**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 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** 4pm 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 D’s failure to action the DS1500 form provided which confirms that C is terminally ill.**

***Background facts***

1. **CLIENT DETAILS,**
2. **HOUSEHOLD, FAMILY**
3. **OTHER INCOME AND PIP AWARD**
4. **DISABILITY / MEDICAL DETAILS**
5. **ON DATE C CLAIMED AND WAS AWARDED UC. THIS IS BEING PAID AT £AMOUNT EACH WEEK.**
6. **C HAS CONTINUED TO PROVIDE REGULAR ‘FIT NOTES’ FROM HIS/HER GP SINCE HIS/HER DATE OF CLAIM.**
7. **ON DATE C PROVIDED A DS1500 SIGNED BY HIS/HER GP CONFIRMING HE/SHE HAS *……* AND CONFIRMING HIS/HER PROGNOSIS AS:**

 **“**

1. CONTACT WITH DWP AND HOW HAVE RESPONDED
2. WHAT CONDITIONALITY IS C SUBJECT TO?
3. HAS C BEEN CALLED FOR A WCA? OR TOLD NEEDS ONE?
4. **C IS SUFFERING CONSIDERABLE FINANCIAL HARDSHIP AND HAS DEBTS OF …**
5. **EFFECT ON 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***

1. Under schedule 9 of the Universal Credit Regulation’s 2013 (“**UC Regs**”) a claimant who is terminally ill AND / OR UNDERGOING TREATMENT FOR CANCER DELETE IF NOT CANCER is to be treated as having Limited Capability for Work Related Activity (“**LCWRA**”).
2. Terminally ill is defined by regulation 2 UC Regs, as amended by the Universal Credit and Employment and Support Allowance (Terminal Illness) (Amendment) Regulations 2022 (S.I. 2022/260), reg 2 (2), in effect from April 2022

*“Terminally ill” means suffering from a progressive disease where death in consequence of that disease can* ***reasonably be expected within 12 months;***

(Emphasis added)

1. [DELETE IF NOT CANCER] Receiving treatment for cancer includes where under paragraph 9 schedule 9 uc regs:

***3****. The claimant is—*

*(a) receiving treatment for cancer by way of chemotherapy or radiotherapy.*

*(b) likely to receive such treatment within 6 months after the date of the determination of capability for work and work-related activity; or*

*(c) recovering from such treatment,*

*And the secretary of state is satisfied that the claimant should be treated as having limited capability for work and work-related activity.*

1. D’s Operational guidance ‘Terminal Illness’(V20)[[3]](#footnote-3) states:

*For benefit purposes, DWP describes a terminally ill claimant as having a progressive disease or health condition and due to that condition, they* ***are not expected to*** *live more than 12 months.*

(Emphasis added)

1. D’s guidance to medical professionals: The ‘Special Rules’: how the benefit system supports people nearing the end of life, (updated 6 April 2022)[[4]](#footnote-4) amends ‘expected’ to the lower standard of ‘would not be surprised’:

*You should complete the DS1500 form promptly if you believe that your patient:*

*has a progressive disease, and*

*as a consequence of that disease you* ***would not be surprised if*** *your patient were to die within 6 months.*

*When you provide a DS1500 to DWP, it is shared across all necessary benefits.*

***…***

*You should complete the SR1 form promptly if you believe that your patient:*

*has a progressive disease, and*

*as a consequence of that disease, you* ***would not be surprised if*** *your patient were to die within 12 months*

(Emphasis added)

1. Under D’s ‘Terminal illness’ guidance, terminal illness is confirmed without reference to a Work Capability Assessment (WCA) when a DS1500 is provided unless there is ‘good reason’ to doubt the information contained in the DS1500:

*The DS1500 form is confirmation that a person is terminally ill and not expected to live more than 6 months, and SR1 form is confirmation that a person is terminally ill and not expected to live more than 12 months. They can be completed by a doctor, other healthcare professional or Macmillan nurse.*

*A correctly completed DS1500 or SR1 can be accepted as evidence that the claimant satisfies the terminal illness criteria.*

