**Please read before using this template:**

* *To complete this template:*
	+ replace any text in [square brackets]including where that text is in [CAPSLOCK], then return the text to lower case, without brackets. Look out for all instances of [s/her] [her/his] [her/him]. Consider the claimant’s first name or ‘The Appellant’ as an alternative.
	+ Consider, address and then delete all prompts/comments and the square brackets surrounding them before sending. If you have deleted paragraphs that do not apply in your case, check numbering is still sequential.
* WARNING *After the appeal decision:*
	+ If the appeal is allowed, DWP *may* not accept it and may seek to appeal to the Upper Tribunal (and suspend payment under the First-tier Tribunal decision whilst they do so).
	+ If the appeal is dismissed, then the claimant may wish to seek permission to appeal to the Upper Tribunal and then to appeal to that Tribunal on the grounds the First-tier Tribunal was wrong not to accept the argument.
	+ In either case, advisers can contact CPAG for further support with the appeal by getting in touch with the [Upper Tribunal Project](https://cpag.org.uk/welfare-rights/support-advisers/support-advisers-england-and-wales/support-upper-tribunal-case), or via the [testcases referral mechanism](https://cpag.org.uk/welfare-rights/test-cases/refer-test-case#:~:text=CPAG%20intervenes%20in%20existing%20cases,our%20test%20case%20referral%20form%20.).

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**Please read before using this template:**

* *Only use this template if:*
	+ The claimant was **receiving contributory ESA**, topped up by income-related ESA when they claimed UC.
	+ The claimant received the **2-week run-on of ESA**, and their **contributory ESA** was treated as unearned income for UC from the first day of their UC award.
* *Edits will be needed if:*
	+ The template assumes that the claimant underwent **managed** migration. If the claimant has not undergone managed migration, then edits are needed.
* *What this template does:*
	+ This template sets out a human rights discrimination challenge to the rule which treats a claimant who migrates to UC from ESA that included both income and contribution-based elements as if they had received new style ESA for the whole of the first assessment period. Compared to a claimant who was getting income related ESA only, such a claimant will be worse off in their first assessment period on UC.

**Using this template requires you understand the arguments used in it, and to adjust the wording where that is appropriate for the facts in your client’s case. If you are not confident in doing this, please do not use this template but instead seek advice from** **advice@cpag.org.uk****.**

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| **First-tier Tribunal****(Social Entitlement Chamber)** | **Tribunal Ref: [REFERENCE]** |

**BETWEEN**

|  |  |
| --- | --- |
| **[NAME]** | **Appellant** |
| **-and-** |  |
| **Secretary of State for Work and Pensions** | **Respondent** |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Grounds of Appeal**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Introduction**

1. [NAME] appeals against the decision dated [DATE] which awarded [her/him] Universal Credit (‘UC’), after being managed migrated from Employment and Support Allowance (‘ESA’).
2. [NAME], before migrating to UC, received both income-related ESA (‘irESA’) and contributory ESA (‘cESA’) as [NAME] met the means-tested requirements of irESA (income and capital), but also met the national insurance conditions for cESA.
3. [Name] has not had the full benefit of the two-week run on of ESA that [s/he] would have had if [s/he] had received irESA only. [S/He] contends that this difference in treatment, as compared to a person in receipt of irESA only (ie, who meets the same means tested requirements but who does not also meet the national insurance conditions for cESA), is discriminatory.

