**This letter challenges…**

DWP’s incorrect treatment of an overpayment of wages as either earned or unearned income rather than capital when calculating UC entitlement.

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 and put on headed paper.

**Delete Box Before Posting**

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

* Has been overpaid wages from a current or former employer
* Their Universal Credit is reduced as a result of that overpayment.

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

* The claimant has less than £6,000 in capital

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

**Delete Box Before Posting**

**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 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

**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 [her/his] universal credit award. We write in accordance with the Pre-action Protocol for judicial review. Please note that we are requesting your response as soon as possible and in any event no later than by 4pm 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)

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. D’s failure to disregard income received in error from C’s [ex-]employer which was not paid under the terms of C’s employment contract.

***Background facts***

1. [Personal, family, disability, housing details etc…]
2. C’s problems with UC began on [date] when [s/he] received advance notification of that month’s award which was at the much reduced amount of £[XX] compared to the usual amount of £[XX]. C inquired as to the reason for this and was provided with a breakdown and it transpired that the reason for the low award was that [s/he] was being treated as having earnings as a result of an overpayment of wages paid in error by [her/his] [ex-]employer (“**the Payment”**) which C is required to repay to [her/his] [ex-]employer.
3. C queried this via [her/his] online journal and was informed by D that:

[“*the overpayment would be treated as earnings unless c could show that the overpayment had been repaid in full to his/her (ex)employer*”].

1. [C’s further contact with DWP and what has been said – dates and quotes in chronological order]
2. [Impact on C including financial hardship and what has been living on]

**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**

#### Ground 1: Unlawfully treating the payment C has received as income

#### *Treating the payment C has received as “earned income”*

1. Chapter 2 of the Universal Credit Regulations 2013 (“**UC Regs**”) “*provides for the calculation or estimation of a person’s earned income for the purposes of section 8 of the Act (calculation of awards)*” (reg 51).
2. Regulation 52(a) UC Regs defines “earned income” as remuneration derived from a contract or income treated as income under Chapter 2 UC Regs.

*“****Meaning of “earned income”***

 ***52.****“Earned income” means—*

*(a) the remuneration or profits derived from—*

*(i) employment under a contract of service or in an office, including elective office,*

*(ii) a trade, profession or vocation, or*

*(iii) any other paid work; or*

*(b) any income treated as earned income in accordance with this Chapter.”*

1. Under regulation 55 UC Regs taxable earned income from employment under a contract is to be taken into account in calculating the amount of UC a claimant is entitled to.

*“****55.****—(1) This regulation applies for the purposes of calculating earned income from employment under a contract of service or in an office, including elective office (“employed earnings”).*

*(2) Employed earnings comprise any amounts that are general earnings, as defined in section 7(3) of ITEPA, but excluding –*

*[…]“*

[exclusions not relevant to C]

1. **The payment in issue was a payment made in error to C by [her/his] [ex-]employer. This is confirmed by [her/his] [ex-]employer requiring it to be repaid and this fact is not disputed by D. The Payment was not therefore a payment made under C’s contract of employment (ie, C’s contract did not provide it had to be paid) and it was not therefore “***remuneration”* derived from C’s *“employment under a contract”* and was therefore not “*earned income* “as defined by reg 52(a) UC Regs*.*
2. **Under reg 52(b) UC Regs “*earned income*” is further defined to include “*any income treated as earned income in accordance with this Chapter*”. Income “*treated as earned income*” under Chapter 2 of the UC Regs “*Earned Income*” is limited to income defined under:**
* **Reg 55(4)-** benefits to be treated as employed earnings,
* **Reg 55(4A)- repayments of income tax or national insurance contributions,**
* **Reg 62- income a person is treated as having due to the minimum income floor,**
* **Reg 77(3)- income received by a company in an analogous position to a partnership or one person business.**
* **Reg 60- notional earned income where a claimant as deprived themselves of earnings to maximise benefit entitlement**
1. The payment from C’s [ex-]employer does not fall to be under **“*treated as earned income*” under Chapter 2 of the UC Regs and the Payment does not therefore meet the definition of “*earned income*” for reg 52(b).**
2. Neither is the Payment a taxable payment of “*general earnings*” as defined by s.7(3) of the Income Tax (Earnings and Pensions) Act 2003. The Payment is not therefore “e*mployed earnings”* under reg 55(2) UC Regs.
3. The Payment does not meet the definition of “*earned income*” for the purposes of reg 55 as defined by reg 52(a) or (b) and is not taxable “*employed earnings*” under reg 55(2) UC Regs.
4. To treat the Payment as “*earned income*” or “*employed earnings*” unlawfully fails to follow the law as provided in the UC Regs.

