**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

**Use this letter if your client:**

* Receives UC.
* UC was previously sanctioned and your client received hardship payments.
* These hardship payments are now being recovered at 25% of your client’s standard allowance.
* This is causing financial hardship and FDWP have refused to reduce the rate of deduction.

Read the whole letter carefully and edit any text in [square brackets]

**This letter challenges** DWP failure to exercise their discretion to reduce the rate of recovery.

**Note**: There is also a discretion to waive recovery altogether. This letter does not challenge DWP refusal to do so. Public Law Project may be able to assist if this is the case.

[publiclawproject.org.uk/content/uploads/2021/06/DWP-guidance-ii.pdf](https://publiclawproject.org.uk/content/uploads/2021/06/DWP-guidance-ii.pdf)

**Delete boxes 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 5pm 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 SSWP to exercise the discretion available to reduce the level of the deductions from C’s UC award when required to do so by law and under SSWP’s own guidance.

***Background facts***

1. C is a [detail circumstances, household, disability, other benefits].
2. C is a vulnerable individual. [Reason for vulnerability].
3. [Reason C claimed UC].
4. C was previously awarded hardship payments and these are now being repaid by way of a deduction from [her/his] UC of £[amount] each month, equivalent to 25% of [her/his] standard allowance.
5. C is left with only £[amount] to live on each month (equivalent to £[amount] per week), from which [s/he] has to pay for all of [her/his] essential expenditure, including [food, Council Tax, gas, electricity, travel costs, TV licence, water rates, anything else – edit as appropriate].
6. This leaves C without enough money to pay for [food or heating and [s/he] has been forced to rely on credit and food banks. C now has debts of £[amount] and [her/his] access to credit has been cut off- edit para as appropriate]
7. C is experiencing severe financial hardship and this has been notified to SSWP [how].
8. SSWP responded by refusing to reduce the level of deductions on [date] stating as the reason:

“…...”

**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***

1. ***The power to recover hardship payments***
2. Section 71ZH of the Social Security Administration Act 1992 (“**SSA Act**”)[[3]](#footnote-3)allows the Secretary of State to recover any amounts paid under s. 28 of the Welfare Reform Act 2012 (“**WRA”**):

***71ZH****.—(1) The Secretary of State may recover any amount paid by way of–*

*(a) a payment under section 28 of the Welfare Reform Act 2012 (universal credit hardship payments) which is recoverable under that section*

1. Section 28 WRA provides that regulations may provide for the making of hardship payments including how ‘hardship’ is to be defined:

***Hardship payments***

***28.-****(1) Regulations may make provision for the making of additional payments by way of universal credit to a claimant (“hardship payments”) where—*

*(a) the amount of the claimant’s award is reduced under section 26 or 27, and*

*(b) the claimant is or will be in hardship.*

*(2) Regulations under this section may in particular make provision as to—*

*[…]*

*(f) whether hardship payments are recoverable.*

#### Reg 119 Universal Credit Regulations 2013 is made under the power in s.28(2)(f) and provides that hardship payments are recoverable, ie may or may not be recovered, in accordance with s.71ZH SSA Act:

#### *Recoverability of hardship payments*

***119.****—(1) Subject to paragraphs (2) and (3), hardship payments are recoverable in accordance with section 71ZH of the Social Security Administration Act 1992.*

Paragraphs 2 and 3 relate to earnings and are not applicable in this case.

***ii) The Defendant’s Guidance on Debt and Deductions That Can Be Taken from Payments***

1. The Defendant’s Guidance “Find out about money taken off your Universal Credit payment”[[4]](#footnote-4) was updated on 12 April 2021 in line with the March 2021 Budget[[5]](#footnote-5) to reduce the total maximum deduction from a claimant’s standard UC allowance to 25%:

*Normally the most that can be taken from your payment is 25% of your Universal Credit Standard Allowance. This is the basic amount you are entitled to, before money for things like childcare and housing costs are added.*

*You may have more than 25% of your Standard Allowance taken off if you pay a ‘last resort deduction’. A ‘last resort deduction’ helps to prevent you from being evicted or having your utilities cut off. It is paid directly to the person or organisation you owe money to.*

1. That this includes recovery of hardship payment is confirmed by SSWP’s guidance Benefit Overpayment Recovery Guide (“**BORG**”), Appendix 4:

*The maximum deduction rate for Recoverable Hardship Payments, Administrative Penalties, Fraud Penalties and Sanctions and Fraud overpayments is an amount equivalent to 40% of the claimant’s Universal Credit Standard Allowance, but this is restricted to an amount equivalent to 25% as a matter of policy.*

1. The figure of 25% will therefore be used throughout the rest of this letter, however where legislation or guidance has not yet been updated and so states maximum deductions are 40% rather than the reduced amount of 25%, this will appear as [25%].

