**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 letter assumes:**

* C is female
* C has a new claim advance and a tax credit overpayment – total combined deduction from UC is 25%
* Recovery of her advance has been suspended for 3 months rather than being reduced C requested it be reduced)
* C’s circumstances have changed since recovery terms were agreed by her.

Edits will be needed if these facts do not apply. Please read the whole letter carefully and edit any text marked with [SQUARE BRAKETS].

Feel free to send to jrproject@cpag.org.uk for review, or if you have any questions as you go through it.

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 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 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. C is challenging the unlawful refusal of D to exercise her discretion to reduce the level of the deductions from C’s UC claim when required to do so by law.

***Background facts***

1. C is [CIRCUMSTANCES]
2. C claimed UC on [DATE]. On [DATE] C requested and was paid a New Claim Advance, ie, an amount in her first UC assessment period before her first regular payment of C was due.
3. This was until recently being repaid by way of a deduction from her UC of [AMOUNT] each month, equivalent to 23.8% of her standard allowance. Together with a deduction of [AMOUNT] for a tax credit overpayment, the total deduction was 25% of C’s standard allowance.
4. [HOW HAVE C’S CIRCUMSTANCES CHANGES SINCE SHE AGREED TO THE ADVANCE?]
5. On [DATE] C, via her advisers, requested that this be reduced. This request was refused however D paused deductions for a period of three months. The pause will be lifted on [DATE].
6. When the deduction is reinstated, C will be left with only [AMOUNT] to live on each month (equivalent to [AMOUNT] per week), from which she has to pay for all of her essential expenditure.
7. C has considerably less than subsistence level income on which to live.
8. C is faced with the impossible decision of whether to pay for her rent, Council Tax, fuel, or food.
9. C is experiencing severe financial hardship [AND THIS HAS BEEN NOTIFIED TO D IN A COMPREHENSIVE NOTIFICATION IN HER ONLINE JOURNAL ON [DATE] WHEN THE FACTS OUTLINED ABOVE WERE DETAILED IN FULL].
10. D responded on [DATE] by refusing to reduce the level of deductions stating that ‘C agreed to this level of deduction when she took out the advance payments’. Instead, D suspended the deduction from C’s UC for 3 months.

**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***

*Payment on Account (“****Advance****”)*

1. The Social Security (Payment on Account of Benefits) Regulations 2013 (“**SS (PAB) Regs**”), made under s. 5(1)(r) Social Security Administration Act 1992 (“**SSAA**”), allow for the making of the payment on account made to C. The law on the recovery of such payments is covered by s71ZG of the SSAA and regulations made thereunder.
2. Section 71ZG SSAA, states as follows:

***71ZG****.-(1) The Secretary of State may recover any amount paid under section 5(1)(r) (payments on account).*

*[….]*

*(3) Regulations may provide that amounts recoverable under this section are to be calculated or estimated in a prescribed manner.*

1. The method of recovery and amount to be recovered under s71ZG SSAA are provided by the Social Security (Overpayments and Recovery) Regulations 2013 (“**SS(OR) Regs**”).
2. Regulation 3(2)(b) SS(OR) Regs states that, in the SS(OR) Regs, “recoverable amount” includes amounts recoverable under s71ZG SSAA, which are payments on account made under s5(1)(r) SSAA.
3. The SS(OR) Regs go on to direct how recoverable amounts are to be recovered by the Secretary of State. Specifically, reg 11(2) sets the maximum amounts that can be recovered from the UC claimant in any one assessment period. The maximum rates, in summary, are as follows:

a) hardship payments (in the case of a person being sanctioned) and overpayments where the claimant or their partner has been found guilty of an offence, or has accepted a caution or agreed to pay a penalty - 40% of the standard allowance;

b) deductions from earned income except where a) applies - 25% of the standard allowance;

c) all other cases - 15% of the standard allowance.

1. In C’s case, paragraphs (a) and (c) do not apply and so the *maximum* rate of recovery is 25%. The regulations do not set a *minimum* rate of recovery, allowing the Secretary of State discretion to deduct less than 25%, or to suspend recovery altogether where needed.
2. D has argued in correspondence to Child Poverty Action Group that recovery of advances is not made under reg 11 SS (OR) Regs, rather under reg 10 Social Security (Payments on Account of Benefit) Regulations 2013 (“**SS(POAB) Regs**”), which provides that “*where it is practicable to do so* [an advance] *is to be offset*” from a claimants’ ongoing UC payments. We do not accept this, however, for the purposes of C’s case it is immaterial whether one analyses the recovery of the advance as via deduction under reg 11 SS(OR) Regs or as via offsetting under reg 10 SS(POAB) Regs as discretion, as exists under reg 11 SS(OR) Regs as to *“the extent that there may be recovered*”, also exists under reg 10 SS(POAB) Regs as to when *“it is practicable*” to offset an amount.
3. Notably, reg 10 SS(POAB) Regs sets neither a minimum nor maximum amount to be ‘offset’ from the claimants UC payments, nor a time period in which the advance must be recovered. Such limits are provided in D’s guidance only, see for example operational guidance “Advances- New Claim” (V15)[[3]](#footnote-3), which if followed in preference to the regulations, fetters the discretion available to D under the regulations (reg 11 SS(OR) Regs or reg 10 SS(POAB) Regs).

*Tax Credit Overpayment*

1. Under reg 28(1)(b) of the Tax Credits Act 2002 an overpayment of tax credits may be treated and recovered by D as an overpayment of UC.
2. The *maximum* rates of recovery for overpayments falls under re. 11 SS (OR) Regs, as also applies to payments on account.
3. As with payments on account, the Regulations do not set a *minimum* rate of recovery, allowing D discretion to deduct less than 25%, or to suspend recovery altogether where needed.