#### *Treating the payment C has received as “unearned income”*

1. **Regulation 65 UC Regs provides for “***the calculation of a person’s unearned income for the purposes of section 8 of the Act (calculation of awards)*.”
2. **Regulation 66 specifies the types of income to be taken into account as “***unearned income*” in calculating the amount of UC a claimant is entitled to. The types of unearned income are limited to (set out in full for clarity):

#### *“What is included in unearned income?*

#### *66.—(1) A person’s unearned income is any of their income, including income the person is treated as having by virtue of regulation 74 (notional unearned income), falling within the following descriptions—*

*(a) retirement pension income (see regulation 67) to which the person is entitled, subject to any adjustment to the amount payable in accordance with regulations under section 73 of the Social Security Administration Act 1992 (overlapping benefits);*

*(b) any of the following benefits to which the person is entitled, subject to any adjustment to the amount payable in accordance with regulations under section 73 of the Social Security Administration Act 1992 (overlapping benefits)—*

*(i) jobseeker’s allowance,*

*(ii) employment and support allowance,*

*(iii) carer’s allowance,*

*(iv) […]*

*(v) widowed mother’s allowance,*

*(vi) widowed parent’s allowance,*

*(vii) widow’s pension,*

*(viii) maternity allowance, or*

*(ix) industrial injuries benefit, excluding any increase in that benefit under section 104 or 105 of the Contributions and Benefits Act (increases where constant attendance needed and for exceptionally severe disablement);*

*(c) any benefit, allowance, or other payment which is paid under the law of a country outside the United Kingdom and is analogous to a benefit mentioned in sub-paragraph (b);*

*(d) payments made towards the maintenance of the person by their spouse, civil partner, former spouse or former civil partner under a court order or an agreement for maintenance;*

*(da) foreign state retirement pension;*

*(e) student income (see regulation 68);*

*(f) a payment made under section 2 of the Employment and Training Act 1973 or section 2 of the Enterprise and New Towns (Scotland) Act 1990 which is a substitute for universal credit or is for a person’s living expenses;*

*(g) a payment made by one of the Sports Councils named in section 23(2) of the National Lottery etc. Act 1993 out of sums allocated to it for distribution where the Payment is for the person’s living expenses;*

*(h) a payment received under an insurance policy to insure against—*

*(i) the risk of losing income due to illness, accident or redundancy, or*

*(ii) […]*

*(i) income from an annuity (other than retirement pension income), unless disregarded under regulation 75 (compensation for personal injury);*

*(j) income from a trust, unless disregarded under regulation 75 (compensation for personal injury) or 76 (special schemes for compensation);*

*(k) income that is treated as the yield from a person’s capital by virtue of regulation 72;*

*(l) capital that is treated as income by virtue of regulation 46(3) or (4);*

*(la) PPF periodic payments;*

*(m) income that does not fall within sub-paragraphs (a) to (la) and is taxable under Part 5 of the Income Tax (Trading and Other Income) Act 2005 (miscellaneous income).”*

1. The Payment does not meet the definition of “*unearned income*” for the purposes of reg 66 and should not be taken into account as such.
2. Further, as the payment C has received is not a sum paid regularly or by reference to a period (as paid outside C’s contract of employment, and not for work done in any period) under reg 46(3) UC Regs, the Payment falls to be treated as capital.
3. In Leeves  v Chief Adjudication Officer [1998] EWCA Civ 1706 reported as *R(IS)5/99*) (more recently cited by Judge Wikeley in *MH v SSWP and Rotherham MBC* *(HB)* [2017] UKUT 401 (AAC)) the Court of Appeal held that an overpayment of student finance (paid after the clamant had left education) was not “income” for the purposes of calculating entitlement to benefit since there was “*an immediate obligation to repay*”, as in C’s case.
4. Whether the Claimant in *Leeves* did repay it (and in fact they did not) was not relevant to the decision as to whether or not an overpayment was to be treated as income. The Court of Appeal’s decision is summarised at para 2:

*“Held, allowing the appeal, that:*

*…monies that a claimant was under an immediate obligation to repay did not amount to “income” for the purposes of either the Social Security Contributions and Benefits Act 1992 or the Income Support (General) Regulations 1987;”*

1. Given the “*certain and immediate liability*” for C to repay, the payment C has received is a payment of capital under reg 46(3) UC Regs ie, not income, and as C’s total capital is less than £6,000, falls to immediately be disregarded in the calculation of C’s UC award.
2. Treating the Payment as income (earned or unearned), rather than capital, fails to follow reg 46(3) UC Regs and the Court of Appeal decision in *Leeves*. The Payment meets neither the definition of earned nor unearned income under the UC Regs and there is therefore no lawful basis for the Payment to be taken into account as income when calculating C’s entitlement to UC. The payment should be taken into account as capital[, and immediately disregarded as C’s total capital is less than £6,000].

