**IMPORTANT:** the address for service changed in January 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 Sending

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

* Will be in LCWRA group once assessed
* Has been handing in fit notes
* It is more than 29 days since they claimed UC

***This letter assumes*** that your client(so can be edited if it does not apply):

* receives PIP
* is subject to inappropriate UC conditionality
* has been sanctioned

**Delete this box before sending**

***This letter challenges*** the DWP’s failure to determine a claimant’s capability for work at all or within a reasonable time.

Please **verify and include all relevant** dates in your letter.

Please **read the whole letter carefully** and make any changes needed, in particular any text in red [square brackets]. Delete all comments/prompts instructions and put on headed paper.

In all cases **send your letter for review to** JRProject@CPAG.org.uk before sending to DWP.

**Delete this 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 [her/his] 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 [date] (14 days).

**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 D’s failure to send a UC50 form (capability for work questionnaire) or carry out a work capability assessment (“WCA”) to determine [her/his] capability for work and work-related activity at all or within a reasonable time.**

***Background facts***

1. **[Client details],**
2. **[Household, family]**
3. **[Disability]**
4. **[Other income, housing ETC]**
5. **[PIP award (if no PIP award, delete all sections on EDP and SDP later]**
6. **[C suffers from …. and is unable to work]**
7. **On [date] C claimed and was awarded [UC]. [This] is being paid at £[X] amount each week.**
8. **C has continued to provide regular ‘fit notes’ from [her/his] GP since [her/his] date of claim.**
9. **[C is required to… by her/his claimant commitment]**
10. **[Any sanctions?)**
11. It is now [ how many] weeks since C’s claim, and [she/he] has not been sent a UC50 form to complete and has not been called for a WCA to determine [**her/his] capability for work and work related activity.**
12. [Contact with the DWP and how they have responded]
13. **C is suffering considerable financial hardship and debts of […]**
14. **[Effect on health 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***

**Work Capability Assessment Requirement**

*Universal Credit Regulations 2013 (“****UC Regs****”)*

1. 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. The “*information requirement*” detailed at reg 43(1)(a) takes the form of a UC50, completion of which is not necessarily determinative of whether or not a person has limited capability for work or work-related activity (reg 43(2)).

***43.****—(1) The information required to determine whether a claimant has limited capability for work or for work and work-related activity is—*

*(a) any information relating to the descriptors specified in Schedule 6 or 7 requested by the Secretary of State in the form of a questionnaire; and*

*(b) any additional information that may be requested by the Secretary of State.*

*(2) But* ***where the Secretary of State is satisfied that there is enough information to make the determination without the information mentioned in paragraph (1)(a), that information is not required.***

*(3) Where a claimant fails without a good reason to comply with a request under paragraph (1), the claimant is to be treated as not having limited capability for work or, as the case may be, for work and work-related activity.*

*(4) But paragraph (3) does not apply unless the claimant was sent a further request to provide the information at least 3 weeks after the date of the first request and at least 1 week has passed since the further request was sent.*

(Emphasis added)

*D’s Guidance*

1. WCAs are used to determine how much UC a claimant will receive and their relevant conditionality[[3]](#footnote-3):

***Work Capability Assessment determinations***

*The Work Capability Assessment (WCA) outcome report, together with any other relevant health-related evidence is used to determine if the claimant:*

* + *has Limited Capability for Work*
	+ *has Limited Capability for Work and Work-Related Activity*
	+ *does not have Limited Capability for Work, so is fit for work*

*These in turn determine:*

* + *the claimant’s Labour Market regime*
	+ *whether an additional amount can be included in the Universal Credit award*
	+ *whether a Work Allowance applies*
	+ *if childcare costs are payable in couple claims*
1. Under D’s operational guidance ‘Work capability assessments’(V17)[[4]](#footnote-4) a WCA is normally carried out 29 days into a claimant’s UC claim unless the claimant falls into a one of a number of specified categories[[5]](#footnote-5), which C does not:

