Legal Department

Local Authority address

**Our Ref:**

**Date:**

**Dear Sir or Madam**

**Re: Proposed claim for judicial review against the COUNCIL by X**

##### We are instructed by X **in relation to his/her overpayment of housing benefit (HB) and failure of the COUNCIL to exercise its discretion not to recover same. We are requesting your response as soon as possible and in any event no later than 5pm on DATE.**

**Proposed Defendant: X COUNCIL / BOROUGH OF X**

**Claimant:** [full name] (“**C**”)

**NINo:** [xxxx]

**Address:** [xxxx]

**Date of Birth:** [xxxx]

**HB Ref No**: [xxxx]

**The details of the matter being challenged**

**X challenges COUNCIL’S failure to exercise the discretion available to it under Reg 100 of the Housing Benefit Regulations 2006 (HB Regs) not to recover an overpayment of HB even when recommended by the courts that they should do so.**

***Background facts***

1. **C (d.o.b DATE) lives in social/private rented accommodation and receives HB to help pay HER/HIS rent.**
2. **DETAILS OF HOUSEHOLD, INCOME, DISABILITY, CHILDREN, DIFFICULTY BUDGETING? DEBTS**
3. **The Claimant contacted the Defendant on DATE to request that HER/HIS HB not be recovered due to …**

 “….”

1. **The Defendant replied on DATE stating:**

“…”

1. **ANY FURTHER CONTACTS**
2. **DETAIL ANY FINANCIAL LOSSES INCURRED E.G. INTEREST ON CREDIT USED TO PAY RENT**

**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 and grounds for judicial review***

1. HB overpayments not caused by official error are “recoverable” under Reg 100 of the Housing Benefit Regulations 2006 (HB Regs):

***Recoverable overpayments***

*100.—(1) Any overpayment, except one to which paragraph (2) applies, shall be recoverable.*

*(2) Subject to paragraph (4) this paragraph applies to an overpayment which arose in consequence of an official error where the claimant or a person acting on his behalf or any other person to whom the payment is made could not, at the time of receipt of the payment or of any notice relating to that payment, reasonably have been expected to realise that it was an overpayment.*

1. The wording of Reg 100 HB Regs makes it clear that local authorities have the discretion to either recover or not recover HB overpayments.
2. The HB overpayments guide[[1]](#footnote-1), Part 4: ‘recovery of overpayments’ confirms this unequivocally, warning local authorities that they must exercise their discretion to avoid being open to legal challenge:

***Write-offs***

***Deciding whether to recover an overpayment***

***4.350*** *Just because an overpayment is recoverable, does not necessarily mean that it must be recovered. The law actually states that all overpayments are recoverable (except certain official errors), but it does not state that they must be recovered.*

*4.351 A recoverable overpayment may be recovered at the LAs discretion. If an LA has a blanket policy of recovering all recoverable overpayments, the policy would be open to legal challenge.*

**Grounds for judicial review**

**Ground 1: unlawful fettering of discretion and application of a blanket policy**

1. The Defendant has provided no information or evidence to suggest any consideration of whether or not to recover C’s overpayment was carried out before reaching its decision to recover the overpayment, and as such an inference can be drawn that the Defendant unlawfully failed to exercise the discretion available to it under Reg 100 HB Reg.
2. **Further,** in every case that C’s advisers are aware of, including where in several cases a County Court Judge has also recommended that the local authority do not recover the overpayment due to the severe financial hardship this would cause to the claimant, the same decision has been reached by the Defendant to recover the overpayment.
3. **It is unlawful to operate a ‘blanket policy’ when a discretion is available.**
4. **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. Failing to exercise its discretion in every case that C’s advisers are aware of, strongly suggests operation of a blanket policy to recover overpayment of HB in all cases. **As such the Defendant has unlawfully fettered the discretion available to it under Reg 100 HB Regs.**

**Ground 2: Failure to take relevant facts into account or to apply relevant guidance**

1. C has provided WHAT EVIDENCE AND INFORMATION of the financial hardship they are experiencing as a result of the recovery of their overpayment WHEN MAKING THEIR REQUEST FOR A WRITE OFF.
2. The Defendant has provided no details to suggest any consideration was given to the evidence and information provided by C in reaching their decision.
3. **It is therefore reasonable to infer that the Defendant did not consider the information and evidence provided by C showing HIS/HER financial hardship in reaching its decision to recover the overpayment.**
4. **Further, the Defendant appears not to have considered the recommendation of the County Court Judge in reaching its decision to recover the overpayment.**
5. **The Defendant also appears not to have considered the requirements of its own guidance, detailed above, in reaching its decision to recover the overpayment.**
6. **This failure by the Defendant to consider C’s personal situation, the County Court’s recommendation or to apply is own guidance amounts to a failure to have regard to material facts and any decision reached in consequence of this failure is therefore unlawful.**

**Alternative remedies**

1. **There is no right of appeal against this failure to exercise discretion. Judicial review is therefore the only available remedy.**

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

**The Defendant is requested to:**

* **Amend its internal policies and guidance and/or deliver staff training to ensure staff are fully aware of the discretion available under Reg 100 HB Regs and account is taken of each individual claimant’s personal circumstances when deciding whether to recover an overpayment.**
* **‘Write off’ the Claimant’s HB overpayment in consideration of HIS/HER personal circumstances and the recommendation of the County Court, and repay monies already unlawfully recovered.**
* **In the alternative, ‘write off’ the Claimant’s remaining HB overpayment in consideration of HIS/HER personal circumstances and monies already unlawfully recovered.**

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

* **A breakdown of C’s income and expenditure**
* **C’s signed authority**

**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, AND EMAIL

**Proposed reply date**

**Due to the urgency of this matter, 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. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/696191/hbopg-part-4-recovery-of-overpayments.pdf> [↑](#footnote-ref-1)