**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] Employment and Support Allowance (“ESA”) 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 5pm 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 D’s refusal pay ESA pending C’s appeal of the decision that [s/he] is not entitled to the same following a work capability assessment (“WCA”) decision that [s/he] does not have limited capability for work (“LCW”).**

***Background facts***

1. C is severely disabled and has been in receipt of ESA for [number] years. C suffers from ….
2. C was in the ESA Support Group, receiving the ESA Limited Capability for Work Related Activity (“**LCWRA**”) component.
3. **EDIT AS APPROPRIATE** C’s current claim started on DATE. This award followed a successful appeal of a WCA decision.
4. **EDIT AS APPROPRIATE** Client receives Industrial Injuries Benefit of £ AMOUNT (exact figure?) each week as well as £23.20 lower rate care Disability Living Allowance and £61.20 higher rate mobility (all of which pays for a motability vehicle).
5. **EDIT AS APPROPRIATE** Cl partner lives his partner NAME, NI No, DoB. NAME works part time earning AMOUNT.
6. C and her/his partner have DETAILS OF HOUSING COSTS OR OTHER EXPENSES WHICH ARE EFFECTED BY NON PAYMENT OF ESA
7. **C received ESA on the basis of [her/his] National Insurance contributions (known as contribution based ESA (“cbESA”)*.***
8. **Cl attended a WCA on DATE.**
9. **C scored NUMBER points at how WCA. C received a letter from D advising her/him on DATE informing him/her that her/**his ESA claim was terminating on DATE as [s/he] was no longer entitled to ESA.
10. C sought a Mandatory Reconsideration of the decision to terminate [her/his] ESA.
11. C received a decision on DATE upholding the decision to terminate [her/his] ESA.
12. C submitted an appeal of the decision to terminate [her/his] ESA on DATE.
13. The Tribunals Service confirmed receipt of C’s appeal on DATE.
14. **What happened next? Contacts, requests for cbESA to come back into payment?**
15. C was informed by D on DATE to claim Universal Credit. C did so, and received a decision that [s/he] is not entitled due to [her/his] household income.
16. **C is suffering considerable financial hardship and has debts of …**
17. **Effect on** [her/his] **health 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.

***Legal issues and grounds for judicial review***

***Legislation***

*Claim for UC irrelevant*

1. Section 3 of the Welfare Reform Act 2012 (Commencement No. 9 and Transitional and Transitory Provisions and Commencement No. 8 and Savings and Transitional Provisions (Amendment)) Order 2013 provides for the abolition of income related ESA and does not provide for the abolition of contribution based ESA (contribution based ESA simply becomes New Style ESA).
2. C’s is therefore entitled to New Style ESA where he would have been entitled to cbESA.

*New Style ESA pending appeal*

1. Regulation 26 of the Employment and Support Allowance Regulations 2013 (“**ESA Regs**”)[[3]](#footnote-3) provides that a claimant will be treated as having LCW pending an appeal of a decision that he does not have LCW following a WCA:

***26.—(1) A claimant is, if the conditions set out in paragraph (2) are met, to be treated as having limited capability for work until such time as it is determined–***

***(a) whether or not the claimant has limited capability for work***

***…***

*(2) The conditions are–*

*(a) that the claimant provides evidence of limited capability for work in accordance with the Medical Evidence Regulations; and*

*(b) in relation to the claimant’s entitlement to any benefit, allowance or advantage which is dependent on the claimant having limited capability for work, it has not been determined–*

*(i) in the last determination preceding the date of claim for an employment and support allowance, that the claimant does not have limited capability for work; or*

*(ii) within the 6 months preceding the date of claim for an employment and support allowance, that the claimant is to be treated as not having limited capability for work under regulation 18 or 19, unless paragraph (4) applies.*

***(3)******Paragraph (2)(b) does not apply where a claimant has made and is pursuing an appeal against a relevant decision of the Secretary of State, and that appeal has not yet been determined by the First-tier Tribunal.***

(Emphasis added)

1. Regulation 7 of the Universal Credit (Claims and Payments) Regulations 2013 (“**UC (CP) Regs**”) provides New Style ESA will be paid automatically pending an appeal of a decision that a claimant does not have LCW; it is not necessary for the Claimant to make a new claim:

***7****.-(1) It is not to be a condition of entitlement to an employment and support allowance that a claim be made for it where:*

 *(a) the claimant has made and is pursuing an appeal against a relevant decision of the Secretary of State; and*

*(b) the appeal relates to a decision to terminate or not to award an employment and support allowance for which a claim was made*

*(2) In this regulation—*

*“appellate authority” means the First-tier Tribunal, the Upper Tribunal, the Court of Appeal, the Court of Session, or the Supreme Court; and“relevant decision” means—*

*(a) a decision that embodies the first determination by the Secretary of State that the claimant does not have limited capability for work; or*

*(b) a decision that embodies the first determination by the Secretary of State that the claimant does not have limited capability for work since a previous determination by the Secretary of State or appellate authority that the claimant does have limited capability for work.*

1. This applies specifically to New Style ESA (previously cbESA) as under reg 2 UC (CP) Regs:

*“employment and support allowance” means an allowance under Part 1 of the Welfare Reform Act 2007 as amended by the provisions of Schedule 3, and Part 1 of Schedule 14, to the Welfare Reform Act 2012 that remove references to an income-related allowance*

1. C meets the conditions of entitlement for ESA at the assessment rate pending his appeal as:
* C is treated as having limited capability for work as he is appealing a WCA decision
* this is the first such decision since the decision that he did have LCWRA, and
* he has submitted a medical certificate.

