**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:

* Has had their universal credit award reduced due to foster care allowance being treated as either unearned income or earnings.
* Has sought a mandatory reconsideration of the decision and not yet had a response.

DELETE BOX BEFORE POSTING

***This letter challenges*** *DWP’s failure to follow the law and DWP guidance by reducing C’s universal credit as C’s foster care allowance is treated as either unearned income or earnings.*

Read and edit whole letter carefully, in particular change any text in [square brackets]

If you have any questions when using this letter, please contact jrproject@cpag.org.uk

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] 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 [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. The failure of SSWP to disregard the fostering allowance C receives as income for the calculation of [her/his] UC entitlement.

***Background facts***

1. Personal, family, disability, housing details etc…
2. [insert additional information as needed]
3. C’s problems with UC began on [date] when [he/she] was notified of SSWP’s decision in respect of [her/his] entitlement to UC for the assessment period from [date] to [date]. The amount awarded was at the much reduced amount of £[xx] compared to the usual amount of £[xx]. C enquired as to the reason for this and was provided with a breakdown and it transpired that the reason for the low award was that [he/she] was being treated as having [unearned income/earnings] as a result of the fostering allowance [he/she] receives from [who/where].
4. C queried this via [his/her] online journal and was informed by SSWP on [date] that fostering allowance is treated as [unearned income/earnings] the purpose of calculating UC.
5. [Add information regarding C’s further contact with the DWP and what has been said]
6. [Add information regarding the impact on C including financial hardship]

**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**

**Policy position**

1. SSWP published briefings on the policies underpinning the Welfare Reform Act during the Welfare Reform Bill’s passing through Parliament. These included: ‘Universal Credit Policy Briefing Note 8, Foster carers’ (“**Briefing Note 8**”)[[3]](#footnote-3).
2. In Briefing Note 8 SSWP explains the unequivocal intention to treat all money received as a fostering allowance as neither earned nor unearned income for UC.

***3.******Key policy proposals: Universal Credit award and treatment of income***

*a) In the current benefits system, the allowances and fees received by foster carers in return for fostering are fully disregarded for the purposes of calculating entitlement to benefits paid by both DWP and HMRC. For the purposes of calculating income-related benefits, foster children are not included in the benefit assessment.*

*b) The same principles will apply within Universal Credit. There are no plans to change this disregard of fostering allowances and fees when Universal Credit is introduced.* ***These payments will not be taken into account as earnings or income, and whether or not a foster carer receives such payments will not affect the amount of Universal Credit they are entitled to.***

#### (Emphasis added)

1. **The implementation of this “*key policy proposal*” is confirmed clearly in SSWP’s operational guidance ‘F**oster carers’ (V4)[[4]](#footnote-4):

*Foster children are not part of the benefit unit for Universal Credit assessment purposes. Foster carers cannot receive an additional award for any foster child because* ***they receive a Fostering Allowance that is not taken into account when assessing the Universal Credit award.***

#### (Emphasis added)

#### **SSWP’s operational guidance ‘**Unearned income’(V15)[[5]](#footnote-5) further confirms that a fostering allowance is a type of unearned income (ie, not earned income), and that a fostering allowance is not a type of unearned income which is to be taken into account when calculating UC**:**

#### *Adjusting the Universal Credit maximum amount: certain income is disregarded*

#### *The following is a list of regular unearned income types which are not taken into account in Universal Credit. This list isn’t exhaustive as other types of income not listed in regulations may be available: […]*

#### *certain payments that are intended to meet additional costs of caring for child dependents, for example:*

#### *• Child Benefit*

#### *• Guardian’s Allowance*

#### *• Fostering Allowance and other Social Services payments*

#### *• Scottish Kinship Care payments*

#### *• continuing care payments*

#### *…*

#### (Emphasis added)

#### Ground 1: Unlawfully taking fostering allowance into account as income

#### It is clear from the above that fostering allowance was not intended to be taken into account either ‘earned income’ or ‘unearned income’ when what became the Welfare Reform Act 2012 was being debated in Parliament, and that under SSWP’s current operational guidance it is in fact not taken into account as either ‘earned income’ or ‘unearned income’.