*These cases should not be referred to Centre for Health and Disability Assessments (CHDA) for a Work Capability Assessment (WCA)* ***unless there is good reason to doubt the information provided on the DS1500 or SR1.***

…

***If staff are satisfied with the information held on the DS1500*** *or SR1 and the claimant has a life expectancy of 12 months or less, the claimant is treated as having Limited Capability for Work and Work-Related Activity (LCWRA).*

(Emphasis added)

1. D’s ‘Terminal illness’ guidance further confirms that a claimant can be *treated as having* LCWRA as soon as a correctly completed DS1500 is received without referral for a WCA, and where information is provided but D is “unsure” for example in in the absence of a ‘valid’ DS1500, a ‘Day 1 referral’ must be made to establish the claimant’s capability for work- and work-related activity immediately. No WCA is needed when a valid DS1500 has been received:

***When are claimants referred for a work capability assessment***

*[…]*

*An immediate WCA referral must be made when a claimant provides sufficient information to confirm they have certain specified conditions or are undergoing certain specified treatments so they can be treated as having:*

*• limited capability for work and work related activity*

*• limited capability for work*

*This is known as a Day 1 referral.*

***If a valid DS1500 has been provided to confirm the claimant has a terminal illness, the claimant can be determined as having LCW without referring to the CHDA.*** *If we are unsure, a day 1 WCA referral is made. For all cases of terminal illness, refer to terminal illness.*

(Emphasis added)

*Effect of being treated as having LCWRA*

1. Under D’s operational guidance ‘Work Capability Assessment Outcomes’(V14)[[5]](#footnote-5) confirms that a claimant *has* LCWRA when they are ‘*treated as having* LCWRA’:

***Limited capability for work and work related activity***

*A claimant has limited capability for work and work related activity (LCWRA) where their capability for work and work related activity is limited by their physical or mental condition and it is not reasonable to require them to undertake work related activity.*

***A claimant has LCWRA where*** *either of the following apply:*

*• it is determined from the WCA*

*•* ***they are treated as having LCWRA***

(Emphasis added)

1. Being *treated as* having LCWRA effects the amount of UC that will be paid, when the LCWRA element will be included in the award and the conditionality a terminally ill claimant is subject to. D’s guidance to medical professionals completing the DS1500[[6]](#footnote-6) confirms:

*The ‘Special Rules’ allow people nearing the end of life to:*

* *get faster, easier access to some benefits*
* *get higher payments for some benefits*
* *avoid a medical assessment*

(Emphasis added)

1. This ‘higher rate of benefit’ is paid under regs 27 and 28 UC Regs 2013 under which claimants *treated as* having LCWRA are immediately paid an additional LCWRA element:

***27****.—(1) An award of universal credit is to include an amount—*

*(a) in respect of the fact that a claimant has limited capability for work and work-related activity (“the LCWRA element”).*

***28****.—(1) An award of universal credit is not to include the LCWRA element until the beginning of the assessment period that follows the assessment period in which the relevant period ends.*

*(2) The relevant period is the period of three months…*

*[…]*

*(5) Paragraph (1) also does not apply if—*

 *(a)* ***the claimant is terminally ill;***

(Emphasis added)

1. Claimants with LCWRA must not be expected or required to carry out any activity in order to receive their benefit under s.19 of the Welfare Reform Act 2012:

#####  *Claimants subject to no work-related requirements*

***19****.-(1) The Secretary of State may not impose any work-related requirement on a claimant falling within this section.*

*(2) A claimant falls within this section if—*

 *(a) the claimant has limited capability for work and work-related activity*

*Effect of not being treated as having LCWRA*

1. A claimant for whom a DS1500 has been provided to D, but that has not been actioned by D, while satisfying both the requirements in the UC Regs as someone to be treated as having LCWRA because they are terminally ill and satisfying the requirements in DWP’s guidance of having provided a completed DS1500 as evidence of their terminal illness, is in practice left in the same position as someone who is not terminally ill and must wait to be assessed by way of a WCA to determine whether they *actually* have LCWRA. Until such time as they are assessed, they are entitled to only the standard rate of UC. This is currently £317.82 per month (not including housing costs).

