**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

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

* NOT subject to conditionality,
* has ongoing earnings from work including sick pay, and
* the work allowance has not been applied because they have NOT been treated as having LCWRA.
* has cancer and is undergoing chemotherapy (can be adapted for other ‘treated as’ circumstances)

If your client has been treated as having LCWRA but the work allowance has still not been applied, please refer to template JR89.

Please contact jrproject@cpag.org.uk for assistance using this letter and to send for review before sending to DWP.

**DELETE BOX BEFORE POSTING**

***This letter challenges*** *DWP’s failure to:*

* **treat C as having limited capability for work and work-related activity when C is undergoing or recovering from chemotherapy or radiotherapy to treat her/his cancer and her/his health care professional has confirmed that this affects her/his ability to work,**
* **apply the work allowance to C’s earnings in the calculation of C’s UC award**

Please read the whole letter carefully and make any changes needed. In particular, edit all text in red or [square brackets] , return all text to black and delete any comments before sending.

**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 [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”)(“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 SSWP’s failure to treat C as having limited capability for work and work-related activity (“LCWRA”) and consequent failure to apply the work allowance to C’s earnings in the calculation of C’s UC award when C is undergoing or recovering from [chemotherapy/radiotherapy] to treat [her/his] cancer and [her/his] health care professional has confirmed that this affects [her/his] ability to work.**

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

1. **Client details**
2. **Household, Family**
3. **Other income and PIP award**
4. **Disability / Medical details / diagnosis**
5. **When did C stop work? How much sick pay is received?**
6. **On DATE C claimed and was awarded UC. This is being paid at £AMOUNT each month.**
7. **On DATE C provided WHAT evidence that [she/he] is undergoing [chemotherapy/radiotherapy] including evidence from their health care professional confirming the impact on their ability to work.**
8. **On date C was informed [she/he] would be referred for a work capability assessment (“WCA”), pending which C has been awarded the UC standard allowance and C’s earnings have been taken into account without application of the work allowance.**
9. **C is suffering considerable financial hardship and has debts of …**
10. **Effect on health etc.**
11. **C is currently on receipt of what pay from [her/his] employer while C is unable to work due to C’s cancer treatments. How much pay is being deducted as earnings from C’s UC without application of the work allowance.**

**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***

### **Under regulation 40 of the Universal Credit Regulations 2013 (“**UC Regs**”) a claimant who is** *treated as having* LCWRA under Schedule 9, *has* LCWRA.

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

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

 *…*

*(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.***

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 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.*

(Emphasis added)

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) 4 […]

***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. **Under the SSWP’s operational guidance ‘**Treated as having Limited Capability for Work and Work Related Activity and day 1 WCA Referrals’(V6)[[4]](#footnote-4) and *‘*Immediate WCA referrals (V10)’ in practice this means that a claimant undergoing chemotherapy or radiotherapy is immediately *treated as having* LCWRA **and** referred for a Work Capability Assessment (“**WCA**”) from day one.
2. SSWP’s operational guidance ‘Work Capability Assessment Outcomes’(V16)[[5]](#footnote-5) 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*

***Effect of being treated as having LCWRA***

1. Having (including being *treated as* having as above), LCWRA affects the conditionality C is subject to and, of relevance to C, the amount of earnings that are taken into account under **reg 22 of the UC Regs, including where those earnings are sick pay received from an employer while C is off work due to cancer treatment and recovery.**
2. **Under reg 22 UC Regs the amount of a claimant’s earnings which are taken into account to calculate a UC award is reduced by way of a ‘work allowance’ where a claimant has, included treated as having, LCW. This has the effect of increasing the amount of UC paid significantly each month as follows:**
* **UC includes a housing costs element: £379**
* **UC does not include a housing costs element £631**

*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 that treatment and the 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 by way of a WCA to determine whether they *actually* have LCWRA. Until such time as they are assessed their earnings are taken into account without application of the work allowance, they may be subject to full UC conditionality, and 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 guidance**

