EMPLOYMENT TRIBUNALS

Claimant: Mr R Wagener

Respondent: The Right Honourable Michael Gove MP

Heard at: Manchester (public hearing via CVP)

On: 16 November 2022

Before: Judge Brian Doyle (sitting alone)

Representation:
Claimant: In person
Respondent: Ms Naomi Ling, Counsel

RESERVED JUDGMENT

1. The Tribunal considers that Mr Gove has apparently been wrongly included as a party (a respondent) to this claim. The Tribunal determines that he should be removed from the proceedings under rule 34 accordingly.

2. Acting under rule 34, the Tribunal orders that the Cabinet Office shall be joined as a respondent to the claim in substitution for Mr Gove.

3. The respondent's present application to strike out the claim, whether under rule 34 or rule 37, is refused.

REASONS

1. This is a preliminary hearing to consider two preliminary questions concerned with the correct respondent to a claim presented on 13 June 2021 [2-13], following Acas early conciliation between 28 May 2021 and 7 June 2021 [1]. An ET3 response to the claim is dated 14 July 2021 [14-25].

2. A case management hearing before Employment Judge Frazer on 5 October 2021 identified the preliminary questions as being: (1) whether The Right Honourable Michael Gove MP is the correct respondent and, if not, whether the claim against

him should be struck out; and (2) if appropriate, to identify who the correct respondent(s) to the claim would otherwise be.

3. The Tribunal had before it an electronic bundle of documents comprising 244 pages, together with a separate index. References to the bundle appear in square brackets in these reasons. The Tribunal also had witness statements from Mr Robert Wagener, the claimant (11 pages); and, on behalf of the respondent, from Mr Michael Gove (2 pages) and Mr Colin Hennem (9 pages). It was agreed that the witness statements would be taken as read and that they did not need to be tested by cross-examination or questions. The witness statement of the claimant was treated as his written submissions. Counsel for the respondent, Ms Naomi Ling, presented written submissions, supported by various materials.

4. The hearing lasted just over 2 hours. The Tribunal reserved its judgment on the preliminary questions. It considered its decision "in chambers" during the rest of the sitting day and it wrote up its decision thereafter.

The claim

5. The claimant was employed by Her Majesty's Revenue and Customs (HMRC) from 3 October 1983 until his retirement on 30 April 2021. He has Type 1 Diabetes. He was also diagnosed with ME shortly before his retirement. The claimant was born on 30 April 1961. He retired at the age of 60.

6. That was earlier than he might have retired because he wanted to maximise the quality years of his retirement. As a result of that decision, he retired with a pension and lump sum calculated in accordance with his pensionable pay and reckonable years of service as at the date of retirement. Had he not retired when he did, he would have had additional reckonable years of service at a higher rate of pensionable pay, which would have increased his pension and lump sum payments. He would have benefited from a 3 year pay deal that would have increased his rate of pay.

7. The basis of his claim is that he had written to the relevant Minister, Mr Gove, in March and April 2021 requesting him to exercise his discretion under the Civil Service Pension Scheme rules to grant him additional years of pensionable service because there were special circumstances that justified the exercise of discretion. It does not appear that his request was determined.

8. The claim contains complaints of disability discrimination. The claimant confirmed that it did not contain complaints of age discrimination (although the relevant box for such a complaint had been ticked). It appears that, subject to any further particularisation that might be required, the claimant relies primarily upon sections 15 and 20-21 of the Equality Act 2010, by reference to section 61 of the Act.

The response

9. The respondent's initial response to the claim was that the claimant wrote to Mr Gove on 1 March 2021 and 30 April 2021. The Civil Service & Royal Mail Pensions Team in the Cabinet Office replied to the first letter on 17 March 2021, but it appears that the claimant did not receive that letter. The claimant's second letter dated 30 April 2021 was misdirected within Cabinet Office after it had been received, but a response for the claimant was being prepared at the time that the ET3 was being presented.

10. The respondent noted that the claimant has named The Right Honourable Michael Gove MP as the only respondent to the claim. It submitted that Mr Gove was not a valid respondent to the claim because the claimant does not have any cause of action against Mr Gove. The correct respondent, in place of any Minister who may exercise such discretion as may be involved, should be the Cabinet Office. The Tribunal was asked to amend the record accordingly. The respondent denied discrimination, whether on grounds of age or disability.

The Cabinet Office's position

11. The position of the Cabinet Office is set out in the witness statement of Mr Hennem. He is employed by the Cabinet Office as Pensions Technical Manager in the Pensions Policy, Strategy and Governance Team. He has been employed by the Civil Service since April 1986 and has been working in the pensions team since February 1997. He has been involved in most aspects of the Civil Service Pensions Scheme – including member's benefits, reckonable service and pensionable earnings, risk benefits (ill-health and death benefits), transfers, additional voluntary contributions (including member-purchased added years/added pension), the Civil Service Injury Benefits Scheme and the Civil Service Compensation Scheme. For the last 7 years he has worked as a Pensions Technical Manager, primarily involved in the interpretation of the scheme rules/regulations for the scheme administrator, employers, and other stakeholders.

12. Rule 2.24 of the Principal Civil Service Pension Scheme Section II (The 1972 Section) (the PCSPS) provides for a discretion to be exercised whereby additional years may be added to a PCSPS member's reckonable service, for the purposes of calculating their pension entitlement. The amount of added years that can be purchased by the employer under this Rule is limited to whatever added years would be required to bring the member's total reckonable service up to 40 years by the pension age. When added years are granted under this Rule, the amount of reckonable service will increase, but not the amount of pensionable earnings. Granting added years does not increase the final salary used in the calculation of pension benefits – only the years of reckonable service.

13. In a letter to Mr Wagener dated 17 March 2021 (it appears that this letter was not received by Mr Wagener and so it was re-sent on 21 July 2021) it was explained to him that rule 2.24 "gives the Minister discretion to grant a scheme member added years of reckonable service. However, it does not treat the member as if they had remained in service for that additional period of time. So, if the Minister were to grant you the additional period of reckonable service you have asked for, it would

increase your reckonable service by this amount, but the pensionable earnings used to calculate your pension would still be based on your earnings up until your last day of service – i.e. they would not be based on what you would have earned if you had remained in service until 31 May 2022" [104].

14. Rule 2.24 has been a relatively little used rule. It was initially a tool that departments could use to aid recruitment. The original wording of Rule 2.24 [30] said that "the Civil Service Department" had discretion to grant additional years' reckonable service, if there were special circumstances to justify it, but that "a decision to grant added years under this rule must be taken within 6 months of the date of entry into the Civil Service".

