EMPLOYMENT TRIBUNALS

Claimant: Mr D Hoppe
Respondents: 1. Commissioners for HM Revenue and Customs
2. Minister for the Civil Service
3. Government Legal Department

Heard at: Liverpool **On:** 10 June 2022

Before: Employment Judge Horne

Representatives
For the claimant: Did not attend and was not represented, but made written submissions
For the respondent: Mr J Hurd, counsel

RESERVED JUDGMENT

1. With one exception, all complaints against the Commissioners for HM Revenue and Customs and Government Legal Department are struck out.
2. The exception is the complaint referred to in the written reasons as "Detriment 2". The tribunal has not yet decided whether to strike that complaint out or not.
3. All complaints against the Minister for the Civil Service are struck out.

REASONS

The claim

1. By a claim form presented on 24 August 2021, the claimant complained that the respondents had subjected him to detriments on the ground that he had made protected disclosures. Section 47B(1) of the Employment Rights Act 1996 ("ERA") gives a worker the right not to be subjected to a detriment by any act (or deliberate failure) done by his employer on that ground.
2. The claim form named three respondents. For convenience, I shall refer to them respectively as "HMRC", "the Minister" and "GLD". The office of the Minister, who

is also the Prime Minister, was held by a man at the time the claim was presented. For convenience I use male pronouns throughout.

Background

3. This claim has a long procedural back-story. There have been at least four previous claims brought by the claimant against HMRC and others. The four I know about are claims 2409957/2013, 2408488/2015, 2404018/2017 and 2400171/2019. It will in due course be necessary to revisit some of the history of these claims order to understand the detriments to which the claimant was allegedly subjected, and the strike-out arguments in relation to those detriments. The last three of these claims have been combined and are due to be heard together at a final hearing. The tribunal has considered the issues in detail and prepared a list, to which I will refer as "the Combined List of Issues".

4. The claimant is a former civil servant and employee of HMRC. Over ten years ago, the claimant raised concerns about the legality of a scheme called Managed Office Infrastructure Solutions ("MOIS"). The claimant's case, in broad outline, is that he made protected disclosures by raising these concerns. He alleges that he was subjected to a long campaign of detriments and was dismissed. All of this was done, he says, on the ground that he had made those disclosures. Further detriments have allegedly been caused to him since his employment ended.

The alleged detriments

5. The claim form with which this judgment is concerned was accompanied by a four-page document (which I call "the Details of Claim"), expressly intended to supplement Box 8.2. The Details of Claim began with a brief summary of the litigation and continued:

> "…
>
> There are three matters further raised in this claim as a result of acts or failure to act by HMRC.
>
> 1. The first matter is the failure to provide a response to the application for determination as a preliminary matter the legality of MOIS…
> 2. The second matter is the HMRC abuse of RIPA powers…
> 3. The third matter is the application by HMRC for an injunction to prevent the reporting by the press of the details of the Employment Tribunal case."

6. For convenience, I have labelled these alleged detrimental acts and failures "Detriment 1", "Detriment 2" and "Detriment 3". The Details of Claim expanded on each one. Based on my understanding of that document, I summarise the claimant's case here.

<u>Detriment 1 – Legality of MOIS</u>

7. The claimant sets out why, in his view, it was important for the tribunal to determine the legality of MOIS:

> "The determination of the legality of MOIS is a fundamental matter of the matters already brought before the Tribunal. That MOIS was illegal was a concern meeting the criterion in PIDA… The breach of Trust and Confidence is already cited in the case in 2408488/15…"

8. According to the Details of Claim, the detrimental acts prohibited by section 47B include acts done by the employer in the defence of tribunal claims brought by the worker. This is how the claimant puts the argument:

> "HMRC has an obligation under PIDA to prevent detriment being caused to me. There is no qualification in PIDA limiting the obligation or exempting any actions from this protections such as the defense of litigation so that obligation applies whether any action or failure to act is before or after the instigation of litigation or as a result of litigation being pursued."

9. Having laid that groundwork, the Details of Claim go on to identify HMRC's alleged detrimental failure that is Detriment 1. The failure related to the claimant's application for permission to rely on expert evidence about the legality or otherwise of MOIS. According to the Details of Claim, the expert evidence application was referred to in a case management order dated 23 July 2021. I will refer to this case management order as "the July CMO".

10. The precise point in time of HMRC's alleged failure was set out in this sentence:

> "The [July] CMO correctly identifies that HMRC indicated it would provide its response to the determination of the illegality of MOIS but did not provide any response."

11. As the Details of Claim go on to explain, "it is not a credible defense for HMRC to argue against the determination of the assertions it makes in its defense of the litigation". Those assertions being, according to the Details of Claim, the assertion that MOIS was legal.

12. The Details of Claim continue by alleging, "Clearly as a preliminary matter with a requirement for an argument and evidence to be presented HMRC were not in a position to support its assertions or state its position."

13. Why was this omission detrimental to the claimant? The Details of Claim put it this way, with original underlining:

> "<u>Such failure by HMRC to respond causes further prolongation of the litigation and hence causes me further detriment and ill health</u>."

<u>Detriment 2 – abuse of RIPA powers</u>

14. The substance of the second detriment claim is set out in this extract from the Details of Claim:

> "Whilst I have not been able to progress the actions in the previous CMO to produce a complete list of evidence… a file had been created of much evidence.
>
> This file had not been looked at for some time and after an attack on my computer. Such file has now disappeared.
>
> <u>It appears on balance of probability HMRC have and continue to abuse the powers held under RIPA to illegally access communications and that on balance of probabilities such as directly or indirectly been used to attack and destroy evidence…Such act of destroying evidence gathered has only become known since return from a short break on 29 July 2021."</u>

15. I take "RIPA" to be a reference to the Regulation of Investigatory Powers Act 2000 and the Investigatory Powers Act 2016.

16. A little earlier in the Details of Claim, the claimant explains his basis for contending that it was HMRC who attacked his computer. He relies on an appearance by the Chief Executive Officer of HMRC before the Public Accounts Committee in 2014. According to the Details of Claim, the CEO refused to give an assurance to the Public Accounts Committee that RIPA powers would not be used to keep whistleblowers under surveillance. (This factual allegation underpins Detriment D4 in the Combined List of Issues.) No other facts are alleged that would be probative of this allegation.

Detriment 3 – HMRC's application for an injunction

17. The Details of Claim allege that HMRC has applied "for an injunction to prevent the press reporting the details of the Employment Tribunal case".

18. According to the claimant, the facts from which the tribunal should conclude that HMRC have applied for such an injunction are:

    18.1. The allegations made by the claimant in his claims "shall cause political discomfort if reported";

    18.2. "Contact has been made during the course of the proceedings on a number of occasions and initial interest has not resulted in any action more specifically no call back when interest has been expressed"

    18.3. A similar pattern of behaviour is also said to have happened "in the earlier stages of the public interest disclosures" at which time "HMRC would not answer the question as to whether an injunction had been obtained against the press";

    18.4. "Further this matter was raised in an application for determination as a preliminary matter in the proceedings … The response of the Tribunal which has claimed not to be aware of the existence or not of any order adversely affecting the opportunity for a fair hearing has been to refuse to order any disclosure on the overtly spurious basis that had an injunction been obtained I would be aware of it… Clearly such super injunction on the Press and not on me with obligation to keep the existence of such injunction secret would be prejudicial to proceedings and the lack of veracity in the Tribunals response only adds to the evidence that …HMRC has obtained an injunction to prevent the reporting of the Tribunal proceedings."

Liability of respondents

19. The final two paragraphs of the Details of Claim set out the claimant's argument as to why the Minister and GLD might be liable for the alleged detriments.

> "The actions identified have been on HMRC behalf but have been undertaken with the services of [GLD] who are also being cited as a respondent to explain their actions. Whilst it is legitimate for [GLD] to take actions to defend HMRC it is not legitimate for [GLD] to take any actions or failure to act which it knows to be illegal. [GLD] shall be aware of the illegal status of MOIS and that the continued failure to acknowledge or state the illegal status of MOIS shall and has caused further detriment.

