***This letter challenges:***

*i)*the DWP’s failure to treat a claimant who is unable to work due to treatment for cancer as having LCWRA (as per sch 9 UC Regs) regardless of their earnings and

ii) DWP’s operational guidance which says a claimant cannot be treated as having LCWRA until determined to have LCWRA by a WCA.

**Read the whole letter carefully** and edit as appropriate including all text in red and/or [square brackets]. Remove square brackets.

**Delete any comments** / prompts and return all edited text to lower case blackbefore posting.

In all cases send your letter to JRProject@CPAG.org.uk for review before you post it.

**DELETE BOX BEFORE POSTING**

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

* Receives universal credit,
* Is undergoing or about to undergo treatment for cancer, is unable to work as a result and this has been evidenced to the DWP,
* Is employed and is on sick leave,
* Does not receive PIP,
* Is receiving contractual sick pay in excess of the work capability assessment (WCA) earnings threshold,
* DWP say we cannot treat you as having LCWRA due to your earnings or we cannot refer you for a WCA so we cannot treat you as having LCWRA due to your cancer.

***This letters assumes* that your client** (can be edited):

* Has a child so already gets the UC work allowance, if this is not the case, please contact JRProject@cpag.org.uk,
* Has completed and returned a UC50,
* Was on full pay on contracted work hours, but used to earn more as used to work more than contracted.
* Was on full pay, then reduced to half pay as contractual sick pay.

**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 claimant name]**

We are instructed by **[full claimant 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 the date at the end of this letter.**

**Proposed Defendant:** **Secretary of State for Work and Pensions (“D”) or (“SSWP”)**

**Claimant:**  **[full claimant name]** (“**C**”)

**NINo:** [xxxx]

**Address:** [xxxx]

**Date of Birth:** [xx/xx/xx]

**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 s.18 of the Crown Proceedings Act 1947** 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. Crown Office practice direction ‘Crown Proceedings Act 1947’ (December 2023)[[1]](#footnote-1) 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 (“GLD”) 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 SSWP’s:**
	1. **failure to treat [her/him] as having limited capability for work and work-related activity (“LCWRA”) and the consequent failure to award the LCWRA element in the calculation of [her/his] UC award when C is undergoing or recovering from both chemotherapy and radiotherapy to treat [her/his] cancer and [her/his] GP has confirmed that this affects [her/his] ability to work; and**
	2. policy as set out in operational guidance (Treated as having Limited Capability for Work and Work Related Activity and day 1 WCA Referrals’(V21)) of:
		1. never treating claimants receiving treatment for cancer, such as C, as having LCWRA, prior to undertaking a WCA, and
		2. in cases where claimants receiving treatment for cancer have earning over the relevant threshold, never treating them as having LCWRA.

***Background facts [edit whole section ]***

1. **C is of working age and until she was diagnosed with cancer, worked [number] hours per week for [employer].**
2. **C is [family details].**
3. **C has had a UC award for [number] years, that includes, the standard element, [a housing costs element, and one child element for …]. [C is already in receipt of a work allowance as [s/he] is responsible for a child.]**
4. **C does not receive Personal Independence Payments (“PIP”).**
5. **C was diagnosed with cancer on [date]. C’s chemotherapy treatment started on [date] and was projected to last for [number] months, followed by [a period of rest, then surgery, then radiotherapy treatment. Recovery from the debilitating effects of this combined treatment is expected to last for most of 2025.]**
6. **On [date] C stopped work and provided D with a Fit Note from [her/his] GP that was dated for [number] months and explained that [s/he] was undergoing cancer treatment and unable to work. [s/he] has supplied continuous Fit Notes ever since, confirming that this situation has not changed.**
7. **C was in receipt of full contractual sick pay for [her/his] first [number] months of sick leave of [amount], until [date]. [This will then be followed by three months at half pay.]**
8. **Having not been treated as having LCWRA further to [her/his] request via [her/his] fit note, C placed a note on [her/his] UC Journal, on [date] specifically requesting that [s/he] be placed on the Work Capability Pathway and be sent a UC50 form so that [s/he] could evidence [her/his] cancer treatment.**
9. **SSWP told C [how] that [s/he] could not be sent on a Work Capability pathway because [s/he] ‘had earnings over the threshold and no PIP is in payment’. C has not been ‘treated as having’ LCWRA.**
10. **C is struggling to support [her/his family on her/his contractual sick pay, as it is only based on her/his contracted part-time hours and has now reduced to half pay.] C’s UC award would be increased if C was awarded the LCWRA element and this would go some way towards making up the shortfall in the family’s income caused by C not being able to work due to [her/his] cancer.**

