Neutral Citation Number: [2024] EWHC 326 (KB)

Case No: QB-2019-003813

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 March 2024

Before:

MR JUSTICE LAVENDER

- -

Between :

JANICE ANYON and 120 others	**Claimants**
- and -	
SECRETARY OF STATE FOR WORK AND PENSIONS	**Defendant**

- -
- -

Douglas Leach (instructed by **Harrison Clark Rickerbys Ltd**) for the **Claimants**
Adam Tolley KC (instructed by the **Government Legal Department**) for the **Defendant**

Hearing date: 3 November 2023

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JUDGMENT

Mr Justice Lavender:

(1) Introduction

1. Each of the claimants is, or was, employed by the defendant as a "local service investigator" ("LSI"), investigating benefit frauds. The post of LSI is graded in the defendant's grading system as "executive officer" ("EO"). In this action, the claimants complain about the conduct of a job evaluation exercise carried out by the defendant in 2015-16 ("the Evaluation"). In summary, they contend that:

   (1) The Evaluation was not conducted in accordance with the relevant procedures.

   (2) Had it been conducted in accordance with the relevant procedures, the Evaluation would have resulted in the role of LSI being graded as "higher executive officer" ("HEO"), which would have increased the claimants' pay.

   (3) This is demonstrated, inter alia, by the fact that, at the same time as the Evaluation, a job evaluation exercise was carried out in respect of the post of "central criminal investigation and intelligence service investigator" ("CCIISI"), which the claimants contend is equivalent to the role of LSI, but the role of CCIISI was upgraded from EO to HEO.

2. The defendant contends that the LSI role was correctly evaluated.

3. The claimants allege, and the defendant denies, that the defendant's conduct of the Evaluation involved a number of breaches of the claimants' employment contracts. It will be necessary for me to consider these allegations in more detail in due course.

4. On 5 May 2023 the claimants applied for permission to amend their particulars of claim. The defendant resisted the application on a number of grounds. It will be necessary for me to consider later in this judgment both the nature of the proposed amendments and the circumstances in which the application was made.

5. This judgment sets out the reasons for my decision on the claimants' application for permission to amend their particulars of claim.

(2) Background

(2)(a) The Evaluation

6. As is the case with ministers in charge of other government departments, the defendant operates a grading system for civil servants in his department. The grade accorded to a role plays a significant part in determining the salary paid to civil servants who perform that role.

7. The defendant was obliged by the Civil Service Management Code ("the CSMC") to develop arrangements for the grading of posts. The version of the

CSMC which I was shown was dated November 2016, but it was not suggested by either party that there were any material differences between that version and the version in force at the time of the Evaluation.

8. The arrangements for the grading of posts which the defendant had in place by the time of the Evaluation consisted of the Job Evaluation Grading and Support system ("the JEGS system"), which was used throughout the civil service. A number of documents set out how the JEGS system was expected to operate throughout the civil service. These documents were, or included:

   (1) The JEGS Handbook. The claimants do not have access to a copy of the JEGS Handbook. It is in the possession or control of the defendant, but it is the copyright of Willis Towers Watson ("WTW") and its contents are said to be a trade secret.

   (2) The "JEGS Joint Evaluation and Grading Support Good Practice Guide" published in May 2013 ("the 2013 Guide").

   (3) The "Job Evaluation - Guidance for Managers and Post-Holders" ("the Guidance").

9. In addition, the defendant had produced the "DWP Guidance on Pay and Reward" ("the DWP Guidance").

10. The JEGS system makes use of software ("the JEGS software") devised by WTW. The defendant says that the JEGS software is not in his possession or control. The defendant's witness, Stuart Potts, has summarised the central part of the JEGS system as follows:

> "The JEGS methodology is contained in the Handbook and the associated software. The Handbook is used by the trained evaluators to score a role by using 44 questions across seven factors, which give an assigned letter value. The scoring from the 44 questions is then input into the software. The algorithm in the software converts the letter value to a numerical final score, which will then be read across to defined ranges which equate to the seven [civil service] grades. JEGS assessors do not know how the algorithm works as otherwise this could add risk that assessors may not complete the assessment fairly and independently as the possibility would be there for them to score questions in a way that pre-empts the grading outcome. These grades ranges are determined by WTW, and the software algorithm is confidential."

11. The 2013 Guide states, inter alia, as follows:

> "Departments should hold libraries of evaluations. These are helpful when looking to identify roles for benchmarking and providing quality assurance. As a minimum, a record should be maintained which shows the following for all posts which have been evaluated:
>
> - the date of the evaluation
> - an anonymised job description/JAF/job profile

- scores by factor
- the finally agreed overall score
- the evaluated pay band."

12. I will refer to the library held by the defendant as "the DWP JEGS library". It was to be used in the quality assurance stage of a JEGS evaluation, following which the proposed outcome of the evaluation was to be considered by an evaluation panel, signed off by a manager and notified to the post-holders. The defendant could subsequently review the outcome if asked to do so.

13. The 2013 Guide also states as follows:

(1) "This Good Practice Guide is intended to raise awareness of good practice in the application and maintenance of the Job Evaluation and Grading Support (JEGS) system. For JEGS practitioners, it should be used as a supplement to the JEGS Handbook."

(2) "Guidance on the JEGS factors used to evaluate posts below the SCS is set out in the separate JEGS Handbook. This should be used by HR teams, senior managers and others undertaking evaluations or sitting on job evaluation panels."

14. The result of the Evaluation was announced on 23 June 2016. A re-evaluation was requested, but in July 2017 the defendant communicated his decision not to re-evaluate the role.

(2)(b) The Action

15. The claim form was issued on 21 October 2019. The defence was served on 18 December 2019. The claimants provided their response to the defendant's request for further information ("the particulars") on 19 August 2020. The defence was amended pursuant to permission granted on 16 December 2021.

16. In the particulars, the claimants said that they were hindered from giving more detail by the lack of disclosure and they requested early disclosure by the defendant. In particular, they sought disclosure of the scoring process and of the justification for the outcome of the Evaluation. At a hearing before Master Thornett on 16 December 2021 the claimants made clear that they were seeking disclosure of the JEGS Handbook and the JEGS software. The Master's order records that:

> "the parties are agreed that the defendant's methodology for grading should be subject to preliminary directions for disclosure for the following purposes:
>
> (a) to identify where there is a subjective element in the application of methodology;
>
> (b) to identify what is needed by way of disclosure of the documents to evidence that subjective element and allow it to be tested;

(c) in turn, to identify whether and if so to what extent [the JEGS Handbook, the JEGS software and any document relevant to their application] are material to the allegations of breach of contract;

(d) to identify and implement safeguards needed reasonably to protect the third party's trade secret and the public interest;"

17. Regrettably, the parties have been unable to make any substantive progress with those issues since then. On 8 February 2023 the defendant applied for an order under CPR 31.22 requiring that, insofar as they were ordered to be disclosed, the "JEGS methodology documents" (i.e. the JEGS Handbook, the JEGS software, the DWP JEGS library and any document relevant to their application) should only be used for the purposes of these proceedings.

18. At the next hearing before the Master, on 9 February 2023, the Master proposed the appointment of an expert or assessor to assist with the determination of the scope of disclosure of the JEGS methodology documents. However, the parties were unable to agree on the terms of a draft order giving effect to that proposal.

19. There was to be another hearing before the Master on 18 May 2023, but this was vacated when the claimants, who had changed their solicitors and counsel in 2022, made their amendment application on 5 May 2023. The Master then made an order on 5 June 2023 that:

> "The following Applications, issue and directions shall be listed before a KB Judge on the first available date in Michaelmas Term 2023, time estimate 1 day:
>
> a) The Defendant's 8 February 2023 Application;
>
> b) The Claimant's 5 May 2023 Application;
>
> c) A concluding direction as to the appointment of an independent assessor for the purposes of disclosure;
>
> d) Any Application issued by the Defendant pursuant to Para 1 above [*i.e. for an order establishing a "confidentiality ring" in respect of the assessor's report*];
>
> e) A direction as to the earliest date for the CCMC to resume before the Assigned Master and hence date by which the Clerk to the Assigned Master should be requested to further list."

20. On 28 June 2023 the defendant applied for an order establishing a confidentiality ring in respect of the assessor's report. On 12 October 2023 the claimants applied for permission to make some changes to their draft amended particulars of claim. In addition, in his skeleton argument for the hearing before me, Mr Tolley for the defendant proposed a new approach to the management of this case, namely an order for the trial as preliminary issues of all issues as to the terms of the claimants' employment contracts.

21. These matters came before me on 3 November 2023. I invited submissions on Mr Tolley's proposal and on the amendment application before any other

matters were addressed. In the event, submissions on the amendment application occupied the whole day and I adjourned the hearing of all other matters.

(3) The Proposed Amendments and the Defendant's Objections

22. The amendment application was treated as an application for permission to amend the particulars of claim ("the PC") in the manner indicated in the most recent draft amended particulars of claim produced by the claimant ("the DAPC"). Unhelpfully, however, the DAPC was not prepared in the conventional manner, i.e. with the text to be deleted, but only the text to be deleted, struck through and with the text to be added, but only the text to be added, underlined. For instance, paragraph 13 of the PC was shown as struck through in the DAPC, but its content was then repeated without amendment, but shown as underlined, in paragraph 19 of the DAPC. Since the only change was in the numbering of the paragraph, it would have been much clearer to leave the text of the paragraph alone and to show the number 13 as struck though and the number 19 as underlined.

23. Some of the proposed amendments were uncontentious. They are the amendments to the following paragraphs of the DAPC: 1 (save for the change of the defendant's name), 3 to 7, 13, the deletion of the former paragraph 17, 51 and the prayer for relief. I grant permission to make those amendments.

24. The contentious proposed amendments fall into the following categories:

    (1) Amendments correcting the defendant's name (to Secretary of State for Work and Pensions, rather than Department for Work and Pensions).

    (2) Amendments to that part of the PC (i.e. paragraphs 10 to 13 and 18 to 21) which sets out the claimants' case as to the incorporation of various documents into their employment contracts.

    (3) Amendments to paragraph 14 of the PC, which sets out the claimants' case as to the implied terms of their employment contracts.

    (4) Amendments to that part of the PC (i.e. paragraphs 22 to 31) which sets out a narrative of what are said to be relevant events in relation to the Evaluation.

    (5) Amendments to paragraph 32 of the PC, which sets out the claimants' allegations of breach of contract.

    (6) Amendments to paragraph 34 of the PC, which concerns loss and damage.

25. The defendant contends that permission to make these amendments should be refused for the following reasons:

    (1) There is no evidence that the claimants made a mistake about the defendant's name, which is required if the defendant's name is to be corrected after the expiry of the applicable limitation period.

(2) There is a lack of merit in the proposed amendments concerning the express and implied terms of the claimants' employment contracts.

