IN THE EMPLOYMENT TRIBUNAL

Case Numbers: 1402068/2021& others

EMPLOYMENT TRIBUNALS

Claimants: FDA claimants

Respondents: His Majesty's Revenue & Customs & others

Heard at: Bristol **On:** 16 November 2022

Before: Regional Employment Judge Pirani

Representatives

For the FDA claimants: Ms I Omambala, King's Counsel and Ms M Stanley, counsel
For the respondents: Mr A Tolley, King's Counsel

RESERVED JUDGMENT

The claims of the FDA claimants (see the schedule attached) are dismissed as an abuse of process and therefore vexatious and have no reasonable prospects of success pursuant to rule 37(1)(a) of the Employment Tribunal Rules.

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RESERVED REASONS

Introduction

1. As set out at a public preliminary hearing in December 2021, with judgment promulgated on 18 January 2022 (the **Newby** judgment), these claims raise a substantively complex point about alleged unjustifiable direct age discrimination under the provisions of the Civil Service Compensation Scheme ("the CSCS" or "the Scheme") in relation to the payment of compensation benefits in cases of early termination of employment on grounds of voluntary redundancy (and voluntary exit) and compulsory redundancy.

2. Large numbers of complaints of claimants within the PCS union and others were made to many different Employment Tribunals. In essence, the contention was that there should be no taper and no maximum compensation payment.

3. The claimants at this hearing are members of the First Division Association (FDA) and represented by Slater and Gordon (S&G). There are 20 FDA Claimants. The Respondent accepted that each of the FDA Claimants' claims had been presented in time save for three of them.

Materials before the tribunal

4. A joint bundle running to 362 pages was provided. The parties produced written skeleton arguments which were later supplemented by further written submissions. After the hearing, a correspondence bundle running to 49 pages was also provided. The parties also emailed the tribunal with further information relevant to the issues to be determined. Annexed to the skeleton argument of the claimants was an "expert witness preliminary report" by Mr Richard Gibson FIA (the Gibson report).

5. The written and oral submissions were of the highest calibre.

The CSCS

6. The CSCS is a non-contributory scheme. Employees do not make any payment to their employer (or suffer any deduction from their earnings) in order

to be entitled to its benefits. Crown employees do not have a statutory right to a redundancy payment under the Employment Rights Act 1996.

7. Part 12.4 of the CSCS provides for entitlements under the CSCS in the event of a voluntary redundancy. The starting point is that individuals are entitled to one month's pay in respect of each year of service subject to a maximum of 21 months' pay (CSCS 12.4.3 and 12.4.5 read with CSCS 12.1.5(a)(i)).

8. The CSCS provides:

   i. that the compensation award paid to individuals above pension age is subject to a cap of 6 months' pay (CSCS 12.4.3 read with CSCS 12.1.5(b)) ("the cap");
   ii. that compensation awards paid to individuals within 15 months of pension are subject to tapering provisions whereby the award decreases proportionately as the individual in question approaches pension age (CSCS 12.4.3 read with CSCS 12.1.5(a)(ii) and CSCS 12.1.9) ("the taper")

9. Accordingly, compensation payments under the CSCS increase according to the length of an employee's length of service. The effects of the taper and the cap are to reduce the compensation sum payable to individuals who are close to or above their pension age.

The PCMO

10. The prevalence of claims (both represented and unrepresented) led to a Presidential Case Management Order (the PCMO) on 30 March 2020. The PCMO provided that the claims be split between those:
    i. claims challenging the provisions for tapering and capping voluntary redundancy or voluntary exit compensation payments in respect of employees who are approaching or have reached their normal pension age of 60 years at their last day of service (schedule A claims); and
    ii. claims challenging the provisions for tapering and capping compulsory redundancy compensation payments in respect of employees who are approaching or have reached their normal pension age of 60 years at their last day of service (schedule B claims).

11. The former were to be stayed and transferred to the Employment Tribunal at Bristol and the latter to Manchester. The Regional Employment Judges

concerned were to coordinate the case management of these claims in both Schedules.

12. All the FDA claims are Bristol based voluntary claims (schedule A).

13. Reference was made within the preamble to an understanding that there may be other such present and future claims in which the Government Legal Department (GLD) is not instructed.

14. It was also noted in the PCMO that consideration be given to the claim in Newby v HMRC (2400627/2020) being treated as a lead case in accordance with Rule 36.

15. In addition, the PCMO provided that any party or representative wishing to make representations for the further conduct of any such claims should do so upon application to the Regional Employment Judge at Bristol or the Regional Employment Judge at Manchester as the case might be (and copied to any other interested party or person). The PCMO also provided that a copy of it shall be sent to ACAS and to all known interested parties, and shall be published on the Judiciary website.

Further case management

16. The first case management preliminary hearing was convened on 16 October 2020 before both the Regional Employment Judges of the South West and North West. There were a number of claimants present at that hearing. Most of the claimants were represented by Thompsons solicitors, but other solicitors were also present.

17. At that stage, the respondents did not concede that the relevant provisions of the CSCS amounted to less favourable treatment because of age contrary to section 13(1) of the Equality Act 2010 ("EQA"). At issue in every single case (see paragraph 11 of the Order), was the justification defence under section 13(2). Many of the claims also appeared to have been presented out of time.

18. It was also noted in the case management order (CMO) that it seems likely that time starts to run from the date of termination of employment if the figures payable under the CSCS were known to the claimant before then, or possibly

from the later date of payment if the figures were not known at the time employment ended.

