***This letter challenges*** *the DWP’s failure to include the housing costs element in a claimant’s Universal Credit award because they are not the ‘named tenant’. Eg, the person named on the tenancy has stopped making payments and if the claimant does not pay, they will need to leave the property.*

Please read whole letter carefully and change any text in red and/or [square brackets].

**DELETE BOX BEFORE POSTING**

DELETE BOX BEFORE POSTING

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

* *Has made a claim for Universal Credit inclusive of the housing costs element OR has asked DWP for the housing costs element to now be included in their award.*
* *The named tenant is no longer paying the rent.*
* *Your claimant must pay the rent to remain in their home.*

**DELETE BOX BEFORE POSTING**

**Before you use this letter:**

Judicial review is a ‘remedy of last resort’. If there is a right of appeal, you must use it before sending a pre-action letter, unless that right of appeal can be said to not be effective.

Send a mandatory reconsideration (MR) request and asking for response within 28 days, or 14 days in exceptional circumstances (which you will need to explain e.g. no benefit in place so risk of homelessness and/or destitution). Feel free to use the references in this pre-action template when drafting your MR request.

Explain that if an MR decision is not received within the time requested, you will send a judicial review pre-action letter.

If an MR decision is not received, your pre-action letter should then address the substantive issue and the delay in providing an MR decision within a reasonable time (see the letter template: UC delay in providing MR decision).

If you are unsure, please contact CPAG to discuss: [JRProject@CPAG.org.uk](mailto:jrproject@cpag.org.uk)

**DELETE BOX BEFORE POSTING**

DWP Legal Advisers

**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](mailto: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](mailto: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] claim for universal credit (“**UC**”). We write in accordance with the Pre-action Protocol for Judicial Review contained in the Civil Procedure Rules. Please note that we require you to respond as soon as possible and, in any event, no later than by **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*](mailto:thetreasurysolicitor@governmentlegal.gov.uk)*.*

**The details of the matter being challenged**

1. SSWP’s refusal to treat C as being liable for rent and include housing costs in [his/her] UC award.

**The issue – factual background**

1. [How long C has lived at address. Named tenant’s details. [Name’s] relationship to named tenant.]
2. [Reason named tenant is not paying (died/moved out/has no recourse to public funds so cannot pay the rent) and relevant dates]
3. [What has happened to cause C to claim housing costs? (End of legacy benefits/event)].
4. [Any other relevant details (eg, C applied to landlord to succeed the tenancy on [date]. A decision is pending OR**,** landlord has agreed to rehouse C in a smaller property and C is waiting for such a property to become available)].
5. [After event, on date C made a claim for UC and included [his/her] housing costs in the claim OR, notified the DWP of [his/her] housing costs and asked that they be included in [his/her] award. This is because the named tenant is not paying the rent and C therefore must, to remain in [his/her] home].
6. [On [date], C asked the DWP via the journal why [he/she] had not been awarded anything towards [his/her] housing costs. [He/She] had included housing costs in [his/her] claim but had not received a response].
7. [On [date], SSWP contacted C stating that as [he/she] is not the named tenant, [he/she] is not eligible for housing costs under UC].
8. [Any further contact with the DWP]
9. [Rent arrears, payments made and how, possession action, any other debts incurred].

**The issue – legal background**

1. The rules for UC are set out in the Universal Credit Regulations 2013 (“**UC Regs**”). Paragraph 2 of Schedule 2 of the UC Regs allows a person who is not legally responsible to pay the rent to be treated as liable where the liable person is failing to pay:

“**Failure to pay by the person who is liable**

***2****.—(1) A claimant is to be treated as liable to make payments where all of the conditions specified in sub-paragraph (2) are met.*

*(2) These are the conditions—*

*(a) the person who is liable to make the payments is not doing so;*

*(b) the claimant has to make the payments in order to continue occupation of the accommodation;*

*(c) the claimant’s circumstances are such that it would be unreasonable to expect them to make other arrangements;*

*(d) it is otherwise reasonable in all the circumstances to treat the claimant as liable to make the payments.”*

1. The Defendant’s guidance, which is available to all DWP staff, confirms C’s eligibility in their ‘Advice for Decision Making’ (“**ADM**”) Chapter F2: Housing Costs Element[[3]](#footnote-3):

