

EXPLANATORY STATEMENT

Social Security (Reasonable Excuse— Participation Payment Obligations) (Employment) Determination 2014 (No.1)

Summary

The *Social Security (Reasonable Excuse – Participation Payment Obligations) Employment Determination 2014 (No. 1)* (the Determination) is made by the Secretary of the Department of Employment (the Secretary).

The purpose of the Determination is to specify matters that the Secretary must take into account in deciding whether a person has a reasonable excuse for committing a failure to comply with obligations in relation to a participation payment for the purposes of subsection 42U (1) of the *Social Security (Administration) Act 1999* (the Administration Act).

The Determination applies to failures to meet participation requirements by recipients of youth allowance (other than apprentices or full-time students), newstart allowance, parenting payment and some special benefit recipients.

The Determination tightens a prior determination that provided for matters that needed to be taken into account in determining whether a person had a reasonable excuse for a participation failure, specifically the *Social Security (Reasonable Excuse — Participation Payment Obligations) (DEEWR) Determination 2009 (No. 1)*.

The matters specified in the Determination are not exhaustive. Due to the operation of section 42U(2) of the Administration Act, the Determination does not limit the matters that the Secretary may take into account in determining whether the person has a reasonable excuse. However, the intention in tightening the determination is to make clear the Secretary's expectation that a person should not typically be found to have a reasonable excuse if the circumstances in subsections 6(3) or 6(4) of the Determination are not present or if they are present but did not directly prevent the person from meeting the requirement that was the subject of the failure.

Explanation of Provisions

Section 1 states the name of the Determination.

Section 2 states that the Determination commences on 1 July 2014.

Section 3 defines terms which are used in the Determination.

Section 4 provides that Schedule 1 to the Determination varies the 2009 DEEWR Determination so that it will not apply in relation to the matters covered by the Determination, but will continue to apply to participation failures regarding Youth Allowance for full-time students and Austudy, as a different compliance framework applies for these payments.

Section 5 revokes the 2009 FaHCSIA Determination as it is redundant.

Subsection 6(1) has the effect of providing that, in determining whether a person had a reasonable excuse for a no show no pay failure, a connection failure, a reconnection failure, or a serious failure, the Secretary must take into account the matters listed in subsections 6(3) and 6(4).

Subsection 6(2) provides that a matter included in subsection 6(3) and 6(4) must only be taken into account if it directly prevented the person from meeting the requirement. For example, a person

who notifies their employment services provider that they have a job interview at the same time as they are due to attend an appointment with the provider would be taken to have a reasonable excuse in accordance with paragraph 6(4)(iii), whereas they would not be taken to have a reasonable excuse if the job interview was some hours before the appointment with the provider and it was possible for the person to attend both.

Some discretion will need to be exercised in determining whether or not a circumstance can be deemed to have directly prevented compliance. For example, being physically assaulted might be classified as an exceptional and unforeseeable circumstance beyond the person's control that makes it unreasonable to expect the person to comply, and as such might provide a reasonable excuse in accordance with paragraph 6(3)(b). However, a person who was subject to an assault a week before their failure would not have a reasonable excuse due to the operation of subsection 6(2) because it would not directly prevent them from meeting their requirement (unless they were still incapacitated as a consequence of the assault). However, if the assault had occurred the day before their failure, they may still be sufficiently traumatised by the incident to prevent them from complying.

Subsections 6(3) and 6(4) provide guidance as to the type of circumstances to which the Secretary must have regard in determining whether a person had a reasonable excuse for the purposes of the above section of the Administration Act. Although the determination does not limit the matters the Secretary is able to take into account in determining if a person has a reasonable excuse, if the circumstances which prevent the person from meeting their requirement do not meet the conditions described in subsection 6(3) or 6(4) then it is unlikely that they would have a reasonable excuse.