19. There was consensus at the hearing that it would be appropriate for the Schedule A and Schedule B cases to be combined for hearing even if they remain in different regions for the purposes of case management. Any further case management hearings would deal with cases in both schedules.

20. A further case management hearing was then listed for 10 December 2020. It was suggested, and noted in the Order at paragraph 32, that sample claimants should all be claimants who are represented by Thompsons. Reference at paragraph 33 was made to a sufficient selection of sample claimants.

21. There was a dispute between the representatives as to whether justification under the EQA should be dealt with as a preliminary issue, since that is common to all claims. The respondent argued that the tribunal should instead deal with the question of whether time should be extended in those cases where that was an issue.

22. The directions made included a specific order that (by 4pm on 6 November 2020) any party objecting to the proposal that "the lead, sample or test claimants" in any forthcoming preliminary hearings be drawn from those claimants represented by Thompsons must have notified the Tribunal and the other parties of that objection with reasons for it.

23. Reasons were then provided on 10 November 2020 for the outstanding matter which related to the question of whether there should be a public preliminary hearing to deal with time limits, as the respondent contended, or whether there should be such a hearing to deal with the justification defence, as the claimants contended. The tribunal determined that a public preliminary hearing to deal with justification should be held before addressing time limits. One of the reasons given was that taking that course of action maximises the possibility that there will only be one substantial hearing in this litigation (see paragraph 21). If the tribunal were to hold a public preliminary hearing on time limits first of all that would guarantee there would be two substantial hearings.

24. At the further case management preliminary hearing on 10 December 2020 directions were given for the future conduct of the proceedings. No unrepresented claimants were present during this hearing, and nor did

solicitors for non-Thompsons claimants attend as they had at the previous hearing. However, included in the orders, at paragraph 9, was provision for any party or representative not present during the hearing to seek a variation of the CMO.

25. Two days earlier, on 8 December 2020, an Employment Tribunal in Bristol had issued its judgment in the case of **Coombes (1401762/2019)**. This was a case concerned with the operation of similar provisions in the context of the CSCS provisions relating to terminations on the ground of 'efficiency'. That Tribunal had the benefit of evidence on behalf of the respondent from Peter Spain (who also gave evidence in this multiple). The **Coombes** tribunal dismissed the claimant's claim of direct age discrimination.

26. Prior to the December hearing, on 13 November 2020, the government respondents applied for the November CMO to be varied or set aside in the interests of justice because it was said to be based on a misapprehension that there were sufficient sample claimants whose claims were brought within time to enable that hearing to proceed. For reasons summarised in the record of the preliminary hearing that application was accepted and the November CMO was revoked. It was agreed during the hearing that the confirmation of the position on sample cases would be provided by 13 January 2021. In the event, that deadline was extended.

27. Importantly, it was argued, on behalf of the government respondents, that if the only ruling on justification in relation to a schedule B claimant affected by tapering was made in the case which was out of time, it would be open to subsequent claimants in the same subcategory to argue that the justification ruling was of no effect because it was made in a case over which the tribunal had no jurisdiction (see paragraph 22). In response, on behalf of the Thompsons/PCS claimants, it was argued that there were a number of ways in which the tribunal could deal with that in a proportionate and just manner without it reaching a hearing on time limits. For example, rule 37 provides that a claim may be struck out at any time (see paragraph 23).

28. The decision of the tribunal was that, although the November CMO was revoked, a public preliminary hearing on justification remained the appropriate way forward. Although the respondents had identified a problem which could in theory lead to a further hearing for other claimants the tribunal accepted the submission that there are powers in the Tribunal Rules to deal with cases in

that situation which mean it was still likely, even if this point were to be pursued, that the case in question could be disposed of without a contested hearing. That could be by way of striking out such a claim (see paragraph 31). In particular, the Tribunal was mindful of the overriding objective and noted that a hearing on time limits for all the out of time claimants would be an expensive and lengthy exercise which could subsequently prove to have been pointless if the justification defence succeeds.

29. In a further CMO promulgated on 5 May 2021 concern expressed about unrepresented or differently represented claimants was rejected. The Tribunal stated at paragraph 13 of the reasons that it was common practice for it to have to deal with cases where claimants were separately represented, or a mix of represented and unrepresented parties, and ruled that the provisions of Rule 41 of the Employment Tribunals Rules were sufficient to enable the Tribunal to conduct the public preliminary hearing in accordance with the overriding objective even if some of the claimants whose cases were being considered were unrepresented or separately represented.

The December 2021 Public Preliminary Hearing

30. The public preliminary hearing on the issue of justification took place on 6, 7, 9, 10, 13, 16 and 17 December 2021 before Judge Doyle, Ms Anne Gilchrist and Mr John Murdie.

31. At that hearing, the respondents conceded potential liability under section 13(1) EQA, but subject to their possible defence under section 13(2): If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

32. The tribunal considered six sample cases which arose for determination, two in each of the following types of case: (1) Compulsory redundancy at or above normal pension age on termination of employment; (2) Voluntary redundancy at or above normal pension age on termination of employment; and (3) Voluntary redundancy within 15 months of normal pension age on termination of employment. This third category of case involved the application of a taper provision in respect of the amount of compensation payable under the terms of the Scheme.