***When are claimants referred for a Work Capability Assessment***

*In most cases, claimants are referred to the CHDA at day 29 of their health condition related claim.*

**No additional amounts for ‘disability‘ in UC**

1. Until such time as a claimant has attended a WCA, unless they are transferring from ESA and have already been assessed or fall under a limited number of specific circumstances, they will **not** be treated as having either LCW or LCWRA until they have been assessed by way of a WCA. The Universal Credit Regulations 2013 (“**UC Regs**”) provide:

### *Limited capability for work*

***39.****—(1) A claimant has limited capability for work if—*

*(a) it has been determined that the claimant has limited capability for work on the basis of an assessment under this Part or under Part 4 of the ESA Regulations; or*

*(b) the claimant is to be treated as having limited capability for work (see paragraph (6)).*

***Limited capability for work and work-related activity***

***40.****—(1) A claimant has limited capability for work and work-related activity if—*

*(a) it has been determined that—*

*(i) the claimant has limited capability for work and work-related activity on the basis of an assessment under this Part, or*

*(ii) the claimant has limited capability for work related activity on the basis of an assessment under Part 5 of ESA Regulations; or*

*(b) the claimant is to be treated as having limited capability for work and work-related activity (see paragraph (5)).*

1. This means that until such time as a claimant is assessed as having LCWRA by way of a WCA [she/he] is paid only the UC standard allowance. This is currently £[393.45] [Check all current rates. Edit amount if C is under 25 or is part of a couple] per month (not including housing costs).
2. Following a WCA and finding of LCWRA, this amount is increased by an additional ‘LCWRA element’ of £[416.19] [per month.
3. This is in contrast to the position under legacy benefits, ie, employment and support allowance (“**ESA**”) when a claimant in C’s position would have been paid the assessment rate of ESA of £[90.50] [Edit amount to £71.70 if C is under 25] per week, but also the enhanced disability premium (“**EDP**”) of £[20.85] per week [Edit amount to £29.75 if C is part of a couple] **and** the severe disability premium (“**SDP**”) of £[81.50] [Edit to £163.00 if C is part of a couple where *both* are eligible] per week [Edit if would not have been eligible for SDP] on the basis of [her/his] Personal Independence Payment award. This is equivalent to £[835.68] per calendar month and would have been paid until such time as [she/he] was assessed as having LCWRA.
4. Under legacy benefits the most severely disabled claimants were therefore receiving some additional amounts to meet the costs of their disability from the start of their legacy benefit claim. This is not the position under UC. Neither the SDP nor EDP exist under UC and all, including the most severely disabled, claimants receive £[416.19] per month (£[410.31] less than the position under legacy benefits).
5. The loss of SDP and EDP led the House of Commons Work and Pensions Committee (the Committee) to comment in their report ‘Universal Credit: support for disabled people’:[[6]](#footnote-6)

*40. Disabled people use the Severe and Enhanced Disability Premiums—along with other benefits—for essential living and care costs, in the absence of a paid for carer. Even with this additional money, meeting costs can be a struggle. Removing vital additional support offered by the disability premia from Universal Credit risks disabled people living more isolated lives, relying on unpaid care (including from their own, dependent children), or simply being unable to complete certain basic daily tasks.*

1. Such comments apply to an even greater extent where a disabled person’s UC award is limited to the standard personal allowance while they are waiting for a WCA.

*Policy intention*

1. This lower amount is a result of Government policy to focus financial help on the
“***most severely disabled people***”by payment of a higher LCWRA element than the equivalent support component paid under legacy benefits (ESA). This was confirmed in the November 2011 Equality Impact Assessment: ‘Welfare Reform Bill Universal Credit’[[7]](#footnote-7):

***3.1 Disability***

*27. The definition of disability for the purposes of equality law is now contained in the Equality Act 2010, previously defined by the Disability Discrimination Act 1995 (as amended) (DDA).8 We estimate, under this definition, around 2.9 million of the potential Universal Credit households self-report at least one disabled person. However, only around 60 percent of these households are likely to be entitled to a disability benefit (DLA, ESA or the disability element of WTC).*

