***This letter challenges*** *the DWP’s failure to; provide a home visit and failure to provide reasonable adjustments. In this instance ESA has not been terminated because of failure to attend the work capability assessment.*

**Note:** this letter is drafted for Old Style ESA claims where a claimant has been called for re-assessment by way of a work capability assessment. References for New Style ESA (ie, if ESA claimed since UC rollout) are in the footnotes should you need to adapt it.

Seek advice if needed: jrproject@cpag.org.uk

**DELETE BOX BEFORE POSTING**

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

* *Is in receipt of old-style ESA and has a disability*
* *Was called for a face-to-face work capability re-assessment (WCA) and did not attend*
* *The WCA was not done on paper and a home visit has not been offered*
* *ESA has NOT been terminated.*

Please read the whole letter carefully and change / edit all text in red and/or [square brackets]. Return all text to black before posting.

**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.

Send a mandatory reconsideration (MR) request and ask for a response within 28 days, or 14 days in exceptional circumstances (which you will need to explain). Feel free to use the references in this pre-action template when drafting your MR request.

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

If an MR 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.

**DELETE BOXES BEFORE POSTING**

**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

[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 [Name] **in relation to [her/his] Employment and Support Allowance (“**ESA**”) 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 by **5pm on [date].****

**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 SSWP’s:**
2. **failure to exercise the discretion available to assess C’s ongoing eligibility for ESA on the basis of C’s paperwork when sufficient paperwork was available to do so,**
3. **failure to make reasonable adjustments to prevent disadvantage resulting from C’s [mental/physical] health disability;**
4. **failure to offer a home visit to carry out a work capability assessment (“WCA”).**

**Factual Background**

1. **[Client details]**
2. **[Household composition/ family]**
3. **[Disability and prognosis]**
4. **[Dates notified of physical/ mental health needs and what was said]**
5. **[Dates requested contact in writing only (or how) and what was said]**
6. **[Date the claimant was called for a face-to-face work capability assessment]**
7. **[Date the claimant requested a home visit/ notified D s/he was unable to attend the work capability assessment because…and provided what evidence?]**
8. **[How has DWP responded? What was the outcome?]**
9. **[Previous ESA award (if applicable)]**
10. **[Current ESA/ Universal Credit award (if applicable)]**
11. **[C is suffering considerable financial hardship and has debts of…]**
12. **[Effect on C’s health etc]**

**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**

**Legislation**

1. **In order to be entitled to ESA, a claimant must have a limited capability for work. Capability for work is defined in s.1(4) of the Welfare Reform Act 2007 (“WRA”), which states:**

***"1. - (4) For the purposes of this Part, a person has limited capability for work if –***

1. ***his capability for work is limited by his physical or mental condition, and***
2. ***the limitation is such that it is not reasonable to require him to work.”***
3. **The** Employment and Support Allowance Regulations 2008 (“**ESA Regs**”) **are made under** powers conferred by the WRA. Reg 19 of the ESA Regs addresses determination of limited capability for work and states:

***“19****. - (1) For the purposes of Part 1 of the Act, whether a claimant’s capability for work is limited by the claimant’s physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require the claimant to work is to be determined on the basis of a limited capability for work assessment of the claimant in accordance with this Part.*

*(2) The limited capability for work assessment is an assessment of the extent to which a claimant who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in Schedule 2 or is incapable by reason of such disease or bodily or mental disablement of performing those activities.”*

1. **The information required in determining whether the claimant has limited capability for work is detailed in reg 21** ESA Regs**:**

***“21. - (1) Subject to paragraphs (2) and (3), the information or evidence required to determine whether a claimant has limited capability for work is-***

1. ***evidence of limited capability for work in accordance with the Medical Evidence Regulations (which prescribe the form of doctor’s statement or other evidence required in each case);***
2. ***any information relating to a claimant’s capability to perform the activities referred to in Schedule 2 as may be requested in the form of a questionnaire; and***
3. ***any such additional information as may be requested.”***

*(2) Where the Secretary of State is satisfied that there is sufficient information to determine whether a claimant has limited capability for work without the information specified in paragraph (1)(b), that information must not be required for the purposes of making the determination.*

1. **There is no requirement in the regulations for a physical examination and it is clear that the assessment can involve consideration of paper evidence only; indeed, the assessment may not even include “*a questionnaire”* where there is sufficient information already held by SSWP.**
2. **Under reg 23 of the ESA Regs a claimant may (and may also therefore not), be called for a medical examination to determine whether he has limited capability for work, and if so called must attend unless she/he has a ‘good reason’ not to do so:**

