**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](mailto: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 unreasonable delay in deciding a request for a mandatory reconsideration of the decision to ‘close’ C’s award and that that C has been overpaid due to C’s failure to re-verify her/his ID when C’s ID was previously accepted.

Please read whole letter carefully and edit as appropriate, in particular change any text in **red** and/or [square brackets].

Delete any comments and return all text to **black** (and not bold) before sending to DWP.

**Please get in touch if you have client in this situation** <https://cpag.org.uk/welfare-rights/test-cases/refer-test-case> or [testcases@cpag.org.uk](mailto:testcases@cpag.org.uk).

DELETE BOX BEFORE SENDING

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

* ID reverification has been sought from your client including a request for a ‘selfie’
* Your client’s UC award was ‘closed’ as a result of not providing a selfie
* An MR has been requested and DWP’s response has not been received within a reasonable time

This letter assumes (and edits will be needed if this is not the case):

• Recovery of the overpayment has started by deduction from wages

• Client has re-claimed and been re-awarded UC

DELETE BOX BEFORE SENDING

[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](mailto: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 **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*](mailto:thetreasurysolicitor@governmentlegal.gov.uk)*.*

1. **Details of the matter being challenged**
2. C is challenging SSWP’s ongoing unreasonable delay in deciding C’s request for a mandatory reconsideration of the decision made on [date / an unknown date] that [she/he] has been overpaid £[amount] of UC and the decision, which is assumed was made on the same [unknown] day, to revise the original decision on [her/his] entitlement to UC claim made on [date] and “close the claim”, all due to C failing to provide a “selfie”.

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

1. C made an online claim to UC on [date] [reason claim was necessary].
2. C reports that [she/he] verified [her/his] identity online as requested when [she/he] first claimed UC. [She/He] recalls uploading identity documents and using [method eg, a gov.uk website to do so / Verify]. [C also recalls answering biographical questions on a telephone appointment.]
3. C reports that throughout [her/his] award [she/he] informed UC of all changes in [her/his] employment, responded to all requests for information and provided all requested documents, via [her/his] online journal. C believes [she/he] has not missed any telephone appointments with DWP.
4. In or around [date], C was requested to verify [her/his] identity again and provide various documents including [her/his] passport and drivers licence, which [she/he] duly provided via [her/his] journal.
5. As part of these requests, C was asked to provide a ‘selfie’. C responded via [her/his] journal saying [she/he] was unable to provide one [because… explain reasons]
6. Shortly after [she/he] sent the message explaining why [she/he] was unable to provide a selfie, C’s universal credit account was closed, in or around [date]. C immediately lost access to [her/his] universal credit journal at this time both in terms of being able to communicate with DWP via [her/his] journal (as a route for lodging a request for a mandatory reconsideration of decisions taken on [her/his] award), but also as a record of decisions taken at any time on [her/his] award, including the decisions that presumably have led to the generation of the purported debt [she/he] has since been notified of by DWP’s Debt Management team.
7. C reports that [she/he] was made aware of [her/his] account being closed [how]. It is unclear whether C had been issued electronically with a decision notice notifying [her/his] of any revision of [her/his] award via [her/his] journal shortly before [her/his] account was closed, but when [she/he] logged in, [she/he] was unable to review or retrieve any previous correspondence from DWP to check this. This appears to be because when accounts are closed, journals are immediately “frozen” or put into “read only” mode, meaning that decision letters contained in PDF letters which have been uploaded to the claimant’s journal cannot be viewed or downloaded.
8. [Any further steps c has taken to resolve the issue / what DWP have said in response]

**Note on D’s duty of candour**

1. As SSWP 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 for inspection, as part of the response to this letter.

***Legal background***

D’s power to revise a benefit decision

1. D’s power to revise decisions on UC entitlement is set out in s.9 Social Security Act 1998 (“**SSA 1998**”)

“***9****. - (1) Any decision of the Secretary of State under section 8 above or section 10 below may be revised by the Secretary of State—*

1. *either within the prescribed period or in prescribed cases or circumstances; and*
2. *either on an application made for the purpose or on his own initiative; his*

*and regulations may prescribe the procedure by which a decision of the Secretary of State may be so revised*.”