(3) Those amendments and the proposed amendments concerning the alleged breaches of contract are prohibited by CPR 17.4(2) because they make new claims after the expiry of the appliable limitation period which do not arise out of the same or substantially the same facts as the existing claims.

(4) Certain proposed amendments are unacceptably equivocal.

(5) The narrative part of the DAPC impermissibly pleads evidence and is prolix and irrelevant.

(6) The proposed amendments concerning loss and damage seek to introduce a claim for a loss of a chance which is bound to fail.

26. I will address each of these matters in turn. I deal first, however, with a general complaint made by Mr Tolley about the amendment application, namely his contention that it was made for an improper purpose, i.e. to increase the claimant's prospects of obtaining disclosure of the JEGS methodology documents. Mr Leach submitted that that was not the purpose of the amendment application. Instead, he said that the amendment application was prompted by the proposed appointment of an assessor, because the claimants' representatives considered that it would assist the assessor to have a statement of the claimants' case which was made in one document, rather than in two (i.e. the PC and the particulars) and which was clearer than the existing PC. He added that the proposed amendments reflected the views of the claimants' new legal team and were intended to set out a more specific, and therefore narrower, statement of the claimants' case.

27. I do not propose to decide the amendment application by reference to the subjective intention of the draftsman of the DAPC, rather than by an objective application of the rules on amendments to statement of case. Mr Tolley invoked the proposition that "It is wrong in principle … to plead immaterial matters with a view to obtaining more extensive disclosure than might otherwise be ordered": see paragraph 24 of Males J's judgment in *Grove Park Properties Ltd v Royal Bank of Scotland Plc* [2018] EWHC 3521 (Comm), cited in paragraph 39 of Andrews LJ's judgment in *BB v Doha Bank Ltd* [2023] EWCA Civ 253. He complained, in particular, of the references in the DAPC to the JEGS software and the DWP JEGS library. However, these are not immaterial matters. The JEGS software is central to the JEGS evaluation process. It, together with the JEGS Handbook, is acknowledged by the defendant's own witness, Mr Potts, to contain the JEGS methodology. The DWP JEGS library is to be used as part of the quality control stage of the JEGS evaluation process. In saying this, I am not to be taken as pre-judging any issues as to disclosure, which may require careful consideration in due course.

(4) Change of Name

28. CPR 17.4(1) and (3) provide as follows:

> "(1) This rule applies where –
>
> (a) a party applies to amend their statement of case in one of the ways mentioned in this rule; and
>
> (b) a period of limitation has expired under –
>
> (i) the Limitation Act 1980;"
>
> "(3) The court may allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question."

29. It was not disputed that the 6-year limitation period provided for in section 5 of the Limitation Act 1980 has expired in the present case. The claimants say that they are entitled to correct a genuine mistake as to the defendant's name which was not one which would cause reasonable doubt as to the identity of the party in question.

30. Mr Tolley submitted that there was no evidence from the claimants that a mistake had been made, but I do not consider that evidence is necessary on the facts of this case. It is plain that a genuine mistake was made when the defendant was named as "Department for Work and Pensions" rather than "Secretary of State for Work and Pensions". No other possible reason has been suggested for the mis-naming of the defendant.

31. Moreover, the mistake did not cause any doubt as to the identity of the party in question. It is plain from the PC that the claimants wanted to sue their employer (or former employer). The defendant is (or was) their employer. The defendant has appreciated from the outset that the claimants wanted to sue him. That is why the defendant has been defending this claim for over four years.

32. I grant permission to amend the PC so as to correct the mistake as to the defendant's name. Mr Tolley pointed out that the claimants have not applied, as they should have done, for permission to amend the claim form. However, that oversight is easily remedied. I grant permission to amend the claim form so as to correct the mistake as to the defendant's name.

(5) Documents Allegedly Incorporated into the Employment Contracts

33. I turn next to the proposed amendments to that part of the PC which sets out the claimants' case as to the incorporation of various documents into their employment contracts. I will consider the nature and effect of these proposed amendments and the submission that I should refuse permission to make these proposed amendments because the case which they are intended to advance lacks merit. I will deal later with Mr Tolley's submission that the proposed amendments are prohibited by CPR 17.4(2).

(5)(a) The Proposed Amendments

34. The defendant contends that the proposed amendments expand the claimants' pleaded case as to the terms allegedly incorporated into the claimants'

employment contracts. The claimants contend that, on the contrary, the proposed amendments narrow that case by providing more specific allegations than are to be found in the PC. It follows that it is necessary, in the first instance, to identify the respects in which the proposed amendments add to the claimants' existing pleaded case as to the documents allegedly incorporated into the claimants' employment contracts. This is not a straightforward task, because the PC is not a model of clarity insofar as it sets out the claimants' case as to the incorporation of terms into the claimants' employment contracts and the DAPC does not identify the proposed amendments as clearly as it should.

35. As to the PC:

(1) Paragraph 11 of the PC states as follows:

> "The Claimants aver that the Civil Service Management Code (as issued under Part 1 of the Constitutional Reform and Governance Act 2010) (the Management Code) was incorporated into their contracts of employment whether expressly or impliedly. By reason of the incorporation of the same and the provisions of "Pay and Allowances" the Defendant was required to comply with [7.1.3]:-
>
> 7.1.3 A department or agency proposing major changes to its pay and grading arrangements must submit a restructuring business case to the Cabinet Office"

(2) Paragraph 12 of the PC then sets out paragraphs 5 and 6 of the introduction to the CSMC.

(3) Paragraph 18 of the PC begins as follows:

> "The terms of JEGS are set out in the Job Evaluation Framework and Good Practice Guide (the Framework and Guide). They include, materially, as follows:-"

(4) The document or documents referred to in paragraph 18 of the PC were understood by the defendant (as appears from paragraph 21 of the re-amended defence: "the RAD") to be, the document which I have called the 2013 Guide and/or the document which I have called the Guidance.

(5) Paragraph 18 of the PC went on to set out 4 quotations. These were all quotations from the Guidance. There were no quotations in the PC from the 2013 Guide. The quotations from the Guidance include the following:

(a) "A JEGS … evaluation will be carried out by trained educators using the relevant methodology to assess the grading of the post."

(b) "Stage 1: collecting the evidence: The evaluator will obtain as much information as possible about the post being evaluated."

(6) Paragraph 19 of the PC sets out some quotations from the DWP Guidance. These include the following:

> "Businesses must adhere to existing procedures for determining the grading of jobs. This should be in accordance with [the Guidance]."

(7) Paragraphs 20 and 21 of the PC state as follows:

> "20. The provisions of both the Framework [*i.e. the 2013 Guide*] and the Guidance [*i.e. the DWP Guidance*] are incorporated into the Claimants' contracts of employment whether expressly or impliedly. Further and alternatively, departure from its terms would constitute a contravention of the implied term of trust and confidence.
>
> 21. Further and alternatively, the Claimants contend that in accordance with the express terms of the Framework and Guide and/or the terms pleaded at [5]-[9] above the Defendant was obliged to ensure that any challenge to a JEGS grading was redressed promptly given the ongoing responsibility to ensure correct grading."

(8) Although the PC did not expressly assert that the provisions of the Guidance (referred to in the PC as the Guide) were incorporated into the claimants' employment contracts, the defendant understood that that either was, or may be, the claimants' case. This appears from paragraph 23 of the RAD, in which the defendant denied that the entirety of either the 2013 Guide or the Guidance was incorporated into the claimants' employment contracts.

(9) The defendant also denied in paragraph 25 of the RAD that the entirety of the DWP Guidance was incorporated into the claimants' contracts of employment.

36. In my judgment, although there was some ambiguity about this, the PC contained, and was understood by the defendant to contain, allegations that:

(1) the CSMC;

(2) the 2013 Guide;

(3) the Guidance; and

(4) the DWP Guidance,

were incorporated in their entirety into the claimants' employment contracts.

37. I note that the particulars given in the PC as to how these documents were incorporated into the claimants' employment contracts were sparse, to say the least. It is alleged that they were incorporated "expressly or impliedly". No

particulars were given, either of the allegation that that they were incorporated expressly or of the allegation that they were incorporated impliedly.

38. As for the DAPC:

(1) Paragraph 11 of the DAPC replaces paragraphs 11 and 12 of the PC. Paragraph 11 of the DAPC alleges that the CSMC was incorporated into the claimants' employment contracts. It then summarises paragraph 5 of the introduction to the CSMC and paragraphs 6.1.1, 6.1.2 and 7.1.1-3 of the CSMC.

(2) Paragraph 12 of the DAPC begins with the following sentence, which is a proposed addition:

> "Pursuant to those express terms, the Claimants' contracts contain further express terms governing the grading of their posts and remuneration."

(3) Mr Leach explained that the claimants' case is that they do not allege that the defendant was in breach of the CSMC. Rather, they rely on the CSMC (and, in particular, the paragraphs of the CSMC quoted in the DAPC) in support of their case that other documents relating to the JEGS system were expressly incorporated into the claimants' employment contracts.

(4) Paragraph 15 of the DAPC then states that:

> "The express terms of the Claimants' contracts pertaining to the JEGS system are set out in documents that are incorporated into their contracts expressly via the CSMC or impliedly:"

(5) Sub-paragraphs 15(A) to (D) of the DAPC then refer to, and in some cases summarise or quote passages from:

(a) the 2013 Guide;

(b) the JEGS Handbook;

(c) the Guidance; and

(d) the DWP Guidance.

(6) The passages quoted from the Guidance and the DWP Guidance are unchanged from the PC. There are no quotations from the 2013 Guide or the JEGS Handbook. In sub-paragraph 15(A), which concerns the 2013 Guide, there is a summary of the JEGS system.

(7) Paragraphs 16 and 17 of the DAPC are what were paragraphs 20 and 21 of the PC, amended so as to allege that the 2013 Guide, the JEGS Handbook, the Guidance and the DWP Guidance are incorporated into the claimants' contracts of employment.

(5)(b) The Effect of the Proposed Amendments

(5)(b)(i) The CSMC

39. It is the claimants' existing pleaded case that the CSMC was incorporated into their employment contracts. It is also the claimants' existing pleaded case that the CSMC was incorporated into their employment contracts "whether expressly or impliedly".

40. I note that the claimants' case as to the incorporation of the CSMC into their employment contracts is inadequately particularised. It has been open to the defendant to request further particulars of that case, asking for further information as to how the claimants allege that the CSMC was: (a) expressly incorporated into their employment contracts; or (b) impliedly incorporated into their employment contracts. However, the defendant has been content to defend this action for four years without requesting those particulars and without requesting particulars of which provisions of the CSMC were alleged to be incorporated.

41. Mr Tolley objected to the proposed amendments in relation to the CSMC insofar as they plead reliance for the first time on paragraphs 6.1.1, 6.1.2, 7.1.1 and 7.1.2 of the CSMC. Given that the claimants' case, as explained by Mr Leach, is that the CSMC is only relied on in support of the claimants' case that other documents relating to the JEGS system were expressly incorporated into the claimants' employment contracts, I consider that the proposed amendments in paragraph 11 of the DAPC are properly to be seen as providing further particulars of the claimants' existing case as to the incorporation of the other documents into their employment contracts.

