***This letter challenges*** *the failure of DWP to make a decision based on paper-based evidence and the unreasonable delay in making such decision when there is ample paper-based evidence to do so.*

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

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

**DELETE BOX BEFORE POSTING**

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

* *Is eligible for the LCWRA element due to health / disability*
* *A telephone work capability assessment (WCA) has been carried out but was inconclusive*
* *There is sufficient medical evidence for a decision to be made on the paperwork*
* *No WCA decision has been made on the on the paperwork*
* *Waiting for a F2F assessment has caused an unreasonable delay*

**DELETE BOX 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] Universal Credit (“**UC**”) 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]** (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 SSWP’s failure to decide [her/his] capability for work and eligibility for the Limited Capability for Work and Work Related Activity (“LCWRA”) element at all, or within a reasonable time, and to do so from the evidence available (a paper-based assessment).**

**Factual Background**

1. **[Client details including disability]**
2. **[Date C claimed and was awarded UC. Rate it is being paid at per month]**
3. **[Date C started providing regular ‘fit notes’ from GP.]**
4. **C’s Claimant Commitment requirements include [detail inappropriate commitments].**
5. It has been [number] of weeks since C was sent a UC50 form to complete and took part in a telephone-based medical assessment on [date].
6. C **has been advised [how] that a decision on capability for work and work-related activity cannot be made until [s/he] can be seen face-to-face.**
7. [What evidence has been provided to DWP which would enable an assessment on the paperwork?]
8. C remains without the LCWRA element and the additional [£354.28] this would bring each month.
9. **[C is suffering considerable financial hardship…provide details of what C is living on].**

**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 & Grounds for Judicial Review**

***Ground 1: Fettering of discretion to make a LCWRA decision on the basis of a paper-based assessment when there is sufficient evidence to do so***

1. Under the Universal Credit Regulations 2013 (“**UC Regs**”) the Secretary of State has the power to carry out an assessment to establish a claimant’s capability for work and work-related activity:

***“When an assessment may be carried out***

***41.****—(1) The Secretary of State may carry out an assessment under this Part where—*

*(a) it falls to be determined for the first time whether a claimant has limited capability for work or for work and work-related activity; or*

*(b) there has been a previous determination and the Secretary of State wishes to determine whether there has been a relevant change of circumstances in relation to the claimant’s physical or mental condition or whether that determination was made in ignorance of, or was based on a mistake as to, some material fact,”*

#### Where it falls for the Secretary of State to determine a claimant’s capability for work, the claimant may, and may also therefore not, be called for a medical (i.e, face-to-face) examination as part of the assessment under reg 44 UC Regs and the decision on whether or not they will be so is delegated to a “*health care professional approved by the Secretary of State*” (“HCP”).

#### *“Medical examinations*

***44.****—(1) Where it falls to be determined whether a claimant has limited capability for work or for work and work-related activity, the claimant* ***may*** *be called by or on behalf of a health care professional approved by the Secretary of State to attend a medical examination.”*

(Emphasis added)

#### The Defendant’s guidance ‘*Advice for Decision Making Chapter G1: Work capability assessment*’[[3]](#footnote-3) confirms that the purpose of a medical examination is to inform SSWP’s assessment (under reg 41 UC Regs) to determine whether a claimant meets the threshold for limited capability for work (“LCW”) or LCWRA. The guidance further confirms SSWP has discretion (delegated to “*a HCP approved by the Secretary of State*”) to require, or not, a medical examination to inform this assessment under Reg 44 UC Regs.

#### *“G1007 As part of the assessment, claimants may be required to complete a questionnaire1 (see G1075 et seq) and if necessary attend a medical examination2 (see G1105 et seq). If they fail without a good reason to do either, they can be treated as not having LCW and LCWRA3.”*

#### ***1 UC Regs, reg 43(1);2 reg 44(1);3 reg 43(3) & 44(2;)***

#### **(Emphasis added)**

*“G1105 Claimants* ***may be called to attend a medical examination*** *by a HCP approved by the Secretary of State where it has to be determined whether they have LCW or LCWRA1. The purpose of the medical examination is to enable the DM, with the benefit of a medical opinion, to determine whether a claimant meets the threshold for LCW or LCWRA.”*

*1 UC Regs, reg 44(1)*

(Emphasis added)

1. **C took part in a full telephone medical assessment with an approved HCP on [date] (an assessment carried out under Reg 44 UC Regs).**
2. **Since C’s telephone medical assessment, no further evidence has been requested from C.**
3. **Prior to, and since, C’s telephone medical assessment C has provided clear medical evidence which would enable a paper-based assessment to be carried out, including:**
* **[Provide details]**
1. **C has however been informed [s/he] must “*wait for a face-to-face assessment*”. There is nothing to suggest that C’s compelling medical evidence has been taken into account in reaching the decision to require C to undergo a face-to-face assessment following [her/his] telephone medical assessment on [date].**
2. **Further, the failure to obtain further evidence to enable a paper-based assessment to be carried out, either following [her/his] telephone assessment on [date] [and provision of further medical evidence], suggests operation of a blanket policy to require a face-to-face assessment in all cases where it was not possible for the HCP tomake a LCWRA recommendation from a telephone assessment.**
3. **Requiring a face-to-face assessment in all cases where a telephone assessment is inconclusive unlawfully fetters SSWP’ discretion under Reg 44 UC Regs not to require a medical examination to assess capability for work based on other available evidence.**