1. In order for D to revise a decision, there must exist a ground for the revision. The reason why the law requires that grounds are needed to revise a decision is set out succinctly in the judgment of Judge Jacobs in *BD v SSWP* [2020] 178 (AAC):

“*11. From the start of the modern social security system in 1948, the legislation has provided for decisions to be changed but only in specified circumstances. Under the current legislation, introduced by the Social Security Act 1998, those circumstances are called grounds for revision and grounds for supersession.* ***These grounds provide a framework for decision-makers and a protection for claimants against arbitrary changes to decision.***”

(Emphasis added)

1. The regulations referred to in s.9 SSA 1998 relevant to this case are the UC, PIP, JSA and ESA (Decisions and Appeals) Regulations 2013/381 (“**D&A Regs**”). Regulation 9 D&A Regs set out a specific ground on which a decision can be revised at any time by D including:

“***Official error, mistake etc.***

*9. A decision may be revised where the decision—*

*(a) arose from official error; or*

*(b) was made in ignorance of, or was based on a mistake as to, some material fact and as a result is more advantageous to a claimant than it would otherwise have been.”*

1. In this context, a “material fact” means a mistake of *primary* fact at the time the original decision was made. It is not an *inference* or a conclusion drawn from a primary fact, as explained by D’s representative in paragraphs 9 – 10 of [*MS v SSWP (DLA and PIP)* [2021] UKUT 41 (AAC)](https://assets.publishing.service.gov.uk/media/606d7d76d3bf7f40152362ea/CPIP9322020__CPIP9342020__CDLA10792020___CDLA10802019.pdf) and endorsed by Upper Tribunal Judge Wikeley at paragraph 35:

*“9. In the instant case the power to revise that was at issue was that in regulation 9(b) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013, which provides that*

*‘A decision may be revised where the decision […] was made in ignorance of, or was based on a mistake as to, some material fact and as a result is more advantageous to a claimant than it would otherwise have been.’*

*10. In this context, a ‘material fact’ is a primary fact about the claimant’s needs, and not a medical opinion (R(M) 5/86 at [10] and Cooke v Secretary of State for Social Security [2001] EWCA Civ 734 (reported in R(DLA) 6/01) at [9]) or an inference from a primary fact (R(S) 4/86 at [4]).* ***The fact must also have existed at the time of the decision under revision*** *(Chief Adjudication Officer v Coombe (reported as R(IS) 8/98), and be such as to require that decision to be changed (R(IB) 2/04 at [187]).”*

(Emphasis added)

D’s power to request information

1. Regulation 38(2) of the UC, PIP, JSA and ESA (Claims and Payments) Regulations 2013/380 (“**C&P Regs**”) set out D’s power to request information or evidence required for determining whether a decision on the award of benefit should be revised under s.9 SSA 1998 or superseded under s.10 of that Act. A person to whom this regulation applies must supply the information in such manner and at such times as D may determine.
2. Regulation 45(4)(a) of the D&A Regs sets out the time period within which information requested under regulation 38 C&P Regs must be supplied as 14 days from notification by the SSWP of the requirements of the regulation, or such longer period as is required in the notification of information required, or such longer period as the claimant satisfies the SSWP is needed to provide the information.
3. *SS v NE Lincolnshire Council (HB)* [2011] UKUT 300 (AAC) makes clear that failure to meet a (housing benefit equivalent of Regulation 38 C&P Regs) information request does not in itself lead to an award ending:

“*As noted above, the original submission by the local authority to the tribunal relied on regulation 86 of the Housing Benefit Regulations 2006. This imposes a duty on claimants to provide information on request in relation to their claim. Again, there is a one month time limit (regulation 86(1)). However,* ***a failure by a claimant to comply with regulation 86 does not operate to end an award of benefit by some process of statutory magic****.* ***There has to be a suspension under regulation 11 or 13 followed by a termination decision under regulation 14 or some other effective revision or supersession decision****.”* [29]