42. Paragraph 5 of the introduction to the CSMC, which is already pleaded, provides that departments must define clearly the terms and conditions of service of their staff and make them available to staff, for example in departmental handbooks, and that, where departments have delegated powers or discretion, they must make clear to their staff how these will be applied by setting out the relevant rules and procedures in their handbooks. The relevance, as I understand it, of paragraphs 6.1.1, 6.1.2, 7.1.1 and 7.1.2 of the CSMC is that they delegate to the defendant powers to which paragraph 5 of the introduction applies, i.e. powers to determine the grading of posts, to develop arrangements for the grading of posts, to determine terms and conditions relating to staff remuneration and to develop arrangements for the remuneration of staff.

43. Although this could certainly have been spelt out more clearly, I can see that these provisions are arguably relevant to the question whether documents other than the CSMC were incorporated into the claimants' employment contracts on the basis that, for instance, paragraph 5 of the introduction to the CSMC requires the defendant to make clear to staff how the power to grade posts will be exercised and that is arguably an indication that the arrangements for exercising that power were, at least to some extent, intended to form part of the claimants' employment contracts.

(5)(b)(ii) The 2013 Guide

44. It is the claimants' existing pleaded case that:

(1) the 2013 Guide was incorporated into their employment contracts;

(2) in its entirety; and

(3) "whether expressly or impliedly".

45. As I have already indicated, the proposed amendments provide some further particulars of the claimants' existing case as to the method of incorporation of the 2013 Guide (and the Guidance and the DWP Guidance) into their employment contracts. That is, in particular, the effect of paragraph 15 of the DAPC and the words "expressly via the CSMC".

46. The summary of the JEGS evaluation process in paragraph 15(A) of the DAPC is not to be found in the PC, although it replaces a shorter summary in paragraph 17 of the PC. It is not suggested that the longer summary is inaccurate in any way, but exception is taken to the fact that it refers to the JEGS software, the JEGS Handbook and the DWP JEGS library. However, it is not alleged that the JEGS software or the DWP JEGS library was incorporated into the claimants' employment contracts.

(5)(b)(iii) The JEGS Handbook

47. The JEGS Handbook is not referred to in the PC. (There is a reference in paragraph 17 of the PC to the "JEGS criteria", which I am told are to be found in the JEGS Handbook.) It is not part of the claimants' existing pleaded case that the JEGS Handbook was incorporated into their contracts of employment. Paragraph 15(B) of the DAPC therefore proposes the introduction of a new allegation.

48. Mr Leach relied on the fact that the JEGS Handbook is referred to in paragraph 28 of the RAD, but that reference, which is made for the limited purpose of relying on the confidential nature of the JEGS Handbook as limiting the scope of the defendant's alleged liability to provide reasons for the grading decision taken as a result of the Evaluation, does not have the effect of creating an issue as to whether or not the JEGS Handbook was incorporated into the claimants' employment contracts.

49. Mr Leach also referred to the fact that the 2013 Guide refers to the JEGS Handbook in the manner which I have already set out. That may be relevant to the question of how (if at all) the JEGS Handbook was incorporated into the claimants' employment contracts, but it does not affect the fact that the allegation that it was incorporated is a new allegation which the claimants seek to make by the proposed amendments.

(5)(b)(iv) The Guidance and the DWP Guidance

50. Paragraph 15(C) of the DAPC does not effect any change to the claimants' existing pleaded case that the Guidance was incorporated into their employment contracts. The same is true of paragraph 15(D) and the DWP Guidance.

(5)(c) Alleged Lack of Merit

51. Mr Tolley invited me to refuse permission to make these proposed amendments because the case which the claimants seek to advance lacks merit. In the light of the findings which I have made as to the effect of these proposed amendments, the focus here is on the new allegation which the claimants seek to make that the JEGS Handbook was incorporated into their employment contracts.

52. Mr Tolley also contended that the following were new allegations which lacked merit:

    (1) The allegation in paragraph 11 of the DAPC that paragraphs 6.1.1, 6.1.2, 7.1.1 and 7.12 of the CSMC were incorporated into the claimants' employment contracts.

    (2) The references to the JEGS software and the DWP JEGS library in the summary of the JEGS evaluation process in paragraph 15(A) of the DAPC.

53. As to these matters:

    (1) I have already said that I consider that the proposed amendments in paragraph 11 of the DAPC are properly to be seen as providing further particulars of the claimants' existing case as to the incorporation of the other documents into their employment contracts.

    (2) I have also noted that: it is not alleged that the summary of the JEGS evaluation process is inaccurate; and the claimants do not seek by the DAPC to allege that the JEGS software or the DWP JEGS library were incorporated into their contracts.

(5)(c)(i) Alleged Lack of Merit: Submissions

54. Mr Tolley submitted that the case advanced by the proposed amendments had no realistic prospect of success. He relied on *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm), in which Carr J said (in paragraph 36):

> "An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as that for summary judgment under CPR Part 24."

55. See also paragraphs 47 and 48 of Males LJ's judgment and paragraph 77 of the judgment of Sir Geoffrey Vos MR and Newey LJ in *CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs* [2023] 1 WLR 4335.

56. Mr Tolley also relied on paragraphs 16 to 18 of the judgement of Popplewell LJ in *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33. Those paragraphs refer to paragraphs 41 and 42 of the judgment of Asplin LJ in *Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204, which state as follows:

> "41. For the amendments to be allowed the Appellants need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a prima facie case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: *Three Rivers District Council v Bank of England (No3)* [2003] 2 AC 1.
>
> 42. The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon. …"

57. Mr Tolley also submitted that:

(1) It was not alleged that there were any express words of incorporation in any contractual document capable of expressly incorporating the JEGS Handbook into the claimants' employment contracts.

(2) There was no adequate pleaded basis for the implied incorporation of the JEGS Handbook, having regard to the law as set out in the passages cited in paragraphs 45 to 47 of the judgment of Choudhury J in *Cox v Secretary of State for the Home Department* [2023] ICR 283.

(3) The claimants should not be able to rely on the JEGS Handbook as a document which was incorporated into their employment contracts because the claimants did not have a copy of it.

58. Mr Leach submitted that the case which the claimants sought to advance was adequately pleaded. He relied on *Briscoe v Lubrizol Ltd* [2002] IRLR 607, CA ("*Briscoe*") as an example of a case in which a document (an insurance policy) which an employee had not seen formed part of his employment contract. Mr Tolley submitted that the judgments in *Briscoe* did not consider the situation of an employee who was seeking to assert a right set out in a document which he had not seen.

(5)(c)(ii) Alleged Lack of Merit: Decision

59. In broad terms, the claimants' case, as I understand it, is that, because evaluations were capable of affecting their remuneration, it was intended and/or went without saying that the defendant was under a contractual obligation to ensure that any evaluation was conducted properly, i.e. in accordance with the procedures laid down for that purpose, and the JEGS Handbook was one of the documents (if not the primary document) in which those procedures were laid down. In broad terms, that strikes me as an arguable proposition, although it will be a matter for consideration at trial whether the proposition, if correct, is better analysed as the result of incorporation (express or implied) of the JEGS Handbook or of an express or implied term that any evaluation would be conducted in accordance with the procedures laid down for that purpose. Moreover, it appears to me to be arguable that the provisions of the CSMC to which I have referred and on which the claimants seek to rely provide some support for that proposition.

60. Indeed, I have already referred to two provisions which are said in the PC to be express terms of the claimants' employment contracts and which appear to require the defendant to conduct any evaluation in accordance with the procedures laid down for that purpose, namely:

(1) The provision in the Guidance that (emphasis added):

> "A JEGS … evaluation will be carried out by trained educators <u>using the relevant methodology</u> to assess the grading of the post."

(2) The provision in the DWP Guidance that (emphasis added):

> "<u>Businesses must adhere to existing procedures</u> for determining the grading of jobs. This should be in accordance with [the Guidance]."

61. Mr Leach did not put his case in this way, but it seems to me that the claimants' existing pleaded case is that the defendant was obliged by these provisions, when conducting the Evaluation, to comply with the requirements of the JEGS Handbook as part of the "relevant methodology" or "existing procedures". I cannot assume at this stage that the claimants will succeed in establishing that these two provisions were terms of their employment contracts, but their presence as part of the claimants' existing pleaded case reinforces my view that it is arguable that the JEGS Handbook was incorporated into those contracts.

62. Another consideration to the same effect is that it is part of the claimants' existing pleaded case that the 2013 Guide was incorporated into their contracts, but the 2013 Guide states that it should be used as a supplement to the JEGS Handbook, which suggests that the 2013 Guide cannot properly be understood without also considering the JEGS Handbook.

63. As for *Briscoe*, that case concerned a long-term disability scheme. The scheme was contained in an insurance policy which had not been provided to the

claimant. The company information handbook summarised the scheme, but there was a discrepancy between the wording of the handbook and the wording of the insurance policy, with the wording of the handbook being less favourable to the claimant than the wording of the insurance policy. The Court of Appeal held that the clear contractual intention of the parties was to confer on the claimant as an employee the benefit of the scheme, with the result that the claimant was entitled to rely as against his employer on the terms of a document which the claimant had not seen. For present purposes, the crucial paragraph of Potter LJ's judgment in *Briscoe* is paragraph 18, in which Potter LJ said as follows:

> "In the instant case, as it seems to me, it was the clear contractual intention of the parties to bestow upon the claimant as an employee the benefits provided in the "Lubrizol continuous disability scheme". Thus, the handbook contained the plainest possible reference to the scheme entered into between Lubrizol and the insurers *under that title*. While it is true that the handbook did not expressly refer to the policy with the insurers, the reference to insurers and their right to seek to impose limitations in benefit (…) made the position quite clear. Furthermore, para. 9 sets out the agreement of the insurers to pay to Lubrizol the benefit payable under the scheme, Lubrizol agreeing to pay it (or its equivalent) on to the employee less tax. In this context, I would construe para. 5 and the first sentence of para. 7 of the handbook also as an obligation undertaken by Lubrizol to the claimant that the full benefit provided for under the scheme would be payable to the claimant after 26 weeks of total disability *as defined in the policy*, and not as erroneously expressed in the second sentence of para. 7."

64. It could perhaps be said that *Briscoe* was a case of express incorporation into an employment contract of a document which was referred to, but not named, in the employment contract. In any event, *Briscoe* remains a case in which, contrary to Mr Tolley's submission, an employee was able to enforce a right set out in a document which he had not seen.

65. I conclude that the allegation that the JEGS Handbook formed part of the claimants' employment contract is arguable, in the sense that it has a real prospect of success.

