**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 a child aged between 16 and 20 in full time non advanced education
* Receives universal credit
* The child element for that child stopped when they reached 16, even if subsequently restarted if not reinstated for the whole period wince they turned 16.

This letter assumes that the child element is now included again, but this can changed if it is not.

DELETE BOX BEFORE POSTING

***This letter challenges*** *a DWP failure to continue an award of child element on UC where the child has reached 16 and has remained in full time non-advanced education or approved training.*

Read whole letter carefully and edit as appropriate including all text in red and/or [square brackets].

Change all text to black before posting.

Send for review to jrproject@cpag.org.uk before posting.

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 [full claimant name] **in relation to [her/his] entitlement to Universal Credit (“**UC**”) and the ongoing failure of the Secretary of State to include the child element for assessment periods from and including the 1st of September following the Claimant’s child’s 16th birthday. We write in accordance with the Pre-action Protocol for Judicial Review. We are requesting your response as soon as possible and, in any event, no later than 5pm on [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. **C challenges SSWP’s refusal to continue to include without interruption the child element in respect of C’s child ([name of child]) when [name] had continued in full time non-advanced education and continued to be a qualifying young person for the purposes of C’s UC award after the 1st of September following [name]’s 16th birthday.**

***Background facts***

1. CLAIMANT’S CIRCUMSTANCES, DISABILITY, WORK ETC
2. FAMILY inc DoBs
3. C has been in receipt of UC since DATE receiving HOW MUCH each month [explain if the amount varies].
4. [name] attends WHAT SCHOOL/COLLEGE undertaking [WHAT LEVEL OF EDUCATION / HOW MANY HOURS p/w and when course started]
5. On DATE [NAME] turned 16 years of age.
6. On DATE, SSWP posted to C’s UC online journal notification of the decision as to the amount of UC C would be entitled to for assessment period (“**AP**”) DATE to DATE. This decision removed from C’s award an element in respect of [NAME] which had previously been included in the award. As such it was a supersession under s.10 Social Security Act 1998.
7. On DATE C received to [her/his] bank account a reduced payment of UC of HOW MUCH in respect of AP DATE to DATE.
8. On DATE C queried this with the Defendant **HOW** and WHAT WAS SAID.
9. On DATE C was notified by the Defendant - **HOW** and WHAT WAS SAID - that the child element would be included in C’s UC award from the next assessment period on WHAT DATE, but not for the assessment period including the 1st of September (ie, the assessment period including the 1st of September following [name]’s 16th birthday) due to ‘late notification of a change of circumstances’.
10. Any further contacts with DWP and what has been said.

***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 for inspection, as part of the response to this letter.

***Ground for judicial review: failure to follow the law***

1. Under s.10 of the Welfare Reform Act 2012, an award of UC includes an amount for children and/orqualifying young persons that the claimant is responsible for:

##### *Responsibility for children and young persons*

***10****.-(1) The calculation of an award of universal credit is to include an amount for each child or qualifying young person for whom a claimant is responsible.*

***…***

*(5) In this Part, “qualifying young person” means a person of a prescribed description.*

*…*

1. The Universal Credit Regulations 2013 (“**UC Regs**”) are made under the Welfare Reform Act 2012 and define Qualifying Young Person as a young person falling under either of two heads of entitlement:

#### *Meaning of “qualifying young person”*

#### *5.—(1) A person who has reached the age of 16 but not the age of 20 is a qualifying young person for the purposes of Part 1 of the Act and these Regulations—*

***(a)*** *up to, but not including, the 1st September following their 16th birthday;* ***and***

***(b)*** *up to, but not including, the 1st September following their 19th birthday, if they are enrolled on, or accepted for, approved training or a course of education—*

