EMPLOYMENT TRIBUNALS

Claimant: Mr D P Hoppe

Respondents: Cabinet Office
Health Assured Limited
Her Majesty's Revenue and Customs

HELD AT: Manchester **ON:** 2-3 February 2021 and 1 April 2021 (in chambers)

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimant: In person
Respondent:
Cabinet Office: Mr S Redpath, counsel
Respondent: Health Assured Limited Mr Z Mati, solicitor
Respondent: HMRC Mr J Hurd, counsel (watching brief)

JUDGMENT

The judgment of the Tribunal is that:

1. The Cabinet Office was not acting as an agent of Her Majesty's Revenue and Customs in failing to take action about the matters raised in the claimant's letter of 22 November 2018 until 14 December 2018 and is dismissed as a respondent to case number 2400171/2019**.**

2. Health Assured Limited was not acting as an agent of Her Majesty's Revenue and Customs in failing to complete a review assessment required under CSIBS by 30 June 2017 and is dismissed as a respondent to case number 2404018/2017.

REASONS

Introduction

1. The code "V" in the heading indicates that this was a hearing conducted by video conference (CVP). The claimant participated by dialling in by telephone to the hearing, rather than joining by visual and audio connection. For most of the hearing, the telephone link was directly into the CVP conference. For a short period, the claimant called on a separate telephone link but I had difficulty hearing him and the other participants in the CVP hearing could not hear him. The claimant later rejoined the hearing by dialling in to the CVP room.

2. At a private preliminary hearing, the record of which was sent to the parties on 2 December 2020, Employment Judge Holmes set out ground rules for the conduct of claims, including the two cases which are the subject of this hearing, up to and including the preliminary hearings on 2 and 3 February 2021. These ground rules included that the Tribunal should provide the claimant with reasons (which the judge took to be written reasons) for any decisions it made or directions it gave and that all hearings would be officially recorded by the Tribunal. In accordance with these ground rules, I recorded this preliminary hearing on a Dictaphone. Written reasons for the rulings I made on 2 February 2021 are contained within these reasons.

3. I am aware that the claimant has requested a transcript of the second day of this hearing i.e. 3 February 2021. At the time of making this decision and writing these reasons, I have not seen this transcript. I rely, as is normal practice, on my note of the hearing in addition to the written witness statements, documentary evidence and, in this case, extensive written submissions in making my decision.

4. In these reasons, "the 2017 case" refers to case number 2404018/2017 and "the 2019 case" refers to case number 2400171/2019. At the time of this hearing, the respondents to the 2017 case are Health Assured Limited and HM Revenue and Customs (HMRC), and the respondents to the 2019 case are the Cabinet Office and HM Revenue and Customs (proceedings against other respondents having been struck out). The issues to be determined at this preliminary hearing only actively concern the Cabinet Office and Health Assured Limited (Health Assured).

Background to this hearing

5. The issues which are the subject of this preliminary hearing arise in the context of complex litigation which was summarised by Regional Employment Judge Parkin in his judgment and reasons sent to the parties on 3 January 2020.

6. The claimant was employed by HMRC. He was dismissed in 2015. He contends this was because he had made protected disclosures. The claimant brought proceedings against HMRC but also proceedings against central Civil Service departments, officers, pension administrators and health providers for detriments subsequent to his dismissal, including the Cabinet Office and Health Assured.

7. Health Assured is a respondent to the 2017 claim. The complaints against Health Assured are of detrimental treatment on the ground of making protected disclosures. REJ Parkin summarised the part of the 2017 claim involving Health Assured as follows, at paragraph 5.2 of his reasons:

> "He [the claimant] 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."

8. The Cabinet Office is a respondent to the 2019 claim. The complaint against the Cabinet Office is of detrimental treatment on the ground of making protected disclosures. The claim relates to alleged failures to act by the Cabinet Office in relation to the claimant's claim for a permanent award under the Civil Service Injury Benefit Scheme (CSIBS). The allegation of detrimental treatment was summarised in the annex to case management orders sent to the parties on 1 September 2020 as follows: "A failure to take action about the matters raised in the Claimant's letter of 22 November 2018 until 14 December 2018".

9. The basis of liability on the part of Health Assured and the Cabinet Office is said by the claimant to be that they were acting as agents for the claimant's employer, HMRC, when subjecting him to detrimental treatment within the meaning in section 47(1A)(b) Employment Rights Act 1996 (ERA).

Issues for this hearing

10. This public preliminary hearing was listed to consider the following matters which were set out by Regional Employment Judge Franey at a private preliminary hearing on 15 July 2020:

10.1. "On Tuesday 2 February 2021, in the 2019 case, whether any act or deliberate failure to act on the part of the Cabinet Office which the claimant alleges caused him a detriment was done by the Cabinet Office as an agent of HMRC with the authority of HMRC so as to make the Cabinet Office potentially liable under section 47B(1A)(b) Employment Rights Act 1996.

