EMPLOYMENT TRIBUNALS

2408488/15 (presented on 30 October 2015):
Claimant: Mr D P Hoppe

Respondent: H M Revenue and Customs

2400171/19:
Claimant: Mr D P Hoppe

Respondents: 1) H M Revenue and Customs
2) MyCSP
3) Health Management Ltd
4) Cabinet Office
5) Minister for Civil Service

HELD AT: Manchester Civil Justice Centre **ON:** 30 September 2019 to 1 October 2019

BEFORE: Regional Employment Judge Parkin

REPRESENTATION:
Claimant: In attendance by telephone
Respondents:
1) HMRC: Mr J Hurd, Counsel
2) MyCSP: Ms R Jellena, Legal Representative
3) Health Management Ltd: Mr B Mold, Counsel
4) Cabinet Office and 5) Minister for Civil Service: Mr S Redpath, Counsel

JUDGMENT AT A PRELIMINARY HEARING

The Judgment of the Tribunal is that:

1. Case No 2408488/15 (presented on 30 October 2015): The claimant's claims of being subjected to detriment for having made protected disclosures are struck out as having no reasonable prospect of success. His claims of ordinary unfair dismissal and "automatic" unfair dismissal for having made protected disclosures will proceed.

2. Case No 2400171/19: The claimant's claims against the second, third and fifth respondents are struck out as having no reasonable prospect of success. The claimant's claims against the first and fourth respondents will proceed.

REASONS

1 **The Preliminary Hearing**

The hearing was to consider applications by various respondents in these two claims to strike out the claims against them. It was held in public over two days, with the claimant attending by telephone. By way of introduction, the Tribunal provides a general overview of all the claimant's claims and then greater detail about each of them.

2 **Overview of claims**

2.1 In summary, the claimant then a civil servant within the Commercial Department of Her Majesty's Revenue & Customs (HMRC) contends that in December 2009, HMRC was embarking on illegal action which was not compliant with public procurement law. He was responsible for managing the SPRINT contract, with the supplier SCC, but was then advised that all HMRC expenditure on the SPRINT IT framework was to be switched to the alternative ASPIRE framework provider Capgemini with a novation of contracts from SCC to Capgemini, under a "deal" called Managed Office Infrastructure Services (MOIS). He refused to assist with this unlawful procurement and contends that he was thereafter sidelined, bullied, harassed and victimised as a result of raising his concerns with senior management, some of which were protected disclosures.

2.2 Later he contends that a flawed Internal Governance report IG355 wrongly exonerated HMRC despite his criticisms and despite the fact that Malcolm Edis, a Government lawyer had presented at a training day that the MOIS deal was illegal and that he, Mr Edis, had advised against it. As time progressed, the claimant claims he continued to make public interest disclosures and suffered extensive mental health breakdown and consequences from the respondent's behaviour towards him. He contends that his eventual dismissal in 2015 was because he had made the protected disclosures or was ordinarily unfair and that he had been subjected to many detriments though actions or failures to act by others alongside his employer HMRC.

2.3 His claims in these two sets of proceedings are brought against HMRC, his former employer, but also against central Civil Service departments, officers, pension administrators and health providers for detriments subsequent to his dismissal. The claims need to be considered within the context of the various sets of proceedings commenced by him.

3 **Case No 2409957/2013** (The 2013 claim) Presented on 25 July 2013. Respondent HMRC only. Protected Disclosure detriment claim

3.1 In this claim, explaining he had been an established civil servant since 1984 and had joined the Inland Revenue which became HMRC in 1991, the claimant set out that he had cause to raise concerns at the level of professional standards demonstrated by senior management and felt he had been treated unfavourably as a result, for instance by the withdrawal of temporary promotion and change of duties. He had raised further significant concerns about a commercial deal (MOIS, Managed Office Infrastructure Services) in which he was asked to execute the movement of works contracted from one framework to another.

Whilst the response to his concerns was inconsistent, he was advised of management's view that he was not considered suitable for promotion or progression, which he took to be management bullying harassment and victimisation and raised a grievance about. The investigation of his grievance was delayed with no attempt to restore the trust and confidence by his employer, leading to a very detrimental effect on his physical and mental health. He now considered his place within the Commercial Directorate untenable.

3.2 The respondent presented a vigorous response to his claim, contending that his grievance had been dismissed and his appeal not upheld, denying that any complaints he had raised constituted a protected disclosure or that he had suffered a detriment as a result.

3.3 There were a number of hearings and several Case Management Orders resulting in an Unless Order that he provide a witness statement or his claim would be struck out which was issued against the claimant on 3 March 2016, when a final hearing was listed. He did not comply and on 17 March 2016 the Tribunal confirmed this claim had been dismissed for failure to comply with the Unless Order.

3.4 The claimant's application for relief from sanction was then refused (on written representations) in a Judgment and Reasons issued by Employment Judge Porter on 18 August 2016. The claimant's appeal was unsuccessful. This claim is concluded.

4 **Case No 2408488/15, against HMRC only**

Unfair Dismissal and Protected Disclosure claim, originally rejected because of wrong payment of Issue Fee. When re-presented, led to Preliminary Hearing on 26 January 2016 at which it was dismissed by Employment Judge Holmes for having been presented out of time. The claimant's appeal against this judgment was originally unsuccessful (before the Supreme Court judgment in the UNISON judicial review of ET fees proceedings) and was then referred back to the Tribunal by the EAT after that judgment declaring the introduction of fees unlawful.

By a Case Management Order sent to the parties on 11 April 2018, Regional Employment Judge Parkin ordered that the original claim form presented on 30 October 2015 be treated as if it had been validly presented.

The claim is therefore now identified as **Case No 2408488/15 (presented 30 October 2015)**, (The 2015 claim). Respondent: HMRC only.

4.1 Alongside unfair dismissal, the claimant claimed he was subjected to unlawful detriment for raising concerns under a protected disclosure, breach of trust and confidence and breach of contract against HMRC and failure in its duty of care. Referring back to the 2013 claim he stated that the matter was a continuation of the detriment, in circumstances where the respondent had failed to deal with his grievance and he had only brought the 2013 claim once it was apparent the respondent would take no further action upon it. The respondent had made no attempt to repair working relationships after the 2013 claim was filed and he had made further protected disclosures concerning the legality of actions in the workplace and concealment/failure to address concerns raised in relation to the production of a corrupt report. Identification of the errors in the IG355 report had prompted the threat of disciplinary action. He set out that he would raise a Scott schedule of disclosures and detriments raised, asking that the claim be joined with the 2013 claim.

4.2 In its resubmitted response presented on 9 May 2018, HMRC admitted that the claimant had been dismissed on 11 June 2015 after employment as a Higher Officer in its Commercial Directorate, working as a commercial manager. It contended that he had covertly recorded a

meeting with one of his managers in August 2014 and then in September 2014 in the course of disclosure within the 2013 claim, he provided its representatives with a memory stick including transcripts and audio files of 5 meetings with his manager/senior manager recorded without consent. That matter was passed to its Internal Governance section to investigate and the investigation found that the claimant accepted he had made the recordings, having felt discriminated against and victimised and thinking his actions reasonable and justified and the investigation to be grossly inconsistent and unfair. He said that he understood that a covert recording could lead to a damaging effect on trust and confidence but felt those had already been destroyed by the respondent's bullying, harassment and victimisation of him and that, had he been aware that it viewed covert recording as gross misconduct, his actions would have been different.

4.3 The claimant did not attend the initial disciplinary hearing, having gone off sick and the rearranged hearing was postponed when his representative informed the respondent that he had sustained a "mini breakdown". The Occupational Health advice was that the claimant could engage in the disciplinary process with assistance either by correspondence or by appointing someone to assist him in the process and allow further time. Whilst the claimant requested HMRC appoint an employment lawyer to assist him, he was told its guidance did not permit the attendance of legal representatives but his union could support him and an HR representative could attend to explain the process or he could make further representations. He then made clear he wished the process to go ahead through correspondence and responded to further questions put by the decision-maker.

4.4 HMRC contended it then dismissed him for gross misconduct since he had breached its Professional Standards resulting in the breakdown of the relationship of trust with him. The claimant appealed, an appeal hearing took place which he attended but his appeal was rejected. HMRC denied any procedural unfairness contending it acted reasonably in treating the claimant's misconduct as a sufficient reason for dismissing him and dismissal was a reasonable sanction but, if the dismissal was unfair, the claimant have contributed significantly to the decision to dismiss. It denied that he had been dismissed or subjected to detriment for having made protected closures and asserted that he had not properly specified the detriments he alleged or indeed the protected disclosures relied upon. The respondent contended it simply did not understand the claimant's breach of trust and confidence, failure to comply with duty of care and breach of contract claims.

4.5 There was a Case Management Hearing on 30 July 2018 but the claimant did not attend, relying upon medical evidence from Dr Brickwood but not seeking a postponement because of his non-attendance. By the Case Management Order sent out on 3 August 2018, the claimant was ordered to provide further information confirming whether he was claiming both ordinary unfair dismissal and automatically unfair dismissal for having made a protected disclosure and identifying the disclosures made and detriments alleged together with any other claims he sought to make by reference to the statutory provisions relied upon.

4.6 The claimant provided further information on 26 August 2018 confirming that he was claiming both ordinary and automatic unfair dismissal for having made a protected disclosure and enclosing a 44-paragraph clarification of box 8.2 of his ET1 claim, with still further information on 25 September 2018 and 19 October 2018. The respondent presented its Amended Response on 11 January 2019, contending the claimant had still failed to particularise his claims sufficiently.

