Case Nos: EA-2020-000093-RN, EA-2021-000354-RN

EA-2021-000684-RN, EA-2021-000685-RN

EA-2021-000692-RN, EA-2021-000693-RN, EA-2021-000694-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 October 2021

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MR D HOPPE	**Appellant**
- and -	
HM REVENUE AND CUSTOMS **MyCSP** **HEALTH MANAGEMENT LIMITED** **CABINET OFFICE** **MINISTER FOR CIVIL SERVICE** **HEALTH ASSURED LIMITED**	**Respondents**

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- -

The **Appellant** in person (by telephone link)
Mr J Hurd (instructed by Government Legal Department) for **HMRC**
Mr E Morgan QC (instructed by Equiniti Group Legal Department) for **MyCSP**
Mr B Mold (instructed by BDB Pitmans LLP) for **Health Management Limited**
Mr S Redpath (instructed by Government Legal Department) for **Cabinet Office**
Mr S Redpath (instructed by Government Legal Department) for **Minister for Civil Service**
Mr Z Mati (Peninsula Business Services) written submission for **Health Assured Limited**

Hearing dates: 23 and 24 September 2021

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JUDGMENT

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WHISTLEBLOWING, PROTECTED DISCLOSURES

The proceedings in the employment tribunal are ongoing. The claimant is a former civil servant and employee of HMRC who was dismissed on the given ground of conduct. Over a period of years, before and after the dismissal, he presented a number of claims to the employment tribunal. His complaints included that he was subjected to detrimental treatment, and unfairly dismissed, for having made protected disclosures. He also alleged various wrongdoing in relation to an application made by him following dismissal for civil service injury benefit in relation to ill health. His case is that his ill health has been caused by his wrongful treatment by HMRC. The claims were and are disputed and defended. A number of decisions of the tribunal were the subject of appeals to the EAT. The following matters were considered at the hearing in the EAT giving rise to the present decision.

(1) The tribunal struck out 18 complaints of detrimental treatment on grounds of protected disclosures. This was the full hearing of the appeal against that decision. The tribunal was entitled to strike out 15 of the detriments. But it erred in relation to three of them, which should be considered at the full merits hearing alongside the complaints of unfair dismissal for having made protected disclosures and ordinary unfair dismissal.

(2) The tribunal struck out complaints against MyCSP, Health Management Limited and the Minister for the Civil Service. This was the full appeal hearing in respect of that decision. The complaints against each of those respondents were sustainable only on the basis that they acted as agents of HMRC in respect of the matters alleged against them. The tribunal was not wrong to conclude that there was no reasonable prospect of that being shown.

(3) There was a challenge to the partial refusal of a disclosure application. That was not reasonably arguable, and was not permitted to proceed to a full appeal hearing.

(4) In another decision the tribunal had determined that the Cabinet Office and Health Assured Limited were not agents of HMRC in respect of the matters alleged against them. The EAT

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refused to extend time in respect of an out-of-time appeal against that decision.

(5) An appeal against a refusal by the tribunal to reconsider that same decision of the tribunal had no reasonable prospect of success and was not permitted to proceed to a full hearing.

(6) Appeals against case management decisions taken in respect of the remaining live complaints against HMRC were not arguable and were not permitted to proceed to a full hearing.

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HIS HONOUR JUDGE AUERBACH:

Introduction

1. For clarity I will refer to the claimant in the employment tribunal as such, and the respondents by name. This ongoing litigation has a long and complex history. As the matter is continuing, there are various issues of fact which remain to be determined. But I can outline briefly the salient background, including of the litigation itself thus far, drawing on the various decisions of the tribunal to which I will be referring.

The employment tribunal claims and proceedings

2. The claimant worked as a civil servant for many years within HMRC. In July 2013 he presented a claim to the tribunal against HMRC, of detrimental treatment for having made protected disclosures (PDs). He referred, among other things, to the novation of certain contracts in 2009 under a scheme called Managed Office Infrastructure Services (MOIS), which he considered to be unlawful. His case was that, having raised objections and concerns about this, he was subjected to bullying, victimisation and harassment. He referred to a grievance which he had raised, which he claimed was not properly handled or progressed. The 2013 claim ended in 2016 as a result of the claimant's failure to comply with an unless order.

3. In June 2015 the claimant was dismissed for the given reason of misconduct. HMRC's case was that this was because it had emerged, when he gave disclosure in the course of the 2013 claim, that he had covertly recorded a number of meetings with managers. Following a disciplinary process it was concluded that this was a breach of the respondent's professional standards, which had led to a breakdown in trust and confidence. Following the dismissal, the claimant presented a claim against HMRC (the 2015 claim) which included complaints of ordinary unfair dismissal, unfair dismissal by reason of having made PDs and detrimental treatment during employment on the grounds of having made PDs.

4. The 2015 claim was struck out because of a failure of timely compliance with the then-applicable fees requirements; but following the Supreme Court's decision in the UNISON case it was reinstated in 2018. Following case management hearings and orders, in September 2019 it was identified by the claimant that, going forward, he was seeking to complain of 18 detriments during employment. In a reserved decision sent on 3 January 2020, arising from a preliminary hearing (PH) on 30 September and 1 October 2019, the tribunal (REJ Parkin) struck out all of the complaints of detrimental treatment.

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5. In August 2017 the claimant presented a claim against HMRC, Health Assured Limited, the National Audit Office (NAO) and the body now known as the Independent Office of Police Complaints (IOPC). This included complaints of unfair dismissal and detrimental treatment for having made PDs. In 2018 the tribunal struck out the complaints against the NAO and the IOPC. An appeal was instituted out of time, and the EAT's Registrar declined to extend time. An appeal from her decision was dismissed by me in 2019.

6. In July 2018 the claimant presented a PD detriment claim against the Cabinet Office and the Civil Service Commission. That claim was struck out in 2019.

7. On 20 December 2018 the claimant presented a further PD detriment claim, which was given a 2019 case number, and which I will call the 2019 claim. The respondents were: (1) HMRC; (2) MyCSP; (3) Health Management Limited (HML); (4) the Cabinet Office; and (5) the Minister for the Civil Service (the Minister). In his 2020 decision, arising from the 2019 PH referred to above, REJ Parkin also struck out the claims against MyCSP, Health Management Limited and the Minister, including on the basis that there was no reasonable prospect of it being found that any of them had acted as the agents of HMRC and with its authority.

8. By a case management order (CMO) sent to the parties on 14 January 2021, REJ Franey partially granted and partially refused an application by the claimant for various disclosure orders relating to a further forthcoming PH. An application by the claimant for a review was refused by a letter of 2 February 2021.

9. Following a PH in February 2021, by a decision promulgated in April 2021, the tribunal (EJ Slater) dismissed the 2017 claim against Health Assured Limited and the 2019 claim against the Cabinet Office, on the basis that they had not acted as agents of HMRC and with its authority. The claimant applied for a reconsideration. By a decision sent on 21 May 2021 EJ Slater refused that application.

10. The claims against HMRC presently remaining live in the employment tribunal are listed for a full merits hearing opening on 29 November 2021. REJ Franey made various case management decisions conveyed by letters of 24 June and 8 July 2021, and contained in an order sent to the parties on 26 July 2021.

The Appeals

11. The following matters were before me at this hearing in the EAT:

(1) The claimant appealed against REJ Parkin's decision to strike out the PD detriment complaints in the 2015 claim. This was the full hearing of that appeal, on the grounds that had been permitted to proceed

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at a rule 3(10) hearing by HHJ James Tayler.

(2) The claimant also appealed against REJ Parkin's decision to strike out the 2019 claim as against MyCSP, Health Management Limited and the Minister. This was also a full hearing of that appeal, on the grounds permitted to proceed by HHJ James Tayler at the same rule 3(10) hearing.

(3) The claimant appealed against aspects of REJ Franey's 2021 decision on his disclosure application. That was considered by Soole J on paper not to be arguable under rule 3(7). The claimant requested a rule 3(10) hearing and that was also before me.

(4) The claimant sought to appeal against EJ Slater's strike-out decision. That appeal was instituted out of time, and he applied for an extension of time. The EAT's Registrar directed that that application also to be considered at this hearing.

