DWP Legal Advisors

Government Legal Department

2nd Floor, Caxton House

Tothill Street

London

SW1H 9NA

By email: legal.queries@dwp.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 [name]**

1. 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 **4pm on [date]** (14 days).

**Proposed Defendant:** The Secretary of State for Work and Pensions (“**SSWP**”)

**Claimant:** (“**C**”)

**National Insurance No:**

**Date of Birth:**

**Address:**

**Details of the matter being challenged**

1. C is challenging the SSWP’s ongoing unreasonable delay in deciding [her/his] request for mandatory reconsideration(“**MR**”) of the decision notified on [date] that [s/he] has been overpaid [amount] of UC, while continuing to make deductions from [her/his] earnings.

***Background facts***

1. C claimed UC on [date] and was awarded and paid UC between [date] and [date]. The claim was made because ….
2. While in receipt of UC C was from time to time required to attend interviews with [her/his] local Job Centre. It is accepted that C did not attend all of the interviews, however C had a good reason for non-attendance on each occasion. C resumed employment on [date] and UC ended on [date].
3. On [date] [C] received a letter from SSWP seeking repayment of the full amount of UC paid on the grounds that:

*“As you did not answer when we called you for your appointments and you didn't contact us to arrange an appointment you* [sic] *claim is closed. Because of this you have been overpaid [amount]”*

1. [Details of request for mandatory reconsideration]
2. C has received no response from SSWP to [her/his] MR request.

***Legal background***

The SSWP’s power to revise a benefit decision

1. C assumes that the letter of [date] represents a decision by SSWP to revise the original decision to award UC, since the overpayment represents the full amount of UC that C received. Although the letter does not say so explicitly that seems the only possible inference from the demand for repayment of the whole of the UC paid to C.
2. SSWP’s power to revise decisions on UC entitlement is set out in s.9 Social Security Act 1998 (“**SSA 1998**”)

“***9****. - (1) Any decision of the Secretary of State under section 8 above or section 10 below may be revised by the Secretary of State –*

* 1. *either within the prescribed period or in prescribed cases or circumstances; and*
  2. *either on an application made for the purpose or on her own initiative;*

*And regulations may prescribe the procedure by the process by which a decision of the Secretary of State may be so revised*.”

1. In order for the Secretary of State to revise a decision, there must exist a ground for the revision. The reason why the law requires that grounds are needed to revise a decision is set out succinctly in the judgment of Judge Jacobs in *BD v SSWP* [2020] 178 (AAC):

“*11. From the start of the modern social security system in 1948, the legislation has provided for decisions to be changed but only in specified circumstances. Under the current legislation, introduced by the Social Security Act 1998, those circumstances are called grounds for revision and grounds for supersession.* ***These grounds provide a framework for decision-makers and a protection for claimants against arbitrary changes to decision.***”

(Emphasis added)

1. The regulations referred to in s.9 SSA 1998 relevant to this case are the UC, PIP, JSA and ESA (Decisions and Appeals) Regulations 2013/381 (“**D&A Regs**”). Regulation 9 sets out a specific ground on which a decision can be revised at any time by the Secretary of State including:

“***Official error, mistake etc.***

*9. A decision may be revised where the decision-*

*(a) arose from official error; or*

*(b) was made in ignorance of, or was based on a mistake as to, some material fact and as a result is more advantageous to a claimant than it would otherwise have been.”*

1. In this context, a “material fact” means a mistake of *primary* fact at the time the original decision was made. It is not an *inference* or a conclusion drawn from a primary fact, as explained by the SSWP’s representative in paragraphs 9 – 10 of [*MS v SSWP (DLA and PIP)* [2021] UKUT 41 (AAC)](https://assets.publishing.service.gov.uk/media/606d7d76d3bf7f40152362ea/CPIP9322020__CPIP9342020__CDLA10792020___CDLA10802019.pdf) and endorsed by the Upper Tribunal Judge Wikeley at paragraph 35:

*“(9) In the instant case the power to revise that was at issue was that in regulation 9(b) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013, which provides that ‘A decision may be revised where the decision […] was made in ignorance of, or was based on a mistake as to, some material fact and as a result is more advantageous to a claimant than it would otherwise have been.’*

*(10) In this context, a ‘material fact’ is a primary fact about the claimant’s needs, and not a medical opinion (R(M) 5/86 at [10] and Cooke v Secretary of State for Social Security [2001] EWCA Civ 734 (reported in R(DLA) 6/01) at [9]) or an inference from a primary fact (R(S) 4/86 at [4]).* ***The fact must also have existed at the time of the decision under revision*** *(Chief Adjudication Officer v Coombe (reported as R(IS) 8/98), and be such as to require that decision to be changed (R(IB) 2/04 at [187]).”*

(Emphasis added)

The SSWP’s power to require a UC claimant to attend interviews

1. The power to require a claimant to attend interviews is set out in section 15 of the Welfare Reform Act 2012 (“**WRA**”):

***Work-focused interview requirement***

***15****.-(1) In this Part a “work-focused interview requirement” is a requirement that a claimant participate in one or more work-focused interviews as specified by the Secretary of State.*

*(2) A work-focused interview is an interview for prescribed purposes relating to work or work preparation.*

*(3) The purposes which may be prescribed under subsection (2) include in particular that of making it more likely in the opinion of the Secretary of State that the claimant will obtain paid work (or more paid work or better-paid work).*