4.7 By letter dated 25 September 2018, the claimant identified 9 disclosures to a variety of HMRC and Civil Service personnel made between 5 August 2013 and 18 May 2015, albeit maintaining that his list was not exhaustive, adding further detail to this on 19 October. He

enclosed a useful narrative "clarification of section 8.2" of his Et1 claim form on 25 September [185-188/2015], which was treated as amendment to this claim and on 19 October 2018 he produced a copy of his email dated 18 May 2015 to Jenny Grainger [194-201/2015].

4.8 The respondent provided an Amended Response on 11 January 2019.

4.9 The claimant provided his comments upon the Amended Response, and provided a new schedule of detriments identifying 20 separate acts of detriment on 25 January 2019. All these acts were described as "ongoing", with his description of the "type of failure" being "breach of trust and confidence, employment terms, duty of care" in all cases with "PIDA protections" and "Human rights" stated in respect of some detriments.

4.10 By a further Case Management Order sent out on 4 March 2019 following a Case Management Hearing on 18 February 2019, the claimant was ordered to identify his protected qualifying disclosures by reference to the types in section 43B (1) (a) – (f) of the Employment Rights Act 1996 and to give detail of the specific acts of unlawful detriment he alleged he was subjected to (as distinct from any consequences flowing from that act).

4.11 The claimant then provided a further submissions document dated 21 March 2019, by email dated 24 March 2019.

4.12 The respondent provided a Supplemental Response on 7 May 2019, contending that the claimant had still failed to comply with the case management order in dealing with his alleged protected qualifying disclosure and acts of detriment and indicating its intention to apply to strike out claims. The respondent made its first formal application to strike out the claims or parts of them or in the alternative to seek a deposit order by letter dated 5 June 2019.

4.13 At another Case Management Hearing on 12 June 2019, which the claimant attended by telephone, the respondent contended that the claimant had still failed to set out properly the basis on which he alleged the 9 disclosures to be protected qualifying disclosures or of which type or to identify any detriments. It therefore sought to regard the only whistleblowing claim as his claim of automatic unfair dismissal, denying also that the claimant had identified any actionable claims of breach of trust and confidence, failure of duty of care and breach of contract.

4.14 The Tribunal's further Case Management Order from that hearing was sent out on 5 July 2019, listing a preliminary hearing to consider the respondent's strike out or deposit applications. The Judge had preferred the respondent's contention that this form of preliminary hearing should be listed to the claimant's contention that a final hearing to consider all his allegations should next be listed.

4.15 By letter dated 17 June 2019, the claimant first proposed that he shortened his claim with a "short case". He proposed that the "complicated matters" be trimmed down to

> "A) The respondent's corrupt production in 2014 and nature of the IG355 report determining the respondent's prejudicial assertion that it has been behaved correctly. This being evidence used in the dismissal proceedings.
>
> B) The respondent's decision to take disciplinary actions following the disclosure of evidence in 2409957/2013.
>
> C) The respondent's failure in January 2015 to follow its own procedures and maintain a duty of care by considering the impact of its actions upon me and directly causing the breakdown suffered in March 2015.

D) The failure of the disciplinary investigation to determine the reasons for the action I took and ignoring the evidence presented.

E) The failure of the disciplinary appeal hearing to focus on other than the respondent's protection from constructive dismissal and ignoring the reasons and evidence presented of the reasons for my actions."

4.16 He supported this suggestion on 12 July 2019 in an email under the heading "Review and clarification" enclosing his "Short Case Narrative", "Short Case" disclosures table of 5 disclosures and "Short Case" schedule of 18 detriments and a list of applications. The 8-page narrative, which is probably the most clear explanation of the claimant's case provided by him within the proceedings, concludes with:

"In terms of the 3rd consideration (which the claimant had identified as the respondent claiming matters some had already heard in 2409957/2013), the above makes clear what was in 2409905/2013 and what is in 2408488/2015. All the acts of detriment identified are between June 2013 and October 2015."

In terms of the 4th consideration which he identified as: "Intimation of being out of time", he wrote:

"As has already been indicated the acts are a series of acts that show a consistent behaviour from the respondent leading to the dismissal via a process that simply will not accept the nature of the HMRC actions or the context. This has already been challenged on time and has spent 2½ years waiting partly due to the Employment Tribunals refusal to listen to the points made by the claimant before being accepted as having been in time."

Summary:

"Whilst there are many aspects to the case the case is really quite simple in nature and can be outlined with the following bullets:-

- HMRC loses control of ASPIRE and resorts to illegal actions to keep Capgemini content.
- I refuse to engage in the appeasement and identify where things are going wrong.
- Rather than be honest HMRC reacts against me and victimises me through BHV (bullying, harassment, victimisation), failure to investigate BHV, failure to conduct grievance properly.
- I file 2409957/2013.
- HMRC take all steps to conceal even clumsily such as IG355.
- I disclose further damning evidence in covert recordings.
- Employment Tribunal seek to not apply the law and co-operate with the concealment
- HMRC continues to try to bully me into submission and hold dismissal over me by an unfair disciplinary process based on previous failures as holding veracity.
- I aim further PIDA disclosure at Jenny Grainger and HMRC terminates employment rather than lose another SCS through failure to act.
- Employment Tribunal still seek not apply the law and cooperate with concealment.

Its not that complicated…"

4.17 HMRC by letter dated 31 July 2019 made clear that it pursued its strike-out applications notwithstanding the claimant's shortening of his claim, saying it was always open to him to withdraw parts of his claim expressly. It renewed and expanded its strike-out application (extending to 37 pages) on 5 September 2019.

4.18 The claimant provided his detailed comments upon the strike-out application on 23 September 2019, in a "slightly revised" document with a new version of his "short case" disclosures table and schedule of detriments. 6 disclosures and 18 acts of detriment are tabled. For the first time in that disclosures document, he identified the subsections of Section 43B (1) he relied on in respect of each disclosure, which are as follows:

1) January 2010 onwards. Disclosure made to: HMRC Commercial Directorate Management at various levels. Stuart Bishop, Tom Carter, David Penny, David Henderson. Identified the illegal nature of MOIS and several other concerns of mismanagement of the commercial relationship between HMRC and Capgemini. Formalised in written disclosure made in 2011. Section 43B(1), A, B and F
2) 24 July 2013. Disclosure made to: David Odd HMRC. Concealment by mishandling evidence. Section 43B(1) C.
3) 12 June 2014. Disclosure made to Simon Bowles HMRC. Fraudulent investigation and determination of original consenting reasons BHVD processes. Section 43B(1) C
4) 25 June 2014. Disclosure made to Internal Governance Lin Homer HMRC. Section 43B(1) C and F.
5) 30 January 2015. Disclosure made to Lin Homer HMRC. Original concerns failure to investigate fraudulent actions of concealment. Section 43B(1) C and F.
6) 18 May 2015. Disclosure made to Jenny Grainger. Fraudulent behaviours concealment. Section 43B(1) C.

5 **Case No 2404018/17 UDL/PID Presented on 18 August 2017** (The 2017 claim)

Respondents (1) HMRC; (2) Health Assured Ltd; (3) National Audit Office; (4) Independent Police Complaints Commission (the IPCC). Unfair dismissal and detriment as a result of making protected disclosure claims.

5.1 The claimant expressed his concerns at the working relationships at HMRC which were detrimental to his health and well-being and destroyed trust and confidence. His complaints of bullying harassment and victimisation had been dealt with outside the designated processes and timeframes. An Internal Governance IG355 report was commissioned and prepared but refused to accept relevant evidence and its conclusions directly contradicted the evidence available and was "nothing short of a fraudulent document". He contended that report was then relied upon in disciplinary proceedings in which he was dismissed. He then complained to the IPCC about the corrupt behaviour of Internal Governance but HMRC declined to refer the complaint and the IPCC declined to call it. Then the National Audit Office also failed to investigate or determine his specific concerns.

5.2 He maintained that, at the point of dismissal, he should have been advised of and invited to make a claim under the Civil Service Injury Benefit Scheme, with a view to compensation for ill-health arising directly from the toxic working environment and detriments. HMRC failed to initiate such an invitation and then eventually when Health Assured Ltd conducted an assessment it failed to act independently and review its assessment in time. The claimant explained the timing of this 2017 claim making clear he was presenting it within 3 months of 30 June 2017, when Health Assured Ltd ceased to be the CSIBS assessor and had shown its position not to be independent.

5.3 At a Preliminary Hearing on 8 February 2018 before Employment Judge T Ryan, the claims against National Audit Office and the IPCC were dismissed as having no reasonable prospect of success. Health Assured Ltd's application for dismissal on the basis of having no reasonable prospect of success was postponed.

5.4 An appeal to the EAT was rejected as being out of time. This claim was later stayed but is still live in respect of HMRC and Health Assured Ltd.

6 **Case No 2413478/18 Presented on 17 July 2018** (The 2018 claim). Respondents (1) Cabinet Office; (2) Civil Service Commission. Protected disclosure detriment claim.

6.1 Explaining that the 2 respondents fell within the wider definition of employer contained in PIDA, the claimant claimed detrimental treatment following whistleblowing. He maintained that the Civil Service had split its responsibilities and actions into a number of different entities such that his direct employer HMRC had function and governance outsourced to the other civil service entities, the Cabinet Office and Civil Service Commission which carried out Internal Governance on the behaviours of employees of the civil service. He referred to his previous claims, especially the 2017 claim. The claimant concluded his ET1 form at Box 15 stating: "This claim shall need to be combined with the previous claims made and be heard together. The claim contains act of failures to act causing detriment that demonstrate a consistent pattern of failure to acknowledge the detriments caused an validity of the original concerns and failure to adhere to its own policies and behaviour that fails to maintain trust and confidence".