33. The six test claimants were selected because to the cap/taper provisions applied to them.

34. In the event, the tribunal heard evidence on behalf of the Claimants from five of the six sample claimants. One was not able to attend and was and was removed as a sample claimant.

35. At paragraph 24 of the reasons, it was noted that it had been agreed, and approved by the Tribunal, that the issues should be resolved by reference to sample cases.

36. The single witness for the respondents was Mr Peter Spain, who is the Head of the Pensions Policy and Technical Team in the Civil Service and Royal Mail Directorate within the Cabinet Office.

37. The ultimate question for the Tribunal was whether the respondents made out their "justification defence." The legitimate aims on which the respondents relied were the seven such aims set out in its amended response and in the opening submissions. Although the claimants challenged the genuineness of the respondents' purported aims and also suggested they were "outdated", ultimately they were all accepted by the Employment Tribunal as being genuine and legitimate "whether taken individually or collectively, particularly when viewed as a cohesive and coherent set of ends, aims or objectives" (see paragraph 311).

38. The tribunal then went on to consider the issue of proportionality. It noted that the more serious the disparate adverse impact, the more cogent must be the justification. It was for the tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the measure and make its own assessment as to whether the former outweigh the latter.

39. The claimants' case was said to be essentially one built upon a perception of unfairness in circumstances where any integrated scheme designed to compensate for loss of employment while also providing immediate or anticipated access to pension benefits must draw a line at some point by reference to length of service and/or to age (see para 336).

40. Ultimately, the tribunal determined that the CSCS is an age discriminatory scheme, but is a proportionate means of achieving a legitimate aim.

41. The direct effect of that Judgment was that the claims of direct age discrimination brought by the sample claimants identified in paragraph 3 of the judgment failed and were dismissed.

Correspondence after the Newby Judgment

42. After the **Newby** judgment was promulgated, all the claimants subject to the PCMO were sent a letter saying it appeared in the light of the judgment sent to the parties on 18 January 2022 that none of the complaints of direct age discrimination brought by any of the claimants in these proceedings have any reasonable prospect of success. It was therefore proposed that those claims be struck out under rule 37(1).

43. The FDA Claimants replied on 29 April 2022 objecting to the proposal to strike out their claims, pursuant to rule 37. They also requested a hearing so that the Tribunal can properly consider these objections.

44. The points made by the FDA in the letter were:

    i. their claims were presented in June and July 2021
    ii. the FDA claimants made no submissions on the terms of the PCMO which was already in place
    iii. the FDA claimants were not involved or represented during any case management in relation to the selection of the 6 sample claimants and/or the arrangements for the hearing in December 2021
    iv. there were notable omissions in the manner in which the **Newby** Claimants ran their claims before the ET. In particular, they say the **Newby** Claimants appear to have obtained no comparable statistical or other evidence (from either a lay or expert witness) as to the benefits, losses and/or financial needs of individuals whose employment was terminated close to, at or over pension age.
    v. there is evidence which “could entirely change” the case

45. The Government Legal Department (GLD) responded on 30 May 2022. At that stage, it was submitted that in accordance with rule 36(2) the **Newby** judgment was binding on all the parties in the group action, subject to rule 36(3).

46. In addition, it was said that the FDA claimants were throughout aware of the progress of the sample claimants’ claims. In particular, it was said that the

respondents specifically drew the PCMO and the related timetable to S&G's attention in July 2021. The GLD maintained that the FDA claimants could have, but chose not to, take a number of steps including making submissions on case management and the selection of cases and seeking to intervene in the course of the December 2021 hearing. It was also said that the FDA claimants were not now suggesting that there is a material distinction between their case and the case of other claimants. Rather, according to the respondents, the FDA claimants' admission is that they now wish to explore obtaining other evidence in support of their claims.

47. S&G wrote again on 14 June 2022 disputing the application of rule 36. Reference was also made to the case of **Ashmore v British Coal Corporation [1990] 2 QB 338**. It was said that the circumstances of the FDA claimants are not the same as the circumstances of Ms Ashmore. In particular, they were not represented at any hearing determining the identity of the sample claimants or ever invited to make any submissions as to who any sample claimants should be.

Issues to be determined at this preliminary hearing

48. By a CMO dated 13 July 2022 the issues to be determined at this hearing were listed as:
    i. Whether the Newby judgment is binding on all the CSCS claims including the FDA;
    ii. If so, whether to grant under rule 5 the FDA Claimants' application for an extension of time to make any application under rule 36(3);
    iii. If so, whether to grant an application under rule 36(3);
    iv. Whether to strike out the claims of the FDA claimants pursuant to rule 37(1) of the Employment Rules of Procedure 2013 on the grounds that the claims have no reasonable prospect of success;
    v. In the alternative, whether to issue a deposit pursuant to rule 39 of the Employment Rules of Procedure 2013 on the basis that any specific allegation or argument raised by the FDA claimants has little reasonable prospect of success;
    vi. If the claims proceed, then to provide further case management (in private). Such case management will include a decision on the provision of lay or expert witness evidence relating to statistics, as suggested by the FDA claimants.

49. In the event, the rule 36 point was not pursued by the respondents. It was explained to both parties that the Tribunal had decided not to deal with the claims by way of binding lead cases in accordance with rule 36. Strike out was argued and resisted on the basis of abuse of process rather than simply prospects of success. A claim which is abusive has no reasonable prospects of success. This would also be in accordance with rule 37 (rule 37(1)(a) – vexatious). This was the primary subject of submissions of both parties.