10.2. On Wednesday 3 February 2021, in the 2017 case, whether any act or deliberate failure to act on the part of Health Assured which the claimant alleges caused him a detriment was done by Health Assured as an agent of HMRC with the authority of HMRC so as to make Health Assured potentially liable under section 47B(1A)(b) Employment Rights Act 1996.

10.3. Any other matters of case management which may arise, including clarification of the complaints and issues for determination at the final

hearing, and provision of a cast list, chronology and timetable for the final hearing."

11. Orders made on paper by REJ Franey and sent to the parties on 14 January 2021 summarised, at paragraph 25, the issues to be determined at this hearing as follows:

> " (a) Firstly, whether the Cabinet Office acted as agent of HMRC in failing to take action about the matters raised in the claimant's letter of 22 November 2018 until 14 December 2018. That letter concerned an alleged failure by Health Management Limited, the successor to Health Assured as Scheme Medical Adviser, to produce an independent assessment of impairment in accordance with CSIBS rules, and a failure by MyCSP to investigate that matter.
>
> " (b) Secondly, whether Health Assured acted as agent for HMRC, either directly or through the Cabinet Office (if the Cabinet Office was an agent of HMRC) in failing to complete a review assessment required under CSIBS by 30 June 2017."

12. The outcome of this hearing will determine whether Health Assured remains as a respondent to the 2017 claim and whether the Cabinet Office remains as a respondent to the 2019 claim.

13. It is not for me to decide at this hearing whether they subjected the claimant to detrimental treatment and, if so, whether this was on the grounds the claimant made protected disclosures. It is assumed for the purposes of this hearing that the claimant will prove at the final hearing that he made the alleged protected disclosures and that the Cabinet Office and Health Assured Limited were responsible for any act or deliberate failure to act which cause the alleged detriment. I am looking only at whether, if they did what is alleged, they were acting as agents of the claimant's former employer, HMRC and, therefore, could be liable to the claimant for a claim brought under section 48 ERA for a contravention of section 47B ERA. If I conclude that Health Assured and/or the Cabinet Office were acting as agents in the sense used in section 47B(1A)(b) ERA, they will remain as a respondent and all other issues relevant to liability will be decided at the final hearing.

The first day of this hearing

14. I had an initial discussion with the parties to confirm the issues I was to deal with and the evidence I was to consider. During the discussion, the claimant told me he had not received a letter which I had believed to have been sent to the parties on the orders of REJ Franey on 29 January 2021. I also discovered that the claimant and Mr Redpath had not received a copy of the bundle of documents prepared by Health Assured Limited. Mr Mati said he had emailed this to the claimant on 20 January 2021 but the claimant could not find that email. At 10.50 a.m. the claimant said he could do with a break. I asked him to rejoin at 11 a.m. but was not sure whether he had left the hearing before I said that. On my instructions, at 11 a.m., my clerk rang the claimant to see if he was ready to rejoin the hearing. He said he needed more

time, so I asked my clerk to ask him to rejoin at 11.30 a.m. and to say that, when he did, we would talk about what we were going to do.

15. The claimant sent an email at 11.40 a.m. saying he had tried to dial in again but the number would not connect. He sent a further email at 11.55. He wrote in this:

> "an expectation for today was
>
> "that ahead of the hearing a response would have been provided to the request for review and clarification.
>
> "that the hearing would be held by Judge Franey as he had determined the evidence he thought was required to determine matters in accord with the indications given previously
>
> that sight of documents and arguments would be provided in accord with the ground rules
>
> that there would be an indication given of the process to be followed
>
> if appears such were not to be met."

16. He also wrote that his mind was fogged and he felt very threatened and "I feel that Tribunal is acting in a manner complicit with respondents to rush crush and coinceal. I have no idea what can realistically be achieved today but ther will be nothing achievced by not recognising the inadequacy of the matter being progressed."

17. The claimant rejoined the hearing after this. He said he did not feel appropriately equipped to engage. He said he could listen but was not in a fit state to respond appropriately. He did not feel able or willing to continue with the Cabinet Office case and was not able to make another witness statement until disclosure. He referred to having insufficient time. I had considerable difficulty hearing the claimant and the other parties were unable to hear him, but the claimant confirmed to me that he wanted to apply for a postponement of both cases and I relayed what he said to the other parties. I said I would adjourn until 2 p.m. when I would hear his application to postpone. My clerk then called the claimant, on my instructions, to work out the best way to proceed so that all parties could hear him.

18. We resumed at 2 p.m. and the claimant participated by telephone link into the CVP conference. I and the other parties were able to hear him.

19. At 1.12 pm, the claimant had sent a further email which I read before resuming. Mr Redpath and Mr Mati confirmed that they had read the email.