**Note on D’s duty of candour**

1. As SSWP 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 for inspection, as part of the response to this letter.

***Legal background***

1. C should be treated as having LCWRA under reg 40(5) and para 3 sch 9 Universal Credit Regulations 2013 (“**UC Regs**”) and is entitled to the LCWRA element under regs 27 and 28(2)(b) 3 months from [date] **when [s/he] made a request for the LCWRA element by providing D with a Fit Note from [her/his] GP that was dated for [number] months and explained that [s/he] would be undergoing cancer treatment and is unable to work, as follows.**

*Universal Credit Regulations 2013*

1. Under regulations 27 and 28 **Universal Credit Regulations 2013 (“UC Regs”)** a claimant who is treated as having LCWRA will after 3 months beginning with the date on which the claimant applies for the LCWRA element to be included in their award or provides medical evidence, have an additional LCWRA amount included in their UC award:

***27.— (1) An award of universal credit is to include an amount in respect of the fact that a claimant has limited capability for work and work-related activity (“the LCWRA element”).***

*(2) The amount of that element is given in the table in regulation 36.*

***(3) Whether a claimant has limited capability for work and work-related activity is determined in accordance with Part 5.***

*[…]*

***28****.—(1) An award of universal credit is not to include the LCWRA element until the beginning of the assessment period that follows the assessment period in which the relevant period ends.*

***(2) The relevant period is the period of three months beginning with—***

***(a) if regulation 41(2) applies (claimant with monthly earnings equal to or above the relevant threshold) the date on which the award of universal credit commences or, if later, the date on which the* *claimant applies for the LCWRA element to be included in the award****; or*

***(b) in any other case, the first day on which the claimant provides evidence of their having limited capability for work in accordance with the Medical Evidence Regulations****.*

1. **Under reg 41(2) SSWP ‘may not carry out an assessment’ if a claimant has earnings above the relevant threshold (16 x national minimum wage).**  However, reg 41(2) confirms that, in cases where an assessment may not carry out an assessment, it does not disapply the ‘treated as’ provisions under reg 40(5):

***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,*

*but subject to paragraphs (2) to (4)*

*(2) If the claimant has earnings that are equal to or exceed the relevant threshold, the Secretary of State may not carry out an assessment under this Part unless—*

*(a) the claimant is entitled to [relevant disability benefits]; or*

*(b) the assessment is for the purposes of reviewing a previous determination that a claimant has limited capability for work or for work and work-related activity that was made on the basis of an assessment under this Part or under Part 4 or 5 of the ESA Regulations,*

*and in a case where no assessment may be carried out by virtue of this paragraph, the claimant is to be treated as not having limited capability for work* ***unless they are treated as having limited capability for work or for work and work-related activity by virtue of regulation 39(6) or 40(5).***

(Emphasis added)

1. In the alternative, and producing the same relevant date to start the 3-month waiting period, **reg 41(2) UC Regs does not apply to C as follows.**
2. **Under reg 41(2) SSWP ‘may not carry out an assessment’ if a claimant has earnings above the relevant threshold (16 x national minimum wage). Reg 40(2) defines ‘an assessment’ as including to determine whether “***at least one of the descriptors set out in Schedule 7 applies to the claimant*”. **Reg 41(2) does not therefore apply for the purpose of reg 28(2)(a) in C’s case, as C does not require an assessment as defined by reg 40(2) as** C is already treated as having LCWRA under reg 40(5) UC Regs (more below). The relevant date under 28(2)(b) is also [date] when C provided a fit note showing [her/his] cancer diagnosis and treatment.
3. **Under regulation 40 of the UC Regs a claimant who is** treated *as* havingLCWRA under Schedule 9, has LCWRA.

