**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 x **in relation to his/her overpayment of Universal Credit (“**UC**”) and the ongoing failure of the Secretary of State to exercise her discretion not to recover same. We are requesting your response as soon as possible and in any event no later than 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-2) 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-3) **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 challenges D’s ongoing failure to exercise the discretion available under Social Security Administration Act 1992 not to recover an overpayment of UC.**

***Background facts***

1. C is … age, family, immigration, housing details etc.
2. C suffers with... disability details, disability benefits, any capacity issues or other vulnerability?
3. Reason for o/p, what happened? Dates. Highlight DWP errors.
4. How and when was o/p notified to C?
5. How is o/p being recovered? What financial hardship is C experiencing as a result? Risk to home? Food bank use? Able to afford heating? Anything else? How is it *detrimental to the health and/or welfare of the debtor or their family?*
6. How has DWP been notified of hardship? How have they responded? Inc dates

**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. Under the Social Security Administration Act 1992 (as amended) (“**SSAA 1992**”) D has the discretion to recover, or not, any overpayment of UC:

***71ZB*** *– (1) The Secretary of State may recover any amount of the following paid in excess of entitlement –*

*(a) Universal Credit,*

1. The wording of s.71ZB makes it clear that discretion exists; an overpayment is ‘recoverable’ ie. may or may not be recovered.
2. D’s guidance “What happens if you are overpaid Universal Credit, Jobseeker’s Allowance or Employment and Support Allowance?”[[3]](#footnote-4) demonstrates both the Secretary of State’s and the claimant’s responsibilities to make sure overpayments do not happen; responsibilities it is clear C met, while D did not:

*To help get your award right, and to help avoid an overpayment happening, it is important that we both meet our responsibilities.*

*In delivering our services we will:*

*• give you the correct advice based on the information you give us*

*…*

*You can help us by:*

*• giving us full, accurate and up to date information*

*…*

*• checking any award notices that you receive from us and telling us if anything is wrong, missing or incomplete.*

1. D’s current staff guidance, the “Benefit Overpayment Recovery Guide”[[4]](#footnote-5) confirms D’s discretion to waive recovery under ‘Chapter 8 – Write-off and Waiver’ subject to “a duty to protect public funds”:

*“8.1 The Secretary of State has a discretion over whether to recover overpayments and associated penalties and how to do so… The discretion can also be exercised by cancelling part of, or the entire overpayment, through the process of waiver and write-off….*

*8.3 The Secretary of State has a duty to protect public funds and will therefore seek to recover debt in all circumstances* ***where it is reasonable to do so****. Waivers are only granted in exceptional circumstances* ***where it can be clearly demonstrated that the debtor’s circumstances will only improve by waiver of the debt****…”*

(Emphasis added)

1. Her Majesty’s Treasuryguidelines “Managing Public Money”[[5]](#footnote-6) which DWP discretion under the guidance above is subject to, makes clear overpayments can be written off where it is in the public interest:

*4.7 Non-standard financial transactions*

*4.7.1 From time to time public sector organisations may find it makes sense to carry out transactions outside the usual planned range, eg:*

*•* ***write-offs of…overpayments****;*

*4.7.2 In each case it is important to deal with the issue* ***in the public interest****, with due regard for probity and value for money.*

(Emphasis added)

1. Will Quince, Parliamentary Under-Secretary (Department for Work and Pensions) further confirmed in answer to a written question on 23rd January 2020 that the above must be followed:

*“The Department has an obligation to ensure that public funds are administered responsibly and to abide by the principles set out in Her Majesty’s Treasury’s guidance on Managing Public Money. Waiver applications have to be considered in line with this guidance. Debts can only be waived if recovery is causing substantial medical and/or financial hardship to a claimant or their immediate family.”[[6]](#footnote-7)*

1. The Benefit Overpayment Recovery Guide goes on to include factors to be taken into account by D when deciding whether to waiver recovery, by way of a non-exhaustive list:

***8.4*** *There are several different reasons why the department may consider waiver – and not all have to be met for a waiver to be granted. Waiver will take into consideration the debtors’ entire circumstances, as far as they are known, including where it is applicable the following factors.*