(Emphasis added)

D's powers to suspend payment of benefit

1. D may **suspend** the payment of a benefit (in whole or in part) to any person who does not comply with the requirements of regulation 45(4) D&A Regs in response to a request for information by D (regulation 45(6) D&A Regs).
2. D may **suspend** payment of a benefit (again, in whole or in part) in other prescribed situations set out in regulation 44(2)(a) D&A Regs, including when

“*(i) an issue arises whether the conditions for entitlement to the benefit are or were fulfilled;*

1. *an issue arises whether a decision relating to an award of the benefit should be revised under section 9 or superseded under section 10 of the 1998 Act,*
2. *an issue arises whether any amount of benefit paid to P is recoverable under or by virtue of section 71ZB, 71ZG or 71ZH of the Administration Act,*
3. *the last address notified to the Secretary of State of P is not the address at which P resides*”

D’s power to terminate for failure to furnish information or evidence

1. In cases where payment of benefit to a person (“P”) has been suspended in full under:
   * Regulation 44 (suspension in prescribed cases) and P subsequently fails to comply with a requirement for information or evidence under regulation 45 and more than one month has elapsed since the requirement was made; or
   * Regulation 45(6) and more than one month has elapsed since the first payment was suspended.

Except where entitlement ceases on an earlier date **for reasons other than failure to furnish information or evidence** D must decide that P ceases to be entitled to that benefit with effect from the date on which the payment of the benefit was suspended (regulation 47 D&A Regs).

1. Strict compliance with the suspension procedure is required to justify termination:

*“The requirement that a claimant be given a specified period within which to provide information is obviously an important part of the scheme.  Regulation 14 provides what is, in effect, a procedural penalty as it enables a local authority to terminate entitlement for a failure to provide information, even if the claimant subsequently provides the information and it reveals that he or she would otherwise have been entitled to benefit.  This procedural penalty is therefore only to be imposed in circumstances where the claimant has been given a firm deadline for providing the information and has been subjected to the pressure of suspension.  It is very easy for a local authority to comply with the requirement to give proper notice of the length of the period within which information must be provided.  In those circumstances, even if a local authority’s failure to comply with regulation 13(3) is not always fatal to a subsequent termination under regulation 14, cases where the failure can properly be overlooked will be very rare.”*

(paragraph 43 of CH/2995/2006)

Identity as a condition of entitlement

1. Section 1(1B) of the Social Security Administration Act 1992 sets out the ways in which a claimant may prove their identity. Section 1(1B) states:

“**1**.-*(1B) This subsection is satisfied in relation to a person if –*

1. *the claim is accompanied by –*
2. *a statement of the person's national insurance number and information or evidence establishing that that number has been allocated to the person…”*

D’s identity verification guidance

1. Under DWP’s UC identity verification guidance (V19)[[3]](#footnote-3), claimants can verify their identity one of the following ways
2. online using the Government Gateway service, or
3. by providing documentary evidence (or
4. by way of a biographical test or check.
5. This guidance states:

*“Claimants can verify their identity “(****ID****”) online using the Government Gateway service. Claimants who have verified their ID online may not be required to undertake a full initial evidence interview. ”*

1. The guidance also states:

*“Claimants who do not confirm their identity online must provide one piece of primary evidence and two pieces of secondary evidence when they attend their Initial Evidence Interview.*

1. The guidance goes on to state:

*“A biographical test can be used to verify a claimant’s identity. The test consists of three questions that are generated using information held on the Customer Information System (Searchlight). After completing the biographical test, a claimant may still have to attend a Standard identity appointment.*

*[…]*

*A biographical check involves the validation of information provided by the claimant and checked with third parties or organisations such as:*

*• other government departments*

*• utility companies*

*• employers*

*Universal Credit need to get consent from the claimant before contact with any third party is made.*

