**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

***This letter challenges*** *DWP’s failure to:*

* *to accept C’s claim for New Style Employment Support Allowance (“NS ESA”) and the frustration of [her/his] appeal rights regarding the same;*
* *to award National Insurance credits (“NICs”) for limited capability for work and to refer C for a Work Capability Assessment (“WCA”) to confirm C’s eligibility for NICs;*
* *or to accept [her/his] claim for NICs and the frustration of [her/his] appeal rights regarding the same.*

Delete all comments before sending and return text to black.

DELETE BOX BEFORE POSTING

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

* has limited capability for work
* contacted DWP to make a claim for new style ESA
* DWP refused to accept the claim as your client has insufficient national insurance contributions and did not award NI credits.

This letter assumes (and can therefore be edited if do not apply) your client:

* has an appointee
* is a student

Please read whole letter carefully and change any text in red and/or [square brackets].

Please feel free to send your letter to JRProject@CPAG.org.uk for review before sending.

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 a[her/his] claim for New Style Employment Support Allowance (“ **NS ESA”**).  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 4pm on the [date] at the end of this letter.

**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:

a)the unlawful refusal to accept **[her/his]** claim for NS ESA and the frustration of **[her/his]** appeal rights regarding the same; and

b) **SSWP**’sfailure to award National Insurance credits (“NICs”) for limited capability for work and to refer C for a Work Capability Assessment (“WCA”) to confirm C’s eligibility for NICs; and in the alternative the **SSWP**’s refusal to accept **[her/his]** claim for NICs and the frustration of **[her/his]** appeal rights regarding the same.

***Background facts* [edit whole section]**

1. **[Client details]**
2. **[household, family etc]**
3. **[disability and diagnosis]**
4. C has an appointee to manage **[her/his]** benefit claims because C lacks capacity to do so [her/him]self due to …..
5. C’s appointee for **[her/his]** benefit claims is [name and relationship].
6. C has limited capability for work as a result of **[her/his]** [disability]. [She/he] finds it difficult to …. However, C is undertaking a course of study to improve **[her/his]** prospects of securing work in the future.
7. C has been receiving Personal Independence Payments **(“PIP”)** in recognition of the effects on **[her/his]** ability to look after **[her/his]** personal care and mobility.
8. On [date] C’s appointee contacted the new claims helpline to make a claim for NS ESA.
9. During this telephone call C was informed [she/he] was not entitled to NS ESA because [she/he] did not meet the national insurance conditions.
10. The decision not to award NS ESA has not been confirmed to C in writing and C has not been advised of **[her/his]** appeal rights.
11. A WCA has not been arranged to confirm C’s limited capability for work (“LCW”) and NICs have not been awarded for the same. A decision not to award NICs has not been confirmed to C in writing and C has not been advised of **[her/his]** appeal rights.

**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 and grounds for judicial review

Ground 1: Failure to award NICs to which C is entitled by law

1. C accepts that if the SSWP is correct [she/he] would not have entitlement to NS ESA because [she/he] does not meet the national insurance contributions condition of entitlement.
2. However, under regulation 8B of the Social Security (Credits) Regulations 1975 (as amended) (“**Credits Regs”**) a claimant is in specified circumstances entitled to be credited with *“with earnings equal to the lower earnings limit”* ie, NICs:

***8B****.—(1) For the purposes of entitlement to any benefit by virtue of a person’s earnings or contributions, he shall be entitled to be credited with earnings equal to the lower earnings limit then in force, in respect of each week to which this regulation applies.*

1. The regulation will apply where reg 8B(2)(a)(iv) is made out. That is where a claimant would have LCW if [she/he] met the national insurance contribution conditions for ESA contained in s1(2)(a) of the Welfare Reform Act 2007 (“**WRA-2007”**):

***8B.****-(2) Subject to paragraphs (2A), (3) and (4) this regulation applies to—*

1. *a week in which, in relation to the person concerned, each of the days—*

*…*

*(iv) was a day of limited capability for work for the purposes of Part 1 of the Welfare Reform Act (limited capability for work) or would have been such a day had the person concerned been entitled to an employment and support allowance by virtue of section 1(2)(a) of the Welfare Reform Act;*

 …

1. Section 1(2)(a) WRA 2007 provides:

#### **Employment and support allowance**

***1****.- (1) An allowance, to be known as an employment and support allowance, shall be payable in accordance with the provisions of this Part.*

*(2) Subject to the provisions of this Part, a claimant is entitled to an employment and support allowance if he satisfies the basic conditions and either—*

***(a) the first and the second conditions set out in Part 1 of Schedule 1 (conditions relating to national insurance)*** *or the third condition set out in that Part of that Schedule (condition relating to youth), or*

***…***

1. Under reg 26 of the Employment and Support Allowance Regulations 2013 (as amended), C would be treated as having LCW until such time as [she/he] is referred for a WCA providing C provides medical evidence and (broadly speaking) has not previously been found not to have LCW.