*28. For the latter group, the Government will reform the current system of overlapping disability premiums and tax credits and create a simpler system. These are paid at different rates and have different qualifying conditions and different purposes. Within Universal Credit, the Government does not intend to replicate every aspect of this provision. Instead,* ***the Government will recycle the savings from abolishing existing premiums to the most severely disabled people by providing all those in the support group an addition that is substantially higher than the current support component in ESA.***

(Emphasis added)

**Full conditionality pending WCA**

1. Under the Welfare Reform Act 2012 (“**WRA**”) once a UC claimant has attended a WCA and been assessed as having LCWRA, they will not be subject to any work-related requirements:

#####  *Claimants subject to no work-related requirements*

***19****.-(1) The Secretary of State may not impose any work-related requirement on a claimant falling within this section.*

*(2) A claimant falls within this section if—*

*(a) the claimant has limited capability for work and work-related activity,*

1. Unlike ESA legacy benefit provisions, there is however no rule that treats a UC claimant as having LCW while they are waiting for their capability for work to be assessed and they are therefore, as a default position, subject to full UC conditionality.
2. Default UC conditionality is contained in regulations 88, 94-96 and 97 and 95 and 96 of the UC Regs including a requirement to look for work for 35 hours per week and being prepared to take up *any* work involving up to 90 minutes travel each way.

##### *Expected hours*

***88.****—(1) The “expected number of hours per week” in relation to a claimant for the purposes of determining their individual threshold in regulation 90 or for the purposes of regulation 95 or 97 is 35 unless some lesser number of hours applies under paragraph (2).*

*[…]*

##### *Work search requirement - all reasonable action*

##### *95.—(1) A claimant is to be treated as not having complied with a work search requirement to take all reasonable action for the purpose of obtaining paid work in any week unless—*

*(a) either—*

*(i) the time which the claimant spends taking action for the purpose of obtaining paid work is at least the claimant’s expected number of hours per week minus any relevant deductions, or*

*(ii) the Secretary of State is satisfied that the claimant has taken all reasonable action for the purpose of obtaining paid work despite the number of hours that the claimant spends taking such action being lower than the expected number of hours per week; and*

*(b) that action gives the claimant the best prospects of obtaining work.*

##### *[…]*

##### *Work availability requirement - able and willing immediately to take up paid work*

***96.****—(1) Subject to paragraph (2) a claimant is to be treated as not having complied with a work availability requirement if the claimant is not able and willing immediately to attend an interview offered to the claimant in connection with obtaining paid work.*

*[…]*

##### *Work search requirement and work availability requirement - limitations*

***97.-*** *(3) A work search and work availability requirement must be limited to work that is in a location which would normally take the claimant—*

*(a) a maximum of 90 minutes to travel from home to the location; and*

*(b) a maximum of 90 minutes to travel from the location to home.*

1. Failure to comply with UC conditionality can lead to a sanction of a claimant’s UC standard allowance under regs 100-105 UC Regs for up to a maximum of 1095 days, as summarised on the D’s website ‘Universal Credit and you’[[8]](#footnote-8):

*You will be sanctioned for 91 days (13 weeks) for your first higher level sanction and 182 days (26 weeks) for your second and each subsequent higher level sanction in any 364 day period if you:*

* *have to meet the ‘work search requirement’, and you fail to apply for a particular job when told to do so*
* *have to meet the ‘work availability requirement’, and you refuse a job offer*
* *leave work or reduce your hours of work, whether voluntarily or due to ‘misconduct’ (while claiming Universal Credit or just before your claim)*
1. The potential consequences of failing to comply with work search and work availability requirements are therefore extremely high.
2. Provision is made under reg 88(2)(c) and 97(2) UC Regs to reduce the number of expected hours of work search and work availability each week, where “*the claimant has a physical or mental impairment*” to “*the number of hours* ***that the Secretary of State considers is reasonable*** *in light of the impairment*” (emphasis added).
3. Modification of the Claimant Commitment is however dependent on individual work coaches. This was confirmed as a problem in the Committee’s report ‘Universal Credit: support for disabled people’:[[9]](#footnote-9)

