**This letter challenges** the refusal of the DWP to depart from the RTI to determine a claimant’s earnings when:

* the RTI is incorrect
* the claimant has provided evidence of their actual earnings, and
* DWP have the power to depart from RTI under reg 61 UC Regs.

Read the whole letter carefully and edit as appropriate including all text in red and/or [square brackets].

Delete all comments and return all text to black before posting.

Delete Box before Posting

**Only use this letter if:**

* Your client receives universal credit
* Your client is employed and their earnings are reported via the Real Time Information (RTI) system
* The RTI report is wrong (**not** due to earnings received early due to a non-banking day)
* Your client has been unsuccessful in challenging the calculation of their earnings

Please send your letter to jrproject@cpag.org.uk for review before sending to DWP.

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](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

[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 [full name] **in relation to [her/his] universal credit 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 [DATE].**

**Proposed Defendant: Secretary of State for Work and Pensions (“D”)**

**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)*.*

**The details of the matter being challenged**

D’s refusal to use the discretion available to assess C’s earnings using information other than that supplied via the Real Time Information (“**RTI**”) system where there is documentary evidence to show that the RTI information is inaccurate.

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

1. Personal, family, disability, housing details etc…
2. …
3. …
4. C’s problems with UC began on DATE when she/he received advance notification of that month’s award which was at the much reduced amount of £XX compared to the usual amount of £XX. C inquired as to the reason for this and was provided with a breakdown and it transpired that the reason for the low award was that he/she was being treated as having earnings which were higher than those he/she actually received.
5. C queried this via his/her online journal and was informed by D that his/her earnings were those reported by HMRC via the RTI system and were therefore correct.
6. Detail C’s further contact with DWP and what has been said and list what evidence has been provided to show the RTI feed incorrect (eg wage slips/bank statements, letter from employer including dates, and dates and how provided to DWP.)
7. Given how carefully C has to budget to make ends meet from month to month, this unexpected fall in her/his UC award had various knock-on effects. DETAIL

**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 for inspection, as part of the response to this letter.

**Grounds for Judicial Review**

**Ground 1: Failure to take into account relevant information and/or unlawful fettering of discretion**

1. **Under Regulation 61** (as substituted by the Universal Credit (Earned Income) Amendment Regulations 2020) **of the Universal Credit Regulations (“UC Regs”) D must assess a claimant’s earned income using information received under the RTI unless such information is “*incorrect, or*** *fails to reflect the definition of employed earnings in regulation 55***”, in which case an assessment of the claimant’s earnings must be made under Reg 55 UC Regs.**
2. Regulation 55 UC Regs “*applies for the purposes of calculating earned income from employment under a contract of service or in an office, including elective office*” to any amounts that are general earnings, as defined in section 7(3) of Income Tax (Earnings and Pensions) Act 2003 (except those excluded under Reg 55(3) UC Regs).

***Information for calculating earned income - real time information etc.***

***61****.-(2) Where a person is, or has been, engaged in an employment in respect of which their employer is a Real Time Information employer–*

***(a) the amount of the person’s employed earnings from that employment for each assessment period is to be based on the information which is reported to HMRC under the PAYE Regulations and is received by the Secretary of State from HMRC*** *in that assessment period […]*

##### 

##### *Exceptions to use of Real Time Information*

***(3)******Paragraph (2) does not apply where—***

*(a) in relation to a particular employment the Secretary of State considers that the employer is unlikely to report information to HMRC in a sufficiently accurate or timely manner;*

***(b) it appears to the Secretary of State that the amount of a payment reported to HMRC is incorrect****,* ***or fails to reflect the definition of employed earnings in regulation 55*** *(employed earnings), in some material respect; or*

*(c) no information is received from HMRC in an assessment period and the Secretary of State considers that this is likely to be because of a failure to report information (which includes the failure of a computer system operated by HMRC, the employer or any other person).*

***(4) Where paragraph (2) does not apply******by virtue of any of the exceptions in paragraph (3)******the Sectary of State must determine the amount of employed earnings for the assessment period in question*** *(or, where the exception in paragraph (3)(a) applies, for each assessment period in which the person is engaged in that employment)* ***in accordance with regulation 55 (employed earning) using such information or evidence as the Secretary of State thinks fit.***

