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

* Has applied for and been refused a DHP
* Has a disability/terminal illness and *their property is adapted to meet their medical/disability needs.*
* *has used your local authority’s dispute/complaint service and a decision has not been made within a reasonable time or a response has been received which states the same reason for the decision.*

DELETE BOX BEFORE POSTING

***This letter challenges a local authority’s failure to take into account the claimant’s disability.***

* Read whole letter carefully.
* Edit all text in red and/or [square brackets] and/or CAPSLOCK
* Return all text to black before sending and delete comments.

**This letter assumes but can be adapted if not all true:**

* Claimants are a couple,
* Property is adapted for disability, and
* One partner is terminally ill

DELETE BOX BEFORE POSTING

Legal Department

Local Authority Address

**Our Ref:**

**[date]:**

Dear Sir or Madam

**Re: Proposed claim for judicial review against the [local authority housing benefit department] by [X]**

We are instructed by [X] and [Y] in relation to their claim for a Discretionary Housing Payment (“**DHP**”). 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 4pm on [date].

**Proposed Defendant:** [local authority housing benefit department] (“**D**”)

**Claimant:** [full name] (“**C**”)

**NINo:** [xxxx]

**Address:** [xxxx]

**Date of Birth:** [xxxx]

**HB Ref No:** [xxxx]

**The details of the matter being challenged**

C challenges the failure of D to follow the law and relevant guidance, or to exercise its discretion reasonably when deciding not to award Cs a DHP.

**Background facts:** [edit background facts in full]

1. Cs are [private / social] tenants of [name landlord] in a property with [number] bedrooms.
2. Cs live with [name, NINo, DoB, (anyone else in the household?)]
3. Cs receive [what benefits?]
4. [disability / care needs]
5. Cs home has been adapted to cope with their disabilities as follows: ...
6. [terminal illness - reasons cannot move]
7. [work and earnings?]
8. [children]
9. [rent per week / month]
10. [why needs DHP – benefit cap, bedroom tax etc]
11. [amount of shortfall each week / month]
12. The C applied for a DHP [on DATE online / by completing the local authority’s DHP application form.]
13. On [date] the D replied, refusing the DHP on the grounds:

“[*what did they say …*]”

1. [Consequences of non payment... rent arrears? Stress? Possession action? What have they gone without? Does ‘going without’ affect health?]

**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. **Under s.**69 of the Child Support, Pensions and Social Security Act 2000 (“**CSPSSA**”) the Secretary of State may by regulations confer a power on relevant authorities to make payments by way of financial assistance (“**DHPs**”) to persons who:

*(a) are entitled to housing benefit or council tax benefit, or to both, universal credit[[1]](#footnote-1) ; and*

*(b) appear to such an authority to require some further financial assistance (in addition to the benefit or benefits to which they are entitled) in order to meet housing costs.*

1. The Discretionary Financial Assistance Regulations 2001[[2]](#footnote-2) then provide the legal framework for DHPs. S.69 CSPSSA (above) is reiterated in reg 2 and some limitations are placed on the on the circumstances in which a DHP can be awarded by reg 3. In all other cases local authorities (“**LAs**") are given the discretion to award DHP whenever an application has been made, and how much to award in each case.

***Discretionary housing payments***

**2** - *(2) Subject to paragraph (3) and regulations 4 and 5, a relevant authority has a discretion—*

*(a) as to whether or not to make discretionary housing payments in a particular case; and*

*(b) as to the amount of the payments and the period for, or in respect of which, they are made.*

*Guidance*

1. The Department for Work and Pensions (“**DWP**”) provide guidance on circumstances in which DHP may be appropriate in the form of ‘*The Discretionary Housing Payments Guidance Manual*’ May 2022 (“**DWP Guidance**”). Of relevance to this case, this includes:

***What DHPs can cover***

*[…]*

*9. DHPS can also cover shortfalls between housing support and actual rental costs, for example, where benefit cap or Removal of the Spare Room Subsidy (“****RSRS****”) deductions are applied.*

1. The DWP Guidance further suggests factors which should be taken into account in deciding DHP applications (set out further in ‘Grounds’ below) and earlier DWP guidance ‘The Discretionary Housing Payments Guidance Manual Including Local Authority Good Practice Guide’ August 2019 (“**Earlier DWP Guidance**”) made clear that LAs have a duty to act “*fairly, reasonably and consistently*”. While not included in the current version of the DWP Guidance, the duty to make decisions in accordance with administrative law clearly persists:

1.10 *Although the regulations give LAs very broad discretion, decisions must be made in accordance with ordinary principles of good decision making i.e. administrative law. In particular, LAs have a duty to act fairly, reasonably and consistently. Each case must be decided on its own merits…*

1. [D has also issued its own guidance in the form of: Test Valley Borough Council Revenues Service: DHP Policy Statement[[3]](#footnote-3) [EDIT ACCORDING TO YOUR CLIENT’S LOCAL AUTHORITY], which confirms the Earlier DWP Guidance and provides guidance on Test Valley’s local priorities; set out in ‘Grounds’ below.]

*Case law*

1. **[delete next 3 paras if DLA/PIP not taken into account as income] In *R (Hardy) v Sandwell Metropolitan Borough Council* [2015]** EWHC 890 (Admin) **the Court held that D’s policy of taking into account the care component of DLA when assessing income for their DHP scheme was unlawful and amounted to a breach of Section 29(6) of the Equality Act 2010 and Article 14 of the European Convention on Human Rights.**
2. **In his judgment, Mr Justice Phillips held the Council’s policy of always taking into account the DLA care component:**

*“is an example of indirect or Thlimmenos discrimination because it treats disabled applicants and their disability-related income in exactly the same way as it treats others and their non-disability related incomes, giving rise to unfavourable treatment to the disabled applicants.”*

1. **In *R (MA) v Secretary of State for Work and Pensions* [2016] 1 WLR 4550, the Supreme Court held that the bedroom tax in its application to disabled people, where there was no objective medical need to an additional bedroom, was not unlawful. Nevertheless, the Supreme Court made clear that in cases where a disabled person had had their home specially adapted, while there may be no objective need for the additional bedroom:**

**“*because the property has been specifically designed to meet* [the disabled person’s] *needs, there may be strong reasons for* [that person] *to receive state benefits to cover the full rent, but again it is not unreasonable for that to be considered under the DHP scheme”* (para 53].**

**(Emphasis added)**

**Grounds for Judicial Review**

**Ground 1: Failure to take into account relevant facts or follow relevant guidance and/or irrationality in exercise of discretion**

1. **Cs meet the criteria for an award of DHP set out in** the law and guidance **as [he/she/they** is/are] entitled to Housing Benefit (“**HB**”) [or] Universal Credit (“**UC**”) that includes housing costs towards rental liability and require further financial assistance with housing costs.
2. Cs’ eligible rent is reduced as they are treated as having more bedrooms than they need. Para 9 of the DWP Guidance **specifically suggests this is a type of shortfall it is envisaged a DHP scheme will be used to meet.**
3. Cs live in a property adapted to meet the needs of [name] due to [her/his] disability.
4. [name] is terminally ill and [extra needs – proximity to hospital,] and would be physically unable to move to a smaller property. Expecting [name] to move to house would also be unduly emotionally distressing at this profoundly difficult time. [delete if not terminally ill]
5. These circumstances are mentioned in the Earlier DWP Guidance as factors which should as a matter of good practice to be taken into account when deciding whether and how long to award a DHP for, and while not mentioned in the current DWP Guidance there would be no justification for no longer taking such relevant factors into account:

*5.2 … you may wish to make a long term or indefinite award until the claimant’s circumstances change. You should remember that it may be more appropriate to make a long term award in cases where a claimant's**circumstances are unlikely to change, and making a short term award will cause them undue distress. An award could also be agreed in respect of a future period regardless of whether your LA’s IT system can support a future award.*

*5.3 The start and end dates of an award are decided by LAs on a case by case basis. For example,* ***where a DHP is awarded to a disabled claimant who lives in significantly adapted accommodation in the social rented sector and is subject to the removal of the spare room subsidy, you should consider making the DHP award on a longer-term basis, including an indefinite award, which is subject to a relevant change in their circumstances.***

***The household’s medical circumstances, health or support needs***

*5.4 You may wish to consider whether the following apply.*

*· Does the household have health or support needs which require them to remain in a particular property (including the needs of children)?*

***· Does the household have a health problem which means that the choice of housing is restricted either temporarily or permanently?***

***· Does the claimant require an extra room because of a physical, or mental, health problem that affects them or a member of their household?***