(5) The claimant appealed against EJ Slater's refusal of a reconsideration. That was considered by HHJ James Tayler not to be arguable. A rule 3(10) hearing in respect of that appeal was also before me.

(6) The respondents against whom REJ Parkin had struck out complaints submitted to the EAT that the agency issue had now effectively been determined by EJ Slater's decision, in a way that bound all parties, and that the appeals as related to them should therefore in any event be dismissed. HHJ James Tayler directed that this was an aspect that should also be considered at the present hearing.

(7) The claimant appealed in respect of aspects of REJ Franey's three case management decisions of June and July 2021. Those appeals were considered by HHJ James Tayler not to be arguable. The claimant requested a rule 3(10) hearing, which was also before me.

Mental Health Issues

12. It is part of the claimant's substantive case in the tribunal that his treatment by HMRC in particular made him ill. Causation is disputed, and, depending on the eventual outcome of his claims, may be a matter for determination by the tribunal. However, what I am concerned with here is the issue of the impact of the claimant's mental health on the litigation. I will summarise first what REJ Parkin's decision says about that.

13. REJ Parkin refers to having seen GP evidence and an October 2018 report of a consultant psychiatrist, Dr Junaid, and to the claimant having depression and anxiety, being prescribed sertraline and having had CBT. The judge noted that he meets ICD10 criteria for a depressive episode of moderate severity F32.1. Dr Junaid

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had suggested adjustments, including advance notice of questions and additional time to respond to them. The judge observed that some of these suggestions were more obviously relevant to a hearing involving cross-examination. The claimant had for some time been anxious about attending hearings in person. No other particular suggestions had been made by him. The judge had permitted the claimant to record the hearing, and provided for breaks and an opportunity for him to prepare representations overnight after day 1.

14. The claimant had contended he had had insufficient time to prepare in relation to the strike-out applications relating to the 2019 claim; but the judge considered that he had had ample notice. He prepared submissions in relation to the 2015 claim, overnight between the first and second days, but emailed in the morning to say that he was on a depressive dive. However, he participated on day 2, and made oral submissions. However, he also sought extra time to put in a written submission in relation to the 2019 claims. The judge allowed him until 4 October to do so. He in fact did so on 3 October 2019.

15. At a PH in July 2020 it was decided that there would be a further PH to discuss what adjustments the tribunal might make for future hearings. Borrowing a term from the criminal jurisdiction, these were described as “ground rules”. The minute explained what sort of medical evidence would assist. The minute of that further PH, on 27 November 2020, before EJ Holmes, records that the claimant had emailed a list of what he was seeking and a GP letter in support. These requests were adopted unopposed for all forthcoming PHs, though different considerations might apply to the full merits hearing. The ground rules were annexed. They were, in summary, that the tribunal would inform the claimant of what was to be considered at each hearing, that it would provide written reasons for its decisions, that he would be given two weeks’ notice of actions required of him, and arguments or skeletons within the same timescale, that case management hearings would be conducted remotely, and that all hearings would be recorded by the tribunal.

Hearing Arrangements in the EAT

16. In advance of the hearing before me, the claimant asked the EAT to make the same adjustments that had been directed by EJ Holmes for PHs in the tribunal proceedings. These were all responded to by HHJ James Tayler in a letter from the EAT of 19 August 2021. Specifically, it was confirmed: that the claimant would be given reasonable notice of matters to be considered at this hearing; he could request written reasons for decisions arising from this hearing; he would be given reasonable advance notice of applications, orders or

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actions required of him; and the hearing would be recorded by the EAT.

17. The claimant had been represented at the rule 3(10) hearing before HHJ James Tayler, by counsel under the ELAAS scheme. It was envisaged that the same counsel might represent him at the hearing before me. In the event the EAT was informed ahead of the hearing that the claimant would be representing himself. About two weeks in advance of the hearing he tabled three skeleton arguments covering, between them, the various matters to be considered. Mr Hurd of counsel appeared for HMRC. Mr Morgan QC appeared for MyCSP. Mr Mold of counsel appeared for Health Management Limited. Mr Redpath of counsel appeared for the Minister and for the Cabinet Office. Each of them tabled skeleton arguments. Mr Mati of Peninsula put in written submissions on behalf of Health Assured Limited. He indicated that he would not be attending.

18. The hearing before me was listed to take place in person, but the claimant requested, and was permitted, to participate by telephone. Appellants, including litigants in person, are normally expected to prepare EAT hearing bundles. On this occasion considerable assistance in this task was given by the EAT administration and the respondents' representatives. In addition to the core bundles and an authorities bundle, both the claimant and respondents had tabled supplementary bundles, to which occasional reference was made.

19. In an email two days before the hearing the claimant complained that there had been no response to his ground rules request. His attention was drawn to the EAT's 19 August 2021 email. In a further email that day, he also asked if it would be possible for him to make his own recording of the proceedings "so that I can review and respond when possible to the respondents' final arguments." This is ordinarily prohibited, and is not granted as a matter of course. See the discussion in *Heal v University of Oxford* [2020] ICR 1294. In this case I considered it neither necessary nor appropriate, and an email was sent so informing the claimant.

20. I took into account the information available to me (including the tribunal's account of the medical evidence that it had earlier seen) and that the EAT had responded positively to the adjustments previously requested by the claimant, which did not include being permitted to make his own recording. He had set out his own arguments in considerable detail in his skeletons, and had had the skeleton arguments for the other parties about two weeks in advance of the hearing (but see below). The hearing time allocated was generous and would enable him to be given ample opportunity to respond to any new points raised in oral argument.

21. On the morning of day one, shortly before the start of the hearing, the claimant emailed a further 28-

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page written submission. I indicated that I would allow time for me and counsel for the respondents to read this document, before continuing. I would be flexible as to the order in which parties spoke, and in which different topics were addressed, as to breaks and so forth. The claimant initially indicated that he did not feel able to contribute by way of oral submissions. However, as the hearing unfolded, he periodically made a number of articulate oral submissions at regular intervals, in response to points raised by the various opposing counsel and in dialogue with me about his case and his arguments. The respondents' counsel did not seek, and were not permitted, to make submissions in relation to the rule 3(10) matters, as such.

22. At one point during day one, and at one point during day two, there were problems with the audio link, we took a break and they were fixed. On both occasions I recapped on what had been said in court in the run-up to the difficulty being identified, to ensure that the claimant had not missed anything.

23. Towards the end of the hearing it transpired that, in error, MyCSP's representatives had failed to send the claimant (or any other party) a copy of Mr Morgan's skeleton, for which he apologised. This was emailed to the claimant and I agreed (without opposition) that he should be allowed more time to respond to it. The claimant asked to do that in writing – he did not want a further hearing – and said he could do so by 28 September. In discussion we agreed on 29 September. The claimant put in a further 21-page skeleton on that date. This not only responded to Mr Morgan's skeleton, but made further wide-ranging submissions in relation to the other matters that were before me. I have read and considered it all.

24. The claimant's written skeletons between them ran to in excess of seventy close-typed pages. His oral contributions during the hearing were articulate, and, on occasion, extended. I am wholly satisfied that, overall, he, as well as the respondents, had a full and fair opportunity to put his case.

Strike-out of PD Detriment claims against HMRC

25. I will consider first the appeal against the decision of REJ Parkin to strike out the 18 PD detriment complaints against HMRC. HHJ James Tayler considered that it was arguable that REJ Parkin erred in law because he did not analyse the detriments individually, and consider, for each, the date or dates, and the specific detriment alleged. He considered it arguable that this was necessary before the judge could determine that a given complaint had no reasonable prospect of success or was insufficiently particularised.

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26. REJ Parkin's decision starts with an overview of all the claims, and then gives a very detailed account of their procedural history. In respect of the 2015 claim there were various PHs and orders, including more than one order requiring the claimant to particularise with clarity the PDs relied upon, and each allegation of detrimental treatment. A great deal of written material was produced by the claimant at various stages, but HMRC remained of the view that the PDs and the detriments had not been properly particularised as directed, and applied for both the PD detriment complaints and the PD unfair dismissal complaints to be struck out.