*76. The Department told us that* ***Claimant Commitments should reflect individual claimants’ needs and circumstances, irrespective of whether a WCA has already taken place.*** *Work Coaches can, for example, choose not to apply any conditionality while a claimant is waiting for a WCA if they feel that the effects of a health condition are sufficient to prevent a claimant from taking steps towards work.156* ***The NAO, citing the Department’s own research, reported that Work Coaches frequently struggle to identify claimant support needs accurately.*** *This can be because:157*

*a) Work Coaches lack the time, knowledge and ability to identify claimants who need additional support;*

*b) They lack the confidence to apply processes flexibility and to put in place appropriate adjustments;*

*c) They feel overwhelmed by the volume of claimants who report health problems—even though the vast majority of current UC claimants do not have health conditions that would be assessed via the WCA as preventing them from working.158*

*156 Q21 (Esther McVey), Q59 (James Wolfe,*

*157 NAO, Rolling out Universal Credit, p.31,*

*158 See Chapter 2 on UC caseloads.*

(Emphasis added)

1. This led the Committee to recommend that claimants who have provided a Fit Note and are awaiting a WCA be subject to **no** conditionality:

*78. Under the legacy system, claimants awaiting a Work Capability Assessment cannot have conditionality applied to them. This is a vital safeguard. It protects claimants from having to meet conditions that may be unmanageable and inappropriate. It also helps avoid souring the relationship between claimants and their Work Coaches from the outset. But no such safeguard exists under Universal Credit.* ***We recommend that the Department immediately amend its guidance to Work Coaches to state that Universal Credit claimants who are awaiting a Work Capability Assessment and who can present a valid Fit Note stating that they are not able to work should not be subject to any conditionality.*** *[[10]](#footnote-10)*

(Emphasis added)

1. The Committee further strongly recommended in their report ‘Benefit Sanctions’ that claimants waiting for a WCA be exempt from all sanctions.
2. [What is C’s conditionality? Have they been sanctioned? If so, mention here and tie into the above]

 **Grounds for Judicial Review**

**Ground 1: Unreasonable delay**

1. The policy intention in removing the EDP and SDP was to focus financial help on the “*most severely disabled people*” and the loss of the SDP and EDP was to be offset by “*providing all those in the support group an addition that is substantially higher than the current support component in ESA*”.
2. Failure to assess claimants within a reasonable time to establish LCWRA fails to give effect to this policy intention and unlawfully leaves claimants such as C, who have serious health conditions and who go on to be assessed as having LCWRA, with only the most basic amount of UC designed for claimants who have no additional costs arising out of disability as well as exposing them to the risk of sanctions for failing to comply with conditionality requirements which they cannot comply with because of their disability.
3. The stress of inappropriate conditionality and risk of sanctions further affect what can be considered a “*reasonable time*” to assess capability for work and work-related activity and to determine the amount of the award.
4. D is under a duty to consider all claims for benefit within a “*reasonable time*” – *R(C and W) v Secretary of State for Work and Pensions* [2015] EWHC 1607 (Admin).
5. A decision on entitlement is dependent on a WCA finding[[11]](#footnote-11) and that WCA finding is incorporated into the decision on entitlement made under s.8 of the Social Security Act 1998 (“**SSA 1998**”) under which the Secretary of State shall “*decide any claim for a relevant benefit*”.
6. The duty to make a decision within a reasonable time applies to s.8 of the SSA. What counts as a reasonable time depends on all the circumstances, including the impact on the claimant[[12]](#footnote-12).