***· Does the household have to live where they do because of the need for access to medical or support services; for example a particular hospital?***

*· Does the household have extra health-related expenses, such as the need for therapeutic classes or non-prescription medicine?*

***Likely duration of award***

*5.6 Your LA can consider making longer term awards where appropriate, for example* ***where a claimant has on-going needs, such as a disabled person living in specially adapted accommodation****. However, the length of time over which an award of DHPs can be paid is your decision, but it may be helpful to consider the following:*

*…*

*· Is it in the best interest of the claimant, and financially prudent, to award a DHP to allow the c****l****aimant to continue to live in their current home?*

(Emphasis added)

1. The current DWP Guidance gives no reason to suggest these factors are no longer to be considered , in particular as it confirms that “*each case must be considered on its own individual merits*”.
2. Cs’ further circumstances fall under [the Test Valley Borough Council’s own objectives [edit depending on relevant local authority policy which include to:

• *Alleviate poverty;*

*• Help claimants through personal crises and difficult events;*

*• Help safeguard residents whose tenancies are threatened;*

*• Keep families together; [include only if there is any risk of one of them having to go into care? In which case detail in background facts]*

*• Support the vulnerable and the elderly in the local community;*

*•* ***Support people with disabilities who has [sic] or need adaptations to their property or require a larger property than the HB regulations allow;***

(Emphasis added)]

1. [Cs’ disabilities, terminal illness, and the special and exceptional nature of their current circumstances also fall under several of the factors to be considered by D in deciding a DHP application. Relevant factors include:

*• The financial and medical circumstances of the claimant, their partner and any dependants and any other occupants of the claimant's home;*

*• The exceptional nature of the claimant and their family's circumstances;*

*• The possible impact on the Council of not making such an award, e.g. the need to prevent homelessness;*

*• Any other special circumstances brought to the attention of the Revenues Service]*

1. The LA is under a duty to act reasonably and consistently in its decision making.

[Have reasons been given for the refusal of DHP?]

1. [**YES** In reaching the decision not to award DHP it appears insufficient, if any, regard has been had to Cs’ circumstances. D has provided as the reason(s) for their decision not to award DHP:

[REASON]

[While D is entitled to take all Cs circumstances into account, the reasons they have provided clearly demonstrate that insufficient regard has been had to Cs’ medical circumstances and the extent of hardship faced by this vulnerable couple.]

[**NO** In reaching the decision not to award DHP it appears insufficient, if any, regard has been had to Cs’ circumstances. No reasons have been provided for the decision not to award DHP. Cs can therefore only assume that no, or little, regard has been had to their individual circumstances.]

1. Failure to award DHP when a claim is made by a couple with severe disability, who have adaptations to their home due to their disability and a terminal illness diagnosis, when D’s own guidance states that [Test Valley’s DHP Scheme aims to “*Support people with disabilities who has or need adaptations to their property*”, “*Help* claimants *through personal crises and difficult events*” and “*Support the vulnerable*,” and in making the decision will consider “*medical circumstances*”, the “*exceptional nature*” of the C’s circumstances and the “*possible impact on the Council of not making such an award*” ]suggests that the decision has been unlawfully reached without reference to the Cs’ individual, personal circumstances.
2. In the alternative, it suggests that the decision has been unlawfully reached without reference to material factors ie to the DWP or D’s own Guidance.
3. In the alternative, the decision not to award DHP in circumstances when a claim is made by a couple with severe disability, on benefit only income, who have adaptations to their home due to their disability and a terminal illness diagnosis which would render moving to a smaller property impossible, so unreasonable as to constitute Wednesbury unreasonableness.

**Ground 2: failure to follow case law and unlawful discrimination** ([delete / edit depending on how disability benefit income has been treated]

1. **The majority of X and Y’s income is made up of benefits paid to meet the additional costs of Cs’ severe disability and resulting care needs.**
2. **When deciding how to treat income from disability-related benefits such as Disability Living Allowance (“DLA”) or Personal Independence Payments (“PIP”), D must have regard to the decision *R (Hardy) v Sandwell Metropolitan Borough Council*. This decision places an obligation on LAs to have regard to the purpose of disability related benefits and whether the money from those benefits has been committed to other liabilities associated with disability. The DWP Guidance confirms the relevance of this decision to DHP decision makers where it states under Annex C: Legal considerations:**

