|  |  |
| --- | --- |
| ***Only use this letter if your client:***   * *Lives in social rented accommodation and receives Universal Credit to help pay their rent.* * *The tenant signed a joint tenancy.* * *The joint tenant has moved out and does not contribute to the rent.*   **DELETE BOX BEFORE POSTING** | ***This letter challenges*** *the DWP’s failure to include the claimant’s full eligible rent in the calculation of the claimant’s Universal Credit award for housing costs. E.g., a joint tenancy has been signed but one tenant has left, Universal Credit does not cover the other half of the rent.*  Please read whole letter carefully and change any text in red and/or [square brackets]  **DELETE BOX BEFORE POSTING** |

***Before you use this letter:***

Judicial review is a ‘remedy of last resort’. If there is a right of appeal, you must use it before sending a pre-action letter, unless that right of appeal can be said to not be effective.

We suggest sending a mandatory reconsideration request and asking for response within 14 days (explaining why this is a reasonable time e.g. no UC in place so risk of homelessness and/or destitution, DWP already made aware of issue, not a complex issue). Feel free to use the references in this pre-action template when drafting your MR request.

Explain that if a mandatory reconsideration decision is not received within the time requested, you will send a judicial review pre-action letter.

If a mandatory reconsideration decision is not received, your pre action letter should then address the substantive issue AND the delay in providing an MR decision within a reasonable time (see the letter template: UC delay in providing MR decision).

If you are unsure, please contact CPAG to discuss: [jrproject@cpag.org.uk](mailto:jrproject@cpag.org.uk)

**BOX BEFORE POSTING**

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](mailto: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 [name] **in relation to [her/his] claim universal credit (“**UC**”) award and the Defendant’s refusal to include [her/his] full contractual rent liability in the calculation of [her/his] UC housing costs element. We write in accordance with the Pre-action Protocol for Judicial Review. Due to the urgency of this matter because of the financial burden put on our client, we are requesting your response as soon as possible and in any event no later than 5 pm on [date] (no. days). This is fewer than the usual 14 days under the Pre-Action Protocol.**

**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*](mailto:thetreasurysolicitor@governmentlegal.gov.uk)*.*

**The details of the matter being challenged**

1. **C challenges SSWP’s failure to include [her/his] full eligible rent in the calculation of [her/his] UC housing costs element.**

**Background facts**

1. **C lives in social rented accommodation at [address] (“the Property”) and receives UC to help pay [her/his] rent.**
2. **C’s tenancy is a joint tenancy in the names of C and [relationship, name, NINo] (“[person’s initials eg, AB]”)**
3. **C and [AB] moved into the property on [date] and signed a joint tenancy, understanding each was joint and severally liable for the full rent.**
4. **[AB] moved out of the property on [date] due to [reason - relationship breakdown? circumstances?] and now lives at: [address], where [s/he] pays rent to [who] and [receives UC to help pay [his/her] housing costs]. [delete if not known or not relevant]**
5. **C lives with [details of household, income, disability, children, difficulty budgeting? debts]**
6. **C contacted SSWP via [her/his] UC journal on [date] to notify them that [s/he] is liable for the full rent at the property:**

**[“*what was said*”]**

1. **SSWP responded on [date]:**

**[“*what was said*”]**

1. **C tried [her/his best to meet the shortfall in her/his] UC housing costs caused by SSWP’s failure, however as UC is a subsistence benefit, [s/he] did not have sufficient income to do so.**
2. **C contacted SSWP again via [her/his] UC journal on [date] to request again that [her/his] full rent be taken into account:**