(6) Alleged Implied Terms

66. Paragraph 14 of the PC sets out 7 alleged implied terms. The claimants seek permission to amend the first, fourth and fifth of these in what has become paragraph 20 of the DAPC. I will consider each of these in turn and the submission that the case for each implied term lacks merit. I will deal later with the submission that the proposed amendments are prohibited by CPR 17.4(2).

(6)(a) The First Alleged Implied Term

67. The proposed amendments to the first alleged implied term are as follows:

> "That ~~all policies devised by the Defendant including those cited above~~ the CSMC, the 2013 Guide, the JEGS Handbook, the Guidance and the DWP Guidance on Pay and Reward would be adhered to;"

68. Given that the claimants do not allege any breach of the CSMC, the reference to the CSMC in the proposed amendment is redundant.

69. Mr Tolley submitted that the reference in the existing pleaded case to "all policies devised by the Defendant" applied only to the DWP Guidance, since that was the only document which was devised by the defendant: the 2013 Guide and the Guidance were not specific to the defendant's department, but applied across the civil service, and the JEGS Handbook was prepared by WTW. On the other hand, the words "including those cited above" could be read as including the 2013 Guide and the Guidance, since they are cited in the PC.

70. Mr Tolley submitted that the basis for implying this alleged implied term was not identified. However, as I have already said, I consider that it is arguable that, because evaluations were capable of affecting the claimants' remuneration, it went without saying that the defendant was under a contractual obligation to ensure that any evaluation was conducted properly, i.e. in accordance with the procedures laid down for that purpose.

(6)(b) The Fourth Alleged Implied Term

71. The proposed amendments to the fourth implied term are as follows:

> "That the Defendant would take reasonable steps to guard the Claimants' economic well-being for the duration of his employment, consisting specifically of a duty to ensure effective and consistent evidence gathering in a JEGS process and to ensure their ability to understand the reasons for the outcome (and thus to challenge it if necessary), in circumstances where: (1) the terms of the JEGS Handbook are not individually negotiated and were not made available to the Claimants; (2) the grading of the Claimants' post (and right to commensurate pay) was contingent on their providing the best available evidence relevant to the JEGS criteria; (3) the LSI interviewees could not reasonably be expected to provide the best available evidence without being properly assisted by the Defendant; and (4) the Claimants could not reasonably be expected to mount any effective challenge to the outcome without understanding the reasons for it; ~~Further and alternatively they owed a common law duty of care to this effect;~~

72. Mr Tolley submitted that there was no basis for such a wide-ranging implied term. He relied on *Greenway v Johnson Matthey Plc* [2017] ICR 43 (*"Greenway"*) and *Benyatov v Credit Suisse Securities (Europe) Ltd* [2023] ICR 534 (*"Benyatov"*).

73. In *Greenway* the employer was in breach of its implied contractual duty to take all necessary and reasonable steps to ensure that the claimants were safe while at work, but it was held that this breach did not result in any physical injury and that it only caused economic loss. The Court of Appeal held that the claimants'

financial losses were outside the scope of the contractual duty and that no term was to be implied imposing a duty on the employer to protect the claimants from economic loss. Sales LJ (with whom Davis LJ and Lord Dyson MR agreed) said in paragraph 39 of his judgment that the relevant term could not be implied in law either as a usual feature of employment contracts or as a feature of the particular employment contracts at issue in that case. The Supreme Court subsequently held that in fact the claimants had suffered physical injury, but that did not affect what the Court of Appeal had said about the implication of terms: see *Dryden v Johnson Matthey Plc* [2019] AC 403.

74. It does not follow, however, that there can never be an implied term in an employment contract imposing a duty on the employer to take care to protect the employee from economic loss. For instance, Sales LJ referred in paragraph 50 of his judgment to *Scally v Southern Health and Social Services Board* [1992] AC 294 and said:

> "*Scally* was a case in which an implied term in an employment contract obliging the employer to take action to protect the employee from financial harm was identified as arising in specific circumstances, where an employee had a valuable contingent right to claim a pension of which he could not be expected to be aware unless his employer brought it to his attention."

75. In *Scally*, Lord Bridge said as follows, at page 307B-E:

> "Carswell J. accepted the submission that any formulation of an implied term of this kind which would be effective to sustain the plaintiffs' claims in this case must necessarily be too wide in its ambit to be acceptable as of general application. I believe however that this difficulty is surmounted if the category of contractual relationship in which the implication will arise is defined with sufficient precision. I would define it as the relationship of employer and employee where the following circumstances obtain: (1) the terms of the contract of employment have not been negotiated with the individual employee but result from negotiation with a representative body or are otherwise incorporated by reference; (2) a particular term of the contract makes available to the employee a valuable right contingent upon action being taken by him to avail himself of its benefit; (3) the employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is drawn to his attention. I fully appreciate that the criterion to justify an implication of this kind is necessity, not reasonableness. But I take the view that it is not merely reasonable, but necessary, in the circumstances postulated, to imply an obligation on the employer to take reasonable steps to bring the term of the contract in question to the employee's attention, so that he may be in a position to enjoy its benefit. Accordingly I would hold that there was an implied term in each of the plaintiffs' contracts of employment of which the boards were in each case in breach."

76. It will be noted that the wording of the proposed amendment is intended to track, with changes, the words used by Lord Bridge. However, Mr Tolley submitted that *Scally* could be distinguished from the present case because:

(1) there was no term of the claimants' employment contract which made available to the claimants a valuable right contingent on action being taken by them to avail themselves of its benefit; or

(2) if there was such a term, it was the term requiring the defendant to conduct the Evaluation properly and, if that was a term of the claimants' employment contracts, then the fourth alleged implied term was unnecessary, which is fatal to the contention that it is implied into the contract.

77. I did not derive any assistance from *Benyatov*, which concerned an unsuccessful allegation that it was an implied term of the claimant's employment contract that his employer would indemnify him against all losses which he suffered as a result of performing his duties on behalf of his employer.

78. The fourth alleged implied term is already pleaded. The proposed amendments can therefore be seen as providing particulars of an allegation which is already pleaded. In that sense, the proposed amendments can also be seen as narrowing the claimants' case. Moreover, there is arguably an analogy between this case and *Scally* in that the Evaluation, which was capable of having significant financial consequences for the claimants, was conducted by reference to the JEGS Handbook, a document which the claimants had not seen.

79. As for Mr Tolley's submission that *Scally* can be distinguished, I consider that it is arguable that the valuable contingent right in the present case is the claimants' right to be paid the salary appropriate for HEOs if their post is graded as an HEO post, which in turn requires both the Evaluation being properly conducted by the defendant and the claimants taking action by way of providing evidence when interviewed and/or challenging the outcome of the Evaluation. The present case is certainly not on all fours with *Scally*, but it is arguable that the similarities are sufficient to lead to the implication of the fourth alleged implied term.

80. As for Mr Tolley's submission that the fourth alleged implied term would be unnecessary if there was a term of the claimants' employment contracts requiring the defendant to conduct the Evaluation properly, I cannot assume at this stage that the claimants will succeed in establishing that there is such a term.

81. In all the circumstances, I consider that permission to make the proposed amendment to the fourth alleged implied term should not be refused on the grounds of lack of merit.

(6)(c) The Fifth Alleged Implied Term

82. The fifth alleged implied term pleaded in paragraph 14 of the PC is as follows:

> "That the Defendant would provide reasonable support during the course of the Claimants' employment;

83. The Claimants seek permission to replace this with the following:

> "That the Defendant would cooperate with its employees in order to ensure the consistent gathering of the best available evidence to support the JEGS evaluation process and in order to ensure their ability fully to understand the reasons for the outcome (and thus to challenge it if necessary) so as not to frustrate the reliability of the Defendant's grading of posts;"

84. Mr Tolley submitted that there was no legal basis for this alleged implied term. He relied on paragraphs 6.135 to 6.142 of *Lewison, The Interpretation of Contacts*, 7th Edn, which cite, inter alia, Lord Blackburn's dictum in *Mackay v Dick* (1881) 6 App. Cas. 251, at 263:

> "… where in a written contract it appears that both parties have agreed that something shall be done, which cannot be effectually done unless both parties concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect."

85. Such a term will only be implied if it is necessary to imply it. In the present case, I consider that it is arguable that some cooperation between the parties was necessary to enable the Evaluation to be conducted properly and that, on that basis, it is arguable that it is necessary to imply such a term. As with the fourth alleged implied term, it may well be that the fifth alleged implied term would be unnecessary if the claimants were to succeed on other aspects of their case as to the express or implied terms of their employment contracts, but I cannot assume at this stage that they will be successful on any other part of their case. Accordingly, I consider that permission to make the proposed amendment to the fifth alleged implied term should not be refused on the grounds of lack of merit.

(7) The Narrative of Events

86. Under the heading "Material Events", paragraphs 21 to 45 of the DAPC, which are a much-expanded version of paragraphs 22 to 31 of the PC, set out at length what the claimants consider to be significant events during the course of the Evaluation and its aftermath. However, I note that:

(1) With two exceptions, the paragraphs of the DAPC setting out the alleged breaches of contract do not cross-refer to any of paragraphs 21 to 45 of the DAPC. The exceptions are: (i) paragraph 48(i) of the DAPC, which cross-refers to paragraphs 21 to 24, 26, 34, 39 and 40 of the DAPC as setting out matters from which it was to be inferred that the cost of applying HEO status to the LSI post was considered prohibitive by the Defendant's senior leadership team; and (ii) sub-paragraph 50(ii), which cross-refers to paragraph 39 of the DAPC.

(2) Paragraph 33 of the DAPC states:

> "The process thereafter was somewhat opaque: the Claimants are not privy to the steps subsequently taken by the evaluators at the "scoring of posts" and "quality assurance" stages, nor to the proceedings of the JEGS Evaluation Panel, …"

(3) Thus, in relation to crucial stages in the Evaluation, the claimants' position is that they are not yet able to say what happened or what they allege went wrong.

87. I do not propose to summarise all of the proposed amendments, which are set out in the annex to this judgment, but, having carefully considered them all, I accept, with two exceptions, Mr Tolley's submission that these proposed amendments are inappropriate because they amount to pleading evidence. It follows that I refuse permission to make these amendments, but it does not follow that the claimants will not be entitled to adduce evidence at trial of the facts alleged in the proposed amendments.

88. The exceptions concern:

(1) Those paragraphs of the DAPC which are referred to in paragraphs 48(i) and 50(ii) of the DAPC. I will return to those paragraphs later.

(2) The proposed amendments set out in paragraphs 37, 41 and 44 of the DAPC, which are minor and inconsequential.