“**Failure to pay by the person who is liable**

*F2089 A claimant is treated as liable1 to make payments where*

***1****. the person who is liable is not making payments* ***and***

***2****. the claimant has to make payments in order to continue to live in the accommodation* ***and***

***3****. the claimant’s circumstances are such that it would be unreasonable to expect them to make other arrangements* ***and***

***4****. it is reasonable to treat the claimant as liable to make the payments.”*

*1 UC Regs, Sch 2, para 2(1); 2, para 2(2)*

1. The Defendant’s operational guidance “Claimants who must pay housing costs without having a tenancy”[[4]](#footnote-4) (V3) further confirms:

***“Liable Person not making rent payments***

*A claimant may be treated, as liable for paying the rent at a property where their name is not on the tenancy agreement, such as where they were living with someone else whose name was on the tenancy agreement but now that person has left the property.*

*The claimant may be treated as liable where all of the following apply:*

*• the liable person is not making payments*

*• the claimant has to make such payments to remain resident in the property*

*• it would be unreasonable to expect them to make alternative arrangements.*

1. The provisions above are analogous to the provisions contained in the Housing Benefit Regulations 2006 (“**HB Regs**”) at reg. 8 (1)(c):

***Circumstances in which a person is to be treated as liable to make payments in respect of a dwelling-***

***8****. - (1) Subject to regulation 9 (circumstances in which a person is to be treated as not liable to make payments in respect of a dwelling), the following persons shall be treated as if they were liable to make payments in respect of a dwelling*

*[…]*

*(c) a person who has to make the payments if he is to continue to live in the home because the person liable to make them is not doing so and either—*

*(i) he was formerly a partner of the person who is so liable; or*

*(ii) he is some other person whom it is reasonable to treat as liable to make the payments;*

1. In *FK v Wandsworth Borough Council (HB)* [2016] UKUT 0570 (AAC) Judge Hemingway confirmed that a person not liable for rent may be treated as liable, holding that the First Tier Tribunal had erred because (at paras 20 -21):

“*it did not ask itself whether, having decided that there was no legal liability upon her, she was some other person whom it was reasonable to treat as liable to make the payments because she had to do so if she was to continue living in her home because the person who was liable to make them…was not doing so…*

*“the use of the term “reasonable” within regulation 8(1)(c)(ii) is to be regarded as meaning reasonable in all the circumstances and in light of the overall purpose of the housing benefit scheme.”*

1. This approach was confirmed by Judge Poynter in *Babergh District Council v GW (HB)* [2017] UKUT 0040 (AAC)) at para 36:

*“…a literal interpretation might be enough. The claimant’s mother (who, assuming the agreement was signed, is the liable person) is not making the payments and— although the decision is for the new tribunal, not me—I cannot immediately see why it would not be reasonable to treat the claimant as liable to make the payments. He was, after all, an adult and the main occupier of the property. In so saying, I respectfully agree with Upper Tribunal Judge Hemingway that “the use of the term “reasonable” within regulation 8(1)(c)(ii) is to be regarded as meaning reasonable in all the circumstances and in light of the overall purpose of the housing benefit scheme” (see FK v Wandsworth Borough Council (HB) [2016] UKUT 0570 (AAC) at paragraph 21).”*

**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.

**Grounds for judicial review: failure to follow the law and own guidance**

1. It is submitted that SSWP has made a clear error of law in deciding that C cannot be treated as liable for the rent because [he/she] is not the named tenant in the relevant tenancy agreement. Schedule 2, paragraph 2 is included in the UC Regs to cover situations where the person legally responsible for the rent is unable to pay and this is made clear to all DWP staff via the DWP’s own guidance.
2. C meets all the conditions set out in UC Regs, Sch 2, para 2and ADM para F2089:
3. The person who is liable to make rental payments [is/ was relationship to tenant] who [reason tenant cannot pay].
4. [Name] needs to make payments towards the rent to avoid eviction and remain living in the property. [If applicable: [Name] has started paying the rent and is making payments towards the arrears from the standard allowance of [his/her] UC].
5. The house is [Name] family home where until recently, [event]. Through no fault of [his/her] own, the rent account is in arrears. [He/She] is unable to make other arrangements.
6. It is reasonable to treat [Name] as liable to make the payments. The tenancy was originally in [his/her relationship to tenant] name, [he/she] continues to occupy the property as [his/her] home [and has already contributed to the rent].
7. Further, the DWP has failed to apply the approach in the case law above. It would clearly be “*reasonable in all the circumstances and in light of the overall purpose*” of the scheme to award C housing costs; C is an adult, the sole occupant of [his/her] home, and no one else can be expected to meet [his/her] rent payments to enable [him/her] to remain in [his/her home]. [Why? Edit as appropriate. The decision not to treat C as liable is therefore unlawful].
8. C requested [Housing costs to be included when [he/she] originally claimed UC /notified the DWP when [he/she] became liable for housing costs]. It is submitted that SSWP should revise the decision refusing C’s housing costs, treat [him/her] as liable for the rent and include the housing element in C’s award from [date].

