**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 x **in relation to recovery of HIS/HER overpayment of BENEFIT from HIS/HER Universal Credit (UC)award. We are requesting your response as soon as possible and in any event no later than 5pm 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)

**The details of the matter being challenged**

1. **C challenges D’s recovery of HIS/HER overpayment of tax credits from HIS/HER Universal Credit (UC) award by way of a lump sum from an underpayment of UC owed to C for the period DATE to DATE accrued as a result of D’s official error in not paying C the Limited Capability for Work and Work Related Activity (“LCWRA”) element to which HE/SHE was entitled from the outset of HIS/HER UC claim in breach of SSWP’s own stated policy.**

***Background facts***

1. The Claimant is … age, family, immigration, housing details etc.
2. The Claimant suffers with... disability details, disability benefits, any capacity issues or other vulnerability?
3. Reason for underpayment, what happened? Dates of ESA claim, date of UC claim, reason for UC claim, why LCWRA element not paid, date DWP accepted it should be etc. Highlight DWP errors. Make sure is clear fits one of the categories in the Overpayment Recovery Guide detailed below.
4. Details of overpayment, what benefit, for what period, was there a repayment arrangement in place? What was it? Had it been agreed with HMRC or DWP? Was it being adhered to?
5. Details of financial hardship and how DWP have been made aware of this.
6. Details of any loss suffered by Claimant as a result of the recovery (i.e. bank charges incurred, phone disconnection fee etc).

**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***

#### Under section 28(1)(b) of the Tax Credit Act 2002 (“TCA”) an, overpayment of tax credits may be treated as if it is a recoverable overpayment of benefit under s.71ZB Social Security Administration Act 1992 (as amended) (“SSAA”) and under 29(4)(b)(i) where notice is provided, recovered under s.71ZC SSAA:

#### *Overpayments*

***28.-*** *(1)* ***Where the amount of a tax credit paid for a tax year to a person or persons exceeds the amount of the tax credit to which he is entitled,*** *or they are jointly entitled, for the tax year (as determined in accordance with the provision made by and by virtue of sections 18 to 21B), the Commissioners may decide that the excess, or any part of it, is to be —*

*(a) repaid to the Commissioners; or*

*(b)* ***treated as if it were an amount recoverable by the Secretary of State under section 71ZB of the Administration Act*** *or (as the case may be) by the relevant Northern Ireland Department under section 69ZB of the Administration (Northern Ireland) Act.* *Recovery of overpayments*

***29.-*** *(4) Where a notice states that this subsection applies in relation to an amount (or part of an amount),* ***it may be recovered—***

*[…]*

*(b)* *by the Secretary of State—*

1. ***by deductions under section 71ZC*** *of the Administration Act (deduction from benefit);*

(Emphasis added)

1. The effect of an overpayment of tax credits being “treated as if it were an amount recoverable by the Secretary of State “ under s. 71ZB SSAA, is that D has the discretion to recover, or not, any overpayment of specified benefits. D may do so by way of a deduction from a benefit prescribed by regulations under s. 71ZC:

***71ZB.*** *– (1) The Secretary of State* ***may recover*** *any amount of the following paid in excess of entitlement …*

1. *universal credit*
2. *jobseeker’s allowance*
3. *employment and support allowance*

*[…]*

***71ZC****. – (1) An amount recoverable from a person under section 71ZB* ***may be recovered by deducting the amount from payments of a prescribed benefit****.*

(Emphasis added)

1. Under reg 3 of the Social Security (Overpayments and Recovery) Regulations 2013 (“**SS (OR) Regs**”) recoverable amounts include “*the amount of any overpayment*” and under reg 2 SS (OR) Regs an overpayment includes an overpayment of tax credits (both by virtue of s.71ZB SSAA and specifically):

“*overpayment” means an amount of—*

*(a) universal credit, jobseeker’s allowance or employment and support allowance which may be recovered by the Secretary of* ***State by virtue of section 71ZB(1) of the Act****;*

*(b)* ***working tax credit or child tax credit which may be recovered under section 29 of the Tax Credits Act 2002*** *as modified by paragraph 10 of the Schedule to the Universal Credit (Transitional Provisions) Regulations 2013*

(Emphasis added)