***“Claimant may be called for a medical examination to determine whether the claimant has limited capability for work***

***23. - (1) Where it falls to be determined whether a claimant has limited capability for work, that claimant may be called by or on behalf of a health care professional approved by the Secretary of State to attend for a medical examination i****n person, by telephone or by video****.***

 ***(2) Subject to paragraph (3), where a claimant fails without good cause to attend for or to submit to an examination mentioned in paragraph (1), the claimant is to be treated as not having limited capability for work.”***

**(Emphasis added)**

##### Therefore, the attendance of the claimant at a medical examination is not essential to the work capability assessment and, even where the claimant has been called for a medical assessment, [s/he] does not need to attend where [s/he] has good cause not to.

##### Under s.19 of the Equality Act 2010 (“EA 2010”) it is indirectly discriminatory to claimants with protected characteristics, which include disability, to apply a criterion or practice to all claimants, which places claimants with that protected characteristic at a disadvantage where that criterion or practice cannot be shown to be a proportionate means of achieving a legitimate aim.

##### *“Indirect discrimination*

##### *“19.-(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*

##### *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*

##### *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*

##### *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

##### *(c) it puts, or would put, B at that disadvantage, and*

##### *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

##### *(3) The relevant protected characteristics are—*

##### *[…]*

##### *disability;”*

##### Under s.20 EA 2010 the Defendant and its contractors have a duty to make reasonable adjustments in the way contact is made and the way assessments for ESA are carried out to avoid disadvantage to claimants with disabilities, such as C.

##### *“Duty to make adjustments*

***20****.****-*** *[…]*

*(2) The duty comprises the following three requirements.*

*(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”*

1. Under s. 21 EA 2010, failure to comply with the s.20 duty to make adjustments constitutes discrimination:

##### *“Failure to comply with duty*

***21****.- (1)A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*

*(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.”*

1. Under s. 29 EA 2010 the duty to make reasonable adjustments applies to service providers and persons exercising public functions:

***“29****.- […]*

*(7) A duty to make reasonable adjustments applies to—*

*(a) a service-provider (and see also section 55(7));*

*(b) a person who exercises a public function that is not the provision of a service to the public or a section of the public.”*

**SSWP’s Guidance**

**Issue 1: Paper Assessment**

**Decision Makers Guide (“DMG”): Volume 8: Chapter 42 - Limited Capability for Work and Limited Capability for Work-Related Activity** **[[3]](#footnote-3)**

1. **The guidance in the relevant DMG chapter makes clear a medical examination may not be necessary at all:**

***42176*** *As part of the assessment, claimants who are not treated as having LCW* ***may be required*** *to complete a questionnaire (see DMG 42161) and* ***if necessary*** *attend a medical examination. If they fail without good cause to do either, they can be treated as not having LCW1 (see DMG 42450 et seq). 1 ESA Regs, regs 22 & 23*

(Emphasis added).

1. This confirms the position as set out in the ESA Regs, that attendance at a medical examination may be required, but that it is not always necessary.
2. The circumstances in which a claimant’s capability for work can be measured without the need for a face-to-face assessment for both ESA and UC are dealt with in the Centre for Health and Disability Assessments (“**CHDA**”) publication *“WCA Filework Guidelines”[[4]](#footnote-4),* where multiple examples are provided of circumstances when a face-to-face assessment will not be necessary:

***“1.4 Purpose of WCA Filework***

***The purpose of the WCA filework process is to identify those individuals for whom advice on limited capability for work (LCW) and limited capability for work and work-related activity (LCWRA) can be provided without the need for a face-to-face assessment. The evidence may suggest that the claimant:***

* ***Is terminally ill***
* ***Has severe functional restriction fulfilling the criteria for a functional LCWRA category***
* ***Meets the criteria for LCWRA on other grounds that do not directly measure function (such as cancer treatment)***
* ***Fulfils criteria for being treated as having limited capability for work (‘Treat as LCW' categories); and where adequate evidence is available to advise on limited capability for work and work-related activity (LCWRA)***
* ***In scrutiny cases, continues to meet the functional threshold of limited capability for work (LCW) where they have previously been identified as having functional LCW at a medical assessment***
* ***In scrutiny cases, meets the criteria for LCW on substantial physical / mental risk, where adequate evidence is available to advise on limited capability for work and work-related activity (LCWRA)***
* ***Fulfils the criteria for LCW or LCWRA where they were previously accepted or exempt as unfit for work under the Incapacity Benefit/Personal Capability Assessment (PCA) regulations, and where the evidence suggests that they are likely to reach the threshold of LCW or LCWRA under the WCA regulations”***

