**This letter challenges**:

* DWP failure to apply the law and follow own guidance
* Misleading DWP guidance.

Please verify then include all relevant dates in your letter.

**Read whole letter carefully** and edit all text in red and/or [square brackets]. **Delete all comments**, return text to black (and not bold), and put your finished letter on headed paper.

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

Delete box before sending

**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

**This letter assumes** (ie, edits needed if not the

case)

* Mixed age UC couple
* C is the older partner with disability
* C has been refused WCA as over PC age and treated as having LCW
* C receives PIP standard rate
* Previous ESA award inc support component awarded after WCA
* C was lead claimant in previous ESA award

Delete box before sending

[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 [full name] **in relation to [HIS/HER] 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 by 4pm on the date at the end of this letter.**

**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 the SSWP’s failure to carry out a work capability assessment (“WCA”) to assess [his/her] capability for work and work-related activity.**

***Background facts***

1. **C is [number] years old, ie, over state pension age. C’s partner (“P”) is [number] years old, ie, under state pension age. C and P are in receipt of universal credit (“UC”) as a ‘mixed age couple’.**
2. **C receives personal independence payment (“PIP”) [standard daily rate and standard mobility] due to [details].**
3. **C was previously in receipt of employment and support allowance (“ESA”) and was accepted as having both limited capability for work and limited capability for work-related activity (ie, [s/he] was in the ‘support’ group). C received ESA with [his/her] partner; with C as the lead claimant. Their claim ended on [date] when C turned pension age.**
4. **C made a claim for State Pension at that time. C and [his/her] partner were unaware that they could make a claim for UC to top up C’s State Pension.**
5. **Having received advice, on [date] C claimed and was awarded UC. This is being paid at [£amount] each month, not including housing costs.**
6. **C has been accepted as having limited capability for work from the start of [his/her] award as he is pension age and in receipt of the PIP standard daily rate.**
7. **C has asked for a WCA referral**. It is now [number] weeks since C’s claim and [s/he] has not been sent a UC50 form to complete and has not been called for **a WCA to determine [his/her] capability for work and work-related activity. C has not been asked to provide sick notes.**
8. C was informed on **[date]**  via [method [eg “[his/her] electronic journal on the universal credit online system”] that [s/he] cannot be referred for a WCA because [s/he] is over State Pension age and the only way to qualify for the Limited Capability for Work and Work-Related Activity (“**LCWRA**”) element is to seek a revision of [his/her] PIP award, as follows:

*“[quote from journal]”*

1. **C is suffering considerable financial hardship. C and [his/her] partner previously received ESA including the support component and C’s need has not changed, however because C did not know they could claim UC and so did not immediately claim, C’s WCA decision has not carried over to their UC claim. C and [his/her] partner’s income has reduced by [£amount] per month as a result.**
2. **Furthermore, there is no evidence or reason to think that C’s health would have improved in any material way since [s/he] was assessed as having LCWRA in respect of [his/her] entitlement to ESA.**

**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 and grounds for judicial review***

1. **Under Reg 19 of the** Universal Credit (Transitional Provisions) Regulations 2014 where a claimant of UC was entitled to ESA immediately prior to claiming UC and had been, in respect of ESA, determined to have LCWRA, then they must be treated as having LCWRA from the outset of their UC claim and that the LCWRA element must be included from the outset. As C was unaware that he should claim UC, while [s/he] had been, in respect of [his/her] ESA, determined to have LCWRA, [S/HE] does not benefit from this provision as he did not claim UC until advised [s/he] was able to do so some months after [his/her] ESA claim ended.

 ***Transition from old style ESA***

***19****.- (1) This regulation applies where–*

*(a) an award of universal credit is made to a claimant who was entitled to old style ESA on the date on which the claim for universal credit was made or treated as made (“the relevant date”); and*

*(b) on or before the relevant date it had been determined that the claimant had limited capability for work or limited capability for work-related activity (within the meaning of Part 1 of the 2007 Act).*

