**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 claim for Employment and Support Allowance (“**ESA**”). 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 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 the decision of the Defendant to end his ESA award after 365 days of entitlement to the contribution based award of that benefit (“cbESA”), without the Defendant having assessed either whether he has Limited Capability for Work Related Activity (LCWRA) or whether he may have an ongoing entitlement to income related ESA (“irESA”).**

***Background facts***

1. **CLIENT DETAILS, HOUSHOLD, DISABILITY, OTHER INCOME, FINANCIAL DIFFICULTIES, HOUSING ETC**
2. **C claimed and was awarded ESA from DATE. HIS/HER ESA was awarded on the basis of HIS/HER National Insurance contributions (known as contribution-based ESA (cbESA)).**
3. **EDIT IF INACCURATE NAME had no other income or capital at the time of HIS/HER application for ESA or throughout the 365 days of his cbESA award. NAME provided WHAT EVIDENCE when HE/SHE made HIS/HER ESA claim which evidenced that he had no income, savings or capital.**
4. **DATE NAME RECEIVED A LETTER FROM THE DEFENDANT ADVISING HIM THAT**  HIS/HER ESA claim was terminating on DATE as HE/SHE had reached the 365 days maximum limit for HIS/HER claim.
5. NAME sought advice from NAME Jobcentre Plus and was advised that HE/SHE must start a claim for universal credit AND, AS HE/SHE IS UNABLE TO USE A COMPUTER, WAS REFERRED TO WHO.
6. WHO contacted the Defendant by telephone to the ESA contact centre in Belfast on DATE to find out whether NAME had been allocated to the Support Group (as a result of being assessed as having LCWRA). The Defendant admitted that NAME had never been sent an ESA50 Questionnaire or invited to a medical assessment at any time throughout his ESA award.
7. During this call SSWP admitted that the failure to send an ESA50 Questionnaire or invite NAME to a medical assessment was an administrative error on its part, as NAME’S details had not been forwarded to the ESA Medical Services Team.
8. NAME has since completed an ESA50 and it is clear HE/SHE meets the conditions for the LCWRA, and should therefore be in the Support Group.
9. The failure by the Defendant to send an ESA50 Questionnaire or invite NAME to a Medical Assessment has resulted in NAME not having the LCWRA premium included in in his ESA, a loss of £37.65 week for 39 weeks of his 52 week claim (a total loss of £1,468.35).
10. The failure by the Defendant to send an ESA50 Questionnaire or invite NAME to a medical assessment has resulted in NAME not having the Enhanced Disability Premium (EDP) included in HIS/HER ESA, a loss of £16.40 per week for 39 weeks of HIS/HER 52 week claim (a total loss of £639.60), which would have triggered NAME’S entitlement to income related ESA, thereby also avoiding the situation NAME currently finds HIMSELF/HERSELF in with no income as HIS/HER ESA has been terminated after 365 days.
11. **SINCE HIS/HER ESA ENDED, NAME HAS NO INCOME AND IS LIVING ON …**
12. **NAME IS SUFFERING CONSIDERABLE FINANCIAL HARDSHIP AND HAS DEBTS OF …**
13. **EFFECT ON HIS/HER 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 background***

***Time-limiting***

1. Under the Welfare Reform Act 2007 (as amended by the Welfare Reform Act 2012 s.51 (May 1, 2012) (WRA)) the duration of an award of contribution related ESA is 365 days unless the claimant has or is treated as having LCWRA.

 **Duration of contributory allowance**

1A.—(1) The period for which a person is entitled to contributory allowance by virtue of the first and second conditions set out in Part 1 of Schedule 1 shall not exceed, in the aggregate, the relevant maximum number of days in any period for which his entitlement is established by reference (under the second condition set out in Part 1 of Schedule 1) to the same two tax years.

**(2) In subsection (1) the “relevant maximum number of days” is–**

**(a) 365 days,** or

(b) if the Secretary of State by order specifies a greater number of days, that number of days.

…

(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).

**LCWRA not decided at end of 365 days**

1. In *MC and JH v SSWP* (ESA) [2014] UKUT 125 (AAC) the tribunal held that a claimant is entitled to appeal against termination of an award of cbESA after 365 days. Judge Rowland stated that termination cbESA for those not in the *support group* can be contested on the basis that the claimant at the point of termination, although not regarded by the Secretary of State as being in the support group, ought to have been because the claimant at that point in fact has limited capability for work related activity (or was to be treated as such), and that the tribunal can make this determination where the Secretary of State has not considered the question:

*34… the new section 1A of the 2007 Act does not itself make provision for the termination of awards; it merely makes provision as to the period for which a person is entitled to a contributory employment and support allowance, leaving termination of the award to be effected under section 10 of the 1998 Act when the period of entitlement ends. Section 12 provides for a right of appeal against any decision made under section 10. This is plainly deliberate and makes sense because, on any view, there must in reality be a decision of some kind since, as… even the calculation of the 365 days may not be entirely straightforward and could give rise to a dispute.”*

