

OVERPAYMENTS IN SOCIAL SECURITY & THE DISCRETIONARY WAIVER

Updated Guidance

February 2023

AT A GLANCE

A discretionary waiver is a mechanism, whereby in exceptional circumstances, DFC can exercise its discretion to ‘waive’ recovery of all or part of an overpaid benefit. This has become more important following a change in the law which, for the first time, allowed recovery of some overpaid benefits even in cases when the overpayment was caused by official error.¹

As a result, a significant number of claimants are now unable to challenge the recovery of an overpayment even if they had not been responsible for it occurring. Claimants in these circumstances would have to ask for a discretionary waiver if repayment would cause them significant detriment.

This guidance is aimed at Advisers and members of the Public. The guidance will:

- i. Outline the background to the law and policy, highlighting the relevant changes;
- ii. Outline the reasons a waiver should be granted;
- iii. Outline how to seek a discretionary waiver;
- iv. Outline the type of evidence necessary to support a waiver request;
- v. Outline options if the waiver request is refused.

1. THE LAW AND POLICY BACKGROUND

The Welfare Reform (NI) Order 2015 allowed recovery of overpayments caused by official error for benefits such as Universal Credit, New Style Employment Support Allowance and New Style Jobseekers Allowance. This change was contrary to the ‘legacy’ benefit system, which previously ensured that the Department could not recover overpayments caused by official error.

¹ Regulation 2 of the Universal Credit, Personal Independence Payment, Jobseekers Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations (NI) 2016: “Official error” means an error made by –

- (a) An officer of the Department or HMRC acting as such which was not caused or materially contributed to by any person outside the Department or HMRC;
- (b) A person employed by, and acting on behalf of, a designed authority which was not caused or materially contributed to by any person outside that authority,

But excludes any error of law which is shown to have been such by a subsequent decision of a Commissioner, or the court (as defined in Article 27(7) of the 1998 Order (a))

Law Centre NI has raised concerns about this law change and poor awareness of the option to seek a discretionary waiver. In February 2023 we published a [Legal Information Briefing](#) which updates on our successful campaign to ensure discretionary waivers are more accessible to claimants.

This updated Legal Information Briefing outlines how to request a discretionary waiver

2. REASONS TO GRANT WAIVER

A waiver can be granted for several different reasons and should consider the claimant's entire circumstances including the following:

- the claimant's financial circumstances and those of their household
- whether the recovery of the debt is impacting the claimant's health or that of their family
- the circumstances surrounding how the overpayment arose for example fraud, official error, DfC conduct
- the claimant's conduct for example, whether the debtor took steps to mitigate any overpayment, notify DfC, misrepresented or failed to disclose any matter, any fraudulent conduct etc
- whether the claimant has relied on the overpayment to their detriment
- whether the Department intended the claimant to have the money
- where the claimant can demonstrate that they did not benefit from the money that was paid
- any other factor which appears relevant to the decision maker, or which indicates recovery would not be in the public interest

3. HOW TO SEEK A DISCRETIONARY WAIVER?

In most circumstances a claimant or their authorised representative must request a discretionary waiver in order for the Department to consider if it is appropriate. However, it is arguable that the Department can act without a request if they are aware that it would be appropriate to waive recovery in the claimant's circumstances.

Waiver requests should normally be made in writing and should outline the reasons why the Department should waive recovery of the overpayment.

Recovery will not normally be suspended on the basis of a waiver request and any monies already recovered will not be refunded. It is therefore important that the

applicant outlines that they do not agree to recovery and that they would like the Department to use its discretion not to recover.

Waiver Requests should be sent to: Department for Communities
PO Box 2136
Belfast
BT1 9RW

The Appendix to this guide provides a template discretionary waiver request letter along with two example letters.

It will normally be necessary to provide supportive evidence along with the discretionary waiver request.

4. WHAT EVIDENCE IS REQUIRED TO SEEK A WAIVER?

EVIDENCE OF DETRIMENT TO HEALTH OR WELFARE

It will not normally be sufficient to provide evidence of diagnoses or the medical condition.

Evidence should specifically outline how the recovery of the overpaid amount would be detrimental to the health of the claimant or their family. This might include a letter from a medical practitioner explaining how the overpayment and its recovery has already caused or would lead to a significant deterioration in health.

If no evidence is supplied the Department may ask for this before rejecting a request.

Additional evidence is not necessary where there is an award of benefit under the 'special rules' for terminal illness. However, guidance indicates that waivers will not be granted automatically and that each case must be considered individually. It is therefore recommended that requests in these circumstances explain how the recovery will impact on health and would not be in the public interest to recover in these circumstances.

EVIDENCE OF FINANCIAL HARDSHIP

Where financial hardship is claimed it will be necessary to provide a full breakdown of the family income and expenditure.

The Department assume that overpayment recovery will cause some level of hardship and therefore when preparing the income/expenditure information must outline the significant impact the recovery will have on the client and their family.

It may also be useful to provide evidence of correspondence or specific dates and times of telephone conversations where the debtor is relying on the updated exceptional circumstances, particularly relating to the Departments conduct or comments. This may also evidence the steps the debtor had taken to mitigate any overpayments.

