**IMPORTANT:** the address for service changed in February 2024, as below.

Please send your letter by post to DWP and by email to the Treasury Solicitor.

Please seek advice from JRProject@CPAG.org.uk if no response is received within 14 days, or consider referring to a solicitor to issue judicial review proceedings, see [this CPAG page](https://cpag.org.uk/welfare-rights/support-advisers/support-advisers-england-and-wales/support-judicial-review-process/pursuing-court-and) for more information.

**Delete Box Before Posting**

This template letter assumes the following and edits are needed if any do not apply:

* In receipt of PIP daily living and mobility enhanced rates
* Has an appointee
* In non-advanced education
* Aged 20 when course started (must have been aged 19 or over when enrolled or accepted on course to use this letter)
* Now aged 21
* Has sought a mandatory reconsideration which has been refused (if this is the case, also appeal and detail that you have done so)

**Read whole letter carefully and edit all text in [square brackets]. Check comments.**

**Delete all comments and 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 [NAME] in relation to [her/his] Universal Credit (‘**UC’**) claim. 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).

**The proposed claimant**

Name: (‘**C**’)

NINo:

Address:

DoB:

**C’s appointee**

Name:

NINo:

Address:

**The proposed defendant**

The Secretary of State for Work and Pensions (“**D**”)(“**SSWP**”)

**The details of any Interested Parties**

We are aware of no interested parties.

**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 decision, dated [date] (and the subsequent mandatory reconsideration notice dated [date]), refusing [her/him] UC from [date]. D refused the claim on the ground that C was receiving education. C challenges this on the basis that D has, in refusing the claim on the ground that [s/he] was receiving education, failed to properly exercise her discretion.

**The Issue**

**Background facts**

1. C is aged [21] and receives the enhanced rate of the Daily Living Component (‘**EDL’**) and enhanced rate of the Mobility Component (‘**EM’**) of Personal Independence Payment (‘**PIP’**). C is [details of disability and impact on C’s abilities].
2. **[date] –** C started [what level course for how many hours per week]. C was [age (over 19)] when [s/he] started the course.
3. **[date]** – C’s appointee claimed UC on behalf of C, at the time of the claim C was aged [age].
4. **[date]** - C submitted a medical certificate (‘**fit note’**) and asked to be referred for a work capability assessment (‘**WCA’**) to determine whether C has limited capability for work (‘**LCW’**).
5. **[date]** – a note in C’s UC online journal, added by ‘an agent’, stated that the claim has been ‘closed’ because C is in education.
6. **[date]** – C’s appointee requested a revision of the decision dated [date].
7. **[date]** – D decided not to revise the decision of [date] and issued a mandatory reconsideration notice (‘**MRN**’) notifying C of this. In the MRN D stated:
	1. C is enrolled in non-advanced education;
	2. C was not a qualifying young person when [her/his] course began;
	3. C is not in receipt of maintenance loans;
	4. C is in the intensive work search category;
	5. The exceptions in reg 14 of the Universal Credit Regulations 2013 (‘**UC Regs**’) do not apply.
8. [any further actions, claims, correspondence, decisions 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.

**Summary of legal issue**

1. Below, we set out the structure of the legislation relevant to the issue in this case. It produces the peculiar result that C’s entitlement to UC turns essentially on the exercise by D of the discretion D has in determining the level of work search and work availability requirements to be imposed on C. That is because of the rule which states C will not be regarded as receiving education if [her/his] course of study if compatible with [her/his] work search requirements (reg. 12(4) UC Regs). That being the case, D’s proper exercise of this discretion is of vital importance: getting it wrong leads not only (as in a typical case) to the claimant having to do work search they should not have to do or risking a sanction but actually to a denial of UC entitlement altogether. In this case D’s MRN demonstrates a failure to consider C’s work search requirements at all.

**Legal issue explained**

*Receiving education*

1. One of the basic conditions of entitlement for UC is that a claimant must not be receiving education (s.4(1)(d) Welfare Reform Act 2012 (‘**WRA’**)).
2. The UC Regs are made under the WRA and reg 12 UC Regs defines ‘receiving education’ for the purposes of s.4(1)(d) WRA. The relevant parts of the regulation are as follows:

***Meaning of “receiving education”***

***12.****— (1) This regulation applies for the basic condition in section 4(1)(d) of the Act (not receiving education).*

*(1A) A qualifying young person is to be treated as receiving education, unless the person is participating in a traineeship relevant training scheme.*

*(1B) […]*

*(2) Except in circumstances where paragraph (1A) applies “receiving education” means—*

*(a) undertaking a full-time course of advanced education; or*

*(b) undertaking any other full-time course of study or training at an educational establishment for which a student loan or grant is provided for the person's maintenance.*