1. Reg 10 SS (OR) Regs prescribes UC as a benefit from which recovery may be made by deduction for the purpose of s. 71ZC SSAA. Under reg 10 SS (OR) Regs recoverable amounts may, and may also therefore not, be deducted from an ongoing award of UC;

### *Recovery by deduction from benefits*

***10.****—(1) Subject to regulations 11 to 14, the Secretary of State may recover a recoverable amount from a liable person by deduction from the benefits specified in paragraph (2) which are payable to them.*

*(2) Those benefits are—*

*[…]*

*(b) universal credit;*

*[…]*

1. Recovery under reg 10 SS (OR) Regs is subject to limits on the amounts that can be deducted by way of regular deductions under reg. 11(2) SS (OR) Regs. Under 11(8) SS (OR) Regs, D’s discretion is not subject to those limitations where a deduction is made from arrears of benefit; D therefore has the discretion to deduct any amount:

***11.—****(1) The following paragraphs apply where the recoverable amount falls to be recovered by deduction from universal credit payable to the liable person.*

*[…]*

*(8)* ***The limitations in paragraph (2) do not apply where******the deduction falls to be made from any payment of arrears of universal credit*** *other than any arrears caused by the operation of regulation 46 of the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (16) (making of payments which have been suspended).*

(Emphasis added)

**Ground 1: Failure to follow policy**

1. D’s Overpayment Recovery Guide (ORG) [[2]](#footnote-2) confirms D’s discretion where it states arrears “can be” withheld, ie, not ‘shall be’; arrears can also therefore *not* be withheld.

***Recovery from Arrears***

*5.49 Where a debtor with an outstanding overpayment is due arrears of benefit, these arrears* ***can be*** *withheld in full to recover an overpayment or Administrative Penalty unless those arrears arose as a consequence of a benefit award being suspended…*

(Emphasis added)

1. The ORG further specifies how that discretion should be exercised in specific situations “*as a matter of policy*.”

*5.50 Additionally,* ***as a matter of policy arrears are not withheld if the following circumstances apply:***

*• The arrears are for full periods’ benefit that have not been paid on time (this is regardless of whether the arrears are due from the start, middle or end of claim) and the customer is not deceased;*

*• The arrears are for a specific reason and are earmarked for a specific purchase or expenditure. This scenario normally only occurs with recipients of income related benefits in relation to such things childcare costs, or where they are for Universal Credit Housing Costs.*

*•* ***Where a payment is made at a ‘safe rate’ which excludes a particular component of the claim pending verification*** *(e.g. verification of housing costs/rent,* ***LCWRA arrears due from the start of the claim****); then* ***once that component has been verified we would not withhold those arrears against outstanding debts.***

*• Where the arrears specifically only relate to one or both of the previous two payment periods*

*(Emphasis added)*

1. The ORG specifically includes as a matter of policy that arrears will not be withheld where an underpayment is due to “*LCWRA arrears due from the start of the claim*”.
2. In C’s case, the underpayment C was unequivocally “*LCWRA arrears due from the start of the claim*”. By deducting the full amount of the underpayment to offset C’s tax credit overpayment, D has unlawfully failed to follow the policy clearly explained in its own guidance.

**Ground 2: Unlawful fettering of discretion and application of a blanket policy**

1. The ORG makes clear an individual assessment of financial hardship must be undertaken.

*5.71 A Repayment Negotiation Framework which is* ***based on the individual circumstances of the debtor,*** *rather than the size of the debt and repayment period, has been developed. Where a debtor, or their representative, contacts the recovery unit stating that the rate of recovery will cause them, or their family, hardship, all the evidence requested should be provided, and a hardship case can be considered.*

*5.72 The recovery of an overpayment from any person in receipt of benefit is almost certain to cause some hardship and upset for them and their family.* ***It is the level of hardship and upset which is taken into account when considering the application.***

(Emphasis added)

