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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 [name]**

1. We are instructed by[full name] 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:** The Secretary of State for Work and Pensions (“**SSWP**”)

**Claimant:** (“**C**”)

**National Insurance No:**

**Date of Birth:**

**Address:**

**Details of the matter being challenged**

1. C is challenging the failure to implement the decision of the First-tier Tribunal (“**FTT**”) on [date] that C has Limited Capability for Work-related Activity (“**LCWRA**”) to include the LCWRA in [her/his] UC award..

**Background facts [edit whole section]**

1. C is a [eg, single woman/man aged [years] with what medical conditions].
2. On [date] C claimed and was awarded UC from [date].
3. On [date] C submitted a fit note and on [date] C’s participated in a medical examination to assist the Secretary of State to gather evidence relevant to the work capability assessment (”**WCA**”), following which it was decided on [date] by SSWP that C was ‘fit for work’, therefore not entitled to the LCWRA element in [her/his] UC award in respect of the period starting from C’s 4th UC Assessment Period.
4. C challenged the decision of [date] by seeking a mandatory reconsideration (revision under s.9 Social Security Act 1998) and on [date] SSWP decided by way of mandatory reconsideration notice dated [date] that the decision would not be changed.
5. On [date] C appealed against the decision of [date] to the FTT, and C’s appeal was allowed; the FTT decided that C has LCWRA from [date]. A copy of the decision notice is attached. The matter was remitted to SSWP to calculate C’s award. [To the best of our knowledge SSWP has not sought permission to appeal against the tribunal’s decision / SSWP is out of time to appeal this decision].
6. On [date] C posted a message on [her/his] UC journal pointing out the effect of the FTT’s decision (ie, that C is entitled to the LCWRA element from [date] / the start date for the LCWRA element should be [date]). On [date] SSWP responded:

“*we are looking into your query*”

1. Since then there has been no communication from SSWP on this issue. No arrears of UC have been paid. [X] months have elapsed since the FTT’s decision.

**Legal background**

1. Regulation 27 of The Universal Credit Regulations 2013 (SI 2013/376) (“**UC Regs**”)provides that a UC award is to include an amount in respect of the fact that a claimant has LCWRA:

***27.****— (1) An award of universal credit is to include an amount in respect of the fact that a claimant has limited capability for work and work-related activity (“the LCWRA element”).*

1. Under regulation 28 that amount is not to be included until the 4th assessment period (with exceptions which do not apply in this case).

*“****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 beginning with****—*

*(a) if regulation 41(2) applies (claimant with [monthly] earnings equal to or above the relevant threshold) the date on which the award of universal credit commences or, if later, the date on which the claimant applies for the ... LCWRA element to be included in the award; or*

*(b) in any other case, t****he first day on which the claimant provides evidence of their having limited capability for work in accordance with the Medical Evidence Regulations.****”*

(Emphasis added)

1. In this case the tribunal allowed the appeal, holding that C was entitled to the LCWRA element within her UC award with effect from [date] and remitting the matter to the Secretary of State. This is a permissible course of action, as confirmed by a Tribunal of Commissioners in *R(IS)2/08* at paragraph 48:

“***When an appeal against an outcome decision raises one issue on which the appeal is allowed but it is necessary to deal with a further issue before another outcome decision is substituted, a tribunal may set aside the original outcome decision without substituting another outcome decision****,* ***provided it deals with the original issue raised by the appeal and substitutes a decision on that issue.******The Secretary of State must then consider the new issue and decide what outcome decision to give. In that outcome decision, he must give effect to the tribunal’s decision on the original issue*** *unless, at the time he makes the outcome decision, he is satisfied that there are grounds on which to supersede the tribunal’s decision so as, for instance, to take account of any changes of circumstances that have occurred since he made the decision that was the subject of the appeal to the tribunal. Because his decision is an outcome decision, the claimant will have a right of appeal against it*.”

(Emphasis added)

1. Alternatively, the tribunal can make the appropriate “outcome decision” but leave to the Secretary of State to make the precise assessment or calculation necessary to implement the tribunal’s decision (*R(SB)11/86*). If it is not possible for the parties to agree the appeal must be restored to the tribunal for a final determination. Following C’s appeal SSWP has not made an outcome decision.

**Ground for Judicial Review: Unlawful delay in implementing the FTT’ decision and deciding C’s award**

1. The effect of the FTT’s decision is that the outcome decision which the SSWP is now obliged to make, must include within its calculation of UC to which C is entitled [the LCWRA element] with effect from [date start of 4th AP]. That determination must now be incorporated into a supersession of the decision making C's award of UC with effect from that date.
2. The period for seeking permission to appeal from the FTT’s expired on [date] (Tribunal Procedure (First-tier Tribunal)(SEC) Rules 2008 rule 38(3)).
3. The SSWP 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). The same principle applies by analogy to pending supersession requests such as in the present case. What counts as a reasonable time depends on the circumstances, including the impact on the claimant and the complexity of the case.
4. The impact on C is [what].
5. The case is not complex. The FTT have already decided that C has LCWRA.
6. The law is clear that SSWP must now make a decision which ‘*gives effect to the tribunal’s decision’.*
7. SSWP’s continuing failure to implement the FTT’s decision constitutes unreasonable delay and is, we submit, contrary to the fundamental to the rule of law that the executive abides by judicial decisions and does so promptly.

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

1. The Defendant is requested
	1. Decide and pay C the LCWRA element from [date]; and
	2. compensate the claimant for the unjustifiable delay in implementing the First-tier Tribunal’s decision.

**ADR proposals**

1. Please confirm in your reply whether the Defendant is willing to consider alternative dispute resolution.

**The address for reply and service of documents**

[Name address and email of advice agency]

**Proposed reply date**

1. We expect a reply promptly and in any event no later than [date] (14 days).
2. Should we not have received a reply by this time we reserve the right to refer the matter to solicitors with a view to issuing proceedings for judicial review without further notice to you.

Yours faithfully

[Signature]