***This letter challenges*** *HMRC’s failure to recognise the basis for C’s DWE as due to a previous ESA award rather than due to an award of PIP*

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

Delete all comments before sending.

DELETE BOX BEFORE POSTING

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

* Is currently in receipt of WTC.
* Was in receipt of the Disabled Worker Element (DWE) on the basis of a previous award of ESA
* HMRC stopped the DWE when your client applied for PIP and PIP was refused

Please feel free to send your letter to [JRProject@CPAG.org.uk](mailto:JRProject@CPAG.org.uk) for review before emailing to HMRC.

DELETE BOX BEFORE POSTING

HMRC Solicitor's Office and Legal Services

First floor, South West Wing

Bush House

Strand

London

WC2B 4RD

By email only to: [preactionletters@hmrc.gov.uk](mailto:preactionletters@hmrc.gov.uk)

**Our ref:**

**Date:**

**Dear Sir or Madam,**

**Re: Proposed claim for judicial review against the Commissioners for Her Majesty’s Revenue and Customs by x**

##### We are instructed by x **in relation to [his/her] working tax credit (“**WTC”**) 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 by 4pm on the date at the end of this letter.**

**Proposed Defendant:** Commissioners for His Majesty’s Revenue and Customs (“**HMRC**”)

**Claimant:** [full name] (“**C**”)

**NINo:** [xxxx]

**Address:** [xxxx]

**Date of Birth:**  [xxxx]

**The details of the matter being challenged**

**C is challenging HMRC’s incorrect termination of the disabled worker element (“DWE”) in [his/her] WTC award.**

***Background facts***

1. **C has been in receipt of WTC since [date]. [S/He] has a diagnosis [of …] Prior to claiming WTC, C was in receipt of employment and support allowance (“ESA”) for [how long]. C returned to work on [date], working [number] hours per week [(16 or more) as a ….]**
2. **[S/He] made a claim for WTC on [date] and, because of [his/her] prior ESA award and [his/her] disability, [he/she] was also entitled and awarded the DWE.**
3. **In recent years, C’s condition has deteriorated [how].**
4. **C made an application for PIP on [date] and was invited to a medical assessment on [date], which [s/he] attended. C found the assessment very difficult, as [why, with the result that PIP was not awarded].**
5. **C received a letter from HMRC on [date], stating that the DWE of [his/her] WTC was being reviewed because [his/her] disability living allowance/ attendance allowance/ PIP had stopped. C has never been in receipt of any of these benefits.**
6. **C contacted HMRC [how] and explained that [S/he] had never been in receipt of PIP and that [his/her] entitlement was based on an earlier ESA claim and so the letter must be incorrect. [How did HMRC respond? E.g.] stating that *“he had ended C’s DWE entitlement he was not entitled to it if he was not receiving a benefit such as PIP”.***
7. **C is very distressed by the fact that [his/her] WTC DWE, on which [s/he] relies, has been stopped for no reason. C still suffers from the health conditions that previously allowed her/him to claim PIP and which place [him/her] at a disadvantage in finding a job.**

**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***

***Revision of a decision on an award***

1. **A claimant’s WTC award may be amended or terminated during the period of an award under s16 of the Tax Credits Act 2002 (“TCA 2002”):**

#### *Other revised decisions*

***16****.-(1) Where, at any time during the period for which an award of a tax credit is made to a person or persons, the Board have reasonable grounds for believing—*

*(a) that the rate at which the tax credit has been awarded to him or them for the period differs from the rate at which he is, or they are, entitled to the tax credit for the period, or*

*(b) that he has, or they have, ceased to be, or never been, entitled to the tax credit for the period,*

*the Board may decide to amend or terminate the award.*

*(2) Where, at any time during the period for which an award of a tax credit is made to a person or persons, the Board believe—*

*(a) that the rate at which a tax credit has been awarded to him or them for the period may differ from the rate at which he is, or they are, entitled to it for the period, or*

*(b) that he or they may have ceased to be, or never been, entitled to the tax credit for the period,*

*the Board may give a notice under subsection (3).*

*(3) A notice under this subsection may—*

*(a) require the person, or either or both of the persons, to whom the tax credit was awarded to provide any information or evidence which the Board consider they may need for considering whether to amend or terminate the award under subsection (1), or*

*(b) require any person of a prescribed description to provide any information or evidence of a prescribed description which the Board consider they may need for that purpose,*

*by the date specified in the notice.*

***Entitlement to disabled worker element:***

1. **A WTC claimant is entitled to the DWE if they satisfy the conditions set out in reg 9(1) of the Working Tax Credit (Entitlement and Maximum Rates) Regulations 2002 (“WTC (EMR) Regs”). The conditions are as follows:**

***Disability element and workers who are to be treated as at a disadvantage in getting a job***

***9.***—***(1) The determination of the maximum rate must include the disability element if the claimant, or, in the case of a joint claim, one of the claimants—***