6.2 Both respondents resisted his claims contending the Tribunal had no jurisdiction to hear them as they were not his employer, contending also that they were out of time and not presented in a form that could reasonably be responded to.

6.3 At a Preliminary Hearing on 25 March 2019 before Employment Judge Ross, the claim against each respondent was struck out as having no reasonable prospect of success.. Although a late direction had been made to combine the 2019 claim with this claim for the Preliminary Hearing, she felt unable to deal with the 2019 claim since a conflicting direction had also been made in the 2019 claim not to combine them. This claim is concluded.

7 **Case No 2400171/19 Claim presented 20 December 2018** (The 2019 claim)

Respondents: (1) HMRC; (2) MyCSP; (3) Health Management Ltd (HML); (4) Cabinet Office; (5) Minister for the Civil Service (The Minister). Protected disclosure detriment claim.

7.1 The claim**:** Under box 4: "Cases where the respondent was not your employer", the claimant wrote: "Detriment following PIDA disclosures" and at box 8.1: "This claim is a further claim linked directly with the previous claims 2409957/2013, 2408488/2015, 2404018/2017 and 2413478/2018, identifying further acts of detriment and continued failure to actions previously identified in earlier cases causing continued detriment".

7.2 He claimed that in 2010 HMRC took illegal actions and gave directions to him to undertake acts that breached the law, which he refused. He had raised concerns which met the criteria in PIDA. but HMRC denied the validity of the concerns in further breach of trust and confidence, creating a toxic workplace which impacted his mental health and well-being. HMRC continued a course of concealment of the illegality and denial of responsibility for the impact upon his health and well-being.

7.3 He set out that prior to his dismissal by HMRC, he had made a claim and had an award under the Civil Service Injury Benefit Scheme (CSIBS). He made a claim for a permanent award after dismissal, for which Case No 2408488/15 relates as unfair dismissal, which had direct conflict with the legal proceedings in which HMRC denied both the existence of his ill-health and its responsibility for it. That CSIBS claim had by acts of maladministration and general obfuscation taken an inordinate length of time to progress.

7.4 He said he had made a PIDA disclosure on 22 November 2018 to HMRC, Cabinet Office and the Minister for the Civil Service, identifying the failure by HML to produce an independent assessment of impairment in accord with CSIBS Rules, the failure by MyCSP to investigate the maladministration by HML, such actions being taken on behalf of the corporate Civil Service employer, being part of a consistent refusal to acknowledge or accept the responsibility for and ill health caused by HMRC.

7.5 He described the dates of the failures to act as by HML: 30 July 2018: date of the last expected communication to respond to his Med 9 complaint; by MyCSP: 9 October 2018, the date MyCSP withdrew from IDR Stage 1 review and by HMRC, Cabinet Office and the Minister: 14 December 2018, the date 3 weeks after his protected disclosure and IDR stage 2 application with no action.

7.6 Under Box 9.2, he explained the compensation or remedy he was seeking as: “In the absence of an independent assessment under the CSIBS scheme rules, I am seeking a lump sum compensation payment equivalent of the proper award. In respect of the ongoing injury to feelings and ill-health directly attributable to the continued acts or failures to act, I see the recognised sum of compensation with 25% enhancement is the respondent’s actions continue to be aggravation of the impacts upon me.”

8 **Case No 2400171/19: ET3 responses**

8.1 HMRC denied the claims against it. After setting out the history of the other claims, it contended the claimant had not clearly specified any protected disclosure, despite on 21 November 2018 sending a letter sent to its CEO, Mr Jon Thompson, amongst others headed “PIDA disclosure”, other than on 22 November 2018 sending a further letter to Mr Thompson enclosing an IDR Stage 2 application form (an Internal Dispute Resolution Stage 2 applications within the Civil Service Pension scheme). He had not explained why he considered that 22 November 2018 letter a qualifying disclosure; HMRC denied it was a qualifying disclosure. It contended that the only detriment the claimant had particularised was HMRC taking no action after receipt of his letter of 22 November 2018, which could not constitute a detriment. Mr Thompson had replied on 17 December 2018 that HMRC would not comment on the matters raised until the current litigation had concluded; there was no detriment in not responding further and HMRC had no direct role to play in responding to the claimant’s IDR2. HMRC considered the claimant’s claim an abuse of process to the extent that it raised matters which were already being dealt with within the other claims or which had been raised in the 2013 claim.

8.2 MyCSP contended that it had no dealings with the claimant after October 2018 and that he had failed to provide adequate particulars. He was at no time its employee, worker, self-employed consultant, agent or otherwise and it had no contractual relationship with him. It was the administrator of the civil service pension and benefits scheme; as an employee of HMRC, he was a member of the Civil Service Injury Benefits Scheme (CSIBS), a statutory scheme under section 1 of the Superannuation Act 1972 with rules as to the payment of benefits where required criteria have been met which it administered in accordance with the rules and

guidance provided by the Pension Schemes Executive. On 30 May 2018 the claimant complained under an Internal Dispute Resolution (IDR), a statutory process with 2 stages: stage 1 - the scheme manager, Cabinet Office (on behalf of the Minister for the Civil Service) arranging for it to complete an initial investigation and provide a determination. At Stage 2, the Cabinet Office completes an investigation and provides a determination.

8.3 The claimant's complaint concerned the outcome of his Injury Benefit Appeal under CSIBS, citing maladministration by HML, the scheme medical adviser. MyCSP's response at Stage 1 IDR was provided on 22 August 2018, with the conclusion that the claimant's complaint was upheld in part but that there was not enough evidence to suggest the actions of HML when completing the medical assessment had any impact on the ultimate outcome provided. MyCSP informed the claimant his complaint had been investigated without sight of the medical report produced by HML since he did not provide the required consent for this report to be released to MyCSP but that, if he provided the consent, it would obtain and review the report and provide a supplementary IDR Stage 1 response. It also notified the claimant his right to pursue IDR stage 2. MyCSP contended it was an external provider of administration services with no contractual relationship with the claimant. The Tribunal had no jurisdiction to hear the claim against it which should be dismissed or struck out as having little prospect of success and it made a formal application to strike out the claim against it relying upon the lack of contractual relationship with the claimant. It denied the claimant made a qualifying disclosure within section 43A Employment Rights Act 1996 or was subjected to any detriment contrary to section 47B, in particular that any failure to complete a supplementary stage 1 IDR response was an act of detriment or because of any disclosure.

8.4 HML set out that it is a health provider advising on eligibility for injury awards and early ill-health retirement under a variety of pension schemes. It was awarded the contract to advise the Principal Civil Service Pension Scheme (PCSPS) on ill-health retirement under the various pension schemes which had previously been delivered by Health Assured Ltd. It averred that the claimant could only bring a claim for detriment against his employer HMRC in respect of detriment caused by the first respondent or another worker of HMRC or an agent of HMRC with its authority. It had never been the claimant's employer nor an agent of HMRC; it was entirely separate and independent from HMRC and the claimant had never been its employee or worker or in any contractual relationship with it. He did not come within the extended definition of worker at sections 230(3) or 43K of the Employment Rights Act 1996. HML denied that the claimant had made any protected disclosure in relation to its actions or that it had subjected him to any detriment as a result and contended his claim was out of time in any event and there was no reasonable prospect of success. It followed this up with a formal application to strike-out on 8 February 2019.

8.5 The Cabinet Office and the Minister presented their response together, denying the claims in their entirety. It stated that the Cabinet Office was a ministerial department, supported by 19 agencies and public bodies which supported the Prime Minister and ensured the effective running of government, being the corporate headquarters of government in partnership with HM Treasury and taking the lead in certain policy areas. The Prime Minister is the Minister for the Civil Service, but delegates the management of the Civil Service to the Minister of the Cabinet Office under section 1(2) of the Civil Service (Management Functions) Act 1992. All civil servants are Crown employees under the definition at section 191 ERA 1996, and appointment of them and terms and conditions are delegated to departments, acting as agents of the Crown in relation to their employment, within the framework laid down by the Constitutional Reform and Governance Act 2010 (CRaGA). The claimant had never been directly engaged by either respondent. Furthermore, section 17 of the Crown Proceedings Act

1947 provides that all proceedings against the Crown should be instituted against the appropriate authorised Government department and only the Cabinet Office and HMRC are such authorised departments, so HMRC was the appropriate authorised department to be respondent.

8.6 These respondents denied any disclosure within section 43A ERA 1996 was made or that the claimant sustained any detriment; they had no legal responsibility for the claimant or his complaint. He had ceased to be a civil servant in 2015 and never worked for either of them, with no requirement for them to take any action. The Cabinet Office and the Minister applied in the response for the claim to be struck out as being scandalous or vexatious or having no reasonable prospect of success and applied formally by letter dated 23 April 2019, relying in particular upon the findings of Employment Judge Ross in case no 2413478/18.

9 Case management and ground rules before the Preliminary Hearing

9.1 Despite it being explained in correspondence and earlier Case Management Orders on many occasions that a ground rules hearing was not considered necessary and that there is no requirement under the Rules for such a hearing to take place, the claimant remained highly critical of the Tribunal's approach. The Tribunal explained that there is no special importance to be attached to holding a "Ground Rules" hearing. That term, which originates from the holding of a preliminary hearing in criminal proceedings particularly to consider how the evidence of vulnerable witnesses and defendants could be received at the criminal trial, means no more than setting the "ground rules" for the next hearing, that is determining what adjustments need to be implemented in order to secure the best possible engagement in the proceedings by a party with particular needs.