20. At 2 p.m. I set out what I considered to be the available options:

20.1. Postpone the whole preliminary hearing and re-list it.

20.2. Postpone the preliminary hearing and deal with the issues at the final hearing.
20.3. Postpone the Health Assured case but go ahead with the Cabinet Office case.
20.4. Go ahead with both cases.

21. I then heard submissions from the claimant, Mr Redpath and Mr Mati as to what we should do. Mr Hurd made a brief submission on behalf of HMRC in relation to the option to deal with the issues at the final hearing.

22. After an adjournment, I gave my decision and reasons for deciding to proceed and how we would proceed as set out below.

Decision to proceed and reasons for that decision

23. My decision is to proceed on 3 February 2021 with hearing evidence on both cases, but the parties' arguments, or submissions, will be made in writing In accordance with a timetable I will decide after discussion with the parties.

24. My reasons for this decision are as follows.

25. The claimant's arguments as to why I should not go ahead with this hearing relate largely to his argument that this cannot be done fairly without the Tribunal ordering further evidence to be disclosed. The matter of disclosure has been dealt with by REJ Franey in his written orders sent to the parties on 14 January 2021. REJ Franey considered further representations made by the claimant and refused the claimant's request for "review and clarification" of his order. I regret that, apparently due to an administrative oversight, REJ Franey's decision on this was not sent to the parties, as the REJ had instructed, on 29 January 2021. The matter of disclosure is, however, at an end, subject to any appeal which the claimant may make. It would not be appropriate to delay this hearing on the basis of an appeal which has not even yet been presented.

26. The claimant's other arguments relate to being prepared for the hearing. In relation to the Cabinet Office case, the claimant received the bundle of documents for the hearing in good time, in accordance with the orders made. The claimant says he was not aware of there being any opportunity or likelihood of evidence in the hearing and has prepared no questions. The claimant should have been aware of the likelihood of evidence being called from the orders made for sending of witness statements. Mr Spain's witness statement was sent to him in advance. The claimant had the opportunity to prepare questions for Mr Spain and, since I have decided that evidence will not be heard until tomorrow, he will have a further opportunity to prepare any questions if he wishes to do so.

27. In relation to the Health Assured case, it appears that the claimant did not receive the bundle of documents on 20 January, although I accept Mr Mati sent it and had no reason to believe it had not been received. However, the bundle does not contain any documents that were not previously disclosed, on 20 January or the preceding September. The claimant should, therefore, be familiar with the

documents. In any event, Health Assured is not calling any witnesses, so no issue arises as to whether the claimant could be expected to be prepared to cross examine witnesses for Health Assured.

28. I consider the interests of justice lie in this hearing going ahead if this can be done in a fair way. All the parties have waited a very considerable time to get to this stage and further delay is not desirable. There are good reasons for these issues being dealt with at a preliminary stage. They have the potential to remove one or two respondents from the case.

29. I consider that the hearing can go ahead in a fair way, having regard to the ground rules agreed for this hearing, as follows. We will adjourn until tomorrow. The claimant will give his evidence first and be questioned by both respondents. Mr Spain will then give evidence on behalf of the Cabinet Office and the claimant will have an opportunity to question him, if the claimant wishes to do so. I will not hear oral submissions. The parties will provide written submissions by dates to be decided, after discussion about this with the parties. This will give the claimant an opportunity to have sufficient time to digest and respond to the respondents' arguments. I will then decide the case, on the basis of the evidence I heard, the documentation in the two bundles, and the parties' written submissions and provide my judgment and reasons in writing.

The Timetable for the hearing and written submissions

30. After giving my decision, I outlined the order of evidence and questions. We agreed the timetable for written submissions. The claimant commented that he was grateful for the clarity that I was bringing to proceedings. We then adjourned until the following day.

31. On 3 February 2021, we proceeded in the way I had decided. Written submissions have been provided subsequently in accordance with the agreed timetable. Contrary to the suggestion in the claimant's submissions, and information the claimant says he was given by someone at the Tribunal, Health Assured's submissions were received by the Tribunal on 25 February 2021, as required by the orders. Mr Mati's email was also correctly addressed to the claimant's email address. It appears that, for reasons so far unexplained, that email did not reach the claimant on that day.

Further case management of the claims

32. When giving my decision on 2 February 2021, I said I would arrange a preliminary hearing by telephone conference call to be conducted by REJ Franey, if possible, to consider any outstanding case management matters relating to the final hearing, including timetabling of the final hearing. At the end of the hearing on 3 February 2021, I confirmed the timetable for submissions and informed the parties I would be considering my decision in chambers on 1 April 2021. I told the parties that REJ Franey would arrange the next case management preliminary hearing. I advised the claimant that, if he wanted to appeal against REJ Franey's case management orders relating to disclosure, he should not wait for my decision before doing so. I

said that the written reasons for my decisions given on 2 February 2021 would be included in the written judgment and reasons for this preliminary hearing.

