EMPLOYMENT TRIBUNALS

Claimant: Ms S Davies

Respondent: Natural Resources Wales

HELD: Via CVP **ON:** 18th June 2021

BEFORE: Employment Judge Eeley

REPRESENTATION:

Claimant: Ms S Sleeman, counsel.
Respondent: Ms E Grace, counsel.

RESERVED JUDGMENT

1. The Tribunal does have jurisdiction, pursuant to article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, to hear and determine the claimant's claim for breach of contract in these proceedings.

2. The respondent's application that the claim should be struck out as having no reasonable prospects of success (rule 37(1)(a) Employment Tribunal Rules of Procedure 2013) is refused.

REASONS

1. The preliminary hearing in this case was listed to determine an issue identified in Judge Ward's case management order of 28th August 2020 as: "*Does the Tribunal have jurisdiction to hear this claim pursuant to article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994?"*

Factual Background

2. The claimant was employed by the respondent from 1st April 2013, under a statutory transfer scheme by which her previous employment with the Forestry Commission transferred to the respondent. The claimant's employment with the Forestry Commission included an express term that she was a Crown employee and subject to the Civil Service Management Code (the "CSMC"). Clause 2 of the contract states:

> *"2. Staff are Crown employees working within the Forestry Commission and subject to the Civil Service Management Code. A copy of the Code is available on-line at http://www.civilservice.gov.uk/iam/codes/csmc/index.asp and can be consulted. The Code sets out regulations and instructions to Departments and Agencies regarding the terms and conditions of service of civil servants. Where Departments and Agencies have been given discretion to determine terms and conditions under the Civil Service (Management Functions) Act 1992, the Code sets out the rules and principles which must be adhered to in the exercise of those discretions."*

The claimant's continuous service dates back to 30th January 1989 due to her having previously been employed by the Land Registry.

3. At the time of her dismissal the claimant was employed in the respondent's Technical Support Team. She was dismissed on 28th November 2019 following a review under the respondent's capability procedure held on 26th November 2019. The reason for the dismissal is set out in a letter dated 11th December 2019, as being on the grounds of her incapability to fulfil the requirements of her role due to her frequent and sustained periods of absence [73-75].

4. The claimant appealed against her dismissal and asserted that she should have been considered for compensation under the Civil Service Compensation Scheme (the "CSCS"). By letter dated 6th March 2020, the claimant was informed that her appeal was unsuccessful, and that the respondent did not consider that the provisions relating to compensation for efficiency dismissals for ill health applied:

> *"With regards to the matter of compensation I note that you have an outstanding appeal lodged with the CSAB in relation to the issue of compensation. NRW does not consider that the provisions relating to compensation for efficiency dismissals for ill health apply to it and will be contacting the CSAB to confirm this."*

5. The claimant's claim was presented on 7th May 2020. The respondent entered a Response and Grounds of Resistance on 24th July 2020. The claimant provided clarification of the basis of her claim on 17th September 2020, pursuant to Case Management Orders issued following the Preliminary Hearing held on 28th August 2020. The respondent entered Revised Grounds of Resistance on 30th September 2020.

6. The relevant portion of the claimant's original Particulars of Claim states:

> *"2. Prior to being transferred to Natural Resources Wales the Claimant was employed by the Forestry Commission and previously the Land Registry. The Claimant had the contractual right to be considered for an inefficiency dismissal payment on termination of her employment for ill health under the Civil Service Compensation Scheme. This right transferred to her employment with Natural Resources Wales.*
>
> *3. The Respondent failed to apply the Civil Service Compensation Scheme when dismissing the Claimant for Inefficiency.*
>
> *4. The Claimant brings a claim that arises during and upon termination of contract arising from the Respondents failure to apply the Civil Service Compensation Scheme arising from her dismissal for inefficiency."*

7. The claimant's clarification document states:

> *"The Civil Service Compensation Scheme is a contractual entitlement that forms part of The Civil Service Pension Scheme. The Scheme provides for a payment to be made in the event of a dismissal on the grounds of inefficiency. The Claimant avers that it is incorporated into her contract of employment or that it is otherwise a contract connected with employment."*
>
> *"The Claimant contends:*
> *(i) That the Respondent is in breach of contract in that they failed to follow and apply the above policies. Had the Respondent not breached the Claimant's contract, she should have received compensation calculated in accordance with Rule 3.3 following her inefficiency dismissal. The Claimant claims damages in the amount that she would have received had her contract not been breached, (to be calculated), or such alternative amount as the Tribunal may calculate.*
> *(ii) That the Tribunal has jurisdiction to hear this claim in accordance with the extension of jurisdiction as the Claimant is claiming for damages for breach of a contract of employment or contract otherwise connected with employment."*

The relevant documents in the claimant's case.