##### 

(Emphasis added)

8. The information provided by HMRC as to C’s earnings for the period [dates] is clearly [“incorrect” / “fails to reflect the definition of employed earnings in regulation 55”**/** “inaccurate”] because […]

9. D has the power under Reg 61(3) UC Regs to decide that Reg 61(2) does not apply and, where it does so, D then has a duty under Reg 61(4) to determine the amount of employed earnings using appropriate information or evidence. D has refused to exercise this power in the present case and failed to have any regard to the information/evidence provided to it by C which clearly shows that the RTI feed was incorrect in [X to X] assessment period.

10. Indeed, rather than considering C’s individual situation and whether the RTI feed in respect of [her/him] for [X to X] assessment period was incorrect so as to warrant departing from the RTI feed in calculating [her/his] earned income, D appears to have unlawfully fettered the discretion available by operating a blanket policy to follow whatever the RTI system says. D made this clear to C by stating:

*[“current policy is …” edit as appropriate]*

1. D’s operational policy therefore appears to be not to use the discretion available under Reg 61(3)(b) UC Regs to depart from the RTI even when it is clear that the RTI is incorrect.
2. Further, the RTI dispute process, when a referral is made, is not appropriate to enable UC awards to be amended in a sufficiently timely manner to take account of the correct earnings where the RTI feed is clearly incorrect. Child Poverty Action Group’s Early Warning System has received reports of the RTI dispute process taking up to 3 months to correct inaccurate RTI reported earnings. This is clearly unacceptable where a claimant’s UC award is contingent on their earnings and over reported earnings can reduce a UC award to zero.
3. D must at the very least consider whether to exercise its discretion under Reg 61(3) and the only reasonable exercise of D’s discretion when presented with C’s clear evidence of earnings is to assess C’s earnings under Reg 55 rather than Reg 61(2).

**Ground 2: Failure to follow DWP policy as described by guidance**

14. The Defendant’s operational guidance (V12)[[3]](#footnote-3) on RTI states:

***When Real Time Information may not be used***

*In exceptional circumstances information provided by the claimant instead of RTI can be used to decide on the amount of earnings received in an assessment period. This can be where:*

* + *information from the employer is unlikely to be accurate or timely*
  + *information is not received because of an IT failure*
  + *information appears incorrect or not to be earnings*

***The claimant is asked to self-report their earnings.***

***Disputed earnings***

*When a claimant disagrees with the information used to calculate their earned income****, they will be asked to provide supporting evidence such as wage slips or bank statements for the disputed period.***

*This information and the reasons are checked against the information received via RTI such as gross taxable earnings less tax, National Insurance, taxable expenses example, Excess Fares Allowance and pension contributions, pay dates and frequency of payments.*

*[…]*

***If the dispute cannot be resolved the case is referred to the RTI Support Team.***

(Emphasis added)

1. D’s guidance Advice for Decision Making (“**ADM**”) confirms that where the RTI is incorrect, the decision maker (“**DM**”) should decide the amount of a person’s employed earnings on the basis of evidence:

**H3192***…****the DM can decide that ADM H3191 does not apply when the DM considers that***

*1. the information from the employer is not likely to be sufficiently accurate or timely* ***or***

*2. in respect of a particular assessment period where*

*2.1 no information is received from HMRC and that this is likely to be due to a failure to report information (including computer failure in relation to systems operated by HMRC, the employer or any other person)* ***or***

*2.2* ***the information received from HMRC is incorrect*** *or that the payment does not fall within the meaning of employed earnings (see H3020 et seq) 1*

*1 UC Regs, reg 61(3)*

*H3193 If the DM decides that ADM H3191 does not apply then* ***a decision must be made as to the amount of a person’s employed earnings using such information or evidence as the DM sees fit****1. A person must also provide such information for the calculation of earned income as the DM may require2 .*

*1*  UC Regs, reg 61(4); 2 reg 61(1)

(Emphasis added)