33. The case management orders about written submissions were confirmed in writing and sent to the parties on 5 February 2021.

The Evidence

34. I heard oral evidence from Mr Peter Spain, Head of the Civil Service Pensions Technical Team, for the Cabinet Office and from the claimant. There was no witness evidence for Health Assured. There was a written witness statement from Mr Spain. I had a written witness statement from the claimant dated 30 July 2020.

35. There were two bundles of documents, one prepared by the Cabinet Office and one by Health Assured Limited. Any references to documents in the bundle prepared by the Cabinet Office will be referred to in these reasons as "CO[page number]" and references to documents in the bundle prepared by Health Assured Limited will be referred to as "HA[page number]".

Facts

36. The claimant was employed by HMRC until his employment was ended with effect from 11 June 2015.

37. The CSIBS is a statutory scheme under section 1 of the Superannuation Act 1972. It offers certain benefits to persons serving in the Civil Service who have suffered qualifying injury or disease in the course of service which impairs earning capacity. The CSIBS is separate from the Civil Service's pension arrangements. The rules relating to the CSIBS as they were at relevant times appear at CO200 onwards. Paragraph 1(ii) provides (CO201):

> "The benefits under this scheme will be paid at the discretion of the Minister and nothing in the scheme will extend or be construed to extend to give any person an absolute right to them."

38. Payments of benefits under the CSIBS are made from money provided centrally but the cost is then recharged to the relevant employer, so HMRC would be charged for any benefits paid under the scheme to the claimant.

39. Section 1(1) confers power on the Minister for the Civil Service to make, maintain and administer schemes such as the CSIBS. Section 1(2) allows the Minister to delegate "to any other Minister or officer of the Crown any functions exercisable by him by virtue of this section or any scheme made thereunder."

40. The Minister for the Civil Service delegates management of the CSIBS to the Cabinet Office. The Cabinet Office, through its Pensions Policy, Strategy and Governance team, is the CSIBS Scheme Manager.

41. The Cabinet Office has, since 2012, delegated the administration of the CSIBS to MyCSP Ltd. MyCSP Ltd administers the CSIBS in accordance with the Rules and guidance provided by the Cabinet Office.

42. Mr Spain's understanding is that MyCSP Ltd was at one stage a joint venture partly owned by government and it is now a private company. His understanding is that, at times relevant for this case, it was a private company, not part of the Civil Service. Mr Spain told me, after making enquiries, that the Cabinet Office initially had a 35% shareholding in the company. Some of this shareholding was sold in 2014 and the remainder was sold in 2018.

43. The Scheme Medical Adviser carries out medical assessments to assess whether applicants meet the requirements for benefits to be paid under the CSIBS. Health Assured Limited became the Scheme Medical Adviser with effect from 1 August 2015. The Cabinet Office had appointed Capita Health and Wellbeing Limited as Scheme Medical Advisor (SMA) from 1 July 2013 under the terms of a Framework Agreement dated 10 July 2013 (the Framework Agreement). The Framework Agreement was novated to Health Assured Limited with effect from 1 August 2015. "The Authority" in the Framework Agreement is the Cabinet Office.

44. Health Management Limited replaced Health Assured as SMA with effect from 1 July 2017.

45. Paragraph 5.10.3 of the MyCSP employer pensions guide (CO232) states:

> "Normally the Scheme Administrator decides if a member has suffered an injury that may qualify them for an injury benefit. The Scheme Administrator may take the advice of the Scheme Medical Adviser but the Scheme Administrator always makes the decision as to whether the member has a qualifying injury."

46. A 2013 booklet "Injury Benefit Scheme – A Brief Guide" states: "MyCSP also processes injury benefit claims on behalf of your employer".

47. Under the terms of the Framework Agreement, "Employers", defined as a body or organisation with employees who are active members of the Civil Service Pension arrangements, may place orders for the provision of services by the SMA (see paragraph 6.1 CO145).

48. Schedule 1 of the Framework Agreement sets out the requirements for the supply of medical and associated administrative services to various schemes, including the CSIBS (CO173).

49. Paragraph 3 of Schedule 1 provides:

> "The requirement is to provide medical advice and recommendations using professional skill and judgement concerning entitlement to scheme benefits in accordance with the relevant scheme rules by…"

A list follows of various steps which must be taken, including examining Occupational Health case papers, other medical papers and other relevant documents and arranging any essential medical examinations.

50. Schedule 2 to the Framework Agreement was redacted in the document disclosed to the claimant and does not appear in the bundles. Paragraph 15 (CO149) provides:

> "The prices offered by the Provider for Orders to Employers shall be the prices listed in Schedule 2 for the relevant service."