15. An extract from the Joint Committee on Superannuation's ("JCS") 1972 report covered added years [31]. JCS was a sub-committee of the National Whitley Council – the main forum for negotiation between the "Official Side" (Civil Service management) and the "Staff Side" (the Civil Service trade unions). The JCS was set up to make recommendations for changes to the Civil Service pension arrangements in the early 1970s. Its report (known as the "Blue Book'") informed the policy for what would become the PCSPS. The focus of the unions in 1972 was for the discretion to grant added years "at management's expense" for late joiners who could not accrue 40 years reckonable service before the pension age. At the time of this report that issue is said to remain "unresolved" (see paragraph 86 of the report) and the wording about decisions being taken about added years in the first 6 months' of service was included in the original Rule 2.24.

16. This approach was again reflected in the guidance from the Pay and Conditions of Service Code. See paragraph 9028 at [32], which is based on the original wording of Rule 2.24. The Code (from 1981) described the discretion as being for the Treasury, reflecting a transfer of functions in the intervening period (those functions have since been transferred to the Minister for the Civil Service).

17. From the outset, the intention was that responsibility for the additional years sat with the department, and that it was originally a discretion that could be exercised only for new entrants into the Civil Service.

18. In 1995, a decision was taken to remove the requirement that the added years be granted within the member's first 6 months of service [39]. Correspondence between the Cabinet Office and the Treasury Solicitor's Department dated 2 June 1995 discussed proposed amendments to the PCSPS rules. In relation to Rule 2.24 it was proposed that the 6 months' time limit should be removed because "there are occasions where the appointment terms for key staff are renegotiated and it is considered appropriate that they should be granted added years, even though they first entered the Civil Service more than 6 months previously." It also noted that the purpose of the rule is to "aid recruitment, or more accurately now, recruitment and retention". It also noted that, although there is nothing on the face of the Rule itself to identify it as a recruitment and retention provision, it would be more appropriate to put that in the supporting Manual than in the Rules themselves, See the Manual [86]. The response from the Treasury Solicitor confirmed that "there is no objection to a discretion being exercised pursuant to general policy guidelines, so long as the application of those guidelines is not so rigid as to fetter

the reality of the discretionary element" [49]. See the Principal Civil Service Pension Scheme (Amendment) Scheme 1995 (No. 2), which removed the 6 months' time limit [57].

19. In practice, Rule 2.24 has been used by departments as a recruitment and retention tool. Each time the same process has been followed. The individual's employer submits a business case to the relevant team within the Cabinet Office – the Civil Service & Royal Mail Pensions (CSRMP) Team. It then considers whether the employer had demonstrated that the grant of added years is in the public interest (for example, it will enable the employer to recruit/retain an individual whose service is vital to the delivery of the Government's stated policies). If the team concludes that the employer has made a persuasive case, it then asks the Scheme Actuary (the Government Actuary's Department) to calculate the cost of purchasing the added years requested. If the employer is willing to meet the cost of the purchase, the team then approves the grant of added years. Although Rule 2.24 itself does not specify that the employer must meet the cost, it is a long-standing principle in the Civil Service that the organisation that seeks the implementation of a particular measure (for example, the granting of added years to a member of its staff) must meet the cost of that measure.

20. There are a handful of examples of this process happening in practice in the bundle at [69], [72] and [81]. In all of these cases, the decision in relation to whether to grant the request is made by officials in the Cabinet Office pensions team. At no point in any of these cases is the question referred personally to a Minister.

21. The question of Ministerial discretion is another point that was raised with the Treasury Solicitor in the correspondence in the bundle. At the point that there was a transfer of functions under the PCSPS from HM Treasury to the Minister for the Civil Service, the question was explicitly asked – "if we replace references from Treasury to the Minister for the Civil Service, how do we deal with individuals querying why the Minister has not personally dealt with their cases? Would we say something like 'the Cabinet Office (OPSS) has exercised its discretion/made a determination on behalf of the Minister of the Civil Service'? It has been suggested here that the Carltona principle should be explained at the front of the published rules. What do you think?" [34]. The reply was that "if individuals query why the Minister has not personally dealt with their cases it would be appropriate to use the wording that you suggest, but I would not have thought it necessary to explain the Carltona principle at the front of the published rules" [35].

22. This was the explanation that was provided to Mr Wagener by the Cabinet Office in its letter dated 28 July 2021 [110]. In that letter it says "there is no formal delegation from Michael Gove to officials. The 'Carltona principle' which was established by the case of Carltona Ltd v Commissioners of Works (1943) confirms that the actions of civil servants are deemed to be the actions of the Government minister for whom those civil servants work."

23. Mr Hennem is aware that Mr Wagener has challenged whether the Carltona principle does or should apply to his request, or to this rule of the PCSPS. In particular, Mr Wagener requested, by way of an FOI, information about the amount of time that Cabinet Office officials have spent attending to matters in the PCSPS

rules that only mention the Minister by name. The Cabinet Office was not able to answer this question, because the amount of time spent by Cabinet Office officials attending to the PCSPS rules is not a metric that the Cabinet Office records or measures [138].

24. In Mr Hennem's view, however, this does not mean though that there is no evidence whatsoever that it was logistically impossible for the Minister to deal personally with the number of matters in the PCSPS that are said to be the sole responsibility of the Minister, as Mr Wagener has stated at [122]. There are 273 references to the 'Minister' in the PCSPS. Most of them are solely to the Minister. Mr Hennem does not accept that, just because some references say - 'or if the Minister so directs, to the scheme administrator' – this means that in no other instance can the discretion or decision reserved to the Minister be delegated. The scheme administrator is MyCSP, and what this specific delegation means in practice is that there are certain delegations under the PCSPS that can be exercised by MyCSP, without Cabinet Office officials being involved

25. In terms of the logistics of the Minister dealing personally with matters under the PCSPS, there are two other sections to consider (the 2002 Section and the 2007 Section) and Alpha, which was introduced as the Civil Service Pension in 2015. These other pension arrangements also contain matters that are the responsibility of the Minister. In addition, the Minister's responsibilities extend far beyond just the Civil Service Pension arrangements, and so decisions such as those made under Rule 2.24 of the PCSPS are just one element of the Minister's role. To give a rough idea of the scale of the work involved in responding to queries about the PCSPS and other pension and compensation arrangements, according to figures published on gov.uk, as at 31 March 2021, the Civil Service headcount was 484,880 – the majority of these individuals participate in the Civil Service Pension arrangements. There are currently 65 people working on various aspects of the Civil Service pension and compensation arrangements. The vast majority of these people are full-time civil servants who spend the whole of their working time on Civil Service pension/compensation matters. This is a sizeable team undertaking a large volume of work. In Mr Hennem's opinion, it would not be logistically possible for the Minister to deal with all of the requests personally.