### *Conditions for treating a claimant as having limited capability for work until a determination about limited capability for work has been made*

### *26.—(1) A claimant is, if the conditions set out in paragraph (2) are met, to be treated as having limited capability for work until such time as it is determined—*

*(a) whether or not the claimant has limited capability for work;*

*…*

 *(2) The conditions are—*

*(a) that the claimant provides evidence of limited capability for work in accordance with the Medical Evidence Regulations; and*

*(b) in relation to the claimant’s entitlement to any benefit, allowance or advantage which is dependent on the claimant having limited capability for work, it has not been determined—*

*(i) in the last determination preceding the date of claim for an employment and support allowance, that the claimant does not have limited capability for work; or*

*(ii) within the 6 months preceding the date of claim for an employment and support allowance, that the claimant is to be treated as not having limited capability for work under regulation 18 or 19,*

*unless paragraph (4) applies.*

1. C is only therefore not entitled to NS ESA because [she/he] does not meet the national insurance conditions under s1(2)(a) WRA 2007 (i.e., not because C has been assessed not to have LCW).
2. C is therefore entitled to NICs for LCW under reg 8B(2)(a)(iv) of the Credits Regs.
3. C’s entitlement to NICs is also dependent on C satisfying reg 8B(4) of the Credits Regs which appears to require that C has given the SSWP notice of basis on which [she/he] satisfies reg 8B(2)(a):

**8B**.-(4) A day shall not be a day to which paragraph (2)(a) applies unless the person concerned has—

(a) before the end of the benefit year immediately following the year in which that day fell; or

(b) within such further time as may be reasonable in the circumstances of the case,

* **furnished to the Secretary of State notice in writing of the grounds on which he claims to be entitled to be credited with earnings.**

(Emphasis added)

1. We are unaware of a method for C to give the notice required under reg 8B(4) of the Credits Regs  but had assumed previously it was by way of claiming contribution based or NS ESA (as in practice when claimants have claimed ESA previously and are not awarded ESA because they have not met the contributions condition, LCW credits have been awarded).
2. SSWP’s guidance ‘Advice for Decision Making confirms at A1052[[3]](#footnote-3) that SSWP is responsible for awarding NICs for LCW:

*A1050 The Secretary of State remains responsible for deciding credits questions1….*

*1 SS Act 98, Sch 3, paras 16 & 17*

***Credits awarded by DWP***

*A1052 DWP considers whether to award credits for*

*1. LCW*

*2. unemployment*

*3. approved training.*

*For further guidance on awarding credits, see The Credit Title Guide.*

1. The Credit Title Guide[[4]](#footnote-4) makes clear the HMRC NICs system operates on behalf of DWP:
	1. *The National Insurance and PAYE System (NPS) is owned by HM Revenue and Customs and is used to awards credits on behalf of DWP.*
2. We have understood that a claim for NS ESA is the method via which a person provides the notice required under reg 8B(4) of the Credits Regs  such that DWP is able to ‘*consider[s] whether to award credits*’. If the SSWP is not of that view then SSWP should state what the mechanism for providing the notice is. A failure to put in place such a mechanism would be unlawful when the existence of such a mechanism is plainly contemplated by the regulations. SSWP is asked to state what the mechanism is for claiming NICs for LCW when a claimant has insufficient contributions for NS ESA.
3. In C’s case, [she/he] has been unlawfully prevented from furnishing to SSWP notice *in writing* of the grounds on which [she/he] is entitled to be credited with earnings by the SSWP’s refusal to accept **[her/his]** claim for NS ESA (and therefore NICs) and failure to provide a claim form for C to complete.

**Ground 2: Unlawful refusal to accept a claim and frustration of appeal rights**

*Unlawful refusal to accept a claim*

1. It is unlawful for the SSWP to refuse to accept a claim for NS ESA even though C is only making the claim to obtain credits and accepts [she/he] does not have sufficient contributions. A claim is a request in the procedurally correct format for a decision on entitlement. The Department for Work and Pensions webpage ‘Employment and Support Allowance (ESA)’ advises that a telephone call to the new claims helpline is the correct way to claim NS ESA when a claimant has an appointee[[5]](#footnote-5).
2. Under section 8(1)(a) Social Security Act 1998 (“**SSA**”) a decision maker must decide whether to make an award of benefit in respect of a claim made for that benefit:

##### *Decisions by Secretary of State*

***8****.* — *(1) Subject to the provisions of this Chapter, it shall be for the Secretary of State—*

*(a) to decide any claim for a relevant benefit;*

1. In C’s case the SSWP has purported to decide that as in SSWP’s view there will be no entitlement then no claim can be made.
2. That is to reverse the correct legal order: a claim is the mechanism by which a claimant requests the SSWP to consider their entitlement. Entitlement can only be decided once a claim has been made (see also s. 1 Social Security Administration Act 1992).