***iii) Recovery of hardship payments***

1. Reg.3(b) and 3(2)(c) of the Social Security (Overpayments and Recovery) Regulations 2013 (“**SS (OR) Regs**”) confirms *recoverable amounts* include amounts under s. 71ZH SSA Act (which are hardship payments made under s. 28 WRA) and goes on to set the **maximum** rates of recovery deduction at reg. 11(2). Hardship payments recoverable by virtue of section 71ZH SSA Act can be recovered at a maximum rate of [25]% of the standard allowance.
2. As such, the **maximum** rate of recovery by deduction in respect of hardship payments is [25]%. No **minimum** rate of deduction is set, providing SSWP with the discretion to deduct less than [25]% or suspend recovery altogether.
3. Under Reg 11(5) the above deductions are subject to paragraphs 4 and 5 of Schedule 6 to the UC etc. (Claims and Payments Regulations) 2013 (“**UC (CP) Regs**”) (see further below). Sch 6 para (UC (CP) Regs) again confirms total deductions must not exceed [25]%. No minimum deduction is confirmed:

### *Maximum amount*

***4.****—(1) Except as provided for in sub-paragraph (4), the Secretary of State may not deduct an amount from a claimant's award of universal credit under a provision mentioned in paragraph 5(2) of this Schedule if, in relation to any assessment period, that would result in the Secretary of State deducting an amount in excess of [25]% of the standard allowance (“the maximum amount”) from the claimant's award under one or more relevant provisions.*

*(2) The relevant provisions are—*

*(a) those mentioned in paragraph 5(2)* of this Schedule;

***5.****—(2) (j) section 71ZH(1)(a) or (b) (recovery of hardship payments etc.) of the Administration Act*

***iv) The Defendant’s guidance on recovery of hardship payments***

1. BORG applies to the recovery of overpayments, associated penalties, and recoverable hardship payments:

*“****General***

*8.1 The Secretary of State has a discretion over whether to recover overpayments and associated penalties and how to do so.* ***This discretion can also be applied to recoverable hardship payments. The discretion to vary the rates of recovery or to suspend recovery are detailed in Chapter 5.*** *The discretion can also be exercised by cancelling part of, or the entire overpayment, through the process of waiver and write-off.*

(Emphasis added)

1. Chapter 5 BORG includes that part of SSWP’s overriding policy is to ensure that recovery does not cause undue hardship to claimants:

*“5.1 The overriding policy is to recover overpayments and any associated penalties in the most efficient and cost effective way possible* ***whilst ensuring that the debtor is not caused undue hardship****.”*

(Emphasis added)

1. Chapter 5 BORG goes on to make clear in cases of hardship (where a debtor cannot repay at the agreed rate) SSWP has the discretion to reduce the rate of recovery. Further, when reaching decisions, which will include whether or not to reduce the recovery rate, the individual circumstances of the debtor and the level of hardship will be relevant:

*“5.4 Where a debtor is unable to repay the overpayment or penalty at the agreed rate there are* ***a range of hardship options available*** *including temporary suspension of recovery,* ***reduction in recovery rate*** *or in exceptional cases write-off of the debt.*

*[…]*

***Debtor claims hardship – Repayment Negotiation Framework***

*5.71* ***A Repayment Negotiation Framework which is based on the individual circumstances of the debtor, rather than the size of the debt and repayment period, has been developed.*** *Where a debtor or their representative contacts the recovery unit stating that the rate of recovery will cause them or their family hardship, all the evidence requested should be provided and a hardship case can be considered.*

*5.72 The recovery of an overpayment from any person in receipt of benefit is almost certain to cause some hardship and upset for them and their family.* ***It is the level of hardship and upset which is taken into account when considering the application.***

*5.73* ***Where a debtor considers that recovery of the debt will cause them significant hardship, the department may consider reducing or suspending recovery.*** *The debtor should provide reasonable evidence to support their request. Where hardship is claimed because either the debtor or a member of their family is seriously ill, it is expected that supporting evidence is provided to explain how or why the recovery of the overpayment would be detrimental to the health or welfare of the debtor or their family.*

(Emphasis added)

1. That this reading of the BORG is correct is confirmed by SSWP’s open letter to the Public Law Project[[6]](#footnote-6) dated 30/07/21 (following *R (B) v Secretary of State for Work and Pensions* CO/116/2020 in which SSWP accepted by way of a Consent Order that SSWP has the discretion to waive recovery of recoverable hardship payments). This letter includes:

*“If a claimant cannot afford their recoverable hardship payment deductions, they should call DWP Debt Management on 0800 916 0647 and* ***a decision will be made as to whether to reduce the amount of the deduction******or****, in exceptional circumstances,* ***waive recovery*** *of the debt.”*

(Emphasis added)

