**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**

**This letter challenges** DWP’s unlawful information request for a document that does not exist and is not required by law, and DWP’s unlawful advice for C to change their legal position by entering into a new tenancy agreement.

Please read the whole letter carefully and make any changes needed, in particular any text in [square brackets]

Delete all comments before sending.

Include screen shots from your client’s journal if these are different to those shown.

Please send your letter for review to JRProject@CPAG.org.uk before sending to DWP.

**Delete box before sending**

**Only use this template if your client:**

* is a private tenant
* who had an Assured Shorthold Tenancy and when this expired, they continued to live in the accommodation
* was not provided with a new written tenancy agreement
* has provided her/his original tenancy agreement and been told it has expired / does not include a ‘term’ so no UC housing costs
* DWP have advised them to “get a new tenancy agreement”

**This letter assumes** (so can be edited if does not apply)

* Lives in an HMO
* Housing cost element has been stopped following a rent increase

Was getting UC housing costs and these have stopped following a rent increase (can be edited if never paid)

**Delete box before sending**

Delete box before sending

[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 by **4pm [date]** (14 days).**

**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 [supersession / revision] of C’s UC award to remove the housing costs element when C has ongoing eligible housing costs and the unlawful evidence requirements made by SSWP, resulting in non-payment of C’s housing costs from [date] and consequent threat to C’s home due to rent arrears.

**Background Facts**

1. [C’ circumstances, other income, disability, children, etc]
2. [housing details]
3. On date C moved into [address] and signed a tenancy agreement. This was an Assured Shorthold Tenancy (“**AST**”) with a private landlord [details of landlord] which included a fixed term of [how long]. The fixed term ended on [date].
4. C lives in a house with [how many other tenants]. This is a House of Multiple Occupation (“**HMO**”).
5. On [date] C declared [her/his] housing costs to SSWP and provided [her/his] tenancy agreement [and any other evidence?]. This was accepted by D and the housing costs element was included in C’s UC award.
6. On [date] C’s rent increased [how? S.13 notice?]
7. On [date] C declared [her/his] rent increase to SSWP and provided [what evidence].
8. On [date] C was asked to provide proof of [her/his] housing costs via a to-do:



1. On [date] C provided to SSWP:
* [what did C provide], and
* [her/his] former tenancy agreement
1. On [date] SSWP suspended C’s housing costs element.
2. On [date] SSWP notified C via C’s journal that



1. On [date] C explained that [s/he] now has a rolling tenancy with the same terms (save as to period) as the tenancy agreement provided to SSWP as well as evidence that C is still living at the address shown on the tenancy agreement and is continuing to pay rent [her/his] landlord as shown how [what evidence] and notified to D. C providd to D on [date]
* Photographs of [her/him] showing all the corners of [address]
* [school / probation /solicitor letter] addressed to C at [her/his] address
* Bank statements showing ongoing rent payments to C’s landlord
1. This evidence was confirmed as received by D [HOW] on [DATE].
2. C lives in an HMO and is not therefore individually liable for utilities or Council Tax; this was explained to SSWP on [date].
3. C’s experience is that when [s/he] asked [her/his] previous landlord for new agreement or to sign a letter, [s/he] was asked to leave.
4. C does not therefore want to seek an amended tenancy agreement from [her/his] landlord as C has nowhere to move to and will be rendered homeless. C continues to live at [address] where C has lived for [no.] years, continues to be liable for and to pay rent and is bound by the terms of [her/his] statutory periodic AST which arose by operation of law at the end of [her/his] AST fixed term, on the same terms as the AST agreement provided to SSWP, including liability for rent.
5. On [date] SSWP notified C via [her/his] journal that [her/his] UC had been superseded to remove the housing costs element because C is not liable for rent.
6. On [date] C sought a mandatory reconsideration of this decision with the help of [her/his adviser] at [organisation].
7. To date, no response has been received to C’s mandatory reconsideration request.
8. The nature of C’s housing costs have not changed (albeit [her/his] rent has increased) and C continues to be entitled to the UC housing costs element.
9. Incorrectly [revising/superseding] C’s award to remove the housing costs element because ‘the tenancy agreement has expired’ and failing to revise that decision at all or within reasonable time, has [had what consequence – rent arrears, threat of evictions, cutting back on food to make what payments towards rent she/he can?].