**[“*what was said*”]**

1. **SSWP responded on [date]:**

**[“*what was said*”]**

1. **C now has rent arrears of [amount] and [has been threatened with possession action by her/his landlord / possession action has been started / taken edit as appropriate]. If C is evicted from [her/his] home, [s/he] has nowhere to move to and [s/he] and [her/his] children will be rendered homeless. DELETE IF NOT RELEVANT.**
2. **[Prior to C’s UC claim, C was in receipt of Housing Benefit (“HB”). [C signed an affidavit on [date] to notify the HB department that [AB] had moved out and C was liable for the full rent, this was accepted by the HB department and C was in receipt of full HB to help pay [her/his] rent.]**
3. **[Any rent arrears when on HB? If not, say so, current risk to c’s home has been entirely caused by the defendant’s actions.]**

**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**

Schedule 4 Universal Credit Regulations 2013 (“**UC Regs**”)

1. Part 5 of Sch. 4 UC Regs applies to social housing tenants. The relevant definitions are as follows:

***2.****In this Schedule—*

*…*

*“joint renter” has the meaning given in paragraph 1(2)[[3]](#footnote-3)*

*“listed persons”, in relation to a renter, means—*

1. *the renter;*

*…*

*“renter” means a single renter within the meaning of paragraph 1(2) or either of joint renters*

#### *3. (1) “Relevant payments” means one or more payments of any of the following descriptions—*

*(a) rent payments;*

*...*

*(2) “Rent payments”, in relation to any calculation under Part 4 or 5 of this Schedule, has the meaning given in paragraph 2 of Schedule 1.[[4]](#footnote-4)*

1. Para. 33 provides the formula by which the amount of a claimant’s housing costs element must be calculated:

***33****.-  The amount of the renter’s housing costs element under this Part is to be calculated by reference to the formula—*

*https://www.legislation.gov.uk/uksi/2013/376/images/uksi_20130376_en_004*

*where—*

*“S” is the amount resulting from whichever of paragraph 34 or 35 applies in the renter’s case, and*

*“HCC” is the sum of the housing cost contributions (if any) under paragraph 13.*

1. Paragraph 35(4) confirms how rent liability should be apportioned between liable people, which can be understood as where A is the full rent liability, B is the total number of people liable to pay rent, and C is the number of people liable for the rent included in the UC award.

##### *Determining the amount from which HCC deductions are to be made: joint tenants*

##### *35 (4) Where the persons liable for the relevant payments are one or more listed persons and one or more other persons, amount S is to be found by the applying the formula—*

*[https://www.legislation.gov.uk/uksi/2013/376/images/uksi_20130376_en_005](https://www.legislation.gov.uk/uksi/2013/376/images/uksi_20130376_en_005)*

*where—*

*“A” is the amount resulting from step 3 in sub-paragraph (2),*

*“B” is the total number of all persons (including listed persons) liable to make the relevant payments, and*

*“C” is the number of listed persons.*

1. The resulting default eligible rent for two joint tenants who do not form part of the same benefit unit and no other deductions apply, is therefore

Full rent liability

­\_\_\_\_\_\_ x 1 single claimant = ½ or 50%

2 joint tenants

1. Paragraph 35(5) then provides for the calculation in 35(4) to be disregarded where it would be unreasonable to apply it:

***35.-*** *(5)****If the Secretary of State is satisfied that it would be unreasonable to determine amount S in accordance with sub-paragraph (4), amount S is to be determined in such manner as the Secretary of State considers appropriate in all the circumstances****, having regard (among other things) to the number of persons liable and the proportion of the relevant payments for which each of them is liable.*

**(Emphasis added)**

**DWP’s Operational Guidance**

1. **The relevance of Sch 4 paras 35(4) and (5) to circumstances such as C’s is confirmed clearly by the DWP’s operational guidance which recognises that it is not unusual for one joint tenant to have moved out of the property but continue to be named on the tenancy. This constitutes an ‘absent joint tenant – only one joint tenant resident’ in its guidance ‘**Joint Tenancies.’[[5]](#footnote-5) This guidance unambiguously confirms the remaining joint tenant is treated as liable for the full rent.

