Public Law Project

Secretary of State for Work and Pensions
By email only to:
thetreasurysolicitor@governmentlegal.gov.uk

Your Ref:

Our Ref: ███

Date: 19 April 2024

Re: Proposed claim for judicial review against the Secretary of State for Work and Pensions in relation to his unlawful use of automation to suspend payment of Universal Credit and/or to triage applications for advanced payment of Universal Credit

Dear Sir/Madam

1. We write in accordance with the Pre-Action Protocol for Judicial Review ("**the Protocol**"). The letter is divided into the numbered sections set out in Annex A of the Protocol.

(1) PROPOSED CLAIM FOR JUDICIAL REVIEW

2. The proposed defendant for this proposed claim is the Secretary of State for Work and Pensions ("**the Defendant**").

(2) THE CLAIMANT

3. Work Rights Centre ("**the Claimant**") is a charity that was established in 2016 in order to, amongst other things, help individuals access in-work social security benefits such as Universal Credit ("**UC**"). Many of the Claimant's clients are foreign nationals, pre-settled status holders, and/or black and minority ethnic.

4. Since 2021, the Claimant has undertaken substantial work in areas relevant to the subject-matter of this claim. It has helped more than 50 individuals who have experienced

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unexpected suspensions of their UC payments, and also has supported individuals applying for UC advance payments. The Claimant has also engaged with other civil society actors in its network and investigated the Defendant's use of automation and data analytics for fraud detection purposes, including through desktop research and Freedom of Information Act requests. The Claimant considers (for the reasons explained in this pre-action letter) that the Defendant's use of automation and data analytics to suspend UC payments and/or to triage applications for advanced payment of UC is unlawful. The Claimant is concerned that these unlawful practices have had and are continuing to have a serious impact on its clients and beneficiaries.

(3)   THE DEFENDANT'S REFERENCE DETAILS

5.   We are not aware of any references that the Defendant may consider to be relevant for this claim. Please provide us with any reference details.

(4)   DETAILS OF THE CLAIMANT'S LEGAL ADVISERS

6.   The Claimant's legal adviser is the Public Law Project ("**PLP**"). The name and contact details of the legal adviser with conduct of this matter are:

███████████
███████████
████████
█████

████████████████

Please note that we request that all legal documents are served on us by email to the following email addresses:

████████████████

7.   Our reference is ██████████

(5)   DETAILS OF THE MATTERS BEING CHALLENGED

8.   The Claimant challenges the Defendant's use of automation and data analytics to suspend payments of UC and/or to triage applications for advanced payment of UC.

(6)   INTERESTED PARTIES

9.   We do not consider that there are any interested parties. If you disagree, please state this in your response and identify who you believe to be an interested party.

(7)   THE ISSUE

10.   This section sets out (a) the relevant background to the Claimant's proposed claim and (b) the Claimant's proposed grounds of review.

(a)   Background to the claim

11.   The Defendant appears to be relying on certain automated processes to suspend payments of UC and/or triage applications for advanced payment of UC. The Claimant's knowledge of the Defendant's use of these processes is necessarily limited because very little information about these processes has been made public by the Defendant.

12.   The Defendant has also generally refused to provide information and documents that have been requested under the Freedom of Information Act 2000 ("**FOIA 2000**"); and where such information or documents have been provided, they have usually been heavily redacted.

13.   The Claimant's understanding of the Defendant's use of automation is therefore based on the limited information that has been disclosed in public reports, during a parliamentary debate, and in response to written parliamentary questions and to FOIA requests.

14.   In summary, the Claimant understands that the following is occurring with respect to UC claims:

(a)   The Defendant's Integrated Risk and Intelligence Service ("**IRIS**") (or another team[1]) is using certain automated processes, including advanced analytics and machine learning, to identify UC claims that may be fraudulent or otherwise erroneous. It appears that these processes include "*transaction risking*", whereby risk scores are assigned to UC claims on the basis of certain undisclosed factors.[2] The Defendant's Enhanced Review Team ("**ERT**"), or another team such as the Risk Review Team ("**RRT**") or the Enhanced Checking Service ("**ECS**"),[3] reviews claims for UC that have been flagged by IRIS.[4]

(b)   It seems that certain UC claims that have been referred to the ERT by IRIS result in a suspension of payments of UC, before the ERT reviews those claims, either: (i) automatically, at the point at which the IRIS flags those claims to the ERT for review; and/or (ii) by the ERT before it carries out any meaningful review of those claims. The Claimant considers that, in scenario (i) and/or (ii), the Defendant is relying on automated decision-making to suspend UC payments, since either scenario involves a decision being taken in relation to an award of UC without

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[1] References below to "IRIS" should be taken as references to any team within the DWP which has carried out, and/or does carry out, similar functions to IRIS on behalf of the Defendant.
[2] Department for Work and Pensions, *Annual Report and Accounts 2022-23*, p. 102.
[3] References below to "ERT" should be taken as references to any team within the DWP which has carried out, and/or does carry out, similar functions to the ERT, such as the RRT and ECS, on behalf of the Defendant.
[4] We understand that the Enhanced Checking Service and the Risk Review Team are now both within the auspices of the Enhanced Review Team.

meaningful human involvement first occurring (scenarios (i) and (ii) are referred to together as "**automated decision-making**" below).