*37. … Therefore, whether the Secretary of State does not consider at all whether the claimant has limited capability for work-related activity as at the date from which his decision is, or could be, effective, or whether he considers the issue only to the extent of relying on his own previous determination, the First-tier Tribunal is entitled to consider the issue afresh”*

**Claim to ESA includes a claim to income related ESA**

1. The Defendant accepted by way of a Consent Order in R (Smith) v SSWP JR/1249/18 that:

*“(i) Employment Support Allowance (“ESA”) is one benefit with two elements;*

*(ii) no separate claim is required for entitlement to one or other of the elements;”*

1. That irESA and cbESA are one benefit and entitlement to irESA does not therefore depend on a separate claim for it, rather a revision or supersession of the existing ESA award, was recently confirmed by the Upper Tribunal in *RS v Secretary of State for Work & Pensions* (ESA) [2021] UKUT 112 (AAC). Judge Mitchell considered the status of a cbESA claim after the relevant maximum number of days (typically 365 days), and at para 45 cites *LH v Secretary of State* [2015] AACR 14:

“…***if a person entitled to ESA(C) wishes to receive the income-related allowance, that is achieved not by making a new claim but through revising or superseding the original ESA decision*** *awarding only the contributions-based allowance (LH v Secretary of State [2015] AACR 14).*

Emphasis added

1. In *R(IS)10/05* the Commissioner held before terminating an award, in this case of Income Support, where the claimant no longer met the criteria on which it was originally awarded, the Defendant must consider whether the claimant was entitled under any other head of entitlement:

*16. As there are 24 prescribed categories at present,* ***the fact that a claimant no longer falls within one category will not usually be a ground for superseding a decision awarding income support unless, on a balance of probabilities, he or she does not fall within any other prescribed category.*** *There will be occasions when the Secretary of State has to make further enquiries before he can be satisfied that that is the case (see, for example, CIS/3781/2002 in which Mr Commissioner Rowland directed the Secretary of State to conduct a personal capability assessment of a claimant who had previously qualified for income support as a carer but also claimed to be incapable of work). The only circumstance in which a claimant’s ceasing to fall within one of the prescribed categories will, of itself, justify supersession is where that change necessarily entails a change in the rate at which benefit is paid (for example, when a person who is in receipt of the disability premium ceases to be incapable of work).*

(Emphasis added)

**Grounds for Judicial Review**

**Ground 1: Error of law / Failure to consider entitlement to income related ESA (irESA)**

1. ESA is one benefit with two parts (income related and contribution related). Where entitlement to an award of ESA based on contributions comes to an end, a supersession cannot end entitlement to ESA altogether unless the Decision Maker has satisfied themselves that either the claimant expressly indicates they do not want entitlement on an income related basis or that the claimant is not in fact entitled to ESA on an income related basis.
2. It follows therefore that when NAME’s entitlement to cbESA had continued for 365 days, the Decision Maker should have considered whether HER/HIS his payments could have continued on an irESA basis. No new claim to benefit was required.
3. NAME was being treated as having LCW as HE/SHE had not yet been assessed (reg. 30 ESA Regs). HE/SHE is therefore entitled to ongoing irESA on the basis of LCW.
4. Under *R(IS)* 10/05 it was for the Defendant to establish whether the claimant was entitled to Income Support under a different “*prescribed category”* otherthan that which their Income Support had been originally awarded before terminating the award. In NAME’S case an analogous consideration must be given to whether NAME had entitlement under the irESA category, when NAME had originally been awarded ESA in the cbESA category.
5. There is no evidence that any consideration was given to NAME’S ongoing entitlement to irESA or if necessary, any investigation was carried out into HIS/HER means to establish whether or not HE/SHE is entitled to irESA.
6. The failure to consider entitlement to, make further investigations to establish entitlement, or pay NAME irESA and the advice by the Defendant that NAME must claim UC, was unlawful.
7. The Defendant’s Decision Makers Guide (DMG)[[3]](#footnote-3) guidance accepts this is the case:

**Claimant also entitled to ESA(IR) 41840**

41840 Where the ESA(Cont) claimant

1. is also entitled to ESA(IR)1 or

2. would be entitled to ESA(IR) but for the rules about amounts payable2 (see DMG 44049) or

3.would be entitled to ESA(IR) once entitlement to ESA(Cont) terminates

the DM may need to reassess entitlement from the date that ESA(Cont) terminates. This includes pending appeal awards and converted awards of ESA(Cont). 1 WR Act 07, s 6(5); 2 s 6(4)

As a result of this failure NAME has had no income since 19/03/19 and has suffered an unlawful financial loss of thus far of at least AMOUNT [which is NUMBER OF WEEKS x £73.10]”, the loss from this error alone is the weekly personal allowance on an ongoing basis.

