought, "Let's extend that and see how it will work." Because we knew that the Department were keen to learn early lessons from PIP, we added in PIP to the Work Capability Assessment. From April, nationally, we have been generating summary reasons in WCA and PIP cases. It is national in that we are running it at those centres where we have the IT support that allows us to use computerised decision notices. The coverage is not 100%, but the majority of hearing centres now are linked up and generating this.

The ball really passes to DWP to make sense of summary reasons. We think there may be two advantages. One is that, because it is a decision in an individual case, it opens the door for the Department to go back to the original decision-maker or even the original healthcare assessor and say, "This is what the tribunal made of the case." There is some scope for learning lessons in individual cases. However, it is also possible to try to aggregate the data to find out whether there are systemic shortcomings.

When the tribunal is at full capacity, I have two concerns. One is whether or not the Department will be able to handle this volume of data. If we were running it last year, we would have generated something like 450,000 pieces of data to be analysed. The second concern is that the crucial feature of feedback is that it should do something; it should be possible for the Department to say, "We have analysed this and this is the way

in which we have changed our process in the light of what you have been saying.” Otherwise, it is just redundant.

Q165 Sheila Gilmore: Obviously, the reason why there has been pressure for reasons was to try to improve initial practice. That was where Harrington was originally coming from. Would you agree? It was not just some abstract notion of, “Let’s give reasons”, but because he felt that would feed back through the process.

HH Judge Robert Martin: The idea emerged in a conversation I had with Malcolm Harrington about this. He was borrowing a checklist we had used in annual reports, which we had produced in 2001, on the standards of DWP decision-making. There is a checklist in that, but it is limited. Particularly, there is an inability to explain more subtly what the reasons were for overturning the decision and how they interacted. Summary reasons are more expensive to produce, but offer richer material.

Q166 Sheila Gilmore: Would you expect the summary reasons to continue on an ongoing basis now?

HH Judge Robert Martin: It is open-ended. As it is extra work for the tribunal to generate, we need the reassurance; we want to see whether it has worked, because feedback only works if it influences things and changes them for the better.

Q167 Sheila Gilmore: How would you expect to be able to judge that, or is it for the DWP to judge?

HH Judge Robert Martin: DWP will have first bite, because they have the material. They would have to analyse it; they would have to demonstrate the capacity. In the controlled start last year, they produced an evaluation. They conducted what they described as a “deep dive” into 120 of those 7,000 pieces of information and saw what lessons it generated for them. They came up with a few: the documentation was not that good; the healthcare professionals were not dealing with inconsistencies in evidence. There were some lessons in there, but it was not anything radically new. It was things that Harrington, Litchfield and, in our own annual reports, we have been saying for ages: basically, listen to the claimant.

Q168 Sheila Gilmore: In the statistics for October to December 2013, 45% of ESA appeals to the First-tier Tribunal led to the DWP’s decision being overturned. Why do you think that was so high? Related to that, if this process of giving reasons is rolled out, do you expect to see a reduction?

HH Judge Robert Martin: I would hope that, if lessons are learned, there would inevitably be a reduction, because people will have less reason to think, “The tribunal is the only one that will give me a fair decision.” The mantra is, “Get it right first time.” It is in everyone’s interest. There are lessons that are emerging from different avenues: from Litchfield, from Harrington and from the tribunal. It is really down to what the Department makes of it, because there are an awful lot of suggestions emerging. The

crunch is: can they act on it? Can they afford to act on it? Many of them might add to the cost. Do they have the skill and manpower to act on it?

I anticipate that there will always be a rump of cases coming to the tribunal, because they are just very difficult, borderline cases. Because they are borderline, half of them might be overturned, but it is the sheer volume: half a million appeals a year come in. That seems to suggest there is scope for improvement.

Q169 Sheila Gilmore: Do you have any view on why the overturn figure is so high?

HH Judge Robert Martin: It must be because there are differences between the initial decision and how that is taken, and what happens in the tribunal. We have indicated some of the key things earlier in our discussions: you have that partnership of doctor and lawyer in the tribunal; you have the semi-structured interview. By that stage, if there is other documentary evidence around, it will have been gathered in; it is not there at the outset.

There are a number of key things, which, in all our feedback, tend to show that it is that dialogue with the claimant that is responsible for something like two thirds of overturns. It is supplemented because there may be GPs' letters and so on, but the key issue is whether you can get that quality of evidence in the early stage of the process. The decision-making, it seems to me, in DWP is in isolation, disconnected from the healthcare professional, who gets the report—I know the Department says you can ring them back, but I do not think it happens that often—and does not see the claimant. If there are questions occurring to the decision-maker, how do they resolve that? They cannot ask for that extra bit of information and they tend not to probe and challenge what they are being told. If you look at a standard Atos report, it is just a list: "The claimant says this, this and this." It might not correspond with the healthcare assessor's own estimate. There is no attempt to explain why something is right or wrong or why it does not carry so much weight. It is just, "Here is the opinion; make of it what you will."