27. REJ Parkin described how, in June 2019, the claimant had proposed that these complaints be shortened to what he called a "short case", which the judge set out at [4.15] as follows:

> "A) The respondent's corrupt production in 2014 and nature of the IG355 report determining the respondent's prejudicial assertion that it has been behaved correctly. This being evidence used in the dismissal proceedings.
> B) The respondent's decision to take disciplinary actions following the disclosure of evidence in 2409957/2013.
> C) The respondent's failure in January 2015 to follow its own procedures and maintain a duty of care by considering the impact of its actions upon me and directly causing the breakdown suffered in March 2015.
> D) The failure of the disciplinary investigation to determine the reasons for the action I took and ignoring the evidence presented.
> E) The failure of the disciplinary appeal hearing to focus on other than the respondent's protection from constructive dismissal and ignoring the reasons and evidence presented of the reasons for my actions."

28. In July 2019 the claimant tabled a "short-case narrative", which itself ran to eight pages, and was accompanied by a table of 18 claimed detriments. That narrative, which the judge considered to be "probably the clearest explanation of his case", concluded as follows:

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

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29. In further correspondence in September 2019 the claimant provided a revised version of his "short case" table of disclosures and schedule of detriments.

30. The application to strike out the PD detriment and unfair dismissal complaints was advanced on the basis that they had no reasonable prospect of success and/or non-compliance with orders. Regarding the claimed PDs the judge noted that the most recent of these had now been identified as being by way of an email to Jenny Grainger of 18 May 2015, a copy of which the claimant had provided. To the extent that the other alleged disclosures were still unclear, that could be addressed by requiring the claimant to table his witness statement or statements relating to the making of the PDs ahead of other witness statements being exchanged. Having regard to that, he declined to strike out the PD unfair dismissal complaint.

31. In relation to the detriment claims, the judge's conclusions, at [17.4], were as follows:

> "The Tribunal takes the opposite view in respect of the disclosure detriment claims. Section 47B(2) provides that separate detriment claims do not gain Section 47B protection where the detriment in question amounts to a dismissal. Having considered the claimant's case carefully in its different formulations, the essence of his case is that his eventual dismissal shortly after his fifth disclosure to Jenny Grainger was indeed caused by him making persistent protected qualifying disclosures: he was dismissed because he was a whistleblower. This is to be dealt with as part of his Section 103A "automatic" unfair dismissal claim. However, as acts of separate detriment, both in terms of the date of the detriment finishing which he always describes as "ongoing" and the overall act of detriment and type of failure by HMRC alleged, labelled as "failure to follow own processes" or policy, "failure to investigate", "failure to follow medical recommendations" and alleging "breach of trust and confidence", "breach of employment terms", "breach of duty of care", "(breach of) PIDA protections", his failure to comply with the Tribunal's Case Management Orders requiring further specification is fundamental. The acts of detriment the claimant seeks to put forward are much too broad and indistinct for the Tribunal to determine upon meaningfully. It is not sufficient for him to assert repeatedly that the failure to investigate properly or to uphold his grievance or accept the validity of his complaints, leading to the breakdown of his health, is itself an act of detriment. As to timing, even though the claimant in his short case formulation says he accepts that the Tribunal can only consider the detriments post-presentation of the 2013 claim, the reality is that he is alleging many broad and vague detriments which clearly began before the 2013 claim was presented and were or could have been included within that claim. As HMRC correctly contends, the time provisions in detriment claims based upon a failure to act, at Section 48(3) and (4) mean that the time limit runs from when a deliberate failure to act is decided upon (as established by the employer doing an act inconsistent with the failed act or within which it might reasonably have been expected to act). As the claimant has identified 22 (reduced to 18) acts of detriment, the time limit applies to each act individually although it is the case that where one act extends over a period, time only starts to run at the end of that period. Accordingly, insofar as the detriment claims under Part V are concerned, the Tribunal strikes all of those out as having no reasonable prospect of success."

32. Mr Hurd acknowledged that the judge did not address each claimed detriment separately, but submitted that he was entitled to deal with them more broadly, given that similar issues arose across the piece; and he had had the benefit of a very detailed strike-out application. The tribunal had identified four sound reasons for

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striking out the detriment claims, being, in summary: (a) that complaints relating to the dismissal could not be pleaded as detriments; (b) that the complaints were too vague and generalised; (c) that complaints could not be pursued which were, or could have been, raised in the 2013 claim, or predated the first properly-identified PD; and (d) time points. In a schedule to his submission Mr Hurd set out, for each detriment in turn, multiple reasons why, he submitted, it would have been struck out, had it been addressed separately. He said that it was also accepted that the claimant would be able to refer to the relevant history of events following his alleged PDs, as background and context to his automatic and ordinary unfair-dismissal complaints.

Discussion and Conclusions

33. I start with some general observations, and by immediately clearing one point out of the way. The fact that the claimant may well in any event be permitted to refer to much, possibly all, of the factual matters and allegations covered by his detriment complaints, as relevant background or context to his unfair dismissal complaints, would not, as such, be a good reason *of itself* to strike them out. I add that the extent to which they do form relevant background to those complaints will be a matter for the appreciation of the tribunal.

34. However, this was, it seems to me, one of those particularly challenging cases not infrequently encountered by tribunals, in which a litigant in person has not pleaded his complaints with clarity, and, following tribunal orders has, as it was vividly put in *Cox v Adecco* [2021] UKEAT/0339/19, 9 April 2021 at [29], then produced further material that "makes up for in quantity what it lacks in clarity." In such a case, faced with a strike-out application, the tribunal should make a reasonable attempt, reviewing the material it has got, to identify if it can, at least the core complaints and issues that the claimant appears to be raising.

35. In this case, it seems to me that the tribunal fairly identified a number of severe difficulties with the detriments schedule generally. There was more than one column relating to dates, and sometimes different or inconsistent dates were given for the same detriment. The dates were generally no more precise than a given year. The claimant also included a column in which he described all 18 detriments as "ongoing". This appears to have been because it was his case that the claimed adverse *effects* on his mental health were ongoing. But what the tribunal needed to know was when the detriments themselves were said to have occurred. It appears that this point had been raised before, but the claimant had not taken it on board. The narrative descriptions for the detriments were also frequently vague and generalised or otherwise difficult to follow. The claimant

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added a column headed "type of failure" in which, in all cases, he wrote: "breach of trust and confidence, employment terms, duty of care", and in some cases also: "PIDA protections", and/or "human rights"; but, as the judge fairly pointed out, this does not provide the reader with any further useful hard information.

36. Faced with this problem, the judge did, it seems to me, look to see what was the core thrust of the PD detriment and dismissal complaints. See his observations at [16.1]-[16.3] to that effect. He identified that while the PDs themselves had not been fully particularised in all respects, enough had been clarified such that a practical and fair way forward was to direct sequential witness statements. He therefore declined to strike out the PD unfair dismissal claim. He also fairly considered what light the "short case" summary material threw on the core complaints. As to that, I observe that four out of the five points in the short summary reproduced at [4.15] referred to aspects of the disciplinary and dismissal process. The concluding summary reproduced at [4.16], in so far as it referred to HMRC's conduct, appears to have related either to matters which were the subject of the earlier 2013 claim, or, again, to aspects of the disciplinary and dismissal process.

37. The tribunal therefore did, it seems to me, fairly summarise the heart of the claimant's case at [17.4] as being dismissal-related. It also correctly identified that a PD detriment complaint cannot be pursued by an employee in relation to a dismissal (see **Employment Rights Act 1996** section 47B(2)) but, rather, would fall to be considered by way of a section 103A PD unfair-dismissal complaint. It was also right to take the approach that it was not open to the claimant to seek to pursue, in the 2015 claim, complaints which were, or could have been, raised in the 2013 claim, which had itself been dismissed. That would be an abuse of process. As I have noted, the tribunal's observations about the designation of all complaints as "ongoing", and the contents of the final column, were fairly made. At this point it is convenient next to turn to consider whether anything further emerges from the contents of the schedule in relation to each of the detriments in turn.