Outline of the law of abuse of process

50. The starting point is that the question of whether a claim is abusive is a fact specific assessment in every case. The test for abuse is high and the burden rests on the party alleging abuse. It is an exceptional jurisdiction, enabling a court or tribunal to protect its procedures from misuse. To regard re-litigation as even prima facie amounting to an abuse of process would be to adopt too rigid an approach and to disregard the importance of individual circumstance and the need to consider each case on its own facts.

51. As the Court of Appeal said in **Ashmore v British Coal Corporation [1990] 2 QB 283** (at 348A):

> "a litigant has a right to have his claim litigated, provided it is not frivolous, vexatious or an abuse of process. What may constitute such conduct must depend on the circumstances of the case; the categories are not closed and considerations of public policy and the interests of justice may be very material."

52. One of the points made in **Ashmore**, which raised important questions as to how court and tribunals deal with large numbers of cases that raise similar factual issues, related to costs. **Ashmore** itself was a case concerning sample cases in equal pay litigation. Stuart Smith LJ held that in cases where sample cases have been chosen so that the tribunal can investigate all the relevant evidence is fully as possible, and findings of been made on that evidence, absent fresh evidence with justifies the reopening of the issue, it is no answer to say if the further claims fail the employers can be compensated in costs. He went on to say that not only is this seldom compensation for inconvenience and the disruption caused by litigation but is not in the interests of justice for the time of the courts or tribunals to be taken litigating claims that have effectively already been decided. The judge then went on to highlight the

further problem of the potential floodgates in that were the further case be allowed to proceed he could see no reason in principle why the other claimants, who were not among the sample claimants, should not also have a similar right.

53. Subsequently, Lord Bingham in **Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1** set out a leading statement of principle. At 31 it was said:

> The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.

54. He went on to conclude that the test should be a "broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before".

55. Therefore, as was highlighted in the earlier case of **Department of Education v Taylor 1992 [IRLR] 308**, there is a general entitlement to re-litigate the same issues between different parties unless abuse of process can be shown by the parties seeking to avoid it. In that case it was emphasised that Ashmore did not change the established principles. Rather, it was simply a case where the party seeking to avoid re-litigation was able to show in the special circumstances of the case then it would be an abuse of process for the matter to go forward.

56. In **Ashmore at 354 E - G**, Stuart-Smith LJ adopted the test that where sample cases had been selected to enable an Employment Tribunal fully to investigate and make findings on all the relevant evidence, re-litigation of the same issue was analogous to a collateral attack on the tribunal's decision, would defeat the purpose of sample selection and would be contrary to the interests of

justice and public policy, unless there were fresh evidence which entirely changed the aspect of the case.

57. This wording was derived from a test expressed by Lord Cairns LC in **Phosphate Sewage Co Ltd v Molleson (1879) 4 App Cas 801,814**. It was later adopted by Goff LJ in **McIlkenny v Chief Constable of the West Midlands [1980] QB 283**.

58. The wording used both in **Ashmore** and in **Phosphate** is "the aspect" not "an aspect" of the case. This is therefore not something which is merely an additional ingredient. It was said to be more rigorous than the test applied on admission of fresh evidence on appeals which is: it would probably have an important influence on the result of the case, though it need not be decisive.

59. However, in the more recent case of **Allsop v Banner Jones Ltd [2021] EWCA Civ 7** the Court of Appeal sought to draw a distinction between civil and criminal proceedings. This was said to be because there is a public interest in criminal convictions only being challenged by way of appeal, and for them not otherwise to be called into question.

60. It was concluded in **Allsopp** that the fact that subsequent civil litigation that calls into consideration an anterior civil decision may or may not be abusive depending on facts that may have nothing to do with re-litigation in its strict sense or the addition of new evidence within the **Phosphate Sewage** test. Marcus Smith J characterised the **Phosphate** case as one of res judicata rather than collateral challenge. The rule in **Phosphate** was said to constitute an exceptional case where a party, who would, in the ordinary course, be estopped against another party to a final decision from challenging that decision, can properly revisit that decision. Collateral challenges, on the other hand, do not give rise to res judicata estoppel.

61. It was held in **Allsop** that the doctrine of abuse of process, at least in the context of a "collateral" attack on a prior civil decision was best framed by reference to the test expounded by Lord Diplock and Morritt V-C: If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge in the earlier action if (a) it would be manifestly unfair to a party to the later

proceedings that the same issues should be relitigated or (b) to permit such re-litigation would bring the administration of justice into disrepute.

The Submissions

62. The respondents say among other things that:
    i. There was no suggestion during the case management hearings that there might be multiple hearings for different groups of claimants
    ii. The FDA Claimants could, at any stage, have made an application in respect of case management
    iii. S&G did not seek to involve themselves in procedural matters on behalf of the FDA Claimants
    iv. It is obvious that if a new claim making the same complaint were to have been issued after the judgment, it would be liable to be struck out under Rule 37 on the basis that, in light of the judgment, its merits were so low as to have no reasonable prospect of success
    v. It has not been suggested that any such evidence would comply with the applicable test that the fresh evidence must be likely to be decisive.
    vi. The effect of the FDA Claimants' approach, if correct, would mean that, even after another tribunal determination against the claim, it would be open to any other group of claimants to assert that they were dissatisfied with the way in which S&G had run the case for the FDA Claimants, and they had in mind adducing some further evidence and rearguing some of the points. The proliferation of litigation would be endless.