**Ground 2: Failure to assess whether NAME had LCRWA at the end of the time-limited period of cbESA**

1. Even were it not the case that the Defendant should have, before ending the award of ESA, first considered whether NAME qualified for the award to continue on an income related basis (or indeed if it emerged from such consideration that NAME was not entitled to an income related award- for example due to a working partner), that would not be the end of the matter.
2. Whether or not NAME is entitled to more than 365 days of cbESA depends on whether or not NAME had LCWRA (because periods with LCWRA are ignored when calculating the 365 days –see s. 1A(5) WRA 2007).
3. In *MC and JH v SSWP* it was held that the FtT needed to assess whether a claimant, who had been subject to time limiting and appealed against the decision ending his ESA, actually had LCWRA. It is clear from that decision, that the SSWP should, in making the original decision, have posed that same question to herself. In effect, for a claimant not entitled to ESA on an income related basis, entitlement after 365 days depends on the claimant being in the support group. It is thus not possible for the SSWP, on whom the burden of proof lies in making a supersession decision which removes entitlement, to end entitlement without determining whether that condition of entitlement is met.
4. This is similar to cases such as *R(IB)8/04[[4]](#footnote-4)*- that case concerned not the making of a supersession decision ending entitlement (as here) but rather the determination of a claim. Due to the facts surrounding the claim that came to be determined in that case, there was a period of time from when the claim was made where the claimant could not be treated as having incapacity for work (under the then reg 28 of the SS(IFW) Regs 1996 which is similar to what is now reg 30 of the ESA Regs 2008). The Commissioner held that to determine the claim in respect of that period it was necessary to determine whether the claimant actually had incapacity for work. In just the same way it is necessary in cases such as the present, before ending an award of benefit to actually make sufficient findings to determine that the claimant is no longer entitled- that would require a determination as to whether the claimant in fact had LCWRA.
5. If a claimant is not entitled to irESA and gets to the end of 365 days of entitlement to cbESA without it having been decided whether the claimant has LCWRA then further payment could be suspended whilst the Defendant organises assessment under the LCWRA.

**Ground 3: Procedural Irregularity**

1. It is clear that all ESA claimants should have their capability for work related activity assessed, to enable the correct amount of ESA to be awarded. This was also confirmed by the Defendant its response to a Freedom of Information request[[5]](#footnote-5):

*Who decides if a claimant is sent an ESA50 questionnaire (“Questionnaire”) during the assessment phase of ESA?*

In response, the issue of a standard Limited Capability for Work Questionnaire (ESA50) is automated as result of the referral being made by DWP to the Assessment Provider.

The ESA1 application form further explains that claimants may be asked to take part in a WCA, which includes the completion and return of the questionnaire.

…

**Every person who claims ESA will undergo the WCA process**. If an ESA50 questionnaire is not received, the referral will go through the scrutiny process. (Emphasis added)

1. **It has been accepted by the Defendant in this case** that the failure to send an ESA50 Questionnaire or invite C to a medical assessment was an administrative error on its part, as C’s details had not been forwarded to the ESA Medical Services Team.
2. **Procedural fairness therefore requires C’s ESA to continue until such time as a WCA is arranged, and for C to be compensated for his loss suffered as a direct result of the Defendant’s failure to** forward his details to the ESA Medical Services Team**.**

**No effective alternative remedy**

1. It is recognised that NAME has a right of appeal against the decision. However it is submitted that given the clear failure by the Defendant to follow the law and her own guidance, the incorrect advice given to the Claimant by the Defendant, and the profound financial hardship caused to the Claimant WHO IS ALREADY HOMELESS, 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 issue guidance dealing with this issue; judicial review is therefore the only effective method of redress to give NAME 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 to end NAME’S ESA and continue to treat HIM/HER as having LCW until such time as a work capability assessment is arranged.
* Arrange a work capability assessment without further delay.
* Compensate NAME for HIS/HER losses suffered as a result of the Defendant’s failures including the support component and the Enhanced Disability Premium from the 13th week of his ESA claim.
* Provide guidance as part of the Decision Makers Guide that a decision to end an award of cbESA after 365 days should not be taken where there has been no assessment of LCWRA.
* Ensure adequate training of DWP staff so that claimants’ irESA entitlement is assessed as part of their ESA claim and irESA comes in to payment immediately at the end of 365 days of cbESA unless the claimant is otherwise not entitled.

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

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

* **COPY OF ESA50 RECENTLY COMPLETED**
* **MEDICAL EVIDENCE CONFIRMING LCWRA**
* **Signed form of authority for NAME**

**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**

ADVICE AGENCY NAME, ADDRESS AND EMAIL HERE

**Proposed reply date**

We expect a reply promptly and in any event no later than DATE. We recognise that this is 7 days rather than the usual 14 days. However, given that NAME has no income and is without any means to support himself we believe that in this case it is appropriate to shorten the time period.

**Should you consider that you need the full 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. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/959418/dmgch41.pdf> [↑](#footnote-ref-3)
4. CIB/3956/2003, now reported as R(IB)8/04 [↑](#footnote-ref-4)
5. <https://www.whatdotheyknow.com/request/esa_wca_questionnaires#incoming-638670> [↑](#footnote-ref-5)