#### However, in C’s case [his/her] fostering allowance has been taken into account as ['earned income/’unearned income’] with the result that C’s UC is reduced by [how much] each month.

#### Under s.8(3) of the Welfare Reform Act 2012 UC is reduced by earned and/or unearned income.

##### *Calculation of awards*

***8.-****[…]*

*(3) The amounts to be deducted are—*

*(a) an amount in respect of earned income calculated in the prescribed manner (which may include multiplying some or all earned income by a prescribed percentage), and*

*(b) an amount in respect of unearned income calculated in the prescribed manner (which may include multiplying some or all unearned income by a prescribed percentage*).

1. The Universal Credit Regulations 2013 (“**UC Regs**”) are made under the Welfare Reform Act 2012 and specify the types of unearned income **to be taken into account** when calculating the amount of UC a claimant is entitled to and what counts as earned income: the foster payments at issue in this case do not fall within either category:

*Unearned Income*

1. The types of unearned income are limited to (set out in full for clarity):

#### *What is included in unearned income?*

#### *66.—(1) A person’s unearned income is any of their income, including income the person is treated as having by virtue of regulation 74 (notional unearned income), falling within the following descriptions—*

*(a) retirement pension income (see regulation 67) to which the person is entitled, subject to any adjustment to the amount payable in accordance with regulations under section 73 of the Social Security Administration Act 1992 (overlapping benefits);*

*(b) any of the following benefits to which the person is entitled, subject to any adjustment to the amount payable in accordance with regulations under section 73 of the Social Security Administration Act 1992 (overlapping benefits)—*

*(i) jobseeker’s allowance,*

*(ii) employment and support allowance,*

*(iii) carer’s allowance,*

*(iv) […]*

*(v) widowed mother’s allowance,*

*(vi) widowed parent’s allowance,*

*(vii) widow’s pension,*

*(viii) maternity allowance, or*

*(ix) industrial injuries benefit, excluding any increase in that benefit under section 104 or 105 of the Contributions and Benefits Act (increases where constant attendance needed and for exceptionally severe disablement);*

*(c) any benefit, allowance, or other payment which is paid under the law of a country outside the United Kingdom and is analogous to a benefit mentioned in sub-paragraph (b);*

*(d) payments made towards the maintenance of the person by their spouse, civil partner, former spouse or former civil partner under a court order or an agreement for maintenance;*

*(da) foreign state retirement pension;*

*(e) student income (see regulation 68);*

*(f) a payment made under section 2 of the Employment and Training Act 1973 or section 2 of the Enterprise and New Towns (Scotland) Act 1990 which is a substitute for universal credit or is for a person’s living expenses;*

*(g)a payment made by one of the Sports Councils named in section 23(2) of the National Lottery etc. Act 1993 out of sums allocated to it for distribution where the Payment is for the person’s living expenses;*

*(h) a payment received under an insurance policy to insure against—*

*(i) the risk of losing income due to illness, accident or redundancy, or*

*(ii) the risk of being unable to maintain payments on a loan, but only to the extent that the Payment is in respect of owner-occupier payments within the meaning of paragraph 4 of Schedule 1 in respect of which an amount is included in an award for the housing costs element;*

*(i) income from an annuity (other than retirement pension income), unless disregarded under regulation 75 (compensation for personal injury);*

*(j) income from a trust, unless disregarded under regulation 75 (compensation for personal injury) or 76 (special schemes for compensation);*

*(k) income that is treated as the yield from a person’s capital by virtue of regulation 72;*

*(l) capital that is treated as income by virtue of regulation 46(3) or (4);*

*(la) PPF periodic payments;*

*(m) income that does not fall within sub-paragraphs (a) to (la) and is taxable under Part 5 of the Income Tax (Trading and Other Income) Act 2005 (miscellaneous income).*

1. Fostering allowance is not a type of unearned income to be taken into account. Types of unearned income not specified under reg 66 UC Regs, including fostering allowance, must be disregarded in the calculation of C’s UC award.
2. Failure to disregard C’s fostering allowance in the calculation of C’s award fails to follow the law and D’s own guidance, and is inconsistent with the policy intent underpinning the Welfare Reform Act 2012.