63. In response, the FDA claimants, say, among other things:

    i. The FDA Claimants were not a party to the **Newby** proceedings and were not represented at the hearing which gave rise to the judgment before EJ Doyle and members (December 2021) or in any of the case management preliminary hearings which preceded the December 2021 hearing.
    ii. The FDA Claimants were not heard by the Tribunal on the issue of the selection of the **Newby** Claimants.
    iii. The FDA Claimants were not heard (and had no opportunity to be heard) at either the preparatory preliminary hearings in the **Newby l**itigation or at the hearing before Employment Judge Doyle and

members in December 2021 when the section 13(2) EQA point was determined.

iv. The practical reality is that the FDA Claimants' claims were issued at a point when the **Newby** sample Claimants had already been selected and case management directions were already largely in place for the hearing which eventually took place before Employment Judge Doyle. They were then stayed under a PCMO which was in place long before the FDA Claimants claims were issued.

v. The **Newby** Claimants were all members of PCS. They were represented by Thompsons Solicitors LLP.

vi. The starting point is that such a first instance judgment does not bind the claim of any other claimant.

vii. The interests of justice do not require that the FDA Claimants should be prevented from litigating their claims.

viii. They seek to rely on fresh evidence which justifies the re-opening of the issue in that the fresh evidence might entirely change an aspect of the case.

ix. The **Newby** Claimants had obtained no comparable evidence as to the benefits and losses attributable to redundancy. The FDA Claimants would wish to obtain such evidence in the running of their own claims. This is evidence that could entirely change an aspect of the case (namely the proportionality assessment).

x. Inaction should not be equated with abuse.

64. The FDA Claimants say that Mr Gibson's report is evidence that could "entirely change an aspect of the case". This is said to be in the language of **Ashmore v British Coal Corporation [1990] 2 QB 338 at 354F** (see above for the actual wording which is "the" not "an"). They go on to say that, in any event, this is not language that requires (and it is not the law) that the Tribunal (in considering whether to strike out for abuse) must be in a position to determine that any such new evidence *would* certainly have made a difference to the outcome of the previous litigation (this is – after all – a summary assessment).

65. The FDA claimants say it is wrong to suggest that Tribunal must be confident that the evidence is "decisive" (referred to as the test in **Phosphate Sewage**) or evidence which will have an "important influence") (referred to as the test in **Ladd v Marshall**).

66. They also say that **Ashmore** makes no reference at all to availability of the evidence relied upon as fresh evidence at the time of the first proceedings.

Conclusions

67. When weighing up the fact sensitive assessment the Tribunal notes:
    67.1 The burden is on the party seeking to strike out
    67.2 Strike out is not inevitable, even if abuse is found
    67.3 The jurisdiction to strike out for abuse is an exceptional jurisdiction and re-litigation is not prima facie an abuse of process
    67.4 The bar to a finding of abuse is high. Proceedings may be abusive if it would be "manifestly unfair" to allow a challenge to earlier findings or if to permit such a challenge would "bring the administration of justice into disrepute"
    67.5 Strike out must be in accordance with the overriding objective set out in rule 2, consideration should be given to whether there is a less draconian response
    67.6 The FDA claimants have discrimination claims which are of a high public interest
    67.7 The Tribunal decided not to deal with the claims by way of binding lead cases in accordance with rule 36

68. These cases were managed at the outset in accordance with the overriding objective set out in rule 2 of the Employment Tribunal Rules. In other words, in addition to ensuring that the cases were dealt with fairly and justly the tribunal sought to manage the multiple in ways which are proportionate to the complexity and importance of the issues as well as avoiding delay and saving expense. As is the case with other multiples involving cases with similar or identical factual and legal issues, it was necessary for the Employment Tribunal to devise some means of dealing with the cases in ways which avoided the need of trying each one separately. When devising such case management care must also be taken to ensure that the course of proceedings is not manipulated by a party for tactical advantage.

69. As set out above, the decision to proceed with a public preliminary hearing on the issue of justification was based on the premise of maximising the possibility that no further substantive hearings would be required. In particular, the tribunal sought to manage the claims to avoid further expensive and lengthy hearings which may prove to be pointless.

70. Crucially, the same CSCS schemes applied to all the claimants. This was why the case was not only suitable to be subject to a PCMO but also litigation by way of sample claims.

71. Concerns about test claimants being unrepresented or being separately represented were specifically rejected by the Tribunal. It was expressly pointed out that it was common practice for Employment Tribunals to have cases combined for hearing where the claimants are separately represented, or a mix of represented and unrepresented parties.

72. As was articulated by the Court of Appeal in **Ashmore**, unless there is fresh evidence which justifies reopening an issue, it is no answer to say that if the further claims fail, the respondent can be compensated in costs. As well as the fact that such compensation is rarely sufficient, it fails to take into account the wider interests of justice point particularly (mentioned in **Allsopp**) at a time when Employment Tribunals are subject to a considerable backlog post-pandemic. Re-litigation of the same points using evidence which could have been obtained prior to determination of the earlier claims would plainly defeat the whole object of setting up the PCMO and litigating sample cases only.

73. As was the case in **Ashmore**, the Tribunal went to considerable lengths in this multiple to enable the parties and representatives to advance their best cases so that as many issues of fact and law covering the various permutations of the schemes could be raised and decided after the fullest inquiry and investigation.