38. Detriment 1 refers to the origins of the whole matter, being the novation of contracts under MOIS, which the claimant considered to be unlawful, and his objections to which, on his case, led to management first forming "a negative view of me". This dates back to 2009, and no specific treatment is identified beyond a generalised description. Detriment 2 refers to the handling of the grievance process which began in 2011. Both matters either were, or could have been, raised in the 2013 claim, and the tribunal did not err in striking them out.

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39. Detriment 3 appears to complain simply of the fact that HMRC defended the 2015 claim. Merely defending litigation (as opposed to taking some particular inappropriate step in the conduct of it) cannot be properly characterised as a detriment (see *St Helens BC v Derbyshire* [2007] ICR 693), and this claimed detriment was properly stuck out as well.

40. Detriment 4 appears to refer to the disciplinary process that led to the dismissal. This would therefore properly fall within the scope of the PD unfair dismissal claim, and not a freestanding detriment claim. So it too was properly struck out, as a detriment claim, as such.

41. Detriment 5 refers to a failure by the respondent to follow its whistleblowing policy, in particular by not appointing a board member to be responsible for whistle-blowers. The date is given simply as 2014. There are no other particulars given of whether, for example, the claimant claims expressly to have invoked the policy on a particular occasion, or what should have been done to apply the policy in his case, and when. Given the severe lack of particulars, the judge was entitled to conclude that this had no reasonable prospect of success.

42. Detriment 6 alleges failure to follow medical recommendations which are said to have indicated a toxic work environment as the source of the claimant's ill health. The claimant told me during oral submissions that he had a number of periods of absence, and medical referrals, between 2011 and the start of 2015 (though in his post-EAT-hearing submission he gives the window as 2013 – 2015), which he said HMRC would obviously know. However, it was entitled to particulars of which particular reports he relied upon, and of what recommended action, was, on his case, not implemented because he had made protected disclosures. Given the lack of such particulars, the judge was entitled to strike this detriment out.

43. Detriment 7 is different. The schedule identifies that the complaint is of failure to refer the claimant for a medical assessment following his putting in an accident form in January 2015. This appears to correspond to item C in the five-point summary reproduced by the tribunal at [4.15]. I think there was enough information given here for HMRC to be able to locate the accident form and respond to the complaint, or, if they could not locate it, ask for a copy, or, if they contended that no such form was put in, defend the matter on that basis.

44. Detriment 8 refers to an IG355 investigatory report in relation to the concerns raised by the claimant. He describes it as "fraudulent". From point A reproduced at [4.15], it appears to be the claimant's case that this report was unfairly relied upon in support of the disciplinary process that led to his dismissal. If so, that

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would potentially fall within scope of the PD unfair dismissal claim, not a freestanding detriment claim. Given the lack of other particulars, the judge was therefore entitled to strike this out, as a detriment claim, as such.

45. Detriment 9 refers to a failure, after the claimant wrote the CEO, Lin Homer, criticising the IG355 report, and complaining of abuse of office, to refer the matter to the IPCC for investigation. This does not clearly identify why this was said to be detrimental treatment of him. The date is also simply given as "2014". However, the schedule does name Lin Homer, and elsewhere REJ Parkin identifies that two of the claimed PDs were communications to Lin Homer, on 25 June 2014 and 30 January 2015. Given that, there were in my view sufficient particulars such that this complaint should not have been struck out for lack of them.

46. Detriment 10 refers to the handling of concerns that appear to be said to have been raised in 2011, and it relates to actions or inactions that followed. It appears to me that the tribunal was entitled to strike it out on the basis that it could or should have been raised in the 2013 claim.

47. Detriment 11 refers to failure to take action following escalation to senior managers including the CEO. The date given is 2014. No further particulars are given. The claimant's post-EAT-hearing submission indicates that this refers to his PDs, but that was not indicated in the schedule before REJ Parkin. Detriment 12 refers to failure to investigate or take action following matters being "escalated to the CI board member". It gives the date as 2015. No more precise date is given, nor the method of escalation, nor the name of the CI board member. In his post-EAT hearing submission the claimant states that this referred to his fifth disclosure, to Jenny Grainger. But that was not explained in the schedule before REJ Parkin. Detriment 13 refers to failure by the Minister to take action following escalation to him. The given date is 2015. No more particular date is given, nor the method of escalation. The post-EAT-hearing submission refers to something being "sent by recorded delivery on many occasions". But neither that information, nor more precise dates, were given in the schedule put before REJ Parkin. Further, for reasons that follow, the argument that the Minister was an agent of HMRC was correctly rejected, and he was struck out as a respondent. The general theme of complaint here is that the concerns raised by the claimant were not vindicated, or actioned. But he does not particularise how, on each occasion, that was a detriment to him. The "short case" summary does not appear to assist on this. In all the circumstances I conclude that the judge was entitled to strike out this group of complaints.

48. Detriment 14 refers to the claimant having received a CSIBS award prior to dismissal. It contends

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that, in these circumstances, his dismissal should have led to him being proactively invited to make a further CSIBS claim. This is a matter distinct from the complaints that have to do with the disciplinary and dismissal process, as such. It appears to me to have been sufficiently particularised. It should not have been struck out.

49. Detriment 15 refers to abuse of RIPA and refers to powers to "monitor WB communications". It states that HMRC was asked to provide an assurance, but refused to confirm, that it would desist from such abuse. It refers to the only response being from "a G7 in HR". The date given is 2014. Again, there is a lack of basic particulars: nature of communication, date, what issue arose under RIPA, who the G7 was, when they replied. The claimant gives a little more information in his post-EAT-hearing submission, but this was not before REJ Parkin. Again, bearing in mind the case-management process undertaken prior to this point, and that the "short case" summary does not assist, I consider that REJ Parkin was entitled to strike out these detriments.

50. Detriments 16 and 17 were, once again about the reason for dismissal and the dismissal process. REJ Parkin was therefore right to dismiss these as detriment complaints. Once again, however, the claimant's contentions in relation to these aspects will fall to be considered as part of his PD unfair-dismissal complaint.

51. Detriment 18 refers to failure to follow process in two investigations which, the narrative itself acknowledges, predated the 2013 claim. This was properly struck out, on the basis that it could, or should, have been raised in the 2013 claim.

52. Accordingly, it appears to me that detriments 7 (failure to refer to medical assessment following submission of accident form in January 2015), 9 (failure to refer to IPCC following the claimant raising the matter with Lin Homer) and 14 (failure to proactively invite the claimant to make a further CSBIS claim following his dismissal) ought not to have been struck out unless it was proper to do so on the basis of time points.

53. As to that, it was *not* the claimant's case that, in so far as a complaint might potentially be outside the time limit, it was not reasonably practicable for him to have presented it in time. As I have noted, the blanket designation of all complaints as "ongoing" was also rightly viewed as not assisting him. The tribunal at [17.4] considers the provisions relating to action extending over a period as being insufficient to get the claimant home, but does not specifically address the alternative of a "series of similar acts or failures". I do not think that (depending on the final view of the merits of the complaints) the possibility of that being found to apply

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could properly have been ruled out by REJ Parkin. Consideration also does not appear to have been given to whether complaint 14 was simply in time.

54. I therefore conclude that these three detriment complaints should not have been struck out, and should be considered by the tribunal at the full merits hearing (including time points). The appeal against REJ Parkin's strike-out of the detriment complaints is, in all other respects, dismissed.

Strike-out of claims against MyCSP, Health Management Limited (HML) and the Minister

The complaints

55. It was common ground before REJ Parkin that the claimant was employed, and only employed, by HMRC. However, he also relied upon the right of a worker (W), pursuant to section 47B(1A)(b) of the **Employment Rights Act 1996**, not be subjected to a detriment on the ground of a PD, by "an agent of W's employer with the employer's authority." Where that occurs, a claim lies both against the agent and, by virtue of section 47B(1B), against the employer, subject in both cases to some qualifications that were not relevant in this case. It was the claimant's case that section 47B(1A)(b) applied to his complaints against each of MyCSP, HML and the Minister. REJ Parkin concluded that there was no reasonable prospect of that contention succeeding in respect of any of them. The complaints against all of them were accordingly struck out. Alternatively, he concluded, the Minister should be removed as a party wrongly included, under rule 34.