*If identity is confirmed the claimant may still have to attend a standard identity appointment.*

1. There is no reference to the provision of “selfies” in DWP’s UC identity verification guidance. Whilst the guidance on the ‘documentary evidence’ verification route envisages an Initial Evidence Interview for the original documents to be checked, the guidance provides alternative routes which do not require attendance at the interview, including verification via biographical tests and checks.
2. Previous guidance provided for identity to be confirmed using the ‘Confirm Your Identity’ service. DWP has stated that this service had been used by 600,000 claimants by October 2020.[[4]](#footnote-4)
3. Since that time, we understand that further methods of verification have been introduced including “*better biographical questions so [DWP] can interrogate people over the phone*” that “*only the right individual could answer*”.[[5]](#footnote-5)

Overpayment recovery policy whilst mandatory reconsideration request pending

1. For UC overpayments, unlike overpayments of all other benefits, DWP’s policy is to not suspend recovery during the mandatory reconsideration process or the statutory appeal process.[[6]](#footnote-6)
2. **Grounds for judicial review**

**Ground 1: Unreasonable delay in providing a mandatory reconsideration decision**

1. 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).
2. The duty to make a decision within a reasonable time applies equally to s.9 SSA 1998 under which Secretary of State may “revise” any decision made under s.8 or s.10, as to the analogous provision at s.8 under which the Secretary of State shall “decide any claim for a relevant benefit”.
3. What counts as a reasonable time depends on the circumstances, including the impact on the claimant and the complexity of the case[[7]](#footnote-7).

*Impact on the claimant*

1. The delay is causing C hardship. The delay relates to a decision on an overpayment [which D has already taken active steps to recover, including recovering money from C’s wages.] The longer that D delays in considering C’s request for mandatory reconsideration, the more money D will be able to recover from C in the meantime.
2. [Explain impact on C]

*Purpose of mandatory reconsideration process*

1. Of relevance to the circumstances and therefore what constitutes a reasonable or unreasonable delay is, the statutory purpose for introducing the mandatory reconsideration process. According to the Government’s consultation paper, the stated purpose is “*to deliver* ***timely****, proportionate and effective justice for claimants, make the process for disputing a decision* ***fairer and more efficient***” (emphasis added). The delay in this case of [**No. of weeks**] and the consequent frustration of C’s appeal rights clearly fails to deliver on this stated purpose and is therefore unlawful. [This is made worse by the fact that D is benefitting from recovering money from C (which C says is not properly owed by [her/him] to D) whilst the delay is ongoing.]

*Non-complex case / all information available*

1. [D has accepted C’s new claim for UC and C has successfully verified [her/his] identity on [her/his] new award. It is therefore clear that D accepts that C is a genuine claimant and is properly entitled to UC (in assessment periods where [her/his] earnings are sufficiently low so as to meet the condition in section 5(1)(b) or 5(2)(b) of the Welfare Reform Act 2012).] [**Delete if has not reclaimed and been awarded UC]**
2. It is not clear on what ground C’s original entitlement decision was revised but the reason given by the universal credit helpline that the account closure and overpayment was issued because “*no selfie had been uploaded*” should be clear to a decision-maker that this was not a proper ground for revision and that the overpayment decision should be revised in line with the mandatory reconsideration request.

**Ground 2: Unlawful policy of revising UC entitlement decisions without grounds**

1. C appears to have been subjected to the retrospective verification exercise carried out by the Department’s ‘Repair Team’.
2. D has stated in correspondence to Child Poverty Action Group on the retrospective verification exercise that:

“*Each award that is reviewed is considered on its own merits, if there are grounds to revise or supersede a decision then the appropriate decision is taken.”*

1. However, decision-makers and/or the ‘Repair Team’ appear to have been instructed to take a blanket approach as part of this exercise in that in circumstances where:
   1. A claimant fails to supply information or evidence within the given period; and
   2. payment of benefit has been suspended in full; and
   3. more than one month has elapsed since the requirement was made[[8]](#footnote-8),

the decision maker must conclude that the claimant is not entitled to UC. Further the decision maker should revise the original UC entitlement decision (for all cases, and without consideration of other factors/evidence which may be available on the claimant’s DWP records or other methods of verification which they may have completed in the course of claiming) on the basis that conditions of entitlement have not been satisfied from the date of claim.