(c)   The Defendant has provided limited evidence about IRIS's or the ERT's functions and the automated processes that they use, and has stated publicly that human involvement <u>does</u> occur before decisions are taken with respect to UC payments. Notwithstanding the Defendant's public comments about human involvement, the Claimant considers that there is credible evidence to suggest that the automated decision-making in scenarios (i) and/or (ii), as described above, are currently occurring. This evidence includes the correspondence between the DWP and the Claimant's clients, the sheer number of UC payments that have been suspended in recent years (at a level which suggests that meaningful involvement by human caseworkers is not occurring), and the information provided by the DWP in response to representations and questions by MPs and third-sector organisations.

(d)   For completeness, the Claimant notes that the Defendant has, in response to an internal review of a refused FOIA request, made guidance publicly available, which, according to the Defendant, was issued to the ERT and implemented from 10 April 2023.[5] The guidance appears to indicate that the Defendant may require members of the ERT to carry out "vulnerability checks" on claims that have been flagged by the Defendant's automated processes, before any suspension is effected (the "**vulnerability checks guidance**"). It is not clear how the vulnerability checks guidance operates in practice; and the Claimant considers that it may not be operating effectively to ensure vulnerable claimants' payments are not suspended. But in any event, for the purposes of the Claimant's proposed claim, it appears that the vulnerability checks guidance is irrelevant. The guidance does not state that the Defendant no longer relies on automated decision-making (or automated triaging, which is described below), and so the guidance does not mitigate the unlawful consequences of the Defendant's processes (which are described at in the Claimant's proposed grounds of challenge below).

(e)   The Claimant also notes that the Defendant has, in response to an FOIA request, disclosed undated training materials that appear to have been produced to assist ERT caseworkers.[6] Although the materials appear to advise ERT caseworkers to review UC payments in certain circumstances, they do not seem to prevent all UC payments from being suspended prior to reviews being carried out; and in the experience of the Claimant's clients, UC payments are routinely suspended without reviews being carried out by ERT caseworkers. Nor do the materials indicate whether and how ERT caseworkers are made aware of the reasons why claims have been flagged for review by IRIS (or another relevant team), and/or whether there are safeguards to prevent caseworkers from assuming that flagged cases should be suspended (and, if so, how those safeguards operate). Indeed, the training materials make no reference to the Defendant's use of automated processes, such as advanced analytics or machine learning, and make no reference to the Defendant's use of *"transaction risking"* (as described above).

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[5]https://www.whatdotheyknow.com/request/change_regarding_approach_to_sus/response/2563145/attach/4/Benefits%20suspension%20and%20Unsuspension%20Redacted.pdf?cookie_passthrough=1.
6 The materials are entitled "CFCD16 ERT Review Process" and "CFCD16 Review Process v2".

15. In addition to the Defendant's use of automated decision-making with respect to existing UC awards, the Claimant also considers that the Defendant is deploying automation in order to triage applications for advanced payments of UC. In summary, the Claimant understands that the following is occurring:

(a) IRIS is using a risk model, called the "UC Advances Model", to identify applications for advanced payment which, according to the Model, may have a greater risk of subsequently resulting in a fraudulent or erroneous UC claim.[7] The UC Advances Model appears to rely on advanced analytics and machine learning in order to determine the level of *"fraud and error"* risk which is attendant upon each application. Once the UC Advances Model identifies and flags an application, it is reviewed by the Defendant's caseworkers. The criteria by which the UC Advances Model flags applications for review are unknown and have not been disclosed by the Defendant.

(b) The National Audit Office describes the UC Advances Model as "*a machine learning model*" which is being used to "*flag potentially fraudulent claims for Universal Credit advances to Universal Credit agents*" and which was created by the Defendant DWP "*by training an algorithm using historical claimant data and fraud referrals, which enables the model to make predictions about which new benefit claims are likely to contain fraud and error*".[8]

(c) The Claimant notes that the Defendant has stated publicly, with respect to the UC Advances Model, that its caseworkers are *"not informed why the claim was selected for review"* and that *"they undertake each review with the same rigour"*.[9] However, even if human involvement does occur before a final decision is made about the application that has been flagged for review, it appears that no human involvement occurs at the point at which the UC Advances Model flags claims for review. As such, the Claimant considers that the determination of which claims are flagged for review, pursuant to an undisclosed set of criteria, amounts to a form of automated decision-making (this is referred to below as "**automated triaging**", in order to distinguish it from the automated decision-making that is described above).

16. At this stage, the targets of the Claimant's proposed claim for judicial review are: (a) the Defendant's use of automated decision-making with respect to the suspension of payments of UC; and (b) the Defendant's use of automated triaging with respect to applications for advanced payment of UC.

(b)   Proposed grounds of challenge

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[7] There is evidence that the Defendant is using similar risk models, which are based on the UC Advances Model, to assist with other aspects of its decision-making in relation to other applications and claims for UC. The Claimant challenges the lawfulness of any such models, and requests that the Defendant discloses the details of any risk model that is being used by the Defendant in the context of social security claims and/or applications.

[8] Department for Work and Pensions, *Annual Report and Accounts 2022-23,* p.309.

[9] Department for Work and Pensions, *Annual Report and Accounts 2022-23*, p. 102.

(i) Ground 1: Failure to follow policy guidance

17. Public authorities are obliged under the common law to follow their published policy guidance unless there is a good reason to depart from it: see *R (ZLL) v SSHCLG* [2022] EWHC 85 (Admin) at §7; and *R (Lumba) v SSHD* [2011] UKSC 12, [2012] 1 AC 245 at §26.