*Total deductions: D’s Guidance on Debt and Deductions That Can Be Taken from Payments*

1. D’s guidance “Universal Credit: debt and deductions that can be taken from payments”[[4]](#footnote-4) was updated on 16th of October 2019 to reduce the total maximum deduction from a Claimant’s standard UC allowance from 40% to 30%:

*There is an overall maximum percentage rate for all debts and deductions that can be taken from a Universal Credit payment. The maximum amount that can be deducted is an amount equivalent to 30% of the claimant’s Universal Credit standard allowance.*

*There are 2 exceptions to this rule, Last Resort Deductions (arrears of housing and fuel) and ongoing monthly costs for utilities (gas, electricity and water) where there are also arrears being taken for them.*

1. From 12 April 2021 this 30% reduced to 25% in line with the March 2021 Budget announcement:

*"From next month* [April 2021] *new claimants will be able to spread Universal Credit advances repayments over a 24-month period and* ***the maximum rate of deductions from Universal Credit will be reduced for all to 25%.*** *Reducing the maximum deduction rate to 25% of a claimant’s standard allowance will allow more than 350,000 families with significant debts to retain more of their monthly award for their day-to-day needs.*"[[5]](#footnote-5)

(Emphasis added)

1. D’s policy is that up to a *maximum* of 25% of claimant’s UC standard allowance may be deducted, no minimum total deduction is set, so less than 25% in total may also be deducted.

**Grounds for Judicial Review: Operation of a blanket policy / fettering discretion and failure to take relevant facts into account**

1. In C’s case, neither C’s Advances nor C’s tax credit overpayment are being deducted at the maximum 25% of C’s standard allowance, rather both have been adjusted such that the total deduction from C’s UC is 25% in line with D’s policy (demonstrating that it is possible for deductions lower than the maximums set by reg. 11 SS (OR) Regs to be made).
2. However, D appears to be operating a blanket policy to either deduct amounts which total the maximum 25% in every case, and/or not to exercise discretion where a level of deduction for an Advance has previously been agreed by the claimant.
3. Thus D appears to have limited the criteria she has used to reach her decision not to reduce the level of deductions from C’s UC to ‘whether the maximum level of permissible deductions has been reached’ and/or whether the deduction for an Advance is being made at the rate the claimant agreed to when the Advance was taken out, irrespective of any change of circumstances a claimant may have experienced in the intervening period.
4. In doing so D has fettered the discretion available to her. It is unlawful to operate a ‘blanket policy’ when a discretion is available, each case must be considered on its individual merits. In *R (S) v Secretary of State for the Home Department* [2007] EWCA Civ 546 the Court of Appeal summarised this principle when it stated:

*“[a] public authority may not adopt a policy which precludes it from considering individual cases on their merits”.*

1. There is no legal reason that prevents D from reducing C’s deductions further. Indeed, the Regulations deliberately provide a discretion to reduce the deductions by setting a maximum deduction, as opposed to a fixed amount.
2. Further, the clear purpose of imposing a 25% total limit on recovery is to avoid a situation where a claimant is left with less money than they need to live. In C’s case it is clear that this purpose has not been achieved, yet this has not been taken into account.
3. The fact that C has agreed a stricter repayment schedule is irrelevant. If the legislation permits discretion, D has a duty to exercise that discretion and that duty supersedes any previous agreement with C. This is particularly important in cases where a claimant’s situation changes *after* they have agreed a repayment schedule. D should clearly in cases such as that be prepared to revisit the situation. However, other examples such as where a claimant has simply miscalculated what they would be able to pay may arise. To insist in all circumstances that a claimant be bound by their acceptance of a repayment schedule is unlawful.
4. Yet, there is no evidence that D has considered whether C’s circumstances amount to a level of financial hardship which would justify a reduction in the total rate of the deduction from her UC.
5. In failing to take account of C’s circumstances, and making the decision not to reduce the total deduction below 25% solely on the basis of whether a) the deduction is at the rate C previously agreed to and/or b) C’s total deductions are made at the maximum 25% permitted, D has failed to take the relevant facts of C’s circumstances and D’s own policy purpose into account, which renders the refusal to exercise its discretion to reduce the total rate of total deduction below 25%, or to reduce the rate of recovery of C’s Advance at all, unlawful.

**The Defendant is requested to:**

* Exercise her discretion to reduce the amount of the deduction from C’s UC for C’s Advance payments to [%] of C’s standard allowance
* Continue to exercise its discretion in respect of C’s tax credit overpayment to continue to make a deduction of [AMOUNT] calendar month.
* Ensure proper training of decision makers as to the guidance on reducing deduction rates and the importance of having regard to individual circumstances and financial hardship when considering a request for such a deduction.

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

* Claimant’s signed authority
* All other documents available through C’s Universal Credit online account (Journal and Claimant Commitment).

**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 agency name, address and email

**Proposed reply date**

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

Should we not have received a reply by this time we will issue proceedings for judicial review without further notice to you.

Yours faithfully

Enc

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. <http://data.parliament.uk/DepositedPapers/Files/DEP2021-0835/005_Advances_-_New_claim_V15-0.pdf> [↑](#footnote-ref-3)
4. <https://www.gov.uk/guidance/universal-credit-debt-and-deductions-that-can-be-taken-from-payments#how-much-can-be-taken-from-universal-credit-payments> [↑](#footnote-ref-4)
5. DWP Touchbase 5th March 2021 [↑](#footnote-ref-5)