1. If this does not accurately reflect SSWP’s policy/processes, please provide an explanation of what the policy/processes in fact is/are and state what exactly is incorrect about the explanation as set out above. The publicly available Advice for Decision Makers does not explain this.
2. As explained above, C does not have access to the notice of overpayment or any written explanation of the overpayment decision.
3. As such, please confirm whether the approach set out above has been applied in C’s case.
4. If the approach set out above was not applied in C’s case, please provide details of the process which was followed and the basis on which the revision decision was ultimately taken.
5. If Regulation 9(b) D&A Regs is the relevant ground for the revision of C’s UC award, please confirm what was the material fact (not inference) that the decision maker identified that the previous decision maker was ignorant or mistaken about. Please confirm whether any other factors/evidence were taken into account in making the decision, including any other forms of verification completed by C previously.
6. **Details of the action the Defendant is expected to take**
7. D should:
   1. Immediately on receipt of this letter direct the Debt Management team to suspend enforcement of the recovery of the overpayment.
   2. Revise the decision of [date / an unknown date] that C was not entitled to UC since [she/he] first claimed and has been overpaid £[amount] in UC (please also provide a copy of the original decision and any contemporaneous record of reasons for the decision).
   3. Refund the money already recovered from C through [direct earnings attachment (and any other means, if relevant)].
   4. Calculate and pay any arrears of UC owed to C for the period between the date [her/his] old award was closed and the date [she/he] reclaimed UC (requests should be made for details of C’s earnings and housing costs during the relevant assessment periods).
   5. Urgently review the processes and decision-maker guidance used by the ‘Repair Team’ to revisit UC claims to ensure that revisions of entitlement decisions have been carried out with proper grounds and not purely for failure to provide evidence before the requested deadline (which is not in itself a proper ground for revision).
   6. Pay C a consolatory payment for maladministration in the sum of £100.
8. **Please find the following documents enclosed:**
9. C’s signed form of authority
10. Copy CRM1 submitted on [date]
11. **ADR proposals**

Please confirm in your reply whether D is willing to consider alternative dispute resolution.

1. **The address for reply and service of court documents:**

[Advice agency name, address and email here]

1. **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 reserve the right to issue proceedings for judicial review without further notice.

Yours faithfully

*Encs.*

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. data.parliament.uk/DepositedPapers/Files/DEP2023-0791/080.\_Identity\_verification\_V19.0.pdf [↑](#footnote-ref-3)
4. “Confirm Your Identity: a new way to verify online DWP”, Alison Phelan, DWP Digital Blog, published 15 October 2020 available at: <dwpdigital.blog.gov.uk/2020/10/15/confirm-your-identity-a-new-way-to-verify-online [↑](#footnote-ref-4)
5. Peter Schofield response to Q5 by Antony Higginbotham and Neil Couling response to Q21 by Peter Grant in “Public Accounts Committee Oral evidence: DWP Accounts – Fraud and error in the benefits system” HC 633 9 September 2021 available at: <[committees.parliament.uk/oralevidence/2690/default/](https://committees.parliament.uk/oralevidence/2690/default/)> [↑](#footnote-ref-5)
6. Para 4.6 and Para 4.13, Overpayment Recovery Guidance. It is not accepted that this policy is lawful. [↑](#footnote-ref-6)
7. *R (C and W) v Secretary of State for Work and Pensions* [2015] EWHC 1607 (Admin) [↑](#footnote-ref-7)
8. This is the Department’s stated position on the suspension process which is followed, however, in practice there is evidence that it has not been followed in many cases. [↑](#footnote-ref-8)