Paragraph 6(3)(a) provides that a person may be considered to have a reasonable excuse if they were unable for reasons beyond their control to meet the requirement. For example, if a person is prevented from travelling to their employment service provider's office because a bushfire has resulted in the closure of all roads to the town where the provider's office is they could be taken to have a reasonable excuse. However, due to the operation of section 42UA of the Administration Act, the job seeker could not be taken to have a reasonable excuse unless they gave prior notice of the reason for their inability to attend their appointment or, if they did not do so, unless the conditions described at paragraph 6(3)(c) were met.

Paragraph 6(3)(b) provides that a person may be considered to have a reasonable excuse if there were exceptional and unforeseeable circumstance beyond the person's control such that no reasonable person would expect them to meet their requirement. Examples of such circumstances include the sudden serious illness or hospitalisation of the person's child or partner, the recent death of an immediate family member or the person being recently subjected to criminal or domestic violence. Such circumstances will generally, by their very nature, be beyond the person's control. Even so, whether or not the person should be taken to have a reasonable excuse is subject to subsection 6(2) and paragraph 6(3)(c).

Paragraph 6(3)(c) applies where the failure is a failure to which section 42UA applies and the person failed to give the notification referred to in that section. That is, they failed to give prior notice of the reason for their inability to attend an appointment, activity or interview. In such a case, under 6(3)(c), the Secretary is to apply a similar test to that which is applied to the circumstances that prevented compliance with the actual requirement. That is, the Secretary is to consider whether the person was unable to give prior notice or whether there were extreme and unforeseeable circumstance beyond the person's control such that no reasonable person would have expected them to give prior notice of the reason for their non-attendance. It is expected that the test in this case would be more rigorous than the test applied to reason for the failure to attend, which is why the circumstance should be "extreme" rather than "exceptional". This is because it is generally the case that the circumstances which might prevent compliance with a requirement will not be so extreme as to prevent the job seeker from giving prior notice.

For example, a person who was unable to attend an appointment due to a medical condition will generally be able to give prior notice of the reason for their non-attendance. They should only be considered to have a reasonable excuse if they provided such notice, unless the medical condition was so severe as to make it unreasonable to expect them to do so, even through a third party.

Subsection 6(4) provides that, in the specific circumstances listed in paragraphs (i) to (iv), the person can be taken to have a reasonable excuse, subject to subsection 6(2) and paragraph 6(3)(c). That is, if a job seeker is undertaking paid work or attending a job interview, is incapacitated, or has unforeseeable and unavoidable caring responsibilities that prevented them from complying and they gave prior notice of their reason for non-attendance (or, if they did not do so, the conditions of 6(3)(c) were met), then the job seeker can be taken to have had a reasonable excuse.

Regulatory Impact Statement

This Determination does not require a Regulatory Impact Statement (RIS) nor a Business Cost Calculator Figure (Office of Best Practice Regulation reference number 17209). This Determination is not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Social Security (Reasonable Excuse - Participation Payment Obligations) (Employment) Determination 2014 (No. 1)

This Legislative Instrument (Determination) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Determination

The *Social Security (Reasonable Excuse – Participation Payment Obligations) Employment Determination 2014 (No. 1)* (the Determination) is made by the Secretary of the Department of Employment (the Secretary).

The purpose of the Determination is to specify matters that the Secretary must take into account in deciding whether a person has a reasonable excuse for committing a failure to comply with obligations in relation to a participation payment for the purposes of subsection 42U (1) of the *Social Security (Administration) Act 1999* (the Administration Act).

The Determination applies to failures committed by recipients of youth allowance (other than full-time students or apprentices), newstart allowance, parenting payment and some special benefit recipients.