Q170 Dame Angela Watkinson: This is a question for Kevin Sadler. Does the Courts and Tribunals Service keep statistics on the disposal of tribunals up and down the country so that good practice could be identified and shared?

Kevin Sadler: Yes. We have a variety of statistics. Robert and HMCTS officials sit on what is called a jurisdictional board, which looks at what is going on in that jurisdiction and discusses proposals for improvement, where things work well, where things work less well and what we can do about both of them.

Q171 Nigel Mills: I have a couple of questions, if that is okay. Roughly how long does the panel get for each case in terms of when they start looking at my case, when we have had the hearing and when they have made their decision? Is that half a day or half an hour? I just do not have any idea, really.

HH Judge Robert Martin: You have a morning and an afternoon session, which are roughly three hours each. We will list into each of those three-hour sessions four cases where we expect the claimant to come and put their case. You can do the sums on that. Some cases are so straightforward that we are astonished they have not been dealt with before, and they may take 5 to 10 minutes. Others take longer.

One of the big factors that enables us to deal with cases in that tight timeframe is that we send all the appeal papers to the panel members two weeks ahead of the hearing. We expect them to digest them thoroughly, so there is no preliminary setting of the scene. The tribunal can just go straight to the heart of the issues.

Q172 Nigel Mills: And the experience is that they do read those papers and they do know what is in them before they get there.

HH Judge Robert Martin: Yes.

Nigel Mills: Heaven forbid that we would ever read our papers as we come through the door.

HH Judge Robert Martin: I am sure that we have similar skills to you. We can skim, or we know which of the papers have the meat in them.

Q173 Nigel Mills: I was trying to read the annual report from the tribunals service. You write the section on social security entitlement.

HH Judge Robert Martin: The Senior President's report.

Nigel Mills: There is a comment in there about the fact that DWP do not attend these appeals or do not present their case, effectively, at all. Would it be helpful if someone from DWP came and said, "Here is why we found against this person; here are the reasons we have."

HH Judge Robert Martin: Yes, very much so. The attendance rate by presenting officers in WCA cases is 0.5%, and I think I have rounded that figure up out of kindness.

Q174 Chair: Attendance by the DWP is 0.5%. In other words, they do not really turn up. Is that what you are saying?

HH Judge Robert Martin: Yes, that is correct, which is a loss, because a good presenting officer is the eyes and ears of the decision-maker. They can feed back what has happened. Importantly, if the presenting officer thinks they have been dropped in it by a poor decision, they may go back and explain the embarrassment they felt before the tribunal.

However, so much of what we talked about on feedback is feedback on the outcomes. Feedback on the process is equally important, because there is a lot of criticism made in Litchfield of the approach by healthcare professionals of asking oblique questions and then drawing improbable inferences from them. It might be useful for presenting officers to see how the tribunal approaches these questions, and that might then inform the

decision-making earlier on, so you would learn about the process as much as you would about what carries weight with the tribunal. It would be a really big step forward. In some of the pilots or pathfinders recently done by the Department, where they have sent presenting officers along to a small number of appeals, they have gone away saying, "We think the tribunal got it right in 80 to 90% of the cases."

Q175 Nigel Mills: What we currently have is not so much an appeal as a re-decision, isn't it? It's not like you have both sides present and you weigh it up. It is a whole new decision.

HH Judge Robert Martin: The Department has put in its submission, which is their case in writing, but cases can change with later developments. You really need to be there.

Q176 Nigel Mills: You think having somebody there saying, "This is why we did this. This is why we think it is right", would be helpful to the process.

HH Judge Robert Martin: They have started doing that in PIP. For the first 400 PIP appeals we are going to do, the idea is to send a presenting officer to explain the Department's decision and the reasoning, see what the tribunal makes of it, go away and learn some lessons, but, again, it is very piecemeal.

Q177 Chair: In our 2011 report, we did recommend that the DWP should send people more often to these hearings. From the MoJ's point of view, all this high-level appeal must have an impact on the MoJ budget, because, after all, you are paying for the appeal side of things. Do you have discussions with the DWP and say, "Get your house in order; get things right the first time, because this has implications on our budget"?

Richard Mason: I was going to ask, if I may, to come back on some of the remarks that Robert made. One of the most important things he said from our and DWP's points of view is, of course, that we are collecting all this material now from summary reasons, and there is little point unless it is used. Going back to when the eight-week pilot was run last year, DWP tell us that, of 6,300 decision notices that were issued in the eight-week pilot, only around 6% were considered by DWP not to contain useful feedback. That was coming clear very early on. DWP are now making use of the data that is coming out of summary reasons. They are using it in training for decision-makers, in reviewing their guidance for decision-makers, looking to identify trends and pulling out useful case studies to use. There is no question that DWP are looking at this stuff and saying, "Gosh, we need to use it. Why do we need to use it? Because we want to get the decision right first time, as far as we can." That would be their position. Yes, that then feeds into the financials.