1. **The issue that arises for consideration in the contemplated claim, is whether it is lawful for the Secretary of State to refuse to conduct an assessment under Part V of the Universal Credit Regulations 2013 (“UC Regs”) in respect of a claimant, such as C, who is over pension age and cannot be deemed to have LCWRA under other provisions.**
2. **Such a refusal means that, as D has acknowledged in correspondence, C cannot obtain the LCWRA element within [**his/her**] UC maximum amount unless** [s/he] **obtains the higher rate of the daily living element for PIP.**
3. **C will argue that that it is not lawful because:**
	1. **There is nothing in the regulations which prevents a claimant such as C from being assessed - the regulations clearly provide a discretion to allow [him/her] to be assessed.**
	2. **SSWP guidance ‘Advice for Decision Making: Staff Gude’ (“ADM”) ‘Chapter G2: Limited capability for work’, unequivocally confirms this , and D is under a duty to follow D’s own published policy.**
	3. **The reason communicated for refusing to assess C shows that D considers wrongly that he has no such power, which has resulted in a fettering of that discretion.**
	4. **A blanket policy on when to exercise the discretion, which refused to assess a person aged over pension age would also be a fettering of discretion and in addition would be unlawful age discrimination.**
4. **DWP policy was expressed to Vivid Homes in correspondence dated 15/02/21 from a Complaint Resolution Manager, DWP Complaints Team as follows:**

***“Following a discussion with our policy team, it was confirmed that in cases such as Mr —'s where he forms part of a mixed age couple and is the one over pension age, we can send him for a WCA should he not meet the above criteria [to be treated as having LCWRA] or if he disagrees with our decision.”***

***(Emphasis added)***

**Ground 1: Unlawful fettering of discretion and taking irrelevant factors into account** *Power to carry out an assessment*

1. Provision is made under Reg 40(5) of the UC Regs for a claimant to be *treated as having* LCWRA where:

***40.-***

*[…]*

*(5) A claimant is to be treated as having limited capability for work and work-related activity if any of the circumstances set out in Schedule 9 applies.*

Sch 9 includes:

***Circumstances in which a claimant is to be treated as having limited capability for work and work*-related activity**

*(5).- The claimant has reached the qualifying age for state pension credit and is entitled to attendance allowance, the care component of disability living allowance at the highest rate or the daily living component of personal independence payment at the enhanced rate.*

1. This does not apply to C as C does not currently receive the enhanced rate of PIP. C cannot therefore be *treated as* *having* LCWRA.
2. C is *treated as having* Limited Capability for Work (“**LCW**”) as [s/he] is over State Pension age and in receipt of PIP under Reg 39(6) and Para 6 of Sch 6 of the UC Regs:

***39.-***

*[…]*

 *(6) Subject to paragraph (7), a claimant is to be treated as having limited capability for work if any of the circumstances set out in Schedule 8 applies.*

Schedule 8

***Circumstances in which a claimant is to be treated as having limited capability for work***

*Disabled and over the age for state pension credit*

*6.  The claimant has reached the qualifying age for state pension credit and is entitled to disability living allowance or personal independence payment.*

1. However, those provisions only provide that C is to be treated as having LCW and, given this and the fact that no deeming provision in Sch 9 applies, whether or not C has LCWRA can only be established by a WCA.
2. Under the UC Regs the Secretary of State has the power to carry out an assessment to establish a claimant’s capability for work and work-related activity:

***When an assessment may be carried out***

***41.****—(1) The Secretary of State may carry out an assessment under this Part where—*

*(a) it falls to be determined for the first time whether a claimant has limited capability for work or for work and work-related activity; or*

*(b) there has been a previous determination and the Secretary of State wishes to determine whether there has been a relevant change of circumstances in relation to the claimant’s physical or mental condition or whether that determination was made in ignorance of, or was based on a mistake as to, some material fact,*

1. There is nothing in that provision on its face which suggests the broad discretion conferred by Reg. 41 on whether an assessment can be conducted does not apply to claimants who are over pension age. That a WCA can be carried out for a person aged over pension age is further indicated by reg. 41(2), which provides that no WCA may be carried out for a claimant who is working unless they are in receipt of a specified disability benefit, including Attendance Allowance (a benefit only available for those who have reached state pension age)[[3]](#footnote-3).
2. The refusal of D to exercise his discretion in relation to claimants who have reached State Pension age is to unlawfully fetter the discretion under Reg 41(1)(a) and to do so in consideration of an irrelevant factor ie, age.
3. Further, D confirmed unequivocally in correspondence Vivid Homes, set out above, that it is policy to refer an older partner in a mixed age couple for a WCA where:
* *The claimant cannot be otherwise treated as having LCWRA, or*
* *if the claimant disagrees with the Defendant’s decision to treat him/her as having LCW rather than LCWRA*
1. In C’s case D’s refusal to refer [him/her] for a WCA when [he/she] has made clear [s/he] does not agree with the decision to treat [him/her] as having LCW, unlawfully fails to follow current policy.