9.2 In the event, and in order to seek to preserve the hearing commencing on 30 September 2019 because of correspondence from the claimant explaining his anxiety and panic attacks, the Judge did hold a "Ground Rules" hearing at 2.15 pm on 23 September 2019, notice of that hearing having been sent to the 2015 claim parties at approximately 4.30pm on 20 September. Unfortunately, the claimant did not attend that hearing, apparently not having seen the email notice of the hearing over the weekend and until after the hearing had taken place. Specifically within the 2015 proceedings, the Tribunal had seen medical evidence from General Practitioners Dr A Brickwood dated19 July 2018 and Dr J Edwards dated 5 February 2019 and had seen the full version of a report from Dr Ola Junaid, Consultant Psychiatrist, dated 3 October 2018 (the respondent HMRC having seen only a redacted version of that report). It is not in dispute that the claimant has conditions of depression and anxiety and is prescribed sertraline anti-depressants and has undergone cognitive behaviour therapy. He meets the ICD 10 criteria for a depressive episode of moderate severity F32.1. Dr Junaid felt that if the claimant had the opportunity to have his illness thoroughly treated he would be in a better position to engage with the requirements of preparing for and attending a Tribunal. However, if it was not possible for the hearings to be delayed to allow the claimant to seek treatment, Dr Junaid suggested adjustments including providing a list of questions in general areas to give him time to prepare in advance to allow him to use an advocate or supporter and to allocate additional time for him to process, prepare and respond to questions.

9.3 Whilst he has proposed stays while appeal proceedings were concluded, the claimant has not sought any deferment of the proceedings generally while he received treatment for his mental health conditions and he seeks final resolution. Some of Dr Junaid's suggestions are obviously more relevant to a hearing involving cross-examination of the claimant.

9.4 Although not covered by Dr Junaid's report, for a considerable period the claimant had not felt able to attend hearings at the tribunal in person through anxiety notwithstanding that, as he has explained in correspondence, he has changed his occupation and works as driver carrying out driving shifts of 4 days at a time. He has also written about his claims extensively and often swiftly upon receiving correspondence from parties and the tribunal and after case management hearings.

9.5 No other suggestions for adjustments were made by Dr Junaid although the possible consequences of the claimant not being able to fully prepare or represent himself at the Tribunal or that the experience itself might exacerbate his mental illness and facilitate a more severe episode of depression were addressed in the psychiatric report. Whilst frequently raising concerns and complaints about the Tribunal's failure to hold a "Ground Rules" hearing or provide adjustments for him, the claimant has made little active suggestion for what adjustment would assist him.

9.6 Accordingly, at the ground rules hearing, the Judge confirmed the following adjustments: participation of the claimant by telephone, if he wished; permission for the claimant to record the hearing; mid-morning and mid-afternoon breaks, with consideration of other breaks, if needed by the claimant and the claimant having the opportunity to take stock and prepare his representations overnight after day 1. The Tribunal considered it had made considerable efforts to enable the claimant to engage with the proceedings at this Preliminary Hearing, having regard to the overriding objective and the need to seek to ensure a fair hearing, which means for all parties and not the claimant alone. However, still further adjustments needed to be made at the hearing.

10 **Case management at the Preliminary Hearing**

10.1 The Judge had directed that the applications in the two cases be heard together over two days. Unfortunately, the start of the hearing on 30 September 2019 was beset by difficulties in that the telephone arrangements to allow the claimant to participate did not work at the Employment Tribunal. Eventually after some unsuccessful attempts, the hearing was moved and commenced just after 11 am, at Manchester Civil Justice Centre with the claimant in attendance by telephone. The Judge identified the documents available to him in respect of the 2 claims being heard, checked that the claimant had been provided with the authorities relied upon by the respondent and explained the procedure to be followed over the 2 days listed in accordance with the procedure confirmed in the Case Management Order sent to parties on 25 September 2019.

10.2 The claimant contended that he had not had sufficient time to prepare in relation to the 2019 proceedings with confirmation that the respondents strike-out application was to be heard at this hearing only received late on 23 September 2019 such that he was only now digesting the strike-out applications. He considered that the application by the Cabinet Office to strike out his claim should not proceed since he had still not had documents disclosed to him and that its application did not reference Section 47 of the Employment Rights Act 1996. The Judge ruled that the applications in the 2019 proceedings were to proceed alongside those of the respondent to the 2015 claim. The 2019 claim respondents making applications had originally applied to strike out the claim against them several months before, in their ET3 responses when presented or soon after that. The preliminary hearing to consider those applications had originally been listed earlier than that in the 2015 claim, by a Notice of Hearing dated 24 July 2019, so the claimant had received ample notice that these applications were to be considered. In his letter dated 14 August 2019, the claimant had acknowledged the few day's postponement of the 2015 hearing (which had been made at his request) and the

bringing together of the two hearings and appeared to approve that course. On that basis, the judge permitted the respondents' applications to proceed, anticipating that the claimant would make his oral representations on the second day, in accordance with the directions he had made.

10.3 However, on the morning on 1 October 2019, the second day, the claimant emailed the Tribunal at 08.27 writing that he was not sure what benefit the hearing could be as he was mentally exhausted and currently on a depressive dive. He contended that it would be useful to ask questions such as what event HMRC had a concern about the date of in order to assert that the 2015 claim was out of time and what acts or detriments HMRC did not understand. He was not sure that he could add anything further to his attached representations if there remained no opportunity to ask questions and address directly the undefined assertions such as "it was probably out of time". He expressed his understanding that only HMRC's counsel would be present on 1 October. The Tribunal replied at 09.10 that the Judge hoped the claimant would attend so he could make his representations orally as well as those made in writing. The Judge understood that the 2019 respondents' representatives would be in attendance and proposed further adjustments to timing in the event that the claimant did not join the telephone conference call arranged for him.

10.4 The claimant had provided written representations on HMRC's application in the 2015 claim overnight but said that he had unable to provide comments on the applications in the 2019 proceedings and sought extra time to put those representations in writing. In the event, he did join the hearing by conference call at the start of the 2nd day and each of the 2019 respondents resisted his application contending that it was disproportionate, that their applications were not complicated and had been made many months before. The Judge considered it was in accordance with the overriding objective to permit the claimant extra time until 4pm on 4 October 2019 provide his written representations in circumstances where he accepted that a 2-day hearing was difficult for the claimant, who had to deal with all of the respondents' oral submissions not all of which had been preceded by a written skeleton argument or submission. The Judge did not permit further written arguments from the respondents following receipt of the claimant's written representations, considering this would give rise to a likelihood of a never-ending exchange in circumstances where they had already made their applications.

10.5 Notwithstanding his desire to give written representations only, the claimant wanted to make the point that he not suggested he had ever been employed by MyCSP, HML or the Cabinet Office or the Minister but he was concerned with the working relationship around HMRC and the Cabinet Office which acted for HMRC. He had made an application for disclosure of documents to explain that relationship more fully which had been rejected by Employment Judge Ross in the 2018 claim, but until that disclosure was provided it would not be reasonable to determine matters. He wanted to rely upon an agency under section 47B(1A): that HMRC were in a master/servant relationship with the Cabinet Office and MyCSP and wanted the opportunity to put questions to the respondents about the relationship. The Judge ruled that it was not appropriate in a hearing based upon submissions to have questions put to the respondents' representatives. In respect of the 2015 claim, the claimant confirmed that his written submissions made the night before were a reasonably complete response to HMRC's application, adding only that the respondent's argument on out of time points were not specific on any allegations, with no recognition of the acts being a series of acts the last of which was in time.

11 The applications to strike out and the submissions

The respondents' applications in the 2019 claim

11.1 MyCSP did not provide a skeleton argument but relied upon its Grounds of Resistance within its response at [41-52/2019] where it applied to strike out the claim against it, supported by its letter dated 23 April 2019 [102/2019]. It submitted briskly that the claimant simply failed to meet the definition providing the protections under section 47B of the Employment Rights Act 1996, citing in particular the judgment of Employment Judge Ross made on 25 March 2018. The claimant was not an employee or worker under the extended definitions at sections 43K and 230(3), as he himself confirmed for instance at [99/2019], and did not fall within Section 47B(1). Judges Ross and Ryan had rejected any argument of an "overarching corporate employer".Anticipating an agency argument by the claimant under Section 47B(1A), it contended there was simply no contractual relationship between HMRC and MyCSP which could give rise to a relationship of agency; MyCSP was only the pensions administrator for the Civil Service pensions and benefits schemes providing services under a contract to the Cabinet Office only, not an agent of the first respondent. Accordingly, the Tribunal simply had no jurisdiction to consider a protected disclosure claim against MyCSP. If the tribunal had jurisdiction, there was no reasonable prospect of success.

11.2 HML expanded upon its skeleton argument dated 23 September 2019. It adopted MyCSP's arguments citing the same legal principles and the same earlier 2018 judgment, stressing that the claimant's employment had ended on 11 June 2015 but HML only become health adviser to advise the Principal Civil Service Pension Scheme on matters such as early ill-health retirements 2 years later on 1 July 2017, having been awarded the contract in January 2017 and taking over from Health Assured Ltd. The contract was with the Minister for the Cabinet Office [230 and 236/2019] Alternatively, HML also contended the claim should be struck out as having no reasonable prospect of success where there was simply no contractual relationship established between it and HMRC and it could not be said that it was HMRC's agent.There was no reasonable prospect of success with the claim so plainly out of time. The 3-month time limit at section 48 (3) ERA applies to a section 47B claim by virtue of section 48(1A). The last complaint of the claimant (as a failure to respond to the Med 9 complaint) related to 30 July 2018; the normal 3-month time limit would expire on 29 October 2018, but the claim was not presented until 20 December 2018 with ACAS notification on 15 December and the certificate issued on 17 December 2018; the claimant was already out of time to notify ACAS with no evidence of it not being reasonably practicable to do so in time especially when he attended a Case Management hearing on 13 November 2018 in the 2018 claim, when time issues were discussed and he did not contact ACAS for another month. HML had raised the time point firmly in its response [60/2019] and its application to strike out on 8 February 2019 [96/2019] and the claimant was therefore on notice to provide some evidence that it had not been reasonably practicable to present it in time. Alternatively, HML asked the Tribunal to make a deposit order against the claimant relying on the same basic arguments.