8. In addition to clause 2 of the contract of employment, the claimant refers to the provisions of the Civil Service Management Code (**"**CSMC"**).** The Code is divided into a serious of sections dealing with work related matters. Paragraph 2 of the introduction to the CSMC states:

> *"2. This Code, on which the recognised trade unions have been consulted, sets out regulations and instructions to departments and agencies regarding the terms and conditions of service of civil servants and the delegations which have been made by the Minister*

for the Civil Service under the Civil Service (Management Functions) Act 1992 to Ministers and office holders in charge of departments, the First Minister in the Scottish Executive and the Welsh Assembly Government, together with conditions attaching to those delegations. For convenience, the term "departments and agencies" has been used in the context of delegation throughout the Code. It includes the Scottish Administration and the Welsh Assembly Government. Where departments and agencies are given discretion to determine terms and conditions, the Code sets out the rules and principles which must be adhered to in the exercise of those discretions. It does not of itself set out terms and conditions of service. In the case of agencies, the presumption is that functions delegated to Ministers and office holders will, in respect of agencies, be exercised by Agency Chief Executives, but the precise extent to which Ministers and office holders may wish to allow the exercise of their powers by Chief Executives is a matter for them to determine." [emphasis added]."

Paragraph 5 of the introduction to the Code states:

"Departments and agencies must comply fully with legislation which binds the Crown or which Ministers have undertaken to apply as if it were binding on the Crown. They must define clearly the terms and conditions of service of their staff and make these available to staff, for example in departmental or agency handbooks."

9. Section 6.3 defines Poor Performance: Inefficiency and Limited Efficiency:

"Inefficiency

6.3.1 Departments and agencies must have procedures in place for dealing with inefficiency, that is:

a. poor performance - where the work of a member of staff has deteriorated to an unacceptable standard; and

b. poor attendance - where the frequent absence of a member of staff adversely affects the efficient running of the office.

6.3.2 In determining their procedures, departments and agencies must:

a. have regard to the ACAS guidance on discipline and grievances at work and the ACAS Code - Discipline and Grievance Procedures

(http://www.acas.org.uk/index.aspx?articleid=2174);

b. provide for staff to have the right to the assistance of a trade union representative or colleague during a hearing under formal proceedings about poor performance;

c. refer cases to the medical services adviser appointed by the Cabinet Office for provisions relating to the PCSPS when either management or the person concerned consider that the causes of poor performance or poor attendance may make retirement on medical grounds appropriate without prejudice

to any decision made by the medical services adviser (see Section 11.10); and

d. inform staff of their right to:

– have their case referred to the medical services adviser appointed by the Cabinet Office for provisions relating to the PCSPS; and apply for medical retirement.

6.3.3

Where performance or attendance does not improve and medical retirement is inappropriate, staff may be dismissed on grounds of inefficiency (see Section 11.4).”

10. Paragraph 11.4 of the CSMC deals with dismissal on efficiency grounds thus:

“*11.4.1 Departments and agencies must provide staff with an internal right of appeal against a decision to dismiss on efficiency grounds (see Section 6.3).*

11.4.2 Once a decision has been taken to dismiss a member of staff on efficiency grounds, departments and agencies must determine whether compensation should be paid and, if so, how much. The maximum amount of compensation that may be paid is set out in Section 11 of the Civil Service Compensation Scheme (CSCS). If departments and agencies consider that compensation should be paid, they must assess in percentage terms the extent to which, if at all, they consider the inefficiency to have been beyond the individual’s control. The compensation payable should then be calculated by applying that percentage to the maximum that could be paid under the CSCS in that case. Guidelines for assessing compensation are published by the Cabinet Office.

11.4.3 Staff have further rights of appeal to the CSAB against decisions:

a. not to pay compensation or the extent to which compensation should be paid.

Provided the relevant conditions in Section 12.1 are satisfied.”

11. Section 11.1 of the Civil Service Compensation Scheme (“CSCS”) provides that, providing the conditions set out in subsection (b) are met, if the employing department decides that a payment of compensation would be appropriate, the maximum amount to be paid is as set out in subsection (b). Cross reference is made to calculation of compensation in accordance with rule 3.3 of the scheme. A payment under section 11 is subject to potential reduction, which is subject to guidance from the Cabinet Office.

12. The Foreword to the Cabinet Office Guidance to Efficiency Compensation states:

“2. Section 11.4 of the Civil Service Management Code sets out the discretion which departments and agencies have to pay compensation in cases where staff depart on Inefficiency grounds. In the event of a decision to compensate, departments and agencies have to decide on the level of

compensation which would be appropriate to reflect the degree of individual and departmental/agency responsibility. Guidelines for making these decisions are given below.

3. The maximum level of compensation which may be payable if the employing department or agency decides that such compensation is appropriate is set out in Section 11 of the Civil Service Compensation Scheme."

13. Paragraphs 7 and 8 of the Cabinet Office Guidance state:

"*7. Compensation should be considered for civil servants when they are dismissed on efficiency grounds under section 6.3 of the Civil Service Management Code. The objective of the compensation is to compensate the employee for loss of employment that is beyond their control; not to compensate for poor performance or poor attendance when there is no underlying health condition. Compensation is not guaranteed.*

8. Compensation payments are paid under the Civil Service Compensation Scheme (CSCS) rules, as set out in Section 11 of the CSCS."

Paragraph 12 of the Guidance states:

"When deciding whether to compensate the employee on efficiency grounds consideration may be based on: health conditions both long term and intermittent, where the condition is not judged appropriate for medical retirement but does affect attendance and/or performance thereby impacting the Service's efficiency. It is important to note that unsatisfactory attendance or poor performance dismissal criteria should not be applied in such cases. Decisions about compensation should be based on the employee's health condition(s) and circumstances."

