**This letter challenges:**

* The DWP’s failure to offer an amount equivalent to the claimants whole UC award as a New Claim Advance
* The DWP’s guidance on New Claim Advances

Please seek assistance and send letter for review to jrproject@cpag.org.uk before sending if needed.

 DELETE BOX BEFORE POSTING

**This letter is relevant if your client:**

* Is exempt from the benefit cap
* Has been offered a new claim advance which is less than their expected whole UC monthly award

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

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 X **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].**

**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 SSWP’s decision to award [£X] as a Payment on Account of Benefit (“**PAB**”), which is a significantly lower amount than C’s estimated total UC award.

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

1. C is a... CIRCUMSTANCES, HOUSEHOLD, DISABILITY, OTHER BENEFITS
2. C is a vulnerable individual. He/she …
3. Why did C claim UC? What were the circumstances when the PAB was offered/granted?
4. C’s monthly UC award is (CALCULATE BASED ON STANDARD ALLOWANCE, HOUSING, CHILDREN AND ANY OTHER RELEVANT ELEMENTS).
5. What reason was given for not awarding the full entitlement?
6. Has it been capped at 360% of the standard allowance or 24 x 25% of the standard allowance?
7. What were the consequences of the low payment on account? Any debts/ particular difficulties as a result of this?

**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. Section 5(1)(r) of the Social Security Administration Act 1992 (“**SSAA 1992**”), allows regulations to be made to allow payments on account in specified circumstances including where a claim for benefit has been made but not yet decided or paid, a claimant is in need, or in accordance with prescribed criteria:

***5****.-(1) Regulations may provide—*

*(r) […]*

*for the making of a payment on account of such a benefit—*

*(i) in cases where it is impracticable for a claim to be made or determined*

*immediately, or for an award to be determined or paid in full immediately,*

*(ii) in cases of need, or*

*(iii) in cases where the Secretary of State considers in accordance with*

*prescribed criteria that the payment can reasonably be expected to be*

*recovered”*

1. The Social Security (Payments on Account of Benefit) Regulations 2013 (SS (PB) Regs) are made under SSAA 1992 and provide for ‘Payments on account of benefit’.

Financial need

1. Under reg 5 SS(PB) Regs, where, as in C’s case, there is no award of benefit but the conditions of entitlement appear likely to be satisfied and a claimant is in financial need, the Secretary of State has the discretion to make a Payment on Account of Benefit (“**an Advance**”):

### *Payment on account of benefit where there is no award of benefit*

***5.****—(1) The Secretary of State may make a payment on account of benefit to A if—*

*(a) either of paragraphs (2) or (3) applies;*

*(b) it appears to the Secretary of State likely that the conditions of entitlement for benefit are satisfied (or will be satisfied during the period in respect of which the payment is to be made); and*

***(c) the Secretary of State is satisfied that A is in financial need.***

*(2) This paragraph applies where A has made a claim for benefit but the claim has not yet been determined.*

*(3) This paragraph applies where A is not required to make a claim for benefit by virtue of—*

*(a)* [*regulation 6 or 7*](https://uk.westlaw.com/Document/I76AD1621864011E29BEBD9065BB2D913/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink))*of the UC etc. Claims and Payments Regulations (claims not required for entitlement to universal credit or an employment and support allowance in certain cases); or, as the case may be,*

*(b) regulation 3 of the Claims and Payments Regulations (claims not required for entitlement to benefit in certain cases),*

 *but an award of benefit has not yet been made.*

1. Regulation 6 SS (PB) Regs applies where an award of UC has been determined, but the claimant has not yet received some or all of their entitlement (based on their current circumstances) and payment is required because the claimant is in financial need. For example:

***6****.- (1) The Secretary of State may make a payment on account of benefit to A if-*

 *(a) an award of benefit has been made to A;*

 *(b) any of paragraphs (2) to (5) applies; and*

 ***(c) the Secretary of State is satisfied that A is in financial need.***

*[…]*

 *(4) This paragraph applies where there has been a change of circumstances*

 wh*ich would increase the amount of benefit payable under the award*

 *and-*

 *(a) the award has not yet been revised or superseded to reflect that*

 *change; or*

 *(b) the award has been revised or superseded to reflect that change but*

 *the date on which the payment of benefit is due to be made in*

 *accordance with the revised or superseded decision has not yet been*

 *reached.*

1. The purpose of an Advance under regs 5 and 6 SS (PB) Regs is to relieve financial need. This is evident from the fact it is precondition for an Advance that a claimant be “*in financial need*”, both where UC has yet to be awarded and where UC has been awarded but paid at a rate insufficient to meet the claimant’s current need (as assessed by calculation of their individual UC award).
2. Financial need is defined by reg 7 SS (PB) Regs:

### *Definition of financial need*

***7.****—(1) A is in financial need for the purposes of regulation 5(1)(c) or 6(1)(c) where the circumstances in regulation 5(2) or (3) or, as the case may be, 6(2), (3), (4) or (5) result in a* ***serious risk of damage to the health or safety of A or any member of their family.***

(Emphasis added)

1. UC is a subsistence benefit and the amounts of subsistence benefits are calculated by reference to a claimant’s individual (and where relevant, family’s) financial need. In UC this is achieved by adding relevant UC elements dependent on the claimant’s circumstances, to a claimant’s fixed rate Standard Allowance. The greater the financial need, the higher the UC award required to achieve subsistence. As Lord Carnwath confirmed in *Samuels v Birmingham CC* [2019] UKSC 28:

 “*benefit levels are not generally designed to provide a surplus above subsistence needs for the family*.” (para 35)

1. Under reg 10 SS(PB) Regs PABs are to be recovered where possible from the claimant’s subsequent award of UC. No time scale for recovery is specified:

### *Bringing payments on account of benefit into account*

***10.****Where it is practicable to do so, a payment on account of benefit—*

*(a) which was made in anticipation of an award of benefit, is to be offset by the Secretary of State against the sum payable to A under the award of benefit on account of which it was made;*

*(b) whether or not made in anticipation of an award, which is not offset under paragraph (a), is to be deducted by the Secretary of State from—*

*(i) the sum payable to A under the award of benefit on account of which it was made; or*

*(ii) any sum payable under any subsequent award of that benefit to A.*

Purpose and amount of an Advance

1. The purpose of an Advance is to alleviate financial need which must necessarily be determined by reference to the claimant’s total UC entitlement including UC elements (rather than only the standard allowance). The maximum amount of an Advance to satisfy this purpose is also the financial need as determined by that total UC entitlement including UC elements (rather than only the Standard Allowance).
2. The above is apparent by, for example, the inclusion of reg 6(4) SS(PB) Regs under which an Advance can be paid to top up a UC award *“where there has been a change of circumstances”.* The UC Standard Allowance (for a single person or couple) is paid at a fixed amount; a *“change of circumstances”* is therefore only likely to increase a claimant’s total UC award by inclusion of additional (or increased) elements, with the Standard Allowance remaining unchanged, and an Advance is therefore available to ‘top up’.

**Ground 1: ultra vires guidance and fettering discretion**

1. Section 5(1)(r) of the SSAA 1992, and the supporting regulations under SS (PB) Regs, allow an Advance where a claimant has not yet received their benefit. The legislation does not set a limit on the amount that can be paid on account. Both the SSAA 1992 and the SS (PB) Regs make reference to circumstances where a payment on account can be paid in circumstances where the UC award has not yet been paid, or not been paid in full, taking into account the claimant’s circumstances at the time. Both the SSAA 1992 and the SS (PB) Regs therefore permit an Advance up to the full value of the expected UC award.
2. D’s operational guidance, “Advances – New Claim[[3]](#footnote-3)” (V16) sets out how the amount of an Advance should be calculated with reference to 3 fixed options. The maximum amount “*will be”* the lower of the 3:

*“****The claimant should be informed of the maximum amount they are entitled to.***

*This will be the lower of:*

*• 360% of their standard allowance*

*• the equivalent of their maximum Universal Credit award (including additional amounts)*

*• 24 x 25% of their standard allowance*

1. The Standard Allowance for a single person (aged 25 or over) is currently a set amount of £334.91 per month [check current rates, and edit all figures if it is a couple claim].[[4]](#footnote-4) The 3 options are therefore capped amounts of:
2. £1,205.68 (360% of £334.91)
3. £2,009.46 (24 x 25% of £334.91)
4. The maximum Universal Credit award (including additional amounts) will vary claimant to claimant, but the PAB amount will be capped to a) or b) if higher.
5. The guidance goes on to state:

*“The claimant should be offered support to calculate the most appropriate amount of Advance payment, based on their monthly outgoings and* ***their ability to repay it over the next 24 months****. To avoid hardship, the* ***repayment amount will be no more than the equivalent of 25% of the claimant’s Universal Credit Standard Allowance.***

(Emphasis added)