74. The PCMO expressly provided for liberty to apply and that any party or representative wishing to make representations for the further conduct of any such claims should do so upon application to the respective Regional Employment Judges.

75. It is agreed that the doctrine of res judicata estoppel is not in play on these facts. However, the FDA claimants accept that in relation to “sample cases” the authorities recognise that claimants do not (in these circumstances) necessarily have an absolute right to re-litigate points that have been determined: The question of whether a particular pleaded claim is abusive is always a fact sensitive exercise. They also accept that very often (particularly in union-backed litigation) the determination of the “sample” claimants’ claims

on the points of principle is sufficient for the parties to resolve the claims of the claimants stayed behind the sample claimants.

76. Further, as the CSCS schemes apply in the same way to all claimants, within the various categories, it is not contended on behalf of the FDA claimants that there are any relevant factual differences between any of the cases of the FDA Claimants and the circumstances of one or more of the sample PCS Claimants. As was held in the **Newby** judgment, the CSCS provisions do not operate by reference to the specific circumstances of any individual. A person whose loss of opportunity to continue earning might be reduced, for example, by ill-health, does not receive less by way of compensation. Nor is any attempt made to distinguish between cases where individuals may have different prospects of obtaining alternative employment outside the Civil Service.

77. The FDA claimants focus on the chronology and point out they joined to multiple relatively late in the day. In their skeleton argument, under the section headed “chronology of this litigation”, they start with the presentation of their claims in June and July 2021 and move on to the **Newby** judgment being sent to them by the Employment Tribunal on 17 January 2022.

78. In fact, the chronology of their involvement in this group litigation is far more extensive than this suggests.

79. S&G wrote initially to the Watford Employment tribunal on 4 June 2021 in relation to the claim of Ms Hunter. The letter indicated that the claim form in that case forms part of a group of claims which were submitted separately, in an abundance of caution. The letter goes on to say:

> The claims should be joined together and managed as one claim as all of the employers are central government departments and they all involve claims under the civil service pension scheme.

80. It is worth pausing to note that at the very outset S&G expressed the opinion that the claims should be managed as one claim because they all involve claims under the CSCS.

81. Initially, S&G sought transfer of the claims to London Central. In the event, the claims came to the attention of the GLD. The GLD wrote to S&G on 12 July

2021 explaining that these claims are subject to a PCMO. The email went on to say:

> These claims are proceeding to a hearing in December 2021 to determine the question of objective justification in respect of relevant lead or "sample" cases. The Regional Employment Judges at Manchester and Bristol have made case management orders to that effect and sample cases have been chosen.

82. On 8 October 2021 the GLD emailed S&G via the Watford tribunal attaching their amended generic response to this and similar claims which were subject to the PCMO.

83. The FDA claims of **Pady and 10 others** (1402068/2021 and others) had already transferred to the Bristol Employment Tribunal. The response was accepted by letter of 16 July 2021 and copied to S&G. The letter of response said the cases remain linked to the national multiple of **Paskins and others** (the Bristol based multiple) and were being treated accordingly. On 13 July 2021 the respondent had emailed its generic amended response both to the Bristol Employment Tribunal and S&G. Attached to that email was the PCMO (which is also available online).

84. Not only were S&G aware that sample claims were to be considered at a public preliminary hearing in December 2021, they also attended the said hearing as observers. A link to the CVP hearing was forwarded to S&G by the GLD.

85. As in other multiples, the sample cases were chosen by reference to categories so that all the relevant factual and legal arguments on the issue of justification across all the claims could be investigated as fully as possible by a full panel tribunal in one substantive hearing.

86. The FDA claimants say that as their claims were issued in June and July 2021 it would not have been realistic or practicable for them to be able to prepare for any hearing listed in December of the same year. In addition, prior to the December hearing, they were not sent the CMOs which post-dated the PCMO. Inaction, they emphasise, is not the same as abuse.

87. In their further written submissions, it is said:

The FDA Claimants presented their claims after the sample Newby Claimants were chosen at a point when (considering the practical realities of multiple litigation in Employment Tribunals particularly in 2021) there was no realistic prospect of the FDA Claimants being able to have their claims heard with the Newby Claimants (or indeed of the FDA Claimants being able to participate meaningfully in the hearing of the Newby Claimants' claims.

88. However, as set out above, the tribunal had taken the trouble to include sample claimants to cover all the different types of claims in an effort to achieve effective determination of all the claims. This was said to maximise the possibility that there would only be one substantial hearing in the litigation. The benefits of selecting sample claimants is obvious in litigation of this sort.

89. The FDA claimants were sent a copy of the PCMO and were put on notice on 12 July 2021 that a hearing was listed in December 2021 to determine the question of objective justification in respect of sample cases.

90. The FDA claimants knew they were parties to group litigation which was being managed by way of sample cases which had been listed for hearing. Had S&G, at any stage, prior to the hearing in December 2021, indicated that they either wished to have input into the hearing by way of (i) providing sample claimants (ii) providing other evidence, or (iii) just wished to make submissions at the hearing then it is inevitable that further case management would have taken place so this could be discussed. Of course, it is also trite law in Employment Tribunals that a party who intends to rely upon expert evidence should usually explore with the tribunal whether that evidence is likely to be acceptable, either in correspondence or at a preliminary hearing.

91. It is inconceivable that an Employment Judge would not have facilitated their involvement. The tribunal would have then done what it could, in accordance with rule 2, to seek to ensure that there would be only one objective justification hearing. To do otherwise would have undermined the whole purpose and effect of previous case management orders.