26. The Scheme rules routinely refer to the Minister, but most operational matters are in practice normally dealt with by CSRMP on the Minister's behalf. This extends to the exercise of discretions, unless they involve particularly novel or contentious issues, or financial consequences for the Scheme, in which case they would potentially be referred to the Cabinet Office Minister with responsibility for Civil Service Pensions and/or the Cabinet Office Permanent Secretary.

27. Mr Wagener's request has not yet been determined. HMRC will need to fund any request for a grant of additional years for Mr Wagener. CSRMP wrote to Mr Wagener on 17 March 2021 (although it appears that this letter was not received by Mr Wagener and so was resent on 21 July 2021) to explain to him that "added years granted under rule 2.24 are paid for by the member's employer. As such the employer needs to submit a business case to the Minister asking him to grant added years in a particular case. If the Minister agrees to this, the scheme actuary (the Government Actuary's Department) calculates the cost of those added years

and they are only granted to the member in question once the employer pays the amount over to the scheme. If you still wish to pursue the added years route, you will need to take this up with your employer in the first instance" [104]. It is understood that Mr Wagener has now put his request to HMRC.

28. If a business case is received from HMRC, then the process for considering it will sit first with Cabinet Office officials in CSRMP. They will provide a consistency check, and they may make an initial decision that a business case does not meet the necessary criteria – for example, if the business case does not show how the recruitment/retention of the individual in question would be of benefit to the public – and that the discretion in Rule 2.24 should not be exercised. This decision would most likely not be referred to a Minister, although they may go back to the employing department with some comments, if they were minded to re-submit an amended business case.

29. However, if the employing department (HMRC for Mr Wagener) put in a convincing business case, and CSRMP was minded to approve it, then they might think it appropriate to refer this upwards for further consideration and approval. There are, however, a number of steps to go through before a Minister would be consulted, and the Minister would not normally be involved in an issue that affects just one individual and which has a negligible impact upon public finances (and where the cost would be met from another department's budget). Any submission to a Minister is first cleared through the Government Chief People Officer and/or the Cabinet Office Permanent Secretary. It is possible that either the Chief People Officer or Permanent Secretary might sign off a request without referring it on to a Minister. Whether or not a matter will be referred to a Minister will depend on a number of considerations, such as the number of employees affected, and the impact on public finances. It may also depend, for example, on the level of interest taken by a particular Minister in a particular subject area, and the economic climate at the time.

30. Under the PCSPS "Minister" is defined as "the Minister for the Civil Service" (rule 1.13(g)). The Minister for the Civil Service is the Prime Minister. It is clearly not logistically possible for the Prime Minister to consider every individual request that is received in relation to the PCSPS and other Civil Service pension arrangements, and so responsibility for the PCSPS is delegated amongst Ministers. From February 2020 to September 2021, Mr Michael Gove was the senior minister of the Cabinet Office, which is the department where responsibility for the Civil Service pension arrangements sits. However, the Minister for the Cabinet Office delegates day-to-day responsibility for Civil Service pensions to one of the Cabinet Office's junior ministers.

31. The decision in relation to Mr Wagener's case would (or if a business case is received, will) not be referred to Mr Michael Gove personally, as he is no longer a Cabinet Office Minister. Nor would it have been referred to him had the request been determined before Mr Gove changed roles, in light of the delegated responsibility amongst Ministers set out above, and the delegated authority of Cabinet Office officials to consider a business case on behalf a Minister, and to determine whether a matter requires a further referral to a Minister, before a decision is made. Any decision in relation to Mr Wagener's request, if it is referred

to CSRMP in due course, will be taken by Cabinet Office officials, potentially with a referral to a Minister to give final approval to any recommendation, as there is no reason why his request could not be determined in accordance with the Carltona principle, on behalf of the Minister for the Civil Service.

Mr Gove's position

32. Mr Gove was not present at the preliminary hearing. He did not give live evidence. However, his position is clear from his witness statement. That position has not been directly challenged.

33. Mr Gove was appointed as Secretary of State for Levelling Up, Housing and Communities on 15 September 2021 and served until 6 July 2022. He was reappointed to that office from 25 October 2022 and he is also Minister for Inter-Governmental Relations. He was previously Chancellor of the Duchy of Lancaster from July 2019 to September 2021. He was also Minister for the Cabinet Office from February 2020 to September 2021.

34. Prior to giving his statement, Mr Gove had not seen the two letters that Mr Wagener sent, addressed to him, dated 1 March 2021 and 30 April 2021, nor the two letters that were sent to Mr Wagener in response to those letters dated 17 March 2021 and 21 July 2021. He did not make any personal decision in relation to the request made by Mr Wagener in his letters of 1 March 2021 and 30 April 2021. The letters that were sent to Mr Wagener in response to his letters addressed to Mr Gove were written by members of the Civil Service and Royal Mail Pensions Team, within Cabinet Office, who have operational responsibility for the Civil Service Pensions arrangements. In Mr Gove's opinion, it is entirely proper that Civil Service officials respond to letters such as these which may be addressed to an individual Minister. The Civil Service and Royal Mail Pensions Team are authorised to respond to operational queries regarding the Civil Service Pensions arrangements.

35. Mr Gove has no personal knowledge of the facts giving rise to Mr Wagener's claim, nor has he personally made any decisions in relation to Mr Wagener's case. He has authorised Cabinet Office officials, with operational responsibility for the Civil Service Pensions arrangements, to deal with this claim on his behalf. This is because he considers that he has no information to provide that is relevant to the case.

Submissions on behalf of the respondent

36. The Tribunal had before it written submissions prepared by counsel for the respondent, Ms Naomi Ling, which were spoken to.

37. The claimant brings claims of age and disability discrimination arising out of his membership of the 1972 section of the Principal Civil Service Pension Scheme (PCSPS). He asserts that his pension on retirement should have been augmented to reflect the salary that he would have received had he remained in employment for two more years. He says that as a result of his disability, diabetes, he retired early at the end of April 2021 and that as a result of this he was unable to benefit from a 13.56% pay rise, retiring having had the benefit of an increase of only

2.75%. This negatively affected the value of his pension and lump sum on retirement.

38. The claimant has yet to fully particularise his claim, in particular identifying the provision, criterion or practice (PCP) required by section 20 of the Equality Act 2010. Additionally, it is not clear on what basis any claim for age discrimination may be brought. It appears that only section 20 (reasonable adjustments) is relied upon [8].

39. This preliminary hearing has been listed to determine: (1) Whether Michael Gove is the correct respondent and, if not, whether the claim against him should be struck out and (2) If appropriate, to identify who the correct respondent(s) to the claim would otherwise be.