51. "The Provider" was Capita Health and Wellbeing Limited and, after the novation of the Framework Agreement, Health Assured Limited.

52. "Order" is defined (CO139) as:

> "an order for Services served by any Employer on the Provider in accordance with the Ordering Procedures and which forms the legally binding agreement (made pursuant to the provisions of this Framework Agreement) for the provision of Services made between an Employer and the Provider."

53. "Services" are defined as "the medical advisory services detailed in Schedule 1" (CO141).

54. Based on these provisions, I consider it likely that the material redacted in Schedule 2 would identify the prices for the services set out in Schedule 1, but would add little, if anything, to the description of the services set out in Schedule 1.

55. In Schedule 1 (CO178), services in relation to injury benefits are described as follows:

> "17. The Provider shall provide advice so the Authority or the Other Employer can decide whether a person has suffered a qualifying injury as defined by CSIBS rule 1.3 or (if the injury occurred before 1 October 2002) former rule 11.3 of the PCSPS, and whether there is a causal link between a specified injury and the Scheme member's official duty.
>
> "18. Where a scheme member becomes entitled to be considered for the payment of injury benefit the Provider will provide an assessment of the degree to which the qualifying injury has impaired earning capacity. Any assessment will be placed in one of the categories contained in CSIBS rule 1.7 (or former rule 11.7 of the PCSPS as the case may be).
>
> "19. In addition, where the injury was sustained on or after 1 April 2003, the Provider will advise whether the injury is "wholly" (more than 90%) or "mainly" (between 50% and 90%) attributable to the nature of the duty. Where the injury is mainly but not wholly attributable to the nature of the duty, the Provider will advise whether attribution is "low" (50-70%) or "medium" (71-90%).

> "20. The Provider will give advice on appeals from an injury benefit beneficiary against a decision that there is no causal link between specified injury and the scheme member's official duty, or against assessments of impairment of earning capacity and (where appropriate) apportionment, reviewing the medical evidence.
>
> "21. The Provider will give advice in accordance with CSIBS rule 1.10 (or former PCSPS rule 11.10 as the case may be) on the beneficiary's request for a review of benefit following the deterioration of their condition (does not apply to injury sustained on or after 1 April 2003)."

56. If an individual is dissatisfied with the decision about benefits under the CSIBS, there is a two stage Internal Dispute Resolution procedure which the individual can use (CO232). The first stage is for MyCSP to undertake an investigation and provide a determination. The second stage, if the individual is dissatisfied with the stage 1 decision, is for the Cabinet Office to investigate the dispute and provide a further determination.

57. The claimant made a claim for benefits under the CSIBS. He made this application to HMRC after contacting MyCSP who told him that they could not accept a claim directly and that he had to make the claim to HMRC.

58. The claimant believes that HMRC raised a purchase order for the cost of the use of Health Assured. The claimant says he requested a copy of documentation including the purchase order, but this has not been provided. Mr Spain's understanding of the current process, based on information received from MyCSP, is that no purchase order is raised, but the SMA bills the employer on the completion of the work. The cost is charged to the employer but commencement of the work is not dependent on completion of a purchase order. Mr Spain had no knowledge of whether a purchase order had been used in the claimant's case.

59. The claimant's understanding that HMRC requested services from Health Assured is supported by the reference in the "advice from medical assessment" to a request from the department, identified as HMRC (HA73).

60. Mr Spain's understanding is that the advice of the SMA is provided to MyCSP and MyCSP makes use of that advice to make decisions. This understanding is supported by the correspondence about the claim and appeal between MyCSP and Health Assured.

61. On 3 November 2015, a medical adviser completed a form headed: "Advice from medical assessment on impairment of Earnings Capacity and Apportionment for Civil Service Injury Benefit" in relation to the claimant. The doctor wrote: "as requested by the department, I have considered the entire available medical and other documentary evidence submitted to the scheme medical adviser about the above." The department is identified in the report as HMRC (HA73).

62. The claimant had some correspondence with Health Assured, taking issue with the report, after receiving this in November 2015.

63. The claimant sent a letter of appeal to MyCSP in September 2016. The claimant referred to the appeal to MyCSP in a letter to Health Assured dated 14 November 2016 (HA108). The claimant's recollection in his submissions (paragraph 71) that the appeal had to be lodged via HMRC is not supported by the documentation.

64. MyCSP Ltd wrote to Health Assured on 24 November 2016, writing that the claimant had appealed against Health Assured's medical assessment of apportionment and/or impairment an enclosing an "Appeal against medical advice - injury benefit" for their consideration (HA110).

65. On 14 February 2017, Health Assured wrote to MyCSP about the appeal. The doctor wrote, for reasons explained in the letter, that they were closing the file and returning it to MyCSP (HA121).