11.3 The Cabinet Office and the Minister relied upon their skeleton argument dated 23 September 2019 and also contended that there was no employment relationship with the claimant nor did he fall within the extended categories at section 43K. They likewise relied upon the earlier Judgment of Employment Judge Ross [134 at 138/2019] where she cited from the claimant's own submission in the 2018 proceedings [99/2019], then finding that the claimant was an employee of HMRC but with no relationship of agency with the respondents in those proceedings (Cabinet Office and the Civil Service Commission). The claimant was simply an employee of HMRC, with no suggestion of the extended definition of worker at section 47K applying, having regard to the guidance in McTigue v University Hospital Bristol NHS Foundation Trust [2016 IRLR 742 at paragraph 38, since there was no introduction or supply of the claimant by these respondents. The Minister i.e. the Prime Minister was even more remote since he delegated the management of the Civil Service to the Minister for the Cabinet Office under Section 1(2) of the Civil Service (Management Functions) 1992. Whilst accepting that civil servants were Crown employees within the definition at section 191 of ERA 1996, the Crown Proceedings Act 1947 requires that proceedings against the Crown are brought against the appropriate government department which was plainly HMRC. The Cabinet Office and the Minister sought also to have the claim struck out on the broader merits; since they had no legal responsibility to act, no detriment could be established; the claim should be struck out as having no reasonable respect of success under the principles in the Employment Appeal Tribunal authority of London Borough of Harrow v Knight [2003] IRLR 140.

12 **The claimant's submissions in respect of the 2019 claim**

12.1 In his written submissions initially on 1 October 2019, the claimant contended the Tribunal had continued to ignore his requests for adjustments and that it was unrealistic for him to provide a final response to the applications to strike out his 2019 claims. He maintained his higher levels of anxiety were caused by the continued awkwardness and failure of the Tribunal to make clear and apply reasonable adjustments in a consistent manner. He objected to the late provision of documents by the respondents and that he would not be permitted to ask questions to clarify the status and responsibilities of the respondents to the 2019 claim. He identified HMRC as the employer, Cabinet Office as the PCSPS scheme manager, MyCSP (which he understood was jointly owned by MyCSP senior management and Cabinet Office) was a QUANGO contracted to Cabinet Office to deliver the PCSPS scheme administration and HML was the scheme medical adviser (as Health Assured had previously been). They all had delegated roles and responsibilities, looking at them with the knowledge and authority of the employer HMRC. MyCSP and HML worked directly to the Cabinet Office, the delegated Civil Service Department for the operation of the Employer pension scheme on behalf of and therefore as agent for all other civil service entities. HML's argument that it only had a contractual relationship with Cabinet Office and not HMRC and hence was not the agent of HMRC was illogical and ignored the protection extended to employees under section 47B(1A)(b). There was no need for a direct contractual relationship. Had the Tribunal determined that questions should be asked, this could have established and would have evidenced the agency. Why were HML taking action? He never chose them; they were selected by the Cabinet Office with delegated responsibility for all Civil Service employers. The Cabinet Office and the Minister had focused on section 43 but ignored section 47. In any corporate organisation there is common ownership or other form of stakeholders and persons or entities that work together collaboratively, which is covered by the wording of section 47B(1A)(b).

12.2 At his request, he then provided fuller written representations on 3 October 2019, following his brief oral submissions on 1 October 2019. Given that the Crown Proceedings Act predated the CRAGA 2010, the claimant questioned whether the liability identified in the CRAGA 2010 changed the position at section 17 of the Crown Proceedings Act. He maintained that he had never claimed any of the 2nd, 3rd,4th or 5th respondents had employed him. He sought to rely upon the section 47B(1A)(b) provisions which the respondents had except HML had ignored for the most part. There did not need to be direct contractual relationship with a person or entity for them to act as an agent for the employer, the only provision was that the agent was acting with the employer's authority; this was a key aspect as it prevents an employer shirking its responsibility by taking actions by proxy. The Tribunal must decide if the agent was acting with the employer's authority and it was important to consider the status of the 2nd, 3rd and 4th respondent to see whether they acted as agent for HMRC. The Minister, the 5th respondent, has legal responsibility for all of the Civil Service and delegates the responsibility for management of it to the Cabinet Office.

12.3 The claimant reiterated that when he raised concerns his employer HMRC reacted adversely causing him ill-health by failing to maintain its duty of care, leading to a claim under the provisions of the Civil Service Injury Benefit Scheme, part of the Principal Civil Service Pension Scheme, an employer operated pension scheme. His claim was assessed and awarded and put into payment but then his employment terminated on 11 June 2015 and his employer was required under the terms of the pension scheme to invite a final claim under CSIBS but failed to do so. The claim was made by the completion of the appropriate form and returned to HMRC which forwarded the claim to MyCSP acting as PCSPS scheme administrators which then commissioned a medical assessment on behalf of the employer from Health Assured Ltd. Health Assured failed to operate in accordance with the scheme rules and produced a non-compliant assessment report which was not independent and ignored evidence and the 2nd report was commissioned to be undertaken by Health Assured, messed about and eventually ceased to be the scheme medical advisers. The commission to complete a medical assessment report was passed to HML which messed about for an extended period and then produced a non-compliant assessment report. When complaint was made, HML stated it had done what it was told to and would not change anything unless instructed to do so by MyCSP or Cabinet Office and MyCSP refused to do anything to uphold the scheme rules. The claimant then raised the matter with the Head of the Civil Service and started Internal Dispute Resolution stage 1 but MyCSP was at fault in completing the IDR stage 1 "investigation" of the maladministration without asking any questions or seeking evidence, until he queried this.

13 HMRC's application in the 2015 claim

13.1 The application to strike out was based upon the claimant's non-compliance with case management orders but also upon him having no reasonable prospects of success, as regards both the content of the protected disclosures relied upon and also the detriments alleged, with deposit orders in the alternative. Relying upon its written application, HMRC concentrated on the extensive procedural history since the claim became live again on 11 April 2018, pointing out that the Tribunal had still not made case management directions for disclosure, exchange of witness statements and listing the final hearing. Its application to strike out was not made lightly; HMRC's preference had always been to proceed on the substantial merit. It acknowledged that the ordinary unfair dismissal claim was bound to proceed but now applied to strike out the protected disclosure detriment and also automatic unfair dismissal claims since there had been further procedural default by the claimant. Although it had previously indicated the application would only be in respect of the detriment claims, HMRC expressly relied upon the 8-stage guidance of the Employment Appeal Tribunal

in Blackbay Ventures v Gafir [2014] IRLR 416. Throughout, the claimant had either looked at matters with his eyes closed or deliberately failed to understand what was required of him. The tribunal made two clear orders on 30 July 2018 [172 onwards/2015] and 12 February 2019 [261 onwards/2015] for clarification from the claimant, but even in his short case formulation the claimant had nowhere near correcting the default.

13.2 In terms of disclosures, he had provided 3 key documents: 19 October 2018, showing 9 disclosures [195/2015]; 12 July 2019, his second "short form" version, removing the non-HMRC recipients, citing 5 disclosures only [321/2015], and 23 September 2019, his most recent attempt to particularise the disclosures, even adding in a 6th disclosure [366G/2015]. Far from identifying each disclosure clearly, this was a new disclosure apparently made "from January 2010 onwards" to 4 individuals, with no dates and no details except a vague assertion that it was formalised in 2011. The claimant would have needed to make an application to amend to include this but it appears the reason he has added this alleged disclosure is that he has realised the significant causal difficulty with the dates of the other disclosures. In reality, the only document evidencing a disclosure is that dated 18 May 2015 to Jenny Grainger; yet HMRC's counsel contended the claimant has never said before 23 September 2019 that this was an email; if the document existed he should have disclosed it or identified it, in accordance with the Order at [172-3, 2015].

13.3 By the second Case Management Order, the claimant was ordered to identify any other disclosures by type under Section 43B(1) but the list before the Tribunal at [366G/2015] still does not set out the detail the Tribunal ordered. Although the claimant has set out some narrative in other documents, it is his case and for him to set out clearly what each protected disclosure was, what type etc. so the Tribunal can make consequential case management orders. There are similar difficulties of lack of clarity in relation to the alleged detriments. Again there are 3 key documents: 25 January 2019, the original 22 acts of detriment [226-231/2015]; 12 July 2019, the subsequent "short case" list of detriments, now reduced to 18 [322/2015], and 23 September 2019, the 22 are again reduced to 18 but this includes a new and different first allegation [366H/2015]. There are generally no identifiable start dates, which is relevant to the ambit of the 2013 claim and the claimant's use of the term "ongoing" with no end date is a fundamental misapprehension about a protected disclosure detriment claim since an act or inaction happens at a relatively fixed date and is not ongoing. Even those detriments which can be understood were already in the 2013 claim giving rise to issue estoppel, res judicata and abuse of process arguments; in short, the claimant is not entitled to have a "2nd bite of the cherry", see Divine-Bortey v London of Brent, which showed that Henderson v. Henderson principles applied in the Tribunal. The dates are also important on the issue whether the claims were presented in time to give the Tribunal jurisdiction. The claimant has put "ongoing" to suggest all claims are in time, yet some detriments date back to 2009 or 2011 and cannot be in time (even acknowledging that, if there is a real factual dispute about out of time points, the Tribunal cannot decide these without oral evidence).

