**IMPORTANT:** the address for service changed in February 2024, as below.

Please send your letter by post to DWP and by email to the Treasury Solicitor.

Please seek advice from JRProject@CPAG.org.uk if no response is received within 14 days, or consider referring to a solicitor to issue judicial review proceedings, see [this CPAG page](https://cpag.org.uk/welfare-rights/support-advisers/support-advisers-england-and-wales/support-judicial-review-process/pursuing-court-and) for more information.

DELETE BOX BEFORE POSTING

***This letter challenges:***

* the unlawful delay in deciding the claimant’s request to include and pay the Limited Capability for Work (“**LCW**”) element,
* the failure to include the LCW element from the start of the claimant’s UC award

Read the whole letter carefully and edit as appropriate including all text in red and/or [square brackets].

Delete any comments and return all text to lower case, black, and not bold before posting.

DELETE BOX BEFORE POSTING

***Only use this letter if*** your client is:

* In receipt of Universal Credit (“**UC**”), and
* Prior to their UC award, they were in receipt of Employment and Support Allowance (“**ESA**”) including the work-related activity component, and
* They have asked for the LCW element and to be included in their UC award and received no response

Please send this letter to jrproject@cpag.org.uk for review before sending to DWP.

DELETE BOX BEFORE POSTING

##### [address your letter to either the:

##### address on your client’s decision letter,

##### address your client sent their claim to, or

##### address on relevant DWP correspondence; or

##### request an upload link to post it to your client’s online UC account]

##### And by email to: thetreasurysolicitor@governmentlegal.gov.uk

##### Our Ref:

##### Date:

##### Judicial Review Pre-Action Protocol Letter Before Claim

##### Dear Sir or Madam,

##### Re: Proposed claim for judicial review against the Secretary of State for Work and Pensions by [full name]. We are instructed by [X] **in relation to [her/his] Universal Credit award. We write in accordance with the Pre-action Protocol for judicial review. Please note that we are requesting your response as soon as possible and in any event no later than 4pm on [date] (14 days).**

**Proposed Defendant: Secretary of State for Work and Pensions (“D”)(“SSWP”)**

**Claimant:** [full name] (“**C**”)

**NINo:** [xxxx]

**Address:** [xxxx]

**Date of Birth:** [xxxx]

**Note on the address for Pre-action Protocol correspondence**

1. This letter is sent to you because in February 2024 a Senior Lawyer at Decision Making and Debt DWP Legal Advisers, Government Legal Department, Ground Floor Caxton House, Tothill Street, London, SW1H 9NA advised that:

*Pre-action correspondence should now be sent directly to DWP, not to DWP Legal Advisers. DWP Legal Advisers is part of the Government Legal Department, not DWP itself. Pre-action correspondence should be sent to the relevant section of DWP. This will normally be the section of DWP responsible for the decision which is the subject of the pre-action correspondence via their usual communication methods. For example if it relates to a particular benefit decision then the pre-action letter should be sent to the address at the top of that letter.*

1. **This letter is also sent by email to the Treasury Solicitor as** Cabinet Office practice direction ‘Crown Proceedings Act 1947’ (December 2023)[[1]](#footnote-1) requires:

*“****All documents*** *required to be served on the Crown for the purpose of or in connection with any civil proceedings by or against the Crown shall, if those proceedings are by or**against an authorised Government department,* ***be served on the solicitor****, if any, for that department”*

(Emphasis added)

1. The practice direction provides that the solicitor for service in connection with civil proceedings against the Department for Work and Pensions is “The Treasury Solicitor”.
2. **The Government Legal Department webpage**[[2]](#footnote-2) **further instructs:**

***[…]***

*The email addresses above are for the service of new proceedings only.
They should not be used for letters before action, or pre action protocol correspondence. If sending such documents to GLD please email these to**thetreasurysolicitor@governmentlegal.gov.uk**.*

**The details of the matter being challenged**

1. C is challenging the unlawful delay in failing to award or pay [her/him] the Limited Capability for Work (“**LCW**”) element from the start of [her/his] (“**UC**”) award contrary to regulation 19 Universal Credit (Transitional Provisions) Regulations 2014 (“**UC (TP) Regs**”).