(8) The Alleged Breaches of Contract

89. Paragraph 32 of the PC lists 11 alleged breaches of contract, numbered from (i) to (x), with two numbered (vii). Sub-paragraphs 32(i), (ii), (iii), (v)(c) and (vii)(a) are proposed to be deleted and not replaced. No issue arises about that. The claimants seek permission to replace the remainder of paragraph 32 of the PC with 4 paragraphs in the DAPC, numbered 47 to 50. Paragraph 32 of the PC and paragraphs 47 to 50 of the DAPC are set out in the annex to this judgment. It will be seen that:

(1) It is alleged in paragraph 47 of the DAPC that the defendant adopted a defective JEGS Evaluation procedure. This is proposed to replace the allegation in sub-paragraph 32(v) of the PC that the Defendant adopted an unfair and/or impermissible procedure, but sub-paragraphs 47(i) to (vi) of the DAPC go further in giving particulars of this allegation than sub-paragraphs 32(v)(a) and (b) of the PC.

(2) It is alleged in paragraph 48 of the DAPC that the defendant undertook a JEGS process that was pre-determined. This is proposed to replace the allegation in sub-paragraph 32(iv) of the PC that the defendant approached the JEGS process with preconceptions and/or in bad faith. Unlike sub-paragraph 32(iv) of the PC, paragraph 48 of the DAPC includes particulars of this allegation, as to which:

(a) Mr Tolley objected to the allegation in sub-paragraph 48(i) that the cost of applying HEO status "consciously or subconsciously" influenced the outcome of the Evaluation. I agree that those words should not be included, since they are inconsistent with the allegation that the outcome of the Evaluation was predetermined.

(b) Mr Tolley also objected to sub-paragraph (ii), which provides as follows:

> "Alternatively, the outcome was pre-determined in the sense that the defective evidence gathering process was causative of it, in whole or in part."

(c) I agree that this amendment should not be permitted, since it confuses causation with predetermination.

(3) It is alleged in sub-paragraph 49(A) of the DAPC that the Defendant took into account irrelevant considerations. This is proposed to replace the allegation in sub-paragraph 32(vi) of the PC that the Defendant took into account irrelevant considerations and the allegation in the first sub-paragraph 32(vii) of the PC that the Defendant took into account factors that were incorrectly understood, with some minor amendments to the particulars currently pleaded in sub-paragraphs 32(vi)(a) and (b) and 32(vii)(c) of the PC. Sub-paragraph 49(A)(i) of the DAPC includes the words "(consciously or subconsciously)", but I agree with Mr Tolley's submission that those words should not be included, because they contradict the allegation that the defendant took an irrelevant consideration into account, which is a conscious process.

(4) It is alleged in paragraph 49(B) of the DAPC that the defendant failed to take into account relevant considerations. This is proposed to replace the allegation in the second sub-paragraph 32(vii) of the PC that the Defendant failed to take into account relevant considerations and/or afforded them insufficient weight, with minor amendments to the particulars in sub-paragraphs 32(vii)(b) to (e).

(5) It is alleged in sub-paragraph 50(i) of the DAPC that the defendant failed to provide any adequate reasons for the outcome of the Evaluation. This is proposed to replace the allegation in sub-paragraph 32(vii) of the PC that the defendant failed to provide any or any adequate reasons for the scoring process.

(6) It is alleged in sub-paragraph 50(ii) of the DAPC that the defendant failed promptly and effectively to resolve the claimants' complaints about the Evaluation. This is proposed to replace the allegation in sub-paragraph 32(x) of the PC that the defendant failed to conduct an investigation and/or review, but it makes no reference to an investigation and/or review. Instead, it says that the Defendant failed promptly and effectively to resolve the claimants' complaints about the JEGS system in two respects: (i) "by never providing the outcome of the work

undertaken on Mr Foley's behalf (para. 39 above)"; and (ii) "by taking 7 months to decide not to re-evaluate the LSI post, when re-evaluation was needed particularly in light of the aforementioned absence of answer from Mr Foley." Mr Tolley was concerned that the claimants were seeking here to make a new claim that the defendant was under a contractual duty to conduct a re-evaluation of the LSI post, but I do not read the sub-paragraph as containing such a claim, rather than merely a claim that it was a breach of contract for the Defendant to take so long to decide not to conduct a re-evaluation.

90. Each of paragraphs 47 to 50 of the DAPC begins by alleging that the matters complained of were in breach of the express terms contained in the CSMC, the 2013 Guide, the JEGS Handbook, the Guidance and the DWP Guidance and/or the alleged implied terms. The reference to the CSMC is redundant, since the claimants do not in fact allege that the defendant was in breach of the CSMC.

91. Helpfully, each allegation of breach of contract is followed by a cross-reference to the relevant paragraph(s) of the DAPC pleading the terms or terms alleged to have been breached. This is not to be found in paragraph 32 of the PC, but it does not involve a change of substance.

92. The foregoing analysis of paragraphs 47 to 50 of the DAPC shows that there are two respects in which those paragraphs effect substantive changes to the PC:

(1) Each of paragraphs 47 to 50 of the DAPC alleges that the Defendant was in breach of the JEGS Handbook. This is a consequence of the earlier proposed amendments which allege that the JEGS Handbook was incorporated into the claimants' employment contracts.

(2) Paragraph 47 of the DAPC contains more by way of particulars than sub-paragraph 32(v) of the PC:

(a) It is alleged in sub-paragraphs 32(v)(a) and (b) of the PC that: managers failed to provide evidence for the Evaluation; and there was a failure to hold face-to-face interviews.

(b) It is proposed to allege in sub-paragraphs 47(i) to (vi) of the DAPC that: managers of the claimants who were interviewed did not engage with them properly or at all; this was inconsistent with the significant assistance provided by line managers in the evaluation of the CCIISI post; interviews were not conducted appropriately, in that inappropriate (and seemingly scripted) leading questions were asked and face-to-face interviews were dispensed with; this was inconsistent with the day-long site visits for interviewees in the evaluation of the CCIISI post; in the case of at least one claimant, no agreed job profile or equivalent was produced; in the case of the same claimant, her job analysis form was not provided to the evaluation panel; there was inconsistency between the Evaluation and the evaluation of the CCIISI post in the scoring, quality assurance, evaluation panel and sign-off processes; the information fed into the JEGS

software at the scoring stage must have been inaccurate and/or inconsistent; the quality assurance process cannot have been properly undertaken; and earlier defects must have been repeated or compounded at the evaluation panel and sign-off stages.

93. It is acknowledged in paragraph 47(vi) of the DAPC that the claimants are not presently privy to how the scoring, quality assurance, evaluation panel and sign-off processes were conducted. The obvious implication is that the particulars currently provided do not represent the claimants' final word on the nature of the alleged defects in the Evaluation and that further amendments may be proposed following disclosure.

94. Mr Tolley did not contend that permission to amend in the manner proposed in paragraph 47 of the DAPC should be refused on the grounds that the case sought to be advanced lacked merit. Rather, he submitted that the proposed amendments were prohibited by CPR 17.4(2), to which I now turn.

(9) Limitation and CPR 17.4(2)

95. CPR 17.4(1) and (2) provide as follows:

> "(1) This rule applies where –
>
> (a) a party applies to amend their statement of case in one of the ways mentioned in this rule; and
>
> (b) a period of limitation has expired under –
>
> (i) the Limitation Act 1980;
>
> …
>
> (2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."

96. Four questions need to be answered when considering CPR 17.4(2): see paragraph 38 of Coulson LJ's judgment in *Mulalley & Co. Ltd v Martlet Homes Ltd* [2022] BLR 198; [2022] EWCA Civ 32 (*"Mulalley v Martlet"*) and the cases there cited. They are:

(1) Is it reasonably arguable that the proposed amendments are outside the applicable limitation period?

(2) Did the proposed amendments seek to add or substitute a new cause of action?

(3) Does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim?

(4) Should the court exercise its discretion to allow the amendments?

97. It is not disputed that the proposed amendments are outside the relevant limitation period.

(9)(a) New Cause of Action?

98. Mr Tolley submitted that the DAPC sought to add or substitute a new cause or causes of action, both insofar as it added new alleged contractual duties and insofar as it added new allegations of breach of contract. As to the applicable law, he relied on the summaries in paragraphs 40 to 46 of Coulson LJ's judgment in *Mulalley v Martlet* and in paragraph 17.4.4.2 of *Civil Procedure 2023*. The authorities there cited make clear that it is necessary to compare the essential factual allegations on which the original claims or claims and the proposed new claim or claims are reliant. It is also the case that a distinction is to be drawn between an amendment which adds a new cause of action and an amendment which merely gives further instances or better particulars of an already pleaded cause of action.

99. I propose to deal with three aspects of the proposed amendments:

(1) The amendments by which the claimants seek to allege that the JEGS Handbook was incorporated into their employment contracts.

(2) The amendments to the alleged implied terms.

(3) The amendments to the allegations of breach of contract.

100. However, before doing so, I note that none of these proposed amendments to the PC affect the relief which the claimants seek, which includes a declaration that the claimants are to be treated as HEOs with effect from 1 January 2014. I do not suggest that this is a determinative consideration, but it is a relevant factor.

(9)(a)(i) New Cause of Action: Incorporation of the JEGS Handbook

101. Where an amendment pleads a duty which differs from that pleaded in the original particulars of claim, it will usually assert a new cause of action: see *Darlington Building Society v O'Rourke* [1999] PNLR 365 at 370, per Sir Iain Glidewell, cited by Tomlinson LJ in paragraph 22 of his judgment in *Co-Operative Group Ltd v Birse Developments Ltd* [2013] BLR 383; [2013] EWCA Civ 474 (*"Birse"*).

102. Although the proposed allegation that the JEGS Handbook was incorporated into the claimants' employment contracts is new, I do not consider that it gives rise to a new cause of action, because, as I have already noted, the claimants' existing pleaded case is that the defendant was obliged by the pleaded provisions of the Guidance and the DWP Guidance, when conducting the Evaluation, to comply with the "relevant methodology" or "existing procedures", which (although this is not expressly spelt out in the PC) included the methodology and procedures set out in the JEGS Handbook.

103. I note also that:

(1) The claimants have not sought to plead any specific terms of the JEGS Handbook. This is unsurprising, as the claimants have not yet seen it. It follows, however, that the claimants are not at this stage seeking to allege that the JEGS Handbook contained any contractual terms which are different from those pleaded, or proposed to be pleaded, by reference to the other documents said to be incorporated in the claimants' employment contracts.

(2) No alleged breach of contract is said to be a breach of the JEGS Handbook alone. Every alleged breach of contract in paragraphs 47 to 50 of the DAPC which cross-refers to sub-paragraph 15(B) of the DAPC (i.e. the sub-paragraph containing the allegation that the JEGS Handbook was incorporated into the claimants' employment contracts) also cross-refers to other paragraphs of the DAPC.

(9)(a)(ii) New Cause of Action: Alleged Implied Terms

104. For substantially the same reasons, I do not consider that the proposed amendments to the first alleged implied term give rise to a new cause of action.

105. Nor do I consider that the proposed amendment to the fourth alleged implied term gives rise to a new cause of action. As I have already noted, the proposed amendment can be seen as providing particulars of an allegation which is already pleaded.