* *the debtor’s financial circumstances and those of their household*
* *whether the recovery of the debt is impacting the debtor’s health or that of their family*
* *the circumstances surrounding how the overpayment arose for example fraud, official error, DWP conduct*
* *the debtors conduct for example, whether the debtor took steps to mitigate any overpayment, notify DWP, misrepresented or failed to disclose any matter, any fraudulent conduct etc*
* *whether the debtor has relied on the overpayment to their detriment*
* *whether the Department intended the claimant to have the money*
* *where the debtor can demonstrate that they did not benefit from the money that was paid*
* *any other factor which appears relevant to the decision maker or which indicates recovery would not be in the public interest*

***8.5*** *This is not an exhaustive list and any factor which appears relevant in a particular case may be taken into account. It is unlikely all the above factors will be present in any individual case but it would normally be expected that the recovery of the debt is* ***causing either financial hardship or welfare issues for the debtor or their family.*** *All factors which appear relevant should be considered along with the individual circumstances of the case. A request for a waiver can be made for a variety of reasons or may be a combination of factors, that when brought together build the reason for the request.*

(Emphasis added)

**Grounds for judicial review: Failure to take relevant facts into account and to follow own guidance**

1. The Claimant has provided what evidence of her/his circumstances, financial hardship:
* A
* B
* C
1. The evidence provided by C clearly demonstrates how recovery is “*causing either financial hardship or welfare issues for the debtor or their family”* and that C’s *“circumstances will only improve by waiver of the debt*” with reference to the factors set out in D’s guidance:
* A
* B
* C
1. Demonstrating circumstances in which under D’s own guidance, recovery should be waived.
2. D has provided no details to suggest any consideration was given to the evidence and information provided by C in reaching its decision.
3. **It is therefore reasonable to infer that in breach of its own guidance D did not consider the information and evidence provided by C showing his/her financial hardship, the detriment to his/her health and general wellbeing, and how C’s circumstances would be improved by the waiver of the debt in reaching its decision to recover the overpayment .**
4. **This failure by D to consider C’s personal situation or to apply its own guidance amounts to a failure to have regard to material facts and any decision reached in consequence of this failure is therefore unlawful.**

**Alternative remedies**

1. **There is no right of appeal against this failure to exercise discretion. Judicial review is therefore the only available remedy.**

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

**We acknowledge the recently (February 2022) amended DWP guidance, which largely reflects the discretion available to decision makers.**

**The Defendant is requested to:**

* **Deliver staff training to ensure staff are fully aware of the discretion available under SSAA 1992 and the DWP guidance and that account is taken of each individual claimant’s personal circumstances when deciding whether to recover an overpayment.**
* **‘Waive’ C’s UC overpayment in consideration of his/her personal circumstances and the unequivocal official error by D.**
* **In the alternative, ‘waive’ C’s remaining UC overpayment in consideration of the above and monies already recovered.**

**The details of any information sought**

**D should provide information on the way in which the Secretary of State** records requests to waive recovery, and whether this includes:

* the reasons for the request by the claimant (eg, official error, financial hardship) and whether it is possible to record more than one reason for he claimant’s request (eg, financial hardship and official error)
* the claimant’s circumstances (eg, family, health, housing, other priority debts)
* Contact made with DWP where the claimant requests a waiver and is advised to call Debt Management (given DWP guidance under para 8.6 that “*If a debtor gets in touch to discuss repayment of their debt, or mentions they are struggling to repay their debt, staff should advise them in the first instance to contact Debt Management*”

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

* **C’s signed authority**
* **Evidence of hardship?**
* **All other documents available via C’s online UC journal**

**ADR proposals**

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

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

Advice agency address 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 we will 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-2)
2. gov.uk/government/organisations/government-legal-department [↑](#footnote-ref-3)
3. Now withdrawn but still available on the Defendant’s website and illustrative of DWP intention <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/651212/uc-jsa-esa-overpayments-customer_guidance-cop1-june13.pdf> [↑](#footnote-ref-4)
4. Updated 9 Feb 2022 <https://www.gov.uk/government/publications/benefit-overpayment-recovery-staff-guide/benefit-overpayment-recovery-guide#chapter-8--write-off-and-waiver> [↑](#footnote-ref-5)
5. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/994901/MPM_Spring_21__without_annexes_180621.pdf> [↑](#footnote-ref-6)
6. www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-01-20/5466/ [↑](#footnote-ref-7)