Law Centre (NI) Legal Information Briefing - September 2017

Personal Injury Compensation and Social Security Benefits

Law Centre (NI)

At a glance

The amount of capital that a person possesses affects the amount of benefit to which they are entitled to. The rules on receipt of personal injury compensation are complicated and treated distinctly from other forms of capital.

This briefing is aimed at:

- advisers
- members of the public

It explains the capital rules for means tested benefits and how an award of personal injury compensation can affect them. It also offers guidance on the steps which should be taken when personal injury compensation is received .

Law Centre (NI)

- promotes social justice and provides specialist legal services to advice organisations and disadvantaged individuals
- in four areas of law: social security, community care, mental health, employment.
- through advice, casework, training, information and policy services

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Introduction

A person's means tested benefits are affected by how much capital and income they have. Capital and/or income beyond a certain level will either reduce the amount of benefit a person receives or stop benefit altogether. This briefing paper deals with the effect a person's **capital** can have on their benefit.

The rules on personal injury compensation are complicated and different to rules which relate to other forms of capital. It is important that both claimants and advisers are familiar with these rules so that correct advice is given and received and in order that claimants can follow proper procedures to protect their benefit and compensation.

The rules on capital are different depending on the age of the claimant. This briefing paper deals with the capital rules for certain means tested benefits **only** where the person is under pension age.

1. Capital Rules for Means Tested Benefits

Some social security benefits are means tested. This means that a person's income or capital (their 'means') are taking into consideration when working out if the person is eligible to receive benefits and, if so, how much. All capital is taken into consideration unless it is specifically disregarded by social security legislation.

A person will not be entitled to means tested benefits where they, or their partner, possess **capital** over £16,000. This is the upper financial limit. A person's benefit is unaffected by any capital below the £6,000 lower financial limit. All capital between £6,000 and £16,000 is considered and results in a reduction in the amount of the benefit the person is paid. Specifically, it is presumed that income is earned on any capital between this limit. This is

called "tariff income" and a person is assumed to have £1 for every £250 (or part) between £6,000 and £16,000.

The rationale for this is the presumption that that a person should reasonably be expected to use this capital to support them instead of relying completely on benefits.

There is a duty to inform and keep informed the Department for Communities (DFC) of any capital which a claimant has between £6,000 and £16,000 including when it increases or reduces. A failure to inform the DFC could result in:

(a) a person not receiving the correct amount of benefit they may be entitled to or
(b) a person receiving too much benefit which could lead to a recoverable overpayment and/or penalty.

2. Benefits affected

The social security benefits affected are as follows:

- Job Seekers Allowance (Income Based)
- Employment and Support Allowance (Income Based)
- Housing Benefit
- Universal Credit[1]

3. Personal Injury compensation

Personal injury compensation is awarded and paid following a personal injury legal claim against the person responsible for that injury. Personal injury compensation is specifically excluded from the definition of capital in social security legislation. Other forms of compensation are not disregarded and will be taken into account for the purposes of assessing a person's capital for means tested benefits.

[1] Universal Credit will be introduced in a gradual basis in Northern Ireland from September 2017. Please see the NI Direct website for a schedule of where and when UC will be introduced: https://www.nidirect.gov.uk/articles/universal-credit#toc-4

The general rule of thumb is that personal injury compensation is disregarded for 52 weeks. However this statement should be treated with **caution**. What this in fact means is that the value of the compensation is ignored as capital for a 52 week period provided that it is not spent. This is to enable the person to create and put the compensation into a 'personal injury trust'. The 52 week protection starts as soon as the person receives the money.

The 52 week protection is lost as soon as the person spends all or any of the money, but only in relation to the money actually spent. The unspent portion is protected for the remainder of the 52 week period as long as the money remains unspent.

The DFC will investigate all money spent within the 52 weeks to assess whether or not they think the expenditure was reasonable. Where they do not view expenditure as reasonable, they will treat the person as deliberately disposing of the money to increase entitlement to benefit/s. This is also known as 'deprivation of capital'. The outcome is that the DFC will treat the person as still possessing the money and recalculate their capital amount to include this money. This money is also referred to as 'notional capital' and will reduce the amount of benefit the person was or is entitled to which will result in an assessment of overpayment which will have to be repaid.

4. Personal Injury Trust

The law gives a person 52 weeks in which to set up a personal injury trust. This, in effect, is a legally binding arrangement where the compensation is held by trustees for the benefit of someone else ("the beneficiary") subject to the terms of the trust deed. If placed in a legitimate personal injury trust within this period, the compensation will receive further protection for the duration of the time it is in the trust. It will not be classified as the person's capital and will be ignored for means tested benefits.

The Trust should be a discretionary trust. This means that the beneficiary cannot demand payments out of the trust and cannot have direct access to the money. The

Trustees can make regular payments out of the trust in accordance with its terms and can make one off payments in response to specific needs that the beneficiary may have but again these payments must be in accordance with the trust deed and cannot be made automatically at the direct request of the beneficiary.

Expert advice from a solicitor should be taken when setting up a personal injury trust in order to ensure that it complies with the necessary criteria for benefit purposes.

5. Case Study:

Law Centre (NI) represented an individual who received personal injury compensation. They were given incorrect advice and lodged the money immediately into a non discretionary trust instead of a discretionary trust. They were wrongly informed that they could take money out and spend it as and when they required it, which is what they did and also wrongly advised that the money was wholly ignored for 52 weeks. Our client spent all of the money within the initial 52 week period believing it to be disregarded in two ways.

The Department later became aware of the award of compensation and commenced investigation as to how it was used. They analysed all expenditure and required receipts as evidence. The conclusion was reached that the payments made were not reasonable and were made with the intention of retaining or increasing entitlement to benefit. The result was a determination that the person was possessed the money but now with the 52 week protection lost. A significant overpayment claim was raised and the person's award of benefit was stopped. The person was held to have the money for as long as it was in excess of £16,000 after the rules on diminishing notional capital were applied. The person was without any form of means tested benefit for almost three years as a result.

6. Diminishing Notional Capital:

The diminishing notional capital rule is applied to money a person no longer possesses where the benefit authorities have decided that the person deprived themselves of it to retain or increase entitlement to benefit. In effect the 'notional capital' figure is reduced on a weekly basis by the amount of means tested benefit and housing benefit the person would otherwise receive. This is reduced through time until it decreases below the £16,000 upper limit and benefit can be recommenced.

It is important that a person is aware if this rule applies to them. This is to ensure that the Department are

1. applying it; and
2. applying it correctly and reducing it by the correct amount; and
3. aware of when the person should start to receive benefit again as this is not always an automatic process.

Law Centre NI is aware of instances where the rule was applied but where there was incorrect calculation or failure to apply at all and the benefit claimant was denied benefit for longer than they should have.

7. Guidance

Anyone awarded personal injury compensation should following the below guidance. They should:

- Inform the DFC when the personal injury compensation is received.

- Seek independent legal advice to properly set up a personal injury trust as soon as possible to protect both the compensation and payment of benefit.
- be aware that spending the compensation within the 52 week period before a personal injury trust is set up will lose the 52 week disregard protection given.
- keep receipts for all payments made out of the compensation in case investigated by the Department.
- be aware of the rule on diminishing notional capital (where applicable) and monitor how much notional capital they are deemed to have and when it will reduce to the point that they are entitled to benefit.

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