13.4 The Tribunal must determine whether there was any detriment in the period from presentation of the 2013 claim up to the claimant's dismissal in June 2015 or at least up to his presentation of the claim on 30 October 2015, such that any act or series of acts is in time within section 48 ERA 1996. The respondent expanded on its written application in respect of each of the 22 or 18 alleged acts of detriment, in particular pointing to no 3 on [226/2015], where it appeared that the main allegation of detriment was bringing tribunal proceedings. This could not amount to a detriment; seeking to enforce one's rights is not the same as having been subjected to detriment. Elsewhere, he repeatedly confused an act of detriment with the consequences of such an act. HMRC relied on the authorities of James v Blockbuster and Bolch v Chipman on the principle of striking out. It accepted this was a draconian outcome but contended there was no other proportionate response. Since the claimant had remained unable to comply with the Case Management Orders orders after 18 months, he was unlikely ever to do so and the Tribunal should proceed on his claim of ordinary unfair dismissal only. It

referred the Tribunal to Harris v Academies Enterprise Trust where Langstaff P.,whilst concluding that the full Civil Procedure Rules considerations did not apply to the overriding objective in ET proceedings, held that part of dealing with the case justly is to have regard to the impact of the case upon the resources of the Tribunal and ensure that one case does not exhaust the disproportionate share and so deprive a later case of time. Notwithstanding the earlier delays which the claimant was not responsible for, there had been significant delay and lack of advance on his part since 2018. As an alternative striking out the protected disclosure claims, the tribunal should consider making an unless Order. When tested by the Judge, HMRC acknowledged there was a substantial factual overlap between an ordinary unfair dismissal and an automatic unfair dismissal claim in that the claimant was entitled to explain the context why he said that he had to covertly record meetings but this was very much more limited than a full automatic unfair dismissal consideration of the basis of having made disclosures.

14 **The claimant's submissions in respect of the 2019 claim**

14.1 The claimant provided a written representation of 102 paragraphs immediately before the hearing on 12 June 2019. He contended that HMRC was itself concentrating upon process rather than the content of his claim; in complaining repeatedly of non-compliance with orders when it had raised no argument that his disclosures were not qualifying and he had tried to comply with the essence of the orders providing his 9 disclosures and had sufficiently identified communications sent making them; in respect of those he had not provided a copy of, he would be happy to provide the documents. He refuted the HMRC argument that it did not understand his disclosures or the acts of detriment he had alleged; he had expressly clarified the acts of detriment he alleged on 26 August 2018 [182-188/2015] and 25 January 2019 [218-231/2015]. On timing, he contended that it was obvious that acts included in his 2013 claim which were also included in the 2015 claim were a continuation from the 2013 claim. The detriments and in particular the impact upon his health were ongoing and so he was unable to state the end date of the act or failure to act. He had complied with the case management orders to the best of his ability. The Tribunal itself had failed to acknowledge, respond or record his applications for disclosure of pertinent evidence which would provide the greater clarity

14.2 He had provided detailed comments on 23 September 2019 on HMRC's revised application, explaining that he had put forward his short case summary on 12 July 2019, when he had expressly dealt with the respondent's concerns. He contended that HMRC had never fully explained what it did not understand about his disclosures and acts of detriment and this had never been clarified by the Tribunal's Orders. By reference to a new schedule of disclosures, he explained that the applicable ERA action should be Section 43B(1) then referring to the appropriate paragraph (i.e. sub- paragraph) of the Act and reiterated that HMRC had never challenged any of the 5 disclosures made in his short case documentation as being protected and he gave further details about the disclosures made to David Odd, Simon Bowles, Internal Governance and Lin Homer, saying these should all be fully identifiable, and reiterated he had already provided a copy of the email to Jenny Grainger. He repeated that the act of detriment continued through to his dismissal on 11 June 2015 and the August appeal and were… "bloody obviously a series of connected events is indicated in the Short Case narrative". He had only listed detriments from June 2013 onwards. He maintained that it was fundamental for the Tribunal to come to a view on the legality or not of MOIS and to determine the veracity of the IG355 report, which he maintained was a corrupt report.

14.3 On 1 October 2019, the claimant provided written representations for the 2015 claim, supporting his oral submission made on the previous day that he had presented his 2013 claim after the grievance process had been running for 12 months but that the acts of detriment had continued notwithstanding the commencement of his proceedings and the respondent took a further 9 months to deal with the grievance procedure. He drew the

comparison between how he had formulated his detriment claim in the 2015 claim (his 18th detriment at [366M/2015] and detriment no 8 in his particulars in the 2013 claim [398/2015].

14.4 The claimant contended that the Blackbay Venture case determined the principle that a claimant must be able to identify a date when the respondent has made the decision to not act and caused a detriment but only if events require that that date is within the 3-week period when the act of failure to act might be expected to have been taken. This principle did not apply to any of the detriments identified in his 2015 claim since all had been identified as failure to act over such a long period of time that the three-week period to confirm the failure to act had been served in them all. The respondent had failed to identify any dates it felt showed that the case was out of time or any individual act that was out of time or was not part of the pattern of actions. HMRC's presentation was intended to confuse and mislead with matters repeated over and over and referring to documents that did not apply, such as earlier versions of his schedules. The only reference to the short case schedule of detriment was to identify that the last detriment that had been added was new. He had in fact identified every act of failure to act in the first sentence of each item in the schedule. He urged that he had sufficiently identified the disclosures, in particular that to David Odd, who was a senior investigator in Criminal Investigation. Whilst he accepted that he was unable to give a precise date for all acts of failures to act, his narrative identified the series of events around the ongoing themes of concealment, toxic work environment, failure to assess or to take action on assessments of the impact on his mental health of the work environment and he contended that in each case he had identified the relevant dates of the last act or failure to act.

14.5 The claimant argued that the process followed in the disciplinary case was unfair by the blank refusal of HMRC to acknowledge or accept the reality of the toxic work environment and its illegality in the workplace. If that was taken away the concealment of the circumstances and the context of breach of trust and confidence in covertly recording his manager expressing negative perceptions of him for raising concerns about an illegal act would disappear as the case would lose its context completely. He summarised his submissions contending that it simply was not credible that HMRC did not understand his disclosures; HMRC were fully aware of its illegality and had been told what it was doing was illegal by Malcolm Edis. Whilst relying on the extent of Employment Tribunal time required to deal with his claims was a convenient argument for HMRC, omitting his protected disclosure claims would not provide justice for him when he had put his case in his revised documentation, to the extent that it was understandable by lay persons and must be understandable to HMRC. He was prepared to provide a simplified case for 2400171/19 to be heard together with 248488/15 and 2404018/17. Whilst accepting that a long delay had occurred, he contended this had hurt him more than HMRC and had been caused by HMRC and not himself such that it would be counter-productive to the overriding objective to strike out his protected disclosure claims.

15 **The Law**

15.1 The various statutory provisions the Tribunal was referred to and applied are as follows. In particular, Parts IVA, V and X of the Employment Rights Act 1996 make provisions in relation to Protected Disclosures, and establish important employment protection rights for "whistleblowers" against unfair dismissal for employees and against being subjected to detriment in employment for extended categories of workers, as well as the ordinary right not to be unfairly dismissed for employees. The protection from suffering detriment in employment includes protection against post-employment acts of detriment.

15.2 **Protected Disclosures, Part IVA**

Section 43A

In this Act a “protected disclosure” means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

Section 43B

(1) In this Part a “qualifying disclosure ” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a)that a criminal offence has been committed, is being committed or is likely to be committed,

(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c)that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d)that the health or safety of any individual has been, is being or is likely to be endangered,

(e)that the environment has been, is being or is likely to be damaged, or

(f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

Section 43C

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure ...

(a)to his employer… , or

(b)where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i)the conduct of a person other than his employer, or

(ii)any other matter for which a person other than his employer has legal responsibility, to that other person…

15.3 **Protection from Suffering Detriment in Employment, Part V**

Section 47B

(1)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A)A worker (“W”) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a)by another worker of W's employer in the course of that other worker's employment, or

(b)by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B)Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C)For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer…

(2) . . This section does not apply where—

(a)the worker is an employee, and

(b)the detriment in question amounts to dismissal (within the meaning of Part X).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker", "worker's contract", "employment" and "employer" have the extended meaning given by section 43K.

15.4 **Unfair Dismissal, Part X**

Section 94

(1) An employee has the right not to be unfairly dismissed by his employer…

Section 98

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b)relates to the conduct of the employee,

(c)is that the employee was redundant, or

(d)is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

Section 103A

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

15.5 **Interpretation, Part XIV**

Section 230

(1)In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2)In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3)In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

(4)In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5)In this Act "employment"—

(a)in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b)in relation to a worker, means employment under his contract;

and "employed" shall be construed accordingly.

(6) This section has effect subject to sections 43K,47B(3) and 49B(10); and for the purposes of Part XIII so far as relating to Part IVA or section 47B, " worker ", " worker's contract " and, in relation to a worker, " employer ", " employment " and " employed " have the extended meaning given by section 43K...

Also in Part IVA, Section 43K

(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who—

(a)works or worked for a person in circumstances in which—

(i)he is or was introduced or supplied to do that work by a third person, and

(ii)the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

(b)contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for "personally" in that provision there were substituted "(whether personally or otherwise)".