***Absent joint tenant – only one joint tenant resident***

*Where has a joint tenancy but is the only joint tenant living in the property, the claimant is treated as liable for the total rent. This can apply to both Social Rented Sector (SRS) and Private Rented Sector (PRS) cases. The declaration from the claimant is sufficient to satisfy the verification requirement. This is an absent joint tenant case.*

1. Advice from the DWP to the National Housing Federation dated 16 October 2020[[6]](#footnote-6) in relation to changes of circumstances (rather than new claims) confirmed:

*On 23 June 2020 a new ‘Record a change in joint tenancy costs’ to-do was introduced to Universal Credit Full Service…*

*The new to-do allows agents to record* ***how many tenants live in the property and the amount of rent/service charge the claimant pays.*** *This ensures that that both absent joint tenant (Untidy Tenancy) or* ***unequal apportionment of rent within a housing costs support claim are paid correctly.***

*As part of the new guidance explaining the operational process for the new ‘to-do’, Work Coaches and Case Managers are reminded that they* ***must not****:*

* *Ask the claimant to re-declare housing costs as a single tenancy, unless there is a genuine change of circumstances.*
* *Make a housing declaration on behalf of the claimant that it is a single tenancy.*
* *Ask the claimant to get a new tenancy from their landlord or a landlord letter to confirm the claimant is solely liable.*

(Emphasis added)

**Grounds for judicial review**

**Ground 1: Failure to correctly follow the law and guidance**

1. **The law set out above is clear. SSWP has the discretion under Sch 4 para 35(5) to include C’s full rent (100%) in the calculation of [her/his] UC housing costs because “***it would be unreasonable to determine amount S in accordance with sub-paragraph (4)”*(ie, only to include 50%of C’s rent), because C has liability for and must meet the full rent to continue living in [her/his] home and because the joint tenant no longer resides at the Property. That this is the case, and that SSWP’s discretion should be exercised to include C’s full rent, is confirmed unequivocally by SSWP’s own guidance including operational guidance where it states: “*Where has a joint tenancy but is the only joint tenant living in the property, the claimant is treated as liable for the total rent”.[[7]](#footnote-7)*
2. **[SSWP has stated that C must provide confirmation from [her/his] landlord that [s/he] is liable for the full rent despite the fact that [s/he] has provided a signed affidavit, accepted by the local authority in respect of [her/his] HB award, that [her/his] partner has moved out. This is not a requirement under Sch 4 UC Regs, under which it must be ‘reasonable’ to include the full housing costs and the SSWP guidance ‘**Joint Tenancies’ **(above) even gives the example of C’s circumstances as an instance in which it will be reasonable. Further this requirement was specifically addressed by SSWP in a note dated 23 June 2020: “***Work Coaches and Case Managers are reminded that they* ***must not****…Ask the claimant to get a new tenancy from their landlord or a landlord letter to confirm the claimant is solely liable”.]*
3. **By refusing to exercise discretion to include 100% of C’s rent [and requiring C to provide a letter from [her/his] landlord], it is clear that SSWP** has unlawfully **refused to consider C’s individual circumstances and failed to follow or take account of SSWP’s own guidance when making the decision. As such SSWP has failed correctly to apply the law at para 35(5) of Sch 4 UC Regs which provides the discretion to include 100% of C’s rent in consideration of these factors.**

**Ground 2: Failure to ask questions /operation of an unlawful new claims system**

1. The law above is not disputed by D and indeed our understanding of the law is supported by D’s guidance.
2. Under regulation 37(2) The Universal Credit etc (Claims and Payments) Regulations 2013 (“**UC (Claims and Payments) Regs"**) SSWP has the power to request from a new claimant information and evidence in connection with their claim and “any question” arising out of it:

***37.-*** *(2) The Secretary of State may require the person to supply information or evidence in connection with the claim, or any question arising out of it, as the Secretary of State considers appropriate.*