The Determination redefines the matters the Secretary must take into account in determining whether a person has a reasonable excuse for a failure, which were previously set out in the *Social Security (Reasonable Excuse – Participation Payment Obligations) (DEEWR) Determination 2009 (No. 1)*. This earlier determination is amended by this Determination. Due to the operation of section 42U(2) of the Administration Act, the Determination does not limit the matters that the Secretary may take into account in determining whether the person has a reasonable excuse. However, the Department will implement a policy to clarify that a person should not typically be found to have a reasonable excuse if the circumstances in subsections 6(3) or 6(4) are not present or if they are present but did not directly prevent the person from meeting the requirement that was the subject of the failure. The intention of this is to clarify that decision makers should typically only find that a person has a reasonable excuse for failing to comply with a participation requirement in exceptional circumstances.

Human rights implications

The Determination engages the right to work, the right to social security, the right to an adequate standard of living, and the rights of equality and non-discrimination.

Right to work

Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right to work. This includes the right to the opportunity to gain a living by work which the person freely chooses or accepts, and is considered an inherent part of human dignity.¹

To enable people to realise their right to work, States are required, among other things, to assist and support individuals in order to enable them to identify and find available employment, and to protect people's right to just and favourable conditions of employment.²

The Determination encourages participation payment recipients to engage with their right to work by incentivising those people to actively participate in statutory requirements and mechanisms

¹ Committee on Economic, Social and Cultural Rights, General Comment 18, paragraphs 1 and 2.

² Committee on Economic, Social and Cultural Rights, General Comment 18, paragraph 12.

designed to encourage them to obtain employment. Accordingly, the Determination promotes the right to work. Under the social security law work will not be suitable for a person if, for example, the person lacks the skills to do the work and no training will be provided by the employer; there is medical evidence that the work would aggravate a medical condition of the person; the work is unsafe; or for any other reason the work is not suitable.³

By providing such an incentive the Determination would mean that more job seekers experience the benefits of employment, for example greater social and economic inclusion. The measure is also compatible with the protection of just and favourable conditions of employment, as work which provides terms and conditions less generous than the applicable statutory conditions is not taken to be suitable work for the purposes of social security law.⁴

This Determination does not restrict the right to freely choose or accept work. While the Determination provides a strong incentive to people to engage with mechanisms designed to encourage the attainment of employment, it does not force a person to accept work. Further, the Determination does not limit the matters that the Secretary may take into account in determining whether a reasonable excuse exists. Accordingly, the Determination is appropriately balanced as the Secretary will be free to take other matters into account in determining whether a reasonable excuse exists, despite the Determination.

Right to social security and right to an adequate standard of living

Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of everyone to social security. Article 11 of the ICESCR recognises the right of everyone to an adequate standard of living and to the continuous improvement of living conditions.

To the extent that the Determination may limit the right to social security and the right to an adequate standard of living, this is reasonable, necessary and proportionate. Where a person is able to do so, that person should participate in statutory requirements and mechanisms designed to encourage him/her to obtain employment so as to reduce or cease dependency on social security.

The Determination ensures that the right to social security and the right to an adequate standard of living are not disproportionately limited. In particular, the Determination merely sets out those matters which the Secretary must take into account in determining whether a reasonable excuse exists. The Secretary may still take into account any relevant matters including whether a person has made a genuine effort to comply. Accordingly, the Determination should not affect those job seekers who are making genuine efforts to comply with their obligations.

Rights of equality and non-discrimination

Articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR) recognise the rights of equality and non-discrimination.

To the extent that the Determination may limit the rights to equality and non-discrimination, this is reasonable, necessary and proportionate.

The matters set out in paragraph 6(3) and 6(4) of the Determination do not limit the matters that the Secretary may take into account in deciding whether a person has a reasonable excuse. Therefore, consistently with the rights to equality and non-discrimination, the Secretary may take factors such as disability and illness into account in determining whether a reasonable excuse exists.

Conclusion

³ See, for example, section 601(2A) in relation to Newstart Allowance.

⁴ See, for example, section 601(2A) in relation to Newstart Allowance.

The Determination is compatible with human rights because it advances the protection of human rights and to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.