1. If the maximum Advance amount that can be offered is the lower of the 3 options, then it is impossible to see how in any case a claimant could be offered 24 x 25% of their standard allowance (i.e. 600% of the standard allowance), since in all cases 360% of their standard allowance will be lower.
2. Both the SSAA 1992 and the SS (PB) Regs permit an Advance up to the full value of the expected UC award. But D’s guidance unlawfully fetters the discretion available to D to award an amount up a claimant’s total UC award where the claimant’s total award is more than £1,205.68 per assessment period and is therefore *ultra vires* the SSAA 1992 and SS (PB) Regs.
3. In *R (Timson) v SSWP* [2022] EWHC 2392 (Admin) the High Court considered the lawfulness of SSWP’s:

“*written guidance to officials (“decision-makers”) who are responsible for deciding whether it is in a benefit claimant’s interests to have deductions made from their subsistence benefit in order to pay sums which are owed by those claimants to utility companies. The deductions are known as Third Party Deductions (“TPDs”)*” (para 1).

1. Mr Justice Cavanagh held that the claim for judicial review succeeded on one aspect-

*“This is that the Defendant's written guidance to decision-makers in relation to TPDs is unlawful because, by implication and omission, it has the effect that, read as a whole, the guidance presents a misleading picture of the true legal position to decision-makers...”* (paragraph 292)

1. Reaching this conclusion not because D’s written guidance on TPDs “*states in terms that decision-makers should not seek representations or information from claimants*” (para 222) but that, contrary to the legal position:

 *“a reasonable and objective reading of the DMG and Overview documents, taken as a whole, is that decision-makers are directed that they are under no obligation to contact claimants for representations/information before they take their decision*” (para 226)

1. Mr Justice Cavanagh was encouraged in this conclusion:

“*by the fact that decision-makers have in practice read the guidance as not requiring them to seek the representations/information from claimants before taking a TPD decision. Whilst the meaning and effect of the written guidance is a matter of law, the fact that in practice the decision-makers have read it as I interpret it gives me encouragement in my interpretation*.”

(para 227)

1. Thus, the guidance challenged in *Timson v SSWP* was held to be unlawful under the third type of case identified in *R(A) v Secretary of State for the Home Department* [2021] UKSC 37; [2021] 1 WLR 3931:

*“****46*** *In broad terms, there are three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others… (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position.”*

1. Analogously in the present case, D’s operational guidance “Advances – New Claim[[5]](#footnote-5)” (V16) purports to provide a full account of the legal position but fails to achieve that because of *a ‘specific misstatement of the law’*,since it introduces a compulsory limit (cap) on the amount that it is open to decision-makers to award where it states that an advance ‘***will be*** *the lower of* [the amounts detailed above]’.
2. By implication it is only open to decision-makers to award Advances up to these capped amounts. No such cap exists under the law, and as such D’s guidance unlawfully fetters the discretion available to decision-makers.
3. As in *Timson v SSWP* this case demonstrates that in practice decision-makers read the guidance as fettering their discretion to award more than the purportedly capped amount.
4. D’s guidance unlawfully fetters decision-makers discretion when deciding the amount of new claim Advances by requiring decision-makers to limit awards up to capped amounts without taking account of relevant factors ie, claimants’ individual circumstances and financial need. When this guidance is replied upon by decision-makers (and this case evidences that it is relied upon), it results in unlawful decision making.

**Ground 2: Irrationality - application of the cap**

1. This cap does not affect all claimants. The rate of the Standard Allowance (single person over 25) is set to provide subsistence level income to claimants in basic circumstances. ie, to meet the assessed financial need of a person who is likely to have no dependents, no disability or illness limiting their ability to work, no caring responsibilities and no housing costs. These non-complex claimants will only be awarded the Standard Allowance on an ongoing basis and will not therefore be affected by the cap of 360% of the Standard Allowance since 100% of the entitlement is less than this amount. These, and others claimants with non-complex circumstances (eg. a claimant with one child who has no limited capability for work related activity, or a claimant with limited capability for work related activity but no children), can have their assessed financial need met in full by way of an Advance.
2. However, in contrast, where financial need is assessed as higher because claimants have more involved circumstances giving rise to multiple types of need (eg, multiple children, disabled child/ren, caring responsibility, limited capability for work related activity, and housing), and a higher amount of UC is awarded to achieve subsistence in their complex circumstances on an ongoing basis, a cap of £1,205.68 means that not all of their assessed financial need can be taken into account for the period of the Advance.
3. D’s policy to apply a cap of 360% of the Standard Allowance to all claimants, irrationally caps the maximum financial needs that D is able to take into account when calculating PABs, only for claimants with the greatest needs and vulnerabilities, arising from the most complex circumstances (needs which D recognises by awarding higher ongoing amounts of UC). Paradoxically, all of the needs of claimants with the least needs, arising from the least complex circumstances, are taken into account when calculating appropriate PABs.