Q178 Chair: We heard from Atos in 2011 the mantra, as you said, about getting it right first time. Now we are getting feedback and everything, but still the appeals come. Is the actual basic premise of the system, or the way that the WCA has been designed, fatally

flawed? Is it just not going to work? All of this feedback does not seem to be improving things. If it were improved so much, then the actual numbers of appeals would drop.

Richard Mason: However, it is still early days, isn't it? Just as the mandatory reconsideration process is very new, so the summary reasons process is new. The summary reasons rollout only ended in April for the tribunals doing ESA cases. We are in very new territory and we need to see where this takes us and, crucially, where it takes DWP.

Q179 Chair: We have had four years: three years of Harrington reviews and one of Litchfield. It came in in 2008. That is hardly new territory. There have been attempts to reform it and make it better. I do not know. Judge, you have been there all that time. Has it improved dramatically, has it improved at all or is there something fundamentally wrong in the design of the way the WCA operates? I know that is a leading question.

HH Judge Robert Martin: I would just observe that it was the normal practice of more than half the judges to give summary reasons in every case anyway. All we are doing now is taking a more systematic approach in trying to get 100% coverage. It would be difficult for me to comment directly, because it is straying into the policy area.

Chair: I know; that is why I asked the question.

HH Judge Robert Martin: From my point of view, what is legitimate is to say that, if there is going to be a test, it should be workable. There are so many aspects of the Work Capability Assessment—and PIP, I am afraid to say—which look really sophisticated, but it is more sophisticated than the evidence you can get to test them out.

Let me just demonstrate this one way. In many cases, whether you win or lose your appeal or whether you qualify for ESA or not might depend on whether you can walk regularly 98 metres or 102 metres. I have never yet met a clinician who could say with confidence, "I can tell the difference between those two people." There is not that degree of sophistication possible to justify the supposed objective assessment.

Q180 Chair: The attempt to be objective has become too rigid and, as a result, you lose sight of the whole person. Is that fair?

HH Judge Robert Martin: In practice, what happens is the healthcare professional does not say to the claimant, "How far can you walk in metres and time?" They say, "Do you go to the supermarket?" and the person says, "Yes, I go around the supermarket." Then an inference is drawn, "You must be able to do 100 metres, 150 metres or more than that." The two do not gel, because people do not live their lives with that degree of scientific precision. When I go around the supermarket, I do not do it all in one stint: I am stopping at shelves and whatever.

Kevin Sadler: Can I make a point on this? One way of answering the question—I have been in this process since 2009 as well—is to ask, "Have I seen DWP work and continue to work on improving the quality of their decision-making and seek to obtain more information from people who claim the benefits?" The answer is yes; I have seen

that. It is very difficult to tell how that has a direct effect on numbers or proportion overturned. You have to look at both the proportion of decisions that result in appeals and the overturn rate to reach a conclusion. What we are talking about is the tip of an iceberg and, if that tip gets smaller, because we are getting fewer appeals, you might actually expect the overturn rate to stay the same or actually get worse, because they are the finest decisions being made. Are the DWP still making efforts to improve the quality of their decision-making? Yes, they are.

Q181 Chair: If the mandatory reconsideration works and weeds out those where the decision was obviously wrong, would that not then make the success rate of the appeals much less? The ones that are coming to appeal will be ones that the Department is more convinced were right in the first place.

Kevin Sadler: It might, but, actually, if they are just leaving the tribunal the most finely balanced cases, it might not.

Chair: So we have to wait and see in that respect.

Kevin Sadler: We have to look at the proportion and the number of appeals coming through the system as a proportion of decisions.

Q182 Nigel Mills: It is not like you do eight cases a day and think, “We need to overturn five of these or two of these. We cannot have a zero each way.”

HH Judge Robert Martin: No.

Nigel Mills: And you don’t feel any personal pressure as the day goes on—“We have dismissed the first seven of the appeals today. We had best overturn one”, or something.

HH Judge Robert Martin: No. I am smiling, because in the address I give at induction training for judges and members I say, “There will days when, purely by chance, you will have dismissed the first seven appeals in your list. Do not, for goodness’ sake, say, ‘Goodness, people will think we are hard; we will allow the last one,’ capriciously.”

Nigel Mills: Or vice versa.

HH Judge Robert Martin: That would be anathema to us.

Chair: We have run out of time. The bells are going to start ringing soon to say that the House is sitting. Can I thank you very much for coming along this morning? Your evidence has been very useful and very interesting. It is always good to hear that independent voice that I know you are. As I say, thank you very much.