56. At [7.1]–[7.6] REJ Parkin summarised the complaints in the 2019 claim. They related to a claim made by the claimant following his dismissal, under the Civil Service Injury Benefit Scheme (CSIBS), for a permanent award under that scheme (having made an earlier claim prior to dismissal). He had complained on 22 November 2018 to HMRC, the Cabinet Office and the Minister, of a failure by HML to produce an independent assessment of impairment in accordance with CSIBS rules, and a failure by MyCSP to investigate that maladministration by HML, "such actions being taken on behalf of the corporate Civil Service employer, being part of a consistent refusal to acknowledge or accept the responsibility for and ill health caused by HMRC." The judge identified at [7.5] that:

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

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57. In the course of the decision the judge identified that CSIBS is a statutory scheme established under the **Superannuation Act 1972**. The scheme manager was the Cabinet Office, acting under delegated authority on behalf of the Minister. MyCSP was the appointed administrator of the Principal Civil Service Pension Scheme and of CSIBS. HML was, from 1 July 2017, the health adviser to the scheme. The claimant had invoked a statutory Internal Dispute Resolution (IDR) process, against HML, in respect of the outcome of his injury benefit appeal. Stage 1 of the IDR provided for an investigation and determination by MyCSP, and stage 2 for an investigation and determination by the Cabinet Office on behalf of the Minister. In interpose that none of this, as such, appears to have been, nor could it sensibly have been, disputed.

58. The claimant's case, however, was that the Cabinet Office (and the Minister, acting through it) act as agents on behalf of the various employing departments, including HMRC. He relied upon the **Constitutional Reform and Governance Act 2010** (CRAGA). He was required to put in his post-dismissal injury benefit claim to HMRC, which forwarded it to MyCSP, which commissioned a medical assessment "on behalf of the employer" from Health Assured Limited (HAL) (HML's predecessor). They produced a defective report and a second report was then commissioned from HML, which also produced a defective report. There did not need to be a direct contractual relationship with HMRC for an agency relationship to be established.

59. The judge accepted that the concept of detriment could, as such, include acting adversely to the claimant's interests, or failing to respect his rights as a member of the pension and benefits schemes. However, on the agency point, his conclusions in relation to this trilogy of respondents were as follows.

> "18.2 Although the claimant was dissatisfied that he had sought disclosure of the relationships between the various different respondents which had not been provided to him at this stage, the Tribunal considered these were sufficiently clearly set out in the respective responses and documents to make its decisions upon the applications. HMRC, the first respondent, was the claimant's employer and remains in the proceedings. No other respondent was the claimant's employer and in fairness to him, despite extensive representations from respondents for instance as to the extended meaning on worker within section 43K of the 1996 Act, he has never claimed to be so. He has however relied upon the corporate nature or identity of the Civil Service employer as entitling him to claim against each of the respondents and, by the time of this Preliminary Hearing very much more clearly than when he commenced these proceedings (which was before the Judgment in Case No 2413478/2018 was delivered and sent out), he relied firmly upon the involvement of the 2nd to 5th respondents as being agents of his employer, HMRC, within the definition at Section 47B(1A)(b) of an agent of employer acting with the employer's authority.
>
> 18.3 The claimant accepts and relies upon the relationship whereby the Cabinet Office manages the pension and benefits scheme for all government department employers, with MyCSP being the scheme administrator and HML the health adviser. In fact, although it is common ground that the Cabinet

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

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

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

60. The judge however considered that it would be premature to determine the application to strike out the Cabinet Office on the basis of the information and documents before him, and he put that matter off to consideration at a further hearing. As we shall see, it was later considered at the hearing before EJ Slater.

Permitted Grounds of Appeal

61. HHJ James Tayler permitted this appeal to proceed on the basis that it was arguable that the judge erred by failing to identify the specific nature of the complaints that had been raised against each respondent and analysing whether there was an arguable case that, if they acted as alleged by the claimant, they did so as

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agent for, and with the authority of, HMRC. As a subsidiary ground of appeal he considered it arguable that the claimant should have had a better opportunity to make submissions, possibly by a postponement, than by way of the written submission that he was permitted to put in following the conclusion of the hearing.

The Law

62. Section 47B(1B) enables liability for detrimental treatment to be imposed on an agent of the employer acting with the employer's authority. In such a case both the agent and the employer are, in principle, co-liable. **The Equality Act 2010**, sections 109 and 110, adopts essentially the same approach, as did the predecessor discrimination legislation. The discrimination provisions (in that case those of the **Race Relations Act 1976**) were considered by the Court of Appeal in *Ministry of Defence v Kemeh* [2014] ICR 625, which also considered the earlier EAT decision in *Yearwood v Commissioner of Police of the Metropolis* [2004] ICR 660 (EAT). In *Kemeh* the issue was whether a company providing catering services to the army, whose employee was abusive to the claimant in that case, was acting as agent of the MoD.

63. I consider that the reasoning in *Kemeh* is equally applicable when considering the PD detriment provisions of the **1996 Act**. The wording is materially the same, and this is one of those contexts where it makes sense to treat the PD detriment provisions as akin to a form of anti-discrimination legislation. For the purposes of what I have to decide, an extended analysis is not necessary. The starting point is that, having designated no other approach, Parliament must be assumed here to have adopted the common law approach to the legal concept of agency. It is not essential, to establish a common law agency, that the putative agent have the power to affect the putative principal's relationships with third parties. However, neither is it sufficient, if it be the case, that the putative agent is providing services to the putative principal under a contract with it. The putative principal must, in fact, be the source of the authority under which the putative agent acts.

64. Thus, at [34] Elias LJ observed of *Yearwood*:

> "I would respectfully agree with the conclusion of the EAT in *Yearwood* that on the facts of those cases there was no agency relationship between the Chief Constable and the disciplining and investigating officers. But I do not think that this conclusion turned on the particular concept of agency employed. The result would, in my view, have been the same even if the appellants' concept had been adopted. 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."

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65. Further on, at [40] Elias LJ observed:

> "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."

66. Lewison LJ agreed that the approach in *Yearwood*, of applying the "well-established" common law concept of agency, was the correct one. Kitchin LJ agreed with both judgments.

Discussion and Conclusions

67. I turn to the principal ground of appeal, challenging the substantive correctness of REJ Parkin's decision on the agency point in relation to each of MyCSP, HML and the Minister.

68. Did REJ Parkin err by failing to consider, or identify correctly, the underlying factual premise of the detriment complaints against each of these respondents? I do not think that he did. As I have described, at [7.3] – [7.5] he fairly summarised this, drawing on the claim form, including identification of the nature of the failures of each of these respondents, and the dates thereof, that were alleged. In particular he identified that the complaints were not just about HML's assessment and related conduct, but about the actions, or inactions of MyCSP, and the Minister (acting through the Cabinet Office) in the staged IDR process. The judge's summary of the responses and arguments also shows that all of these aspects were live and argued before him.

69. Before further considering REJ Parkin's decision on the agency point, it is illuminating to consider the later decision of EJ Slater. She heard evidence from the claimant and from Peter Spain, the Head of the Civil Service Pensions Technical Team. She had more documents before her than did REJ Parkin. She made findings of fact and determined the agency point in respect of the Cabinet Office and HAL substantively. Her findings of fact included the following:

> "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

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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…"

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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

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> 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."

70. EJ Slater's self-direction as to the law included a cogent analysis of *Yearwood* and *Kemeh*, and the guidance to be extracted from them. Her conclusions are worth setting out in full:

> "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

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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

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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."

71. REJ Parkin does not appear to have had authorities such as *Kemeh* and *Yearwood* cited to him, and they are not discussed in his decision. His analysis is not as full as that of EJ Slater, when she came to decide the substantive agency issue in relation to the Cabinet Office and HAL. That said, it should be borne in mind

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that he was considering a strike-out application, not making a substantive determination.

72. At the heart of the claimant's challenge to REJ Parkin's decision are the following propositions. First, REJ Parkin's conclusion fails to recognise the central role of HMRC as the claimant's (former) employer. It ignores the practical realities that he was required to submit his post-dismissal application in the first instance to HMRC (which passed it to MyCSP), that it can be inferred that HMRC would have raised a purchase order with HML, which would have created a direct contractual relationship with it, that HMRC bore financial responsibility for HML's (and before it, HAL's) reports, and that those reports were written for the benefit of HMRC. Secondly, it fails to take account of the reality that the power delegated by the Minister to the Cabinet Office, which in turn appointed MyCSP, was exercised on behalf of employing departments, including HMRC.