*Effect of unlawful policy on Claimant*

1. In C’s case she has limited capability for work related activity, 2 children and housing costs. Her monthly UC will be (at current rates):

409.89 Standard Allowance

336.20 Limited Capability for Work Related Activity element

227.08 child element

231.67 second child element

1,200 housing costs

= £2,404.84

1. To cap the PAB available to C at £1,205.68. leaves [him/her] with insufficient funds to meet his/her living and housing costs, funds which D has assessed [him/her] as needing to achieve subsistence.
2. The amount offered to C is an amount which is necessarily insufficient to meet [his/her] assessed subsistence level financial need, leaving C with insufficient income to meet subsistence level living costs for C [and [her/his] family] while waiting for [her/his/their] first regular payment of UC and is insufficient to prevent “*serious risk of damage to the health or safety”*.
3. Calculating the amount of C’s Advance without reference to [his/her] financial need as expressed by [his/her] total estimated award unlawfully fails to take account of the C’s circumstances.

**Ground 3: Discrimination contrary to the Equality Act 2010** (“**EA 2010**”) **[edit if male disabled client]**

1. Complex circumstances are most likely to include claimants having multiple children, caring responsibilities, a disabled child, or a disability which prevents them from being able to work, as these groups have higher ongoing total UC awards.
2. The majority of UC claimants who are responsible for children, including disabled children, and those who are carers[[6]](#footnote-6), are women. C is [DESCRIPTION OF CLAIMANT’S CIRCUMSTANCES]. Sex is a protected characteristic under s.4 EA 2010.
3. Section 19 EA 2010 provides:

##### *Indirect discrimination*

***19****.- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*

*(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*

*(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*

*(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

*(c) it puts, or would put, B at that disadvantage, and*

*(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

1. D’s method of calculating Advances takes into account the full financial need of claimants with non-complex claims but does not take into account the full financial need of claimants with more involved claims. The policy of using this method has a disproportionate adverse effect on claimants with complex claims, who are more often women. This prima facie indirect discrimination on grounds of sex falls to be justified by the D and we are not aware of any reasons put forward to countenance such adverse treatment.

*Breach of Public Sector Equality Duty*

1. The disproportionate adverse effect on individuals with relevant protected characteristics (as defined by s.4 EA 2010) set out above also raises concerns about whether D discharged its public sector equality duty, as set out in s.149 EA 2010, in the drafting of this guidance, and whether the SSWP has continued to monitor the impact of the guidance on these affected groups[[7]](#footnote-7).

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

**The Defendant is requested:**

* **without further delay to provide C with a payment on account equivalent to their full UC award / estimated entitlement, repayable over a reasonable time period so that payments do not cause financial hardship;**
* **to amend its guidance to remove the caped options and allow decision makers to exercise the discretion available to them.**
* **To accept that it has discriminated against C and pay damages.**

**The details of documents that are considered relevant and necessary**

**Please find enclosed copies of the following documents:**

* **Form of authority**
* **Documents available to the DWP on C’s 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]**

**Proposed reply date**

We expect a reply promptly and in any event no later than DATE. This is less than the usual 14 days. However, we consider this shortened timeframe to be entirely appropriate given (a) the Defendant is aware that the claimant and their family need significantly more than the amount awarded in order to meet their basic living costs, based on the Defendant’s own calculation of their UC award, and (b) the family DETAILS have no other source of income / ONLY X INCOME and are currently reduced to ...

**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.

S**hould we not have received such a request for further time nor a substantive reply by the given deadline we 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. [data.parliament.uk/DepositedPapers/Files/DEP2022-0452/006-Advances\_-\_New\_claim\_V16.0.pdf](https://data.parliament.uk/DepositedPapers/Files/DEP2022-0452/006-Advances_-_New_claim_V16.0.pdf) [↑](#footnote-ref-3)
4. Different Standard Allowances are fixed for couples and those aged under 25. [↑](#footnote-ref-4)
5. http://data.parliament.uk/DepositedPapers/Files/DEP2019-0980/6.\_Advances\_-\_New\_Claim\_v6.0.pdf [↑](#footnote-ref-5)
6. Census 2011 [↑](#footnote-ref-6)
7. The High Court confirmed in *Brown v SSWP* [2008] EWHC 3158 (Admin) that PSED is a continuing duty. [↑](#footnote-ref-7)