106. The proposed amendment to the fifth alleged implied term would substitute an alleged duty to co-operate with the claimants for an alleged duty to provide support for the claimants. Although those alleged duties are differently expressed, it does not appear that they are different in substance. The proposed amendment to the fifth alleged implied term indicates that the alleged duty to cooperate is said have arisen in two respects:

(1) "in order to ensure the consistent gathering of the best available evidence to support the JEGS evaluation process"; and

(2) "in order to ensure [the claimants'] ability fully to understand the reasons for the outcome (and to challenge it if necessary) so as not to frustrate the reliability of the Defendant's grading of posts".

107. However, I note that:

(1) It is already pleaded (in paragraph 18(ii) of the PC) that it was a term of the Guidance, and therefore of the claimants' employment contracts, that "The evaluator will obtain as much information as possible about the post being evaluated" and (in sub-paragraphs 32(v)(a) and (b) of the PC) that it was a breach of contract for managers to fail to provide evidence for the Evaluation and for there to be a failure to hold face-to-face interviews.

(2) It is already pleaded (in paragraph 26 of the PC) that the first claimant was given no, or no adequate, explanation for the scoring process, (in

paragraph 27 of the PC) that the defendant, when providing the final numbers for the scoring process, did not disclose anything which might assist the claimants in understanding how those numbers were reached and (in sub-paragraph 32(viii) of the PC) that it was a breach of the express and implied terms of the claimants' employment contracts for the defendant to fail to provide any, or any adequate, reasons for the scoring process.

108. Accordingly, I do not consider that the proposed amendment to the fifth alleged implied term gives rise to a new cause of action.

109. It is also relevant to note that no alleged breach of contract is said to be a breach of the first, fourth or fifth alleged implied term alone. Every alleged breach of contract in paragraphs 47 to 50 of the DAPC which cross-refers to sub-paragraph 20(i), (iv) or (v) of the DAPC (i.e. the sub-paragraphs containing the first, fourth and fifth alleged implied terms) also cross-refers to other paragraphs of the DAPC.

(9)(a)(iii) New Cause of Action: Alleged Breaches of Contract

110. There are two aspects of the proposed amendments to be considered here, i.e.:

(1) the proposed amendments contained in paragraph 47 of the DAPC; and

(2) the proposed amendments contained in sub-paragraphs 48(i) and 50(ii) of the DAPC insofar as they cross-refer to paragraphs 21 to 24, 26, 34, 39 and 40 of the DAPC, coupled with the proposed amendments to paragraphs 21, 22 and 39 and the proposed insertion of paragraphs 23, 24, 26, 34 and 40.

111. I have already noted that "the addition of further instances or better particulars do not amount to a distinct cause of action": *Paragon Finance v Thakerar* [1999] 1 All ER 400, at 405, per Millett LJ, cited by Tomlinson LJ in paragraph 20 of his judgment in *Birse*. On the other hand, it has been said that "If the claimant alleges a different breach of some previously pleaded duty, it will be a question of fact and degree whether that constitutes a new claim": see paragraph 38(ii) of Jackson J's judgment in *Secretary of State for Transport v Pell Frischmann Consultants Ltd* [2006] EWHC 2009 (TCC), cited by Tomlinson LJ in paragraph 22 of his judgment in *Birse*.

112. I do not attach any significance to the difference between the words used in paragraph 32(v) of the PC ("The adoption of an unfair and/or impermissible procedure …") and paragraph 47 of the DAPC ("The Defendant adopted a defective JEGS Evaluation procedure …") to describe the nature of the breach alleged. An impermissible procedure was surely a defective one and a defective procedure, in the context of a breach of contract claim, surely means an impermissible one.

113. The question is whether the proposed amendments to the particulars given of this allegation amount to a new cause of action or merely the addition of further

instances or better particulars. In my judgment, they are the latter. I consider that:

(1) Sub-paragraphs 47(i) and (ii) of the DAPC add more detail to what is already alleged in sub-paragraphs 32(v)(a) and (b) of the PC.

(2) Sub-paragraphs 47(iii) and (iv) of the DAPC are new, but they are further instances of what is alleged to be a defective/impermissible procedure.

(3) Sub-paragraphs 47(v) and (vi) of the DAPC bolster the complaint made in sub-paragraph 32(v)(b) of the PC that there was a disparity of treatment as between the Evaluation and the evaluation of the CCIISI post.

(4) Insofar as it is alleged in sub-paragraph 47(vi) of the DAPC that the information fed into the JEGS software must have been inaccurate and/or inconsistent, the quality assurance process cannot have been properly undertaken and earlier defects must have been repeated or compounded at the evaluation panel and sign-off stages, the DAPC:

    (a) sets out the inferences which the claimants contend are to be drawn from the (already pleaded) alleged disparity of treatment as between the Evaluation and the evaluation of the CCIISII post; and

    (b) makes express what is already implicit in the claimants' contention that the Evaluation arrived at the wrong result.

114. As for the proposed amendments to paragraphs 21, 22 and 39 of the DAPC and the proposed insertion of paragraphs 23, 24, 26, 34 and 40 of the DAPC, I consider that these are particulars of the claimants' already pleaded claim (in paragraph 32(iv) of the PC) that "the Defendant sought to avoid elevation to HEO grading and reasoned backwards from that desired conclusion", which is rephrased in paragraph 48 of the PC as an allegation that "the Defendant undertook a JEGS process that was pre-determined."

(9)(b) The Same or Substantially the Same Facts

115. If I am right in my conclusion that the proposed amendments do not give rise to a new cause of action, then the third and fourth questions set out above do not arise. However, it may be helpful to set out how I would have decided those questions if they had arisen.

116. Mr Tolley submitted that the new cause or causes of action which he contended were introduced by the proposed amendments did not arise out of the same or substantially the same facts as are already in issue. As to the applicable law, he relied on the summaries in paragraphs 47 to 54 of Coulson LJ's judgment in *Mulalley v Martlet* and in paragraph 17.4.4.3 of *Civil Procedure 2023*.

117. If I am wrong in my conclusion that the proposed amendments do not give rise to a new cause of action, then I consider that any new claim arises out of the same or substantially the same facts as are already in issue on the existing causes of action. Central to the existing pleaded claims are the contentions that the features of the LSI post were such that, if the JEGS methodology had been properly applied, then the post would have been upgraded, but the post was not upgraded because the JEGS methodology was not properly applied. That remains the case with the DAPC.

118. As for the alleged incorporation of the JEGS Handbook and/or its inclusion in the first alleged implied term, the JEGS Handbook, although it is not referred to in the PC, is clearly something which has to be considered when assessing the claims pleaded in the PC:

(1) The claimants' existing pleaded case is that the defendant was obliged by the pleaded provisions of the Guidance and the DWP Guidance, when conducting the Evaluation, to comply with the "relevant methodology" or "existing procedures", which (although this is not expressly spelt out in the PC) included the methodology and procedures set out in the JEGS Handbook.

(2) It is pleaded in the PC that the 2013 Guide was incorporated into the claimants' employment contracts and the 2013 Guide states that it should be used as a supplement to the JEGS Handbook and that guidance on the JEGS factors used to evaluate posts is set out in the JEGS Handbook. It appears that consideration of the JEGS Handbook will be necessary in order to understand the 2013 Guide and to consider whether the factors have been properly scored.

(3) It is difficult to envisage how one could assess whether the wrong data was input into the JEGS software without considering the JEGS Handbook.

119. As for the proposed amendments to the fourth and fifth alleged implied terms, these are not dependent on any new factual allegations, but instead concern differently-worded alleged implications from the evidence which already has to be considered for the purposes of the existing pleaded claims.

120. As for the proposed amendments to the alleged breaches of contract, these do not change the claimants' central contention, namely that the Evaluation arrived at the wrong result because it was not properly conducted. They give further details of that contention, but any new cause of action is based on substantially the same facts as the existing claims because it is an aspect of the same central contention.

(9)(c) Discretion

121. Mr Tolley contended that this is a stale claim, to which Mr Leach responded by submitting that the defendant's approach to disclosure had been the cause of significant delay. It is clear that disclosure has been a major issue between the parties and it is an issue which remains unresolved more than 3 years after the

service of the particulars and more than 2 years after the hearing before Master Thornett on 16 December 2021.

122. If it had been necessary for me to exercise my discretion under CPR 17.4(2), I would have concluded that it is appropriate to grant permission for the proposed amendments, subject to the exceptions which I have identified. The claimants seek to advance a case which I consider to be arguable and I do not consider that the proposed amendments will cause any undue prejudice to the defendant.

(10) Loss

123. It is alleged in paragraph 34 of the PC that in breaching the claimants' employment contracts the defendant "has caused the Claimants to sustain past loss of earnings (including pension entitlements) and exposed them to continued prospective losses in pay." No particulars are given. Two amendments are proposed to that paragraph in what is paragraph 52 of the DAPC:

(1) First it is proposed to add an explanation that the defendant caused the alleged loss by depriving the claimants of the HEO status which they would otherwise have received:

(a) In my judgment, that is merely spelling out what is already implicit in the paragraph, especially as one of the declarations sought in the prayer for relief in the PC is that the claimants are to be treated as HEOs with effect from 1 January 2014.

(b) Indeed, it is clear from paragraph 3(d) of the RAD that the defendant understood that the claimants' case was that they were caused loss because the LSI post was incorrectly evaluated. In response to that case, and in support of his case that there was no causation of loss and damage, the defendant asserted that the claimants' role had been correctly evaluated.

(c) Mr Tolley contended that the DAPC does not set out a pleaded basis for the allegation that a properly conducted Evaluation would have resulted in the LSI post being graded as an HEO post. I do not accept this. The claimants have set out the nature of their case, but they have done so in a context where one of their complaints is that the defendant has failed to provide adequate reasons for the scoring process and where they allege, as set out in the particulars, that they have been hindered from providing more details of their case by a lack of disclosure.

(2) Secondly, it is proposed to add the following:

> "Alternatively, the Claimants lost the chance that they would have received HEO grading and received commensurate pay and entitlements."

124. Mr Tolley submitted that this second proposed amendment was legally incoherent, because damages for the loss of a chance are only available where

the claimant's loss depends on the hypothetical actions of a third party. He relied in support of this proposition on *Allied Maples Group v Simmons & Simmons* [1995] 1 WLR 1602, CA. In that case, Stuart-Smith LJ addressed the question (posed at page 1611B) whether, in a case where the claimant's loss depends on the hypothetical action of a third party, the claimant had to prove on a balance of probability that the third party would have acted so as to confer the benefit or avoid the risk to the claimant or whether the claimant could succeed provided that he had a substantial chance rather than a speculative one, with the evaluation of the substantial chance being a question of quantification of damages. Stuart-Smith LJ did not expressly deal with the question whether damages for a loss of a chance could be awarded in any other situation.