**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**

**Ground 1: Unlawful requirement for C’s tenancy agreement to include a fixed ‘term’**

1. Statutory periodic Assured Shorthold Tenancies do not have a fixed term. Under s.5 of the Housing Act 1988 (as amended) (“**Housing Act**”) when the fixed term of an AST comes to an end other than by court order, surrender, or notice under the Immigration Act, the tenant is entitled to continue to occupy the property on the same terms as their former agreement (with the exception of the fixed term) on a periodic basis under a new statutory periodic tenancy.

***5****.-(2)* ***If an assured tenancy which is a fixed term tenancy comes to an end*** *otherwise than by virtue of—*

*(a) an order of the court of the kind mentioned in subsection (1)(a) or (b) or any other order of the court],.*

*(b) a surrender or other action on the part of the tenant, or*

*(c) the giving of a notice under section 33D of the Immigration Act 2014,*

*then, subject to section 7 and Chapter II below,* ***the tenant shall be entitled to remain in possession of the dwelling-house let under that tenancy*** *and, subject to subsection (4) below,* ***his right to possession shall depend upon a periodic tenancy arising by virtue of this section.***

*(3)* ***The periodic tenancy referred to in subsection (2) above is one—***

*(a)* ***taking effect in possession immediately on the coming to an end of the fixed term tenancy;***

*(b)* ***deemed to have been granted by the person who was the landlord*** *under the fixed term tenancy immediately before it came to an end to the person who was then the tenant under that tenancy;*

*(c)* ***under which the premises which are let are the same dwelling-house*** *as was let under the fixed term tenancy;*

*(d)* ***under which the periods of the tenancy are the same as those for which rent was last payable*** *under the fixed term tenancy; and*

*(e)* ***under which, subject to the following provisions of this Part of this Act, the other terms are the same as those of the fixed term tenancy immediately before it came to an end,*** *except that any term which makes provision for determination by the landlord or the tenant shall not have effect while the tenancy remains an assured tenancy*

(Emphasis added)

1. Since coming into force of the Housing Act 1996, an assured tenancy under s.5 Housing Act is an AST, and a periodic tenancy which comes into being by virtue of s.5(2) Housing Act at the end of a fixed term AST is also an AST:

#### Assured shorthold tenancies: post-Housing Act 1996 tenancies.

***19A. An assured tenancy which****—*

1. *is entered into on or after the day on which section 96 of the Housing Act 1996 comes into force (otherwise than pursuant to a contract made before that day), or*
2. ***comes into being by virtue of section 5******above on the coming to an end of an assured tenancy within paragraph (a) above,***

***is an assured shorthold tenancy*** *unless it falls within any paragraph in Schedule 2A to this Act*

(Emphasis added)

1. None of the paragraphs in schedule 2A apply in C’s case.
2. A statutory periodic AST is created by operation of law at the end of a fixed AST term, no new document is required for the legal liabilities of both parties to arise. This is standard practice in the private rental sector (“**PRS**”) in particular with HMOs, and does not require a new written tenancy agreement to be provided by the landlord, indeed to do so would necessarily introduce a new fixed term which may not be desired by either landlord or tenant (since both landlord and tenant’s ability to end the tenancy within a fixed term is limited, and the landlord’s ability to increase the rent is more restricted during a fixed term). Further, under the Tenant Fees Act 2019 renewal fees are prohibited there is therefore little incentive for landlord/s (or their agents) to offer new fixed-term AST agreements, simply because they can no longer charge for this.
3. It is not necessary under housing law and it is not common PRS practice to create a new fixed term at the end of an AST fixed term in an HMO, rather the tenant remains in the property, under a new periodic tenancy arising by operation of law at the end of their former AST under s.5 Housing Act on the same terms (except the fixed term).
4. This is confirmed in *Superstrike Ltd v Marino Rodriguez* [2013] EWCA Civ 669 (which considered whether a deposit requires protection upon the commencement of a “new” statutory periodic tenancy) at para 27:

*“… It is clear from the 1988 Act* ***that what happens at the end of the fixed period tenancy is the creation of a new and distinct statutory tenancy****, rather than, for example, the continuation of the tenant’s previous status. I do not see that there can be any doubt as to that. It was so held in relation to a comparable provision in the 1988 Act in N & D (London) Ltd v Gadson (1991) 24 HLR 6) .*

(Emphasis added)