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

*(a) it has been determined that—*

*[…]*

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

*[…]*

*(5) Subject to paragraph (6),****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.***

*(6) Where the circumstances set out in paragraph 4 of Schedule 9 apply, a claimant may only be treated as having limited capability for work and work-related activity if the claimant does not have limited capability for work and work-related activity as determined in accordance with an assessment under this Part.*

(Emphasis added)

1. Under Schedule 9 **UC Regs,** a claimant who is undergoing or recovering from treatment for cancer is to be treated as having LCWRA where the Secretary of State is satisfied that they should be treated as having LCWRA:

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

### *Receiving treatment for cancer*

***9****- (3)****.****The claimant is—*

*(a) receiving treatment for cancer by way of chemotherapy or radiotherapy;*

*(b) likely to receive such treatment within 6 months after the date of the determination of capability for work and work-related activity; or*

*(c) recovering from such treatment,*

*and the Secretary of State is satisfied that the claimant should be treated as having limited capability for work and work-related activity.”*

1. **SSWP’s guidance: Advice for Decision Making (“ADM”)** Chapter G3: ‘Limited capability for work and work–related activity’[[3]](#footnote-3) confirms:
* the decision maker must decide whether a claimant is to *be treated as* having LCWRA prior to, or without, a WCA on the basis of available medical evidence, information provided by their health care provider, and the impact of the claimant’s ability to work (ie, whether *‘the Secretary of State is satisfied’)*
* the presumption will be that claimants undergoing cancer treatments will have, and therefore should be treated as having, LCWRA.

**Where it states:**

*“****G3005******Certain claimants can be treated as having LCWRA and do not have to undergo the WCA.*** *This is where the claimant:*

*[…]*

***3.*** *is*

***3.1*** *receiving or*

***3.2*** *likely to receive or*

***3.3*** *recovering from*

*treatment for cancer by way of chemotherapy or radiotherapy* (see G3015) […]

***1*** *UC Regs… Sch 9…* ***4*** *para 3*

***Cancer treatment***

***G3015*** *A claimant can be treated as having LCWRA if*1

*1. they are*

*1.1 receiving treatment for cancer by way of chemotherapy or radiotherapy* ***or***

*1.2 likely to receive treatment as in 1.1 within six months after the date of the LCWRA determination* ***or***

*1.3 recovering from treatment as in 1.1* ***and***

***2. the DM is satisfied that the claimant should be treated as having LCW and LCWRA****.*

*1 UC Regs, Sch 9, para 3*

***G3016*** *The claimant is asked in the questionnaire (form UC50) to ensure that their* ***HCP completes page 20 of the form, giving details of the diagnosis, treatment including how long it is likely to last, and the expected recovery period, as well as an opinion on the effects on the claimant’s ability to work.*** *The claimant is asked to complete the form as normal if other health conditions are present.*

***G3017*** *The DM should* ***take into account the debilitating effects of the treatment*** *in G3015* ***1****. when considering whether the claimant should be treated as having LCWRA.* ***The presumption is that claimants who fall within G3015 1. will be treated as having LCWRA, where the cancer treatment has work limiting side effects, and those effects are likely to limit all forms of work.”***

 (Emphasis added)

1. SSWP’s operational guidance ‘Work Capability Assessment Outcomes’ (V21)[[4]](#footnote-4) confirms that a WCA is not necessary to treat a claimant as having LCWRA (and *has* LCWRA if treated as having LCWRA):

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

*A claimant has limited capability for work and work-related activity (LCWRA) when their capability for work and work-related activity is limited by their physical or mental condition and it is not reasonable to require them to undertake work-related activity.*

***A claimant has LCWRA when either of the following apply:***

*• it is determined from the WCA*

*•* ***they are treated as having LCWRA****”*

 (Emphasis added)

*Effect of being treated as having LCWRA*

1. Having LCWRA, including being treated as having LCWRA (as above), affects the amount of UC C is entitled to **while C is off work due to cancer treatment and recovery.**
2. **Under regs 27 and 28 UC Regs after 3 months beginning on the date C provided medical evidence to request the LCWRA element, the LCWRA element must be included in [her/his] award.**

*Effect of not being treated as having LCWRA*

1. A claimant for whom evidence of cancer treatment and effect on ability to work has been provided to DWP satisfies both: **i)** the requirements in the UC Regs as someone to be treated as having LCWRA because they are undergoing treatment for cancer; and **ii)** the requirements in DWP’s guidance of having provided evidence of cancer treatment and its effect on their ability to work. In circumstances where DWP have failed to act on the evidence provided, the claimant is, in practice, left in the same position as someone who is not undergoing treatment for cancer and must wait to be assessed (if it is possible to assess them) by way of a WCA to determine whether they actually have LCWRA. Until such time as they are assessed, they will receive only the standard UC allowance (not including housing costs or other elements).