18. The Defendant's published policy guidance – for example in his *Suspension and Termination Guide* and *Fraud Investigations Guide* – envisages that decision-makers will take certain actions before they suspend payments of UC. For example, decision-makers are told to consider each case on its own merits, consider whether hardship would occur, exercise their powers in an objective and unbiased way, and ensure that "*the question giving rise to the suspension*" is supported by "*clear, genuine evidence*".[10] The Defendant's guidance therefore envisages individualised assessments taking place before UC payments are suspended. Similarly, the Defendant's *Personal Information Charter* states that "*DWP does not use AI to replace human judgement to determine or deny a payment to a claimant. A final decision in these circumstances always involves a human agent.*"[11]

19. Furthermore, the Defendant's published policy guidance advises decision-makers to provide reasons when they suspend payments of UC. The Defendant's *Suspension and Termination Guide,* for example, states that decision-makers must "*be able to show they acted reasonably whenever they exercise their discretion", "record their decision"* and give a "*reasoned account*" of the factors that were considered when making their decision.[12]

20. As a result of the Defendant's use of automated decision-making, UC payments are in practice being suspended without individualised assessments being carried out and without reasons being provided to UC claimants. As described above, it appears that UC payments are being suspended: (i) automatically, at the point at which the IRIS flags those claims to the ERT for review; and/or (ii) by the ERT before it carries out any meaningful review of those claims. The Defendant's failure to carry out individualised assessments and/or to provide reasons amount to departures from the Defendant's published guidance. These practices are unlawful because the Defendant has provided no reason to justify them.

21. To the extent that (a) the Defendant relies on guidance to govern his determination of applications for advanced payment of UC and (b) the Defendant is failing to follow this guidance as a result of his use of automated decision-making, the Defendant's practices (in particular his reliance on the UC Advances Model) may be in breach of this guidance too. The Defendant is therefore asked to provide any such guidance by way of disclosure, as requested below.

(ii) Ground 2: Breach of the principle of transparency and/or breach of the duty of publication and/or systemic unfairness

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[10] Department for Work and Pensions, *Suspension and Termination Guide,* §2005.
[11] Department for Work and Pensions, *Personal Information Charter*, p. 7.
[12] Department for Work and Pensions, *Suspension and Termination Guide,* §1050.

22. Public authorities are subject to the following common law obligations:

   (a) Under the duty to act transparently, authorities are required to make individuals aware of the criteria which authorities use to determine their legal rights. In *R (Ames) v Lord Chancellor* [2018] EWHC 2250 (Admin), for example, the claimant successfully challenged the Legal Aid Agency's refusal to disclose an algorithm on which it relied to make fee offers on the basis that this breached the duty of transparency and resulted in procedural unfairness.

   (b) Under the duty of publication, authorities are obliged to publish policies which either (i) are relied upon to guide their decisions or (ii) replace or amend the authority's existing policies: see, for example, *R (McMorn) v Natural England* [2015] EWHC 3297 (Admin), [2016] PTSR 750 at §150.

   (c) Under the duty to act fairly, authorities are prohibited from adopting a practice or policy which gives rise to an unacceptable risk of systemic procedural fairness: see, for example, *R (Howard League for Penal Reform) v Lord Chancellor* [2017] EWCA Civ 244, [2017] 4 WLR 92; *R (A) v Secretary of State for the Home Department* [2021] UKSC 37, [2021] 1 WLR 3931.

23. The Claimant considers that the Defendant's use of automated decision-making and/or automated triaging breaches all or some of these obligations for the following reasons:

   (a) Under the principle of transparency, the Defendant is obliged to provide individuals with transparent and reliable guidance as to how he relies on automation in order to suspend payments of UC or to triage applications for advanced payments of UC. Yet the Defendant's published policies do not contain meaningful guidance in relation to the DWP's use of automated decision-making or automated triaging, even though these processes are relied upon by the Defendant for the purpose of determining individuals' entitlement to UC payments.[13] The Defendant's failure to provide individuals with any information as to how automation is being used breaches the principle of transparency.

   (b) Under the duty of publication, the Defendant is obliged to publish policies that guide the Defendant's use of automation and/or that replace or amend existing policies. To the extent that the Defendant is relying on an unpublished policy which guides his use of automation, and which may therefore have amended or replaced the guidance in his published policies (such as the guidance in his *Suspension and Termination Guide* or *Fraud Investigations Guide*), the Defendant is in breach of the duty of publication.

   (c) Under the duty to act fairly, the Defendant is prohibited from adopting practices which give rise to an unacceptable risk of systemic procedural unfairness. The

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[13] For example, the Defendant's *Suspension and Termination Guide* does not make reference to the use of automation. The *Fraud Investigations Guide* does make reference to the use of automation but does not explain in any detail how automation is used by the DWP. The *Personal Information Charter* also does not contain information about the DWP's use of automation, other than to state that the "*DWP does not use AI to replace human judgement to determine or deny a payment to a claimant*" and "*the DWP uses profiling to help detect and prevent fraud and error*" (see p. 7).

Defendant's use of automated decision-making and/or automated triaging both give rise to a risk of systemic procedural unfairness because they result in UC claimants and/or advanced payment applicants not being informed as to why their UC payments are suspended and/or why their application for advanced payment has been triaged for further review. Procedural unfairness therefore inheres within the Defendant's reliance on automated decision-making and/or automated triaging.

24. Accordingly, the Defendant's use of automated decision-making and/or automated triaging is unlawful because it breaches the principle of transparency, breaches the duty of publication, and/or gives rise to a risk of systemic procedural unfairness.

(iii)   Ground 3: Unlawful delegation and/or fettering of discretion

25. Under the Social Security Act 1998 ("**SSA 1998**") and Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 ("**D&A Regs 2013**"), the Defendant is empowered to take decisions in connection with the suspension of UC payments. In doing so, the Defendant is required to consider certain factors. For example:

   (a)   Under ss. 21 and 22 of the SSA 1998, the Defendant is empowered to suspend UC payments *"in prescribed circumstances"* and in response to a claimant's failure to furnish information.