1. When information about an untidy tenancy is volunteered by a claimant in respect of an existing UC award via the ‘Record a change in joint tenancy costs’ to-do (above) this information is recorded and used by SSWP to calculate a claimant’s housing costs. Yet this information is not requested of new claimants.
2. On the last version of the new claim questions seen by CPAG (Release 138.19) the questions in relation to joint tenancies are as follows:
3. *Is there anyone else on the tenancy agreement?*
4. *How many people are on the tenancy agreement including you?*
5. *How much is the total rent paid by everyone?*
6. *How many other people live with you?* (which includes an instruction not to provide joint tenants details)
7. These questions do not ask, and do not provide the claimant with opportunity to say, whether the joint tenant still lives at the property, ie, whether the claimant has an ‘untidy tenancy’, information which is crucial to the determination of a claimant’s eligible housing costs by D.
8. In *Kerr (AP) v Department for Social Development (Northern Ireland)* 2004] UKHL 23 Lady Hale confirmed D’s duties when determining a claim, making clear it is for D to ask the relevant questions since D knows ‘*what information it needs to have’,* while a new claimant may have the information required, but not know that it is relevant to their claim until asked:

*62.  What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part.* ***The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met.****The claimant is the one who generally speaking can and must supply that information. […]*

(Emphasis added)

1. The onus is therefore on SSWP to ask a claimant for information relevant to their new claim, not for the claimant to volunteer it, since a new claimant will not know until asked what information they need to provide.
2. By failing to ask whether a joint tenant still lives in a claimant’s home, SSWP is unlawfully failing to exercise the inquisitorial duty described by Lady Hale.
3. The DWP’s 2020 ‘Spotlight on: Joint Tenancy Costs - Absent Joint Tenant (Untidy Tenancy)’[[8]](#footnote-8) includes:

“*The claimant must always declare their housing costs accurately****. They must declare that it’s a joint tenancy and confirm the number of joint tenants declared on the tenancy agreement. The claim must be verified as a joint tenancy even though there is an absent joint tenant.*** *Case managers can decide that the claimant is wholly liable for the rent, or the percentage split of rent as split between the remaining joint tenants.* ***Case managers must accept the claimant’s declaration****.”*

(Emphasis added)

1. The new claim questions do not allow a claimant to “*declare their housing costs accurately*” since a new claimant is not asked to confirm whether a joint tenant lives at their property and so whether they are liable for the whole or only a part of the rent.
2. It appears it is then for the new claimant to correct this inaccurate declaration. “*Case managers* ***must*** *accept the claimant’s declaration”* [[9]](#footnote-9) however, to require further declaration not elicited in response to a new claim question, unlawfully shifts the burden to new claimants to volunteer information only DWP may know is relevant. At no point in the new claim process does SSWP check whether claimants with joint tenancies (ie, claimants who have circumstances where an untidy tenancy is possible) have an untidy tenancy, and as such SSWP is operating an unlawful new claims system.
3. SSWP have made available a ‘Record a change in joint tenancy costs’ to-do (set out above). Claimants making new claims who have an existing ‘untidy tenancy’ at the point of claim have not had a ‘change in joint tenancy costs’ since making their new claim. If new claimants are required to report their ‘untidy tenancy’ as a ‘change’ via this to-do, this is inaccurate and misleading as it may not be clear to new claimants that their existing housing costs must be reported as a change, making it likely that claimants with untidy tenancies will incorrectly report their housing costs.
4. If the questions relating to new claims have changed since Release 138.19, please provide details of the current questions relating to joint tenancies.