And paragraph 14 further provides:

"Compensation must not be awarded where any of the following criteria would apply:

- *in any discipline/ misconduct dismissals*
- *where investigations establish evidence that the attendance management policy has been abused by the employee*
- *in dismissals where there is no evidence that they are related to an underlying ill-health condition or conditions*."

Whereas paragraph 15 states:

"A payment would be made only when the following requirements are met:

- *where medical evidence exists or can be obtained to show that the employee's unsatisfactory attendance or performance is caused by an underlying medical condition (or combination of conditions) or circumstances in the context of their medical condition, which is, at least partly, beyond the control of the individual*
- *there is clear evidence that the employee has made efforts to comply with relevant departmental policies [LINK to relevant policies], and cooperate with Occupational Health (OH) Service requirements and*

there is clear evidence that the employee has tried to improve their attendance/performance by cooperating with their department. For example the employee has:

- *sought and accepted agreed reasonable adjustments, where relevant;*
- *demonstrated commitment, where appropriate, to return to work/has attempted to return to work in unsatisfactory attendance cases;*
- *demonstrated a positive attitude and commitment to work where possible, for example they have attempted to implement recommended changes to working practices."*

14. The Guide for Calculating Compensation includes provision for 0% to be awarded in cases where the specified criteria are met [71].

How the claimant puts her case

15. The claimant in this case says that the net intended effect of these Civil Service documents is that clause 2 of the contract of employment makes the claimant's terms and conditions of employment subject to the rules and principles of the CSMC. The Code then defines the concept of inefficiency and defines the circumstances in which an employee may be dismissed on grounds of inefficiency. Paragraph 11.4 of the CSMC indicates that once the employer decides to dismiss the employee for inefficiency it must go through a determination process to decide whether or not compensation should be paid and, if so, how much. Paragraph 11.4 of CSMC is said to require the employer to use the method/basis of calculation of compensation set out in the CSCS which itself refers to guidelines for assessing compensation published by the Cabinet Office. Those Guidelines provide for the possibility that the end result of the calculation process is that the employee receives 0% compensation [71].

16. The claimant in this case is therefore arguing that there has been a breach of her contractual entitlement to be put through the process to determine eligibility for compensation and, if applicable, the amount of any compensation sum. Those are the terms which are said to be part of the contract of employment or part of a contract connected with her employment. The respondent is said to breach them when it decides to dismiss her for inefficiency but fails to follow the process of determining eligibility for and/or quantum of compensation. The claimant is claiming damages for breach of the contract or an award of the sum due under the contract. The measure of damages claimed is, as yet, unquantified, and would be arrived at once the proper process had been followed, as set out in the documents taken as a whole. Hence, the process for calculating damages is set out but the amount claimed as a result has not been specified. Any Tribunal deciding this case at a final hearing would be asked by the claimant to carry out the calculation process using the best available evidence in an effort to put the claimant back in the position should would have been in "but for" the respondent's breach of contract.

Relevant statutory provisions

17. The Tribunal's jurisdiction to determine breach of contract claims is derived from the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 which states:

"Article 3 Extension of jurisdiction

Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies; and

(c) the claim arises or is outstanding on the termination of the employee's employment.

Article 5

This article applies to a claim for breach of a contractual term of any of the following descriptions—

(a) a term requiring the employer to provide living accommodation for the employee;

(b) a term imposing an obligation on the employer or the employee in connection with the provision of living accommodation;

(c) a term relating to intellectual property;

(d) a term imposing an obligation of confidence;

(e) a term which is a covenant in restraint of trade.

In this article, 'intellectual property' includes copyright, rights in performances, moral rights, design right, registered designs, patents and trade marks."

18. The successor to s131(2) of the Employment Protection (Consolidation) Act 1978 is the Employment Tribunals Act 1996 section 3 which states:

"(1) The appropriate Minister may by order provide that proceedings in respect of—

(a) any claim to which this section applies, or

(b) any claim to which this section applies and which is of a description specified in the order, may, subject to such exceptions (if any) as may be so specified, be brought before an employment tribunal.

(2) Subject to subsection (3), this section applies to—

(a) a claim for damages for breach of a contract of employment or other contract connected with employment,

(b) a claim for a sum due under such a contract, and

(c) a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract,

if the claim is such that a court in England and Wales or Scotland would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim.

(3) This section does not apply to a claim for damages, or for a sum due, in respect of personal injuries.

(4) Any jurisdiction conferred on an employment tribunal by virtue of this section in respect of any claim is exercisable concurrently with any court in England and Wales or in Scotland which has jurisdiction to hear and determine an action in respect of the claim.

(5) In this section—

"appropriate Minister", as respects a claim in respect of which an action could be heard and determined by a court in England and Wales, means the Lord Chancellor and, as respects a claim in respect of which an action could be heard and determined by a court in Scotland, means the [Secretary of State], and

"personal injuries" includes any disease and any impairment of a person's physical or mental condition.

(6) In this section a reference to breach of a contract includes a reference to breach of—

(a) a term implied in a contract by or under any enactment or otherwise,

(b) a term of a contract as modified by or under any enactment or otherwise, and

(c) a term which, although not contained in a contract, is incorporated in the contract by another term of the contract."

