**Before using this letter** please contact Debt Management to request a waiver and detail how and when you have done so in the background facts section.

Read whole letter carefully and edit as appropriate including all text in red and/or [square brackets]

This letter assumes the o/p was a result of official error by DWP, the claimant is experiencing financial hardship and DWP have refused to waiver the debt.

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 [his/her] overpayment of Universal Credit (“**UC**”) and the ongoing failure of the Secretary of State to exercise his 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-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 challenges SSWP’s ongoing failure to exercise the discretion available under the 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**”) SSWP 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. In *R (K) v SSWP* [2023] EWHC 233 (Admin) it is accepted as common ground that:

 *“…s.71ZB is a power, not a duty, to recover UC overpayments. And that power falls to be exercised in accordance with public law principles. Given the breadth of the power in s.71ZB, and the unavailability of the defences developed by the common law to avoid injustice, the Secretary of State’s discretion to waive recovery is of crucial importance.”* (Para 15)

1. D’s guidance “What happens if you are overpaid Universal Credit, Jobseeker’s Allowance or Employment and Support Allowance?”[[3]](#footnote-3) demonstrated 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-4) confirms D’s discretion to waive recovery under ‘Chapter 8 – Secretary of State discretion and waiver’ subject to “a duty to protect public funds”:

*“8.1 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.*** *The legislation on the recovery of debts provides the Secretary of State with discretion over whether and how to recover money that is owed. This Chapter explains how that discretion can be* ***exercised. This discretion can be exercised by cancelling part of, or the entire debt through the process of write off or waiver.*** *Discretion can also be exercised by varying the rate of recovery or suspending recovery.*

*8.2. Discretion can be considered at any point in the debt journey which could be either when an overpayment is first discovered and before it is notified to the claimant or after notification where the claimant has asked us to look at the circumstances surrounding their overpayment****. In exercising this discretion the Secretary of State adheres to the principles set out in the HMT Guidance***[***Managing Public Money***](https://www.gov.uk/government/publications/managing-public-money)***(MPM) May 2021.***

*8.3 There are four main ways that the Secretary of State discretion may be applied*

*[…]*

* *Waiver - Waivers are only granted in exceptional circumstances and there would need to be very specific and compelling grounds to do so. A request for waiver should normally be made in writing. This may result in all, or part of the debt being written off.*

*[…]*

(Emphasis added)

1. His Majesty’s Treasuryguidelines “Managing Public Money”[[5]](#footnote-5) 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-6)*

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

***Waiver***

*[…]*

*8.5. There are a number of different reasons why the department may consider waiver – and* ***not all need to be met for a waiver to be granted****.*

*8.6. Factors which may be relevant to a waiver decision are:*

* *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*
* *DWP conduct and the circumstances surrounding how the overpayment arose*
* *The debtors conduct and whether the debtor took steps to mitigate any overpayment, contact or notify DWP, whether the debtor misrepresented or failed to disclose any matter, or if there was 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 – for example where the claimant was paid the wrong benefit but could have claimed a different benefit and received the same amount of 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***

*8.7. 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. In most cases it would usually be expected that the recovery of the debt is causing either financial hardship or welfare issues for the debtor or their family. This will depend on the facts of the particular case and* ***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 and may be a combination of factors.*

*8.8****. Matters that fall into the category of public interest might include the Department’s reputation; public response; legal implications and risk of challenge and the current Government policies.*** *Whether it would be in the public interest or not to recover a debt will be subjective, therefore for cases that fall into this category* ***it will often be appropriate to involve Policy and/or Legal in the decision-making process to ensure a consistent approach.***

***8.9. Waiver will not be dependent upon all of the factors above being applicable but is likely to be a combination and will be dependent upon the individual circumstances of the case. The decision should consider all the relevant factors and any other exceptional or extenuating circumstances; however, the decision will always take into account the impact of recovery on the debtor.***

(Emphasis added)

1. In *R(K) v SSWP* the High Court considered whether a decision not to waive recovery of an overpayment of UC which arose in consequence of official error and where the claimant was experiencing financial hardship, as in this case, was unlawful because it applied a fettered discretion / failed to give lawful regard to all relevant considerations, including whether recovery was in the public interest. Mrs Justice Steyn found that SSWP’s decision was unlawful, as:

*“129. In my judgment,* ***the claim based on failure to have regard to material considerations must succeed.******In accordance with the defendant’s policy, the following matters were relevant considerations: (i) how the overpayment arose; (ii) the debtor’s conduct, and in particular whether she acted in good faith, and whether and to what extent she took steps to notify the defendant of all relevant information and to query her entitlement.*** *The third decision only addressed these matters to the very limited extent set out in [10]. This is manifestly inadequate.”*

 *130. First, an acknowledgement that the overpayment was “because of DWP error” does not capture the circumstances in which it arose. This was not a mere case of official error. It was one in which, as the defendant has acknowledged, and the FTT found,* ***the defendant repeatedly miscalculated her entitlement over a prolonged period, in what was a “profound lapse in service”.***

*131. Secondly, the third decision notes that “your client states she was not aware that she was being overpaid at the time”, without specifying whether her statement was accepted or not. Whereas, in fact,* ***the issue of the claimant’s conduct did not depend on, and was not limited to, an assertion by the claimant that she was unaware she was being overpaid****. It was clear from the defendant’s acknowledgments, the FTT’s findings, and the contemporaneous evidence, that* ***(i) the claimant acted in good faith; (ii) the claimant timeously provided all the information required to the defendant; (iii) the claimant took all reasonable steps both to clarify her entitlement and to prevent any UC overpayment by actively querying her entitlement*** *on at least four occasions.*