**Ground 3: Failure to take account of relevant information**

1. [C has provided a copy of the signed affidavit confirming Y moved out of the property on DATE.]
2. [C was previously in receipt of HB in respect of the full rent for the Property. [Her/his] circumstances have not changed and SSWP has provided no reason as to why it believes they have.]
3. UC is a subsistence benefit. Where the payment made in respect of housing costs is unlawfully reduced, C does not have the means to meet the rent shortfall to [her/his] landlord and SSWP’s actions have therefore placed the security of C‘s home at risk for [her/himself and her/his children].
4. **In refusing to exercise its discretion, SSWP has unlawfully failed to consider relevant information, namely [the evidence provided in the form of an affidavit, the acceptance of the same in consideration of C’s previous housing benefit claim], C’s subsistence level income, the consequent inability to make additional payments to [her/his] rent account, SSWP’s own guidance as set out above, [and the risk of cc losing [her/his] and [her/his] children’s home as a result of the decision].**

**Alternative remedies**

1. It is recognised that C has the right of appeal against the amount of [her/his] UC award. However given the clear failure by SSWP to follow the law and SSWP’s own guidance in what are not unusual circumstances, the profound financial hardship caused to C including a risk to [her/his / the family] home, and that this matter has already been brought to the defendant’s attention via C’s online UC Journal [more than once], judicial review is the only effective remedy available to provide a speedy resolution to this clear unlawfulness.

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

**The Defendant is requested to:**

* **Increase C’s UC housing costs with immediate effect and from the start of C’s UC award to cover [her/his] full rent liability.**
* **If the above list of questions is accurate, including for new claimants, (under ‘documents requested’, include an additional question as a follow-up to question 2:**

“*is the other person on the tenancy agreement living at the property*”

This would prevent errors such as in C’s case of D assuming a joint tenant is resident, and so awarding an incorrect housing costs element, when they are not.

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

* **C’s signed authority**
* **Other documents available via C’s UC journal**

**ADR proposals**

**Please confirm in your reply whether SSWP 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**

**Due to the urgency of this matter we expect a reply promptly and in any event no later than [DATE – no. days from date of letter]. Should we not have received a reply by this time our client reserves the right 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. Claimants to whom regulation 26(2) UC Regs applies, which is those who meet all the criteria in Reg 25 including: payment condition, liability condition and occupation condition [↑](#footnote-ref-3)
4. #### Under para 2 Sch 1 UC Regs “rent payments” include “payments of rent”

   [↑](#footnote-ref-4)
5. [data.parliament.uk/DepositedPapers/Files/DEP2022-0452/083-Joint\_tenancies\_V8.0.pdf](https://data.parliament.uk/DepositedPapers/Files/DEP2022-0452/083-Joint_tenancies_V8.0.pdf) [↑](#footnote-ref-5)
6. [www.housing.org.uk/news-and-blogs/news/new-advice-dwp-universal-credit-calculations/](file:///C:/Users/jstrode/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/UGDTBDTA/www.housing.org.uk/news-and-blogs/news/new-advice-dwp-universal-credit-calculations/) [↑](#footnote-ref-6)
7. data.parliament.uk/DepositedPapers/Files/DEP2022-0452/083-Joint\_tenancies\_V8.0.pdf [↑](#footnote-ref-7)
8. [www.whatdotheyknow.com/request/698686/response/1672757/attach/3/Spotlight%20on%20Joint%20Tenancy%20Costs%20Absent%20Joint%20Tenant%20Untidy%20Tenancy.pdf?cookie\_passthrough=1](file:///C:/Users/LDalton/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/M5ZNUR0F/www.whatdotheyknow.com/request/698686/response/1672757/attach/3/Spotlight%20on%20Joint%20Tenancy%20Costs%20Absent%20Joint%20Tenant%20Untidy%20Tenancy.pdf) [↑](#footnote-ref-8)
9. [www.whatdotheyknow.com/request/698686/response/1672757/attach/3/Spotlight%20on%20Joint%20Tenancy%20Costs%20Absent%20Joint%20Tenant%20Untidy%20Tenancy.pdf?cookie\_passthrough=1](file:///C:/Users/LDalton/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/M5ZNUR0F/www.whatdotheyknow.com/request/698686/response/1672757/attach/3/Spotlight%20on%20Joint%20Tenancy%20Costs%20Absent%20Joint%20Tenant%20Untidy%20Tenancy.pdf) [↑](#footnote-ref-9)