Jurisdiction

19. I am asked to determine the issue of jurisdiction. In order to do that I must consider whether the statutory preconditions for jurisdiction are met in this case. I do not need to assess what the outcome of the case would be at a final hearing. I am not making findings of fact after hearing all the evidence in this case. I am looking to determine whether the claimant's case as the claimant puts it (or "taken at its highest") falls within the jurisdiction of the Tribunal. Whether the claim ultimately succeeds and what, if any, compensation is to be awarded will be a matter for the Tribunal at the final hearing.

20. In order for the Tribunal to have jurisdiction in relation to the claimant's claim, the requirements of the 1994 Extension of Jurisdiction Order have to be met. The first condition is that the claim presented comes within section 3 of the Employment Tribunals Act 1996 (previously s131(2) of the Employment Protection (consolidation) Act 1978). In this case I must ask myself whether it is a claim for damages for breach of a contract of employment (or other contract connected with employment), or a claim for a sum due under such a contract.

21. On an objective reading of the claimant's case, she is claiming that there is a term incorporated into her contract that if she is dismissed for inefficiency the respondent will go through a specified process to determine her eligibility for an award of compensation and the amount of any such award. She says that this amounts to a contractual obligation. She claims that the respondent has acted in breach of that contractual term and that she is entitled to a compensating sum of money as a result. The respondent may seek to argue that the terms relied upon by the claimant do not, in fact, form part of the contract whereas the claimant says that they are apt for incorporation and are clearly incorporated, particularly given the language in the documents which is 'mandatory' in tone and talks in terms of

'obligation'. That is a matter to be determined at a final hearing: were the terms relied upon by the claimant actually incorporated as contractual terms?

22. The respondent does not accept that the CSCS or the CSMC are its policies or that they are incorporated into the claimant's contract. The respondent expressly reserves its position on this matter for the final hearing as the Tribunal does not have sufficient evidence to determine this point at present (paragraph 17 respondent's skeleton argument). However, in the next paragraph the respondent asserts that:

"taking C's case at its highest, R submits as follows:

a. The CSCS is not a contract connected with C's employment;…"

It may well be that, after consideration of all the evidence at the final hearing, the Tribunal concludes that the claimant's argument that the terms of the CSCS and CSMC were incorporated into the claimant's contract should fail. But to make such a finding now, at a preliminary hearing, would not be to take the claimant's case at its highest. I ask myself whether the claimant's argument that she is relying on a term incorporated into her contract of employment or a contract connected with her employment "works" as a matter of law. I see that it does. I find that, for the purposes of establishing jurisdiction at this preliminary stage, the claimant has shown that she is bringing a claim for breach of the employment contract or a contract connected with it. She will seek to demonstrate at a final hearing that the terms relied upon are contractual in nature and are incorporated into her contract. Section 3(2) of the 1996 Employment Tribunals Act is made out for the purposes of conferring jurisdiction. It seems to me that the documents relied upon by the claimant are potentially apt for incorporation given their subject matter and their position within the CSMC and the CSCS. I accept that a provision which is part of the employee's remuneration package may still be apt for construction as a term of the contract even if couched in terms of information or explanation or expressed in discretionary terms.

23. The respondent argues that the claimant does not have a right to payment under the scheme, only a chance to be considered for a payment at the respondent's discretion. It is asserted that her claimant cannot, therefore, be a claim for damages (paragraph 18 respondent's skeleton argument). I do not agree. The claimant is arguing that the respondent has breached the contractual term requiring it to decide whether the claimant was dismissed for inefficiency and eligible for a payment and, if so, how much compensation should be awarded. This is clearly a claim that the Tribunal should award her whatever sum she would have received had the respondent performed its contractual obligations.

24. The claimant accepts that the proper performance of the alleged contractual term required her employer to exercise a discretion. That does not mean that, if the employer breaches that term, there is no claim for damages. What it means is that the claim for damages is not a claim for a predetermined or specified sum. Rather, once a breach is established the Tribunal will have to go through the process of quantifying damages using the applicable legal principles to determine what loss flows from the breach. What would have been the outcome if the contractual term had been properly performed rather than breached? What evidence is there to show the basis on which the respondent would have determined eligibility and calculated the size of an award? This may well involve some element of uncertainty. Such uncertainty is a regular feature of Employment Tribunal remedy hearings. Tribunals routinely determine and making findings, on the best available evidence, on issues such as, in a redundancy situation, the percentage chance that an employee would have remained in employment if a reasonable and fair selection pool or criteria had been followed. The Tribunal may make a finding as to the length of time the employee would have stayed in employment if a fair procedure had been followed. Alternatively, it may have to decide how long it will be before a dismissed employee will fully mitigate their losses by obtaining alternative employment or whether they will ever replace a final salary pension scheme that they were formerly enrolled in on a 'like for like' basis. A Tribunal may decide the likely timeframe over which an employee would have become incapacitated through ill health and, therefore, at what point they could have been fairly dismissed. Likewise, in contractual bonus cases if an employee proves that a contractual bonus scheme was in place, the Tribunal may have to decide the size of the bonus using the same factors for exercise of a discretion as the employer would have utilised had it not breached the contract. I do not accept the respondent's argument that the claimant is not making a claim for damages. Rather, she is claiming damages for breach of contract or for a sum due under the contract but the precise amount of the award is yet to be quantified. That is not to say that the award of damages is not properly quantifiable. A claim for breach of contract or for a sum due under a contract may be currently unquantified but still quantifiable during the course of proceedings. This does not take it outside the Tribunal's jurisdiction. Rather, it means that, if the claim succeeds, the Tribunal will have to decide (based on the best available evidence) what sum the claimant would have been awarded if the respondent had exercised its powers and made a decision in line with its contractual obligations and the proper exercise of its discretion.