1. Under section 6(2) Housing Act before the end of the fixed term C’s landlord had the option to give notice to C “*proposing an adjustment of the amount of the rent*”. This did not happen, and C’s rent continued at the same rate as under C’s former tenancy until C’s landlord [served notice to increase C’s rent as permitted to do annually during a statutory periodic AST under s.13 Housing Act.]
2. The tenancy agreement provided by C is evidence of the terms of C’s current tenancy since a statutory periodic AST is under s.5(3) Housing Act on the same terms as the former AST.
3. C’s current tenancy is created by operation of law (s.5(2) Housing Act) and does not exist as a document, however all of its terms, except the fixed term, are evidenced by C’s former tenancy agreement as these terms are implied into C’s tenancy, already provided by C, under s. 5(3)€ as confirmed at s.6 Housing Act:

***6.****- (1) In this section, in relation to a statutory periodic tenancy,—*

***(a) “the former tenancy” means the fixed term tenancy on the coming to an end of which the statutory periodic tenancy arises; and***

***(b) “the implied terms” means the terms of the tenancy which have effect by virtue of section 5(3)(e) above, other than terms as to the amount of the rent;***

*but nothing in the following provisions of this section applies to a statutory periodic tenancy at a time when, by virtue of paragraph 11 or paragraph 12 in Part 1 of Schedule 1 to this Act, it cannot be an assured tenancy.*

(Emphasis added)

1. Paragraphs 11 and 12 in Part 1 of Schedule 1 do not apply to C.
2. C’s current tenancy started by operation of law on the day after [her/his] former tenancy ended (s.5(30(a) Housing Act). It is a periodic tenancy and does not therefore have a fixed term. It can only be brought to an end by either tenant or landlord in the future by notice, surrender, or court order. Until such time, C (and C’s landlord) are bound by the terms of the written tenancy agreement provided to SSWP as these are implied into C’s current tenancy agreement (s.5(3(e) and 6(1)(b) Housing Act.) The law does not require a fixed term and SSWP’s refusal of the UC housing costs element without one is unlawful.

**Ground 2: Unlawful requirement for a written tenancy agreement**

1. The law is clear that liability for rent and therefore eligibility for UC housing costs is not dependent on a written tenancy agreement. A claimant has a liability to pay rent if they have a legal obligation to pay rent. In *R v Rugby BC HBRB ex p Harrison* (1994) 28 HLR 36 (also relied upon in CH/2959/2006) the Court considered the “*meaning of "liable" in the expression "liable to make payments"”* in respect of the analogous provisions for Housing Benefit under section 130 (1)(a) of the Social Security Contributions and Benefits Act 1992 Act and found that “*liable*” means “*an enforceable obligation to pay*” (“*as distinct from a moral commitment or something falling short of an enforceable obligation*”).
2. It cannot be in doubt that a tenant has an enforceable obligation to pay rent due under a statutory periodic AST arising under s.5 Housing Act, as set out above, since that tenancy is under s.5(3)(e) made on the same terms as originally made (except for the fixed term and any subsequent rent increase) and the existence of the tenant’s new tenancy is confirmed by case law, *Superstrike Ltd v Marino Rodriguez.*
3. The insistence of a written tenancy agreement which includes a fixed term, is unlawful. C’s liability for rent must be decided on the evidence provided and on the understanding of the operation of s.5 Housing Act having created by operation of law, rather than by the signing of a new or amended agreement, C’s current statutory periodic AST.
4. Further, SSWP has decided that C does not meet the conditions because C’s tenancy agreement does not include a “term” while there is no requirement under the legislation for a tenancy agreement to include a “term”.
5. In C’s case, there is no requirement under the Welfare reform Act 2012 or the Universal Credit Regulations 2013 (or case law) for a tenancy agreement which includes a “term”. To refuse the UC housing cost element on the grounds that a fixed term has not been provided is unlawful as the decision has been reached in consideration of irrelevant facts, and is further *ultra vires* the legislation which includes no such requirement.

**Ground 3: Unlawful instruction for C to change [her/his] legal position**

1. Under regulation 38 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (“**UC (C&P) Regs**”) SSWP has the power to request information and evidence from claimants:

***38****.-(2) Subject to regulation 8 of the Personal Independence Payment Regulations, a person to whom this regulation applies must supply in such manner as the Secretary of State may determine and within the period applicable under regulation 45(4)(a) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013****such information or evidence as the Secretary of State may require*** *for determining whether a decision on the award of benefit should be revised under section 9 of the Social Security Act 1998 or superseded under section 10 of that Act.*

(Emphasis added)

1. Under regulation 45 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (“**UC (D&A) Regs**”) where SSWP has requested information or evidence from a claimant under reg 38(2) UC (C&P) Regs, the requirement to provide that information or evidence is met where the claimant either provides it or satisfies SSWP that it does not exist or cannot be obtained.