40. Is Michael Gove the correct respondent?

41. The rules of the PCSPS (1972 Section) refer to a 'minister' who has powers and duties under the scheme. That Minister is the Minister for the Civil Service who has the power to make, maintain and administer schemes pursuant to the Superannuation Act 1972. Section 1(2) of the Superannuation Act gives the Minister the power 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.

42. The Minister also has the power to delegate his duties to civil servants pursuant to the 'Carltona' principle. As for whether the Carltona principle should be considered to arise in a particular case, this depends on an open-ended examination of the following factors: (a) The framework of the legislation; (b) The language of pertinent provisions in the legislation; and (c) The importance of the subject matter (see *R v Adams* [2020] UKSC 19 at paragraph 26).

43. Under the provisions of the 1972 section of the PSCPS, there is express delegation to the 'scheme administrator'. This is largely delegation of administrative functions, though there is further express permission to delegate some aspects of decision making and the exercise of discretion to the scheme administrator. Colin Hennem explained in his witness statement that the scheme administrator is a separate body known as MyCSP and it is submitted that the express reference to delegation to the scheme administrator is entirely consistent with the continued power to delegate to other officers of the Crown contained in section 1(2) of the Superannuation Act.

44. In any event, the question of delegation is not key to the question of whether a claim can proceed against the respondent personally. The duties contained within the PCSPS fall on the Minister for the Civil Service in his corporate capacity, which is as a corporation sole (see Ministers of the Crown Act 1975, section 6 and paragraph 5 of Schedule 1). The respondent's actions as regards the claimant were performed in his capacity as Minister.

45. However, pursuant to section 17(3) of the Crown Proceedings Act 1947, all civil proceedings against the Crown are to be instituted against the appropriate

authorised Government department. The appropriate department in this case would have been the Cabinet Office. Pursuant to section 205(6) of the Equality Act 2010, these provisions apply in relation to proceedings brought under that statute.

46. That is not to say that Ministers cannot be named in their personal capacity. However, the circumstances in which this may be done are only where the Minister has committed or authorised the commission of the wrong (*M v Home Office* [1994] 1 AC 377 at 408D, 408F and 409H). This position tallies with the position in relation to personal liability of individuals under the Equality Act 2010. An employer is liable under section 39 of the Equality Act, and the managers of a pension scheme under section 61. The liability of an employee or an agent under section 110 arises only where the individual does something that is a contravention of the Act. In this case it can be seen from the witness statements of Michael Gove and Colin Hennem that the respondent has had no involvement with the claimant's case at all.

47. Should the claimant's claim be struck out?

48. There is power to substitute one respondent for another pursuant to rule 34 of the Tribunal Rules of Procedure. However, the respondent requests that the claim is struck out in its entirety on the grounds that it does not have reasonable prospects of success, either against the Cabinet Office or on the underlying merits of the case in total.

49. In respect of the Cabinet Office, the question of whether to exercise its discretion has not yet been made pursuant to rule 2.24 of the 1972 Section of the PCSPS. The internal process adopted by the Cabinet Office is that, where an employer (in this case HMRC) wishes to pay for added years of reckonable service for a member, it needs to make a business case to the Scheme Manager. In this case, there has been no such business case made and therefore the discretion has not been exercised.

50. In relation to the nature of the claimant's case, it is not usually the case that the Employment Tribunal will find that it is a reasonable adjustment to extend pay (for example, by increasing sick pay) for a disabled employee. The purpose of the disability discrimination legislation is to assist disabled persons to obtain employment and assist them into the workforce, rather than simply to put more money into the wage packet of the disabled person: *O'Hanlon v Revenue and Customs Commissioners* [2007] ICR 1359 at paragraph 68 of the EAT judgment, cited at paragraph 28 of the Court of Appeal judgment, and approved at paragraph 57 of the Court of Appeal judgment. In an extension of this reasoning, the EAT held in *Mylott v Tameside NHS Trust* UKEAT/0352/09/DM (paragraph 53) that the duty to make reasonable adjustments did not extend to enabling a disabled employee who was not able to work to leave employment on favourable terms.

The claimant's submissions

51. The claimant's witness statement was effectively his written submissions, which the Tribunal treated as such, and to which he spoke.

52. The claimant submitted that, as Minister for the Civil Service, rule 2.24 of the Principal Civil Service Pension Scheme Rules 1972 (PCSPSR) [155] gave the respondent the discretionary power to grant the reasonable adjustments the claimant had sought in his ET1 [8].

53. As the respondent was responsible for the operation of rule 2.24 of the PCSPSR, the claimant argues he must also have been responsible for the guidance relating to this rule. This guidance [159], however, appears to limit the operation of rule 2.24 by reference to budgetary considerations (that is, the need for further employer contributions). The claimant also understands that it was this pre-condition that resulted in the failure to agree the reasonable adjustments he had sought. The claimant argues that this is contrary to the decision in the case of *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16 at paragraph 46 [213], which held that budgetary considerations were not in themselves 'legitimate aims' for the purposes of determining whether discrimination was legal.

54. The claimant contends that Michael Gove is a valid respondent, as he was a 'responsible officer' of the PCSPS, as the senior manager of the pension scheme (section 61(4)(a) of the Equality Act 2010) [167] and as a person who held relevant powers of appointment (section 61(4)(c)) [167]. The claimant contends that the respondent is also a valid respondent under the third-party rules in Schedule 8 to the Act because: (a) the respondent and others acted together as 'principal and agent' respectively (section 109) [169]; (b) the respondent sanctioned 'instructions' [159] that led to illegal discrimination (section 111) [170, 171]; and (c) the respondent thereby assisted others in this discriminatory behaviour (section 112) [172].

55. The claimant says that it has been argued that the respondent is not a valid respondent because: (a) he has delegated his discretionary power to others; and (b) because he ceased to be the Minister for the Civil Service on 15 September 2021. The claimant argues that Michael Gove clearly held the ultimate discretion on this matter, as rule 2.24 has not been amended to delegate his powers to others. Given the wording of rule 2.24, the claimant further argues that it would be *ultra vires* for the respondent to completely divest himself of these discretionary powers, according to the most recent commentary on the Carltona principle in *R v Adams* [123-136]. The claimant also seeks to establish that the respondent should have exercised his discretion to grant the reasonable adjustments that the claimant sought. If the Tribunal holds that the respondent could and should have done this, then his successor would be duty bound to give effect to that finding. The fact the respondent was no longer the Minister for the Civil Service would be immaterial.

56. The claimant addressed "the facts" as he saw them. He was employed continuously by HMRC (previously the Inland Revenue) from 3 October 1983 to 30 April 2021, when he retired. He is currently unemployed.