EVIDENCE OF OTHER FACTORS

Any evidence that supports the claimants conduct and circumstances. For example, Universal Credit journal entries; acknowledgment from DfC of maladministration; evidence of how the money was spent.

5. WHAT IF THE DISCRETIONARY WAIVER REQUEST IS REFUSED?

There is no limit on how many times a person can seek a discretionary waiver and it is possible to reapply if new evidence is available.

There is no right of appeal against a decision not to grant a discretionary waiver but any decision which is unreasonable; unfair or inconsistent with guidance and practice may be subject to Judicial Review. Law Centre advisers can help.

Please contact the **Law Centre's Social Security team** should you require further advice and assistance.

Tel: 028 90 244401

EXAMPLE 1: DISCRETIONARY WAIVER REQUEST LETTER

25 February 2023
Department for Communities
PO Box 2136
Belfast
BT1 9RW

Discretionary Waiver Request

To whom it may concern,

Re: Mrs Joan Bloggs. 1 Spring Rise, Townsville. BT99 3LJ
NINO: AB123456C

I write on behalf of the above-named client and attach a signed form of authority. My client has received notification on 25 January 2023 seeking a recovery of an overpayment of Universal Credit totalling £3,195.30.

My client is not able to repay this overpayment due to the impact on her and therefore does not agree to any recovery.

We request that the Department use its discretion to waive recovery of this overpaid amount because of the significant detrimental impact it will have on our client's health and financial circumstances and that of her family.

Whether the recovery of the debt is impacting the claimant's health or that of their family. Example:

As outlined in the attached letter from the GP, our client has a history of anxiety and depression which has on previous occasions required specialist intervention. The GP as recorded deterioration in Mrs Bloggs condition associated with the ongoing concerns about the recovery of the overpayment. It is the GP's opinion that the recovery of the overpayment could cause a further deterioration in the condition and has recently referred the patient back for specialist support.

The claimant's financial circumstances and those of their household. Example:

We have also provided an income and expenditure which outlines that in addition to the health issues Mrs Bloggs also has significant financial pressures. This demonstrates that even with the minimal deductions Mrs Bloggs does not have

sufficient income to repay the overpaid amount without incurring further debt and reducing her living standards below a reasonable level.

The circumstances surrounding how the overpayment arose for example fraud, official error, DFC conduct. Example:

In addition, the overpayment in this case occurred in good faith because our client did not cause it to occur. The overpayment occurred due to official error and our client had spent the money believing she was entitled to receive this as indicated in previous award notifications.

For the reasons outlined above, we do not consider it to be in the public interest to recover this overpayment and therefore request you apply discretion and waive recovery of the overpaid amount.

We look forward to receiving your response.

Yours faithfully,

- Enc. - Form of Authority
- GP Letter dated 20 February 2023
 - Income/Expenditure February 2023

EXAMPLE 2: DISCRETIONARY WAIVER REQUEST LETTER

1 February 2023
Department for Communities
PO Box 2136
Belfast
BT1 9RW

Discretionary Waiver Request

To Whom it may concern,

Re: Mrs Ann Green. 1 Glen Street, Cityville . BT99 6RE

NINO: CB345678A

I write on behalf of the above-named client and attach a signed form of authority. My client has received notification on 1 January 2023 seeking recovery of an overpayment of Universal Credit totalling £2,467.20.

My client does not agree to the recovery of this overpayment.

How the overpayment arose:

My client contacted the department on several occasions to ensure that her payments were correct due to a reported change of circumstances. However, the department failed in their duty to act upon this information and therefore the overpayment was caused by official error.

The claimant's conduct:

My client advises that she disclosed a relevant change of circumstances on 10th November 2022. Furthermore, on 14th December 2022, the client also left a note on her journal seeking confirmation that the department had taken her new circumstances into consideration, this was confirmed by the client's Work Coach. My client acted in good faith and had taken steps to ensure her entitlement was correct.

Use of the overpaid benefit to the claimant's detriment:

My client spent the additional monies on day to day living expenses and bills. Other opportunities to increase her income were not pursued because of the additional income generated from the overpayment. This overpayment has also resulted in a missed opportunity to apply for grants to which my client would have had entitlement to, had this overpayment not occurred.

Whether the Department intended the claimant to have the money. Example:

My client contacted Universal Credit on her journal, and specifically asked if her entitlement was correctly calculated. Staff from Universal Credit confirmed that the entitlement was accurate, and the client acted under this added reassurance.

No benefit received from the money paid:

As outlined above our client used the payment for essential necessary expenses. Had she not had access to this money she would have had to seek discretionary support to meet these expenses and therefore has not made any material gain.

Additional factors including public interest:

We do not believe it to be in the public interest to recover this overpayment as my client acted in good faith; spent the money on essential needs and was not the cause of this overpayment. Additionally, opportunities were missed by the department to identify and rectify the situation when my client made further enquiries to check they were able to spend this money. My client has been greatly stressed by the situation.

We look forward to receiving your response.

Yours faithfully,

Enc. - Form of authority

***Please add or remove headings/information where relevant.**

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