*132.* ***It does not appear from the decision letter that these relevant considerations were taken into account.*** *If they had been, it is impossible to see on what basis the decision maker could have considered the claimant’s circumstances to be less compelling than case study 2 (which bears a striking close resemblance to this case) or case study 4 (in which there were fewer “missed opportunities” than in this case, and they did not arise – as in this case - when the claimant was querying whether she was wrongly being paid the element that resulted in the overpayment).*

*133.* ***The third decision considered the request for waiver on financial and health/welfare grounds but there is no reference in the letter to show that any consideration was given to whether it was in the public interest, having regard to all the circumstances, to recover the UC overpayment.*** *As I have explained above,* ***it is clear that the public interest is a discrete ground for waiver, albeit one in which some of the relevant factors may overlap with the other grounds.***

*134. The policy makes clear that a ground on which a waiver may be granted is that the debtor has relied on the overpayment to their detriment.* ***No consideration was given in the third decision to the evidence that the claimant had relied on the overpayment to her detriment****. First****, she had done so by spending the extra money on day-to-day living expenses; the overpayment was irretrievably lost.*** *The DMGW gives an example of taking on a long-term financial commitment, but* ***there is nothing to indicate that it would not encompass – as the common law defence of change of position would (see Goff & Jones, §27-13) - a person who normally has very straitened finances and who relaxes the constraints on her ordinary living expenditure to the extent of spending what she reasonably believed to be the means at her disposal****. Secondly, there was evidence that the claimant had foregone opportunities to make gains, to her detriment, in reliance on the overpayment: claimant’s first statement, §38. A number of possibilities would have been open to her if she had been made aware when she first informed the defendant of A’s apprenticeship that she would no longer be entitled to the CDC element, including considering an alternative course for A which would not have had the same effect on her UC entitlement or applying for other financial support. (I note the possibility of A applying for UC was not raised prior to the third decision.)*

***135. The matters I have referred to above are material considerations that the defendant failed to take into account, rendering the decision unlawful.***

*(Emphasis added)*

**Grounds for judicial review**

**Ground 1: Failure to take relevant factors into account, follow caselaw and apply guidance**

1. C has provided what evidence of [her/his] circumstances, financial hardship:
* A
* B
* C
1. These are factors specifically considered by the High Court in *R(K) v SSWP:*

• As at par 130 SSWP repeatedly miscalculated C’s entitlement over a prolonged period, in what was a “profound lapse in service”,

* As a para 131 C (i) acted in good faith; (ii) timeously provided all the information required to SSWP; (iii) took all reasonable steps both to clarify [her/his] entitlement and to prevent any UC overpayment by actively querying [her/his] entitlement;
* As at para 133 no consideration appears to have been given to whether it was in the public interest, having regard to all the circumstances, to recover the UC overpayment (further discussion of public interest in Ground 2)

• As at para 134, C relied on the overpayment to [her/his] detriment by spending the extra money on day-to-day living expenses such that the overpayment was irretrievably lost.

1. As at para 135 of *R(K) v SSWP these “are material considerations that the defendant failed to take into account, rendering the decision unlawful.”*
2. This is evidence which SSWP’s Benefit Overpayment Recovery Guide (as amended after *R(K) v SSWP* was heard by the High Court) further specifically states will be taken into account:

• List (quote relevant BORG provisions from list)

• List

• List

1. SSWP has provided no information or evidence to suggest that C’s personal circumstances or D’s official error has been taken into account in reaching the decision to recover the overpayment and as such, an inference can be drawn that SSWP has unlawfully failed to take the same into account.
2. **D also appears not to have considered the requirements of D’s own guidance, detailed above, in reaching the decision to recover the overpayment.**
3. **This failure by SSWP to consider C’s personal situation and SSWP’s official error, or to apply SSWP’s own guidance amounts to a failure to have regard to material facts and failure to follow caselaw (*R(K) v SSWP*) and any decision reached in consequence of this failure is therefore unlawful.**
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.**
5. **Further, we are aware of cases in which waivers have been requested on similar grounds and D has responded only to advise that the claimant ‘contact Debt Management’. When contacted, Debt Management have been able to reduce the rate of recovery, but not to waiver the debt.**
6. **R**eferring to Debt Management, when Debt Management will only delay recovery/extend the period over which recovery sought, still means that the power to recover is being exercised without any consideration given to the exercise of discretion not to recover, and is strongly suggestive of an unstated policy of recovering in all circumstances. Such a blanket policy would amount to unlawful fettering of discretion.
7. Further, **DWP guidance** Benefit Overpayment Recovery Guide at para 8.15 states staff should advise claimants to contact Debt Management “*in the first instance*”**. C has already attempted to** contact Debt Management without success. This is not therefore ‘in the first instance’ and such advice would be contrary to SSWP’s guidance.

**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**

**SSWP 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 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 SSWP 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 5pm on [date] (14 days). Should we not have received a reply by this time our client will seek representation to 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. 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-3)
4. Updated 23 Dec 2022 [www.gov.uk/government/publications/benefit-overpayment-recovery-staff-guide/benefit-overpayment-recovery-guide#chapter-8](http://www.gov.uk/government/publications/benefit-overpayment-recovery-staff-guide/benefit-overpayment-recovery-guide#chapter-8) [↑](#footnote-ref-4)
5. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/994901/MPM_Spring_21__without_annexes_180621.pdf> [↑](#footnote-ref-5)
6. www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-01-20/5466/ [↑](#footnote-ref-6)