92. Even if the FDA claimants had indicated during the December hearing itself that they wanted input into the hearing or indicated the possibility of calling evidence on the justification point it is virtually certain that the Doyle tribunal would have adjourned either to discuss the issue or to facilitate this process.

93. As the Respondents point out, in view of the Tribunal's response to HMRC's concerns about groups of differently represented (or unrepresented) claimants, an intervention by S&G reasonably to advance the interests of the FDA Claimants would have had good prospects. If and in so far as appropriate, different or additional evidence and submissions could have been adduced and made. At the very least, and on the assumption of a lack of cooperation from Thompsons, S&G might have corresponded with GLD to make further inquiries as to the evidence and the submissions.

94. Therefore, although the Tribunal fully accepts that it would not have been practicable for the FDA claimants to be able to prepare for full involvement in the substantive hearing listed in December 2021 they had a period of opportunity of at least five months, and possibly more than six months, for S&G to make a procedural intervention prior to the December 2021 hearing.

95. Bearing in mind S&G were also at the December hearing (as observers) they could have also highlighted any concerns they had by way of an email to the respective Regional Judges (as per the PCMO).

96. The fact that S&G were not involved in the selection of the PCS sample claims is precisely the reason why they should have intervened had they wished to do so. A wait and see approach, if that is what occurred, is not compatible either with rule 2 or the desire to avoid overlapping and repetitive substantive hearings about objective justification.

97. If permitted, such an approach would encourage parties to sit on their hands and avoid costs to see if their interests and objectives could be achieved by the time and expense of others. Further, as the respondents have pointed out, it would clearly not be open to them, had they lost on objective justification, to re-run the same point against a different set of claimants, whether that be the FDA claimants or any others who were subject to the PCMO. Both these matters go to the effective administration of justice.

98. The tribunal accepts that the position of the FDA claimants is not precisely on all fours with the case of **Ashmore**. Before Ms Ashmore had switched unions she had been represented by a union who has selected the sample claims. She had also been kept fully informed of the selection process and elected not to be put forward as a sample claim. However, like Ms Ashmore, if any of the

FDA claimants had wished to be one of the sample cases they could have applied at any time before the hearing for that to be done.

99. Unlike the facts of **Allsop**, the FDA claimants were parties to the previous litigation, in the sense that they, along with all the other claimants, were subject to the PCMO and also privy to the litigation in that it was open to them to apply to vary the case management orders. The FDA claims were stayed in accordance with the PCMO. These proceedings do not allege, as was the case in **Allsop** breach of duty on the part of a legal advisor.

100. Turning to the substance of the additional evidence supplied by the claimants. On Tuesday 8 November 2022 (at 16.49), less than 24 hours before skeleton arguments had been directed and without any prior reference, S&G sent GLD a preliminary expert's report from Mr Gibson dated 8 November 2022 [the Gibson Report]. S&G did not seek to include the report in the hearing bundle, but rather, it formed an annexe to the skeleton argument.

101. In accordance with **Allsop**, in cases of civil re-litigation the question of abuse of process depends on the facts and might have nothing to do with re-litigation in its strict sense or the adoption of new evidence within the test as articulated by **Phosphate**.

102. It is not said on behalf of the claimants that the proposed fresh evidence could not with reasonable diligence have been obtained earlier and adduced at the December 2021 hearing. At the very least, the fact that the FDA claimants believed that such evidence was potentially desirable could have been highlighted to the Tribunal. The Tribunal is satisfied that evidence akin to the Gibson report could either have been obtained by the time of the December 2021 hearing or its potential existence highlighted to the Employment Tribunal. There has been no response to the question of when it was commissioned.

103. Nonetheless, the FDA claimants say that that these claims are not abusive in that they seek to rely on fresh evidence which justifies the re-opening of the issue because that the fresh evidence could entirely change an aspect of the case. They go on to emphasise that the evidence of Peter Spain was central to the Newby Tribunal's finding on the section 13(2) EQA point and no other witness evidence was relied on by the respondent to establish the justification defence.

104. The Gibson report considers the effect of the taper and the cap on the benefits and losses arising out of a redundancy (and in particular the ratio between these benefits and losses). This report, it is argued, "indicates the sort of expert evidence the FDA Claimants would wish to call which would entirely change an aspect of the case" (see paragraph 64 of the FDA skeleton argument). It is later said that such future expert evidence, if it is obtained, "would be fresh evidence capable of entirely changing a material aspect of their age discrimination cases" see paragraph 72 of the FDA skeleton argument).

105. Among other things, points are taken in the preliminary report about alleged "systemic errors" in the calculation of benefits and losses. For example, Mr Gibson considers that Mr Spain was incorrect in taking into account the lump sum received by individuals under their pension schemes. It is said that when this approach is corrected the benefits to loss ratio is reduced. Mr Spain (when calculating the losses attributable to a redundancy), it is argued, takes an "overly simplistic" approach when calculating the value of pension lost as a result of early exit.

106. It is not said that Gibson Report, or evidence like it, would be likely to have a decisive effect on the outcome of any further hearing or even that it would probably have an important influence on the result. The propositions to be derived from the statistical evidence produced by Mr Spain were relied on by the respondent as only one of numerous points in support of their case on justification. In the context of the overall justification defence, it was relied on as one of seven principal points relating to proportionality in opening, and one of eight in closing submissions. The **Newby** judgment accepted all the respondent's submissions on proportionality.