*Frustration of appeal rights*

1. SSWP is not allowed to prevent someone from making a claim because SSWP has formed a view there will be no entitlement. To allow this approach would allow the SSWP, by declining to receive claims, to evade SSWP’s duties to decide claims and would deprive claimants of the appeal rights they get in respect of decisions on claims.
2. The refusal to accept a claim for NS ESA and / or for NICs can be seen to be unlawful as it deprives a claimant who wishes to dispute the decision not to award NS ESA and/or NICs of an appeal remedy.
3. Decisions, including a decision on entitlement to NS ESA, are made under s. 8(1)(a) SSA carry a right of appeal under s. 12 SSA:

 ***Appeal to First Tier Tribunal***

 ***12****.—(1) This section applies to any decision of the Secretary of State under section 8 or 10 above (whether as originally made or as revised under section 9 above) which–*

*(a) is made on a claim for, or on an award of, a relevant benefit, and does not fall within Schedule 2 to this Act; or*

*(b) is made otherwise than on such a claim or award, and falls within Schedule 3 to this Act.*

1. Decisions to award or not NICs also specifically carry a right of appeal under sch. 3 SSA

***Decisions against which an appeal lies***

***17.*** *A decision whether a person is entitled to be credited with earnings or contributions in accordance with regulations made under section 22(5) or (5ZA) of the Contributions and Benefits Act.*

1. The Social Security (Credits and Contributions) (Jobseeker’s Allowance Consequential and Miscellaneous Amendments) Regulations 1996 are made under s22(5) of the Contributions and Benefits Act and introduce reg 8B of the Credits Regs; decisions made under reg 8B of the Credits Regs (including the decision to not award C NICs) are therefore appealable.
2. There is no basis in law for the holding that C cannot make a claim for NS ESA and/or NICs and then challenge the refusal of those claims. To refuse to accept a claim unlawfully deprives C of **[her/his]** ability to claim benefit/NICs to which [she/he] is entitled and frustrates C’s ability to appeal that refusal.

Alternative remedies

1. It does not appear to us that C has any suitable alternative means of obtaining redress notwithstanding the right of appeal to the First-tier Tribunal (“**FTT**”) set out above. [C *has* in any event filed an appeal against the decision, but this will not provide the redress sought.]
2. In particular, C has neither been provided with a decision notice nor advised of **[her/his]** appeal rights. As no decision has been notified or effectively notified then there is no effective decision to appeal against.
3. Furthermore, this is a problem which is frequently reported to Child Poverty Action Group from advisers across England and Wales. C‘s challenge therefore represents a wider issue than **[her/his]** individual claim about the lawfulness of not accepting claims for benefit for the given reason that in the SSWP’s view there is no enticement to the benefit claimed, the way decisions are made and the way claimants are notified of their appeal rights. The staff training and improvements to guidance sought are not available through the FTT.

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

SSWP is requested to:

* Accept C’s claim for NS ESA made on [date], make an entitlement decision and advise C of **[her/his]** of appeal rights.
* Award C NICs and refer C for WCA to confirm **[her/his]** LCW.
* Issue staff training and/or guidance to ensure that the making of claims is not prevented or discouraged even where benefit will not be awarded because the claimant does not meet all of the conditions of entitlement for the relevant benefit.
* Amend the guidance Advice for Decision Making at ADM A1053 where it states: “*the DM should decide the credits issue*” when “*the claimant alleges that they should be awarded credits* ***for a past period***” to remove the misleading words “*for a past period*,” to reflect that in all cases the DM should decide a credits claim / issue when the contribution condition is not met for an award of NS ESA.
* Amend the DWP’s operational guidance ‘New Style Employment and Support Allowance only claims’ (V5)[[6]](#footnote-6) to include as an example when a claimant meets the conditions for NS ESA but benefit is not awarded because s/he has not made sufficient national insurance contributions, as well as the current example in the guidance *“if an occupational pension has reduced their entitlement to nil.”*

The details of documents that are considered relevant and necessary

* C’s signed authority
* Evidence of LCW (fit notes)
* Copies of correspondence with DWP
* [phone log showing date of call?]

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

Email]

Proposed reply DATE

We expect a reply promptly, and in any event no later than 4pm on [date]. Should we not have 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/890304/adma1.pdf [↑](#footnote-ref-3)
4. Made available in response to an FOI request by Martin Williams https://www.whatdotheyknow.com/request/692848/response/1650082/attach/html/4/Credit%20Title%20Guide%20Chapters%201%20to%204.pdf.html [↑](#footnote-ref-4)
5. www.gov.uk/employment-support-allowance/how-to-claim [↑](#footnote-ref-5)
6. https://data.parliament.uk/DepositedPapers/Files/DEP2023-0365/108\_New\_Style\_ESA\_only\_claims\_V5-0.pdf [↑](#footnote-ref-6)