**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

[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 his/her claim for Universal Credit (UC). 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”)(“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. **The Claimant (‘C’) is challenging the Defendant’s failure to give full reasons for finding that s/he does not have limited capability for work and is therefore not entitled to ESA.**

***Background facts***

1. **CLIENT DETAILS,**
2. **HOUSEHOLD, Family**
3. **Disability and prognosis**
4. **Details of medical assessment. New claim? Date requested? Date attended?**
5. **C received a decision letter on DATE. The letter stated that C did not have limited capability for work and may be able to do some work.**
6. **The decision letter stated that, in reaching this decision, the DWP had looked at the capability for work questionnaire, the information provided by the Health Assessment Advisory Service, and any other information provided by C and/or his/ her doctor. The letter states that, in reaching the decision, the following activities have been looked at:**
* **Moving around and up or down steps**
* **Standing and sitting**
* **Reaching**
* **Picking up and moving things with either arm**
* **Using your hands**
* **Speaking, writing and typing**
* **Hearing and reading**
* **Seeing well enough to get around safely**
* **Staying conscious without fainting, seizures or blackouts**
* **Learning to do new tasks**
* **Being aware of hazards**
* **Planning, starting and finishing common tasks**
* **Coping with changes to your routine**
* **Going out on your own**
* **Coping with being with people**
* **Controlling your behaviour around other people**
1. **The letter does not detail what conclusions were reached in respect of these activities.**
2. **C requested a mandatory reconsideration (MR) on DATE. A mandatory reconsideration notice (MRN) was received on DATE, upholding the original decision. The MRN did not expand on the explanation given in the original decision letter and again listed the activities considered without any detail of how C’s conditions affected his/ her abilities in respect of those activities.**

**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***

***Legislation***

1. **In order to be entitled to ESA, a claimant must have limited capability for work. This is defined in s1(4) of the Welfare Reform Act 2007 (WRA), which states:**

***1.- […]***

***(4) For the purposes of this Part, a person has limited capability for work if –***

1. ***his capability for work is limited by his physical or mental condition, and***
2. ***the limitation is such that it is not reasonable to require him to work.***
3. **The** Employment and Support Allowance Regulations 2008 (ESA Regs) **are made under** powers conferred by the WRA. Reg 19 of the ESA Regs addresses determination of limited capability for work and states:

***19****. - (1) For the purposes of Part 1 of the Act, whether a claimant’s capability for work is limited by the claimant’s physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require the claimant to work is to be determined on the basis of a limited capability for work assessment of the claimant in accordance with this Part.*

*(2) The limited capability for work assessment is an assessment of the extent to which a claimant who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in Schedule 2 or is incapable by reason of such disease or bodily or mental disablement of performing those activities.*

*(3) Subject to paragraph (6), for the purposes of Part 1 of the Act a claimant has limited capability for work if, by adding the points listed in column (3) of Schedule 2 against each descriptor listed in that Schedule which applies in the claimant’s case, the claimant obtains a total score of at least—*

*(a) 15 points whether singly or by a combination of descriptors specified in Part 1 of that Schedule;*

*(b) 15 points whether singly or by a combination of descriptors specified in Part 2 of that Schedule; or*

*(c) 15 points by a combination of descriptors specified in Parts 1 and 2 of that Schedule.*

1. **In C’s case, the DWP decided that C does not have a limited capability for work because the conditions of reg 19 of the ESA Regs have not been met.**

***Guidance:***

1. **Chapter 42, volume 8 of the Decision Makers’ Guide, “Limited Capability for Work and Limited Capability for Work Related Activity”, provides the following guidance to decision makers for determining whether a claimant has satisfied the limited capability for work assessment:**

*42279 The DM should decide which descriptor applies to each activity. Provided the determination is sufficiently supported by evidence, for each activity the DM can select the descriptor from the medical report (ESA85), the evidence provided by the claimant (including the ESA50 questionnaire), or a different descriptor. Satisfaction of the test is decided on the total number of points from the final selection of individual descriptors (see DMG 42177).*