> The Minister … has full legal responsibility for HMRC and [GLD] including that such bodies should comply with the laws in place. On 17 August 2021 the three matters above causing illegal detriment by breaching the protections in PIDA were identified to the Minister. It would be entirely reasonable that such disclosure to the Minister would be acknowledged by return and that a response from the Minister should be issued. This has not happened which again prolongs and increases the detriment caused by the actions and non actions on HMRC's behalf for which the Minister has legal responsibility for. Hence the Minister has also been cited as a Respondent for the inaction taken to address."

20. Attached to the claim form was a copy of the claimant's letter of 17 August 2021. It was addressed for the attention of "Boris Johnson Minister for the Civil Service". After greeting the Minister by his first name, the letter went on to summarise the factual allegations underpinning Detriments 1 to 3. His letter did not specify a timescale for a reply.

The respondents' applications

21. By letter dated 17 January 2022, HMRC applied for the claim to be struck out on the ground that it was scandalous, vexatious and/or had no reasonable prospects of success. In the alternative, HMRC sought a deposit order and/or an Unless Order.

22. HMRC's proposed Unless Order included a requirement to provide answers to the following questions:

> "…
> (d) If it is alleged by the Claimant that his computer was illegally accessed by the First Respondent and evidence destroyed, the First Respondent requests that the Claimant be asked to identify: (1) when; (2) what files he alleges were tampered with and in this respect was it more than his "evidence file" and if so what did it contain?
> (e) If the Claimant's case is that a single file relating to these proceedings has disappeared, please provide the name of the file, and where it was stored on his computer.
> (f) The evidential basis that this was an "attack" as opposed to a computer malfunction; and
> (g) What basis the Claimant has for alleging that the attack was perpetrated by [HMRC]."

23. The tribunal informed the parties on 3 March 2022 that HMRC's application would be considered at a public hearing on 25 April 2022. That hearing was subsequently postponed and re-listed to be heard on 10 June 2022.

24. In the meantime, the Minister and GLD each made strike-out, deposit and unless order applications of their own. These were sent respectively on 12 and 25 May 2022. Letters from the tribunal, respectively dated 23 and 30 May 2022, informed the parties that the public hearing would be used to determine those applications, too.

Earlier procedural history

<u>Claims against the Cabinet Office and the Minister</u>

25. On 17 July 2018, the claimant presented claim 2413478/2018, alleging that he had been subjected to whistleblowing detriments. The respondents included the Cabinet Office.

26. In written submissions dated 24 March 2019, the claimant accepted that Cabinet Office was not his employer. Nevertheless, he argued that the Cabinet Office would be liable because

> "The relationship between the respondents is not one of strangers, they are all part of the Civil Service or are contracted to provide services to the Civil Service"; and
>
> "the Minister for the Civil Service … holds a statutory legal responsibility for the Civil Service including the HMRC employer entity."

27. In a judgment sent to the parties on 5 April 2019, Employment Judge Ross struck out the claim against the Cabinet Office. At paragraph 31 of her reasons, EJ Ross rejected the notion that the Cabinet Office and HMRC were part of a single common employer. She also considered, at paragraph 32, whether or not the Cabinet Office was HMRC's agent for the purposes of section 47B(1A)(b) of ERA. In EJ Ross's judgment, there was no evidence that the Cabinet Office was HMRC's agent.

28. On 20 December 2018, the claimant presented a further claim which was given case number 2400171/2019. Amongst the respondents were the Minister and the Cabinet Office. The claimant alleged that the Cabinet Office had failed to respond to a letter that he had written on 22 November 2018 and that, by doing so, the Cabinet Office had subjected him to a detriment on the ground that he had made a protected disclosure. The 22 November 2018 letter had pointed out alleged detrimental failures on the part of Health Management Limited and other bodies in connection with his claim for benefits under the Civil Service Injury Benefit Scheme (CSIBS).

29. Claim 2400171/2019 was combined with other claims and considered by Regional Employment Judge Parkin. He ordered that there should be a preliminary hearing in public for purposes which included consideration of striking out the claim against the Cabinet Office and the Minister.

30. The preliminary hearing took place on September 2019 and 1 October 2019, following which a judgment was sent to the parties on 3 January 2020. One of the decisions recorded in that judgment was to strike out the claim against the Minister. Paragraph 18.5 of the reasons explained that civil proceedings could not validly be served on the Minister, whose statutory responsibility for managing the Civil Service had been delegated to the Cabinet Office. The claim against the Cabinet Office was listed for a further preliminary hearing to consider the arguments in more detail.

31. That preliminary hearing took place before Employment Judge Slater in February 2021. In a reserved judgment sent to the parties on 7 April 2021, EJ Slater determined that the Cabinet Office had not acted as HMRC's agent. This is how she reasoned:

> "85. I conclude that, in this case, the Cabinet Office was not acting by virtue of any authority conferred by HMRC when acting in relation to a claim for benefits under the CSIBS. The powers of the Cabinet Office were delegated to them by the Minister for the Civil Service. The Minister for the Civil Service has the power, under the Superannuation Act 1972, to make, maintain and administer schemes such as the CSIBS. Section 1(2) of that Act allows the Minister to delegate "to any other Minister

> or officer of the Crown any functions exercisable by him by virtue of this section or any scheme made thereunder." The Cabinet Office, if it subjected the claimant to detrimental treatment as alleged, was not acting by virtue of authority conferred by HMRC. It was acting by virtue of powers under the statutory scheme delegated to it by the Minister for the Civil Service.
>
> 86. I conclude, therefore, that the Cabinet Office was not acting as the agent of HMRC and there is no basis for liability under section 47B ERA against the Cabinet Office. I, therefore, dismiss the Cabinet Office as a respondent to the proceedings in both cases."

32. The claimant appealed to the Employment Appeal Tribunal (EAT) against the decision of REJ Parkin. His appeal was combined with other appeals (see below) and heard by His Honour Judge Auerbach on 23 and 24 September 2021. By that time, all concerned had seen EJ Slater's judgment on the agency point. The EAT's judgment was handed down on 11 October 2021. So far as the appeals concerned the Cabinet Office and the Minister, they were dismissed. HHJ Auerbach observed that REJ Parkin had correctly described the statutory delegation of functions from the Minister to the Cabinet Office. He approved and adopted EJ Slater's analysis of the agency position. The authority of the Cabinet Office in relation to the operation of the CSIBS derived not from HMRC, but from statute. Neither the Cabinet Office, nor the Minister, were acting as HMRC's agents for that purpose.

<u>Expert evidence, legality of MOIS and "super-injunction"</u>

33. To trace the procedural history relevant to Detriment 1 (expert evidence and legality of MOIS), we have to go at least as far back as 2019, if not to 2013.

34. I have mentioned in passing that REJ Parkin considered the combined claims in 2019 and ordered that there should be a preliminary hearing in public. At the time of making that order, REJ Parkin also had to consider an application which lies at the heart of Detriment 1. The application, which was made by the claimant, was for permission to rely on expert evidence concerning the legality of MOIS.

35. Importantly, for the purposes of this claim, the respondent opposed the application. In broad outline (adopted from the subsequent appeal judgment), the respondent contended that there was no need for expert evidence and that a similar application had been made within earlier proceedings lodged in 2013 and had been rejected.

36. REJ Parkin refused permission to rely on expert evidence. According to REJ Parkin, not only was the application premature, but expert evidence would not assist the tribunal to determine the issues before it.

37. The claimant appealed. A hearing took place on 30 October 2019, before Choudhury J, President, under rule 3(10) of the Employment Appeal Tribunal Rules 1993 ("the EAT Rules"). One of the claimant's submissions at that hearing was that HMRC's stance throughout the internal grievance process had been that MOIS was not unlawful. The President summarised the claimant's argument in this way (at para 7): "A fundamental part of the claimant's case is that [HMRC's] refusal to accept that MOIS was illegal caused him detriment. As it was a fundamental part of the case, it is something which the Tribunal would need to determine…"

38. To take stock, for a moment, this argument is now being deployed in the claimant's Detriment 1 complaint (see my paragraph 11 above).

39. At the conclusion of the hearing, the appeal was dismissed. The President engaged directly with the claimant's argument. Having first identified the issues for determination in a claim under section 47B of ERA, he continued (at para 8):

> "It is apparent from the provisions of [ERA] that none of that requires the Tribunal to find, as a matter of fact, whether or not the allegation was true."