1. D’s ‘Spotlight on Earnings’[[4]](#footnote-4) (“**Spotlight**”) further confirms that Work Coaches (“**WC**”) and Claims Managers (“**CM**”) must resolve earnings disputes wherever possible including where a claimant has evidence to show that the RTI feed is incorrect, and only if they are unable to resolve a dispute must they refer to the *RTI Support Team*:

***The WC or CM must try to resolve the query where possible.*** *If the claimant agrees with the RTI information following an explanation, but continues to disagree with how their earnings have been used to calculate their Universal Credit payment, they should be advised that they can raise a complaint via the Complaints Team. A dispute must not be raised via the RTI Support Team.* ***If the claimant has evidence*** *to support their earnings query,* ***and the WC or CM is unable to resolve it****, then a dispute must be raised via the RTI Support Team.*

(Emphasis added)

1. C has provided [what evidence of earnings – bulleted list if more than 2 items] to evidence [her/his] earnings for the assessment period [X to X]. D has offered no explanation for not taking C’s evidence into account except stating on [date]:

[“*what has been said – eg, we must follow the RTI*”].

1. Under D’s operational guidance and Spotlight only if the dispute cannot be resolved is the case is referred to the *RTI Support Team*. In most cases therefore, the DM should resolve the dispute without such a referral. In C’s case, C has provided clear evidence of [her/his] earnings and it would be straightforward for D to assess C’s earnings under Reg 55, and to do so without referral to the *RTI Support Team*, yet contrary to D’s own guidance D has not done so and has unlawfully failed to take account of the evidence C has provided.
2. It is clear that C’s earnings have been incorrectly reported by the RTI system and D is in clear breach of D’s guidance by not requiring or allowing C to ‘self-report’ [his/her] earnings.
3. By failing to resolve the issue at the earliest stage (ie, without referral to *RTI Support*)when presented with clear and unequivocal evidence of C’s actual earnings, D has failed to follow its own guidance.
4. Further, if D is unable to assesses C’s earnings under Reg 55, D must refer to the *RTI Support Team.* In C’s case, D has not done so.
5. By failing to refer to the *RTI Support Team* when the DM could not decide C’s earnings in consideration of the evidence available, D has unlawfully failed to follow D’s policy to do so as explained in D’s operation guidance and Spotlight.

**Alternative Remedy**

1. **The amount of an award is a matter open to appeal under Schedule 3 of the** Social Security Act 1998 (c. 14) and **in this instance C has also requested a mandatory reconsideration of the decision, however**, given the Defendant’s operation of a blanket policy not to go behind the RTI feed and the number of claimants who potentially have inaccurate RTI amounts, the most appropriate remedy to address this wider issue is judicial review rather than appeal.
2. **In addition, C is suffering significant financial hardship and struggling to make ends meet. Given the clear unlawfulness of the approach to exercising the Reg 61(2) UC Regs discretion, judicial review is the appropriate remedy to provide a speedy resolution.**

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

1. **The Defendant is requested without delay to:**
2. Use the power under Reg 61(3) UC Regs to require C to self-report [her/his] earnings and assess C’s earnings using the evidence provided to them by C.
3. Revise C’s UC award and pay additional amounts due to C from [DATE].
4. Ensure that decision makers are made aware of the relevant sections of the ADM in respect of incorrect RTI feeds and the correct approach to dealing with situations where the RTI reported earnings are clearly incorrect.

**Details of documents that are considered relevant and necessary**

* **Documents available to D via C’s UC journal**
* **C’s form of authority**

**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**

**[NAME, ADDRESS AND EMAIL OF ADVICE AGENCY]**

**Proposed reply date**

We expect a reply promptly and in any event no later than 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. [data.parliament.uk/DepositedPapers/Files/DEP2023-0791/134.\_Real\_Time\_Information\_V12.0.pdf](https://data.parliament.uk/DepositedPapers/Files/DEP2023-0791/134._Real_Time_Information_V12.0.pdf) [↑](#footnote-ref-3)
4. whatdotheyknow.com/request/536701/response/1283912/attach/2/FOI2018%

   2012590%20Spotlight%20on%20Earnings.pdf?cookie\_passthrough=1 [↑](#footnote-ref-4)