57. On 1 March 2021, the claimant sent a letter to the respondent [99-101], asking him to exercise his discretion under rule 2.24 of the PSCPSR [155]. The Minister has discretion to grant added years of reckonable service to a civil servant if there are special circumstances to justify this. The number of added years which may be granted will be subject to the limits set out in rule 2.3 (limit on length of reckonable

service). Subject to those limits, the Minister may determine whether the added years are to be treated as accruing evenly over the period from the date of entry into the Civil Service until the pension age or over such other period as the Minister may specify.

58. The claimant did not receive a reply from the respondent, despite his letter being sent by Recorded Delivery and being signed for at the respondent's official address [102, 103]. The claimant therefore sent a further letter to the respondent on 30 April 2021 [105, 106]. This was also sent by Recorded Delivery and signed for at the respondent's official address [107].

59. As the claimant had not received a reply to either letter, he approached ACAS as a prelude to possible action before the ET. Without the Tribunal exploring the contents of his discussion with Acas, the claimant understood the Cabinet Office's position to be that the claimant had to approach HMRC first. The claimant's position was that the Cabinet Office's position made no sense as rule 2.24 PCSPSR clearly stated that responsibility for the decision lay solely with the Minister, who was identified by the PCSPSR as 'the Minister for the Civil Service' [153]. As a result, he presented an ET1 claim in due course.

60. So far as the legal principles engaged are concerned, the claimant submitted that section 61 of the Equality Act 2010 [167, 168] requires 'responsible persons' of occupational pension schemes (section 61(4)) to make reasonable adjustments (section 61(11)). The rules relating to reasonable adjustments are covered by section 20 [163,164].

61. Section 61(4) defines 'responsible persons' as follows: (a) the trustees or managers of the scheme; (b) an employer whose employees are, or may be, members of the scheme; (c) a person exercising an appointing function in relation to an office the holder of which is, or may be, a member of the scheme. In relation to section 61(4)(a), the PCSPSR refers in several places to 'the Minister' and then to 'trustees or managers', for example, at rule 6.17(ii) [157]. However, the word 'manager' is not a defined term in either the Equality Act or the PCSPSR. It must therefore be given its ordinary dictionary definition of a 'person responsible for controlling or administering an organization or group of staff' (page 1074, OED, Third Edition, 2010 [161]).

62. The claimant submitted that the Minister clearly acts as a *de facto* manager, controlling many of the activities of the pension scheme. In fact, 'the Minister' is referred to no fewer than 273 times in the PCSPSR, which also includes several references to the Minister directing the activities of the scheme administrator, for example, 4.69(iii) [156]. The Minister is also the ultimate arbiter of all questions relating to the interpretation of the pension scheme rules, per rule 1.14 [154].

63. As regards section 61(4)(c), the Minister has an appointing function, with responsibility for appointing both the Scheme Actuary and the Scheme Medical Adviser (1.13h and 1.13j) [153]. There is nothing in the PCSPSR to preclude either of these two office holders from also being 'a member of the scheme', the other pre-condition of section 61(4)(c).

64. Even if it were held that section 61 did not apply to the Minister, however, the claimant argues that one or more of the third-party rules would clearly be relevant. The provisions in Part 8 of the Equality Act 2010 allow discrimination claims to extend to various third parties.

65. Paragraph 358 of the Explanatory Notes to the Act [188] outlines that the overriding purpose of these sections is to ensure that both the person carrying out an unlawful act and any person on whose behalf he or she was acting can be held to account where appropriate. The claimant argues that even if the respondent were not a 'responsible person' of the PCSPS, he was still a person who clearly influenced, if not directed, the way in which the PCSPS operated.

66. In particular, the respondent has argued that the rule in 2.24 of the PCSPSR can only be invoked if an employer provides appropriate funding [159]. If this is correct, then the respondent has permitted the unfettered discretionary powers given to him by rule 2.24 to be administered by others in a way that limits the scope to make reasonable adjustments. If this is the case, then it means that perfectly justified 'reasonable adjustment' requests could be prevented by budgetary considerations alone, for example, if an employer decided not to pay the additional contributions. The claimant contends that this would amount to illegal discrimination, as the Supreme Court held in *Seldon v Clarkson Wright and Jakes* that 'budgetary considerations ...could not in themselves constitute a legitimate aim…' ([2012] UKSC 16, paragraph 46) [213].

67. The claimant argues that section 109 of the Act would apply to the respondent if he required, allowed or otherwise caused subordinate officers to operate rule 2.24 in the way that led to illegal discrimination under the Equality Act (see above). Section 109(2) says that anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

68. Although section 41(5) defines what 'principal' means in the context of contract work, there is no general definition of either the word 'principal' or 'agent' in the Act within its definition section, Schedule 28 [184, 185]. In accordance with the normal rules of legal interpretation, therefore, those words in section 109 must be afforded their ordinary dictionary definitions, modified by reference to their contexts, where appropriate. The standard dictionary definitions of 'agent' and 'principal' are simply 'a person who acts on behalf of another' and 'a person for whom another acts as an agent or representative' (pages 31 and 1,411 of OED, Third Edition, 2010 [160, 162].

69. There is no requirement for this relationship to be the result of a formal agreement or understanding or even for the parties to be conscious that this is the nature of their relationship. This is confirmed by section 109(3), which states that, It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

70. This reading of section 109(2) is confirmed by case law – in particular, the decisions in *Kemeh v Ministry of Defence [2014] IRLR 377* and *Heatons Transport v Transport and General Workers' Union [1972] ICR 308,* as expounded in the more recent decision of *Unite the Union v Miss S Nailard*, *UKEAT/0300/15/BA* [222-242].

In *Unite the Union* (paragraph 46) [230], it was held that that whilst regard must be had for the legal concept of agency, it was not essential that 'the putative agent should have the authority to bind the principal contractually'. Furthermore, paragraph 58 of that decision [231] held that the principal cannot 'avoid responsibility for acts done with his authority by merely saying to his agent: "Of course you must not do anything illegal" or (in the context of the Equality Act) "Of course you must not do anything against equality law"'.

71. The claimant therefore contends that in this case the respondent and the officers who managed and administered the PCSPS acted as *de facto* principal and agents respectively.

72. Turning to section 111(1), this provides that a person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention). Part 5 relates to work; section 108(1)/(2) relates to relations that have ended; and section 112(1) relates to aiding contraventions. The claimant contends that the respondent has contravened section 112(1) by tacitly endorsing official instructions (see above), which permit PCSPS Scheme Managers to apply rule 2.24 of the PCSPSR [155] in a restricted way that is conditional upon contributions from an employer, something which prevents the consideration of perfectly valid and justified reasonable adjustments requests, simply because the employer chooses not to do this.