73. However, none of these arguments makes good the contention that REJ Parkin should have considered it arguable that these respondents were, in law, acting as the agent of HMRC and with its authority. With respect, the claimant's case proceeds on the basis of a number of assumptions which are legally erroneous. First, even if a contract was formed directly between HMRC and HML, it would not follow from this fact alone that HML was the agent of HMRC. As *Kemeh* explains, the mere fact that one party procures services from another, does not make the latter the agent of the former. Similarly, even if it could be said that, in some sense HMRC benefited from the work of MyCSP and the reports of HML, this too would not be sufficient to establish an agency relationship. In this case it was clear, as EJ Slater explains, that the arrangements required the medical companies to make independent assessments and provide advice; and, further, that HMRC had no role or power in terms of the decision whether to make an award or not, or appeals in that connection.

74. Thirdly, the fact that it was the claimant's status as a (former) employee of HMRC that was the reason why he was, potentially, eligible to claim benefits under CSIBS, does not point to the legal conclusion that the Cabinet Office (on behalf of the Minister) was, for these purposes acting as the agent of HMRC (and hence delegated such agency down the chain to MyCSP, which in turn delegated it to HML (or, before it, HAL)). That is because neither the Minister, nor, hence, the Cabinet Office, MyCSP, or HML (or HAL) derived their authority to perform their respective roles *from HMRC*. Rather, they derived their authority and powers from the statutory framework under the **Superannuation Act 1972** and the statutory power of the Minister to delegate his functions to the Cabinet Office. REJ Parkin correctly identified that the **Constitutional Reform**

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and Governance Act 2010 gives the Minister the power to manage the civil service, and the **Civil Service (Management Functions) Act 1992** gives him the power to delegate such functions to another Crown servant.

75. These points are all more fully explained and developed in the discussion in EJ Slater's decision that I have set out, and with which I agree. Although her decision was specifically concerned with the position of the Cabinet Office and HAL, it sets out all of the relevant legislation and fully addresses the roles and relationships as between HMRC, Minister, Cabinet Office and HAL. It is also clear that the Framework Agreement with the first provider, Capita, dating from 2013, was novated to HAL in 2015 and then HML in 2017, so that her analysis holds good in relation to HML as well. Her analysis also explains why the Cabinet Office was not, in law, the agent of HMRC, acting with its authority. Again, I agree with it, and adopt it.

76. The claimant contends that EJ Slater's analysis is unsafe, because she did not have all the relevant documents before her. First, she did not have the EU tender document before her. This, he argues, would have shown that the contract to be awarded was being awarded on behalf of HMRC. But I agree with EJ Slater, that it was sufficient that she had before her the actual documentation by which the arrangements were implemented, following the outcome of the tender – in particular the Framework Agreement. The claimant has in fact extracted what he says was the relevant tender document (which is in the public domain) and included it in his post-EAT-hearing submission. I cannot see anything in it that demonstrates that either REJ Parkin or EJ Slater's analysis was wrong, or would have been different had either of them had it before them.

77. Secondly, the claimant says that the Framework Agreement is just that – it sets out the overarching framework. But, when there is an individual job to be done – such as the medical assessment in relation to his application – more documentation would be produced. In particular, he says, a purchase order would be raised by HMRC. As the foregoing extracts from her decision set out, this point was canvassed before EJ Slater, and there was a conflict of evidence. But EJ Slater proceeded on the assumption, in the claimant's favour, that there was a purchase order, and indeed that it formed a contract with HMRC.

78. Finally, the claimant says that there would have been a document such as a "stakeholder charter" or a "participation agreement" as between the Cabinet Office and HMRC. Without these, he says, neither REJ Parkin nor EJ Slater could see the full picture of the relationships between the parties. However, I do not agree. For reasons explained by EJ Slater at [84] – [86], the source of the Cabinet Office's authority and role was

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expressly determined by legislation. That could not have been altered by any such document.

79. More generally, it seems to me that the claimant's arguments in relation to documentation are again premised on his erroneous contentions that the fact that HMRC was the (former) employer, that he was eligible for the scheme because he was a former employee of HMRC, and had to put in his application via HMRC, and/or that HMRC ultimately bore the financial costs of the assessment, and/or the possible existence of a contract to which it was a party would, severally or together, necessarily constitute one or more of the other respondents in law its agent, acting with its authority. But that is not, as a matter of law, correct.

80. Before leaving this aspect, I note that there was some discussion before me of the question of the ownership of MyCSP. The claimant told REJ Parkin that his understanding was that MyCSP was jointly owned by MyCSP senior management and the Cabinet Office (see [12.1]). Mr Spain's account of the matter appears in EJ Slater's decision at [42]. This aspect does not appear to me to be relevant. REJ Parkin referred in parentheses to what the claimant had told him about this. He does not appear to have relied upon it. Even if, at the relevant time, the Cabinet Office had a stake in MyCSP, that would not mean that MyCSP was, in relation to the matters at issue in this case, acting as its agent and with its authority.

81. REJ Parkin also identified that HML had contended that the complaint against it was out of time. The complaint was of a failure to respond to the claimant's Med9 complaint by 30 July 2018; but ACAS EC ran from 15 – 17 December, and the complaint was presented on 20 December 2018. Mr Mold submitted that the time point alone justified the strike out. The claimant advanced no case to the effect that it was not reasonably practicable to present this claim in time. I conclude that there was, indeed, no error in striking out the claim against HML on the additional ground that there was no reasonable prospect of overcoming the time obstacle.

82. As a somewhat more tentative additional point HHJ James Tayler allowed through a ground to the effect that the claimant did not have a fair opportunity to respond to this strike-out application (as opposed to that of HMRC), as that might have required a further hearing. As to that, as I have recorded, the claimant's request was to be permitted to put in a post-hearing written submission, which the judge agreed, and the claimant in fact did so with a day to spare. The respondents were not permitted to reply, and he does not appear to have requested a further oral hearing. I do not think there was any unfairness to him in this regard.

83. Before leaving REJ Parkin's decisions in respect of both the 2015 and 2019 claims, I should note that,

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in his written and oral submissions for the present hearing before me, the claimant made more generalised allegations of bias or unfairness and what he called discrimination against REJ Parkin and the tribunal generally, both in respect of the October/November 2019 hearing and earlier case management decisions. He referred in oral submissions for example to a previous disclosure application having been rejected by EJ Ross.

84. However, it was not open to the claimant, as part of the present appeals, to seek to reopen earlier case management decisions; and REJ Parkin's decisions have to be considered on the basis of the material that was before him. Nor was a generalised allegation of bias or unfairness relating to that hearing or the decision arising from it advanced by the claimant's counsel at the rule 3(10) hearing, nor included among the grounds permitted by HHJ James Tayler to proceed. Nor, in any event, can I see that there would have been any basis for this. REJ Parkin set out with conspicuous care and thoroughness the background, issues and arguments. His decision also shows that he gave full and fair consideration to adjustments for the claimant, and it is cogently reasoned in a way that gives no basis for concern as to any actual or apparent bias on his part.

85. For all of these reasons, the appeal against REJ Parkin's decision to strike out the claims against MyCSP, HML and the Minister is dismissed.

<u>REJ Franey's Disclosure Decision – rule 3(10)</u>

86. The issues relating to the status of HAL and the Cabinet Office were listed to be heard on 2 and 3 February 2021. For the purposes of that hearing the claimant made an application for disclosure by reference to paragraph 43 of a witness statement dated 30 July 2020. Following submissions, that was determined by REJ Franey's decision sent to the parties on 12 February 2021. Although the claimant referred me also to the fact that his application for review was unsuccessful, and he sent in that paperwork with his notice of appeal, the appeal is against the original order only.