(Emphasis added)

1. **C meets these criteria [How? Emphasise relevant in bold above and delete any wholly irrelevant bullet points].**
2. **SSWP’s guidance *“A Guide to Employment and Support Allowance – the Work Capability Assessment”****[[5]](#footnote-5)***, which is aimed at professionals and contractors, further details when an assessment can be carried out on papers only:**

*“If the healthcare professional feels that they can provide comprehensive and fully justified advice to the Departmental decision maker on the basis of the available paper evidence, then the claimant will not be asked to attend a face-to-face assessment.”*

*(pp.13)*

1. The healthcare professional therefore has a discretion to provide advice to the decision maker based solely on the paper evidence available.

**Issue 2: Home visit**

1. SSWP accepts in *WCA Filework Guidelines[[6]](#footnote-6)* that a home visit will sometimes be required [and that the request may be accepted from someone involved in the claimant’s care: DELETE IF NOT RELEVANT]

***“10.3 Domiciliary visits***

*Not all benefit assessments are conducted at an Assessment Centre. Sometimes a claimant indicates that they are unfit to travel to or to attend the Assessment Centre and then a domiciliary visit (DV) may be necessary.*

*…it is recognised that, at times, the assessment needs to be conducted in the claimant’s home.*

*[…]*

*The request for a DV may come from a GP or other health care professional involved in the claimant’s care.”*

1. *WCA Filework Guidelines* goes on to give examples of evidence that may support a request for a home visit. This includes having a “d*iagnosis suggesting significant disability that may make travel extremely difficult”,* there being evidence “*that the claimant receives home visits or telephone consultations with their GP (due to inability to attend the surgery),” or evidence “that the claimant has home visits from the psychiatrist/CMHT”.* In C’s case… [state how C meets the criteria and what evidence has been provided].
2. The intention demonstrated by this guidance is that a home visit will be provided where it is necessary and evidence of the need for a home visit has been provided, as in this case.

**Grounds for judicial review**

**Ground 1: Failure to exercise discretion and/or take account of relevant information in not deciding the Claimant’s claim on the paperwork available when all the evidence needed to make an award was available**

1. SSWP’s discretion to require a face-to-face assessment, or not, is clear under reg 23(1) ESA Regs **and throughout SSWP’s own guidance.**
2. C has provided the following evidence which confirms unequivocally that [her/his] capability for work is limited by [her/his] physical or mental condition and such that it would not be “reasonable” to require [her/him] to work or undertake work related activity (under reg 19(1) or 34(1) ESA Regs):
* [C’s evidence]
* [How does it show what points s/he scores? Detail points (in an appendix if very length)]
* [When is it dated?]
* [Where is it from?]
* [When was it provided to the Defendant?]
1. In failing to exercise the discretion available to it under r**eg 23(1) ESA Regs, as reiterated in SSWP’s own guidance,** to decide C’s claim on the paperwork available, SSWP has unlawfully failed to take account this wholly pertinent information and evidence.
2. SSWP is aware of C’s medical conditions and the impact that this has on [her/his] capability for work, and evidence of this has been provided. SSWP does not appear to have given due consideration to this evidence. Had this evidence been appropriately taken into account, the conclusion would necessarily have been reached without a face-to-face assessment that C’s condition is such that [her/his] capability for work and work related activity is so limited that it is not reasonable to require [her/him] to look for work or undertake any work related activity. SSWP instead appears to be unlawfully operating a blanket policy of requiring every claimant to attend a face-to-face assessment.

**Ground 2: Failure to offer a home visit**

1. Without prejudice to the foregoing ground that an assessment should have been conducted solely on the papers, it is contended in the alternative that it was unlawful not to offer C a home visit. SSWP’s guidance is clear. As stated in part 10.3 of the *WCA Filework Guidelines*, a home visit, or domiciliary visit, should be carried out where needed, including where a claimant is unable to travel.
2. In C’s case, [s/he informed SSWP on multiple occasions of her/his severe mental health problems and that this results in inability to…and therefore attend assessments] yet a home visit was not offered, and appears not even to have been considered.
3. In failing to offer a home visit when presented with clear evidence that it was not possible for the Claimant to [travel to/ attend] the assessment centre by reason of [her/his] [physical/ mental] health condition, SSWP is in breach of its own policy as set out in the *WCA Filework Guidelines*.