66. On 3 May 2017, MyCSP returned the claimant's file to Health Assured at their request (HA122).

67. There was further correspondence from Health Assured to McCSP on 18 May 2017 (HA123).

68. There was no correspondence between Health Assured and the Cabinet Office or HMRC about the appeal.

69. The case was transferred to Health Management Limited with effect from 1 July 2017 when Health Management Limited became SMA in the place of Health Assured.

70. On 22 November 2018, the claimant wrote to the Head of the Civil Service (CO132), enclosing a copy of his IDR2 Appeal application (CO189). This related to an alleged failure by Health Management Limited, the successor to Health Assured as Scheme Medical Adviser, to produce an independent assessment of impairment in accordance with CSIBS rules, and a failure by MyCSP to investigate that matter. The claimant's allegation of detrimental treatment by the Cabinet Office is about the Cabinet Office failing to take action about the matters raised in that letter until 14 December 2018.

Submissions

71. The parties made written submissions. I do not seek to summarise these submissions which can be read in their entirety, if required. I do, however, seek to deal with the principal arguments made by the parties in my conclusions.

Law

72. The relevant parts of section 47B Employment Rights Act 1996 for this case are as follows:

> "(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."

73. The parties have been unable to find any case law directly on the issue of the meaning of "agent" in section 47B ERA. However, the legal provision is written in similar terms to that in sections 109 and 110 of the Equality Act 2010 and the equivalent provisions in its predecessor legislation. The parties have referred me to case law on the discrimination provisions which I consider is of assistance in interpreting the similar provisions in section 47B ERA.

74. I was referred to three authorities: **Yearwood v Commissioner of Police of the Metropolis** [2004] ICR 1660 EAT**, Ministry of Defence v Kemeh**, [2014] ICR 625 and **Unite the Union v Nailard** [2019] ICR 28 CA.

75. In **Yearwood** the EAT concluded that, where "agent" and "principal" were used in the discrimination Acts which were the precursors to the Equality Act 2010, the terms were not used in a general sense, but in the particular sense of an agency as understood in common law, with the only change being that, in accordance with the discrimination legislation, both principal and agent would be liable for the act of discrimination (the EAT were held by the Court of Appeal in **Ministry of Defence v Kemeh** to be wrong in saying the agent would not also be liable at common law, but the Court said this did not undermine the EAT's reasoning). Judge McMullen QC quoted from *Bowstead and Reynolds on Agency* for the common law meaning of agency. The judge noted, at paragraph 39, that an important incident of the relationship is that an agent may be appointed to do any act on behalf of the principal which the principal might do himself or herself.

76. In **Ministry of Defence v Kemeh**, the Court of Appeal considered the concept of agency in section 32 of the Race Relations Act 1976 (RRA) in the context of a claim brought by a soldier about racially abusive comments by the employee of a company

providing catering services to the Army. Elias LJ reviewed the case of **Yearwood**. He agreed with the conclusion of the EAT that, on the facts, there was no agency relationship but commented, at paragraph 36, that this conclusion did not turn on the particular concept of agency employed. He wrote:

> "The officers were independently exercising an authority conferred by the Regulations. The chief constable chose them for the task but he was not thereafter the source of their authority. It could not sensibly be inferred, in the face of the Regulations, that the disciplining officers were exercising their powers by virtue of any authority conferred by the chief constable. No implied authority from the chief constable was needed to explain why they had the power they did."

77. Elias LJ expressed doubt about how significant the differences between the two concepts of agency advanced in **Yearwood** are.

78. In paragraph 38, Elias J wrote:

> "The concept of agency at common law is not one which can be readily encapsulated in a simple definition. As the editors of *Bowstead & Reynolds* point out, no-one has the correct use of this or any term. Moreover, Judge Peter Clark appears to have had reservations about the requirement, considered to be an essential part of the definition by the appeal tribunal in the *Yearwood* case, that an agent must have power to affect the principal's legal relations with third parties. In fact the authors of *Bowstead & Reynolds* (see para 1—04) recognise that someone might quite properly be described as an agent even where this feature is missing."

79. At paragraphs 39 and 40, Elias LJ wrote:

> "39 Even in the so-called "general concept of agency" advanced in the *Yearwood* case, it would be necessary to show that a person (the agent) is acting on behalf of another (the principal) and with that principal's authority. Once it is recognised that the legal concept does not necessarily involve an obligation to affect the legal relations with third parties, I doubt whether the concepts are materially different.
>
> "40 But ultimately it is not necessary for the purposes of appeal to resolve that question. Whatever the precise scope of the legal concept of agency, and whatever difficulties there may be of applying it in marginal cases, I am satisfied that no question of agency arises in this case. In my view, it cannot be appropriate to describe as an agent someone who is employed by a contractor simply on the grounds that he or she performs work for the benefit of a third party employer. She is no more acting on behalf of the employer than his own employees are, and they would not typically be treated as agents. (That is not, of course, to say that employees can never be agents; they might well be, depending on the obligations cast on them, such as where a senior manager is authorised to contract with third parties. He will be an

> employee but will also act as an agent when exercising the authority to deal with third parties.)"