**Grounds for Judicial Review**

**Ground 1: Failure to follow the law and own ADM guidance**

1. The law and ADM are clear. A UC claimant undergoing treatment for cancer can be, and the presumption is will be, immediately treated as having LCWRA.
2. Further, the ADM is clear that a WCA is not necessary to treata claimant as having LCWRA when that claimant is undergoing cancer treatment.
3. In this case, C has not been treated as having LCWRA, in clear breach of the law and the SSWP’s own guidance.

**Ground 2: Failure to take account of relevant evidence**

1. Continuous Fit Notes have been provided to SSWP by C since [date]stating clearly that C is undergoing treatment for cancer [and C has completed and returned a UC50 to D].
2. While SSWP is correct that ‘**no referral to a Work Capability Pathway could be made’, this does not prevent C from being treated under reg 40(5) and sch 9 as being treated as having LCWRA, and does not affect [her/his] eligibility for the LCWRA element under regs 27 and 28 UC Regs.** C’s case should have been referred to a decision-maker.
3. Failure to treat C as having LCWRA when relevant evidence has been provided and simply informing C that **no referral to a Work Capability Pathway could be made due to [her/his] earnings and lack of PIP award,** suggests SSWP has failed to take into account the provisions of her own guidance when calculating C’s UC award.

**Ground 3: *Ultra vires* operational guidance**

1. **Under the SSWP’s operational guidance** **‘**Treated as having Limited Capability for Work and Work Related Activity and day 1 WCA Referrals’(V21)[[5]](#footnote-5) claimants who are undergoing treatment for cancer are **never** treated as having LCWRA:

***Claimants who may have LCWRA and who can be referred for a Work Capability Assessment at day 1***

*Claimants who provide medical evidence for having one of the conditions, or are receiving one of the treatments, in the following list be referred for a WCA from day 1 – which is the day they first tell us about having the condition or receiving the treatment:*

*[…]*

*• is awaiting, receiving or recovering from treatment for cancer by way of radiotherapy, chemotherapy or immunotherapy (including biological therapies or hormonal therapies)*

***These claimants remain in a conditionality regime based on their individual circumstances until a decision is made based on the outcome of their WCA.***

*(Emphasis added)*

1. The list under “Claimants who can be treated as having LCWRA” does not include claimants undergoing treatment for cancer (nor pregnant claimants, who also appear in Schedule 9).
2. If ‘*a decision is made based on the outcome of their WCA*’ claimants will have been assessed as having LCWRA and will not need to be treated as having LCWRA under reg 40(5). The effect of SSWP’s policy to never treat claimants undergoing treatment for cancer as having LCWRA and in all cases to require a day 1 WCA referral and to keep claimants who are undergoing treatment for cancer *“in a conditionality regime based on their individual circumstances’* is to wholly negate para 3 sch 9 UC Regs.
3. This guidance unlawfully fetters SSWP’s discretion under sch 9 para 3 UC Regs under which a claimant will be treated as having LCWRA where SSWP is “*satisfied that the claimant should be treated as having limited capability for work and work-related activity*” as it never allows SSWP to be satisfied prior to a WCA, or in circumstances like C’s *ever*, regardless of the claimant’s individual circumstances.
4. This guidance creates a barrier to the LCWRA element for claimants with earnings which is not contained in the legislation. To require claimants undergoing treatment for cancer to have their capability for work ‘assessed’ rather than treating them as having LCWRA means that claimants who are undergoing treatment for cancer and receiving sick pay from their employer above the relevant threshold are excluded from the LCWRA element as they fall foul of reg 41(2) UC Regs regardless of reg 40(5) which treats them as having LCWRA and the provision within 41(2) that claimants who are treated as having limited capability for work or for work and work-related activity by virtue of regulation 39(6) or 40(5) are **not** treated as **not** having LCWRA. This exclusion is not provided under the legislation and is *ultra vires*.
5. **SSWP’s operational guidance ‘Relevant periods for limited capability for work and work related activity’(V6)**[[6]](#footnote-6) **also implies that claimants who are treated as having LCWRA “**must also meet the Eligibility criteria for Work Capability Assessment referral”:

*“When does the relevant period start?*

*For an employed claimant who has earnings which are equal to (or greater than) the monthly earnings threshold, the relevant period starts:*

*• from the date the award starts, or*

*• if later - the date the person applies for the additional amount for having LCWRA.*

***They must also meet the Eligibility criteria for Work Capability Assessment referral”***

(Emphasis added)

1. The law is clear that a claimant who is treated as having LCWRA under reg 40(5) does not require a referral for a Work Capability Assessment, where this is used to mean an assessment as defined by reg 40(2) UC Regs. Guidance that s**tates that ‘[t]***hey must also meet the Eligibility criteria for Work Capability Assessment referral”* fetters SSWP’s discretion under sch 9 para 3 and is *ultra vires* the legislative framework.
2. This guidance does not reflect the law. In *R (Timson) v SSWP* [2022] EWHC 2392 (Admin) the High Court found Third Party Deduction (TPD) guidance was unlawful because, read as a whole, it purported to provide a full account of the legal position, but through misstatement or omission, presented a misleading picture of it because it did not make clear that claimants should be offered the opportunity to make representations to the decision-maker before a TPD was imposed (para. 114). Analogously in this case, D’s guidance, through misstatement does not reflect the discretion under para 3 sch 9 UC regs to treat claimants undergoing treatment for cancer as having LCWRA when they are undergoing treatment for cancer but do not meet the eligibility criteria for Work Capability Assessment referral.

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

**D is requested to:**

* Treat C as having LCWRA and apply include the element in C’s UC award from three months from the time that C first provided medical evidence / applied for the LCWRA element.
* Accept that the failure to treat C as having LCWRA 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 at a time when C is already having to cope with a cancer diagnosis and treatment and agree to pay C compensation in respect of the same.
* Confirm that, within 1 month of the substantive response to this letter, D will review and update her operational guidance (including, in particular, Treated as having Limited Capability for Work and Work Related Activity and day 1 WCA Referrals’(V21)) so as to cease her unlawful policy, and provide an update to C’s representative on the same

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

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

* **Medical evidence confirming illness and prognosis and effect on ability to work;**
* **Signed form of authority for C; and**
* **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 mechanisms.**

**The address for reply and service of court documents**

[Adviser name,

Advice agency address

Adviser email address]

**Proposed reply date**

We expect a reply promptly and, in any event, no later than [date] (7 days). This is less than the usual 14 days. However, we consider this shortened timeframe to be entirely appropriate given (a) the delay already experienced; (b) the lack of complexity of the issue, and (c) the effect on C who is already coping with the cancer diagnosis and treatment.

If you consider that you require 14 days from the date of this letter to reply, please immediately inform us in writing, giving full reasons. Should we not have received such a request for further time nor a substantive reply by the given deadline 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/preview [↑](#footnote-ref-1)
2. gov.uk/government/organisations/government-legal-department [↑](#footnote-ref-2)
3. [assets.publishing.service.gov.uk/media/67f671e2e3c60873d6c90dde/adm\_g3.pdf](file:///C%3A%5CUsers%5Cjstrode%5CAppData%5CLocal%5CMicrosoft%5CWindows%5CINetCache%5CContent.Outlook%5CUGDTBDTA%5Cassets.publishing.service.gov.uk%5Cmedia%5C67f671e2e3c60873d6c90dde%5Cadm_g3.pdf) [↑](#footnote-ref-3)
4. p.3, <https://data.parliament.uk/DepositedPapers/Files/DEP2024-0673/197_Work_Capability_Assessment_outcomes_V21.0.pdf>

 [↑](#footnote-ref-4)
5. data.parliament.uk/DepositedPapers/Files/DEP2024-0673/197\_Work\_Capability\_Assessment\_outcomes\_V21.0.pdf [↑](#footnote-ref-5)
6. <https://data.parliament.uk/DepositedPapers/Files/DEP2024-0673/144_Relevant_periods_for_LCWRA_V6.0.pdf> [↑](#footnote-ref-6)