**Ground 3: Failure to make reasonable adjustments and discrimination**

1. The duty to make reasonable adjustments applies to SSWP under s.29 EA 2010.
2. As above, SSWP is aware of C’Ss’s [mental/physical] health condition and has been specifically advised of [her/his] needs. Further C has requested the reasonable adjustment of [contact only in writing] because of the severe anxiety and distress that other forms of contact cause.
3. In failing to take account of C’s [mental/ physical] health problems and needs, and disregarding [her/his] request for contact to be made in writing to avoid significant and undue mental health distress, SSWP has failed to make reasonable adjustments.

##### In requiring claimants such as C with conditions that make attendance at such appointments difficult, to attend face-to-face assessments at an assessment centre, for, when there are other readily available ways of assessing claimants’ capability for work and of obtaining such information or evidence as is required (assessing on the papers, offering a home visit and contacting in writing), SSWP has indirectly discriminated against C in breach of s.19 EA 2010.

1. In failing to take account of C’s preferred method of contact, calling [her/him] to a face-to-face assessment and failing to offer a home visit when aware of the psychological distress this will cause, with the result that **a negative determination is likely to be made when C is unable to attend the assessment scheduled because of [her/his] [physical/mental] health condition (when a person without Ct’s health condition would have been able to attend), SSWP** has in breach of s.20 EA 2010 put “*a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled”* and has unlawfully failed to take *“such steps as it is reasonable to have to take to avoid the disadvantage”.* Non-compliance with the duty to make reasonable adjustments under s.20 EA 2010 amounts to discrimination under s.21 EA 2010 and SSWP has therefore discriminated against C on the grounds of [her/his] mental health disability in breach of EA 2010.

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

**D is requested to:**

* Assess C’s capability for work on the information and evidence already available to D.
* In the alternative, if it is not possible to make an assessment of C’s capability for work on the basis of[her/his] paperwork alone, to offer and arrange a home visit without delay.
* Provide C with a written apology and compensation for the catalogue of failures by SSWP and or their agents as detailed above which have resulted in a level of service which is far below that which should be expected has caused [her/him] needless stress and anxiety further exacerbating [her/his] existing mental health issues.
* Ensure vulnerable claimants are identified, their needs recorded, and this record is available to and referred to when further contact is made by SSWP or SSWP’s agents (including Maximus).
* **Accept that C has been unlawfully discriminated against on the grounds of [her/his] [mental health disability] contrary to the Equality Act and agree to pay [her/him] damages for the financial and non-financial loss, including injury to feeling, suffered as a result.**
* Ensure guidance to staff on seeking further evidence to support a paper assessment (if needed) where it is identified that a face-to-face assessment would cause severe distress to the claimant is followed.
* Ensure guidance to staff on offering assessment on home visit when aware that attending an assessment centre will cause severe distress to the claimant is followed.
* Ensure internal monitoring of decisions over when to have paper based or home based assessments is carried out.

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

**Please find enclosed copies of the following documents:**

* **Medical evidence**
* **Signed form of authority for** the Claimant

**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]

**Proposed reply date**

Please provide your response promptly and in any event within 14 days (by **5pm on [date]**).

If you consider that you require more than 14 days from the date of this letter to provide your response, please inform us in writing immediately, giving full reasons and the date by which you will be able to respond substantively to this letter [Edit as appropriate].

Should we not have received such a request for further time nor a substantive reply by the given deadline, the Claimant reserves [her/his] right to issue proceedings for judicial review without further notice to you and to seek [her/his] costs of doing so from you.

Yours faithfully

**[Adviser signature]**

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. For New Style ESA see analogous provision at Advice for Decision Making (“**ADM**”) Chapter U2: ESA Limited capability for work and Limited capability for work-related activity U2176:

assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/865053/admu2.pdf [↑](#footnote-ref-3)
4. This applies to both Old and New Style ESA, and Universal Credit: 2nd April 2019 MED-WCAFWG~001 [www.whatdotheyknow.com/request/601653/response/1442629/attach/3/WCA%20Filework%20Guidelines.pdf](http://www.whatdotheyknow.com/request/601653/response/1442629/attach/3/WCA%20Filework%20Guidelines.pdf) [↑](#footnote-ref-4)
5. ESA214 - July 2016 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/535942/esa214-july-2016.pdf> [↑](#footnote-ref-5)
6. n 2 [↑](#footnote-ref-6)