107. These arguments were considered in detail at paragraphs 312 – 337 of the **Newby** judgment. Other matters relied on by the respondents included the fact that the predecessor schemes and the schemes made under the 1972 Act involved the integration of compensation rights and pension rights. There was also a recognition that employees who are already at (or beyond) or close to normal pension age as at the date of termination typically have more limited opportunity to continue to receive earnings than a person below normal pension age.

108. The respondent's case in respect of proportionally was subject to "careful scrutiny" (see paragraph 322 of the **Newby** judgment) "in the context of the business concerned to see whether they do meet the objective and that there are no other, less discriminatory, measures which would do so" (see para 334). Ultimately, the Doyle tribunal was satisfied that the respondents have discharged the burden upon it of showing that its treatment of the sample claimants is a proportionate means of achieving a legitimate aim (see paragraph 336).

109. At paragraph 337 the Doyle tribunal concluded:

> The scheme strikes an objective balance between the discriminatory effect of its measures and the needs of the Civil Service. Where the claimants have established disparate adverse impact, the respondents have established a cogent justification to the required degree. Weighing the reasonable needs of the Civil Service against the discriminatory effect of the scheme, the Tribunal's assessment is that the former outweighs the latter. The Tribunal is also satisfied that no "traditional assumptions" relating to age have influenced the respondent. In coming to that conclusion, the Tribunal has focused on the schemes as a whole and as of a piece.

110. In essence, it was accepted by the Doyle Tribunal that the taper and minimum payment operate as part of an overall package which makes relatively generous provision for employees close to normal pension age, who lose their employment on grounds of redundancy and who would not otherwise be able to claim compensation.

111. Mr Spain's evidence was material, but not determinative. Points can be made for and against the arguments set out in both the Gibson report and Mr Spain's evidence. This is the case with almost all litigation and almost all experts' reports. For example, the respondent says the Gibson report misses the key point about the purpose of the CSCS scheme bridging the gap between termination of employment and entitlement to receive full (in the sense of unreduced) payment of pension at normal pension age under the PCSPS.

112. Similarly, the Gibson report suggests one should more fully take into account the value of the pension benefits that the individual might have accrued had they continued in employment, as well as the cost of the member contributions

that would have been made. The result of this alleged omission is that the analysis "slightly overstates the loss". Points raised in the Gibson report about the ratio of benefits to potential loss were addressed and determined by the Doyle Tribunal. Some of the individual claimants also provided evidence on the same issue.

113. Points made in the Gibson report about longer periods being allowed for the calculation of the expected future working lifetime of civil servants on his own admission are without access to relevant "further information". Understandably, there is no identification or analysis of how this would affect the figures or conclusions.

114. The Gibson report also says the Newby analysis does not fully consider the value of the pension benefits the individual might have accrued had they continued in employment. On the face of it is seems that this attack on the methodology proceeds on the misunderstanding that contributions are paid. In any event, the ultimate conclusion of the Gibson report on this point is that the cabinet Office Newby analysis "slightly overstates the loss."

115. Taking all this into account, the Tribunal determines that seeking to re-litigate the same points at this stage in this multiple is an abuse on these specific facts. Of course, it is not contended that issuing the claims in the first place was an abuse of process. It is only post the judgment in **Newby** that abuse becomes an issue. Considerations of public policy and the interests of justice in accordance with the overriding objective are paramount. Allowing the claims to proceed could cause a sense of injustice to those who have already lost. It cannot be said that the fresh preliminary evidence supplied would, should or could entirely change the aspect of the case or foundation of the claim or the defence to it. This assessment is made on a preliminary basis on the assumption that a more fully formed report would be produced in due course. Of course, Mr Spain would then be able to respond to the said report and the respondent adjust its case on justification accordingly. In any event, as was set out in the more recent case of **Allsopp**, on the specific facts of these cases it would not only be manifestly unfair to the respondent that the same issues are re-litigated but also, in these circumstances, to permit such re-litigation would bring the administration of justice into disrepute. There is no less draconian response which is suitable.

116. On the facts of these cases, in the Tribunal's judgment, these high tests are met. The FDA claimants were subject to the PCMO and privy to the sample litigation. They were interested parties. It was open to them to intervene in that litigation at any point. They could have indicated to the Tribunal the potential of fresh evidence. The content of the fresh evidence supplied is not sufficient to justify the re-opening of the issues already determined. None of the points made in the Gibson report affects the underlying substance of the issue, which is that a fairer distribution of benefits is achieved by maintaining the operation of the taper and minimum payment provisions.

Regional Employment Judge Pirani

22 December 2022

Judgment sent to the parties on:

23 December 2022

For the Tribunal:

IN THE EMPLOYMENT TRIBUNAL

Case Numbers: 1402068/2021& others

FDA Claimant Schedule

1402068/2021	Pady
1402069/2021	Carney
1402071/2021	Bach
1402072/2021	Barnes
1402073/2021	Chapman
1402075/2021	Clayton
1402076/2021	Coulter
1402077/2021	Littlewood
1402079/2021	Mitchell
1402080/2021	Roots
1402082/2021	Nicholas
1402409/2021	Evans
1402714/2021	Evans
2203595/2021	Borril
2203597/2021	Bovill
2203599/2021	Burfitt
2203600/2021	Gibson
2203601/2021	Hughes
2203603/2021	McGill
3310311/2021	Hunter