**Ground 2: Unlawful failure to follow published policy**

1. **SSWP guidance ‘Advice for Decision Making : Staff Gude’ (“ADM”) ‘Chapter G2: Limited Capability for Work’ was amended in June 2023 to make clear that a WCA may be carried out in respect of a claimant who is over SPC, age and is already treated as having LCW.**

***G1020******A WCA may be carried out when***

*[…]*

*2. there has been a previous determination* ***that the claimant has or is treated as having LCW*** *or LCWRA, and the DM wishes to determine whether*

*2.1 there has been a relevant change of circumstances in the claimant’s physical or mental condition or*

*2.2 the previous determination was made in ignorance of, or based on a mistake as to, some material fact 2 .*

*1 UC Regs, reg 41(1)(a); 2 reg 41(1)(b)*

***Note: If one partner of a couple is over the qualifying age for SPC then that claimant is not precluded from a WCA.***

(Emphasis added)

1. Where published policy exists, there is a public law for duty for decision-makers to follow it, as confirmed by Lord Dyson in *R (Lumba) v SSHD* [2011] UKSC 12 at [26]:

*“a decision-maker must follow his published policy … unless there are good reasons for not doing so.”*

1. We are aware of no ‘good reason’ for SSWP no to follow published policy on this issue. If the reason is that other SSWP guidance is misleading, it is not accepted that this is a ‘good reason’, and it is requested below that that guidance be amended.

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

**The Defendant is requested to:**

* Conduct a work capability assessment for C without further delay. It appears to us at present that no medical examination should be necessary in order to come to a conclusion on C’s LCWRA. [S/he] was assessed as having LCWRA in respect of ESA. There is no reason to expect [his/her] health has improved. The findings from that previous assessment can therefore be relied upon to determine [his/her] LCWRA status for UC.
* Accept that the failure to conduct a WCA up until this point falls well below the level of service that C should be entitled to expect from the DWP and has caused C unnecessary stress and financial hardship and agree to pay C compensation in respect of the same.
* Amend the Defendant’s operational guidance ‘Treated as having Limited Capability for Work’ (V2)[[4]](#footnote-4) and ‘Work Capability Assessments (V22)’[[5]](#footnote-5) to make clear that being treated as having LCW, does not preclude a WCA being carried out to establish whether a claimant has LCWRA where the claimant does not agree with the decision, including where the claimant is over pension age. ‘Work Capability Assessments’ in particular is currently misleading where it states:

***Mixed age couples***

*Where one of a couple is above State Pension age (SPA) and has a health condition or disability, and is submitting medical evidence in support of that condition, a WCA referral should be made* ***unless they may be treated as having:***

***• Limited capability for work (LCW)****; or*

*• Limited capability for work and work-related activity (LCWRA) and day 1 WCA referrals*

(Emphasis added)

It is easy to inaccurately understand this to mean that no WCA referral should be made where a claimant ‘may be treated as having LCW’ including where the claimant may be *treated as having* LCW but in reality *has* LCWRA.

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

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

* **Medical evidence confirming LCWRA**
* **Signed form of authority for C**
* **All other documents available through C’s online UC journal**

**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 and email]**

**Proposed reply date**

We expect a reply promptly and in any event no later than **DATE** (14 days).

**If 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. Note reg. 41(2) does not limit the situations in which a WCA can be carried out for someone who is in receipt of one of the specified benefits - it limits the situations where a WCA can be carried out for a working claimant. [↑](#footnote-ref-3)
4. data.parliament.uk/DepositedPapers/Files/DEP2023-0791/172.\_Treated\_as\_having\_LCW\_V2.0.pdf [↑](#footnote-ref-4)
5. data.parliament.uk/DepositedPapers/Files/DEP2023-0791/190.\_Work\_Capability\_Assessments\_V22.0.pdf [↑](#footnote-ref-5)