 *…*

*(Emphasis added)*

1. That C was entitled to a child element for [name] under the first head, reg 5(a), up to the 1st of September following [name]’s 16th birthday[, and that C continues to be entitled to a child element for [name] under the second head, reg 5(b), as a young person aged between 16 and 20 in full time non advanced education,] is not disputed by the SSWP.
2. C’s UC award however did not include the child element in the assessment period including the 1st of September following [name]’s 16th birthday because the SSWP states that C notified the Secretary of State of her ‘change of circumstances late’. C’s UC award was therefore superseded not to include the child element for this assessment period. C avers this was unlawful because, on proper analysis there had been no change of circumstances and therefore the provisions which set the effective date for a change of circumstances beneficial to a claimant cannot be applied in this way.
3. The power to make a supersession decision applies to decisions made under Part III, Chapter 1 of the Universal Credit etc. (Decisions and Appeals) Regulations 2013 (“**UC (DA) Regs**”) including under reg. 23 where there has been a relevant change of circumstances:

***23****.—(1) The Secretary of State may supersede a decision in respect of which—*

*(a) there has been a relevant change of circumstances since the decision to be superseded had effect or, in the case of an advance award under regulation 32, 33 or 34 of the Claims and Payments Regulations 2013, since it was made; or*

*(b) it is expected that a relevant change of circumstances will occur.*

1. A ‘relevant’ change of circumstances is one which affects the continuance, amount or payment of benefit, ie, causes the original decision to no longer be correct.
2. C’s child was in full time non-advanced education up to and including [her/his] 16th birthday, and continued to be so on the 1st September following [her/his] 16th birthday. This fact is not disputed by D..
3. C’s was entitled to payment of a child element for [name] up to and including [her/his] 16th birthday, and continued to be so on the 1st of September following [her/his] 16th birthday at the same rate. This fact is also not disputed by D.
4. SSWP made a supersession decision to reduce C’s UC award on the basis of [name]’s birthday and the occurrence of the 1st of September following [name]’s 16th birthday. However, neither [name]’s birthday nor the subsequent 1st of September was a “*relevant change of circumstances”* because C’s UC entitlement did not change.
5. Rather, the occurrence of the 1st of September following [name]’s 16th birthday was a situation which *may* have indicated that a change of circumstances had occurred. To determine if a change had occurred D would have needed information about whether [name] continued in education.
6. Before making a supersession decision to reduce C’s UC award, the SSWP must establish that there has been a relevant change of circumstances which affects C’s entitlement. This includes confirming whether eligibility for the element in question (the child element) arises under a different head of entitlement. The burden is on the SSWP to do so because he is reducing an award of benefit he has previously made to C.
7. In *R(IS)10/05*, a decision to terminate a claimant’s Income Support where she longer qualified under one head (incapacity for work) without the decision maker first exercising their inquisitorial jurisdiction to confirm whether the claimant was entitled under another head (disabled worker) was unlawful. Judge Poynter held, following the House of Lords decision in *Kerr v Department for Social Development [2004] UKHL 23,* that Decision Makers (DMs) must act inquisitorially, because they, rather than claimants, are likely to know what information is needed to confirm entitlement:

*“26. … it is not only the tribunal that has an inquisitorial role to play in this process.* ***The decision-maker is also obliged to act inquisitorially****. In the recent decision of the House of Lords in Kerr v Department for Social Development [2004] UKHL 23 [now reported as R 1/04 (SF)] Baroness Hale stated:*

*“61. Ever since the decision of the Divisional Court in R v Medical Appeal Tribunal (North Midland Region), Ex p Hubble [1958] 2 QB 228, it has been accepted that the process of benefits adjudication is inquisitorial rather than adversarial. …*

*62. What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. …”*

*27. Most claimants whose income support is stopped because they have been engaged in non-exempt work will not be aware of the possibility that they may nevertheless have an entitlement as a disabled worker unless the Department “which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met” asks them for the information needed to decide the issues raised by regulation 6(4)(a****). In such circumstances, the principles enunciated by Baroness Hale in Kerr impose an obligation on the decision-maker to consider the possible alternative bases of entitlement and to ask “the questions it needs to ask” before reaching a final decision on such a claimant’s entitlement****. If they do not do so, then the most probable outcome will be that the tribunal will adjourn and ask the necessary questions itself. However, in the last resort there is the possibility that a failure to ask the right questions will result in the issue being determined against the Department in the same way as the issue in Kerr was.”*