   (b)   Under s. 21(2) of the SSA 1998, and regs 44(2) and 45(4)(b) of the D&A Regs 2013, the Defendant must decide whether certain conditions exist before deciding whether to suspend UC payments.

26. Although the statutory regime does not require the Defendant to exercise these functions personally, the Defendant may only delegate his functions to officials, amongst other things, if (a) such delegation is consistent with the statutory regime (see *R v Adams* [2020] UKSC 19, [2020] 1 WLR 2077) and (b) the delegated powers are exercised by responsible and suitably experienced persons (see *R v SSHD, ex p Oladehinde* [1990] UKHL 11, [1991] 1 AC 254, 303E). Separately, the Defendant is not entitled to fetter the exercise of his discretion: see, for example, *R v SSHD, ex p Venables* [1997] UKHL 25, [1998] AC 407, 496G-497.

27. The Claimant considers that by using automated decision-making and/or automated triaging, the Defendant is unlawfully delegating to automated processes his functions under the SSA 1998 and D&A Regs 2013. Such delegation is inconsistent with the statutory regime, which envisages that decisions will be taken by human decision-makers. It is therefore unlawful.

28. Furthermore, the Claimant considers that if the Defendant is permitting decisions to be taken or applications to be triaged pursuant to pre-programmed algorithms or processes, without any possibility of deviation in accordance with the particular circumstances of an individual's case, then the Defendant's use of automated decision-making and/or

automated triaging is unlawfully fettering the Defendant's exercise of discretion. This too is unlawful.

(iv)   Ground 4: Breach of the UK GDPR

29.   The UK GDPR, which is implemented by the Data Protection Act 2018 ("**DPA 2018**"), confers various rights upon individuals, and imposes various obligations on public authorities, with respect to data processing. The following parts of the UK GDPR are relevant:

(a)   Article 22(1) provides that a data subject has the right "*not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or significantly affects him or her*". Article 4(4) defines "*profiling*" as "*any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements*".

(b)   Article 13 provides that "*Where personal data relating to a data subject are collected from the data subject, the controller shall, at the time when personal data are obtained, provide the data subject with*", amongst other things, information as to "*the purposes of the processing for which the personal data are intended as well as the legal basis for the processing*" (art. 13(1)(c)) and information as to "*the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject*" (art. 13(2)(f)).

(c)   Article 15 provides that the "*data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data*" and information amongst other things as to "*the purposes of the processing*" (art. 15(1)(a)) and "*the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject*" (art. 15(1)(h)).

30.   The Claimant considers that the Defendant's use of automated decision-making and/or automated triaging breaches art. 22(1) of the UK GDPR.[14] This is because:

(a)   By relying on automated decision-making to suspend payments of UC, the Defendant is subjecting data subjects to decisions that are based solely on

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[14] For completeness, the Claimant does not consider that any domestic law requires or authorises the Defendant's use of automated decision-making or automated triaging. Nor does the Claimant consider that there are domestic laws that have established suitable measures to safeguard data subjects' rights, freedoms and legitimate interests, in circumstances where automated decision-making and/or automated triaging is taking place: see art. 22(2)(b) of the UK GDPR.

automated processing and that plainly have legal effects and/or significantly affect data subjects; and

    (b)   By using automated triaging to determine which claims should be flagged for review by caseworkers, the Defendant is subjecting data subjects to *"profiling"*.

31. Furthermore, the Claimant considers that the Defendant is in breach of his obligations under arts. 13 and 15 because, in (a) suspending payments of UC and/or (b) triaging applications for advanced payment of UC, the Defendant fails to provide claimants / applicants with adequate information as to the manner in which the Defendant uses profiling and automated processes (see Ground 2 above).

32. Accordingly, the Defendant's use of automated decision-making and/or automated triaging is unlawful under the UK GDPR.

(v)   <u>Ground 5: Discrimination contrary to the EA 2010</u>

33. Under ss. 19 and 29 of the Equality Act 2010 ("**EA 2010**"), the Defendant is prohibited from adopting a provision, criterion or practice which indirectly discriminates against persons on the basis of their protected characteristics.

34. The Claimant considers that both the Defendant's automated practices may be indirectly discriminatory[15] for the following reasons:

    (a)   It appears that the Defendant's use of automated decision-making, for the purpose of suspending UC payments, may be discriminating against persons on the basis of their sex and/or race. The vast majority of the Claimant's clients, whose payments of UC have been suspended by the ERT (or the RRT), are Bulgarian nationals.[16] It also appears that women, including single mother claimants, are having their payments suspended by the ERT (or a similar team such as the RRT) at a greater rate than other UC claimants.

    (b)   It also appears that the Defendant's use of automated triaging, for the purpose of flagging applications for advanced payments of UC for review, may be discriminatory. The Defendant has failed to publish the criteria that its UC Advances Model uses to determine which claims to flag for review, so there is necessarily limited evidence as to the equality impacts of the UC Advances Model. However, the National Audit Office has reported that the Model's algorithm uses *"historical claimant data and fraud referrals"* in order to *"make predictions about which new benefit claims are likely to contain fraud and error"*.[17] The Defendant has not made clear whether safeguards have been put in place to ensure that the Model's use of claimant data does not result in the Model targeting individuals

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[15] The Claimant presently reserves its position on whether these practices are directly discriminatory, pending further disclosure.
[16] See, for example, comments made by Kate Osamor MP in a debate in Parliament on 26 June 2022, where she stated that she became aware of 29 constituents in October 2021 who had all had their UC payments suspended and were being investigated by the RRT. All 29 constituents were Bulgarian nationals.
[17] Department for Work and Pensions, *Annual Report and Accounts 2022-23,* p.309.