*Earned Income*

1. The UC Regs define earned income as remuneration derived from a contract, or income treated as earned income under Chapter 2 of the UC Regs.

**Meaning of “earned income”**

**52.** “Earned income” means—

(a) the remuneration or profits derived from—

(i) employment under a contract of service or in an office, including elective office,

(ii) a trade, profession or vocation, or

(iii) any other paid work; or

(b) any income treated as earned income in accordance with this Chapter.

1. A fostering allowance is not remuneration or profits derived from and of the headings under reg. 52(a)(i)-(iii). Rather, it is a “*payment intended to meet additional costs of caring for child dependents*” as explained in SSWP’s operational guidance ‘Unearned income,’ and as such does not meet the definition of earned income under reg 52(a) UC Regs.
2. Neither is a fostering allowance caught by reg. 52(b) as it is not “treated as earned income” under Chapter 2 of the UC Regs. The only income caught by this provision is that under:
	1. reg 55(4) benefits to be treated as employed earnings,
	2. reg 55(4A) repayments of income tax or national insurance contributions,
	3. reg 62 regarding the minimum income floor,
	4. reg 77(3) income received by a company in an analogous position to a partnership or one person business.
	5. reg 60 notional earned income where a claimant as deprived themselves of earnings to maximise benefit entitlement
3. As fostering allowance is not caught by any of those provisions it does not fall to be “treated as earned income” under reg. 52(b).

*Conclusion*

1. The fostering allowance C receives does not meet the definition of either “unearned income” or “earned income” under the UC Regs. There is therefore no lawful basis for it to be taken into account as income when calculating C’s entitlement to UC. To treat C’s fostering allowance as [earned/unearned] income fails to follow the law and SSWP’s own unequivocal guidance, and is inconsistent with the policy intent set out above.

***Alternative Remedy***

1. **The amount of an award is a matter open to appeal under Schedule 3 of the** Social Security Act 1998 (c. 14) and **in this instance C has also requested a mandatory reconsideration of the decision, however**, given the clear unlawfulness of the decision, that SSWP has been made aware of the problem and had opportunity to resolve it, and that the issue has been raised by multiple advisers across England and Wales suggesting operation of a blanket undisclosed policy to treat fostering allowance as income, judicial review is the appropriate remedy.
2. **In addition, C is suffering significant financial hardship and struggling to make ends meet. Given the clear failure to follow the law, judicial review is the appropriate remedy to provide a speedy resolution.**

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

**SSWP is requested without delay to:**

* Disregard the fostering allowance received by C from [where] in full and revise [his/her] universal credit award from [date].
* Ensure that decision makers are made aware of the definitions of earned and unearned income under regs 52 and 66 UC Regs and the approach to be taken when a claimant receives a fostering allowance for children in their care.

**Details of documents that are considered relevant and necessary**

* **Documents available to SSWP on C’s UC journal**
* **C’s form of authority**

**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**

**Email]**

**Proposed reply date**

We expect a reply promptly and in any event no later than 4pm on [date]. **Should we not have received a reply by this time 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. hbinfo.org/wp-content/uploads/guidance/ucpbn-8-fost-carers.pdf [↑](#footnote-ref-3)
4. [data.parliament.uk/DepositedPapers/Files/DEP2019-0980/53.\_Foster\_carers\_v4.0.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP2019-0980/53._Foster_carers_v4.0.pdf) [↑](#footnote-ref-4)
5. data.parliament.uk/DepositedPapers/Files/DEP2022-0860/161.\_Unearned\_income\_V15.pdf [↑](#footnote-ref-5)