40. The President continued:

> "…Of course, what the Claimant says is that the employer's failure to accept the illegality of the position resulted in further mistreatment of him, and in order to address that part of the case, whereby the Respondent is, effectively, justifying its actions, expert evidence would assist.
>
> 9. I disagree. The Respondent does not have a defence of justification if there is detriment…That goes to show, it seems to me, that the critical issues which the Tribunal needs to determine do not require expert evidence."

41. In the meantime, the tribunal continued to manage the case. By January 2021, a final hearing had been listed for 15 days, to begin on 29 November 2021.

42. In January 2021, the claimant made a further request to rely on expert evidence concerning the legality of MOIS. After some correspondence, a preliminary hearing was listed to take place on 16 June 2021 to consider that request, amongst other things.

43. The present Grounds of Claim assert, by way of background, that the claimant's application was initially "obfuscated" in hearings and correspondence. In my view it is unnecessary to decide for the purpose of the strike-out hearing whether or not any obfuscation initially occurred. It is clear from the Grounds of Claim that the failure that is alleged to be Detriment 1 happened much later, once the 16 June 2021 hearing had already been listed.

44. On 15 June 2021, the claimant e-mailed his submissions for the hearing the following day. They ran to four and a half pages of dense type. The submissions covered many topics, including the difficulties he would face at the forthcoming hearing, and wide-ranging criticisms of decisions made at previous hearings, and accusing the tribunal of bias. Amongst the points made in his submissions was this:

> "32. Matters already before the Tribunal are:-
>
> 33. An application for expert witness evidence to be ordered to determine … the legality of the MOIS deal. These matters have been raised with the Tribunal and shall require a preliminary hearing process as it is clear that there shall be difficulty and appeal arising if the Tribunal continues to seek to ignore the case brought. …The Tribunal is already on record in the first case brought now dismissed as having stated that it will never make such order even though it is clearly an absolute requirement that in hearing the case brought the Tribunal shall have to reach a determination of if the Employer acted illegally in treating me the way hit has when acting illegally in awarding MOIS…"

45. A few minutes later, the tribunal received a response from Mr Sladen of GLD. His e-mail indicated that he had intended to represent HMCTS at the hearing, but, "given the Claimant's non-attendance, and his detailed submissions, we would be content to consider those submissions and provide a written response, rather than attend without counsel in the Claimant's absence".

46. REJ Franey acted upon the correspondence the same day. He postponed the preliminary hearing and caused a letter to be sent to the parties on 15 June 2021. The letter read: "The respondent should reply to the claimant's written submission by 4pm on 22 June 2021 and Regional Employment Judge Franey will then decide how to proceed."

47. The e-mails continued. In the evening of 15 June 2021, the claimant complained that the tribunal had not responded to his allegations of bias. His e-mail added,

> "The current status in which clarity and justification is not present is prejudicial the longer it persists. Please make clear how the prejudice shall be addressed as the options shall not be changed by delay or the Respondents views.
>
> From the attached it is unclear if the Respondent is supposed to be putting argument forward or not or when I shall be putting my argument forward in respect of the applications made."

48. It appears from this e-mail that the claimant wanted to know what HMRC was going to say, if anything, in opposition to his applications. From the e-mail, it also appears that the claimant believed that the respondent's views to be meaningless in any event.

49. On 16 June 2021, the claimant sent a further two pages of detailed submissions, mostly making applications for specific disclosure. On 21 June 2021, the claimant sent a lengthy e-mail to the tribunal, asking for clarification of the respondent's position in relation to his submissions. His e-mail asserted,

> "A key feature of the handling to date of the case which has caused prejudice has been the Tribunals reluctance to seek a position from the Respondent/s. The applications currently made and requiring determination are to seek such clarification of position to the following questions:-
>
> 1. Does HMRC accept that MOIS was illegal and hence it breached trust and confidence in directing that I should take actions that were illegal…
>
> I ask these questions of HMRC here to assist the Tribunal in considering how to progress the applications made.
>
> It appears likely that the HMRC position on each of these questions is "No". If the answer to each of these questions is no then the determination of suitable evidence to determine these preliminary matters shall be required or the Tribunal shall be hearing a case with insufficient evidence to determine if detriment from an act or failure to act has occurred.
>
> The first [question] relate[s] to matters where the interests of justice shall be served by the Tribunal having available to it expert evidence to address the current imbalance between HMRC … and me….
>
> …
>
> It would be useful if HMRC can be clear when giving its response by tomorrow what its answers are to the three questions asked above."

50. What the claimant was doing in this e-mail was to advance the argument that he now makes in his Grounds of Claim (see my paragraph 11). As I have already

observed, this was precisely the same submission that he had made unsuccessfully to Choudhury J on 30 October 2019.

51. HMRC did not reply to the claimant's submissions by 22 June 2021 as directed. That evening, on HMRC's behalf, Mr Sladen apologised for the delay and stated, "Our reply to the Claimant's submissions will be sent tomorrow". The next day came and went without any written reply from HMRC. The claimant chased Mr Sladen by e-mail at 10.11pm, but no reply had been sent to the tribunal by the time REJ Franey reviewed the file on 25 June 2021.

52. On 25 June 2021, REJ Franey wrote a detailed letter to the parties, summarising his understanding of the current case management position. His letter addressed the claimant's application for expert evidence on the legality of the MOIS deal. He observed that this matter did not appear "to have any bearing on the issues to be determined at the final hearing," adding," The claimant will have a chance to explain the relevance of these matters at the next preliminary hearing before a decision is taken as to whether permission to rely on expert evidence is granted." As for the questions for HRMC posed by the claimant in his 21 June 2021 e-mail, REJ Franey's letter observed that none of them – including the legality of MOIS – were "appropriate questions".

53. Pausing there, it is clear that REJ Franey did not believe himself to be in a position to make a final decision on the claimant's application for permission for expert evidence. This was not because of the absence of a response from GLD. Rather, it was evidently because REJ Franey considered the claimant's submissions to be inadequate. The regional judge's opinion, as expressed in this letter, was that the claimant would need to explain the relevance of the proposed expert evidence before his application could get off the ground. The decision on his application was deferred to the next preliminary hearing, the better to enable the claimant to provide that explanation.

54. The claimant sent multiple replies to REJ Franey's letter, including a two-page submission e-mailed on 7 July 2021. The claimant took exception to REJ Franey's observation about the lack of relevance of the proposed expert evidence. He added,

> "Given that there is no objection and there has been explanation of the direct relevance and significance it is difficult to see the Tribunal actions in once again deferring the matter submitted in January 2021 until 22 July 2021."

55. Here, in this e-mail, was the claimant relying on the lack of a response by HMRC to his submissions as a point in his favour. His e-mail also made clear that the claimant wanted his application determined without any further hearing.

56. Further e-mails from the claimant requested that the final hearing to be postponed.

57. On 23 July 2021, REJ Franey signed the July CMO, which was sent to the parties on 26 July 2021. Amongst the decisions recorded in the July CMO were:

    57.1. a refusal of the claimant's application to postpone the final hearing

    57.2. a refusal of permission to rely on expert evidence; and

    57.3. a refusal to order disclosure of HMRC's application for an injunction.

36. REJ Franey identified the issues in relation to which the expert evidence was said to be relevant. One of these was the legality of MOIS. Having done so, REJ Franey decided that expert evidence would not be reasonably necessary in relation to that issue. This was because (with his emphasis):

> "40…Essentially, the claimant says that he made protected disclosures about the legality of this matter which then resulted in unlawful treatment. As the [Combined] List of Issues sought to make clear, the Tribunal is not determining whether there was illegality in the MOIS. It is concerned with identifying whether the claimant disclosed information which he reasonably believed tended to show illegality. That is a question of assessing the information before him and whether he had a reasonable belief at the time he made the disclosure. Whether, with hindsight, he was right or wrong is not for the Tribunal to determine. Expert evidence of this kind would not therefore be relevant."
>
> 41. Nor would it be relevant to the question of unfair dismissal. It appears the claimant intends to argue that the decision to dismiss him for breaching trust and confidence through covert recordings was unfair because it was HMRC that had already destroyed trust and confidence by acting illegally. The fairness of the dismissal will be assessed in the light of the information available at the time to HMRC, or information which could reasonably have been acquired through an investigation within the band of reasonable responses. Introducing expert evidence in hindsight is not relevant to the question of fairness."