(whether by design or through machine learning) on the basis of their protected characteristics. To the extent that no (or no adequate) safeguards have been put in place, the UC Advances Model may be discriminatory.

35. The Claimant also notes that, in addition to the UC Advances Model, the Defendant has recently *"developed and piloted four similar models designed to prevent fraud in the key areas of risk in Universal Credit: people living together, self-employment, capital, and housing"*.[18] To the extent that these *"key areas of risk"* have been translated into criteria for determining and reviewing UC claims, the Claimant contends that these criteria may be indirectly discriminatory. The Defendant is asked to provide details in relation to these four models (see below).

36. Although the evidence of discrimination is necessarily limited given the Defendant's failure to provide information about his use of automated decision-making and/or automated triaging,[19] the Claimant notes that:

    (a) The National Audit Office has reviewed the Defendant's automated processes and concluded that his use of machine learning through the UC Advances Model gives rise to *"an inherent risk that the algorithms are biased towards selecting claims for review from certain vulnerable people or groups with protection characteristics"* due to *"unforeseen bias in the input data or the design of the model itself"*;[20] and

    (b) The DWP has itself recognised that *"its ability to test for unfair impacts across protected characteristics is currently limited"* and that its own analysis found *"some evidence of bias toward older claimants"*.[21]

37. Accordingly, the Claimant considers there is sufficient evidence, even at this early stage, to indicate that the Defendant's use of automated decision-making and/or automated triaging gives rise to indirect discrimination contrary to the EA 2010.

(vi) Ground 6: Unlawful discrimination in breach of the ECHR

38. Section 6 of the Human Rights Act 1998 ("**HRA 1998**") prohibits public authorities from acting in a way which is incompatible with a right under the European Convention on Human Rights ("**ECHR**"). Schedule 1 to the HRA 1998 sets out the articles of the ECHR which are protected for the purposes of the HRA 1998. These include Article 8 (the right

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[18] Department for Work and Pensions, *Annual Report and Accounts 2022-23,* p.309.
[19] The Defendant has not published any (unredacted) equality impact assessment in relation to the way IRIS or the ERT/RRT operate, and has not published data on the protected characteristics of those who have faced suspension. The Claimant requests that the Defendant urgently provide a breakdown by age, nationality and sex of the numbers of claimants who have had their benefits suspended. Similarly, the Defendant has failed to disclose the criteria which the UC Advances Model (and similar models) use to triage applications for advanced payment of UC. The Claimant requests that these criteria are disclosed, and that the Defendant urgently provide a breakdown by age, nationality and sex of the numbers of applications which have been referred by the UC Advances Model to DWP caseworkers. The Claimant reserves the right in due course to rely on further evidence of discriminatory impact.
[20] Department for Work and Pensions, *Annual Report and Accounts 2022–23*, p.309.
[21] Department for Work and Pensions, *Annual Report and Accounts 2022–23*, p.309.

to respect for private and family life), Article 14 (the right not to be discriminated against in the enjoyment of the rights and freedoms set out in the ECHR), and Article 1 of Protocol 1 ("**A1P1**") (the right to peaceful enjoyment of property).

39. It is well-established that decisions which affect individuals' entitlement to social security benefits can fall within the ambit of Article 8 and/or A1P1 such as to engage Article 14: see, for example, *R (MA) v SSWP* [2016] UKSC 58, [2016] 1 WLR 4550; *R (DA) v SSWP* [2019] UKSC 21, [2019] 1 WLR 3289; and *R (SC & Ors) v SSWP* [2021] UKSC 26, [2022] AC 223. It is also well-established that a measure or practice can be challenged on a systemic basis if an unacceptable risk of ECHR rights being violated inheres within the measure (see, for example, *R (Just for Kids Law) v SSHD* [2019] EWHC 1772 (Admin), [2019] 4 WLR 97 and *R (British Medical Association) v SSHSC* [2020] EWHC 64 (Admin)), and that a policy can challenged on a systemic basis if the policy sanctions, positively approves or encourages violations of ECHR rights (see *R (BF (Eritrea)) v SSHD* [2021] UKSC 38, [2021] 1 WLR 3967).

40. For the reasons given above under Ground 5, the Claimant considers that the Defendant's use of automated decision-making and/or automated triaging may be disproportionately affecting certain individuals on the basis of their protected characteristics. To this extent, the Defendant's use of these processes gives rise to an unacceptable risk of violating UC claimants' rights under Article 14, read in conjunction with A1P1 and/or Article 8. Further and/or alternatively, to the extent that such processes are governed by policy guidance (whether published or unpublished), the Claimant considers that such guidance necessarily sanctions violations of ECHR rights and is therefore unlawful.