***Limited capability for work and work-related activity***

***40.****—(1) A claimant has limited capability for work and work-related activity if—*

*(a) it has been determined that—*

*(i) the claimant has limited capability for work and work-related activity on the basis of an assessment under this Part, or*

*(ii) the claimant has limited capability for work related activity on the basis of an assessment under Part 5 of ESA Regulations; or*

*(b) the claimant is to be treated as having limited capability for work and work-related activity (see paragraph (5)).*

1. Further, there is no rule that treats a UC claimant as having LCW or LCWRA while they are waiting for their capability for work to be assessed and they are therefore, as a default position, subject to full UC conditionality. Default UC conditionality is contained in regs 88, 94-96 and 97 and 95 and 96 of the UC Regs including a requirement to look for work for 35 hours per week and being prepared to take up *any* work involving up to 90 minutes travel each way.
2. Provision is made under reg 88(2)(c) and 97(2) UC Regs to reduce the number of expected hours of work search and work availability each week, where ‘the claimant has a physical or mental impairment’ to ‘the number of hours **that the Secretary of State considers is reasonable** in light of the impairment’ (emphasis added). Tailoring of the Claimant Commitment is dependent on individual work coaches.
3. C’S CONDITIONALITY INCLUDES…
4. Failure to comply with UC conditionality can lead to a sanction of a claimant’s UC standard allowance under regs 100-105 UC Regs for up to a maximum of 1095 days. The potential consequences of failing to comply with work search and work availability requirements are therefore extremely high.
5. DETAIL HOW C’S CONDITIONALITY IS INAPPROPRIATE AND WHY THEY WILL BE UNABLE TO MEET IT. HAVE THEY BEEN SANCTIONED?? IF SO, MENTION HERE AND TIE INTO ABOVE.

**Grounds for Judicial Review**

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

1. Further, D’s guidance is clear that terminal illness is evidenced by provision of a DS1500 and that where a correctly completed DS1500 has been provided and there is no good reason to doubt its contents, a WCA is not necessary to establish LCWRA.
2. However, even in the event that there is uncertainty about the DS1500, a WCA ‘Day 1 referral’ must be made.
3. In this case, C has not been treated as having LCWRA but nor has any ‘Day 1 referral’ been made, in clear breach of the law and D’s own guidance.

**Ground 2: Failure to take account of relevant evidence**

1. A properly completed DS1500 has been provided to D BY … THIS MADE CLEAR TO THE DEFENDANT THAT …
2. WHAT OTHER MEDICAL EVIDENCE HAS BEEN PROVIDED?
3. No account appears to have been taken of this evidence as C REMAINS UNLAWFULLY SUBJECT TO UC CONDITIONALITY and in receipt of only the standard allowance.
4. Further, no explanation has been offered as to why the information on the DS1500 has not been actioned. If **it is considered that “t**here is good reason to doubt the information provided on the DS1500”[[7]](#footnote-7), C **is entitled as a matter of public law and as a basic principle of natural justice to have an explanation as to why this is the case so that he/she is aware of whether any irrelevant matters have been taken into account/relevant matters not considered and challenge such a finding accordingly and/or provide further evidence as may be the case**. **No such reasons have been given.**

**Ground 3: Unreasonable delay**

1. On the introduction of UC, the LCWRA element was set at a higher rate than the previous ‘support component’ under legacy benefits, at the same time as removing the disability premia which were previously available. This aimed to focus financial help on the ‘most severely disabled people’, which was confirmed in the November 2011 Equality Impact Assessment: ‘Welfare Reform Bill Universal Credit’[[8]](#footnote-8):

*…the Government will recycle the savings from abolishing existing premiums to the most severely disabled people by providing all those in the support group an addition that is substantially higher than the current support component in ESA.*