*(3) In paragraph (2)(a) “course of advanced education” means—*

*(a) a course of study leading to—*

*(i) a postgraduate degree or comparable qualification,*

*(ii) a first degree or comparable qualification,*

*(iii) a diploma of higher education,*

*(iv) a higher national diploma; or*

*(b) any other course of study which is of a standard above advanced GNVQ or equivalent, including a course which is of a standard above a general certificate of education (advanced level), or above a Scottish national qualification (higher or advanced higher).*

***(4) A claimant who is not a qualifying young person and is not undertaking a course described in paragraph (2) is nevertheless to be treated as receiving education if the claimant is undertaking a course of study or training that is not compatible with any work-related requirement imposed on the claimant by the Secretary of State.***

(Emphasis added.)

1. A qualifying young person is defined by reg 5 UC Regs as:

*5.—(1) A person who has reached the age of 16 but not the age of 20 is a qualifying young person for the purposes of Part 1 of the Act and these Regulations—*

*(a) up to, but not including, the 1st September following their 16th birthday; and*

*(b) up to, but not including, the 1st September following their 19th birthday, if they are enrolled on, or accepted for, approved training or a course of education—*

*(i) which is not a course of advanced education,*

*(ii) which is provided at a school or college or provided elsewhere but approved by the Secretary of State, and*

*(iii) where the average time spent during term time in receiving tuition, engaging in practical work or supervised study or taking examinations exceeds 12 hours per week.*

*(2) Where the young person is aged 19, they must have started the education or training or been enrolled on or accepted for it before reaching that age.*

(Emphasis added.)

1. At the date of the decision C was:
	1. Aged [years] and had started his course aged [years] (over 19) and so was not a qualifying young person (as defined at reg.5 UC Regs), this means that [s/he] could not be treated as receiving education under reg.12(1A) UC Regs;
	2. Undertaking non-advanced education and so does not fall into the definition of ‘receiving education’ in reg.12(2)(a) UC Regs (as C’s course does not meet the definition of ‘*advanced education*’ under reg 12(3) UC Regs); and
	3. Not in receipt of any student loan or grant for [her/his] maintenance and so does not fall into the definition of ‘receiving education’ in reg.12(2)(b) UC Regs.
2. As a result, whether or not C is entitled to UC comes down to reg.12(4) UC Regs ie, whether or not C is undertaking a course that is not compatible with any work-related requirement imposed by D.
3. It is to be noted that reg.14 UC Regs has no relevance to this case. C is not ‘receiving education’ as defined in reg.12 UC Regs, so there is no need for [her/him] to be exempted from the requirement not to be receiving education under reg.14 UC Regs.

*Conditionality*

1. C falls into the all work-related requirements conditionality group under s.22 WRA. C has provided a fit note and asked to be assessed for LCW. Nonetheless, until such time as D assesses [her/him] as having LCW, [s/he] remains in the all work-related requirements conditionality group.
2. For as long as C remains in the all work-related requirements conditionality group D must, except in prescribed circumstances – set out in regs. 98 & 99 UC Regs, impose a work search requirement and a work availability requirement and may impose a work-focused interview requirement and a work preparation requirement.
3. Regulations 88 and 97 UC Regs however provide that these requirements be limited where the claimant has a physical or mental impairment:

***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).*

*(2).- [****…****]*

***c) where the claimant has a physical or mental impairment, the number of hours that the Secretary of State considers is reasonable in light of the impairment.***

***97.****—(1) Paragraphs (2) to (5) set out the limitations on a work search requirement and a work availability requirement.*

***(2) In the case of a claimant*** *who is a relevant carer or a responsible carer or* ***who has a physical or mental impairment, a work search and work availability requirement******must be limited to the number of hours that is determined to be the claimant's expected number of hours per week in accordance with regulation 88.***

1. Under reg 88 and 97 UC Regs D has the power to exercise her discretion in ways that can significantly alter how demanding the conditionality is that is applied to a claimant:
	1. Because C has physical and mental impairments, D has wide discretion over what are considered the reasonable ‘expected hours’ are for the purposes of determining the individual threshold under reg.88(2)(c) and 97(2) UC Regs.
	2. With regard to this it should be noted that:
		1. There is no definition of “physical or mental impairment” in the regulations- particularly it is not related to an assessment of LCW etc. or provision of a medical certificate. That means D must take account of C’s impairments as they are found to be.
		2. D is required to set the expected hours as those which are reasonable given C’s health problems– this would make the work search and work availability requirements under regs.95 – 97 UC Regs much more achievable for any claimant with challenges regarding their daily living and mobility including those claimants, such as C, that have very significant care and mobility needs. There is no minimum level of expected hours.
	3. D has complete discretion over all other aspects of the limitations on the work search and work availability requirements. That discretion must be exercised under standard public law principles; in consideration of all relevant factors including C’s health and disability, [her/his] ability to undertake specific conditionality activities, and whether it would be reasonable to expect [her/him] to do so.
2. D also *must not* impose a work search requirement or a work availability requirement if a claimant has been unfit for work for a period of longer than 14 days, has provided a fit note, and the Secretary of State is satisfied that it would be unreasonable  require the claimant to comply with a work search requirement (reg.99(2A),(2B),(5)(c) & (5A) UC Regs). C provided a fit note following [her/his] claim and has been unfit for work for longer than 14 days. D has provided no explanation as to why it would be reasonable to expect C to comply with a work search requirement given C’s health and disability, and [his fit note. No work search or availability requirements should therefore have been imposed.