*42280 The DM must record the final scores for each descriptor and the reasons for the decision. Guidance on burden of proof is in DMG Chapter 01.*

**Grounds for judicial review**

**Procedural unfairness:**

1. **The DWP has decided that C does not meet the conditions set out in reg 19 of the ESA Regs, as s/he has not obtained a total score of 15 points by adding the points listed against the relevant descriptors in Schedule 2 of the ESA Regs.**
2. **C was given standard information about the evidence that was used to reach this decision. The letter states that the capability for work questionnaire, the information provided by the Health Assessment Advisory Service, and any other information provided by C and/or his/ her doctor were considered, but does not provide any detail of specific evidence considered in C’s case. The letter also lists the activities that were considered, which appears to be a list of all the activities that are included in the ESA assessment, but does not provide the conclusions that were reached in respect of those activities.**
3. **While there is no stand-alone duty to give reasons for administrative decisions, reasons should have been provided in this instance to comply with the duty of fairness and to enable C to know whether all relevant information had been taken into account/that no irrelevant information was taken into account. See for example, pages 14 and 16 of *Judge over your Shoulder* (October 2018 edition) which is specifically aimed at ‘improv[ing] the quality of administrative decision making’.**
4. **The need for a person to be provided with reasons for a decision in order to establish whether that decision should be appealed or judicially reviewed was considered in *R v SSHD ex parte Doody* [1993] UKHL 8, where Lord Mustill stated the following:**

***“I think it is important that there should be an effective means of detecting the kind of error which would entitle the court to intervene”*[19].**

1. **C’s challenge is not, at this point, to the decision that he/she does not have limited capability for work which carries a right of appeal, but is to the necessarily preceding stage of failing to give reasons for that decision which, of itself, is not appealable.**
2. **In this case, C is unable to determine whether there has been an error of law or fact that would allow him/ her to appeal against the decision. Further, if C were to submit an appeal without knowing the reasons for the decision, s/he would not be able to make any meaningful submissions as s/he cannot demonstrate the basis on which the decision maker was wrong in reaching the conclusion that he did, when s/he has not been told how that conclusion was reached.**
3. **The DWP’s failure to give reasons for the decision reached in C’s case has therefore frustrated C’s appeal rights under s12 SSA 1998 contrary to Article 6 ECHR, as C cannot meaningfully challenge the decision reached without knowing the evidence relied on and the conclusions that the decision maker reached from that evidence.**

**Alternative remedies**

1. **The decision that C does not meet the conditions of reg 19 of the ESA Regs and consequently does not have limited capability for work is an appealable decision under s12 of the Social Security Act 1998 (SSA 1998). However, without knowing the reasons behind the decision maker’s decision, C cannot know whether the information on which the decision was based was correct and therefore whether the decision should be appealed.**
2. **In line with the guidance, as set out above, in ESA cases, the decision maker should decide which descriptor applies to which activity and the determination should be supported by evidence. Reaching a conclusion that is not adequately supported by the evidence available is an error of law. However, without knowing how the decision maker reached his decision, C cannot know whether this decision was adequately supported by the evidence available and so whether it is appealable or not.**

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

**The Defendant is requested to:**

* **Provide reasons for the decision that C does not meet the requirements under reg 19 of the ESA Regs, and that s/he does not have limited capability for work.**
* **Ensure that those making decisions concerning limited capability for work are properly trained on the importance of and legal requirement to make properly reasoned decisions supported by the evidence.**
* **Ensure that the practice of using standardised letters with generic reasons which say nothing about the individual’s own circumstances is immediately stopped.**
* **Provide compensation for the poor decision making which falls below the standard to be expected and leaves C with no knowing the basis on which he/she has been found not to have limited capability for work.**

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

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

* **Signed form of authority for** the Claimant
* **Decision letter from DWP.**
* **MR notice**

**ADR proposals**

**Please confirm in your reply whether the Defendant is willing to consider alternative dispute resolution.**

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

**Advice agency name and address here**

**Proposed reply date**

We expect a reply promptly and in any event no later than **DATE** (14 days).

**If we not have 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)