*Time limiting of cbESA / New Style ESA*

1. C was in receipt of cbESA for [number] years. In the event that C is treated as having received cbESA for 365 days and not therefore having entitlement to New Style ESA as no longer in the support group, note that during [her/his] claim C has been in the support group and under s. 1A (5) WRA 2007[[4]](#footnote-4) days on cbESA spent in the ‘support’ group do not count towards the 365 day limit of cbESA which applies to those in the ‘work related activity’ group:

*(5) In calculating for the purposes of subsection (1) or (4) the length of the period for which a person is entitled to a contributory allowance, the following are not to be counted–*

*(a) days in which the person is a member of the support group,*

*(b) days not falling within paragraph (a) in respect of which the person is entitled to the support component referred to in section 2(1)(b), and*

*(c) days in the assessment phase, where the days immediately following that phase fall within paragraph (a) or (b).*

1. There is therefore no legal basis on which not to pay C ESA pending [her/his] appeal and the decision not to pay [her/him] ESA is unlawful.

|  |
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**Defendant’s own guidance**

1. D’s Decision Maker’s Guide (“**DMG**”) Volume 8Chapter 42 ‘Limited Capability for Work and Limited Capability for Work-Related Activity’ and Advice for Decision Making Chapter (“**ADM**”) U7 ‘ESA award made pending appeal’[[5]](#footnote-5) confirm unambiguously that cbESA / New Style ESA should be paid pending an appeal providing the 365 day time restriction has not been exceeded:

**DMG: ESA awarded pending LCW appeal**

**42790** Where the conditions in DMG 42791 - 42792 are satisfied, a claimant who makes and pursues an appeal to the FtT can be

1. treated as having LCW1 and

2. exempt from the requirement to claim before being awarded ESA2

where the appeal is lodged against a relevant decision (see DMG42795) made on a claim made or treated as made on or after 30.3.1 5.

1 ESA Regs, reg 30(2)( b); 2 SS(C &P) Regs, reg 3(1)(j)

**42791** The conditions in DMG42790 are that 1

1. entitlement to ESA is disallowed or terminated in a relevant decision following a determination that the claimant does not have LCW after application of the WCA and

2. following mandatory reconsideration, the claimant makes an appeal to the FtT against the disallowance and

3. the claimant provides or continues to provide medical evidence and

4. no claim for IS or JSA is made.

1 ESA Regs, reg 30(1), (2)(a)&(3); 2SS(C&P) Regs, reg 3(j)

**42792** The claimant must also satisfy the other conditions of entitlement:

1. the basic conditions - see DMG41012 and

2. for

2. 1 ESA (Cont), the time limits[[6]](#footnote-6) – see DMG41021

**ADM: Claimant treated as having LCW**

**U7005** Where the conditions in U7006 - U7007 are satisfied, a claimant who makes and pursues an appeal to the FtT can be

1. treated as having LCW1 **and**

2. exempt from the requirement to claim before being awarded ESA2

where the appeal is lodged against a relevant decision (see U7010) made on a claim made or treated as made on or after 30.3.15.

1 ESA Regs 13, reg 26(2)(b); 2 UC, PIP, JSA & ESA (C&P) Regs, reg 7(1) 1

**U7006** The conditions in U7005 are that

1. entitlement to ESA is disallowed or terminated in a relevant decision following a determination that the claimant does not have LCW after application of the WCA and

2. following mandatory reconsideration, the claimant makes an appeal to the FtT against the disallowance and

3. the claimant provides or continues to provide medical evidence and

4. no claim for JSA is made.

1 ESA Regs 13, reg 26(1), (2)(a) & (3); 2 UC, PIP, JSA & ESA (C&P) Regs, reg 7(1)

**U7007** The claimant must also satisfy the other conditions of entitlement: 1. the basic conditions1 - see ADM Chapter U1 and

2. **the time limits2** - see ADM Chapter V2.

1 WR Act 07, s 1(3); 2 s1A

(Emphasis added)

1. That a claimant who has received cbESA/New Style ESA for more than 365 days is not eligible is clear confirmation that a claimant who has received cbESA / New Style for fewer than 365 days is eligible to have it paid pending their appeal.
2. Refusal to award or pay ESA pending C’s appeal of his WCA decision fails to follow D’s own guidance and is therefore unlawful.

**No effective alternative remedy**

1. It is recognised that C has a right of appeal against the decision. However it is submitted that given the clear failure by D to follow the law and D’s own guidance, the incorrect advice given to C by D, and the financial hardship caused to C, judicial review is the only effective remedy available to provide a speedy resolution to this clear unlawfulness.
2. Further, the First-tier Tribunal has no power to direct the DWP to deliver staff training on this issue; judicial review is therefore the only effective method of redress to give C recourse to the remedy sought.

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

**The Defendant is requested to:**

* Revise the decision not to pay ESA pending C’s appeal.
* Ensure staff are adequately trained and aware of the relevant guidance on this issue to prevent such decisions being made in the future.

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

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

* **Correspondence with D on this issue**
* **Signed form of authority for C**

**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**

**Proposed reply date**

We expect a reply promptly and in any event no later than 5pm on **DATE**.

**Should you consider that you need more than 14 days to respond, please inform me of the same with reasons by return, otherwise if 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. This corresponds to ESA Regs 2008 reg. 30 [↑](#footnote-ref-3)
4. As inserted by s.51 (5) Welfare Reform Act 2012 [↑](#footnote-ref-4)
5. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/661832/admu7.pdf [↑](#footnote-ref-5)
6. 41021 From 1.5.12 entitlement to ESA (Cont) for claimants who are not in the support group is limited to a period of no more than 365 days [↑](#footnote-ref-6)