25. I was referred, on behalf of the claimant, to the judgement of the Court of Appeal in the case of Keeley v Fosroc International [2006]IRLR 961. In that case the Court of Appeal held that a provision relating to enhanced redundancy payments which was unquantified, stating only that details would be discussed during both collective and individual consultations, was nevertheless apt for incorporation as a term of the contract. The Court of Appeal went on to hold (as set out in the headnote)

"Where a contract of employment expressly incorporates a document such as a collective agreement or staff handbook, it does not necessarily follow that all the provisions in that document are apt to be terms of the contract. Some provisions, read in their context, may be declarations of an aspiration or policy falling short of the contractual undertaking. However, the fact that the document is presented as a collection of "policies" does not preclude their having contractual effect if, by their nature and language, they are apt to be contractual terms. It is necessary to consider in their respective contexts incorporating words and the provision in question incorporated by them. The fundamental starting point is the wording of the provision itself and the aptness of the provision in its own right to be a contractual term. If put in clear terms of entitlement, it may have a life of its own, not to be snubbed out by context immediate or distant in the document of which it forms a part. Where the wording of the provision, read on its own, is clearly of a contractual nature and not contradicted by any other provision in the documentary material constituting the contract, context is not all. The importance of the provision to the overall bargain is also highly relevant. A provision which is part of the employee's remuneration package may still be apt for construction as a term of the contract even if couched in terms of information or explanation, or expressed in discretionary terms. Provision for redundancy, notwithstanding statutory entitlement, is now widely accepted feature of an employee's remuneration package and, as such, is particularly apt for incorporation by reference."

In the Keeley case the enhanced redundancy payment provision was apt to be a contractual term that was incorporated by reference along with other provisions of the staff handbook that were similarly apt. *"In its use of the word "entitled" and its location in the "employee benefits and rights" part of the staff handbook, the provision clearly referred to a legal right. Other sections in that part, for example those providing entitlements in respect of annual leave, parental leave and paternity leave, were also part of the context in which the entitlement in the redundancy section fell to be considered…. Such matters were clearly to be treated differently from the quite distinct procedural, aspirational or discretionary matters in the section going to the selection of employees for redundancy. Although the enhanced redundancy payment provision was conditional on its "details" being found elsewhere, it was not vitiated by uncertainty since it identified the means of reference by which appropriate payment would be calculable when the time came."*

26. I am also fortified in my conclusion on this point by the authority of Horkulak v Cantor Fitzgerald International [2004] IRLR 942.) The fact that the document relied upon as the terms of the contract admits of the exercise of discretion by an employer does not mean that it cannot impose a contractual obligation. Rather, such terms which give a discretion to an employer are subject to an implied term that they will be exercised genuinely and rationally. The head note of the reported case states:

"A discretion provided for in a contract which is prima facie of an unlimited nature will be regarded as subject to an implied term that it will be exercised

genuinely and rationally. That is presumed to be the reasonable expectation and therefore the common intention of the parties, even though they are likely to have conflicting interests and the provisions of the contract effectively place the resolution of that conflict in the hands of the party exercising the discretion…. Nothing was said in Lavarack v Woods of Colchester to suggest that, in respect of a claim for damages put upon the basis that the claimant would have received payments under a discretionary bonus scheme of which he was already a potential beneficiary, the court should assume that the employer's discretion would be exercised against him in the case. The broad principle that a defendant in an action for breach of contract is not liable for doing that which is not bound to do will not be applicable willy-nilly in a case where the employer is contractually obliged to exercise his discretion rationally and in good faith in awarding or withholding a benefit provided for under the contract of employment. Where the employer fails to do so, the employee is entitled to be compensated in respect of such failure. In the present case, the judge had correctly held that the claimant was entitled to a bone fide and rational exercise by the employers of their discretion as to whether or not to pay him a bonus and in what sum. The bonus clause was contained in the contract of employment in a high earning and competitive activity in which the payment of discretionary bonuses was part of the remuneration structure. The objective purpose of the bonus was plainly to motivate and reward the employee in respect of his endeavours to maximise commission revenue, and the condition precedent that the employee should still be working for the employers demonstrated that the bonus was to be paid in anticipation of some future loyalty. The provision was necessarily to be read, therefore, as having some contractual content, i.e. as a contractual benefit to the employee, as opposed to being a mere declaration of the employer's right to pay a bonus if they so wished, a right which they enjoyed regardless of contract. Although the clause left the amount of the bonus at large, it provided for a process of attempted mutual agreement prior to the making of any final decision. This emphasised the employer's obligation to consider the question of payment of a bonus, and the amount, as a rational and bona fide, as opposed to an irrational and arbitrary, exercise when taking into account such criteria as the employers adopted for the purpose of arriving their decision. Failure so to construe it would strip the bonus provision of any contractual value or content in respect of the employee whom it was designed to benefit and motivate and would fly in the face of the principles of trust and confidence which have been held to underpin the employment relationship."