***Background facts***

1. C [circumstances, household, disability, other benefits]
2. C is a vulnerable individual. [She/He] suffers from …
3. On [date] C made a new claim for [UC because] …
4. Immediately prior to [her/his] claim to UC, C was in receipt of Employment and Support Allowance (“**ESA**”) including the work-related activity (“**WRA**”) component, having been determined by D to have limited capability for work. C had been in receipt of ESA including the WRA component since [date].
5. DELETE IF NOT RELEVANT ON DATE On [date] an entry was placed by D on C’s UC online journal stating that [she/he had been/was] in receipt ESA including the WRA component.
6. C received [her/his] first UC payment on [date]. It was based on [her/his] standard allowance, housing element, child elements (x number) but included no LCW element.
7. On [date], C posted an entry in [her/his] UC journal regarding payment of the LCW element, [having raised the issue several times in telephone calls].
8. [DWP response]
9. DELETE IF NOT RELEVANT On [date], C posted a further entry regarding payment of the LCW element. C received a response that [the request (originally raised… ) could take 28 days to process].
10. DELETE IF NOT RELEVANT In the meantime, D had undertaken a work capability assessment (“**WCA**”) on [date] and determined that C still has LCW.

**Note on D’s duty of candour**

1. As D will be aware, the duty of candour arises as soon as a public authority becomes aware that someone is likely to test or challenge a decision or action. The duty is engaged at every stage of the proceedings, including the pre-action stage, as confirmed in *R (HM, KH and MA) v Secretary of State for the Home Department* 3 [2022] EWHC 2729 (Admin).
2. If any guidance, policy or guidelines exists concerning any of the matters raised in the Background section above, we consider that compliance with the pre-action protocol and the duty of candour requires that it be i) disclosed and ii) provided in full for inspection, as part of the response to this letter.

***Legal background***

1. Regulation 19 UC (TP) Regs requires that where a UC claimant was entitled to ESA immediately prior to claiming UC and had been, in respect of ESA, determined to have LCW, then they must be treated as having LCW from the outset of their UC claim:

 ***Transition from old style ESA***

***19****.- (1) This regulation applies where–*

*(a) an award of universal credit is made to a claimant who was entitled to old style ESA on the date on which the claim for universal credit was made or treated as made (“the relevant date”); and*

*(b) on or before the relevant date it had been determined that the claimant had limited capability for work or limited capability for work-related activity (within the meaning of Part 1 of the 2007 Act).*

*(2) Where, on or before the relevant date, it had been determined that the claimant had limited capability for work (within the meaning of Part 1 of the 2007 Act)–*

*(a) […]*

 *(b) the claimant is to be treated as having limited capability for work for the purposes of 1 section 21(1)(a) of the Act.*

1. Regulations 2 to 5 of the Employment and Support Allowance and Universal Credit (Miscellaneous Amendments and Transitional and Savings Provisions) Regulations 2017 (“**ESA and UC (MATSP) Regs**”) amended the Employment and Support Allowance Regulations 2008 and 2013, the Universal Credit Regulations 2013 and the Universal Credit (Transitional Provisions) Regulations 2014 to abolish the ESA WRA component and UC LCW element.
2. Transitional protection exists however for those already in receipt of the WRA ESA component or UC LCW element prior to 3rd April 2017.
3. Schedule 2 “Transitional and savings provisions” ESA and UC (MATSP) Regs sets out the circumstances in which the transitional protection applies and includes, as in C’s case, where a claimant in receipt of ESA including the WRA component makes a new claim to UC:

***Universal Credit: transitional and savings provisions***

***8.****—(1) The amendments made by regulations 4 and 5 and paragraphs 13, 16 and 17 of Schedule 1 do not apply—*

*(a) where a claimant has an award of universal credit in any of the circumstances in the following paragraphs; and*

*(b) for so long as the claimant continues to be entitled to universal credit and to have limited capability for work.*

*[…]*

***Claimants entitled to employment and support allowance before 3rd April 2017***

***13.****The fifth circumstance is where immediately before 3rd April 2017 the claimant was entitled to employment and support allowance and remains so entitled throughout the period beginning with 3rd April 2017 and ending with the date on which the claim for universal credit is made or treated as made.*

1. D’s Advice for Decision Making (“**ADM**”) confirms that the result of a Work Capability Assessment done for ESA applies equally to a subsequent claim for UC[[3]](#footnote-3):

***G2002*** *A claimant has LCW where*

1. *it is determined that they have LCW on the basis of the WCA, whether for the purposes of UC or ESA1 (see G2090 et seq)* ***or***
2. *they are treated as having LCW2 (see G2010 et seq).*

*1 UC Regs, reg 39(1)(a) & Sch 6; ESA Regs 13, Part 4;*

*2 UC Regs, reg 39(1)(b) & (4) & Sch 8*

1. The Appendix to ADM “Chapter F5: The LCWRA element” confirms the removal of the LCW element does not apply to claimants in C’s position:[[4]](#footnote-4)