***Impact on the claimant***

1. C is [level of vulnerability]
2. The delay is causing [C/the family] hardship. Failure to assess C, with the result that C’s LCWRA has not been determined and the [LCWRA element not paid] not paid for [length of time], has left C unable to meet the additional costs of [her/his] health condition and [specify financial hardship]
3. [Any appropriate sanctions? What is the effect of inappropriate conditionality on their health?]

**Ground 2: Unlawful discrimination**

1. The default award of UC is [£X], which represents the assessment rate of [the standard allowance of UC]
2. It is recognised that people with disabilities and health conditions that result in LCWRA have costs arising out of those disabilities and health conditions which require a higher award of benefit.
3. As such, provision is made for payment of a LCRWA element to meet these costs and avoid the discriminatory impact of treating those with and without disabilities and health conditions which result in LCWRA the same.
4. Further, the default requirement under reg. 88(1) taken together with reg. 97 UC Regs is that all claimants are required to undertake 35 hours of work search each week and be available to take up work for the same.
5. Claimants who are waiting for their capability for work to be assessed are treated as **not** having limited capability for work until such time as they are assessed, leaving them open to sanction for failure to meet such inappropriate conditionality.
6. Failure, as in the case of C, to assess an individual’s capability for work within a reasonable time, so as to enable them to receive the additional LCWRA element and have their conditionality requirements modified, amounts to discrimination / failure to make reasonable adjustments in the provision of a service or public function, contrary to the requirements of the Equality Act 2010.
7. Failure to treat claimants with LCWRA differently, by failing to assess whether they have LCWRA at all or within a reasonable time, and as a consequence:
* failing to pay the additional element to which they are entitled, and
* subjecting them to full UC conditionality
* [sanctioning their UC award details as a result of inappropriate conditionality.]

results in them being treated the same as UC claimants who do not have LCWRA.

1. The need to have a claimant’s capability for work assessed before a decision on entitlement to the LCWRA element can be made and conditionality requirements modified may, in general, justify treating the two groups the same until such assessment takes place. However, it cannot be a legitimate justification where, as in C’s case, that assessment is either not carried out at all or not carried out within a reasonable timeframe.

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

**D is requested to:**

* Arrange a work capability assessment for C without further delay.
* Ensure all WCAs are carried out promptly at the end of the expected 29 day waiting period and issue guidance to this effect.
* Modify C’s Claimant Commitment to remove requirements to [Insert requirements] and remove any sanctions imposed unlawfully as a result.
* Accept that C has been discriminated against contrary to the Equality Act 2010 and to pay C damages accordingly.
* Accept that the failure to conduct a WCA for C 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.

**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 D 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,

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/DEP2021-0835/168\_WCA\_outcomes\_V13-0.pdf [↑](#footnote-ref-3)
4. data.parliament.uk/DepositedPapers/Files/DEP2021-0835/172\_Work\_Capability\_Assessments\_V17-0.pdf [↑](#footnote-ref-4)
5. Set out in Sch 8 and 9 Universal Credit Regulations 2013 including for example terminal illness, pregnancy, cancer treatments, and communicable disease. [↑](#footnote-ref-5)
6. publications.parliament.uk/pa/cm201719/cmselect/cmworpen/1770/177004.htm [↑](#footnote-ref-6)
7. assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/220152/eia-universal-credit-wr2011.pdf [↑](#footnote-ref-7)
8. gov.uk/government/publications/universal-credit-and-you/draft-uc-and-you [↑](#footnote-ref-8)
9. publications.parliament.uk/pa/cm201719/cmselect/cmworpen/1770/1770.pdf [↑](#footnote-ref-9)
10. publications.parliament.uk/pa/cm201719/cmselect/cmworpen/1770/1770.pdf [↑](#footnote-ref-10)
11. data.parliament.uk/DepositedPapers/Files/DEP2021-0835/168\_WCA\_outcomes\_V13-0.pdf [↑](#footnote-ref-11)
12. R(C and W) v Secretary of State for Work and Pensions [2015] EWHC 1607 (Admin) [↑](#footnote-ref-12)