The fact that this authority arose in the High Court is not material for the purposes for which it is relied on in this case. The Tribunal exercises a concurrent jurisdiction with the civil courts subject to the cap on damages and the specified requirements of the 1994 Order. So long as the statutory requirements for the grant of jurisdiction are made out, there is no reason in principle why this Tribunal should not follow Horkulak merely because it is a High Court case.

27. I accept the claimant's argument (taken at its highest) that the wording of clause 2 of her contract that staff are "Crown employees and subject to the Civil Service Management Code" can be taken to denote the requisite certainty of applicability. The further wording: "the Code sets out the rules and principles which must be adhered to in the exercise of those discretions(emphasis added)" also uses the language of obligation and can be taken to mean that there is an obligation to follow those rules and principles when exercising a discretion under the terms of the contract. Likewise, the language of obligation at paragraph 2 to the Introduction to the Code. The employer does not have a free hand. It must apply the principles and rules to exercise the discretion. The way in which the decision is to be taken and the matters which are to be considered as relevant by the employer in coming to a conclusion are plainly set out in writing. It is the particular outcome in any given case (i.e. the availability of an award and the size of such an award) which is not specified. That is the product of the exercise of the employer's discretion under the contract. The content of the policies and documents is all information which can be examined and assessed at a final hearing to see whether the respondent has exercised its discretion genuinely and rationally in a Horkulak sense.

28. In order for the respondent's argument to succeed the Tribunal would have to conclude that, despite the fact that rules and principles for the exercise of discretion have been set out in writing, there is no obligation on the employer to actually go through the specified decision-making process. The Tribunal would have to conclude that the employer is entirely free to either not make a decision/determination on eligibility at all, or to ignore the specified factors in determining eligibility or quantum. Such a conclusion would render the terms of the CSMC and the CSCS meaningless as a matter of practicality. Despite being told how to go about exercising its discretion, the employer would be free to refuse to even start the process of exercising its discretion, thereby leaving the employee without any recourse. On the contrary, I accept that the use of language in the documents denotes mandatory adherence and that this is significant. I also accept that the particular term in question is apt for incorporation by reference as it comprises part of the claimant's remuneration package.

29. I accept that it is open to the claimant to argue at any final hearing that section 11.4.2 means that there is an obligation to determine whether the provisions of the CSCS regarding eligibility are met and then to apply the stated principles to determine, if eligibility is met, what the amount of any award should be. The claimant can argue that the respondent does not have a discretion to completely avoid the process for determining eligibility in the first place. Even the percentage reductions to be applied to compensation are covered by the principles set out in the Guidance. It allows for circumstances where, after the application of all the guidance and principles, a decision is made that 0% should be awarded. There is some force in the argument that if there were actually no contractual obligation on the respondent to go through the eligibility decision-making process at all, then this specific power to award 0% would be pointless. The respondent could achieve the same outcome more quickly and efficiently by refusing to make an eligibility decision at all or to embark on the decision-making process in the first place.

30. In this case I am satisfied that the claim is not excluded by article 5 of the 1994 Order. It is not a claim for a sum due in respect of personal injuries, for example.

31. The next precondition which must be satisfied in order for the Tribunal to have jurisdiction is that the claim arises or is outstanding on the termination of the employee's employment. The respondent argues that section 11 shows that the claimant can only become eligible to any amount payable under the CSCS after her dismissal. It is argued that it is only once the effective date of termination has passed that the compensation is payable. Any payment is said to be purely contingent on dismissal.

32. The respondent refers me to the case of Miller Bros & FP Butler Ltd v Johnston [2002] ICR 744 in support of its argument that the claim in the instant case did not arise and was not outstanding on the termination of employment. In that case an employee wrote a letter of resignation to the employers on 25th of April indicating his intention to bring proceedings for constructive dismissal if they were unable to agree terms by negotiation. On 2nd May his employment terminated and on 13th May he reached an agreement for the employers to pay him a sum of compensation in settlement of his claims. The claimant then brought a claim for damages for breach of contract when the respondent failed to pay him the settlement sum. At first instance the employment tribunal found that there was a concluded contract for the payment of an agreed sum, and that, the sum not having been paid, the employees were in breach of contract. On appeal the employers contended that under article 3(c) of the Employment Tribunals Extension of Jurisdiction Order 1994, the tribunal had no jurisdiction to determine the claim. The Employment Appeal Tribunal held that article 3(c) of the 1994 Order had to be interpreted as limiting the jurisdiction of an employment tribunal to a claim which was either outstanding on the date of termination of the employee's employment, or which arose on termination in a temporal sense; and that a compromise agreement which was made only some days later could not fall within the jurisdiction of the tribunal. The judgment discusses whether the phrase "The claim arises or is outstanding on the termination of the employee's employment" is to be read in a causative or temporal sense. The EAT noted that if the legislative intention had been to cover compromise agreements arising after the date of termination, the appropriate word would seem to be "from"-and it would have been a simple matter of drafting to have provided that a claim which was "outstanding on or arose from" the termination of employment was within the jurisdiction.