73. The respondent's only potential exemption from the operation of section 111 is section 111(7), which says that this section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B. Given the respondent's level of authority, however, he was clearly in a position to commit a 'basic contravention' in relation to PCSPS managers, trustees or administrators, for example, by ignoring their recommendations, overriding their decisions or by making pejorative observations about their work, for reasons, or in language, that would infringe the Equality Act.

74. The claimant next considered section 112 [172]. This provision relates to aiding another party to commit a 'basic contravention' (see above) under the Equality Act. For this section to apply, section 112(1) says that the person in question must 'knowingly help another' to commit such a contravention. However, the word 'knowingly' clearly does not require the perpetrator to be 'certain' that the act in question is a 'basic contravention', because section 112(2) exempts the perpetrator from culpability if they 'reasonably rely' on assurances from the other party that the actions in question do not constitute a basic contravention. In this case, those assurances might, for example, take the form of the Equality Act reviews undertaken by Ministers in accordance with section 149 [173, 174] (see Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017). The claimant argues that by enabling PCSPS managers to apply rule 2.24 in a way that allows reasonable adjustments to be refused solely for budgetary reasons, the respondent has 'aided' them in enhancing the probability of illegal discrimination (see above).

75. In conclusion, so far as the law is concerned, if it is held that the Minister of the Civil Service cannot ever be a valid respondent in relation to the PCSPS, as the

ET3 attachment [23] appears to assert, then any decisions he took under rule 2.24 or any of the other 272 references to him in the PCSPSR, would be immune from action under the Equality Act, no matter how blatantly and deliberately discriminatory they were. The claimant contends that this is an untenable position in law, as it would amount to a legalised abuse of power. The claimant maintains that no individual, including a Minister, is exempt from the consequences of their acts of commission or omission where they lead to illegal discrimination under the Equality Act.

76. The claimant then took the Tribunal to the relevant regulations and relevant provisions of the PCSPR.

77. The claimant contends that he has requested adjustments to his pension arrangements under the discretionary powers contained within rule 2.24 [155] of the PCSPR. This states that these discretionary powers are exercisable by 'the Minister', and rule 1.13g [153] defines the term 'Minister' to mean, 'the Minister for the Civil Service'. At the time the claimant lodged this claim, the position of Minister for the Civil Service had been delegated by the Prime Minister to The Right Honourable Michael Gove MP. He was therefore the appropriate respondent, unless it can be shown that: (a) he was legally prevented from being a respondent; or, (b) he had completely divested himself of those discretionary powers.

78. The claimant says that he has received no evidence in relation to (a). As regards (b), the respondent's legal representative has referred to point 3.34 of the guidance for employers [159]. This indicates that some of the discretionary powers in rule 2.24 can be exercised by the Scheme Manager. This guidance, however, does not say that the Minister cannot also still exercise this discretionary power, or that he could not overrule the decision of the Scheme Manager if the Minister wished to do so. In addition, the powers granted to the Scheme Manager in relation to rule 2.24 are limited to cases where an employer wishes to provide added years for an employee and supplies a business case and the funding required to meet the additional costs.

79. Rule 2.24 PCSPCR, however, has not been amended and it refers solely to 'the Minister'. The Minister must therefore have retained the ultimate decision-making powers, even if some of the day-to-day processing of certain types of claims has been delegated to others. Moreover, rule 2.24 is not confined to circumstances where an employer provides a business case and additional funding. Rule 2.24 gives the Minister an unfettered discretionary right to grant additional years and also the right to determine the period to which those added years are to be attributed. In the absence of any evidence to the contrary, therefore, The Right Honourable Michael Gove MP must have been the correct respondent at the time the current claim was submitted to the Employment Tribunal and at the time this claim was sent to him by the Tribunal.

80. Turning next to the Tribunal's procedural rules, rule 1 of The Employment Tribunals Rules of Procedure 2013 [192] says that the term "respondent" means the person or persons against whom the claim is made. Here, the claim was made against The Right Honourable Michael Gove MP. Rule 34 of those rules [194] says that the Tribunal may 'remove any party apparently wrongly included.' No evidence has

been provided to show that the respondent was wrongly included. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 do not provide any further guidance on how the term 'apparently' should be construed in the context of the rule mentioned above.

81. It might be argued, however, that whilst there was an initial *prima facie* justification for naming him as the respondent, this is not valid, because: (a) he has 'apparently' ceded his discretionary powers in rule 2.24 to the Scheme Manager (see above); and (b) he is no longer the Minister for the Civil Service, so he could not now agree to the adjustments being sought by the claimant.

82. In relation to (a), the claimant argues that it would be *ultra vires* for the Minister to completely divest himself of the discretionary powers given to him by rule 2.24 of the PCSPSR. The claimant therefore contends that this could not have happened in law. As regards (b), in relation to discrimination, redress can be sought under the Equality Act for: (i) past infringements under the Act; and/or (ii) in relation to discrimination that is ongoing. Here, the claimant seeks to establish that the respondent could and should have exercised his discretion in the past to grant the reasonable adjustments that the claimant sought. If the Tribunal found that the respondent could and should have done this, then the respondent's successor and the Cabinet Office would be legally bound to give effect to that finding. The fact the respondent could no longer act personally in this matter would be immaterial.

83. Finally, the claimant took the Tribunal to the case law.

84. The respondent has argued that the Minister has effectively delegated his discretionary powers in rule 2.24 of the PCSPSR (see above), and that other junior officers could have acted on his behalf in accordance with the decision in the case of *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 (CA). This decision held that the acts of government departmental officials are synonymous with the actions of the minister in charge of that department.

85. The Cabinet Office's letter of 28 July 2021 [110, 111], however, says that no specific delegation has been made in relation to this matter. The claimant also does not agree that the Carltona principle applies to rule 2.24 of the PCSPSR and has drawn attention to the recent decision in the Supreme Court case of *R v Adams* [2020] UKSC 19 [123-136]. The claimant points out that whilst the Carltona principle allows actions of a department to be attributed to a minister, this principle does not apply automatically (paragraph 25, *R v Adams*) [132]. Furthermore, in deciding when the actions of a Minister can be undertaken by other members of his department, Lord Kerr held that three criteria needed to be applied, namely – (a) the seriousness of the matter or its consequences (paragraph 14) [129]; (b) if it was logistically possible for the minister to undertake the duties (paragraph 18) [130]; and (c) whether there was any express/implied requirement in the relevant statute (paragraph 26) [133].