***R v. Sandwell MBC, ex parte Hardy***

***7. When deciding how to treat income from disability-related benefits such as Disability Living Allowance or the Personal Independence Payment, LAs must have regard to the decision of the ‘High Court in R v. Sandwell MBC, ex parte Hardy’.***

***8. This decision places an obligation on LAs to consider each DHP application on a case-by-case basis having regard to each component of the benefit, the purpose of those disability related benefits and whether the money from those benefits has been committed to other liabilities associated with disability.***

1. **The refusal of DHP strongly suggests that X and Y’s [DLA/PIP] income has been taken into account in calculating their ability to meet the shortfall in their rent. There is no evidence to suggest that D has considered the purpose of this income nor the way it which it is used by the Cs to meet their profound needs. As such, the D has failed to follow the law.**
2. **Further, as in *R (Hardy) v Sandwell Metropolitan Borough Council,* this “*is an example of indirect or Thlimmenos discrimination because it treats disabled applicants and their disability-related income in exactly the same way as it treats others and their non-disability related incomes, giving rise to unfavourable treatment to the disabled applicants.*”**
3. In Thlimmenos v. Greece - 34369/97 [2000] ECHR 162, (2000), the ECtHR held that Article 14 “*is [also] violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different” (para 44 of the judgment). The test is therefore whether they “have been treated the same as others in a relevantly different situation*”.
4. **Failure to treat these disabled applicants and their disability-related income differently to applicants without disability or additional costs arising out of disability, amounts to discrimination contrary to Article 14 ECHR taken with Art 1 Prot 1 ECHR.**

**Alternative remedies**

1. **Cs have no right of appeal against the decision not to award a DHP. [Name of council] has a [dispute resolution/complaints] procedure which Cs have followed, however [no response has been received within a reasonable time or at all / D’s response does not address the arguments above, which were detailed in Cs’ complaint] and Cs are facing [what hardship] while DHP is not in payment.**
2. **Judicial review is therefore the only remedy which can provide a timely resolution and challenge D’s unlawful decision making in respect of DHP applications from disabled / terminally ill claimants whose properties have been adapted to meet the needs of their specific disability.**
3. **Further, C is seeking HRA damages, which are not available through [the LA dispute resolution/ complaints] procedure.**

**Details of the action that the defendant is expected to take**

**D is requested:**

* **without further delay award and pay Cs DHP from [date]**
* **to accept that it has unlawfully discriminated against Cs and to pay them HRA damages.**

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

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

* **Medical evidence (as provided to D)**
* **DHP application (**as provided to D)
* [Rent statement showing rent arrears which have accrued as a result of non payment of DHP]
* Signed form of **authority**

**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**

**Email]**

**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. ‘universal credit’ inserted by [Welfare Reform Act 2012 (c. 5)](https://www.legislation.gov.uk/id/ukpga/2012/5), [s. 150(3)](https://www.legislation.gov.uk/id/ukpga/2012/5/section/150/3), [Sch. 2 para. 55](https://www.legislation.gov.uk/id/ukpga/2012/5/schedule/2/paragraph/55); [S.I. 2013/358](https://www.legislation.gov.uk/id/uksi/2013/358" \o "The Welfare Reform Act 2012 (Commencement No.8 and Savings and Transitional Provisions) Order 2013), [art. 2(1)](https://www.legislation.gov.uk/id/uksi/2013/358/article/2/1), [Sch. 1 para. 21](https://www.legislation.gov.uk/id/uksi/2013/358/schedule/1/paragraph/21); [S.I. 2013/983](https://www.legislation.gov.uk/id/uksi/2013/983" \o "The Welfare Reform Act 2012 (Commencement No. 9 and Transitional and Transitory Provisions and Commencement No. 8 and Savings and Transitional Provisions (Amendment)) Order 2013), [art. 3(1)(b)(i)](https://www.legislation.gov.uk/id/uksi/2013/983/article/3/1/b/i) [↑](#footnote-ref-1)
2. Amended by the Welfare Reform Act 2012 (Consequential Amendments) Regulations 2013 to allow Universal Credit claimants to have access to the DHP Scheme. [↑](#footnote-ref-2)
3. 31 March 2021 Available here [www.testvalley.gov.uk/benefitsandcounciltax/benefits/discretionary-housing-payment](https://www.testvalley.gov.uk/benefitsandcounciltax/benefits/discretionary-housing-payment) [↑](#footnote-ref-3)