33. The claim in Johnston was wholly different on its facts to the instant claim. The contract on which the claimant in Johnston sued was a settlement agreement or contract which only arose as a consequence of the termination of the claimant's contract of employment and the settlement of his potential claims arising out of that termination. The said settlement contract was not even in existence at the time the employment contract came to an end. As a matter of fact it is hard to see how it can be said that a breach of such a contract arose or was outstanding as at the date of

termination of employment. The current case is different. The term relied upon by this claimant is part of the contractual arrangement between the parties which was in existence during the course of the employment relationship. It did not come into effect after the event. The very latest date at which that claim could be said to arise would be at the effective date of termination which would apparently fall within the scope of the jurisdiction, given the wording of the provision. In any event, for reasons which I set out below, I find that the alleged breach of contract occurred when the decision was made to terminate the claimant's employment on grounds of inefficiency but the employer failed to go through the process to determine whether she was eligible for compensation under the CSMC and the CSCS. That is distinguishable from the Johnston case on the facts.

34. I am referred to the case of Peninsula Business Services Ltd v Sweeney [2004] IRLR 49 where it is asserted that Rimer J made it clear that contingent claims, even those arising as at the date of termination, are not within the purview of the statutory jurisdiction.

35. In Sweeney there was a claim of constructive unfair dismissal and also a claim for payment of £20,839 by way of damages for breach of contract. That claim was in respect of unpaid commission. The general terms of the bonus scheme included this paragraph:

"All commission in relation to new and renewal business or consultancy work is all paid at the end of the calendar month following that in which the business was conducted, but only if the company has received at least 25% of the fee from the client. If 25% of the fee has not been received at the time commission will only be paid on the due pay date at the end of the calendar month following the calendar month in which 25% of the fee has been received."

So, it can be seen that the due date for payment of commission to the employee was tied firstly to when the employee conducted the business generating the commission (the date of the 'work done') but also subject to a minimum portion of the money having been paid to the business by the client (the date of 'receipt'). There was a further paragraph in the section entitled "Employees Leaving the Company":

"(1) If the contract of employment is terminated either by the company through dismissal or by the sales representative through resignation, then special rules apply in relation to commission and bonus payments that might otherwise have been payable.

(2) Commission payments on new and renewal business are only paid if the sales representative is in employment at the end of the calendar month when the commission payment would normally become payable. This does not apply in circumstances where the termination by the company or the employee is by virtue of retirement or redundancy.

(3) It is therefore an express contractual provision that an employee has no claim whatsoever on any commission payments that would otherwise have

been generated and paid, if they are not in employment on the date when they would normally have been paid, being at the end of the month following 25% of the fee being received.

(4) Employees in employment at the end of the calendar month when commission and bonus payments would normally be payable, but under a period of notice, whether by dismissal or by resignation will be entitled to the appropriate commission payments payable at the end of each calendar month in question that falls within such a notice period."

So, the combined effect of these provisions was that commission was only payable if the salesman was still in employment at the end of the calendar month when the commission became payable (i.e. at the end of the calendar month following receipt of the minimum 25% of the fee.) Mr Sweeney resigned on 2nd July 2001 and so on the face of it forfeited any right to commission he could be said to have earned in the past but which had not yet become payable to him in accordance with section A.

36. The relevant paragraphs of the judgement in Sweeney are as follows:

"47. Peninsula's argument is simple. As at the date of, and immediately after, the termination of Mr Sweeney's employment, the claimed commission was not due to him and so he had no right either to claim payment or to complain that, in omitting to pay him the commission, Peninsular had committed any breach of contract. The earliest point in time at which Mr Sweeney could have been entitled to advance either claim was at varying later dates, when different amounts of commission actually became payable to him.

48. In those circumstances Peninsula submitted that the claim in respect of commission neither "arose" nor was "outstanding" on the termination of the employment. Nothing happened at the moment of, or immediately after, such termination to cause such a claim to "arise"; and although as at the date of termination Mr Sweeney had a prospective claim for payment of commission, that claim cannot be said to have been "outstanding" at that time, a concept which can sensibly only refer to an unsatisfied claim which has already fallen due for payment.

49. Peninsula relied on the decision of this appeal Tribunal in Miller Bros and FP Butler Ltd V Johnston [2002] ICR 744. The judgment was a carefully reasoned one delivered by Mr Recorder Langstaff QC. The issue was whether a claim by an employee under a compromise agreement entered into shortly after the termination of his employment was enforceable under the 1994 Order. This appeal tribunal held that it was not, as the claim neither arose "in a temporal sense" on the date of termination, nor was it then outstanding. It only arose some days after the termination.

50. In this case, it appears to us plain that, as at the date of resignation, the claimed commission was no more "outstanding" on the termination date than was the claim in Miller. In our view, a claim will only be "outstanding" at such date if it is in the nature of a claim which, as at that date, was

immediately enforceable but remained unsatisfied. This is obvious both from the language of regulation 3, and also from the fact that regulation 7 prescribes a time limit for the bringing of such claims of three months beginning with the effective date of termination. That necessarily presupposes that, as at that date, there existed a claim which was capable of being brought.

51. It is also obvious that no claim for commission can be said to have "arisen" on the date of Mr Sweeney's resignation. He was no more entitled to sue for it on that day than he was the day before. Assuming he was right that section B did not apply to him, he was only entitled to sue for it once it had fallen due for payment under section A-and that only happened after the effective date of termination. It is true that, at that date, he could be said to have a prospective right to the payment of commission. But since he could not sue for payment until the right had matured into an actual right, we do not regard that as giving the tribunal jurisdiction.