***45.****—(1) This regulation applies where* ***the Secretary of State requires information or evidence*** *from a person mentioned in paragraph (2) (“P”) in order to determine whether a decision awarding a benefit should be revised under section 9 of the 1998 Act or superseded under section 10 of that Act.*

*(2) The persons are—*

*(a) a person in respect of whom payment of any benefit has been suspended in the circumstances set out in regulation 44(2)(a) (suspension in prescribed cases);*

*(b) a person who has made an application for a decision of the Secretary of State to be revised or superseded;*

***(c) a person from whom the Secretary of State requires information or evidence under regulation 38(2) (evidence and information in connection with an award) of the Claims and Payments Regulations 2013;***

***[…]***

*(3) The Secretary of State must notify P of the requirements of this regulation.*

***(4) P must either—***

*(a) supply the information or evidence within—*

*(i) a period of 14 days beginning with the date on which the notification under paragraph (3) was given or sent to P or such longer period as the Secretary of State allows in that notification, or*

*(ii) such longer period as P satisfies the Secretary of State is necessary in order to comply with the requirements, or*

***(b) satisfy the Secretary of State within the period applicable under sub-paragraph (a)(i) that either—***

***(i) the information or evidence does not exist****, or*

*(ii) it is not possible for P to obtain it.*

(Emphasis added)

1. SSWP has no power to request that a claimant changes their legal position in order to meet SSWP’s evidence requirements. SSWP’s statement:

“*you need to get your landlord to amend your tenancy agreement with this information*”

is an instruction for C to change [her/his] legal position in order to be liable for [her/his] rent (which is not accepted, see Ground 1). SSWP is not competent to give housing advice and has no power to require claimants to change their legal relationship with their landlords yet SSWP has made this a condition of entitlement to the UC housing costs element.

1. C has explained that [she/he] has a statutory periodic AST and has provided [her/his] former AST agreement showing its terms and evidence of [her/his] ongoing occupancy and rent liability. C has explained [s/he] is not able to provide a written tenancy agreement showing a fixed term, because such a document does not exist, rather C’s tenancy has arisen by operation of law, ie, s.5(2) of the Housing Act. C has therefore met the requirement under reg 45(4)(b)(i) UC (D&A) Regs and SSWP’s failure to revise the supersession decision of [date] and to resume payment of C’s housing costs element under reg 46(b) UC (D&A) Regs is unlawful.

**Alternative remedies**

1. **C has a right of appeal and has exercised this by seeking a mandatory reconsideration. However, is an issue which arises frequently (details attached at Appendix A) and while resolvable on an individual basis through the Tribunal, demonstrates a clear need for DWP guidance to be amended and/or staff to be trained on the proper application of the legislation and guidance when making evidence requests. This is not a remedy available through the Tribunal.**

**The Details of the Action the Defendant is Expected to Take**

1. D should immediately revise the decision to stop C’s UC housing costs element from [date] and pay C’s housing costs without delay.
2. D should amend operational guidance ‘Private Rented sector’ (V22)[[3]](#footnote-3) which includes:

*A tenancy agreement or evidence of rent liability should include the:*

*• […]*

*• date the tenancy began* ***and how long the term is for***

*• [..]*

To make clear this is not required where a tenant has a statutory periodic tenancy under s.5 of the Housing Act following the end of a fixed AST term.

**The Details of Documents that are Considered Relevant and Necessary**

**D already has access to C’s UC records relevant to this matter.**

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

* **Signed form of authority**

**ADR Proposals**

Please confirm in your reply whether D is willing to consider alternative dispute resolution.

**The Address for Reply and Service of Court Documents**

**[advice agency name and address]**

**Proposed Reply Date**

We expect a reply promptly and in any event no later than **[date]** (14 days).

Should you require more time to consider the matter fully please send an interim reply and propose a reasonable extension, giving a date by which D expects to respond substantively, accompanied with reasons why the deadline cannot be met.

**Should we not have received a reply by this time we will issue proceedings for judicial review without further notice to you.**

Yours faithfully,

*Encs.*

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. <https://data.parliament.uk/DepositedPapers/Files/DEP2023-0365/122_Private_Rented_Sector_V22-0.pdf> [↑](#footnote-ref-3)