**Alternative remedies**

1. It is recognised that C has the right of appeal against the amount of [his/her] UC award. However, given the clear failure by SSWP to follow the law and its own guidance in what are not unusual circumstances, the profound financial hardship caused to C including a risk to [his/her] home, and that this matter has already been brought to SSWP’s attention via C’s online UC Journal [More than once], judicial review is the only effective remedy available to provide a speedy resolution to this clear unlawfulness.

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

**SSWP is requested to:**

* **Revise its decision to award UC not including C’s housing costs and include the housing element in C’s award from [Date]; and**
* **Compensate C for the financial loss and significant stress caused by SSWP’s error.**
* **Revise the DWP operational guidance “***Claimants who must pay housing costs without having a tenancy*”[[5]](#footnote-5) where it states, in addition to the criteria provided in the legislation and confirmed in the ADM as set out above:

“*The claimant* ***must*** *provide evidence from the landlord confirming that they must make the rent payments in order to continue living in the property.”*

(Emphasis added)

Any decision reached which refuses UC housing costs only because confirmation has not been provided by the landlord due to reliance on the Defendant’s operational guidance, in preference to the UC Regs, caselaw and ADM, will be unlawful. This criterion is not provided in the legislation, and while it may be one factor used by a decision maker to decide whether “*it is reasonable to treat the claimant as liable to make the payments”* underpara 2 Sch 2 UC Regs, if treated as a mandatory criterion, it will inevitably lead to decisions being reached which unlawfully fail to consider other relevant factors. A mandatory criterion, not provided for by the legislation, unlawfully fetters SSWP’s ability to decide under paragraph 2 of Schedule 2 of the UC Regs whether “*it is reasonable to treat the claimant as liable to make the payments”* in consideration of all relevant factors*.*

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

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

* **Rent account**
* **C’s signed form of authority**
* **All other relevant documents are available via C’s online UC journal.**

**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

Email]

**Proposed reply date**

Please provide your response promptly and in any event within 14 days (by 5pm on [date]).

[OR, by [date]. We note this is fewer than the 14 days recommended by the Pre-action Protocol. However, we consider this shortened timeframe to be entirely appropriate given; (A) the clear unlawfulness of the decision and (B), the risk to [Name’s] tenancy due to rent arrears caused by DWP’s failure to pay housing costs. If evicted, [Name] has nowhere to move to and will be rendered homeless].

**[If you consider that** you require more than 14 days from the date of this letter to provide your response, please inform us in writing immediately, giving full reasons and the date by which, you will be able to respond substantively to this letter] [Edit as appropriate or delete if 14 days allowed].

S**hould we not have received such a request for further time nor a substantive reply by the given deadline the Claimant reserves [his/her] right to issue proceedings for judicial review without further notice to you and to seek [his/her] costs of doing so from you. All [Name’s] rights remain reserved.**

Yours faithfully

**Adviser signature**

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. assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/1065521/admf2.pdf [↑](#footnote-ref-3)
4. data.parliament.uk/DepositedPapers/Files/DEP2022-0452/034-Claimants-housing\_costs\_without\_tenancy\_V3.0.pdf [↑](#footnote-ref-4)
5. data.parliament.uk/DepositedPapers/Files/DEP2022-0452/034-Claimants-housing\_costs\_without\_tenancy\_V3.0.pdf [↑](#footnote-ref-5)