*Reasonable adjustments*

1. D has a duty, under s.20 of the Equality Act 2010, to make reasonable adjustments to avoid disadvantage where a practice of D’s puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled.

**Grounds for judicial review**

*Ground 1: Failure to exercise discretion over application of conditionality or, in the alternative, irrational use of discretion over application of conditionality*

1. Whether or not C is entitled to UC as a result of [her/his] claim comes down to whether or not [s/he] is undertaking a course that is not compatible with any work-related requirement imposed by D, as per reg.12(4) UC Regs.
2. It is acknowledged that, until such time as D assesses C as having LCW, C falls into the all work-related requirements conditionality group. However, D has discretion over the precise application of conditionality to C and, thus, to whether or not [her/his] course is compatible with that conditionality (of relevance to reg.12(4) UC Regs).
3. C has a number of conditions which have a very severe impact on [her/his] life, to the extent that he requires help with daily living, including personal care, and with mobility – something which D has recognised in awarding [her/him] the highest rates of each PIP component. C also has an appointee for the purposes of [her/his] benefit claim (which should only have been arranged under reg. 57(1) of the UC etc. (Claims and Payments) Regulations 2013 if D was satisfied C was unable to act). It would be hoped that each of these facts would be a ‘red flag’ to D that discretion should be applied when setting conditionality.
4. Despite this, D has refused C UC without any apparent consideration of what C’s UC conditionality should be and whether C’s education would be compatible with this reduced conditionality. It appears that D has assumed a level of conditionality set at the maximum possible level with no regard for C’s level of disability. Indeed, the wording of the [date] letter refusing to revise the decision does not suggest that D was even aware she could reduce the expected hours under reg. 88.
5. D’s failure to adjust C’s conditionality is unlawful.

*Ground 2: Failure to make reasonable adjustments contrary to Equality Act 2010*

1. **D has failed to comply with the first requirement under s.20 of the Equality Act 2010. This failure to comply with the first requirement is, under s.21, a failure to comply with the duty to make reasonable adjustments and is discriminatory.**

*Ground 3 (alternative): unlawful failure to determine LCWRA before deciding C’s claim*

1. In C’s specific circumstances as:
* a young person over school leaving age yet in non-advanced education,
* who has never worked,
* who has long term severe disability,
* who receives Personal Independence Payments, and
* who has an appointee to deal with her/his benefit claims,

it is almost certain that if C were assessed under Part 5 of the UC Regs C would be determined to have Limited Capability for Work and Work-related Activity (“**LCWRA**”).

1. C is entitled to UC if under reg 12(4) C’s course of non-advanced education is compatible with C’s work-related requirements. The question, as above, is therefore, what are C’s work-related requirements?
2. Under s.19 WRA person with LCWRA is in the “no work-related requirements” group, ie, has no work-related requirements and any course of non-advanced education will therefore be compatible. LCWRA for the purpose of s.19 is defined in s.37 as defined in the Regs.
3. Whether or not C has LCWRA is therefore pertinent to reg 12(4) UC Regs and D needs to assess whether C has LCWRA in order to decide whether or not C is entitled to UC.
4. This is analogous to the position in *R (Kauser and JL) v SSWP* (CO/987/2020), where the claimants’ UC entitlement as students turned on whether or not they had Limited Capability for Work for the purposes of reg 14(b) UC Regs (as it read at the time), rather than in this case, C’s entitlement turning on whether [s/he] has work-related activity requirements which [her/his] course must be compatible with for the purposes of reg 12(4) UC Regs. In the High Court in *Kauser* the parties agreed at para  9 to the Annex:

“ …that *upon the claimants claiming universal credit, the Secretary of State was required to determine whether they had limited capability for work […] by conducting a work capability assessment.”*

1. The same principle applies.
2. Under s. 8 SSA 1998 the Secretary of State must determine a claim when made. That process involves the Secretary of State gathering the information necessary to determine if the facts of the claimant’s situation fit within the legal conditions of entitlement for an award to be made. Baroness Hale described it in *Kerr v DSDNI* [2004] UKHL 23 as follows:

*“The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met.”*

1. In the specific circumstance of a person who is a student getting PIP who will have LCWRA when assessed, then in order to work out if that person meets the basic condition of entitlement of not receiving education under s.4 WRA, D will need to determine if the person has LCWRA or not.
2. That determination must be made when UC is claimed by way of an assessment under Part 5 of the UC Regs.
3. The caselaw from analogous legacy benefits is clear. A claim cannot be determined where eligibility is dependent on an assessment which has not yet been carried out (eg. R(IB)8/04).
4. It is of note that with regard to every other condition of entitlement, the Secretary of State asks for information and evidence to enable her to work out whether the condition is met. However, for this one particular group - disabled students, the Defendant simply declares they are not entitled prior to gathering the evidence needed to determine whether that is correct.
5. In this case, D has refused to make an award of UC to C on the ground that [s/he] does not meet a basic condition of entitlement. However, in doing so, D has unlawfully failed to ask herself the following questions:
* Is C’s education is compatible with C’s work-related activities, and
* What will C’s work-related activities be given C’s specific circumstances?
1. D has failed to consider, or to decide whether, C has or will have once assessed LCWRA and will not therefore be subject to any work-related requirements, such that there is no way that C’s studies could be incompatible with them and C is eligible for UC under reg 12(4) UC Regs.

**Alternative Remedies**

1. C acknowledges that [s/he] has a right of appeal in respect of the decision to refuse [her/him] UC and has exercised this by submitting an appeal. However, until C’s appeal is decided, C has no UC. UC is a subsistence benefit and without UC, C is unable to meet [her/his] basic housing and living costs.
2. Further, this issue has been reported to Child Poverty Action Group in other cases. There is therefore concern that decision makers are failing to exercise the discretion available to them when claimants who:

are 19+ years of age,

have disabilities, *and*

are in non-advanced education

claim UC.

1. The concern is that decision makers (‘**DMs**’) are not considering appropriate limitations to work search and availability requirements *before* deciding claims from this group of disabled claimants; that DMs are failing to assess whether courses of study or training would in fact impact the claimants’ ability to comply work-related requirements if those requirements were appropriately reduced under reg 88 and 97 UC Regs. Ie, whether such courses of study or training are or are not compatible with individually set work-related requirements.

**Details of the action that the Defendant is expected to take**

1. D is asked to:
2. Revise the decision dated [date] and award C UC from [date].
3. Ensure that C has appropriate conditionality applied and make reasonable adjustments to ensure that any conditions are compatible with C’s disabilities, including reducing appointments to the bare minimum and conducting them by telephone rather than in person.
4. Issue guidance to decision makers making clear that relevant conditionality must be considered before a claim from a 19/20 year-old in non-advanced education is decided.
5. Carry out an assessment as to whether C has limited capability for work and limited capability for work-related activity.
6. Compensate C for the poor handling, by D, of [her/his] UC claim which has added to [her/his] overall stress and anxiety and has, by causing [her/him] financial difficulties [details]. The compensation should include recognition of the extra expense incurred by C and [her/his] appointee as a result of D’s poor handling of [her/his] claims.
7. Provide a full explanation for the failures in C’s case, and reassurance that systems and training are in place to prevent them from being repeated.
8. Pay C damages in consequence of the discrimination caused by the failure to make reasonable adjustments in line with the Equality Act 2010- to include an element for injury to feelings. C is of the view that under the Vento scale the discrimination falls in the middle band. That is argued on the basis that:
	1. The treatment was serious in that C was without a basic income intended to provide for [her/his] subsistence needs for a prolonged period. The consequences of that are set out in the facts above.
	2. The treatment was severe in that it should have been absolutely obvious to D that C was under significant disability and needed adaptations made as D had awarded C PIP and accepted he could not manage [her/his] affairs.
	3. The treatment was repeated over 3 separate claims.
	4. The treatment was maintained in the mandatory reconsideration decision.
	5. Given this issue falls within the medium level on the *Vento* scale, D should offer C damages of £9,000.

**ADR proposals**

1. **We are not aware of any alternative dispute resolution mechanism- we would be happy to consider any suggestions made by D.**

**The details of any information sought**

1. Please provide us with the full UC file including full copies of decisions not notified to C (see chronology above).

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

1. Please find enclosed copies of the following documents:
* Client’s form of authority
* All other documents available via C’s online UC journal

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

1. [Advice agency name, address and email]

**Proposed reply date**

45.We expect a reply promptly and in any event no later than 4pm on [date](14 days).

1. Should we have not received a reply by this date we will issue proceedings for judicial review without further notice to you.
2. Please reply by return if D cannot manage to respond within the usual time frame.

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)