125. Mr Leach, however, referred to *Dandara Holdings Ltd v Cooperative Retail Services Ltd* [2004] EWHC 1476 (Ch), in which Lloyd J said as follows:

> "Cases where the damages claimed are for the loss of a chance of a benefit start before *Chaplin v. Hicks* [1911] 2 KB 786, but that is as far as I need to go back. There has been a good deal of development of the cases recently, and Counsel cited to me *Allied Maples Group Ltd v. Simmons & Simmons* [1995] 1 WLR 1602 and also *Coudert Brothers v. Normans Bay Ltd* [2004] EWCA Civ 215. In most cases, including those two recent cases, a loss of chance case depends on assessing the likely hypothetical act of a third party. In the present case it depends on the hypothetical act of CRS or CWS. In that respect this case is like *Chaplin v. Hicks* rather than those recent cases, in that what the Claimant complains of is that it was deprived, by CRS' breach, of the chance of entering into an agreement with CRS itself (or its successor, CWS). Likewise, Miss Chaplin complained of being kept out, in breach of contract, of a competition among 50 people, to 12 of whom the Defendant was committed to offering a contract. It could not be said for certain that he would have offered her a contract, if she had been able to take part, but she lost the chance that he would have done so. That does not seem to me to alter the principle, namely that the Claimant must show that, as a result of the Defendant's breach, it has lost a real or substantial, not merely a speculative, chance of gaining the benefit in question."

126. These dicta were obiter, because Lloyd J found that the claimant had not lost a real or substantial chance of gaining the benefit in question in that case, which was an agreement with the defendant (which had acted in breach of an exclusivity agreement) to a contract for the purchase of the defendant's land. Nevertheless, Mr Leach relied on what Lloyd J said as providing some support for the proposition that damages for loss of a chance are not limited to cases in which the claimant's loss depends on the hypothetical actions of a third party.

127. I note that *Chaplin v Hicks*, which is generally regarded as the modern foundation of the law that damages can, in appropriate cases, be assessed by reference to the value of a lost chance, was not a case in which the claimant's alleged loss depended on the hypothetical actions of a third party. On the contrary, no third party was involved in *Chaplin v Hicks*. Miss Chaplin was one of a group of 50 women selected by readers of a newspaper, from whom Mr

Hicks had agreed to choose 12 who would receive theatrical engagements for 3 years at various salaries. In breach of contract, Miss Chaplin was deprived of the opportunity of participating in the selection process. Damages fell to be assessed by the jury. The judge did not direct the jury that they could only award damages if they concluded on the balance of probabilities that, if Miss Chaplin had participated in the selection process, Mr Hicks would have chosen her as one of the 12 and she would have received one of the engagements. Fletcher Moulton LJ said:

> "I cannot lay down any rule as to the measure of damages in such a case; this must be left to the good sense of the jury. They must of course give effect to the consideration that the plaintiff's chance is only one out of four and that they cannot tell whether she would have ultimately proved to be the winner. But having considered all this they may well think that it is of considerable pecuniary value to have got into so small a class, and they must assess the damages accordingly."

128. In my judgment, it is significant that *Chaplin v Hicks* was treated as a case in which the jury could not tell whether Miss Chaplin would have been selected by Mr Hicks as one of the 12 women who received an engagement, even though the decision was one for Mr Hicks. Had it been possible for the jury to decide that question, then the jury would have been in a position to find on the balance of probabilities either that Mr Hicks' breach of contract had caused Miss Chaplin to lose an engagement or that it had not. Instead, damages were awarded on the basis of the value of the chance lost by Miss Chaplin.

129. Accordingly, I consider that the proposition advanced by Mr Leach is arguable and I will grant permission to make this amendment.

130. In addition, I note that, in the alternative, Mr Leach submitted that, in a sense, the claimants' loss was dependent on the hypothetical actions of a third party, namely the JEGS software. As I understand his submission, it was that, if the claimants were to succeed in establishing a breach of contract in relation to the conduct of the Evaluation, then:

(1) the court would have to consider in what respects the data which was fed into the JEGS software would have been different if the defendant had complied with its contractual obligations; and

(2) the court would next have to consider what score the JEGS software would have generated on the basis of that data and, in particular, whether that score would have been high enough to require the LSI post to be upgraded; but

(3) it may not be possible to give a definitive answer to that question, in which case it may be that the most that the claimants could be required to prove was that they had lost a real and substantial chance of having their post upgraded.

131. In my judgment, it is simply too early to tell whether the loss of a chance approach to damages would be appropriate in this case, assuming it to be

permissible as a matter of law. Following disclosure, it may be that the claimants will be better able (within the limits imposed by CPR 17.4(2)) to be more specific as to what they say that the defendant should have done differently in relation to the conduct of the Evaluation and what effect that would have had on the outcome of the Evaluation. It may, at that stage, be possible for the court to make findings as to what the outcome of the Evaluation would have been if the defendant had acted differently (as I did in *Grainger v North East London NHS Foundation Trust* [2017] EWHC 2254 (QB)), but it may not, depending, for instance, on questions such as whether it is possible to reconstruct the JEGS software as it was at the relevant time or otherwise to replicate its effect. Those considerations reinforce my conclusion that it is appropriate to give permission for the proposed amendment.

(11) Conclusion

132. I grant permission to the claimants to amend the claim form so as to correct the defendant's name.

133. I grant permission to the claimants to make the proposed amendments to the PC as set out in the DAPC, with the exception of:

(1) The references to the CSMC in paragraphs 20 and 47 to 50.

(2) The insertion of paragraphs 25, 27 to 33, 35, 36 and 38.

(3) The words "consciously or subconsciously" in sub-paragraphs 48(i) and 49(A)(i).

(4) Sub-paragraph 48(ii).

134. I direct that the claimants must produce a new version of the DAPC, which is to be agreed by the parties or approved by the court:

(1) which includes all renumbering and other changes consequential on my decision; and

(2) in which the text to be deleted, but only the text to be deleted, is struck through in red and the text to be added, but only the text to be added, is underlined in red. (I appreciate that this may require some re-ordering of paragraphs.)

135. There will be a hearing on a date to be fixed for consideration of:

(1) any matters consequential on this judgment;

(2) the issues which could not be addressed at the hearing on 3 November 2023; and

(3) any other issues which, in the light of this judgment, might progress this action.

Annex

(A) Paragraphs 21 to 45 of the DAPC

~~20.~~21. In or around 2002 the Defendant conducted a review of the LSI post. It was found to be a "specialist" role but no increase in pay or grading was made~~.~~ or has been made since. The explanation given at the time by Tony Crompton (Head of Profession Office) on behalf of Richard Kitchen, by email dated 19.11.02 to Robert 126 15 Davidson (union representative for West Derby and Liverpool) was that "with nearly 5000 staff, it is a specialism that is much bigger than any others and the costs of implementing change are much greater".

~~21.~~22. This prompted a number of efforts over several years to secure a JEGS review. As such, on or around April 2014 the PCS union made a formal request to the Defendant for ~~JEGS exercise in relation to LSIs. The Defendant finally commenced work on this exercise in October 2015. Mrs Anyon provided her JAF on or around 13 November 2015.~~a JEGS exercise in relation to the Fraud and Error Service (FES), covering both LSIs and CCIIS investigators. In 2014, Mrs Anyon's then Head of Profession, Claire Norfolk, announced that a full JEGS evaluation would take place. However, she also indicated that a "light touch JEGS" evaluation had already taken place and that in senior management's opinion, both fraud investigator roles were correctly graded at EO level. Comments in a later memo from Jackie Skinner (HR Business Partner) to the Senior Leadership Team (SLT) in the FES dated 13.10.15 were to like effect.

~~22. The process thereafter was somewhat opaque. The Claimants aver that it was "reasoned backwards" in that the Defendant wished to avoid an elevation to HEO grade and took such measures it could to avoid that outcome. As such, and by way of illustration, some of the Claimants were precluded from providing information on surveillance work in the JAF and the Defendant took no or inadequate consideration of surveillance and other key skills when conducting the JEGS process.~~

23. In or about October 2014, approximately a year before the JEGS evaluation commenced, CCIIS employees were told by Nick Owen (head of CCIIS) at a meeting that they would have HEO status within a year.

24. During the next 12 months, prior to the JEGS evaluation commencing in October 2015, changes were made to the Claimants' LSI role, consisting of the hiving-off of the Claimants' surveillance duties to newly created roles in a discrete surveillance team with effect from April 2015. This left approximately 3,000 LSIs, with approximately 2,000 new surveillance roles filled by former LSIs. Fraud investigators in CCIIS roles had already been working alongside their own separate surveillance team for several years. Nonetheless, removal of direct surveillance duties from the LSI post would inevitably have a negative effect on the treatment of the LSI post in the JEGS process.

25. The Defendant finally commenced work on the JEGS evaluation exercise in October 2015. Its commencement was not widely broadcast or announced. Management generally selected those who would be asked to complete a JAF,

but Mrs Anyon asked her Regional Manager, Mike Ashurst, if she could participate after hearing about a colleague having been approached. That request was eventually accepted.

26. In Jackie Skinner's 13.10.15 memo to the FES SLT concerning the commencement of the JEGS exercise, she referred to having updated them about it "at our team telekit"; she noted that her colleague in HR, Paulene Pearson, would be "leading on this exercise for us" and that "Mark Thomas is working on some costings, should the role come out as HEO".

27. Mrs Anyon received little guidance on how to complete the JAF. She attended one "telekit" meeting with HR beforehand, at which LSI participants were specifically instructed not to include details of surveillance duties, as they would be disregarded. Mrs Anyon nevertheless included some details of her continued involvement in the decision to undertake, obtaining of authority for, and organisation of, surveillance activities (with the surveillance itself to be carried out by newly separated surveillance officers). While all four relevant CCIIS JAFs also made reference to duties of obtaining surveillance authority and organising/liaising with surveillance officers, one of those four JAFs suggested that direct surveillance duties were personally undertaken, even though they had in fact been undertaken by a discrete CCIIS surveillance team for several years.

28. After completing her JAF, Mrs Anyon passed it to a Fraud Manager, Brian Lee, who signed it off without providing any assistance or feedback. She is aware of another LSI interviewee's experience (Elen Roberts in in Wales), which was similar. By contrast, at least one of the CCIIS employees, Angela Kelly, received help in completing her JAF from Andrew Meath (then Organised Fraud Team Manager), which Mr Meath informed Mrs Anyon of in a phone call in about November 2015, and Mrs Anyon understands that generally the CCIIS employees received similar assistance. Mrs Anyon provided her JAF to HR on or around 13 November 2015. In it, she referred to Charity Commission Investigators (a Civil Service post) performing comparable (or even lower level) work but being graded at HEO.