**Ground 2: Unreasonable delay**

1. SSWP is under a duty to consider all claims for benefit within a “reasonable time” – *R (C and W) v Secretary of State for Work and Pensions* [2015] EWHC 1607 (Admin).
2. When a medical assessment has been required, a decision on entitlement is dependent on its findings. A “WCA outcome report”[[4]](#footnote-4) (ie, a UC85 Assessors obtained under Reg 44 UC Regs) is used by the Decision Maker to determine capability for work under Reg 41 UC Regs. That determination is incorporated into the decision on entitlement made under s.8 of the Social Security Act 1998 (“**SSA 1998”**) under which the Secretary of State shall “decide any claim for a relevant benefit”. As SSWP’s guidance “Work Capability Assessment outcomes” (V15)[[5]](#footnote-5) explains:

*“The Work Capability Assessment (WCA) outcome report, together with any other relevant health-related evidence, is used to determine if the claimant:*

*• has limited capability for work*

*• has limited capability for work and work-related activity*

*• does not have Limited Capability for Work, so is fit for work*

*These in turn determine:*

*• the claimant’s Labour Market regime*

*• whether an additional amount can be included in the Universal Credit award*

*• whether a Work Allowance applies*

*• if childcare costs are payable in couple claims”*

1. The duty to make a decision within a reasonable time applies to s.8 of the SSA 1998. What counts as a reasonable time depends on all the circumstances, including the impact on the claimant[[6]](#footnote-6).

***Impact on the claimant***

1. C suffers from [provide details – is it life limiting?]
2. The delay by SSWP is causing C hardship. Failure to assess C, with the result that C’s LCWRA has not been determined and the LCWRA element has not been paid for [number] months, has left C unable to meet the additional costs arising from [her/his] health condition and [provide details of hardship].
3. [This is compounded by the application of the benefit cap, from which C will be exempt once it is determined that he has LCWRA].

**Ground 3: Unlawful discrimination**

1. The default award of UC is [£ per month], which represents the assessment rate of the [standard allowance] of UC.
2. It is recognised that people with disabilities and health conditions that result in LCWRA have costs arising out of those disabilities and health conditions which require a higher award of benefit.
3. As such, provision is made for payment of a LCWRA element to meet these costs and avoid the discriminatory impact of treating those with and without disabilities and health conditions which result in LCWRA the same.
4. Claimants who are waiting for their capability for work to be assessed are treated as **not** having limited capability for work until such time as they are assessed, leaving them open to sanction for failure to meet inappropriate conditionality requirements.
5. Failure, as in the case of C, to assess an individual’s capability for work within a reasonable time (using the paper evidence available), so as to enable them to receive the additional LCWRA element, amounts to discrimination under Article 14 ECHR read with Article 1 to the First Protocol.
6. Furthermore, in *Thlimmenos v. Greece* - 34369/97 [2000] ECHR 162, (2000), the ECtHR held that Article 14 is “violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different” (para 44 of the judgment).
7. Thus, the third and fourth questions of the well-established four stage approach to discrimination under Article 14 ECHR (see eg, *Stec v United Kingdom* (2006) 43 ECHR 1017):

(i) their situation is within the ambit of a substantive ECHR right (Article 1, Protocol 1);

(ii) they have statuses protected by Art 14 (disability or suffering from a serious health condition);

(iii) there is a difference in treatment between them and appropriate comparators; and

(iv) the difference is unjustified

becomes for disabled claimants or claimants suffering from serious or significant health conditions only receiving the UC standard allowance and subject to full UC conditionality, whether they “have been treated the same as others in a relevantly different situation” and whether that similarity in treatment is justified.

1. Failure to treat claimants with disabilities or serious health conditions differently, by failing to assess whether they have LCWRA at all or within a reasonable time, and as a consequence:
* failing to pay the additional element to which they are entitled, and
* subjecting them to full UC conditionality

results in them being treated the same as UC claimants who do not have LCWRA.

1. The need to have a claimant’s capability for work assessed before a decision on entitlement to the LCWRA element can be made may, in general, justify treating the two groups the same until such assessment takes place. However, it cannot be a legitimate justification where, as in C’S case, that assessment is either not carried out at all or not carried out within a reasonable timeframe.

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

**The Defendant is requested to:**

* Assess C’ capability for work on the basis of [her/his] paperwork without further delay.
* Ensure paper-based-assessments are carried out where telephone assessments are inconclusive.
* Accept that C has been discriminated against contrary to the Human Rights Act 1998 and agree to pay [his/her] damages accordingly.
* Accept that the failure to make a determination on C’s LCWRA up until this point falls well below the level of service that he should be entitled to expect from the DWP and has caused him unnecessary stress and financial hardship and agree to pay C compensation in respect of the same.

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

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

* **Medical evidence confirming LCWRA**
* **Signed form of authority**
* **All other documents available through 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 Name,**

**Address**

**Email]**

**Proposed reply date**

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

**If we have not received a reply by this time we will issue proceedings for judicial review without further notice to you.**

Yours faithfully

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/864925/admg1.pdf](file:///C%3A/Users/carolineclayton/Downloads/assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864925/admg1.pdf) [↑](#footnote-ref-3)
4. f data.parliament.uk/DepositedPapers/Files/DEP2022-0860/166.\_WCA\_outcomes\_V15.0.pdf [↑](#footnote-ref-4)
5. Ibid Footnote 3 [↑](#footnote-ref-5)
6. *R (C and W) v Secretary of State for Work and Pensions* [2015] EWHC 1607 (Admin) [↑](#footnote-ref-6)