***(a) undertakes qualifying remunerative work for at least 16 hours per week;***

***(b) has any of the disabilities listed in Part 1 of Schedule 1, or in the case of an initial claim, satisfies the conditions in Part 2 of Schedule 1; and***

***(c) is a person who satisfies any of Cases A to G on a day for which the maximum rate is determined in accordance with these Regulations.***

1. **Regs 9(2) – 9(8) set out Cases A to G, referenced in reg 9(1)(c). The relevant Cases in C’s circumstances are Cases A and G. Case A, set out in reg 9(3), states as follows:**

***9.-(2) Case A is where the person has, for at least one day in the preceding 182 days (“the qualifying day”), been in receipt of—***

***(a) higher rate short-term incapacity benefit;***

***(b) long-term incapacity benefit;***

***(c) severe disablement allowance; or***

***(d) employment and support allowance or a limited capability for work credit, where entitlement to employment and support allowance or that credit or statutory sick pay or a benefit or allowance mentioned in sub-paragraphs (a) to (c) or the income support payable under paragraph (3)(a), has existed for a period of 28 weeks immediately preceding the qualifying day comprising one continuous period or two or more periods which are linked together.***

1. **Case G, set out in reg 9(8) states as follows:**

***9.-(8) Case G is where the person was entitled, for at least one day in the preceding 56 days, to the disability element of working tax credit or to disabled person's tax credit by virtue of his/her having satisfied the requirements of Case A, B, E or F at some earlier time.***

***For the purposes of this Case a person is treated as having an entitlement to the disability element of working tax credit if that element is taken into account in determining the rate at which the person is entitled to a tax credit.***

1. **A person who initially qualifies for the DWE by satisfying the conditions of Case A, such as C, will fall into Case G when the Case A entitlement ceases. They will therefore continue to be entitled to the DWE on an indefinite basis until either their entitlement to WTC ceases or they no longer have a disability that places them at a disadvantage in finding a job. This was confirmed by Judge Poynter in** *PW v HM Revenue & Customs* (TC) [2018] UKUT 12 (AAC).
2. In addition to satisfying one of Cases A to G, a WTC claimant must also have one of the disabilities listed in Part 1 of Schedule 1 of the WTC (EMR) Regs. This Schedule lists disabilities that put the claimant at a disadvantage in looking for a job and includes the following, which applies to C:

***17. Due to mental disability he is often confused or forgetful.***

**Grounds for judicial review**

**Improper use of power in revising a decision without reasonable grounds for believing that there has been a change in entitlement**

1. C’s entitlement to the DWE arises from [his/her] award of ESA prior to [his/her] claim for WTC on [date]. It continues, under Case G, set out above, as C has a disability that puts [him/her] at a disadvantage when looking for work and works 16 hours per week.
2. The automated letter [dated …], which C received on [date], appears to be a notice under s16(3) TCA 2002, requesting that C provides further information, which HMRC needs to determine whether to amend or terminate [his/her] award, due to their belief that there has been a change of entitlement. The content of the letter suggests that HMRC believed there had been a change of entitlement due to an award of PIP ending.
3. C complied with this notice by informing HMRC [on two] occasions, [how], that [s/he] had never been in receipt of PIP. S/He explained that [his/her] DWE was based on an ESA claim.
4. C’s WTC award was amended. The only basis for doing this would be under s16(1) TCA 2002, where HMRC had reasonable grounds for believing that C’s entitlement had changed. There were no reasonable grounds for this belief in C’s case. HMRC requested further information from C to determine whether [s/he] was still entitled to DWE. [S/He] provided information that confirmed that [his/her] entitlement was based on an ESA award, and that HMRC’s information that an award of PIP had ended was incorrect, as an award of PIP has not been made.
5. HMRC do not need to amend or terminate the award, even if they have reasonable grounds for believing that there has been a change in C’s entitlement. However, in C’s case, there were no reasonable grounds for believing that C’s entitlement had changed, taking into account the information that C had provided and the conditions of entitlement set out in WTC (EMR) Regs, set out above. The power provided by s16(1) TCA 2002 to amend the award was therefore improperly used.

**Alternative Remedies**

1. C has a right of appeal against this decision [and has submitted a request for a mandatory reconsideration]. However, we consider that judicial review is the more appropriate remedy in this case because:
   * 1. Our client is dependent on this income from WTC to meet [his/her] basic living costs and the delay of firstly awaiting a mandatory reconsideration and then, potentially, a tribunal date would cause financial hardship; and
     2. The content of the [correspondence C has received / webchat / telephone conversation on date] has raised concerns about the training provided to HMRC staff and a direction to provide further training is not a remedy that can be obtained through the appeals process.

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

**The Defendant is requested to:**

* Reinstate C’s DWE with immediate effect.
* Provide further training to HMRC staff on DWE entitlement.

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

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

* **Signed form of authority for** C
* **[Records of both webchats between C and HMRC / correspondence with HMRC]**

**ADR proposals**

**Please confirm in your reply whether the Defendant 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 [date] (14 days).

**If we have not received a reply by this time, we will issue proceedings for judicial review without further notice to you.**

Yours faithfully,