**Facts**

1. [NAME] had been receiving ESA, made up of cESA and irESA, alongside [ADD OTHER BENEFITS/TAX CREDITS RECEIVED]. [NAME] has been awarded means tested legacy benefits because [NAME’s] income and capital was below the minimum subsistence level set by the government.
2. [NAME’s] cESA reduced the amount of irESA [s/he] received, to the amount [NAME] would have received in irESA had [NAME] not also been entitled to cESA; the amount [NAME] received in ESA was therefore the same as if [s/he] has not received cESA.
3. [DATE]: The Secretary of State for Work and Pensions (‘SSWP’) issued [NAME] with a migration notice requiring [her/him] to make a claim for UC or to have [her/his] legacy benefit awards ended.
4. [DATE]: [NAME] claimed UC. [PROMPT: It is assumed that this claim took place on or before managed migration deadline for claiming UC. If it was after the deadline but before the final deadline then this should be stated. The document will then need to be edited to refer to reg.46 UC TP Regs 2014, rather than reg.5 Universal Credit (Managed Migration Pilot and Miscellaneous Amendments) Regulations 2019]
5. [NAME]’s ESA award continued unchanged in accordance with the ‘two-week run-on’ provisions.
6. [DATE]: [NAME] no longer received irESA after the end of the two-week run-on period. [NAME]’s cESA, not being a benefit abolished by UC, continued in payment (albeit now by virtue of reg. 1(3) of the ESA Regulations 2013[[1]](#footnote-2) under those regulations rather than the ESA Regulations 2008[[2]](#footnote-3)).
7. [DATE]: [NAME] was awarded UC. The first payment statement uploaded to the UC online account (which is in effect the s.8 SSA 1998[[3]](#footnote-4) decision on [her/his] claim for UC) shows that, in respect of the first assessment period, the UC award took cESA into account as income.
8. [DATE]: [NAME] requested, via his online UC journal, a mandatory reconsideration of the decision dated [DATE].
9. [DATE]: The SSWP refused to revise the decision.
10. [DATE]: [NAME] submitted an appeal.

**Submissions**

1. [NAME], as a person whose ESA award included both irESA and cESA, was unlawfully discriminated against, contrary to art. 14 European Convention on Human Rights (‘ECHR’), read with art. 1 of Protocol 1 in that the amount of UC [sh/e] received for [her/his] first assessment period was less than the amount of UC received by someone whose ESA award was solely irESA. That discrimination arises because [sh/e] is treated as receiving cESA paid under the new rules for the whole of that assessment period.

*The effect of claiming UC on ESA*

1. [NAME] had been receiving ESA paid in accordance with the ESA Regulations 2008. [S/He] had also been receiving [ADD ANY OTHER BENEFITS AND TAX CREDITS RECEIVED, OR IF NONE RECEIVED REMOVE THIS SENTENCE]. [NAME] claimed UC on [DATE].
2. [NAME]’s claim for UC brought into force the abolition of irESA subject to a two-week run-on. This was achieved by means of the following provisions:
	1. Section 33 of the WRA provides for the abolition of various benefits, including irESA;
	2. Section 150(3) WRA provides the power for the SSWP to appoint, by statutory instrument, the day on which various sections of the WRA – including s.33 - come into force. The SSWP exercised this power to make various Commencement Orders.
	3. The day appointed for the coming into force of the provisions abolishing irESA are set out in the relevant Commencement Order. the Commencement Orders specify that the first day in respect of which the claim for UC is made is the day specified for the abolition of irESA;
	4. Regulation 5 of the Universal Credit (Managed Migration Pilot and Miscellaneous Amendments) Regulations 2019 (‘the UC MMPMA Regs’) provides for a two-week run-on of irESA. Reg.5 reads as follows:

***Two week run-on of income-based jobseeker's allowance and income-related employment and support allowance: day appointed for abolition***

***5.—****(1) Subject to paragraph (2) where, in relation to any relevant claim for universal credit, an article (“the specified article”) of any Order made under the powers in section 150(3) of the Welfare Reform Act 2012 provides for the coming into force of the amending provisions, the provision in that article for the day appointed is to be read as though the day appointed was the last day of the period of two weeks beginning with the day after the day mentioned in that provision.*

*(2) […]*

*(3) In this regulation—*

*“amending provisions” has the meaning given by article 2(1) of the No. 9 Order;*

*“the No. 9 Order” means the Welfare Reform Act 2012 (Commencement No 9 and Transitional and Transitory Provision and Commencement No 8 and Savings and Transitional Provisions (Amendment) Order 2013 M1;*