(vii) Ground 7: Breach of the Withdrawal Agreement

41. The Withdrawal Agreement, which is implemented in domestic law by section 7A of the European Union (Withdrawal) Act 2018, prohibits discrimination of EEA citizens (and their family members) on grounds of nationality (Article 12) and entitles EEA citizens (and their family members) to equal treatment (Article 23). The EU Charter of Fundamental Rights also prohibits discrimination (Article 21). Most of the individuals that approached the Claimant for assistance with UC suspensions held pre-settled status or settled status, and the Claimant understands that most of these individuals were also asked to provide proof of this status, as part of the Defendant's investigations into the eligibility of their claims. The Claimant understands from previous communication with the Independent Monitoring Authority for the Citizens' Rights Agreement ("**the IMA**") that the IMA was investigating whether these practices were contrary to the Withdrawal Agreement. To the extent that the Defendant's automated systems are disproportionate identifying this cohort's claims for suspension, because of their nationality/immigration status, these processes do in fact breach the Withdrawal Agreement. The Claimant notes that this cohort have been required, by necessity, to obtain a new form of immigration status to remain in the UK, and it would be contrary to the Withdrawal Agreement if this obligation to obtain a new immigration status has also caused their claims to be suspended at a disproportionate rate.

(viii) Ground 8: Breach of the PSED

42. Under s. 149 of the EA 2010, public authorities are subject to the public sector equality duty ("**PSED**"). The PSED requires public authorities, in the exercise of their functions, to "*have due regard to the need to – (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under [the EA 2010]; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it*". The following principles are relevant in determining whether and how the PSED arises in a given case:

    (a)   The PSED can involve a duty of inquiry: *Bracking v SSWP* [2013] EWCA Civ 1345, §26(8)(ii).

    (b)   The extent of the duty of inquiry is context specific: *R (Refugee Action) v SSHD* [2014] EWHC 1033 (Admin) at §§121, 149-151. Where a policy will apply to a large number of people, a careful inquiry will be required, particularly where those people are vulnerable and/or marginalised.

    (c)   The PSED must be *"exercised in substance, with rigour, and with an open mind"*: *Bracking*, §26(5)(iii).

    (d)   The duty is more demanding where the public authority is using a novel digital system. In such circumstances, it is required to satisfy itself that the system design does not inherently disadvantage particular protected groups: *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058, [2020] 1 WLR 5037, §§191, 199 and 201.

    (e)   The PSED is a continuing duty, and arises every time a public function is exercised: *R (Bapio Action Ltd) v Royal College of General Practitioners* [2014] EWHC 1416 (Admin).

    (f)   The failure to monitor the impact of an exercise of a public function has been held to be a breach of the PSED: *R (DMA) v SSHD* [2020] EWHC 3416 (Admin).

43. Given (a) the grave impact that UC suspensions have on individuals (including causing individuals to live below subsistence levels and creating a risk of destitution and homelessness), (b) the high number of people that have been impacted and fall to be impacted in the future,[22] and (c) the fact that the Defendant is using novel digital systems to suspend UC payments and/or review applications for advanced UC payment, the PSED in this case is demanding: see *Bridges*.

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[22] The Claimant notes that the Defendant has asserted in his *Annual Report 2022-23* that he intends to have reviewed 8 million UC claims by 2027/28. The Claimant understands that the Defendant intends to use automated technologies to assist with this review. The Claimant also notes that as of March 2023, the RRT had suspended 188,119 UC payments (of which 7,221 payments had been reinstated following review by the RRT), according to a response to a FOIA request dated 1 March 2023 and responded to on 27 March 2023 [FOI2023/16558]. It also appears that between May 2020 and March 2023, the ERT suspended 425,510 cases. See Department for Work and Pensions, *Annual Report and Accounts 2022-23*, p 101.

44. However, although the Defendant has been asked via FOIA requests to provide equality impact assessments that are relevant to the Defendant's use of automated decision-making and/or automated triaging[23] – and although parliamentarians have asked whether such assessments have been carried out and for such analysis to be published[24] – the Defendant has refused to disclose any meaningful information about any equality impact assessments which his department may have carried out.

45. Notwithstanding the lack of public information about the equality impacts of the Defendant's use of automation, the Claimant considers that there is sufficient evidence to demonstrate that the Defendant has breached the PSED. In particular, the Claimant notes that:

    (a) The Defendant's use of automated decision-making and/or automated triaging appears to be having a discriminatory impact, for the reasons given above under Ground 5;

    (b) The Defendant has himself recognised that there are equality concerns with his use of automation and that further assessments are necessary, for example by stating that the DWP's *"ability to test for unfair impacts across protected characteristics is currently limited"*;[25]

    (c) A respected external organisation, the National Audit Office, has reviewed the Defendant's automated processes and concluded that his use of machine learning gives rise to *"an inherent risk that the algorithms are biased towards selecting claims for review from certain vulnerable people or groups with protection characteristics"* due to *"unforeseen bias in the input data or the design of the model itself"*;[26] and

    (d) The Defendant does not appear to have been monitoring the impact of his use of automation in any meaningful way. Nor does the Defendant appear to have been making inquiries which, in light of the concerns that have raised by organisations and parliamentarians such as Kate Osamor MP, he was obliged to make: see *Bracking*.[27]

    (e) Further, the Claimant is concerned about recent statements made on behalf of the Defendant, which indicate that the Defendant may no longer even be monitoring the number of payments which are being suspended by the ERT, apparently "due to large volumes of data being held across different clerical

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[23] See, for example, the request from Jack Maxwell on 28 August 2020 seeking, among other things, DPIAs and equality impact assessments in relation to the Defendant's fully automated risk analysis and intelligence system for fraud and error.

[24] See the debate on 26 January 2022 at 4.21pm on the DWP Risk Review Team (Column 397WH) and responses to Written Parliamentary Questions, including response by Tom Pursglove MP to Jonathan Ashworth MP (UIN 188292).

[25] Department for Work and Pension, *Annual Reports and Accounts 2022-23*, p. 309.

[26] Department for Work and Pensions, *Annual Report and Accounts 2022–23*, p.309.