86. In relation to (a) above, it was held that Gerry Adams's internment was a serious enough matter to warrant the Minister's personal consideration, even though the impact of that decision was limited to one person and the outcome was largely ephemeral in nature. The refusal of the claimant's 'reasonable adjustment'

requests, however, would have a very significant effect on his income and that of his family for the rest of his life and also for the rest of his wife's life, were he to predecease her. The claimant therefore contends that there is a respectable argument for saying that the claimant's issues are of at least equal seriousness to the matters under consideration in *R v Adams*.

87. As regards (b) above, the claimant sought information from the Cabinet Office under the Freedom of Information Act to determine how much time had been devoted to issues in the PCSPSR that refer to action by 'the Minister' alone. The Cabinet Office's reply of 24 September 2021 [138] confirmed that they held no information regarding this. There is therefore no evidence that it would have been logistically impossible for the Minister to personally attend to all of the issues in question. That would clearly depend on the frequency with which these issues arose.

88. Moreover, In the case of *R v Adams*, considerable weight was attached to the condition (c) above, which was clearly the decisive factor in that case. In reaching his decision, Lord Kerr pointed out that distinctions in the wording of the legislation clearly indicated that some actions had to be taken by the Minister, whilst others could be undertaken by the Minister or his junior colleagues.

89. Here, an identical situation exists in relation to the PCSPSR. These rules refer on several occasions to actions that can be undertaken by 'the Minister or, if the Minister so directs, the scheme administrator', for example, rule 4.71(iv) [156]. Elsewhere, however, and crucially within rule 2.24, the PCSPSR reserves the right of action to 'the Minister' alone. This clearly indicates that the wide-ranging discretion provided by rule 2.24 is held solely by the Minister and that he personally must have the final decision on issues relating to its application. The consequence of this is that it cannot be argued that the Minister no longer has any discretionary powers under rule 2.24. For this to happen, the claimant understands that the rules would have to have been changed by the agreement of Parliament, in accordance with the 1972 Superannuation Act that led to their creation. On 28 September 2021, the claimant requested evidence from the Cabinet Office under the Freedom of Information Act 2000 to support the reading of rule 2.24 provided by their guidance at 159. The Cabinet Office has not been able to find any such evidence [151, 152].

The relevant law

90. The Tribunal has had regard to sections 15, 20-21, 39, 61, 108-112, 120, 126 and 205 of the Equality Act 2010; the Crown Proceedings Act 1947; the Superannuation Act 1972; and the Ministers of the Crown Act 1975.

91. It has also taken account of the case law authorities cited to it by both parties and in particular: *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560; *In re M (M v Home Office)* [1994] 1 AC 377; *O'Hanlon v Revenue & Customs Commissioners* [2007] ICR 1359; *Tameside Hospital NHS Foundation Trust v Mylott* (2011) EAT; *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16; *Unite the Union v Miss S Nailard*, *UKEAT/0300/15/BA*; *R v Adams* [2020] UKSC 19. The Tribunal is alert to decisions decided under the Disability Discrimination Act 1995

and which pre-date the Equality Act 2010, not least any that pre-date section 15 of the later Act.

92. It has also considered rules 1, 2, 34, 35 and 37 of its procedural rules.

The second claim

93. For completeness, the Tribunal also records here the claimant's second claim arising from this matter and which was referred to during the hearing. This is Case Number 2401493/2022. This claim was presented on 22 February 2022. It names as respondent the claimant's former employer, HMRC. It is a claim for age and disability discrimination. It refers back to the first claim, but it asserts that HMRC has prevented the Minister from making reasonable adjustments. A case management hearing is listed for 5 December 2022. It is not presently combined with this claim.

Discussion and decision

94. The relevant rules of the PCSPS with which this claim is concerned are made under the powers contained in the Superannuation Act 1972. Superannuation schemes concerning civil servants are made under section 1(1) of the Act, which affords the relevant power to "the Minister", which in turn means "the Minister for the Civil Service". Section 1(2) provides that the Minister may, to such extent and subject to such conditions as he thinks fit, delegate to any other Minister or officer of the Crown any functions exercisable by him by virtue of section 1 or any scheme made thereunder.

95. The *Carltona* principle derives from the decision of the Court of Appeal in *Carltona v Commissioner for Works* [1943] 2 All ER 560. This may be summarised as being that the whole system of departmental organisation and administration is based on the constitutional notion that the decision of a government official was constitutionally that of his Minister, who alone was answerable to Parliament. The Court noted that public business could not be carried on if the responsible Minister had to personally consider every decision. The powers and duties of a Minister were normally exercised by responsible officials in his department. The Minister was obliged to ensure that important duties were taken by appropriately qualified officials, and he was answerable to Parliament if that were not the case.

96. The *Carltona* principle was revisited by the Supreme Court in 2020 in the case of *R v Adams* [2020] UKSC 19. The case was concerned with a Minister's powers and duties in relation to detention without trial. The principle of the case may be summarised as being that the seriousness of the consequences of a decision was a consideration to be considered in deciding whether a power had to be exercised by a Minister personally. It was doubtful whether there was a presumption that the *Carltona* principle, allowing ministerial powers to be delegated, should apply to a power absent contrary statutory language. Even if there was a presumption, it was displaced in relation to the Secretary of State's power to make an interim custody order under the Detention of Terrorists (Northern Ireland) Order 1972. The statutory language was unambiguous, and the consequences of the decision were that an individual could be kept in custody, possibly indefinitely.

97. The Tribunal does not consider that the *Carltona* principle as finessed in *Adams* takes the present issue in the present case very much further. Section 1(2) of the Superannuation Act 1972 permits the delegation of functions to civil servants, and this would include the scheme administrators. Does any of this analysis assist us in deciding whether the claimant in the present case can proceed against the Minister personally? Here the Crown Proceedings Act 1947 and the Ministers of the Crown Act 1975 are relevant.

98. Section 6 of the Ministers of the Crown Act 1975 provides that Schedule 1 to the Act shall apply to any Minister eligible for a salary under the relevant provisions of the Ministerial and Other Salaries Act 1975. The provisions of Schedule 1 to the Act shall continue to apply to the Minister for the Civil Service, and (where appropriate) to his department. Schedule 1, paragraph 5 provides that the Minister shall for all purposes be a corporation sole, and shall have an official seal, which shall be authenticated by the signature of the Minister or of a secretary to the Minister or of any person authorised by the Minister to act in that behalf. A corporation sole is a holder of a public office, that office being treated as a legal entity in its own right, independently of the person who is the office-holder at any given time. As a result, powers and functions pass automatically from one office-holder to the next regardless of the identity of the human person who holds the office at any given time.