80. At paragraph 46, he concluded that, whatever, the precise scope of the agency concept in section 32 RRA, "in my view it must at least reflect the essence of the legal concept".

81. Lewison LJ agreed with the EAT in Yearwood that Parliament must be taken to have intended the legal concept of agency in the discrimination statutes to be interpreted in accordance with ordinary legal parlance.

82. Kitchin LJ agreed with the judgments of both Elias LJ and Lewison LJ.

83. I have found **Unite the Union v Nailard** [2019] ICR 28 CA of less assistance since, in that case, as noted in paragraph 43, they were not considering whether not, an agency relationship exists at all (as we are in this case), but with liability in tort for acts done in the course of an agency relationship.

Conclusions

Whether the Cabinet Office was acting as the agent of HMRC

84. I note from the authorities there may be some uncertainties as to the exact limits of agency in the context of the Equality Act 2010 and, by analogy, that of section 47B ERA. However, I consider that the issue of whether the Cabinet Office was acting as the agent of HMRC in failing to take action about the matters raised in that letter until 14 December 2018, can be decided on the basis of what is clearly part of the essence of agency: for a person to be acting as the agent of another, they must be doing the relevant act by virtue of authority conferred by the principal. Elias LJ noted in relation to **Yearwood** that the chief constable was not the source of the officers' authority; this came from the relevant regulations (see paragraph 76).

85. I conclude that, in this case, the Cabinet Office was not acting by virtue of any authority conferred by HMRC when acting in relation to a claim for benefits under the CSIBS. The powers of the Cabinet Office were delegated to them by the Minister for the Civil Service. The Minister for the Civil Service has the power, under the Superannuation Act 1972, to make, maintain and administer schemes such as the CSIBS. Section 1(2) of that Act allows the Minister to delegate "to any other Minister or officer of the Crown any functions exercisable by him by virtue of this section or any scheme made thereunder." The Cabinet Office, if it subjected the claimant to detrimental treatment as alleged, was not acting by virtue of authority conferred by HMRC. It was acting by virtue of powers under the statutory scheme delegated to it by the Minister for the Civil Service.

86. I conclude, therefore, that the Cabinet Office was not acting as the agent of HMRC and there is no basis for liability under section 47B ERA against the Cabinet Office. I, therefore, dismiss the Cabinet Office as a respondent to the proceedings in both cases.

Whether Health Assured Limited was acting as the agent of HMRC

87. I need to decide whether Health Assured acted as agent for HMRC, either directly or through the Cabinet Office (if the Cabinet Office was an agent of HMRC) in failing to complete a review assessment required under CSIBS by 30 June 2017.

88. My conclusion that the Cabinet Office was not acting by virtue of authority conferred by HMRC when acting in relation to a claim for benefits under the CSIBS means that Health Assured Limited cannot have been acting as agent for HMRC through the Cabinet Office. If the Cabinet Office was not an agent of HMRC, it could not delegate authority from HMRC. I am left, therefore, with the remaining issue of whether Health Assured was acting directly as agent for HMRC in failing to complete a review assessment required under CSIBS by 30 June 2017 (it being assumed for the purposes of this hearing that Health Assured did subject the claimant to detrimental treatment in this way).

89. It does appear that HMRC had some role in Health Assured being commissioned to provide services. The claimant's evidence that he was told by MyCSP that he had to make his application to HMRC and the medical report from Health Assured which refers to the report being prepared at the request of the "department", in turn identified as HMRC, suggests that HMRC made the request for the initial medical report. It is agreed that HMRC bears the cost of the report (and, if an award is made, bears the cost of the award). The claimant asserts that there would have been a purchase order raised by HMRC for the report and that there would have been a contract between HMRC and Health Assured. The claimant is unhappy that the purchase order (if there was one) has not been disclosed. Mr Spain has been able to tell me about the current practice, which he understands would not involve a purchase order, but could not say that there would not have been a purchase order at the time of the report about the claimant. For the purposes of deciding the agency issue, I, therefore, assume (without deciding this) that there was a purchase order and there was a contract between HMRC and Health Assured for the provision of the medical report.

90. Factoring in this assumption, the factual situation is as follows. The Minister for the Civil Service has delegated power to administer the CSIBS to the Cabinet Office. In turn, the Cabinet Office has delegated to MyCSP Ltd the administration of the CSIBS in accordance with the Rules and guidance provided by the Cabinet Office. Health Assured Limited provides medical advice, in accordance with the Framework Agreement, to help the scheme administrator make a decision as to whether to award benefits under the CSIBS and, if an award is to be made, how much is to be awarded. MyCSP Ltd makes the decision about the award of benefit, under its delegated power from the Cabinet Office. If an award is made to an HMRC employee, such as the claimant, HMRC is required to meet the cost of that award.