87. REJ Franey paraphrased the five categories of disclosure sought as follows:

(i) Notice of the tenders which appointed Health Assured as Scheme Medical Adviser for the Civil Service Injury Benefit Scheme ("CSIBS");

(ii) Framework documentation defining the commercial relationship between the Cabinet Office and Health Assured as Scheme Medical Adviser;

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(iii) Details of the commercial arrangements between the Cabinet Office and MyCSP, which administers the CSIBS on behalf of the Cabinet Office;

(iv) All communications between HMRC, the Cabinet Office, MyCSP and Health Assured relating to the medical assessment being commissioned and the internal dispute resolution process which ensued;

(v) All communications and actions taken as a result to the protected disclosures which the claimant allegedly made to the Cabinet Office as set out in the List of Issues attached to the September CMO.

88. REJ Franey refused (i) as he did not consider the documentation to be relevant. He observed that "[t]he relationship will be defined by the contractual or other documentation entered into after a successful tender, not before it." The claimant, as I have already noted, argues that this was wrong, as the tender documentation was crucial. However, REJ Franey's reasoning appears to me to have been entirely sound.

89. REJ Franey granted (ii) subject to redaction of commercially-sensitive details. The Framework Agreement was duly disclosed. The claimant argued in oral submissions that REJ Franey's paraphrase truncated his request, as he was seeking all framework documentation, including any participation or stakeholder agreement between the Cabinet Office and HMRC. However, having looked at the his request, the paraphrase is accurate, in particular in referring specifically to the commercial relationship between the Cabinet Office and the Scheme Medical Adviser. No specific documents were identified in the request.

90. As to (iii) REJ Franey recognised that it might be argued that there was a chain of agency from HMRC to the Cabinet Office to MyCSP to HAL. He observed: "If the documentation appointing Health Assured as Scheme Medical Adviser comes from MyCSP rather than the Cabinet Office direct, it should still be disclosed by Health Assured." His order included a requirement for HAL and the Cabinet Office to disclose the documentation by which HAL was appointed as scheme medical adviser including any documentation identifying its roles and responsibilities in that capacity. In oral argument the claimant said to me that the disclosure was insufficient to show what the roles of all the players were. That does not support the contention that the judge erred in not making a wider order than he did in response to this particular request.

91. REJ Franey said that (iv), as framed, was too wide, as the allegation of detriment was "about a specific

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review assessment which was required by 30 June 2017." However, he required HAL to disclose the documentation by which, on its case, it was instructed by HMRC to reopen the stage 1 appeal injury benefit claim. Again the claimant maintains that there must be more documentation than has been disclosed, casting light on the overall relationships. Again, that does not support the contention that the judge erred in not making a wider order than he did in response to this particular request.

92. REJ Franey considered (v) to be too broad as it was "a matter for the final hearing, not for this preliminary hearing." That appears to me to have been plainly right.

93. This proposed appeal is not arguable. I will not permit it to proceed to a full hearing and it is dismissed.

EJ Slater Decision of 8 April 2021 – Out of Time Appeal

94. EJ Slater's reserved judgment and reasons, striking out the 2017 claim against Health Assured Limited and the 2019 claim against the Cabinet Office, was sent to the parties on 8 April 2021. By an email of 18 April 2021 the claimant applied to the employment tribunal for a reconsideration. By a judgment and reasons sent to the parties on 26 May 2021 EJ Slater refused that application. On 24 June 2021 the claimant submitted a notice of appeal seeking to appeal against both decisions.

95. The EAT identified that the proposed appeal against the substantive judgment had been instituted 35 days out of time. The claimant applied for an extension of time by email of 23 August 2021, which set out his reasons in support. The Registrar directed that to be considered at the hearing before me. By email of 9 September 2021 HAL's representatives set out six short bullet points in opposition to the application and indicated that they would not appear at the hearing. The Cabinet Office's written submission in opposition was set out within Mr Redpath's skeleton argument. The claimant's additional written skeleton of 23 September 2021 set out some further submissions from him on this issue. It also asserted that HAL had provided no argument. I therefore reminded the claimant that they had put forward their six bullet points in their representatives' email of 9 September 2021. He then located his copy, re-read it and made a further oral submission in response to it. He also made further oral submissions on this on day two.

96. There is no dispute, and I find, that the appeal against EJ Slater's 8 April 2021 decision was instituted 35 days out of time. The EAT has the power to extend time. A number of principles discussed in the authorities

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guide the exercise of that power. Many of them were reviewed and restated by the Court of Appeal in *Green v Mears Limited* [2019] ICR 771. I note the following pertinent points.

97. First, a party does not have a right to an extension of time. It is something that must be justified by way of an exception to the ordinary time limit. That applies to all late appeals, even those that are late only by seconds. Secondly, the time allowed to appeal, being 42 days, is generous. Thirdly, it is relevant that a party who is seeking to appeal has, by definition, already had a consideration and adjudication in the tribunal below. The interests of finality in litigation fall to be taken into account. Fourthly, in principle, no particular additional indulgence should be given to litigants in person, simply on account of their status, as such, alone.

98. Where a party has applied to the tribunal itself for a reconsideration, that does not have any effect on the time limit for appealing the original decision. This is clearly highlighted in the guidance materials produced by the tribunal service, to which parties are sent links and which are readily available online.

99. In the given case the EAT must consider three questions: (a) what is the reason for the default? (b) does that reason provide a good excuse? (c) in any event are there exceptional circumstances justifying an extension of time? Whilst every case turns on its own particular facts, many of the reasons commonly put forward, will not ordinarily be regarded as a good excuse or amounting to exceptional circumstances.

100. Some very general guidance was given in another Court of Appeal decision, *J v K* [2019] ICR 815, about cases where the impact of mental ill health or disability is relied upon. Consideration should be given to whether the evidence shows that the appellant indeed suffers from mental ill health. Usually that will require some sort of clinical evidence. If so, consideration needs to be given to whether it has impacted on the lateness of the appeal. Medical evidence may be relevant to that. The EAT may also take account of other evidence of what the individual was or was not able to do during the relevant period. Where the EAT is satisfied that the delay has been significantly caused or contributed to by mental ill health, an extension will usually be appropriate, although there may be some cases where, taking account of the interests of other parties, it is not.

101. In summary, the claimant advanced the following points. There was a lack of clarity in the original reasons, and so he had requested a reconsideration. It appeared that the tribunal had then delayed its response. He referred to the fact that he is a litigant in person, has family responsibilities and works long and irregular hours. He also said that his functioning was impaired by anxiety and depression. He tries not to think about

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the litigation all the time. He confirmed that he was aware of the time limit. He did not claim not to know that time was running from the date of promulgation of the original decision. It simply went out of his mind.

102. I accept entirely that the claimant has been open and candid with the EAT about this matter. However, his family and work circumstances, the fact that he is a litigant in person, and that there were a number of ongoing strands to this litigation, do not, separately or together, constitute a valid excuse. It was his responsibility to keep track of the matter and to present a timely appeal if he wished to challenge the decision. I have taken into account the information I have about his mental health, and have assumed, in his favour for this purpose, that his condition had not materially improved by spring 2021 from that which was diagnosed in 2018. But he did not claim to have had any particular severe or prolonged depressive episode during the relevant period, and he was clearly able, during that period, to engage in correspondence about the litigation.

103. I conclude that there is neither a sufficient excuse, nor any other exceptional circumstances, that would support the grant of an extension of time at all, and certainly not of 35 days. That application is therefore refused, and the appeal against EJ Slater's substantive decision is therefore dismissed.

EJ Slater reconsideration decision – rule 3(10)

104. I note that, in respect of all the rule 3(10) matters before me, I have, in the established way, given fresh consideration to the matter, in light of all the material available to me, and submissions that I had, both in writing and oral, from the claimant. I have not limited myself to considering the reasons given by the judge who reviewed the proposed appeal on paper under rule 3(7), though where I in fact agree with them, I say so.

105. The claimant's proposed appeal against EJ Slater's reconsideration decision is in time. I have to decide whether the proposed grounds of appeal are arguable. It appears to me that he contended, in his reconsideration application, that the original decision was wrong; and contends in his proposed appeal that EJ Slater was, for that same reason, wrong not to grant a reconsideration. But the fact that a party contends that the original decision was itself wrong would not normally be a proper ground for granting a reconsideration. The route by which to pursue such contentions is a timely appeal. There has to be something of a different character to make it appropriate and in the interests of justice for an employment tribunal to revisit its own decision.