58. REJ Franey's reasons for refusing disclosure of the supposed injunction application were as follows:

> "45. The claimant applied in his written submission of 16 June 2021 for an order requiring HMRC to disclose whether they have obtained an injunction (or a "super injunction") suppressing the reporting of the concerns he raised. He also applied for an order in relation to whether there were any injunctions preventing the reporting of the Employment Tribunal case.
>
> 46. Determination of this case requires consideration of the mental processes of the individuals responsible for any actions identified in the list of detriments which are found to have occurred and to have been a detriment to the claimant. If the claimant seeks to make the point that the matters he was raising in his disclosures were serious, that can be done by reference to the text of the disclosures themselves. The question of whether HMRC as an organisation sought to suppress those disclosures is not sufficiently relevant to justify an order for disclosure.
>
> 47. Nor is the question of whether any injunctions have been obtained to prevent the reporting of the Employment Tribunal proceedings. The Tribunal is not aware of any such injunction, and as the claimant would be in a position to report the outcome of the proceedings it would seem plain that he would have to be aware of any such injunction if he were to be bound by it."

59. Paragraph 47 of the July CMO has some significance to this case. Here was a finding by REJ Franey that no injunction had in fact been obtained by HMRC. He

did not expressly state that he had found this to be a fact. But the paragraph can have no other meaning.

60. The claimant appealed to the Employment Appeal Tribunal against these parts of the July CMO and others. His appeal was considered by His Honour Judge Auerbach. It was heard together with the appeals I have already recounted, concerning the claims against the Cabinet Office and the Minister.

61. In relation to the expert evidence decision, the claimant's appeal was dismissed. HHJ Auerbach explained his decision in this way:

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

62. HHJ Auerbach also dismissed the appeal in respect of the "super-injunction". At paragraph 117, he reasoned:

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

63. It is plain from paragraph 117 that one of the pillars of HHJ Auerbach's decision was his view that there could have been no injunction to restrain reporting. Had HMRC obtained such an injunction, the claimant would have been aware of it.

64. In the meantime, the claimant persisted in his efforts to persuade REJ Franey that it was necessary for the tribunal to determine the legality of MOIS. A case management order following a hearing on 1 October 2021 recorded:

> (8) In the course of this part of the discussion the claimant said that the issue most fundamental to the case was the illegality of MOIS. He also repeated the assertion that it was not possible for him to have breached trust and confidence

through gross misconduct if his employer had already breached trust and confidence through instructing him to act in a way that was illegal. These are propositions which his understanding of the scope of the case. I observed that both propositions were based on a misapprehension on his part. At least four different Judges have ruled that expert evidence is not admissible because the Tribunal does not have to determine the legality of the MOIS deal. For example, decisions to that effect have been made in the Employment Tribunal by Employment Judge Porter and myself, and in the Employment Appeal Tribunal by The Honourable Mr Justice Choudhury (President), in paragraphs 8-10 of the transcript of the Judgment delivered on 30 October2019. The reasons why this is not a matter for the Tribunal to determine are contained in paragraphs 40 and 41 of my written Case Management Order sentto the parties on 26 July 2021.

(9) As for the point about a breach of trust and confidence, this is contrary to authority in the form of the decision of the EAT in *Atkinson v Community Gateway Association* [2015] ICR 1, referring to a decision of the Court of Session in Scotland in *Aberdeen City Council v McNeill* [2014] IRLR 114. A breach of trust and confidence by an employer does not relieve the employee of his contractual obligations until such time as he accepts that breach as one which terminates the contract of employment (i.e. by resigning).

65. In the same order, REJ Franey observed that the timetable would be "tight", but that the final hearing would remain listed to begin on 29 November 2021. He ordered a further preliminary hearing to ensure that the parties were ready.

66. REJ Franey caused a further written decision to be sent to the parties on 19 October 2021. His decision was about specific disclosure of documents. Refusing disclosure of certain documents, REJ Franey explained the complaints and issues in the combined claims in some detail and then added:

> "18… None of this requires the Tribunal to determine for itself whether the MOIS deal was legal or illegal. In what follows I will refer to the claimant's misunderstanding on this point as the "MOIS deal point".
>
> 19. In addition, the claimant asserts that some documents are relevant because he wants to argue that because HMRC had breached trust and confidence, he could not fairly be dismissed for breaching trust and confidence by gross misconduct. He says this renders relevant all material showing how HMRC treated him in the past. But the law says that while the contract subsists, the obligations on both sides continue. For an example of that in the employment law context one can refer to **Atkinson v Community Gateway Association [2015] ICR 1**. I acknowledge that that was a case where the situation was the other way round (the respondent unsuccessfully argued that the claimant could not claim constructive unfair dismissal on the basis of a breach of trust and confidence by the employer where he himself had breached trust and confidence through other actions), but the principle remains applicable. An employee who considers his employer to have acted in a way which destroys trust and confidence, but who remains in employment, is not immune from dismissal if he subsequently commits gross misconduct. I accept that the claimant can argue that the decision to dismiss was unfair given the background, but that is assessed on the basis of the information before the

> decision maker at the time. I will refer to this misconceived argument based on an alleged prior breach of trust and confidence as "the **Atkinson** point.""

67. A further preliminary hearing took place on 10 November 2021. This time, REJ Franey decided that the final hearing had to be postponed. The written record of the hearing set out REJ Franey's reasons for the postponement. The final hearing could not go ahead because the claimant was not ready. At that time, the claimant's mental health was suffering, he could not deal with the thousands of pages of documents that were disclosed to him, and he still could not accept the tribunal's view of the scope of the issues for determination. The final hearing was re-listed to be heard in 2023.

68. The claimant appealed against the specific disclosure decision and against REJ Franey's further refusal to allow expert evidence on the MOIS legality point. His appeal was initially dismissed under rule 3(7) of the EAT Rules. Following a hearing under rule 3(10) of the EAT Rules, Eady J, President, dismissed the appeal. So far as the grounds of appeal related to the need to determine the legality of MOIS, the President described them as "without merit". Paragraph 23 of her judgment addressed the ground of appeal with regard to expert evidence. According to the President, that ground, "can only be characterised as an abuse of process and the appeals in this regard are totally without merit".

Enabling the claimant to participate in hearings

69. Prior to the hearing on 10 June 2022, the tribunal had agreed to adapt its preliminary hearings to take account of the claimant's mental health. The "ground rules" were set out in the order of Employment Judge Holmes dated 27 November 2020. As later summarised by the Employment Appeal Tribunal, the ground rules were:

> "that the tribunal would inform the claimant of what was to be considered at each hearing, that it would provide written reasons for its decisions, that he would be given two weeks' notice of actions required of him, and arguments or skeletons within the same timescale, that case management hearings would be conducted remotely, and that all hearings would be recorded by the tribunal."

70. A further set of adjustments have been proposed by the tribunal with a view to enabling the claimant to participate in the final hearing.

The hearing on 10 June 2022 and further representations

71. Before giving an account of the hearing, and the correspondence that surrounded it, I ought to forewarn the reader that I refer from time to time to the tone and language of the claimant's e-mails. In broad terms, the claimant resorted increasingly to swearing and to making accusations of corruption on the part of His Majesty's Courts and Tribunals Service. It is important to be clear about why I am mentioning these things. The references are not gratuitous. Nor should they be taken as any kind of indication on my part about what I think of the underlying merits of the claim. The claimant's way of expressing himself in e-mails is, nonetheless, a relevant part of the procedural history. It helps to explain why I managed the case in the way that I did. In particular, they partly explain why I decided to determine the strike-out applications without any further hearing. His e-mails also appeared to be a barometer of his stress levels, which I took into account in making orders for written representations.