(Emphasis added)

1. This inquisitorial obligation applies equally to elements forming part of an ongoing award as to an award of benefit in its whole. In *PW v HM Revenue & Customs (TC)* [2018] UKUT 12 (AAC) the Upper Tribunal, citing *R(IS)10/05,* held termination of an element in Working Tax Credit that the claimant had ceased to be entitled to under one head, was unlawful without considering her eligibility under any of the 6 alternative heads of entitlement:

*38 … that did not mean that her maximum rate no longer included the disability element because falling within Case A is not the only way of satisfying regulation 9(1)(c). There are six other Cases into which she might have fallen,* ***all of which needed to be considered before HMRC could legitimately amend the award by removing the disability element:*** *see, by analogy, R(IS) 10/05 at paragraphs 15-16.*

(Emphasis added)

1. For the removal of the UC child element which had been awarded to C, by way of supersession, to be lawful, the Secretary of State first needed to exercise his inquisitorial duty to obtain information about whether or not [name] remained in education. Only, on having exercised that duty and concluded as a matter of fact that [name] was not continuing in education could the supersession lawfully be made.

**Alternative remedies**

1. It is recognised that the Claimant has the right of appeal against the amount of HER/HIS UC award and C REQUESTED A MANDATORY RECONSIDERATION on date. However, given the clear failure by the Defendant to follow the law in what are not unusual circumstances, the financial hardship caused to the Claimant, and that this matter has already been brought to the Defendant’s attention via the Claimant’s online UC Journal more than once, judicial review is the only effective remedy available to provide a speedy resolution to this clear unlawfulness.
2. **Further, a similar unlawful decision-making process** has been followed in multiple cases Child Poverty Action Group are aware of and **appears to be caused by the automated nature of the UC system, which recognises that the claimant has a child who has turned 16 years of age but fails to trigger any investigation by the DM into ongoing entitlement. The remedy sought by the Claimant includes a change to guidance and/or training which would not be available on appeal.**
3. **Judicial review is also appropriate because the Defendant’s guidance, unlawfully instructs decision makers to make such decisions, without requiring them to first have undertaken the inquisitorial process which is required by the fact that the burden of proof on a negative supersession rests with the decision maker. Thus the Defendant’s ‘Additional amount for children’ guidance**[[3]](#footnote-3) **(V27) states:**

***Child or Qualifying young person is aged 16 and over***

 *Claimants must notify Universal Credit if their child is going to continue in fulltime non-advanced education or approved training after the age of 16. This is so they can continue to receive the additional amount for children and the disabled child addition if appropriate.*

1. **That guidance suggests that notification is a requirement of continued receipt of the addition, whereas the caselaw set out above provides that the decision maker must make enquiries before that can happen.**

**The details of the action the Defendant is expected to take**

**SSWP is requested to:**

* **Pay C the child element in respect of [name] for the assessment period including the 1st of September following [name]’s 16th birthday.**
* **Amend its guidance to reflect that child elements must not be terminated without DM’s confirming whether or not children have remained in full time non-advanced education from the 1st of September following their 16th birthday.**

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

* **C’s signed authority**
* **All other documents available via C’s online UC Journal**

**ADR proposals**

**Please confirm in your reply whether the SSWP is willing to consider alternative dispute resolution.**

**The address for reply and service of court documents**

**ADVICE AGENCY ADDRESS**

**Proposed reply date**

**We expect a reply promptly and in any event no later than 5PM on DATE (14 days). Should we not have received a reply by this time we will issue proceedings for judicial review without further notice to you.**

Yours faithfully,

Adviser name and signature

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. [data.parliament.uk/DepositedPapers/Files/DEP2023-0365/002\_Additional\_amount\_for\_children\_V27-0.pdf](file:///C%3A%5CUsers%5CEmily%20Freeman%5CDownloads%5Cdata.parliament.uk%5CDepositedPapers%5CFiles%5CDEP2023-0365%5C002_Additional_amount_for_children_V27-0.pdf) [↑](#footnote-ref-3)