1. The financial hardship caused by the failure to pay the LCWRA element from the outset of Cs claim meant what? UC is a subsistence level benefit, C did not have sufficient income to meet HIS/HER basic expenditure including WHAT and as a result has accrued rent arrears/borrowed money/what? What expectation of the underpayment? D has been made aware of this how?
2. C had a repayment arrangement of £40 per month negotiated with Debt Management on the basis of C’s financial hardship. This payment arrangement was ongoing and C’s circumstances had not changed. D was therefore aware of C’s financial hardship and there is no evidence that this relevant information was taken into account in reaching the decision to offset the full amount of C’s overpayment from the sum due.
3. C remains IN RENT/MORTGAGE arrears and HER/HIS it is a priority for C to reduce this debt to protect HER/HIS home and has been deprived of the opportunity to do so by the failure to pay the UC SHE/HE was entitled to from the outset of HIS/HER UC claim, now compounded by the decision to recover HER/HIS tax credit debt as a lump when a repayment arrangement was already in place.
4. D has provided no information or evidence to suggest any consideration of whether or not to recover C’s tax credit overpayment by way of a lump sum was carried out before reaching its decision to recover the overpayment in this way, and as such an inference can be drawn that D unlawfully failed to exercise the discretion available to it under the law and its own guidance.
5. **FURTHER,** IN EVERY CASE THAT THE CLAIMANT’S ADVISERS ARE AWARE OF, INCLUDING WHERE RECOVERY BY WAY OF LUMP SUM CAUSES SEVERE FINANCIAL HARDSHIP AND THE UNDERPAYMENT DUE TO THE CLAIMANT IS A RESULT OF OFFICIAL ERROR ON THE PART OF D, THE SAME DECISION HAS BEEN REACHED BY D TO RECOVER THE OVERPAYMENT BY WAY OF A LUMP SUM. ***DELETE IF NOT TRUE***
6. **It is unlawful to operate a ‘blanket policy’ when a discretion is available. In *R (S) v Secretary of State for the Home Department* [2007] EWCA Civ 546 the Court of Appeal summarised this principle when it stated:**

***“[a] public authority may not adopt a policy which precludes it from considering individual cases on their merits”.***

**Ground 3: Failure to take relevant facts into account**

1. The Claimant has provided WHAT EVIDENCE OF CIRCUMSTANCES AND FINANCIAL HARDSHIP?
2. The evidence provided by C clearly demonstrates how recovery by way of a lump sum would cause an unacceptable level of “*level of hardship and upset”* including **detriment to HIS/HER health and general wellbeing.**
3. D has provided no details to suggest any consideration was given to the evidence and information provided by C in reaching its decision.
4. **It is therefore reasonable to infer that D did not consider the information and evidence provided by the Claimant showing HIS/HER financial hardship and the detriment to HIS/HER health and general wellbeing in reaching its decision to recover the overpayment by way of a lump sum.**
5. **This failure by D to consider C’s personal situation or to apply its own guidance amounts to a failure to have regard to material facts and any decision reached in consequence of this failure is therefore unlawful.**

**Alternative remedies**

1. **There is no right of appeal against this failure to exercise discretion. Judicial review is therefore the only available remedy.**

**The details of the action D is expected to take**

**D is requested to:**

* **Deliver staff training to ensure staff are fully aware of the policy not to recover as a lump sum when an underpayment is accrued due to failure to pay the LCWRA element from the outset of a UC claim.**
* **Amend its internal policies and guidance and/or deliver staff training to ensure staff are aware of the discretion available under reg 8(11) SS(OR) Regs and its own guidance not to recover as a lump sum and to ensure account is taken of each individual claimant’s personal circumstances when deciding how to recover an overpayment.**
* **Pay C the underpayment due comprised of the LCWRA element to which C has been entitled since the start of HIS/HER UC claim, and reinstate the negotiated repayment arrangement in respect of C’s overpayment to enable C to budget as HE/SHE had planned (in particular by clearing/ reducing his/her rent/mortgage arrears to protect his/her home).**
* **Consider making an ex gratia payment to C for the following additional costs which C has occurred as a result of D’s failure to follow her policy:**
  + **INSERT DETAILS**

**The details of any information sought**

**D should provide any available figures on:**

* **The number of tax credit overpayments not recovered by way of a lump sum when a UC underpayment has accrued due to official error.**

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

* **C’s signed authority**
* **Evidence of hardship?**
* **All other documents available via C’s online 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 HERE

**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 will 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. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/985577/benefit-overpayment-recovery-guide-12-05-21.pdf [↑](#footnote-ref-2)