**Ground 2: Purported requirement for C to repay the Payment to C’s [former] employer**

1. **As above, the payment C has received is not of a type to be taken into account in the calculation of C’s UC award, regardless of whether C repays it in full or in part to [her/his] [ex-]employer.**
2. C’s employer has the right to attempt to claim back the money they have overpaid C and can do so through the County Court if necessary. Whether C repays the money to [**her/his] [ex-]employer** has no bearing on whether or not the Payment was payable under [her/his] contract of employment and is irrelevant to the D in [deciding and paying her/his benefit claim / reviewing her/his benefit award]**.**
3. By D purporting to require C to “*pay the full amount back*” as a condition of making a decision on [her/his application / carrying out a review of her/his award], the D is inappropriately involving himself in a civil dispute between an (ex-)employee and [her/his] [former] employer in favour of C’s [former] employer.
4. **It is unlawful for D to make [deciding c’s claim / conducting a review of C’s award] conditional on something which has no bearing on C’s [claim/award]; to do so is *ultra vires*.**

***Ground 3: Failure to exercise discretion with reference to relevant factors to start an “earnings dispute”***

#### C disputes the accuracy of information supplied to D by the Real Time Information System (“RTI”).

#### Under reg 61(2) UC Regs the RTI is to be used as the basis for calculating earned income, except where under reg 61(3), reg 61(2) does not apply:

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

***61****.-(3) Paragraph (2) does not apply where—*

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

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

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

(Emphasis added)

#### D acknowledges that the Payment was a) paid in error outside C’s employment contract and b) C is immediately liable to repay it. It is clear that the payment [s/he] has received does not meet the definition of employed earnings in reg 55 UC Regs (set out above), and D must therefore under reg 61(3)(b) depart from the RTI (since reg 61(2) does not apply).

#### Under reg 61(4) UC Regs, where reg 6192) does not apply in the circumstances set out under reg 6193), here reg 61(3)(b), the Secretary of State “*must determine the amount of employed earnings*” in accordance with reg 55. As above, under reg 55, C has no employed earnings.

#### D has refused to depart from the RTI until C has repaid the money to [her/his] [ex-]employer stating:

[*“UC are refusing to pay any money to her/him until s/he pays the full amount back and shows them proof that s/he has done so then they will start an earning dispute.*“]

1. Discretion not to depart from the RTI when the amount reported “*fails to reflect the definition of employed earnings in regulation 55 (employed earnings), in some material respect*” does not exist and is ultra vires and D must immediately disregard the Payment.

**Alternative Remedy**

1. **The amount of an award is a matter open to appeal under Schedule 3 of the** Social Security Act 1998 (c. 14) and **in this instance C has also requested a mandatory reconsideration of the decision, however**, given D’s operation of a blanket policy not to go behind the RTI feed and the number of claimants who potentially have inaccurate RTI amounts, the most appropriate remedy to address this wider issue is judicial review rather than appeal.
2. **In addition, C is suffering significant financial hardship and struggling to make ends meet. Given the clear unlawfulness of the failure to follow reg 55 UC Regs and D’s approach to applying reg 61(3) UC Regs, judicial review is the appropriate remedy to provide a speedy resolution.**

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

1. **The Defendant is requested without delay to:**
2. Disregard the Payment received by C from [her/his] [ex-]employer in full and [award/revise] C’s UC from [date].
3. In the alternative, use the power under Reg 61(3) UC Regs to raise an RTI dispute in respect of the Payment received and assess C’s income using the evidence provided by C.
4. Ensure that decision makers are made aware of the definition of earnings under regs 52 and 55 UC Regs and the approach to be taken when a claimant receives a payment in error from an employer when there is an immediate liability to repay (and ensure claims and revisions are delayed by an unlawful requirement to meet that liability and repay any sums received).

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

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

**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 service name, address and email address here]**

**Proposed reply date**

We expect a reply promptly and in any event no later than 4pm on [date] (14 days). **Should we not have received a reply by this time we have the right to 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)