*(4) The Secretary of State may specify how, when and where a work-focused interview is to take place.*

1. Sections 23 to 25 WRA contain supplementary provisions concerning, *inter alia*, the requirement to attend interviews. Section 27 WRA empowers the SSWP to impose a sanction in the event of non-compliance with a requirement to attend an interview. The level of sanction available is set by Regulation 104 of the Universal Credit Regulations 2013.
2. **There is no power in either the primary or secondary legislation for the SSWP to revise a UC award decision for non-compliance with an interview requirement.**

The SSWP’s power to recover overpayments

1. The SSWP has power to recover overpayment of UC under section 71ZB of the Social Security Administration Act 1992. Section 71ZD empowers the SSWP to make regulations enabling recovery by deduction from earnings. The relevant regulations are Part 6 of the Social Security (Overpayments and Recovery) Regulations 2013.

The SSWP’s policy on recovery action

1. The SSWP’s policy is set out in the Benefits Overpayment Recovery Guide (“**BORG**”).[[1]](#footnote-1) The general policy for means-tested benefits is to suspend recovery action while there is a pending request for mandatory reconsideration, but this policy does not apply to UC (paragraph 4.25). BORG contains no explanation or justification for the differing policies.

The claimant’s appeal rights

1. The claimant can appeal to the First-tier Tribunal against the decision to revise [her/his] award, but only if [s/he] first requests SSWP to revise the revised decision (Section 12(3A) SSA 1998; Regulation 7 of the D&A Regs). [s/he] has no right of appeal against the decision to recover an overpayment by deductions from earnings (SSA 1998 section 12 and Schedule 2 paragraph 9; D&A Regs regulation 50(2) and Schedule 3 paragraph 13).

**Grounds for Judicial Review**

**Ground 1: Unreasonable delay in dealing with mandatory reconsideration request**

1. The SSWP is under a duty to consider all claims for benefit within a “reasonable time” – *R(C and W) v Secretary of State for Work and Pensions [2015*] EWHC 1607 (Admin).
2. The duty to make a decision within a reasonable time applies equally to s.9 SSA 1998 under which Secretary of State may “revise” any decision made under s.8 or s.10, as to the analogous provision at s.8 under which the Secretary of State shall “decide any claim for a relevant benefit”.
3. What counts as a reasonable time depends on the circumstances, including the impact on the claimant and the complexity of the case .
4. It is now [X] weeks since C requested a revision.
5. This is not a complex case, as set out above; there is no legal power to revise a decision on entitlement due to non compliance with an interview requirement and SSWP’s decision to do so is unlawful.

*Impact on the claimant*

1. The delay is causing C hardship. The delay relates to a decision on an overpayment which the SSWP has already taken active steps to recover, by deduction from earnings. The deduction is [amount] per month. [Details of hardship] The longer that the SSWP delays in considering the request for mandatory reconsideration, the more money the SSWP will be able to recover from [C] in the meantime.

*Purpose of mandatory reconsideration process*

1. Of relevance to the circumstances, and therefore what constitutes a reasonable or unreasonable delay, is the statutory purpose for introducing the mandatory reconsideration process. According to the Government’s consultation paper, the stated purpose was “*to deliver* ***timely****, proportionate and effective justice for claimants, make the process for disputing a decision* ***fairer and more efficient***”[[2]](#footnote-2) (emphasis added). The delay in this case of [X] weeks and the consequent frustration of C’s appeal rights clearly fails to deliver on this stated purpose and is therefore unlawful. It is aggravated by the ongoing deductions and the fact that the reason given for the decision is manifestly without a legal basis.

**Ground 2: Unlawful policy of taking recovery action while deciding mandatory reconsideration requests**

1. The different recovery policies adopted by the SSWP in relation to UC and other types of claimant have no rational basis.
2. The SSWP appears to have issued policies and deployed resources in such a way as to give rise to a steady income stream for many weeks and months even in cases where there is manifestly no justification for the overpayment decision. That may give rise to an inference that the consequence is deliberate. If so, that would be an improper and unlawful use of the SSWP’s powers. See *Congreve v Home Office* [1976] 1 QB 629.

**Details of the action the Defendant is expected to take**

1. SSWP is requested to:
   1. Immediately on receipt of this letter direct Debt Management Services to suspend enforcement of the recovery of the overpayment.
   2. Revise the decision of [date] that Ct was not entitled to UC since [s/he] first claimed and that [s/he] has been overpaid [amount] in UC
   3. Refund the money already recovered from C through the direct earnings attachment and any other means.
   4. Pay the claimant a consolatory payment for maladministration in the sum of £100.

**Please find the following documents enclosed:**

1. C’s signed form of authority
2. Copy of decision letter [dated]
3. Copy of letter seeking mandatory reconsideration [dated]
4. [any other relevant documents]

**ADR proposals**

1. 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**

We expect a reply promptly and in any event no later than [14 days]. Should we not have received a reply by this time we reserve the right to place this matter in the hands of solicitors to issue proceedings for judicial review without further notice.

Yours faithfully

1. https://www.gov.uk/government/publications/benefit-overpayment-recovery-staff-guide/benefit-overpayment-recovery-guide [↑](#footnote-ref-1)
2. assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/220473/mandatory-consideration-consultation.pdf [↑](#footnote-ref-2)