91. I conclude that the 2013 booklet "Injury Benefit Scheme – A Brief Guide" is misleading when it states: "MyCSP also processes injury benefit claims on behalf of your employer", if this is intended to include claims for benefits under the CSIBS. This is not an accurate description in so far as it states that the claims are processed on behalf of the individual's employer. The claimant was entitled to be considered for

a discretionary award under the terms of the CSIBS because he was an employee of HMRC but the statutory scheme is independent of HMRC and other Civil Service employers. HMRC had no role in the decision as to whether the claimant would be given an award. The power to make that decision lay with MyCSP Ltd, having that power delegated by the Cabinet Office which, in turn, had its power delegated by the Minister for the Civil Service. The Minister for the Civil Service derives his power in relation to the CSIBS from the Superannuation Act 1972.

92. The fact that HMRC is required to pay for the services of Health Assured Limited and then for any benefit awarded to the claimant under the terms of the CSIBS does not give HMRC any powers in the decision making process, including a review assessment. HMRC does not, therefore, have any authority which it can delegate to Health Assured Limited in relation to a review assessment and Health Assured Limited cannot, therefore, in providing advice in relation to the review assessment, be acting as agent for HMRC.

93. Even if Health Assured Limited was performing its work for the benefit of HMRC as well as MyCSP Ltd, this would not be enough, by itself, to make Health Assured Limited the agent of HMRC when doing that work. Elias LJ stated in **MOD v Kemeh** (see paragraph 79) that it cannot be appropriate to describe as an agent someone who is employed by a contractor simply on the grounds that he or she performs work for the benefit of a third party employer.

94. I consider that the claimant's argument (paragraph 5) that an electrician engaged by a prime contractor for an employer commissioning building works would be an agent of the employer would fail for this reason. Whether the employer could be liable on some other basis for negligence of the electrician is not something I need to decide and does not assist with the issue before me, which is of agency.

95. Health Assured Limited was not acting on behalf of HMRC (or even MyCSP) in providing medical advice. It was providing a service in supplying independent medical advice to enable MyCSP to make a decision as to entitlement to benefits under the CSIBS. I consider that the arrangements lack the essence of agency, which is that the agent acts on behalf of the principal, with the principal's authority.

96. I conclude, therefore, that Health Assured Limited was not acting as the agent of HMRC in failing to complete a review assessment required under CSIBS by 30 June 2017 (if this was proved to be the case). Health Assured Limited cannot, therefore, be liable to the claimant for subjecting him to a detriment, under the provisions of section 47B ERA. I, therefore, dismiss Health Assured Limited as a respondent to case number 2404018/2017.

97. In coming to this conclusion, I do not rely on the arguments Health Assured's representative has made under the heading "Comity" i.e. that it would be undesirable for the Tribunal to make a decision which conflicted with the decision of then Regional Employment Judge Parkin that it was a bridge too far to find that Health Management Limited (Health Assured's successor) was an agent of HMRC in respect of their role in the CSIBS. REJ Parkin was considering whether the argument that Health Management Limited acted as the agent of HMRC had no reasonable

prospect of success; I have been considering whether or not, on a balance of probabilities, Health Assured Limited was acting as agent for HMRC. I have had more material available to me than was available to REJ Parkin. I have considered it appropriate to consider the issue afresh, on the basis of all the evidence available to me and the submissions of the parties. Had I reached the conclusion on the evidence available to me that Health Assured Limited was acting as agent for HMRC, I would have made that decision, despite the potentially anomalous resulting position that one scheme health advisor remained as a respondent whilst its successor had been dismissed as a respondent.

The claimant's arguments about legal responsibilities deriving from the Minister for the Civil Service

98. The claimant appears to argue that HMRC had a role in the process relating to a claim under the CSIBS and the Cabinet Office and Health Assured Limited could be acting as its agents, because all legal responsibilities derive from the Minister for the Civil Service (see paragraph 8 onwards of the claimant's submissions). Even if the Minister for Civil Service could have chosen to delegate responsibilities in relation to administration of the CSIBS to employers including HMRC, there is no evidence that the Minister did so. Power was delegated to the Cabinet Office and then to MyCSP Ltd. Even if HMRC's powers as an employer derive from the Minister for the Civil Service, this does not give HMRC power in relation to decisions as to benefits under the CSIBS. Since HMRC did not have these powers, it could not delegate them to the Cabinet Office or Health Assured. I conclude that this "single source" argument does not provide a basis on which the Cabinet Office and/or Health Assured Limited can be found to have been acting as agents of HMRC.

Employment Judge Slater
Date: 7 April 2021

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON 8 APRIL 2021

FOR THE TRIBUNAL OFFICE