99. That means that it is neither appropriate nor necessary to bring Employment Tribunal proceedings against The Right Honourable Michael Gove MP in his personal capacity. The proper and orthodox position is that proceedings might be brought against the Minister for the Civil Service or, as the case might be, the Minister for the Cabinet Office in his corporate capacity rather than against Mr Gove (or the Prime Minister) in his personal capacity. In practice, as the Minister for the Civil Service is also the Prime Minister, who also in practice delegates his functions in relation to civil servants to the Minister for the Cabinet Office, relevant proceedings should be brought against the Minister for the Cabinet Office (as a corporation sole).

100. However, account also needs to be taken of the Crown Proceedings Act 1947. Section 17(3) of the Act provides that civil proceedings against the Crown shall be instituted against the appropriate authorised Government department, or, if none of the authorised Government departments is appropriate or the person instituting the proceedings has any reasonable doubt whether any and if so which of those departments is appropriate, against the Attorney General. A list of the appropriate authorised Government departments is maintained under section 17(1). The Cabinet Office is the appropriate authorised Government department in the present claim.

101. In turn, section 205(6) of the Equality Act 2010 ensures that Employment Tribunal proceedings under the Equality Act 2010 are treated as civil proceedings for the purpose of section 17 of the Crown Proceedings Act 1947.

102. The result is that, *all other things being equal*, these proceedings should not have been instituted against Mr Gove in his personal capacity. They might have

been commenced against the Minister for the Civil Service or, as the case might be, the Minister for the Cabinet Office in their corporate capacity, although as a matter of practice and procedure such proceedings would then be assumed by the Cabinet Office and the title of the proceedings amended accordingly.

103. However, are *all other things equal*? There might be circumstances in which it is conceivably appropriate that a Minister of the Crown could be sued in his personal capacity. Mr Gove's personal liability in his capacity as an MP is one thing (for example, as an employer of the staff of his constituency office); his personal capacity in his role as a Minister of the Crown is quite another. It is that role with which we are concerned here.

104. The case of *M v Home Office* illustrates that, prior to the Crown Proceedings Act 1947 and subsequently, an action could be brought against a Minister of the Crown personally in respect of a tort committed or authorised by him, although he had been acting in his official capacity. A finding of contempt of court could be made against a government department or a Minister of the Crown in his official capacity, depending upon the body against which the order breached had been made. A finding of contempt could be made against a Minister personally where the contempt related to his own default, although normally any injunction would be granted against the Minister in his official capacity and where it was the department for which he was responsible that had been guilty of contempt.

105. However, this is not a case in which Mr Gove can be said to have committed a (statutory) tort or authorised the commission of one by others. It is apparent from the witness statement of Mr Hennem how the handling of pensions matters in the Cabinet Office worked. Mr Gove had little or no role in such matters, save potentially in the very limited and exceptional sense that Mr Hennem explained. Mr Gove's own witness statement made it clear that he had played no part in any decisions taken or not taken regarding the claimant, Mr Wagener, and that he had been wholly unaware of Mr Wagener's issue until these proceedings were brought to his attention. It cannot be said that Mr Gove exercised his ministerial discretion one way or the other, either positively or negatively. It might be said that he simply did not exercise a discretion at all, but that has been explained as arising from the fact that Mr Wagener's application was not referred to him and it would not have been so, if at all, until a business case had been made by HMRC.

106. Mr Gove was not the claimant's employer for the purposes of section 39 of the Equality Act 2010. He was not a responsible person for the purposes of section 61. He was not a trustee or manager of the Civil Service Pension Scheme. He was not an employer of employees who were or might be members of the scheme. He was not a person exercising an appointing function in relation to an office-holder who was or might be a member of the scheme. He was not an employer or principal for the purposes of section 109. He was not himself an employee or agent for the purposes of section 110. He cannot be said to have instructed, caused or induced a contravention of the Equality Act for the purposes of section 111. He cannot be said to have aided such a contravention so that section 112 might apply.

107. Accordingly, the Tribunal concludes that Mr Gove is not appropriately a respondent or party to these proceedings.

108. Rule 34 of the Tribunal's procedural rules provides that the Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and it may remove any party apparently wrongly included.

109. The Tribunal considers that Mr Gove has apparently been wrongly included as a party (a respondent) to this claim. Nothing is added to this rule by the inclusion of the word "apparently". The Tribunal determines that he should be removed from the proceedings under rule 34 accordingly.

110. Should the Tribunal then use its rule 34 power to add the Cabinet Office by way of substitution? The respondent suggests to the Tribunal that it should not do so. Its position is that, as the claim is currently understood, it has no reasonable prospect of success. The result should be, in its submission, that the claim should be dismissed, whether as a result of the consequence of the decision under rule 34 or (by implication) under rule 37.

111. The Tribunal is reluctant to proceed under rule 37, at this juncture at least. That rule provides that, at any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim on the ground that it has no reasonable prospect of success. A claim may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

112. Notice that a rule 37 application would be dealt with at this hearing was not given as part of the notice of hearing. It is correct that the claimant has had an opportunity at the hearing to deal with the suggestion that the claim should be struck out on its merits rather than the Cabinet Office be substituted for Mr Gove.

113. However, the Tribunal considers that the pleading of the claim is not yet concluded. Additional information (or further and better particulars) is sought so that the legal basis upon which it is said that the Cabinet Office is in breach of the Equality Act can be better understood. The respondent has presented no more than a holding response and it will have leave to amend its response in due course. There is also a second claim, now against the claimant's employer (HMRC), which is intrinsically linked to the first claim. The factual matrix of the two claims is in large part identical. It is suggested that the claims should be consolidated (combined for hearing). Although the merits of the first claim do not immediately appear to be strong in the light of what is said in Mr Gove's and Mr Hennem's witness statements – without deciding the matter at this stage – it cannot be obviously said that it has no reasonable prospects of success. It would be better if the pleading stage were to be concluded and/or for the matter to be tested in evidence and in law at a final hearing.

114. For much the same reasoning, the Tribunal does not consider that it is in the interests of justice, or in accordance with the overriding objective, to achieve the

same outcome via rule 34. In the Tribunal's consideration, it appears that there are issues between the Cabinet Office and the claimant (and potentially HMRC, if the proceedings are combined) potentially falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings. The Tribunal is not yet in a position to do proper justice to the arguments made in paragraphs 14 and 15 of Ms Ling's written submissions (or the wider challenges to the evidential or legal basis of the claimant's claim).

115. In all the circumstances, the Tribunal determines that the claim should not be struck out. The Cabinet Office shall be joined as a respondent to the first claim in substitution for Mr Gove. The existing ET3 response, subject to future amendment, shall be treated as its response to the claim and accepted as such.

116. Case management orders shall be issued separately.

Judge Brian Doyle
DATE: 17 November 2022

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON
21 November 2022

FOR THE TRIBUNAL OFFICE