*“relevant claim for universal credit” means a claim for universal credit made on or after 22nd July 2020 including a claim where, under the article in question, the amending provisions come into force despite incorrect information having been given by the claimant, but excluding any claim that is treated as made by a couple in the circumstances referred to in regulation 9(8) (claims for universal credit by members of a couple) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013.*

1. [NAME]’s cESA continued in payment. However, from the end of the run-on period (ie from [DATE] with the previous day, [DATE], being the final day of the run-on) [NAME]’s cESA was no longer paid under the ESA Regs 2008 (cESA paid under those regs is referred to as ‘old-style’ cESA-see reg. 2(1) UC(TP) Regs 2014) and began to be paid under the ESA Regulations 2013 (‘ESA Regs 2013’), cESA paid under these regs is referred to as ‘new-style cESA’- reg. 2(1) UC(TP) Regs 2014). The ESA Regs 2013 apply to a case in accordance with reg.1(3) ESA Regs 2013:

***Citation, commencement and application***

***1.—****(1) These Regulations may be cited as the Employment and Support Allowance Regulations 2013.*

*(2) They come into force on 29th April 2013.*

*(3) They apply in relation to a particular case on any day on which section 33(1)(b) of the Welfare Reform Act 2012 (abolition of income-related employment and support allowance) is in force and applies in relation to that case.*

*The treatment of ESA as income in the first UC assessment period*

1. IrESA runs on for two weeks after the start of the UC award, it is not listed as unearned income in reg.66 Universal Credit Regulations 2013 (‘the UC Regs’) and so does not count as income when calculating the award of UC. This is confirmed in the Advice for Decision Making Guidance (‘ADM’)[[4]](#footnote-5) issued by the SSWP to DWP staff:

***M6132*** *Any payments of the run-on of HB, IS, JSA(IB) or ESA(IR) made as in M6121, M6124 and M6126 are disregarded as income for the purposes of UC. They are not included in the list of benefits regarded as unearned income1. They are not treated as included in that list2 for the purposes of whether there is an overpayment, as the claimant remains entitled during the run-on period (see M6131). […]*

1. CESA continues as old-style cESA during the two-week period in which irESA runs on, then converts to new-style cESA following the two week run-on period.
2. The definition of ESA at reg.2 UC Regs does not cover old-style cESA. As such, old-style cESA is not listed as unearned income at reg.66(1)(b)(ii) UC Regs and so does not count as income for UC.
3. New-style cESA is listed as unearned income at reg.66(1)(b)(ii) UC Regs (read with the definition of ESA at reg.2) and so counts as income for UC.
4. The effect of all that, without more, would be that none of the ESA that [NAME] received during the first 14 days of [her/his] UC award would have counted as income for the purposes of that award. However, reg.8B UC TP Regs treats a UC claimant whose old-style cESA becomes new-style cESA as having been entitled to their award of new-style cESA from the first day of the assessment period:

***Effect on universal credit award of two week run-on of […] income-related employment and support allowance***

***8B.*** *In a case where an award of […] income-related employment and support allowance is to continue for two weeks after the commencement of an award of universal credit by virtue of regulation 8(2A) or 46(1) or by virtue of regulation 5 (two week run-on of income-based jobseeker’s allowance and income-related employment and support allowance: day appointed for abolition) of the Universal Credit (Managed Migration Pilot and Miscellaneous Amendments) Regulations 2019—*

*(a) […]; and*

*(b) in a case where the claimant has become entitled to an award of new style JSA or new style ESA on the termination of an award of income-based jobseeker’s allowance or income-related employment and support allowance, the claimant is to be treated, for the purposes of regulation 73 of the Universal Credit Regulations (unearned income calculated monthly), as if they had been entitled to that award of new style JSA or new style ESA from the first day of the award of universal credit.*

1. This means that an amount equivalent to cESA received for a whole month during the first assessment period is unearned income for UC purposes and thus reduces the UC award during that assessment period. This is confirmed in the ADM:

*M6133 Where a UC claimant becomes entitled to an award of new style JSA or new style ESA on the termination of an award of JSA(IB) or ESA(IR) as in M6126, the claimant is treated as if they were entitled to new style JSA or new style ESA from the first day of entitlement to UC for the purposes of calculating unearned income1.*

*1 UC Regs, reg 73; UC (TP) Regs, reg 8B(b)*

***Example***

*Ranjan is entitled to HB and ESA. Her award of ESA is made up of ESA(Cont) of £74.35 personal allowance and £39.20 support component, as well as ESA(IR) of £17.10 EDP. Ranjan moves to another LA area and claims UC from 3.8.20. Her ESA(IR) amount of £17.10 weekly continues until 16.8.20 and is disregarded for the purposes of her entitlement to UC. Her ESA(Cont) award of £113.55 becomes new style ESA from 17.8.20 However, for the purposes of calculating the UC award, she is treated as having new style ESA as unearned income from 3.8.20.*

*Consequence for [NAME]*

1. The consequence of reg.8B UC TP Regs is that [NAME] was treated as having cESA unearned income of [ADD AMOUNT] during [her/his] first assessment period, all of which was deducted £ for £ from [her/his] UC award.
2. Had reg.8B not existed [NAME] would have had [her/his] UC unearned income calculated based only on the new-style cESA [s/he] actually received during [her/his] first assessment period –the 14 day period in which [s/he] got old style ESA ([ADD WEEKLY AMOUNT] per week so [ADD AMOUNT FOR 2 WEEKS] in total) would have been disregarded. The new-style cESA which [s/he] received from [ADD DATE] would have been taken into account and calculated according to the usual rule in reg. 73(2)-(2A) UC Regs for the monthly calculation of unearned income:

***73****.- (2) Where the period in respect of which a payment of income is made is not a month, an amount is to be calculated as the monthly equivalent, so for example—*

*(a) weekly payments are multiplied by 52 and divided by 12;*

*(b) four weekly payments are multiplied by 13 and divided 12;*

*(c) three monthly payments are multiplied by 4 and divided by 12; and*

*(d) annual payments are divided by 12.*

*(2A) Where the period in respect of which unearned income is paid begins or ends during an assessment period the amount of unearned income for that assessment period is to be calculated as follows—*

|  |  |
| --- | --- |
|  *N x* | *M x 12* |
|  *365* |

*where N is the number of days in respect of which unearned income is paid that fall within the assessment period and M is the monthly amount referred to in paragraph (1) or, as the case may be, the monthly equivalent referred to in paragraph (2).*

1. £598.87 [PROMPT: Figures used are for 2024/25] is the monthly figure arrived at under para (2) for new style ESA for someone in the support group ((£138.20 x 52) ÷ 12). But [NAME]’s new style ESA begins within the assessment period and [s/he] only gets new style ESA for 17 days [PROMPT: Check this and amend calculation as appropriate] that assessment period (so N in para (2A) is 17). So applying the para (2A) formula: 17 x ((£598.87 x 12) ÷ 365)) = £334.71 of new style ESA would be taken into account as income.

*Discrimination*

1. [NAME] submits that being treated as entitled to new-style cESA for the whole of [her/his] first assessment period is discriminatory and contravenes [her/his] rights under art. 14, read with art. 1 of the First Protocol (‘A1P1’), of the ECHR.
2. They provide:

*“Article 14 – Prohibition of discrimination*

*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”*

*“The First Protocol - Article 1 – Protection of property*

*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”*

1. The Human Rights Act 1998 (‘HRA 1998’) provides, so far as relevant:

***3*** *– Interpretation of legislation.*

*(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*

*…*

***6*** *- Acts of public authorities.*

*(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*

*(2) Subsection (1) does not apply to an act if-*

*(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or*

*(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.*

*(3) In this section “public authority” includes-*

*(a) a court or tribunal … ”*

1. The Tribunal must therefore determine whether [NAME] did suffer unlawful discrimination as claimed and grant relief if it is able (that is what s.6(3) requires). In considering the human rights argument put forward by [NAME] in this case the tribunal must deal with the substance of the argument, provide adequate reasons, and explain the reasons for their decision. As set out by UTJ Wright in *PR v SSWP (UC)* [2023] UKUT 290 (AAC) a failure to do so would be an error of law:

***10****. Even ignoring the requirement imposed on the First-tier Tribunal by section 6(1) and (3)(a) of the Human Rights Act 1998 not “to act in a way which is incompatible with a Convention right”, which places a concomitant duty on a First-tier Tribunal when asked to do so to work out whether the decision it makes on an appeal will breach an appellant’s rights under the ECHR, this refusing is woefully inadequate. In truth, it is non-existent on the human rights argument. The duty to provide adequate reasons for the tribunal’s decision involved the tribunal explaining its reasoning on the principal issues that arose on the appeal: see, if it is needed, paragraph [36] of South Bucks DC v Porter (No.2) [2004] UKHL 33; [2004] 1 WLR 1953. There is no doubt that a (if not the) principal issue on the appeal to the tribunal in this case was the human rights argument. The novelty or difficulty of such an argument, and lack of assistance at that stage from the Secretary of State, did not absolve the tribunal from dealing with that argument in substance and explaining why (which is the result of the tribunal’s decision) the argument did not assist the appellant. Indeed, section 6 of the Human Rights Act 1998 placed an additional obligation on the tribunal to deal properly with this argument. The tribunal’s wholesale failure to do so was an abnegation of its judicial duty. I have, accordingly, no hesitation in setting aside the tribunal’s decision as being given in error of law*

1. The test for whether a matter is unlawfully discriminatory has been set out many times by the Courts. Holgate J in *R (TP) v SSWP* [2022] EWHC 123 (Admin)(“TP3”) put it as follows:

*“****100****. A1P1 does not require the creation of any particular system of welfare benefits, nor does it dictate the type or amount of such benefits. But where a state creates a system of welfare benefits it must do so in a manner compatible with Article 14 (Stec v United Kingdom (2006) 43 EHRR 47 at [53] and Lewis J in TP 1 at [55]).*

***101****. In order to determine whether a measure is incompatible with Article 14 it is necessary to address four questions:-*

*(1) Do the circumstances fall within the ambit of one or more Convention rights?*

*(2) Have the claimants been treated less favourably than a class of persons whose situation is “relevantly similar” or who are in an “analogous situation”?*

*(3) Is that difference in treatment on the ground of one of the characteristics listed in Article 14 or an “other status”?*

*(4) Is there an objective and reasonable justification for that difference in treatment?*

*These questions are not rigidly compartmentalised (In re McLaughlin [2018] 1 WLR 4250 at [15]; SC at [37]; Salvato at [24]). Where the first three questions are answered yes, the burden switches to the defendant to justify the difference in treatment.”*

1. Addressing those questions in order:

*(1) Do the circumstances fall within the ambit of one or more Convention rights?*

1. Entitlement to a means tested benefit such as universal credit falls within the ambit of A1P1: , see *Stec v United Kingdom* [2005] ECHR 924; *R (oao RJM) v SSWP* [2008] UKHL 63.

*(2) Have the claimants been treated less favourably than a class of persons whose situation is “relevantly similar” or who are in an “analogous situation”?*

1. Regarding difference in treatment to a person in an analogous situation:
	1. [NAME] has been treated less favourably compared to a person in otherwise exactly the same situation except whose award of ESA before moving to UC consisted only of irESA (ie they did not have a cESA award)
	2. That person, all other circumstances being equal, would have had an amount of ESA exactly equal to [NAME]. The only difference being that [NAME]’s ESA is made up of cESA and irESA whereas person A’s ESA is made up exclusively of irESA.
	3. That person, on claiming UC and having a two-week run-on of ESA, would have no ESA taken into account as income at all during the first assessment period of their UC award – none of the ESA received in respect of the first two weeks of the UC award would be taken into account as income for UC. [NAME], by contrast, would have the cESA he received in respect of the two-week run-on period taken into account as income for UC.