52. The tribunal took a different view. They were referred to the Miller case, but decided that it afforded no assistance. They prefer to adopt what they called a "purposive view" of the language of regulation 3, one which they held enabled a claim to be brought in the employment tribunal in respect also of merely contingent claims existing as at the effective date of termination. They did not overlook regulation 7, but said that the contingent claim could have be brought within the three month period, which would be sufficient to confer jurisdiction on the tribunal; and that the substantive hearing could, if necessary, be deferred "until the crystallising or contingent event" occurs.

53. With respect, we regard that reasoning as defective. If a payment is only contingently due, it is not possible to claim payment until the contingency has happened. Before then, all that can be claimed is a declaration of entitlement to the payment if and when the contingency does happen, but a claim of that sort is not within regulation 3."

The comments in Sweeney are strictly speaking obiter as this part of the argument did not arise for consideration, the case having been resolved on other grounds.

37. To follow and apply the principles enunciated in Sweeney I would have to analyse the contractual terms in this case to see whether they are in fact dealing with a contingent event and, if so, what is that contingency? When does the contingency take place so that the right to claim a breach of the contract arises? The claimant refers me to 11.4.2 of the CSMC which states*: "Once a decision has been taken to dismiss a member of staff on efficiency grounds, departments and agencies must determine whether compensation should be paid and, if so, how much…."(*emphasis added). If this is a case involving a contingency, the claimant says, then the contingency is the decision to dismiss. That decision was made before the effective date of termination. As at the effective date of termination it had been decided that the claimant was dismissed on efficiency grounds. This had already

triggered the duty on the respondent to determine whether the claimant was entitled to compensation and, if so, how much. Once that decision had been taken then the contractual term applied and the claimant was entitled to payment of whatever the process showed her entitlement to be. No further contingency had to occur before her entitlement arose albeit the quantification of the amount owed might take place after the decision to dismiss. Even so, all the relevant factors were there to be considered and for eligibility to be determined. As a matter of practicality, the award itself might only be paid after the effective date of termination or in the final pay packet. That does not mean that the breach of contract cause of action only crystallized after termination of the employment. On the contrary, it was immediately enforceable and unsatisfied as at the date of termination because a decision to dismiss for inefficiency had already been taken. I accept the claimant's arguments in this regard.

38. Furthermore, the facts in Sweeney are significantly different to those in this case. They concerned express terms of a contract which said in terms that the entitlement to certain payments was not outstanding as at the date of termination but only at the end of a calendar month relative to when the customer paid 25% of the fee. There is no such built-in time lag in this case. It is not part and parcel of the design of the scheme in the instant case that entitlement to payment is tied to receipt of money from a third party. Rather, it is the decision to dismiss for inefficiency which triggers the entitlement. In my view Sweeney is therefore also distinguishable from this case on the facts.

39. The current case is more akin to a classic breach of contract claim in the employment tribunals, namely a claim for unpaid notice pay. That entitlement arises when the decision is taken to dismiss the employee without notice and without notice pay (assuming no entitlement to summarily dismiss). That is the breach of contract. At that point in time, when it is decided that the employee will not work his notice period (and be paid for it) and will not be paid the equivalent sum 'up front' either, the employee is entitled to claim that there has been a breach of contract and he has an entitlement to damages representing notice pay. He is entitled to claim the sum he would have earned during his notice period or which would have been paid in lieu of notice. The fact that the employee only finds out later that he has in fact been dismissed without payment of his notice entitlement does not mean that the breach of contract only occurs later. Such cases clearly involve a situation where the claim "arises or is outstanding on the termination of the employee's employment." At the date of termination the employee is entitled to pay and to demand payment. In Sweeney, the claim only arose or was outstanding once the right to payment crystallized and became due at the end of the month when the 25% minimum fee was received by the employer.

40. In light of the above I conclude that the Tribunal does have jurisdiction to hear and determine the claimant's claim for breach of contract on its merits.

Strike out on the grounds of "no reasonable prospects of success."

41. Respondent's counsel couched her submissions in the alternative in the language of a request that the Tribunal strike out the claim on the basis that it has no reasonable prospects of success (rule 37 of the Employment Tribunal Rules of Procedure 2013). I remind myself of the appellate guidance that I should not carry out a "mini trial" in order to determine a strike out application of this nature. I should bear in mind that there may be many facts in dispute between the parties and that such disputes can only be resolved once the Tribunal has heard evidence and made findings of fact. Having examined the parties' respective submissions and having concluded that the Tribunal does indeed have jurisdiction to hear the claim, I am unable to conclude that the claim has no reasonable prospects of success. I have examined the law in order to establish jurisdiction and the claim is reasonably capable of succeeding as a matter of law. Any remaining strengths or weaknesses in the claim will arise out of the evidence which will be heard and the facts to be determined at a final hearing. Consequently, that assessment should be left to a final hearing. I will not strike out the claim pursuant to rule 37(1)(a) as having no reasonable prospects of success.

42. The case now needs to be case managed and listed for a final hearing. To that end the case should be listed for a further one-hour telephone preliminary hearing to on the next available date. It can be heard by any judge, sitting alone

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Employment Judge Eeley

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Date: 26th June 2021

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON 28 June 2021

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FOR EMPLOYMENT TRIBUNALS Mr N Roche