72. The claimant e-mailed GLD on 29 May 2022 with regard to the strike-out hearing, asking when the respondents' submissions would be made available. On 31 May 2022 he asked for the "dial-in details" for the hearing. GLD sent him an indexed copy of the preliminary hearing bundle on 1 June 2022. At that point the bundle ran to 262 pages. It included the three respondents' written applications. The claimant e-mailed the tribunal again on 8 June 2022, observing that the respondent had not yet sent in any submissions and querying what progress could be made at the forthcoming hearing. He was informed that the CVP link to the hearing would be sent to him the following day. On 9 June 2022, the respondent e-mailed the claimant an updated bundle, this time containing 29 further pages of what appeared to be documents generated towards the end of the claimant's employment. The claimant e-mailed again, expressing his anxiety at the "lack of sight of any arguments". The claimant was provided with the CVP link later that day.

73. On 10 June 2022, the claimant e-mailed the tribunal stating that his internet connection was insufficient to support a video hearing. He also complained that "the Judge" had provided "no clarification of how the proceedings will be conducted and when arguments will be made available for me to respond to". In further e-mails sent that day, the claimant made clear his dissatisfaction that the hearing would not be before REJ Franey.

74. The hearing began. Mr Hurd appeared on behalf of all three respondents. The claimant did not participate. I caused an e-mail to be sent, inviting the claimant to join by telephone, and giving him the dial-in details. On receipt of that e-mail, the claimant sent a further e-mail to indicate that he needed to "step out" of the hearing. I arranged for a further e-mail to be sent to the claimant, encouraging him to reconsider, proposing adjustments and reminding him of the importance of a process whereby the claimant and I could check that each had properly understood what the other had to say. One of the adjustments proposed was that the hearing be converted into a case management hearing, with the question of striking out being left to a separate hearing. The e-mail specifically addressed the claimant's concern that he had not seen any written submissions from the respondent. The claimant was informed that the respondent's submissions were set out in their written strike-out applications which had already been provided to the claimant well in advance of the hearing. The claimant's next two e-mails made clear, in intemperate language, that he had no intention of participating in the hearing. They went on, however, to indicate that he would be content to make written submissions on the understanding that all the respondent's submissions were in the bundle.

75. Acting on that information, I decided to reserve my decision and to give the opportunity to put his arguments in writing. In a written case management order sent to the parties on 13 June 2022, the claimant was informed that:

    75.1. he would have a further 21 days in which to make his written submissions;

    75.2. the respondents had not made any submissions during the hearing;

    75.3. that he could request a further hearing before me, at which the strike-out applications could be decided; and

75.4. if he requested that the further hearing be conducted by REJ Franey, the likely outcome would be that I would decide the strike-out applications without any further hearing.

76. The claimant provided written representations dated 27 June 2022. They ran to 7 pages of dense type. He did not request a further hearing before me. On the contrary, his written representations repeated his contention that the strike-out applications should be considered by REJ Franey, because (as he saw it) it was unfair for his claims to be considered "piecemeal".

77. The claimant's written representations also stated:

> "13. Given the impact on health from the 10th June 2022 the time allocated in the subsequent order of three weeks to produce a written response is not reasonable with out such submission as this produced here to not be rushed or considered appropriately. Not least when the Respondents have chosen to take as previously the cleaver legal bullshit approach in puffing bullshit that does not reflect the facts."

and

> "121. I have run out of time. I am working from tomorrow until after the period allocated on the order issued for this submission. I am not happy with this submission as it is rushed, it is incomplete in not responding to all the cleaver legal bullshit puffs from the respondents and a compromise to try and balance health and safety against the requirement to provide a submission. Due to the time of year I have not even been able to obtain legal advice."

78. On 28 June 2022 the Employment Appeal Tribunal handed down its judgment (see below). I formed the provisional view that the judgment was relevant to the strike-out applications. Amongst other things, the judgment appeared to be relevant to the question of whether it was or is necessary for the tribunal to determine the legality of MOIS.

79. I thought that the claimant should be given the opportunity to make representations about the EAT's judgment in the context of the strike-out applications. It also seemed to me that the claimant may not have been able to make all the points that he wanted to make in his written submissions. He might have believed that any submissions he sent to the tribunal after the initial deadline expired would not be taken into account. I therefore made a further case management order which explained my thinking, and gave the claimant an additional 28 days in which to make further written submissions. My order was sent to the parties on 8 August 2022.

80. The claimant made further written submissions on 11 August 2022. The thrust of them was that the tribunal was "hell bent on suppressing both evidence and consideration of the context of the actions I have taken". In abusive language, the claimant suggested that the tribunal was trying to make it easier for the respondent to continue to deny that it had subjected the claimant to detriments as a whistleblower. He denied having seen the EAT's judgment.

81. Having taken these further submissions into account, I did consider whether or not the claimant ought to be given a further copy of the EAT's judgment, together with a final opportunity to make written representations. Having regard to the tone

and content of the latest submissions, however, I considered that the overriding objective would not be achieved by any further hearing or written representations. They were becoming less focused, more repetitive, more abusive and more confrontational with the tribunal.

Relevant law

Overriding objective

82. Rule 2 of the Employment Tribunal Rules of Procedure 2013 sets out the overriding objective of dealing with cases fairly and justly. The overriding objective includes, where practicable, placing the parties on an equal footing and dealing with cases in ways that are proportionate to the importance and complexity of the issues.

Striking out and deposit orders

83. Rule 37 provides, so far as is relevant:

> (1) At any stage of the proceedings…. on the application of a party, a Tribunal may strike out all or part of a claim … on any of the following grounds-
>
> (a) that it is …vexatious or has no reasonable prospect of success;
>
> …
>
> (2) 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.
>
> …

84. The relevant parts of rule 39 are:

> "
>
> (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim…has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
>
> (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit…"

85. Whistleblowing complaints are highly fact-sensitive. There is a strong public interest in such claims proceeding to a final hearing so that the evidence can be properly examined. Striking out such a claim on the ground that it has no reasonable prospect of success is reserved for the clearest of cases. The claim must be truly hopeless, taking the alleged facts at their highest. Where there is a central core of disputed fact, it is highly unlikely that should strike it out. See *Eszias v. North Glamorgan NHS Trust* [2007] EWCA Civ 330 as authority for these propositions.

86. Before striking out a claim, or ordering a deposit, the tribunal must first make reasonable efforts to understand the complaints and allegations. This includes carefully considering the claim form and supporting documentation that the claimant has provided: *Malik v. Birmingham City Council* UKEAT 0027/19 at para

50-51. "Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is": *Cox v. Adecco* UKEAT 0339/19.

87. The following principles should be borne in mind when considering whether or not to make a deposit order:

87.1. The purpose of a deposit order is "to identify at an early stage claims with little prospect of success and discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails". It is not the purpose of deposit orders "to make it difficult to access justice or to effect a strike out through the back door": *Hemdan v. Ishmail* [2017] IRLR 228 per Simler J at paras 10-11.

87.2. Because of the access to justice implications, tribunals should take particular care before making a deposit order, and give sufficient reasons before deciding that an allegation or argument has little reasonable prospect, particularly where core facts are in dispute: *Sami v. Avellan* [2022] EAT 72.

87.3. It is legitimate to have regard to the claimant's prospects of successfully proving the facts that are essential to their case. This may include forming a provisional view as to the credibility of the assertions being put forward: *Van Rensburg v. Royal Borough of Kingston-upon-Thames* UKEAT 0095/07.

87.4. As with striking out, the tribunal must engage with, and make a reasonable attempt to understand, the basis of the claim before assessing its prospects of success: *Wright v. Nipponkoa Insurance (Europe) Ltd* UKEAT/0113/14.

<u>"Vexatious" - issue estoppel and abuse of process</u>

88. In *AG v. Barker* [2000] 1 FLR 759, Lord Bingham CJ said this:

> '"Vexatious" is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.'

89. A claimant in civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his cause of action, if the same assertion was an essential element in the claimant's previous cause of action in previous civil proceedings between the same parties and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect: *Mills v. Cooper* [1967] 2 QB 459.

90. This principle is known to lawyers as "issue estoppel", and has been further defined in this way:

> "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause

> of action to which the same issue is relevant one of the parties seeks to reopen that issue." *Arnold v. National Westminster Bank plc*

91. For these purposes, an employment tribunal is a court of competent jurisdiction. A previous tribunal decision is binding on future tribunals in claims between the same parties: *Munir v. Jang Publications Ltd* [1989] ICR 1, CA.