*(3) Is that difference in treatment on the ground of one of the characteristics listed in Article 14 or an “other status”?*

1. The discrimination occurs on the ground of possession of contributory ESA. It is submitted that this is an “other status” for the purposes of A1P1. Alternatively, or additionally, persons who are in receipt of cESA have a more recent and/or substantial history as employed or self-employed persons (sufficient to meet the contribution conditions for cESA) prior to their claims than persons on irESA only. That more recent employment history is also an “other status”.
2. With regard to the first of those statuses (someone getting cESA), the Courts have taken a wide view of “other status”. For example, in *Stevenson v SSWP* [2017] EWCA Civ 2123, at [50] the Court of Appeal accepted that Fiona Stevenson had an “other status” in that she was a person who had claimed income support after a certain date as opposed to before a certain date.
3. With regard to the second of those statuses (someone with a more recent or substantial work history prior to the ESA claim), then the Strasbourg Court has recognised statuses linked to employment in numerous cases. The Registry of the ECtHR has produced a guide on article 14 which deals with these cases at [207-210][[5]](#footnote-6).

*(4) Is there an objective and reasonable justification for that difference in treatment?*

1. Regarding justification:
	1. This is for the SSWP to show. [NAME] wishes to reply to whatever the SSWP puts forward on justification should SSWP do so.
	2. It is important to bear in mind that what has to be justified is not the underlying policy behind the two-week run on. Rather it is the difference in treatment complained of.

*Remedy*

1. In *RR v SSWP* [2019] UKSC 52 the Supreme Court held that a tribunal must, where it is possible to do so, disregard a provision of subordinate legislation which results in a breach of a right under the ECHR.

*27. Although the majority of the Court of Appeal in Carmichael (CA) accepted the arguments of the Secretary of State, in my view Leggatt LJ was entirely right to accept the arguments of the appellant. There is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament and its requirements are clear.*

*[…]*

*32. As that great judge, Lord Bingham of Cornhill, put it in Attorney General’s Reference (No 2 of 2001)[2003] UKHL 68; [2004] 2 AC 72,92, “I cannot accept that it can ever be proper for a court, whose purpose is to uphold, vindicate and apply the law, to act in a manner which a statute (here, section 6 of the Human Rights Act 1998) declares to be unlawful”.*

1. In this case the FTT would be able to avoid the discriminatory outcome by disapplying reg.8B UC TP Regs so that [NAME] is not treated as having new style cESA from the first day of the UC award, such an approach would mean that the amount of new-style cESA to be taken into account would be determined in accordance with reg.73 UC Regs. As the disapplication of reg.8B can avoid the discriminatory outcome of which [NAME] complains the FTT has no alternative but to disapply it.

**Conclusion**

1. The decision under appeal discriminated against [NAME] by taking a full months’ worth of ESA into account as income. Had [NAME] received only irESA, as opposed to both irESA and cESA, [s/he] would not have had any ESA taken into account as income in respect of the two-week run-on period. To remedy the discrimination the tribunal must allow the appeal and disapply reg.8B TP Regs.

[NAME AND ORGANISATION]

[DATE]

1. Employment and Support Allowance Regulations 2013 (SI No. 379) [↑](#footnote-ref-2)
2. Employment and Support Allowance Regulations 2008 (SI No. 794) [↑](#footnote-ref-3)
3. Social Security Act 1998 [↑](#footnote-ref-4)
4. [gov.uk/government/publications/advice-for-decision-making-staff-guide](https://www.gov.uk/government/publications/advice-for-decision-making-staff-guide) [accessed 26/09/24] [↑](#footnote-ref-5)
5. https://ks.echr.coe.int/documents/d/echr-ks/guide\_art\_14\_art\_1\_protocol\_12\_eng [↑](#footnote-ref-6)