1. Failure to act on C’s DS1500 and therefore pay C the LCWRA element immediately, or, if the DS1500 is doubted/not correctly completed, failure to arrange a Day 1 assessment to establish LCWRA fails to give effect to this policy intention and unlawfully leaves claimants such as C, who are terminally ill, with only the most basic amount of UC designed for claimants who have no additional costs arising out of disability as well as exposing them to the risk of sanctions for failing to comply with conditionality requirements which they cannot comply with because of their terminal illness.
2. The stress of surviving on a basic standard allowance and being subject to inappropriate conditionality and risk of sanctions further affect what can be considered a ‘reasonable time’ to action a DS1500 or, to make a Day 1 referral to assess capability for work and work related activity and to determine the amount of the award. This is on top of the stress and anxiety that C is already facing in having to come to terms with HIS/HER impending death and risks being considered as inhuman and degrading treatment.
3. D 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).
4. A decision on entitlement is dependent on a work capability finding[[9]](#footnote-9) and that finding 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”.
5. The duty to make a decision within a reasonable time applies to s.8 of the SSA. What counts as a reasonable time depends on all the circumstances, including the impact on the claimant[[10]](#footnote-10).
6. THE IMPACT ON C HAS BEEN DETAILED ABOVE AND INCLUDES …

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

**D is requested to:**

* Treat C as having LCWRA immediately
* Award the LCWRA element from the start of C’s claim to UC (or the date the DS1500 was provided, whichever is later)
* Modify C’s claimant commitment to remove all requirements and refund any sanctions imposed unlawfully as a result.
* Accept that the failure to act on the DS1500 provided for C up until this point falls well below the level of service that C should be entitled to expect from the DWP and has caused C unnecessary stress and financial hardship at a time when he/she is already having to come to terms with his/her imminent death 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 illness and prognosis**
* **Signed form of authority for C**
* **All other documents available through C’s online UC journal**

**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 AND EMAIL HERE

**Proposed reply date**

We expect a reply promptly and, in any event, no later than DATE (7 DAYS). This is less than the usual 14 days. However, we consider this shortened timeframe to be entirely appropriate given (a) the delay already experienced; (b) the lack of complexity of the issue, and (c) crucially, the limited remaining lifespan of the Claimant.

If you consider that you require 14 days from the date of this letter to reply, please immediately inform us in writing, giving full reasons. Should we not have received such a request for further time nor a substantive reply by the given deadline 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-1)
2. gov.uk/government/organisations/government-legal-department [↑](#footnote-ref-2)
3. <https://data.parliament.uk/DepositedPapers/files/DEP2022-0452/151-Terminal_illness_V20.0.pdf> [↑](#footnote-ref-3)
4. [https://www.gov.uk/government/publications/dwp-factual-medical-reports-guidance-for-healthcare-professionals/the-special-rules-how-the-benefit-system-supports-people-nearing-the-end-of-life](https://nam12.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.gov.uk%2Fgovernment%2Fpublications%2Fdwp-factual-medical-reports-guidance-for-healthcare-professionals%2Fthe-special-rules-how-the-benefit-system-supports-people-nearing-the-end-of-life&data=05%7C01%7C%7Cd398b09291e24e435c0d08da76bf0082%7C84df9e7fe9f640afb435aaaaaaaaaaaa%7C1%7C0%7C637952859963305197%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000%7C%7C%7C&sdata=G4%2FC3Q%2FP3uiHxvCCFHelLvmH0A12O939G8vQCsr1%2Fkk%3D&reserved=0) [↑](#footnote-ref-4)
5. <https://data.parliament.uk/DepositedPapers/Files/DEP2022-0452/166-WCA_outcomes_V14.0.pdf> [↑](#footnote-ref-5)
6. <https://www.gov.uk/government/publications/dwp-factual-medical-reports-guidance-for-healthcare-professionals/the-special-rules-how-the-benefit-system-supports-people-nearing-the-end-of-life> [↑](#footnote-ref-6)
7. <http://data.parliament.uk/DepositedPapers/Files/DEP2021-0835/154_Terminal_illness_V17-0.pdf> [↑](#footnote-ref-7)
8. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/220152/eia-universal-credit-wr2011.pdf> [↑](#footnote-ref-8)
9. <http://data.parliament.uk/DepositedPapers/Files/DEP2021-0835/168_WCA_outcomes_V13-0.pdf> [↑](#footnote-ref-9)
10. R(C and W) v Secretary of State for Work and Pensions [2015] EWHC 1607 (Admin) [↑](#footnote-ref-10)