**DWP UNIVERSAL CREDIT FULL SERVICE**

**Our Ref:**

**DATE**

Dear Sir or Madam

**Re: NAME, ADDRESS, NINO, DOB – Mandatory Reconsideration Request**

We are instructed by X (“**C**”) in relation to his/her claim for universal credit (“**UC**”). We are requesting a mandatory reconsideration of the decision of DATE, where the benefit cap was applied to C’s UC award for the assessment period(s) DATE – DATE, despite the fact that C was working [well] over 16 hours per week at minimum wage, throughout this period (the “**Decision**”).

[In light of the immediate hardship faced by C, we request a response to this mandatory reconsideration request by 7 DAYS FROM DATE OF MR REQUEST *– only include if relevant, otherwise a 14 day response time is appropriate*.]

**Background**

1. C is DETAILS OF C’S CIRCUMSTANCES - EG. LONE PARENT, CHILDREN, LIMITED CAPABILITY FOR WORK ETC..
2. C works as DETAILS OF JOB, INCLUDING HOURS AND ££ [*provide evidence of this if possible eg. contract / letters confirming hours]*. C is paid DETAILS OF PAY ARRANGEMENTS – EG. MONTHLY ON 30th OF EACH MONTH / MONTHLY ON THE LAST WORKING DAY OF EACH MONTH. This is a fixed and regular pay date, but one which can vary by up to a few days each month, on account of how weekends/bank holidays fall differently in different months. [C has asked their employer whether they can be paid on a different date, but their employer has refused this request.]
3. C’s assessment periods run from X of each month to Y of each month, which is around his/her pay date.
4. In the Decision, C was treated as having no earned income, as a result of being paid on DATE X and DATE Y *[include dates C was paid twice in previous assessment period or, if a different fact pattern applies, when they were paid just before the challenged assessment period and just after (the latter scenario will likely mean that the ‘two wages’ assessment period will follow the assessment period challenged in this request]*.The relevant wage slips are enclosed / have been provided via C’s UC journal. As a result of this, C was subjected to the benefit cap, resulting in £AMOUNT being deducted from his/her UC payment, despite him/her working HOURS during MONTH(S) and earning £AMOUNT.
5. [C is facing real and immediate hardship as a result of this substantial reduction of UC income. C is facing difficulties covering regular, monthly bills and other outgoings for C and his/her family. DETAILS OF PROBLEMS / CHALLENGES THE ISSUE HAS CAUSED e.g. debts accrued, rent arrears, missed bills, resorting to emergency support via foodbanks or otherwise, any stress/mental health effects.]
6. [ANY OTHER PARTICULAR CIRCUMSTANCES OF C – eg. C is pregnant/childcare commitments/health/other reasons why difficult to look for alternative work. IS C CONSIDERING LEAVING THEIR JOB TO FIND ALTERNATIVE WORK THAT PAYS ON A DIFFERENT DAY?]

**Reason for MR request:**

##### ***Irrationality of applying the benefit cap to a claimant earning above the exception threshold specified in the legislation:***

1. Regulation 82 of the Universal Credit Regulations 2013 (“**UC Regs 2013**”) sets out the exception to the benefit cap for those whose earned income is equal to or exceeds the amount of earnings that a person working 16 hours per week at national minimum wage would earn. C’s earned income has, since DATE, been substantially higher than this, as a result of him/her working X hours per week at an hourly rate higher than national minimum wage. Purely as a result of the ‘non-banking day salary shift’, SSWP has applied the benefit cap to C, in circumstances where they would otherwise be eligible for the exception.
2. By taking this approach, the SSWP is frustrating the aims of the benefit cap, which, as discussed at §§7 & 8 of *R (DA & DS and others) v SSWP* [2019] UKC 21, are to (i) improve the fairness of the social security system, (ii) make fiscal savings and (iii) to incentivise non-working parents to obtain work. The aims, as discussed in *DA & DS*, were taken from the August 2016 Impact Assessment relating to the Welfare Reform and Work Act 2016. This Impact Assessment also identified work incentivisation as the main aim of the scheme and, in their consideration of it, the Supreme Court stated that the ability to escape the cap through working a set number of hours was therefore central to the scheme. The application of the benefit cap to a [full time worker / individual working X hours per week] purely because of the ‘non-banking day shift’ frustrates the **policies of encouraging work, being responsive to changes in income and making work pay to the fullest extent (*R (on the application of Pantellersico & ors) v SSWP*** [2020] EWHC 1944 (Admin) **[53]).**
3. **Applying the Court of Appeal’s approach in** *Johnson & Ors v SSWP* [2020] EWCA Civ 778**, the DWP’s approach to calculating earned income for the purposes of assessing whether the benefit cap exception applies is irrational because, as a result of the non-banking day salary shift, it produces the “*perverse*” result that C is treated as not having worked enough hours to escape the cap for the assessment period covered by the Decision, despite consistently working [full time / X hours per week]. It is “*odd in the extreme*” that C is being subjected to the cap,** despite the fact that s/he is consistently working more than the amount envisaged by the legislation. As the High Court recognised in *Pantellerisco* [52], also applying *Johnson*, the claimant is being treated as if s/he is not working enough, when in fact s/he is.