***13*** *The removal of the LCW element does not apply where the claimant*

*1. was entitled to ESA immediately before 3.4.17 and*

*2. remains entitled to ESA throughout the period beginning on 3.4.17 and ending on the date on which the UC claim is made or treated as made1.*

 *1 ESA & UC (Misc Amdt etc.) Regs, Sch 2, para 13*

**Ground 1: failure to include the LCW element from the outset of the UC claim**

1. Immediately prior to claiming UC, C was in receipt of ESA including the WRA component, having been determined to have LCW on [date].
2. This was something that the decision maker was specifically aware of from the fact that it was recorded in C’s UC journal on [date].
3. Despite this, and the fact that C has repeatedly requested inclusion and backdating of [her/his] LCW element, the LCW element has not been included in [her/his] UC.
4. Delete on date and [date], C’s example Citizens Advice advisor / mental health welfare rights caseworker raised this issue with the UC processing team. A copy of the letter of [date] is enclosed. That letter clearly amounts to a request for official error revision. However, to date it has still not been acted upon despite the passage of some [number] months.
5. The failure to award C the LCW element from the start of C’s UC award is unlawful contrary to reg 19 UC (TP) Regs and D’s own guidance (set out above).

**Ground 2: unlawful delay**

1. A request for official error revision of C’s award / the decision not to award and pay the LCW element from the start of C’s UC award on [date] has been made on several occasions by [who], the latest occasion being on [date], but has still not been actioned. This amounts to unreasonable delay.
2. While there is no specified timeframe in which D is required to respond to a request for official error revision, D is under a duty to do so within a “reasonable time” – *R(C and W) v Secretary of State for Work and Pensions* [2015] EWHC 1607 (Admin). What counts as a reasonable time depends on the circumstances, including the impact on the claimant.
3. In the present case, an over [number] months delay is unreasonable and therefore unlawful given:
	1. C’s very limited financial circumstances, [details] including [her/his] having to access foodbanks to ensure enough food for [her/him] and [her/his] [number] children;
	2. [her/his] vulnerability [details] as somebody with ongoing mental / physical health problems;
	3. the fact that D was aware from the outset of C’s claim that C had been in receipt of ESA immediately before claiming UC and had bee in receipt of the WRA component;
	4. the fact that the issue has been raised repeatedly by both C and subsequently a [welfare rights worker].

**Alternative remedies**

1. EDIT AS APPROPRIATE C requested a mandatory reconsideration of the decision on [date]. D replied via C’s UC online journal on [date]:

“.... ”.

1. C is prevented from appealing the decision in question by the refusal of D to accept C’s mandatory reconsideration request and/or the failure to action that request within a reasonable time. Judicial review is therefore the only way for C to challenge the unlawful failure to include the LCW element in [her/his] UC award.

**The details of the action that the defendant is expected to take**

The Defendant is requested to:

1. Award C the LCW element from the start of [her/his] UC award.
2. Compensate C for the poor handling by DWP of [her/his] UC claim which has added to C’s overall stress and anxiety at a time when [she/he] has been having to deal with … Contrary to DWP’s stated priority of delivering ‘outstanding services to our clients and customers’, C finds [her/himself length of time] after initially making [her/his] UC claim, still waiting for payment of the LCW element. Such poor handling is also contrary to DWP’s customer charter, with its commitments inter alia to understand C’s circumstances and to provide [her/him] with the correct decision and information.
3. Confirm what systems and training are in place to prevent this unlawful failure from being repeated.

**The details of documents that are considered relevant and necessary**

* **C’s signed authority**
* **All other documents available through C’s Universal Credit online account (journal and Claimant Commitment).**

**ADR proposals**

**Please confirm in your reply whether D is willing to consider alternative dispute resolution.**

**The address for reply and service of court documents**

**[advice agency name, address and email here ]**

**Proposed reply date**

We expect a reply promptly and in any event no later than [date] (14 days).

**Should we not have received a reply by this time our client will seek representation to issue proceedings for judicial review without further notice to you.**

Yours faithfully

Enc

1. assets.publishing.service.gov.uk/media/657c891d83ba380013e1b66c/List-of-Authorised-Government-Departments-under-s.17-Crown-Proceedings-Act-1947-15.12.2023.pdf [↑](#footnote-ref-1)
2. gov.uk/government/organisations/government-legal-department [↑](#footnote-ref-2)
3. [assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment \_data/file/661586/admg2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment%20_data/file/661586/admg2.pdf) [↑](#footnote-ref-3)
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