92. There is a decision of the Employment Appeal Tribunal to the effect that issue estoppel is not limited to findings about the elements of the cause of action. A previous finding of fact (such as whether particular pages were attached to a claim form) may create an issue estoppel if that finding was essential to deciding whether or not the tribunal had jurisdiction to consider a late-presented claim: *Hutchison 3G UK Ltd v. Francois* UKEAT 0078/08.

93. For issue estoppel to operate, the finding of fact in the earlier proceedings must be clear and precise, and the issue for determination in each set of proceedings must be identical: *Turner v. London Transport Executive* [1977] ICR 952, CA, *Munir v. Jang Publications Ltd* [1989] ICR 1, CA.

94. Issue estoppel allows for a "special circumstance" exception. The special circumstance is where there has become available to a party further material relevant to the correct determination of the point in the earlier proceedings and such material could not by reasonable diligence have been adduced in those proceedings: *Arnold* at p109B and *Mills v. Cooper.*

95. In addition to issue estoppel is "the more general procedural rule against abusive proceedings" *Virgin Atlantic Airways Ltd v. Zodiac Seats UK Ltd* [2013] UKSC 46 at para 17. Unlike issue estoppel, the doctrine of abuse of process is not a "rule of substantive law", but a "concept which informs the exercise of the court's procedural powers" (at para 25).

96. For there to be an abuse of process, there does not need to be evidence that the second claim was presented with the intention of harassing or oppressing the respondent. "The very fact that a defendant is faced with two claims where one could and should have sufficed will often of itself constitute oppression. It is not necessary to show that there has been harassment beyond that which is inherent in the fact of having to face further proceedings": *Agbenowossi-Koffi v. Donvand Ltd (t/a Gullivers Travel Associates)* [2014] EWCA Civ 855.

97. It remains, however, for the party seeking to strike out to show an abuse of process. It is not for the party seeking to re-litigate to show cause why the claim should not be struck out: *Bragg v. Oceanus Mutual Underwriting Association (Bermuda) Ltd & anor* [1982] 2 Lloyds Rep 132, CA.

<u>Unless orders</u>

98. Rule 38 provides:

> "An order may specify that if it is not complied with by the date specified the claim… shall be dismissed without further order."

99. Material non-compliance with an Unless Order triggers the automatic consequences in rule 38. Where a claimant has materially failed to comply with the order in one respect, the fact that the claimant may have complied with it in other respects does not stop the claim from being dismissed.

100. It follows that an Unless Order must it is expressed in clear terms. It does nobody any good if the parties and the tribunal cannot work out whether the order was complied with or not.

101. When deciding whether or not to make an Unless Order, the tribunal must have regard to the overriding objective. The purpose is to secure compliance with the order, rather than to defeat the claim.

Protected disclosure detriment

102. Section 47B(1) of ERA provides:

> "(1) A worker has the right not to be subjected to any **detriment** by any act, or any deliberate failure to act, by **his employer** done on the ground that the worker has made a protected disclosure."

103. The protection in section 47B(1) is extended by subsection 47B(1A), which reads, so far as is relevant:

> "A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done…(b) by an **agent** of W's employer with the employer's authority."

104. I have added the bold type to both subsections for emphasis.

"Detriment"

105. An employer can subject a worker to a detriment within the meaning of section 47B of ERA even after the employment relationship has ended: *Woodward v. Abbey National plc* [2006] EWCA Civ 822.

106. The concept of "detriment" should be construed widely. A detriment is something that could reasonably understood by the worker to put them at a disadvantage: *Jesudason v. Alder Hey Children's NHS Foundation Trust* [2020] EWCA Civ 73.

107. An unjustified sense of grievance is not a detriment: *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.

108. Where an employee brings a complaint to a tribunal under equality legislation, "ordinary steps in defending the claim … do no one any harm and may even do some good" (*St Helens MBC v. Derbyshire* [2007] UKHL 16, at paragraph 37), but respondents who "went further than was reasonable in protecting their own interests" (at paragraph 28) crossed the line and subjected the claimants to a detriment.

"On the ground that"

109. An employer's act, or failure, is done "on the ground that" the worker made a protected disclosure if that disclosure influenced the employer's motivation to an extent that was more than trivial: *NHS Manchester v. Fecitt* [2011] EWCA Civ 1190.

Claims against the Crown

110. Section 17 of the Crown Proceedings Act 1947 relevantly provides:

> (1) The Minister for the Civil Service shall publish a list specifying the several Government departments which are authorised departments for the purposes of this Act, and the name and address for service of the

> person who is, or is acting for the purposes of this Act as, the solicitor for each such department, and may from time to time amend or vary the said list…
> (3) 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.

111. The Minister is not named on the list of authorized Government departments. The Cabinet Office is. The arrangement is unsurprising. Section 3 of the Constitutional Reform and Governance Act 2010 confers the function of managing the Civil Service on the Minister (who is also the Prime Minister). Under section 1(2) of the Civil Service (Management Functions) Act 1992, the Minister may delegate that function to another servant of the Crown. The Minister has delegated that function to the Cabinet Office. Where a person has a justiciable claim arising out of the management of the Civil Service, it makes sense for the claim to be brought against the Cabinet Office, who has the delegated responsibility for managing it, and not against the Minister.

"Agent"

112. I have already set out the history of EJ Slater's and HHJ Auerbach's judgments on the question of whether the Cabinet Office could be regarded as acting as HMRC's agents for certain purposes. There is no need for me to cite the decisions again. The essential points I take from them are:

112.1. The starting point is to identify the function that the alleged agent was carrying out.

112.2. Then the tribunal must ask: what was the source of the supposed agent's authority to carry out that function? Did their authority derive from the alleged principal? Or was it conferred independently, for example, by statute?

Social context

113. The *Equal Treatment Bench Book* (ETBB) identifies difficulties commonly encountered by litigants in person. The introduction to Chapter 1 includes this passage:

> "Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure, about which they may have no knowledge. They may be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party."

114. It is well known that a party with mental ill health, including anxiety, can be at a disadvantage when it comes to participating in tribunal hearings. The ETBB provides ideas for how hearings can be adjusted in order to lessen such disadvantages. At page 425, one of the suggested adjustments is:

> "In severe circumstances, allow…written submissions to be provided."

115. Other suggested adjustments for mental disabilities (page 121-122) include "holding additional case management preliminary hearings", "extending time-limits for taking action".

116. It is dangerous to make assumptions about a person's attitude based on their manner of communication. As the ETBB puts it at page 127,

> "A person might appear disrespectful, difficult, inconsistent or untruthful, but these impressions might be erroneous if they have a mental health condition."

Conclusions – reasonable opportunity to make representations

117. I have set out the events surrounding the 10 June 2022 hearing at some length. I have considered the claimant's disability and the need to make adjustments to enabled him to participate effectively. Having done so, I am satisfied that the claimant has had a reasonable opportunity to make representations. In particular, he has made representations in writing at the tribunal's invitation on two occasions. By the time of his first set of written representations on 27 June 2022, it had been 28 days since the last of the respondents' written arguments, it had been 17 days since he had been given the most recent iteration of the bundle, and it had been 14 days since the order had been sent to him confirming that the respondent had made no submissions at the hearing. By the time of his second set of representations on 11 August 2022, he had had a further six weeks to marshal his arguments.

118. The claimant did not request a hearing before me, or any other judge apart from REJ Franey. Rule 37 does not entitle a party to specify which judge should conduct the hearing.

Conclusions – claim against GLD

119. Detriments 1 and 3 concern the conduct of litigation by GLD on HMRC's behalf. For present purposes I will assume that GLD acted as HMRC's agent at all times with HMRC's authority to conduct the litigation in the way that it did. So far as the claim concerns Detriments 1 and 3, the claim against GLD will stand or fall with the claim against HMRC. Prospects of success for these detriments should therefore be considered together in relation to both respondents.

120. Detriment 2, as I discuss in more detail below, is essentially an accusation of a crime. Here, both respondents ought to be considered separately. It is one thing for the claimant to try and prove that someone at HMRC hacked into his computer. It adds another layer of difficulty to his case to try and show that HMRC enlisted the help of government lawyers to do it for them. The claimant relies on various background facts in support of his theory about who perpetrated the criminal act. If those background facts point to any Government agency at all being responsible for the claimant's loss of data, they might implicate HMRC, but do not appear to implicate GLD.