1. The law and guidance are clear. A UC claimant undergoing treatment for cancer can be, and the presumption is will be, immediately treated as having LCWRA, with the effect that the work allowance will be immediately applied to any earnings.
2. Further, the SSWP’s own guidance is clear that a WCA is not necessary to treata claimant as having LCWRA when that claimant is undergoing cancer treatment.
3. A WCA ‘Day 1 referral’ must be made to confirm LCWRA, but pending the WCA, C must be treated as having LCWRA.
4. In this case, C has not been treated as having LCWRA [and nor has any ‘Day 1 referral’ been made,] in clear breach of the law and the SSWP’s own guidance.

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

1. [What medical evidence confirming treatment and impact on ability to work] has been provided to SSWP [by … this made it clear to SSWP that …]
2. [What other medical evidence has been provided?]
3. No explanation has been offered as to why the information has not been actioned.
4. Failure to treat C has having LCWRA [or refer C for a Day 1 WCA] when relevant evidence has been provided, and failure to explain why this evidence has not been actioned when the presumption under the SSWP’s own guidance at ADM G3017 is that C will be treated as having LCWRA, suggests SSWP has failed to take into account both C’s relevant medical evidence and the provisions of its own guidance when calculating C’s UC award.
5. Alternatively, if there is a reason that the Secretary of State is not satisfied “*that the claimant should be treated as having limited capability for work and work-related activity*”, C **is entitled as a matter of public law and as a basic principle of natural justice to have an explanation as to why this is the case so that [she/he]** is aware of whether any irrelevant matters have been taken into account or **relevant matters not considered, and challenge such a finding accordingly and/or provide further evidence as may be the case. No such reasons have been given.**

**Ground 3: Unreasonable delay**

1. The stress of surviving on earnings reduced to [how much while undergoing / recovering from cancer treatment], and to have these earnings taken into account in full reducing C’s UC [to how much], must be considered when deciding what is a ‘reasonable time’ to action the evidence provided including to make a Day 1 referral to assess capability for work and work-related activity and to determine the amount of C’s award. This is on top of the stress and anxiety that C is already facing in having to come to terms with [her/his] cancer diagnosis.
2. SSWP 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).
3. A decision on entitlement is dependent on a work capability finding[[6]](#footnote-6) and that 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”.
4. 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[[7]](#footnote-7).
5. The impact on C has been detailed above and includes …

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

**The Defendant is requested to:**

* Treat C has having LCWRA and apply the work allowance from the start of C’s claim to UC (or the date the confirmation of [her/his] cancer treatment was provided, whichever is later)
* Accept that the failure to treat C as having LCWRA and to apply the work allowance 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 [she/he] is already having cope with [her/his] cancer diagnosis and treatment 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 illness and prognosis and effect on ability to work**
* **Signed form of authority for C**
* **All other documents available through C’s online UC journal**

**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

 Address

Email]

**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 [her/his] 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 [↑](#footnote-ref-1)
2. gov.uk/government/organisations/government-legal-department [↑](#footnote-ref-2)
3. [assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/866944/admg3.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/866944/admg3.pdf) [↑](#footnote-ref-3)
4. data.parliament.uk/DepositedPapers/Files/DEP2023-0365/166\_Treated\_as\_having\_LCWRA\_and\_Day\_1\_WCA\_referrals\_V6-0.pdf [↑](#footnote-ref-4)
5. https://data.parliament.uk/DepositedPapers/Files/DEP2023-0365/180\_Work\_Capability\_Assessment\_outcomes\_V16-0.pdf [↑](#footnote-ref-5)
6. data.parliament.uk/DepositedPapers/Files/DEP2023-0365/180\_Work\_Capability\_Assessment\_outcomes\_V16-0.pdf [↑](#footnote-ref-6)
7. *R(C and W) v Secretary of State for Work and Pensions* [2015] EWHC 1607 (Admin) [↑](#footnote-ref-7)