*Contravention of the claimant’s human rights*

1. In the alternative and without prejudice to the above ground, the SSWP is requested to revise her decision because the application of the benefit cap which C has experienced is in violation of his/her rights under Article 14 of the European Convention on Human Rights (“**ECHR**”), read in conjunction with Article 1 to the First Protocol (“**A1P1**”) as [a working parent and/or] a worker whose monthly assessment period falls on or around his/her monthly pay date.
2. The Secretary of State is aware of her duty under section 3 of the Human Rights Act 1998 which provides that:

*“3 (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which compatible with the Convention rights.*

*(2) This section –*

 *(a) applies to primary legislation and subordinate legislation whenever enacted;*

*(b) does not affect the validity, continuing operation or enforcement on any incompatible primary legislation; and*

*(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.”*

1. The application of the benefit cap falls within the ambit of A1P1 and Article 14 ECHR is therefore engaged. SSWP provides an exception to the benefit cap for working parents / workers earning over a certain amount. However, for several assessment periods a year, C is treated differently from other working parents earning the same as (or even substantially less than) s/he does, as a result of his/her pay date falling around his/her assessment period date.
2. In light of the finding in *Pantellerisco* of the irrationality of the effect of this issue (ie. the application of the benefit cap to a claimant who is working more than then level envisaged by the exception), and the finding of the Court of Appeal in *Johnson* on the irrationality of the cause of the issue (ie. the non-banking day salary shift for monthly paid claimants), the SSWP cannot consider that the differential treatment of C is justified and so decline to read regulation 54 and/or regulation 82 of the UC Regs 2013 in a way which gives effect to C’s Convention rights, in accordance with the Secretary of State’s duty under section 3 HRA 1998.

*Claimant has a legitimate expectation that DWP will treat the benefit cap exemption as satisfied*

1. In the further alternative, C has a legitimate expectation that the exception to the benefit cap will be consistently applied whilst s/he is working full-time.
2. Where a decision maker either expressly, or through custom or previous conduct, suggests that a particular outcome is likely and an individual relies on this to their detriment this is known as legitimate expectation. The basic ingredients of a substantive legitimate expectation are satisfied where there is “*an unambiguous promise or assurance by a public official in which the affected citizen reposes trust*” (*Mehmood (legitimate expectation)* [2014] UKUT 469 (IAC).
3. An unambiguous assurance was made by Mr Neil Couling on Twitter on 27 June 2020 in response to a query made by an adviser regarding paragraph 66 of the *Johnson* judgment which refers to “*a workaround*” having been put in place by DWP “*so* [the claimants] *are not subject to the benefit cap in those months where they appear to receive no salary*”.[[1]](#footnote-1)
4. Mr Couling states “*So this is the court’s understanding of a point made in the CPAG evidence. Relates to the benefit cap and 3 cases CPAG brought to our attention where under Reg 54 two monthly salaries fall in the same AP and in the next AP there is no salary and ben cap triggered (1)”.* “***This is not the policy intent, claimant is working as Benefit Cap incentivises them to do. So we developed a solution so that Ben Cap wouldn’t apply. In effect we use the fact that the claimant is working to trigger the exemption to the Ben Cap each month*** *(2)”. “But that doesn’t help in Johnson I reckon because we don’t move or attribute earnings into a different Assessment Period and calculate entitlement. We just treat as exemption satisfied. This one is a dead end I’m afraid (3).”*
5. C continues to work **[full time / X hours per week]**, with the understanding that s/he will be exempt from the benefit cap as a result.

**Summary**

We request that the Secretary of State:

* 1. **revises the Decision to apply the benefit cap to C’s UC award**, as C had worked well over the required number of hours and earned well over the amount specified in the legislation to qualify for the exception, continuously since DATE, as evidenced by C’s pay slips; and
	2. **provides confirmation that** C will not be subjected to the benefit cap going forward as a result of this issue with his/her pay dates and makes a note on C’s UC account so that this issue is avoided in future assessment periods whilst C remains in their current employment.

Yours faithfully

[*Adviser’s details*]

1. <https://twitter.com/gmorgan_ferret/status/1275839614834507776> [↑](#footnote-ref-1)