**Grounds for Judicial Review**

**Failure to take relevant facts into account and fettering discretion**

1. **SSWP appears not to have considered whether C’s circumstances amount to a level of ‘financial hardship’ which would justify a reduction in the rate of the deduction from [her/his] UC and in doing so has failed to take the relevant facts of C’s circumstances into account, which renders the refusal to exercise discretion to reduce the deduction from the current maximum deduction rate of 25% unlawful.**
2. SSWP appears to have limited the criteria used to reach the decision not to reduce the level of deductions from C’s UC to ‘whether the maximum level of permissible deductions has been reached’ and in doing so has fettered the discretion available.
3. **There is no legal reason that prevents SSWP from reducing deductions. Indeed, the regulations deliberately provide a discretion to reduce the deductions by setting a maximum deduction, as opposed to a fixed amount.**
4. **The approach taken by SSWP, of only considering the affordability of the deductions if these are for a benefit overpayment, social fund loan or rent arrears, does not come from the SS(OR) Regs.**
5. **By refusing to consider a reduction in the amount deducted in circumstances where the regulations clearly permit this, the SSWP is fettering the discretion afforded by the legislation, which is unlawful.**
6. **Further, SSWP appears not to have considered the requirements of its own guidance, BORG, which confirms that in circumstances such as C’s “***the department may consider reducing or suspending recovery”* and that it “*is the level of hardship and upset which is taken into account”.* Failure to take account of its own guidance is unlawful.
7. The Defendant’s operational guidance ‘Deductions’ fails to reflect the legal position set out at reg. 11(2) SS (OP) Regs which provides a ‘maximum’ deduction of [30]% of the standard allowance (in the Claimant’s circumstances). The guidance is unlawful as it is explicit in its fettering of this discretion by requiring the maximum deduction to always be made where it states “When there is only one deduction required the item’s maximum deduction rate is taken”.
8. The guidance fails to reflect the legislation set out above and is therefore incorrect and, to the extent that it is relied upon by decision makers, results in unlawful decisions being reached, including the decision not to reduce the deduction from C’s UC when he/she has clearly demonstrated financial hardship.

**SSWP is requested to:**

* Exercise discretion to reduce the amount of the deduction from C’s UC for [her/his] hardship payments to [10%] of [her/his] standard allowance.
* Ensure proper training of decision makers as to the law and 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.
* Amend its operational guidance. In contrast to the BORG, SSWP’s operational guidance ‘Deductions’[[7]](#footnote-7)(V12) unlawfully limits the discretion available under the legislation where it states under ‘Maximum rates of Deductions’:

*“There are maximum deduction rates or set deduction rates for each of the individual items that require deductions to be made.*

*When there is only one deduction required the item’s maximum deduction rate is taken.”*

SSWP cannot lawfully have a policy to take the maximum available deduction in all cases where there is only one deduction required. Further SSWP cannot lawfully have a policy for deductions rates to be “set” when the law makes clear the rate is within SSWP’s discretion.

* Amend its guidance, BORG, at para 5.45 onwards to make clear that discretion exists to either waiver recoverable hardship payments or to reduce the rate of recovery, as well as to write off amounts owed in specified circumstances.
* Amend chapter 5 of its guidance, BORG, throughout and in line with para 8.1 of the same, to make clear that SSWP discretion to reduce the rate of recovery from a claimant applies to recoverable hardship payments in the same way as it applies to overpayments in cases of financial hardship.

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

* **C’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 SSWP 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 our client reserves the right to 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. As inserted by the Welfare Reform Act 2012 (Commencement No. 8 and Savings and Transitional Provisions) Order 2013 (SI 2013/358) art 5(2) (April 29 2013) [↑](#footnote-ref-3)
4. [www.gov.uk/guidance/find-out-about-money-taken-off-your-universal-credit-payment](http://www.gov.uk/guidance/find-out-about-money-taken-off-your-universal-credit-payment) [↑](#footnote-ref-4)
5. [news.dwp.gov.uk/dwplz/lz.aspx?p1=M3QDU0OTQ1OFM1ODI0OjYzMDZERUIwOTNEM0M3Njg0ODMxMUIwNzE3QkMzNEFB-&CC=&p=0](https://news.dwp.gov.uk/dwplz/lz.aspx?p1=M3QDU0OTQ1OFM1ODI0OjYzMDZERUIwOTNEM0M3Njg0ODMxMUIwNzE3QkMzNEFB-&CC=&p=0) [↑](#footnote-ref-5)
6. publiclawproject.org.uk/content/uploads/2021/09/210730-DWP-Open-letter-re-RHP-process.pdf [↑](#footnote-ref-6)
7. data.parliament.uk/DepositedPapers/Files/DEP2022-0452/047-Deductions\_V12.0.pdf [↑](#footnote-ref-7)