15.6 **Particular Types of Employment, Part XIII**

Section 191

(1) Subject to sections 192 and 193, the provisions of this Act to which this section applies have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees or workers.

(2) This section applies to—

…(b) Part V, apart from section 45,

…(e) Part X, apart from section 101, and

(f)this Part and Parts XIV and XV.

(3) In this Act "Crown employment" means employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision.

(4) For the purposes of the application of provisions of this Act in relation to Crown employment in accordance with subsection (1)—

(a)references to an employee or a worker shall be construed as references to a person in Crown employment,

(b)references to a contract of employment, or a worker's contract, shall be construed as references to the terms of employment of a person in Crown employment,

(c)references to dismissal, or to the termination of a worker's contract, shall be construed as references to the termination of Crown employment,

(d)references to redundancy shall be construed as references to the existence of such circumstances as are treated, in accordance with any arrangements falling within section 177(3) for the time being in force, as equivalent to redundancy in relation to Crown employment, …

15.7 **Time provisions**

Part V, Section 48

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;.

and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

Part X, Section 111

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

15.8 **Constitutional Reform and Governance Act 2010**

Section 3

(1) The Minister for the Civil Service has the power to manage the civil service (excluding the diplomatic service)…

(3) The powers in subsections (1) and (2) include (among other things) power to make appointments…

(5) The agreement of the Minister for the Civil Service is required for any exercise of the power in subsection (2) in relation to—

(a)remuneration of civil servants (including compensation payable on leaving the civil service), or

(b)the conditions on which a civil servant may retire…

Civil Service (Management Functions) Act 1992

Section 1

(1) This section applies to the functions conferred on the Minister for the Civil Service by section 3 of the Constitutional Reform and Governance Act 2010 (management of the civil service, excluding the diplomatic service).

(2) The Minister for the Civil Service may, to such extent and subject to such conditions as the Minister thinks fit, delegate a function to which this section applies to any other servant of the Crown.

Crown Proceedings Act 1947

Section 17

(1) The Minister for the Civil Service shall publish a list specifying the several Government departments which are authorised departments for the purposes of this Act, and the name and address for service of the person who is, or is acting for the purposes of this Act as, the solicitor for each such department, and may from time to time amend or vary the said list…

(3) Civil proceedings against the Crown shall be instituted against the appropriate authorised Government department, or, if none of the authorised Government departments is appropriate or the person instituting the proceedings has any reasonable doubt whether any and if so which of those departments is appropriate, against the Attorney General.

15.9 **The Employment Tribunals Rules of Procedure 2013**

Rule 2:

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a)ensuring that the parties are on an equal footing;

(b)dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c)avoiding unnecessary formality and seeking flexibility in the proceedings;

(d)avoiding delay, so far as compatible with proper consideration of the issues; and

(e)saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Rule 37:

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing…

Approach to Rule 37: Whilst there is much case law on the individual provisions, the clear import of the authorities is that Rule 37 gives the Tribunal draconian powers which are exercised infrequently and only after careful consideration in clear cases, having taken the party's case at its highest at this interlocutory stage prior to full disclosure of documentary evidence having taken place; striking out orders are unlikely to be made where there are matters of fact to be determined on oral evidence. The Tribunal seeks where possible to determine claims fully after hearing oral evidence and submissions. In respect of Rule 37(1)(c), the Tribunal followed the Court of Appeal guidance in, and the EAT guidance in Bolch v Chipman, Blockbuster v James and Force One Utilities Ltd v Hatfield [2009] IRLR 45. As well as determining first whether the claimant had not complied with an order, it expressly considered whether a fair hearing was still possible and whether a less onerous sanction than striking out would suffice.

Rules 38 and 39 make provision for Unless Orders and Deposit Orders respectively and Rule 34 deals with addition, substitution and removal of parties..

15.10 **Caselaw cited**

Blackbay Ventures Ltd t/a Chemistree v Gahir 2014 IRLR 416

Divine-Bortey v London Borough of Brent 1998 ICR 886

Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684; [2006] IRLR 630

Bolch v Chipman [2004] IRLR 140

Harries v Academies Enterprise Trust & others UKEAT/0097/14/KN

Secretary of State for Justice v Betts UKEAT/0284/16/DA

Arthur v London Eastern Railway Ltd 2007 IRLR 58

Day v Health Education England 2017 IRLR 623

Gilham v Ministry of Justice CA 2018 IRLR 315 (but note this decision has since been overturned on appeal by the Supreme Court).

Hammond v Haigh Castle & Co Ltd 1973 ICR 148

McTigue v University Hospital Bristol NHS Foundation Trust 2016 742

London Borough of Harrow v Knight 2003 IRLR 140

The Tribunal was particularly assisted by the observations of the Employment Appeal Tribunal giving guidance to first instance tribunals on protected interest detriment cases in Blackbay Ventures v Gafir, at paragraph 98:

1) Each disclosure should be identified by reference to date and content;
2) The alleged failure or likely failure…should be identified;
3) The basis upon which the disclosure said to be qualifying should be addressed;
4) Each failure or likely failure should be separately identified;

5) Save in obvious cases if the breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation…;
6) The employment tribunal should then determine whether or not the claimant had the reasonable belief referred to in section 43B(1)(b) and…
7) Where it is alleged that the claimant has suffered a detriment short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the claimant. This is particularly important in the case of deliberate failures to act because, unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.
8) The employment tribunal should then determine … whether the disclosure was made in the public interest.

16 **Conclusions**

16.1 At times, the Tribunal has found its task in case managing the proceedings and in determining the respondent's applications at this Preliminary Hearing daunting because of the scale and apparent complexity involved. It is clear that the claimant has himself faced difficulties as a litigant in person with a disability in his attempts to comply with the Case Management Orders made, although he has very often concentrated on process and procedure to such an extent that he has not furthered his own cause; he has been so involved in his case that he has lost focus on the legal issues which the Tribunal has to decide upon and writes at huge length but in a way which often merely updates and increases the volume of his written output without adding clarity.

16.2 All the respondents have expressed a dissatisfaction with the claimant's approach, partly prompting their applications to strike out his claims, but they too have not always fully engaged with the way he has put his claims against them, as for instance in terms of his 2019 claim case against respondents as agents of HMRC or HMRC's counsel in the 2015 claim overlooking the claimant's earlier disclosure of an actual email to Jenny Grainger.

16.3 The Tribunal has therefore stood back to assess these two claims in context as set out at the start of this Judgment, looking to concentrate on what the claimant is claiming and how he has explained that formally in Further Information in the 2015 claim and less formally through written and oral representations in both claims. It is convenient and logical to deal with the 2015 claim first.

17 **2015 claim**

17.1 The claimant was employed, albeit in Crown employment, by HMRC and thus has an entirely arguable ordinary unfair dismissal claim arising from his dismissal. In an "automatically" unfair dismissal claim where the claimant (who has sufficient service for ordinary unfair dismissal) claims an inadmissible reason was the principal reason for dismissal, the respondent will fail to prove its potentially fair reason or principal reason for dismissal if the Tribunal concludes that the reason or principal reason i.e. the "real reason" underpinning the decision to dismiss was the inadmissible reason. Accordingly, it is necessary to consider whether the claimant can point to protected qualifying disclosures which he asserts were the real reason for his dismissal. If there were any such protected qualifying disclosures, the automatic unfair dismissal claim should proceed to hearing notwithstanding the claimant's

difficulty in establishing any separate unlawful acts of detriment not forming part of the dismissal. Whilst the claimant still has to prove that he made protected qualifying disclosures, taking his case at its highest at this stage, the Tribunal should be well able to decide upon the reason, or principal reason, for his dismissal.

17.2 Notwithstanding HMRC's strong submissions that the 5 disclosures, in the version at [321/2015], cannot amount to protected qualifying disclosures or are still insufficiently identified by the claimant, taking those disclosures at [321/2015] alongside the "applicable ERA section" listed in the 23 September 2019 version [366G/2015], it is clear he alleges them all to disclose miscarriage of justice, Section 43B(1)(c), with the 3rd and 4th also disclosing deliberate concealment, Section 43B(1)(f). All 5 alleged disclosures were to HMRC personnel and thus potentially within the Section 43C(1)(a) qualification. Although HMRC was correct that the claimant had failed to comply fully with the Case Management Orders in respect of Section 43B(1) previously, he finally did list the type of disclosure within section 43B(1) on 23 September 2019 almost at the last possible moment before the Preliminary Hearing; in the circumstances, the Tribunal considers that it would not be appropriate to strike out the automatic unfair dismissal claim on the basis that the claimant simply cannot establish he made any protected qualifying disclosures. The Tribunal does not permit the claimant to rely also upon another disclosure, simply added by him into his most recent version on 23 September 2019 [366G/2015] as part of some "slightly revised short case disclosures" as the first disclosure listed; whilst identifying HMRC managers at various levels, there is insufficient clarity about the date and form of this disclosure shown as both "January 2010 onwards" and "Formalised in written disclosure made in 2011" and the claimant cannot once again change his stance upon the disclosures he wants to rely upon.

17.3 To the extent that HMRC contends the first to the fourth disclosures listed on [321/2015] are still not sufficiently clearly identified, that can be remedied by requiring the claimant to provide his witness statement of primary evidence dealing with making his disclosures first, before service or exchange of other statements from any supporting witnesses of the claimant and the respondent's witnesses, and once the ordinary procedure of disclosure of documents has been completed. The claimant has provided a copy of the fifth disclosure (an email to Jenny Grainger, [196-201/2015] as an attachment to his email dated 19 October 2018), and thus the content of that letter is very clearly evidenced. At this stage, the Tribunal is determining no more than that the claimant can proceed with his automatic unfair dismissal claim alongside his ordinary unfair dismissal claim. If he fails to prove that any of the 5 disclosures at [321/2015] amounts to a protected qualifying disclosure, then the Tribunal at the final hearing will be able to determine only his ordinary unfair dismissal claim.