Conclusions – Detriment 1 – HMRC and GLD

<u>Protected disclosures</u>

121. For present purposes I assume that the claimant will prove that he made all the protected disclosures set out in the Combined List of Issues. I will work on the same assumption when considering Detriments 2 and 3.

<u>What was the alleged deliberate failure?</u>

122. The failure that is said to amount to Detriment 1 was GLD's failure to respond to the claimant's application for determination of the legality of MOIS as a preliminary issue.

123. The window of time in which this failure is alleged to have occurred is clear from the Grounds of Claim. The window started when GLD agreed to respond. It ended when REJ Franey observed that no response had been received and made his decision. That places the failure between 15 June and 23 July 2021.

Prospects of proving the deliberate failure

124. There does not appear to be any dispute that the failure occurred.

125. I assume for the purposes of this judgment that the claimant will prove that the failure was deliberate, as opposed to inadvertent.

Prospects on the motivation issue

126. If Detriment 1 proceeded to a final hearing, the tribunal would also have to consider whether the deliberate failure was done on the ground that the claimant made a protected disclosure. For short, I will call this the "motivation issue". As the authorities repeatedly tell us, the motivation issue is a fact-sensitive question. Determination of the motivation issue will almost always require careful consideration of the evidence. Put another way, on a strike-out application, the claimant's case should be taken at its highest, unless the uncontroversial facts compel the opposite conclusion.

127. The respondents argue that there are obvious reasons that could explain GLD's failure to respond to the claimant's application. These include the possibility that GLD was acting HMRC's instructions following GLD's legal advice, or simply had nothing to add to the "steer" that the tribunal had already given that determination of the legality of MOIS was unnecessary. According to the respondents, the tribunal will inevitably find that GLD and HMRC were motivated by these factors, rather than the fact that the claimant had made a protected disclosure.

128. I do not go quite so far. That is not to say that the respondents' arguments do not have force. They point attractively towards the conclusion that the claimant has little prospect of success on the motivation issue. Between 25 June 2021 and 23 July 2021 (part of the window during which the failure is said to have occurred), the respondent's decision-making would undoubtedly have been influenced by REJ Franey's "steer" that determination of the legality of MOIS had "no bearing" on the issues to be decided at the final hearing. HMRC and GLD could have been forgiven for thinking that further written submissions on that point would be a waste of time and money, as they would have been pushing at an open door. Were I not to strike out Detriment 1 on other grounds, I would consider making a deposit order, taking the motivation issue into account. But to strike Detriment 1 out on that ground would be to risk applying the wrong legal test. If there is a reasonable prospect that the tribunal might find the disclosure to have had any significant influence on the decision, it would not matter that HMRC had other reasons for taking that decision. So I could not strike out Detriment 1 unless the other reasons were so compelling that they plainly and obviously excluded the possibility that the respondents were also motivated by the claimant's disclosure. I think the evidence would need to be considered before the tribunal could safely reach that conclusion.

Judicial proceedings immunity

129. The respondents' strike-out applications do not appear to contend that HMRC and GLD were protected by judicial proceedings immunity. I have not considered such immunity as a specific defence when assessing prospects of success. I have, however, considered the context of GLD's failure when deciding whether the failure was detrimental.

Prospects of proving detriment

130. This leaves one important issue to consider. Assuming that GLD's failure to respond was deliberate, and done with the proscribed motivation, was it detrimental to the claimant?

131. As best I can understand the Grounds of Claim, the claimant is saying that the failure was detrimental to him in that it prolonged the litigation, with a consequential effect on his health.

132. It is also possible that the claimant might also be arguing that the failure was detrimental in two other ways:

132.1. It made it more difficult for the claimant to put forward his arguments in relation to his application; and

132.2. It adversely affected the outcome of his application.

Conduct of litigation not a detriment

133. Before going into the detail of the four specific detriments, I record my conclusion on one fundamental problem that the claimant has which is common to all of them. Failing to respond to the claimant's application was an omission to take a step in the proceedings. GLD's failure cannot be said to have gone further than was reasonable to protect HMRC's interests. It could not reasonably have been understood to be a detriment.

134. I would strike out Detriment 1 on that ground alone.

135. In case I am wrong about that, I address each alleged detriment in turn.

Prolonging the litigation

136. GLD's failure to respond did not prolong the litigation, and the claimant has no reasonable prospect of proving that it did.

137. GLD's failure had no effect on the overall length of the litigation. To do so, it would have had to have caused or contributed to the final hearing being delayed. The claimant has no prospect of showing that GLD's failure had any effect on the timing of the final hearing. At the time of the failure, the final hearing was scheduled to start on 29 November 2021. Once REJ Franey was aware of GLD's failure, he had at least two opportunities to postpone the final hearing if he thought that that failure might have any effect on the parties' ability to prepare. The first opportunity was in the July CMO, where REJ Franey specifically mentioned GLD's failure and yet refused the claimant's postponement application. The second was in the case management order following the 1 October 2021 hearing. Again, REJ Franey ordered the final hearing to proceed as listed. When, on 10 November 2021, the final hearing was ultimately postponed, it was for reasons that had nothing at all to do with GLD's failure.

138. GLD's failure did not even prolong the step in the litigation that was immediately at hand. REJ Franey did defer his decision from 25 June 2021 until 23 July 2021,

but that was not caused by GLD's failure. As I have already observed, it was caused by REJ Franey taking the view that the claimant's submissions had not adequately addressed the issue of relevance, which was critical to the success or failure of the application.

Effect on the claimant's health

139. The claimant has no reasonable prospect of proving that GLD's failure caused or materially contributed to a deterioration in his mental health. This is because:

139.1. According to the Grounds of Claim, it was the prolonging of the litigation that was the cause of his ill health. As I have just concluded, the claimant is never going to prove that GLD's failure prolonged the litigation.

139.2. In any case, it is clear that the overwhelming cause of the claimant's anxiety over the years has been his sense of grievance at not being allowed to rely on expert evidence to prove the illegality of MOIS. He thought that the issue was fundamental to his claim and he was frustrated that the tribunal disagreed. As I go on to explain, that sense of grievance was unjustified. It cannot amount to a detriment. The claimant has in any event no reasonable prospect of obtaining a reliable expert medical opinion that could say that GLD's failure added to this anxiety in any significant way.

Effect on the claimant's ability to argue the application

140. There is no reasonable prospect of the claimant demonstrating that GLD's failure had any adverse effect on the claimant's ability to develop his arguments. At the time, he relied on GLD's failure as a point in his favour. In any case, the tribunal will inevitably find that the claimant thought that GLD's views were meaningless. What is more, the tribunal will be bound to conclude that the claimant knew all along what GLD would say if it responded. He knew full well that GLD would contend that expert evidence on the legality of MOIS was unnecessary and irrelevant. That was the stance that HMRC had taken in 2019 before REJ Parkin, and it had been spelled out to him in Choudhury P's appeal judgment.

Effect on the outcome of the application

141. I am not entirely sure whether the claimant is in fact arguing that GLD's failure harmed his chances of getting permission to rely on expert evidence. If that is what the claimant is arguing, the argument is hopeless. This is because:

141.1. Had GLD responded, it would inevitably have been to resist the application. That would not have improved the claimant's chances.

141.2. The application was doomed to fail in any event. Even if his application had never been considered before, and REJ Franey had an entirely free hand, he would have refused the application for the reasons he gave in the July CMO and his two further case management orders. Expert evidence was not reasonably required. The tribunal did not have to determine the legality of MOIS.

141.3. It is in any case not open to the claimant to argue in this claim that his expert evidence application could have succeeded. Such an argument would be vexatious. This is because precisely the same point has been considered and determined against him by REJ Parkin, REJ Franey, Choudhury P, Eady P and HHJ Auerbach. My interpretation of *Francois* is that these decisions have created an issue estoppel. If I am wrong about that, it is clearly an abuse of

process within the wider meaning in *Zodiac.* There is no prospect of any "special circumstances" exception succeeding. Expert evidence on the legality of MOIS is just as unnecessary now as it was then.