[27] See the debate on 26 January 2022 at 4.21pm on the DWP Risk Review Team (Column 397WH) and responses to Written Parliamentary Questions, including response by Tom Pursglove MP to Jonathan Ashworth MP (UIN 188292).

platforms", which would need to be "forensically examined" in order for the data to be available. The Defendant has also said that data on the number of cases closed, reinstated or which are presently suspended by ERT also are not available to him.[28] The Claimant does not understand why this information is not available, when it appears that information of this nature with respect to the RRT was previously disclosed. The Claimant also does not understand how the Defendant can state that it does not suspend pending further inquiries "most cases where intelligence flags a concern regarding the veracity of a claim", if it does not have readily available data on how many cases are handled by the ERT and how many are ultimately suspended, and whether this suspension occurs before or after the further enquiries have been carried out.

(f)   The Claimant notes that the Defendant has said his department "is committed to reporting annually to Parliament on its assessment of the impact of data analytics on protected groups and vulnerable claimants" and that a first assessment will appear in his department's 2023-24 Annual Report and Accounts. However, the Claimant does not understand how this assessment can be meaningful where the Defendant is not actively monitoring even the number of claims that the ERT is suspending, whether prior to any further investigation or otherwise. To the extent that the Defendant is indeed failing to monitor the number of claims that are suspended by the ERT, and is therefore failing to make sufficient inquiries before assessing the impact of his automated decision-making on protected groups and vulnerable claimants, the Claimant considers that the Defendant may be in breach of his *Tameside* obligation: see *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014.

(8)   DETAILS OF THE ACTION THAT THE DEFENDANT IS EXPECTED TO TAKE

46.   In order to avoid the need for us to issue proceedings against you, please take the following actions **within 21 days of today's date (i.e. by 4pm on 10 May 2024):**

(a)   Confirm that the Defendant will publish any internal unpublished guidance that explains how the Defendant is using automated processes in order to (i) suspend payments of and/or otherwise support the determination of claims for UC and/or (ii) triage and/or review applications for payment of UC;[29]

(b)   Confirm that the Defendant will publish any guidance that relates to how automation, in any form, might assist the Defendant in his suspension, determination, reviewing and/or triaging of payments or applications for UC;

(c)   Confirm that the Defendant will provide a detailed explanation as to whether and how the Defendant is using automated processes, for the purpose of addressing fraud and error in the social security system, in order to assist with (i) the

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[28] Response by Paul Maynard MP to Simon Lightwood MP (UIN 4018).
[29] The Claimant expects that this will include, amongst other documents, the "Enhanced Review business as usual instructions" and the "Handover Tool" referred to in the vulnerability checks guidance.

suspension of UC payments and/or (ii) the reviewing and triaging of applications for advanced payment of UC;

(d) Confirm that in the future the Defendant will not, without first providing adequate explanation as to the basis of his decision to individual claimants and/or applications, (i) suspend UC payments and/or (ii) triage applications for advanced payment of UC;

(e) Confirm that the Defendant (i) will no longer use automation in a way that constitutes unlawful delegation and/or a fettering of his discretion and (ii) will publish guidelines and/or provide information as to how the Defendant will ensure that his delegation is lawful and discretion is not fettered, where automation is utilised, in the future;

(f) Confirm that the Defendant will (i) no longer suspend UC payments, and/or triage applications for advanced payment of UC, in a way that is contrary to arts. 13, 15 and 22 of the UK GDPR and (ii) explain the steps that the Defendant will take to ensure his use of automation complies with arts. 13, 15 and 22;

(g) Confirm that the Defendant will immediately cease to use automation in order to (i) suspend payments of and/or otherwise determine claims for UC and/or (ii) triage and/or review applications for payment of UC, pending a comprehensive review of the discriminatory impacts that these processes may be having. The Defendant should explain the steps that his Department will take in order to assess their discriminatory impacts and this assessment should consider, in particular, whether and how these processes discriminate against individuals on the basis of age, race (nationality), gender, status a single mother or parent, and immigration status/EUSS status;

(h) Confirm that the Defendant will immediately unsuspend any UC payments that are currently suspended as a result of the Defendant's use of automated processes pending a review of these claims to ensure that suspension of those payments is lawful;

(i) Confirm that the Defendant will give due regard to his PSED and provide details of how the Defendant will comply with his PSED going forward.

(9) ALTERNATIVE DISPUTE RESOLUTION PROPOSALS

47. As set out above, the Claimant is hopeful that this issue can be resolved without recourse to litigation and is receptive to any offer of negotiation or alternative dispute resolution. Please confirm if you are willing to resolve this claim without litigation and outline any proposed or preferred alternative dispute resolution in your response, taking into account the fact that the issues raised by the Claimant may affect a significant number of UC claimants and/or applicants, whose UC payments could be suspended or whose application could be flagged for review without any explanation.

(10) **DETAILS OF ANY INFORMATION SOUGHT**

48. If you contest this claim, please provide us with full disclosure of any and all documents that the Defendant has in his possession that are relevant to this claim.

49. We remind the Defendant of his duty of candour in the conduct of judicial review proceedings. The Defendant's duty is particularly demanding in circumstances where:

    (a)   The Defendant has failed to make information publicly available as to the nature of his use of automated decision-making and/or automated triaging; and

    (b)   Since 2020, colleagues at Public Law Project and other organisations have sought such information via requests for information made under the Freedom of Information Act 2000 ("**FOIA 2000**"), and yet the Defendant has provided only limited information in response by relying on exceptions to disclosure contained in the FOIA 2000.