17.4 The Tribunal takes the opposite view in respect of the disclosure detriment claims. Section 47B(2) provides that separate detriment claims do not gain Section 47B protection where the detriment in question amounts to a dismissal. Having considered the claimant's case carefully in its different formulations, the essence of his case is that his eventual dismissal shortly after his fifth disclosure to Jenny Grainger was indeed caused by him making persistent protected qualifying disclosures: he was dismissed because he was a whistleblower. This is to be dealt with as part of his Section 103A "automatic" unfair dismissal claim. However, as acts of separate detriment, both in terms of the date of the detriment finishing which he always describes as "ongoing" and the overall act of detriment and type of failure by HMRC alleged, labelled as "failure to follow own processes" or policy, "failure to investigate", "failure to follow medical recommendations" and alleging "breach of trust and confidence", "breach of employment terms", "breach of duty of care", "(breach of) PIDA protections", his failure to comply with the Tribunal's Case Management Orders requiring

further specification is fundamental. The acts of detriment the claimant seeks to put forward are much too broad and indistinct for the Tribunal to determine upon meaningfully. It is not sufficient for him to assert repeatedly that the failure to investigate properly or to uphold his grievance or accept the validity of his complaints, leading to the breakdown of his health, is itself an act of detriment. As to timing, even though the claimant in his short case formulation says he accepts that the Tribunal can only consider the detriments post-presentation of the 2013 claim, the reality is that he is alleging many broad and vague detriments which clearly began before the 2013 claim was presented and were or could have been included within that claim. As HMRC correctly contends, the time provisions in detriment claims based upon a failure to act, at Section 48(3) and (4) mean that the time limit runs from when a deliberate failure to act is decided upon (as established by the employer doing an act inconsistent with the failed act or within which it might reasonably have been expected to act). As the claimant has identified 22 (reduced to 18) acts of detriment, the time limit applies to each act individually although it is the case that where one act extends over a period, time only starts to run at the end of that period. Accordingly, insofar as the detriment claims under Part V are concerned, the Tribunal strikes all of those out as having no reasonable prospect of success.

18 **2019 claim**

18.1 The protection under Part V is protection from suffering detriment in employment, which includes in Section 47B, in respect of protected disclosures, protection against or remedies for being subjected to post-employment acts of detriment (as well as acts of detriment during the actual employment) carried out by the employer and the employer's own employees in the course of their employment and the employer's agents acting with the employer's authority. Taking the claimant's case at its highest at this stage, it appears that detriment could include acting adversely to the claimant's interests or failing to act in respect of his rights as a member of the pension and benefit scheme, which are collateral benefits of his employment.

18.2 Although the claimant was dissatisfied that he had sought disclosure of the relationships between the various different respondents which had not been provided to him at this stage, the Tribunal considered these were sufficiently clearly set out in the respective responses and documents to make its decisions upon the applications. HMRC, the first respondent, was the claimant's employer and remains in the proceedings. No other respondent was the claimant's employer and in fairness to him, despite extensive representations from respondents for instance as to the extended meaning on worker within section 43K of the 1996 Act, he has never claimed to be so. He has however relied upon the corporate nature or identity of the Civil Service employer as entitling him to claim against each of the respondents and, by the time of this Preliminary Hearing very much more clearly than when he commenced these proceedings (which was before the Judgment in Case No 2413478/2018 was delivered and sent out), he relied firmly upon the involvement of the 2nd to 5th respondents as being agents of his employer, HMRC, within the definition at Section 47B(1A)(b) of an agent of employer acting with the employer's authority.

18.3 The claimant accepts and relies upon the relationship whereby the Cabinet Office manages the pension and benefits scheme for all government department employers, with MyCSP being the scheme administrator and HML the health adviser. In fact, although it is common ground that the Cabinet Office is the manager of the scheme, there is little documentation explaining its role and its relationship with HMRC as another government department the employees of which are members of the schme. Nonetheless, the Tribunal considers it a massive leap to make My CSP and HML the authorised agents of HMRC in

employment or post-employment detriment terms, even on the claimant's case of them subjecting him to unlawful detriment in acting or failing to act upon his CSIBS claim. Ultimately, it appears to the Tribunal that MyCSP and HML are doing no more than providing services to the Cabinet Office which contracts with them respectively to administer and act as medical adviser to the pension and benefit scheme run for all civil service employees. MyCSP and HML did not become the agents of HMRC just because they were providing services which HMRC were the ultimate end-user of or an indirect recipient of on behalf of its employee who was a member of the scheme. Even if the claimant's argument that there does not need to be a direct contractual relationship between the employer and the agent is correct, there certainly needs to be very much more direct link or fiduciary relationship between the service provider, MyCSP or HML, and the end-user than is evidently the case here. If anything, since there is a specific contracting body which MyCSP operates under and HML advises, the Cabinet Office, it is still less feasible that they are HMRC's agents acting with HMRC's authority.

18.4 Considering the point another way, HMRC is not expressly or impliedly holding MyCSP or HML out as specifically acting on its behalf so as to affect legal relations with third parties, they are just providing services that its employees get the benefit or use of as members of the civil service pension scheme. In terms of the role of HML, this respondent has the strongest argument in seeking to be dismissed from the proceedings, since it was the successor scheme medical adviser operating at very considerable distance from HMRC. Moreover, even without hearing oral evidence, the argument that the claim was out of time and that it would have been reasonably practicable to present it in time (not least since time limits were discussed at a Case Management Preliminary Hearing in Case No 2423478/2018 on 13 November 2018) is accepted. The claims against both MyCSP and HML are struck out as having no reasonable prospect of success.

18.5 Whilst the Minister has a statutory responsibility to manage the Civil Service, it is common ground that he delegates this to the Cabinet Office, as he is entitled to do under Section 1(2) the Civil Service (Management Functions) Act 1992. Although the Tribunal has seen no current list of authorised departments for service of proceedings on as prescribed by the Crown Proceedings Act 1947, it is understood that the Minister (i.e. the Prime Minister) is not on the list upon which or whom service of proceedings can be validly effected, whereas HMRC and Cabinet Office are certainly listed. The claimant himself acknowledged that the removal of the Minister as a named respondent to the proceedings does not detract from his claims and it is appropriate to strike him out as a named respondent on the basis that claims against him stand no reasonable prospect of success (or alternatively to remove him from the proceedings under Rule 34 as a party apparently wrongly included).

18.6 That leaves consideration of the position of the Cabinet Office, the Government Department with responsibility to manage the pension and benefits scheme which employees of the various government departments belong to and benefit from. There is plainly significant inter-relationship between the Cabinet Office and government departments such as HMRC, such that HMRC is one of the employing departments which gains the benefit of the Cabinet Office's management of the pension and benefits scheme, even though it has legal responsibility for Crown employees employed by it. Regrettably, the Cabinet Office's ET3 and skeleton argument have been substantially lacking in detail about its role in managing the scheme and how it liaises with the HMRC and other employer departments in respect of it. The response and submissions concentrated entirely upon whether the claimant was an employee or worker, albeit also relying upon Employment Judge Ross's Judgment in in Case No 2423478/18 (which in turn cited from that of Employment Judge Ryan in Case No

2404018/17). Whilst the Tribunal regards other first instance decisions as being of persuasive authority and would generally not wish to deviate from them as a matter of comity, it considers that the claimant's arguments as to agency of the Cabinet Office as acting for HMRC are now much more fully developed. Although the argument that the Cabinet Office is HMRC's agent in managing the pension scheme and thus can be liable under Section 47B(1A)(b) is not supported by evidence from the claimant, he is right to stress that no disclosure of documents has yet been made (other than voluntarily within the Bundle) at the stage of this Preliminary Hearing. Conversely, it appears to the Tribunal that the Cabinet Office's case is based firmly upon its assertion as to its status and the general and extended definitions of worker rather than upon evidence and ignores its role as manager of the pension scheme. The Tribunal therefore concludes that it would be premature to dismiss the Cabinet Office as a respondent to this claim alongside HMRC or to deal conclusively with its arguments of absence of any duty to act in relation to the claimant, which will be considered fully at a later hearing.

19 Deposit applications

Whilst both HMRC and the Cabinet Office raised applications for deposits to be made against the claimant if the claims proceeded, on the basis of the claims against them having little reasonable prospect of success, the Judge concluded that this was not an appropriate case for deposit orders. The differentiation between no and little reasonable prospect of success is always fine but the unfortunate history of the 2015 claim and the multiplicity of claims here, taken with the claimant's new preparedness to reduce his claims to "short case" formulation, means that further case management to bring them to hearing should be engaged with as soon as possible.

20 Case management of other claims

In respect of other case management, the Judge canvassed views about lifting the stay in and combining the 2017 claim with any other claims going forward. Both the claimant and HMRC agreed the stay should be lifted in the 2017 claim, which also concerns Health Assured Ltd. However, HMRC noted that progress in the 2017 and 2019 proceedings was behind the 2015 claim in terms of clarity of protected disclosures and acts of detriment alleged. The claimant expressly made clear that he proposed to shorten the 2017 and 2019 claims as he had done with the 2015 claim. The way forward is to list a further case management hearing on the 2015 claim together with the 2017 and 2019 claims, insofar as all claims are continuing.

Regional Employment Judge Parkin

3 January 2020

Sent to the parties on:

3 January 2020

For the Tribunal