106. In her reconsideration decision EJ Slater went through all the strands of the reconsideration

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application, and correctly concluded, it appears to me, that none of them provided an appropriate basis for a reconsideration. I agree with HHJ James Tayler's rule 3(7) reasons in this respect. In oral submissions to me the claimant said that she ignored the fact that she did not (on his case) have all the relevant documents before her. But she correctly took the approach that it was not appropriate for her to revisit the previous decision on the claimant's disclosure application; and she properly decided both the original matter, and the reconsideration application, on the basis of the material before her. This proposed appeal is not arguable, and I dismiss it.

Estoppel Point

107. As I have dismissed the appeal against REJ Franey's decision to strike out the claims against MyCSP, HML and the Minister, those respondents do not, as it turns out, have to rely on their additional estoppel point. However, in case I am thought to be wrong in other respects, and as I had submissions on it from Mr Morgan (with which counsel for HML and the Minister associated themselves), and a response from the claimant on the point, I will address it.

108. As I have described, the decision of EJ Slater, though specifically concerned with the status of the Cabinet Office and HAL, and the agency argument in relation to them, in fact considered the wider picture. Its findings of fact, consideration of the law, and application of the law to the facts, identified that the source of MyCSP's authority was the Cabinet Office ([90]-[91]). It also established that the Minister was not an agent of HMRC any more than the Cabinet Office was, as it identified (at [85]) that his power derives from legislation. As the same Framework Agreement was novated from one medical provider to the next, her reasons in respect of HAL also clearly hold good in respect of HML.

109. Having regard to the common elements of the overall litigation and its management, to the relationship between the Minister and the Cabinet Office and to the fact that HML stepped into the former shoes of HAL under the same Framework Agreement, this is one of those occasions on which the difference in parties would not create a barrier to a contention of estoppel by abuse of process. (See: *Johnson v Gore-Wood & Co* [2002] 2 AC 1 at 32C-G.) Accordingly, had I considered that the agency issue had not been properly determined by REJ Parkin, in respect of MyCSP, HML and/or the Minister, I would have concluded that it *had* been determined by EJ Slater's decision, and could not be further revisited in this litigation hereafter.

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REJ Franey's 2021 Case Management Decisions

110. I turn to the related appeals concerning the three case-management orders made by REJ Franey in the summer of 2021. These dealt with various applications and matters relating to the forthcoming full merits hearing of the live complaints against HMRC, including responding to multiple emails from the claimant.

111. The notice of appeal, and claimant's submissions, in relation to these decisions, are discursive and unfocussed. There is a general complaint that REJ Franey's actions were "discriminatory". This appears in particular to relate to the fact that the 26 July 2021 orders were made on paper, following the postponement of a case management hearing that was to have taken place on an earlier occasion. This is discussed in the minute of hearing. It appears to me that there was no unfairness to the claimant in REJ Franey dealing with the matters concerned on paper, and that the claimant had had a full opportunity to make submissions about them all.

112. There is a generalised allegation of bias. I cannot see any basis for this. The decisions identify that the claimant's correspondence and arguments have been considered, and are all properly reasoned. The claimant has repeatedly put on record his general lack of faith in the tribunal. But a decision being not what he had sought, or considers to be correct, is not evidence of bias.

113. The claimant applied to be permitted to call expert evidence on the question of the legality of MOIS. As I have described, his case that it was illegal and fraudulent was at the heart of his claimed disclosures, and he considers that the fact that it has never been accepted that he is correct about that is itself a grievous wrong. But REJ Franey was right to say that the lawfulness of MOIS, as such, is not an issue that needs to be determined in order to adjudicate whether he made protected disclosures or the other issues raised by his complaints that are live before the tribunal. The claimant also contends that, if he is right about MOIS being illegal, then the conduct for which HMRC says he was dismissed could not properly have been regarded as conduct undermining the relationship and justifying his dismissal; and therefore that the issue does have to be determined for that reason. But this, too, is legally misconceived.

114. The claimant sought access to the audio recording of the hearing before EJ Slater. He had been provided with a transcript, and REJ Franey was right to hold that there was no exceptional good reason to justify being given access to the audio recording as well.

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115. The claimant sought an order requiring HMRC to disclose the identity of its whistleblowing champion. But I agree with REJ Franey that that was not relevant, as such, to any issue that the tribunal would have to decide, though it might or might not be apparent from the evidence generally in the case.

116. The claimant sought to make further applications for disclosure relating to the agency issue. But REJ Franey was right to refuse those, on the basis that all such issues had been determined and were no longer live.

117. The claimant sought an order that HMRC disclose whether it had obtained an injunction suppressing reporting of his concerns or the employment tribunal case. He appears to have surmised that there might have been a "super injunction" of which he was unaware. There appears to have been no basis at all for this unusual application, other than the claimant's fears and suspicions. The claimant and the tribunal itself would have to be made aware of any such injunction in order to ensure that it was enforced. In any event, the proper course for a party who believes that reporting restrictions are required in relation to tribunal proceedings, is to apply not to the court, but to the tribunal itself. Again, had such an application been made, the claimant would have been notified of it. The judge also rightly pointed out that if there were wholly separate litigation seeking to restrain publicity attaching to HMRC's alleged wrongdoing, that would not be a matter for the tribunal.

118. The notice of appeal refers to an application for information relating to pay scales, for the purposes of the claimant's schedule of loss, which had not been responded to when it was presented. If the claimant considers that this is relevant and still outstanding for a response, he can raise it with the tribunal.

119. Case management decisions are, like any judicial decision of the tribunal, amenable to challenge if the tribunal has erred in law. But the point that was explained by HHJ James Tayler's paper decision is that tribunals have a wide discretion in such matters. It is not the function of the EAT to case manage proceedings in the employment tribunal. The tribunal's general directions for preparations for the final hearing were all reasonable and took proper account of all the claimant's circumstances. The tribunal was not wrong to refuse to postpone or stay the proceedings because of the pending appeals. There is no arguable basis for the EAT to interfere with any of the case management decisions challenged by this group of appeals. They will be dismissed.

Outcome

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120. The appeal against REJ Parkin's decisions in relation to the strike out of the PD detriment claims against HMRC (EA-2020-000093- RN) is allowed in respect of detriments 7, 9 and 14. The strike-out of those three detriment complaints is quashed. That appeal is otherwise dismissed.

121. The appeal against REJ Parkin's decision to strike out the claims against MyCSP, Health Management Limited and the Minister for the Civil Service (EA-2020-000093-RN) is dismissed.

122. There is no reasonable basis for the appeal in respect of the disclosure orders made by REJ Franey sent to the parties on 16 January 2021 (EA-2021-000354-RN) and it is dismissed.

123. The proposed appeal against the decision of EJ Slater sent to the parties on 8 April 2021 (EA-2021-000684-RN) is out of time and the application to extend time is refused. It is therefore dismissed.

124. There is no reasonable basis for the appeal against EJ Slater's reconsideration decision (EA-2021-000685-RN) and it is dismissed.

125. There is no reasonable basis for the appeals against REJ Franey's June and July 2021 case management decisions (EA-2021-000692-RN, EA-2021-000693-RN, EA-2021-000694-RN) and they are dismissed.

126. There are two final points to make.

127. First, the claimant does still (unless for some reason this has changed since the hearing before me) have live complaints against HMRC of both ordinary unfair dismissal *and* unfair dismissal for the reason or principal reason of having made protected disclosures, proceeding to a full merits hearing in the tribunal. Although some complaints of detriment were properly struck out because they relate to the dismissal, that is precisely because complaints about the dismissal will fall to be considered, so far as relevant, as part of the unfair dismissal complaints, and not as separate complaints of detrimental treatment.

128. Secondly, the claimant has included in his submissions a request for permission to appeal "if any appeal is not upheld". But an application for permission to appeal can only be made against an actual decision, once given. If any party wishes to appeal against any of my present decisions, they will need to make an application for permission to appeal either to the EAT or the Court of Appeal, within the respective time limits, identifying which decision they are seeking permission to appeal against, and why.

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