50. Irrespective of the outcome of those FOIA proceedings, the Defendant is under a discrete and important duty of disclosure in the context of this proposed judicial review claim, which applies at the pre-action stage.[30] Without adequate disclosure at this stage, the Claimant will not be able properly to assess the lawfulness of the Defendant's use of automation and, therefore, will not be in a position to seek to resolve the dispute without recourse to litigation.

51. The Claimant therefore requests, in addition to any other documents which may be relevant to the claim, disclosure and/or provision of the following documents and/or information:

    (a)   Any/all relevant internal guidance or policies and, in particular, any guidance or policies that are being relied upon by the RRT and/or the ERT and/or the ECS and/or the Interventions Prevent Team and/or any similar team either within and/or externally contracted by the DWP in reviewing cases that are flagged by IRIS;

    (b)   The *"relevant guidance for individual benefits"* that is referred to in the DWP's *Suspension and Termination Guide* as containing "*details of the action to take on computer systems to suspend, terminate entitlement to benefit or stay a decision*";[31]

    (c)   The mechanism by which IRIS flags claims for review to the RRT and/or the ERT and/or the ECS and/or the Interventions Prevent Team and/or any similar team within or contracted by the DWP, and the steps (if any) that caseworkers in these teams take before deciding to suspend UC payments and/or to determine applications for advanced payment of UC;

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[30] See, for example, the Treasury Solicitor's Department, *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings*, January 2010 (p. 4) and *HM, MA, KH v SSHD* [2022] EWHC 2729 (Admin), §§5, 16, 38-43.
[31] Department for Work and Pensions, *Suspension and Termination Guide,* §100.

(d) The risk factors applied by IRIS in determining which claims should be referred to the RRT and/or the ERT and/or the ECS and/or the Interventions Prevent Team and/or any similar team within or contracted by the DWP for further review or investigation;

(e) Information about the four risk models that the DWP "*piloted*" in 2022/23 to investigate the following "*key areas of risk in [UC]: people living together, self-employment, capital, and housing*";[32]

(f) The "*pre-launch fairness analysis*" and equality impact assessments ("**EIAs**") that the DWP has carried out in relation to data matching and IRIS, and any materials in relation to the fairness analysis assessment, which the DWP has confirmed it will include in its *Annual Report and Accounts 2023-24*;[33]

(g) Any EIAs and/or similar equalities data that is held by the DWP in connection with IRIS and/or the RRT and/or the ERT and/or the ECS and/or the Interventions Prevent Team and/or any similar team within or contracted by the DWP, including but not limited to a breakdown by nationality, sex, single parent status and immigration status of the numbers of claimants who have had their UC payments suspended and/or whose applications for advanced payment of UC have been flagged for review by the UC Advances Model;

(h) Any data that is used by the Defendant to programme and/or otherwise train automated processes, and the timeframe in which the dataset was collected;

(i) Contracts between the DWP and private suppliers of automated services, and in particular the contract for the Common Risk Engine ("**CRE**");

(j) Information about the DWP team that is carrying out reviews of advanced UC payments that are flagged by the UC Advances Model, and in particular details of the team that carries or carried out the "*fairness analysis*" (including the "*pre-launch*" fairness analysis).[34]

(k) Information about the "Enhanced Review business as usual instructions" and the "Handover Tool" referred to in the vulnerability checks guidance.

52. In this context, the Defendant is further reminded of his duty of cooperation in the conduct of judicial review proceedings, which includes making genuine efforts to resolve the dispute.[35]

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[32] As described in Department for Work and Pensions, *Annual Report and Accounts 2022-23,* p.309.
[33] See the letter from the DWP to the Public Accounts Committee dated 24 October 2023.
[34] As described in Department for Work and Pensions, *Annual Report and Accounts 2022-23,* p.309.
[35] See, for example, (i) both the Protocol and the overriding objective of the Civil Procedure Rules; (ii) the Administrative Court Office, *Judicial Review Guide 2022*, October 2022 (§13.2.1); and (iii) *R (Terra Services) v NCA* [2019] EWHC 1933 (Admin), in which the Court described the *"underlying principle"* as being that public authorities should approach judicial review proceedings as a *"common enterprise"* to uphold the rule of law (§15).

53. If you do not provide a substantive response and proper disclosure within the 21-day period, with regret, judicial review proceedings, including an application for disclosure, may be commenced without further notice to you. Alternatively, an order for pre-action disclosure may be sought (see *R (BUAV) v SSHD* [2014] EWHC 43 (Admin)). In either case, we may also seek an appropriate order for costs, with reference to any failure by the Defendant to comply with his duties of candour and cooperation.

(11) DETAILS OF ANY DOCUMENTS THAT ARE CONSIDERED RELEVANT AND NECESSARY

54. See paragraphs 48-53 above.

(12) THE ADDRESS FOR REPLY AND SERVICE OF COURT DOCUMENTS

55. See paragraph 6 above.

(13) PROPOSED REPLY DATE

56. Please respond to this letter by 4pm on 10 May 2024, confirming that you will comply with the requests set out at paragraph 46. Should you not agree to comply with these requests, please provide the information sought at paragraphs 48-53 above.

57. Though it is hoped that it will not be necessary to do so, we hereby provide formal notice that should you not respond agreeing to the above, the claimant may issue judicial review proceedings without further recourse to you.

(14) CONCLUSION

58. If you disagree with any aspect of our factual or legal characterisation of the circumstances of this proposed claim, please state and particularise this in your response letter. If litigation cannot be avoided, we will rely on your answers in any future claim.

59. Please confirm receipt of this letter.

60. We look forward to receiving your response by 4pm on 10 May 2024.