Outcome – Detriment 1 – HMRC and GLD

142. I therefore strike out the complaint of Detriment 1 against HMRC and GLD.

Conclusions – Detriment 2 – HMRC

143. Detriment 2 allegedly consisted of HMRC allegedly attacking the claimant's computer causing him to lose a file of evidence.

144. There is a central core of disputed fact here. Did HMRC do the alleged detrimental act or not?

145. For this part of the claim to succeed, the claimant will need to prove:

145.1. That his computer was hacked, as opposed to merely malfunctioning; and

145.2. That the hacker was HMRC, or someone acting on HMRC's behalf.

146. HMRC seek an Unless Order in relation to this allegation. As HMRC put it, the claimant has accused them of a crime with seemingly very little evidence in support. As a minimum, they argue, the claimant must provide the full factual basis for his accusation at the outset. Not only have they set out the information they require from him, but they argue that the claimant's failure to provide it should result in the automatic dismissal of this part of his claim.

147. In my view, an Unless Order would not help to achieve the overriding objective. My concern is that it would lead to satellite litigation about whether the claimant had complied with the order or not. In particular, if the claimant were at some later stage to provide information (for example in his witness statement) that ought reasonably to have been provided in answer to the Unless Order, what would that mean for his claim? Would it be automatically dismissed or not?

148. I do, however, consider that the claimant should be required to provide the full factual basis of his allegation now. I will defer consideration of the prospects of success until the claimant has had the opportunity to provide it. If he does not answer the questions posed by HMRC, I may draw inferences from his failure when considering whether this part of his claim has any reasonable prospect of success.

Conclusions – Detriment 2 - GLD

149. If the claimant maintains his Detriment 2 complaint against GLD, he will need to set out his basis for concluding that GLD was involved in the attack on his computer. I will then consider separately whether Detriment 2 should be struck out against GLD.

Conclusions – Detriment 3 – HMRC and GLD

150. The detrimental act complained of is an application allegedly made by HMRC for an injunction to prohibit press reporting by the press of the details of the employment tribunal case.

151. Injunction applications do not always succeed. It is not entirely clear whether the claimant's allegation is that HMRC actually obtained an injunction, or whether they merely applied for it (successfully or unsuccessfully).

152. If the claimant's allegation is that HMRC managed to obtain an injunction, that allegation is in my view vexatious. Two previous judges, REJ Franey and HHJ Auerbach, have concluded that no such injunction has ever been obtained. Their view, clearly expressed, was that there could not have been an injunction without the claimant having been informed of it. The claimant believes that these judges have got it wrong. Not just wrong, but dishonest. In his words, the tribunal's denial of the existence of an injunction was "overtly spurious" and "lacking in veracity". But just because that is what the claimant believes does not stop his argument from being an abuse of process. Even if it were not abusive, his argument would have no reasonable prospects of success, for the reasons given by the two previous judges.

153. The next possibility is that the claimant's case is that HMRC subjected him to a detriment by making an unsuccessful injunction application. That allegation, too, has no reasonable prospects of success. I have two reasons for reaching this conclusion:

153.1. First, it is fanciful to suggest that HMRC would have made an application to either the employment tribunal or the High Court without notifying the claimant of the application. He would have been the obvious choice of respondent, being the person with the greatest knowledge of what was happening in the employment tribunal and being best placed to pass information about the case to the press. The claimant is not suggesting that anything happened that could have generated sufficient urgency for HMRC to consider an application without notice to the claimant. In any event, the claimant would have been informed about the unsuccessful application afterwards. If all HMRC wanted to prevent was press reporting of public tribunal hearings, HMRC would have applied to the tribunal under rule 50. They have not made any such application, successfully or otherwise. The tribunal would know about it if they had.

153.2. Second, there is no reasonable prospect of the claimant showing that an unsuccessful injunction application was detrimental to him. He could not reasonably understand a failed application on HMRC's part to have put him at a disadvantage.

154. I therefore strike out the complaint of Detriment 3 against HMRC and GLD.

Conclusions – claim against the Minister

<u>Crown Proceedings Act 1947</u>

155. The claim was expressly brought against the Minister as the person with "legal responsibility for HMRC and [GLD]". If the Minister has any legal responsibility for those agencies, it can only be as the servant of the Crown with statutory responsibility for the management of the Civil Service. Section 17 of the Crown Proceedings Act 1947 requires that proceedings against the Crown must be issued against an authorised government department. The Minister is not an authorised government department. His responsibility for managing the Civil Service has been delegated to the Cabinet Office by statute. The claimant has presented a

claim that section 17 does not permit him to present. The claim against the Minister therefore has no reasonable prospect of success.

156. REJ Parkin has already determined precisely the same point when striking out the claimant's previous claim against the Minister in his judgment sent to the parties on 3 January 2020. His judgment gives rise to an issue estoppel, being determination of an issue that is essential to the claimant's cause of action against the Minister. Even if there is no strict issue estoppel, it would clearly be an abuse of process for the claimant to re-litigate it. There are no identifiable circumstances, for example the emergence of new evidence, that justify a departure from this conclusion. Proceeding against the Minister in those circumstances is vexatious.

157. I would strike out the claim against the Minister on that ground alone.

Liability of the Minister or the Cabinet Office - prospects

158. In case I am wrong to strike out the claim purely on that ground, I have considered the Minister's other arguments in favour of striking out the claim against him. For this purpose, I assume that the defect in the claim might be cured, for example, by giving permission to the claimant to add the Cabinet Office as a respondent.

159. In that event, I would still strike out the claim. I cannot see any basis upon which the Minister or the Cabinet Office could be liable to the claimant for the alleged breaches of section 47B of ERA.

160. The claimant does not suggest that the Cabinet Office was his employer within the meaning of section 230 or section 47K of ERA. The "single common employer" argument has in any event been determined against him by EJ Ross and it would be an abuse of process to try to re-argue it.

161. It is worth remembering how the Grounds of Claim attempt to place liability onto the Minister. I do not take the claimant to be arguing that the Minister was acting as the agent of HMRC in subjecting the claimant to Detriments 1 to 3. (Such an argument would be an abuse of process in any event because of EJ Slater's decision.) Rather, I understand the claimant's case that the Minister subjected the claimant to a further detriment by failing to reply to his letter to the Minister dated 17 August 2021 and by his "inaction taken to address" the concerns raised in that letter.

162. The answer to the agency issue, as identified by EJ Slater, derives from the source of the purported agent's authority to do the detrimental act or failure. In this case it is the failure to act upon the claimant's letter. If the Minister had any authority to act upon a letter from a former civil servant raising concerns about their ex-employer's conduct of litigation, or abuse of surveillance powers, or improper use of court procedures, the claimant has not put forward any arguable case that such authority was conferred on the Minister by HMRC. The Minister's authority to deal with these matters, if it existed, is overwhelmingly more likely to have derived from the Minister's statutory power to manage of the Civil Service in section 3 of the Constitutional Reform and Governance Act 2010 (and delegated by statute to the Cabinet Office).

163. There is no reasonable prospect that the Cabinet Office or the Minister could be held to be liable for any breach of section 47B as alleged in the Grounds of Claim.

164. I would also strike out the claim against the Minister on this ground.

Prospects of proving detriment

165. The tribunal is, in any case, bound to conclude that the claimant was not subjected to a detriment by the Minister's failure to reply. His claim form was presented to the tribunal 7 days after the claimant wrote his letter to the Minister. He had not suggested any timescale for a response. He did not chase a reply. He could not reasonably have understood the failure to reply "by return" or within 7 days to have been detrimental to him. Even assuming that the Minister had any responsibility to the claimant under section 47B of ERA, there is no reasonable prospect of the claimant demonstrating that the section was breached.

166. For those reasons, I have decided to strike out the claim against the Minister without considering any additional challenges the claimant might face in showing that he made a protected disclosure, or that the Minister was motivated in his failure by the fact that the claimant had made such a disclosure.

Next steps

167. I have made a separate case management order indicating what should happen next. The claimant is required to provide further information about Detriment 2, following which I will make a further decision in respect of that part of the claim. The remainder of the claim is struck out.

Employment Judge Horne

24 October 2022

SENT TO THE PARTIES ON

25 October 2022

FOR THE TRIBUNAL OFFICE