29. In total, 14 LSI JAFs were received by HR, and initially 5 CCIIS JAFs were received. One CCIIS JAF was however "withdrawn by the business" for unknown reasons. In the event, 13 LSIs and 4 CCIIS investigators were assessed in the JEGS process. Interviewers or JEGS evaluators were Paulene Pearson, Bev Rosser, Izzy Yeadon-Wright, Adrian Moore, Fleur Mason and Martin Scragg.

30. Mrs Anyon thereafter had a 20-30 minute telephone interview with Martin Scragg of HR. The reason for proceeding by telephone interview was said to be to avoid unnecessary travel. In advance of the interview, Mrs Anyon asked Mr Scragg by email dated 4.12.15, whether she would need to provide examples and supporting evidence in respect of what she had included in the JAF. Mr Scragg told her on the same date that she did not, "as what I capture will be validated by your manager". At the interview Mr Scragg's first question to Mrs Anyon was a leading one: "you are supervised all day constantly, aren't you?" (or words to that effect). Mrs Anyon disputed this and pointed out the areas where her post exercised autonomy over an investigation, but Mr Scragg repeated the opinion that the post involved being supervised and told what to do. He was dismissive of Mrs Anyon's protestations. He did not ask questions

about the JAF. Mrs Anyon formed the impression that he was adhering to a script or similar.

31. By contrast, Mrs Anyon's CCIIS colleagues benefitted from a full-day site visit by an evaluator at Norris Green, Liverpool (where CCIIS were based in Mrs Anyon's region), instead of telephone interviews generally used with LSIs. The Norris Green office is only 6 miles from the Wirral office where Mrs Anyon was based, and only a few miles from all other Liverpool offices. There were only 4 CCIIS interviews to conduct, suggesting that considerably longer than 20-30 minutes was spent with each CCIIS individual.

32. Following her interview, Mr Scragg and Mrs Anyon exchanged a series of emails seeking to finalise a Job Profile. Initially, he asserted that Mrs Anyon only dealt with "low level problems". Mrs Anyon did not agree that that was correct. While he later removed those words from the draft Job Profile, in his final email to Mrs Anyon of 28.1.16 (attaching his final draft of the Job Profile) his assessment of the nature of the problem-solving and decision-making involved in the LSI role remained essentially unchanged and not agreed by Mrs Anyon. She further raised various other objections to the proposed Job Profile in respect of matters that she did not agree with. A definitive version was never signed off by Mrs Anyon and her manager as an agreed Job Profile. It is not known which version of the Job Profile was provided to the JEGS Evaluation Panel, if any. Mrs Anyon was told by Mr Scragg that all JEGS documents – which she understood to include her JAF – would be considered by the JEGS Evaluation Panel. Accordingly, she was satisfied that the discrepancy between her JAF and the non-agreed Job Profile would be clear.

33. The process thereafter was somewhat opaque: the Claimants are not privy to the steps taken subsequently by the evaluators at the "scoring of posts" and "quality assurance" stages, nor to the proceedings of the JEGS Evaluation Panel, which consisted of Bev Rosser (who had also been an interviewer), Bernadette Swallow and Brian Nairn.

34. A "Methodology and Outcome" document (undated) indicates that Paulene Pearson (HR Business Partner) was the Lead HRBP and Lead JEGS assessor/evaluator, and ultimately signed off the conclusions of the JEGS Evaluation Panel. That document further indicates that the Fraud and Error Service Director (David Foley) and the SLT were thereafter to consider the outcome; whether they were content with the grading and job role findings; and whether they wished to amend the job role to add in further responsibilities which might change the grading, before then communicating the outcome to the people involved in the exercise.

35. An initial letter was thereafter sent to LSIs dated 22.4.16 by David Foley, advising them that their post had been graded at EO level, and that the CCIIS exercise had not yet concluded.

36. Mrs Anyon was advised by Brian Nairn in a phone call on 26.5.16 that LSIs received low scores for "management of resources". CCIIS investigators did not have budgets or staff to manage either, however. Mr Nairn further informed her in a meeting at which Ed Whiteside was also present on 1.8.19, that JAFs were not considered by the JEGS Evaluation Panel, in the context of a discussion about LSI JAFs and Mrs Anyon's in particular.

~~23.~~37. Finally on 23 June 2016 PCS Bulletin DWP/BB/065/16 ~~issued~~notified the Claimants ~~with~~of the JEGS outcome ~~into~~in relation to both CCIIS and LSI roles. Whilst the former were elevated to HEO grade the latter remained at EO.

38. It transpired that the 13 LSI scores given were within the EO range of 311-420. All 13 individual scores are not known, although one is known to have been 366. The 4 CCIIS scores were within the HEO range of 420-519. Specifically, 431, 432, 436 and 436. The LSI "Methodology and Outcome" document did not specify each individual's total score, whereas the equivalent CCIIS document did.

~~24.~~39. On 8 July 2016 Mrs Anyon sent an email to Mr David Foley (Head of Fraud & Error Services) requesting an explanation of the JEGS scoring process and seeking a meeting. A meeting later followed on 30 August 2016 but provided no ~~and/or no adequate explanation for the scoring process.~~adequate explanation for the scoring process. Paulene Pearson (HR Business Partner) was in attendance with David Foley. At that meeting, Mr Foley commented, "I don't know what you are expecting today, but you won't be getting your HEO out of it". When asked what the difference was between LSI and CCIIS investigators, Mr Foley said it was "the caseload", by which he meant the types of case worked on by each post. He later indicated that he needed to go away and consider that issue, but subsequently in a follow-up letter dated 20.12.16, he still was not in a position to give an answer. Instead he indicated that he had "recently commissioned some work to consider this in more detail", but the Claimants have not subsequently been provided with the outcome of that work.

40. Similar uncertainty was expressed on an "all colleagues" call on 11.8.20, when Adrian Landeg answered a question about the outcome of the LSI JEGS exercise, by saying that it was due to costs, before immediately giving a different answer, namely that the outcome was a result of a lack of evidence on autonomy.

~~25.~~41. On 12 August 2016 Ms Jackie Skinner, HR Advisor for the Defendant, provided some of the final numbers of the scoring process but did not disclose anything which might assist the Claimants in understanding how those numbers were reached.

~~26.~~42. PCS took some measures to challenge the process including a letter dated 19 December 2016 raising a series of fundamental concerns. These concerns were echoed by PCS Bulletin DWP.MB/031/17 dated 9 June 2017 which stated, inter alia, "Evidence was provided to the employer in December 2016 which we believe shows that the JEGS exercise evidence gathering for LSI was flawed and that the responsibilities for the role are that of an HEO rather than the current EO grading." It was later highlighted by way of illustration that surveillance activities had, for some of the LSIs, been excluded from the JEGs exercise. In July 2017, seven months after the PCS letter, the Defendant communicated its refusal to re-evaluate the role.

~~27.~~43. Subsequent efforts to secure a review of the process by the PCS were unsuccessful and ultimately the union opted to take no further action. It is understood that further efforts have been undertaken to engage PCS to no avail.

~~28.~~44. In or around March 2018 the Claimants discovered that an LSI had been elevated to HEO grade after he provided evidence of the work he had

undertaken which was an overspill of CCIIS work. This was a complete derogation from the JEGS process seemingly approved both by the PCS and by Mr David Foley~~.~~ and illustrates the essentially interchangeable nature of the two posts.

~~29.~~45. Subsequent efforts to challenge this process internally have failed culminating in the Defendant's letter of 18 February 2019.

(B) Paragraph 32 of the PC

By reason of matters aforesaid the Claimants aver that the Defendant has breached the express and/or implied terms of their Contracts of employment as set out at [9]-[13] and [17]-[20] above.

Particulars of Breach

i. Failing on a continuing basis to implement the outcome of the 2002 evaluation exercise which determined that Local Service Investigator was a specialist post;

ii. Failing to timeously commence a JEGS exercise whether in general or having regard to the continued representations of PCS;

iii. Failing to complete the 2015 JEGS timeously;

iv. Approaching the JEGS process with preconceptions and/or in bad faith in that the Defendant sought to avoid elevation to HEO grading and reasoned backwards from that desired conclusion;

v. The adoption of an unfair and/or impermissible procedure in that:-

   (a) Managers failed to provide evidence for the purpose of the evaluation exercise contrary to the express requirements of [24] Guidance;

   (b) There was an impermissible failure to hold face-to-face interviews with the post-holder and evaluator. Instead a 20-minute telephone interview was conducted. By contrast CCIIS JEGS candidates were afforded the access to a face-to-face interview. This gave rise to an indefensible disparity of treatment;

   (c) There was a failure to consider the previous 12 months of service as expressly required by the JEGS Guidance in that surveillance work was removed from consideration for some of the LSIs.

vi. The Defendant took into account irrelevant considerations contrary to express and/or implied terms of the contract (including the implied duties to exercise discretion in a *Wednesbury/Braganza* reasonable manner), namely:-

   (a) The financial implications of awarding HEO status;

   (b) The Defendant impermissibly focussed upon the type of investigations undertaken rather than the skills required to undertake the role. It is the latter upon which the JEGS exercise is focussed;

vii. The Defendant took into account factors that were incorrectly understood, namely;

   (c) Team Leader supervision. The Claimants assert that that Team Leaders are not involved in cases and do not undertake supervision.

vii. The Defendant failed to take into account relevant considerations and/or afforded them inadequate weight, namely:-

(a) Surveillance work;

(b) The iniquity of treatment as compared to the CCIIS cohort and FIU (EO) investigators all of whom had received HEO grade;

(c) The need for parity and/or consistency across the Department;

(d) The need for parity and/or consistency across the Civil Service in that the LSI team are performing work regarded as HEO and in some instances SEO status in other departments;

(e) A recognition that the level of knowledge required to undertake LSI work is akin to NVQ level 4, a factor of HEO status in comparable circumstances.

viii. A failure to provide any or any adequate reasons for the scoring process contrary to the express and implied terms;

ix. A failure on the part of the Defendant's HR department to comply with [40]-[42] JEF ([17] above);

x. A failure to conduct an investigation and/or review whether in general and/or following representations made by the Claimants and/or the PCS.

(C) Paragraphs 47 to 50 of the DAPC

47. In breach of the express terms contained in the CSMC, the 2013 Guide, the JEGS Handbook, the Guidance and the DWP Guidance on Pay and Reward at paras.10-19 above, and/or the implied terms at para.20 above, the Defendant adopted a defective JEGS Evaluation procedure by reason of the following matters (taken individually and/or collectively):

(i) Line Managers of the 13 LSI interviewees did not all engage with them properly or at all in relation to the agreement of their JAF. [paras.15(A)(i), 15(B), 15(C)(ii)-(iii), 15(D)(i)-(ii), 20(i), (iii)-(v)]

(ii) Some LSI Job Evaluation Interviews were not conducted appropriately for achieving their purpose of full and accurate information gathering: in at least one case clearly inappropriate leading questions were asked (particularly asserting a lack of autonomy on the part of LSIs, seemingly in adherence to a form of script), and face-to-face interviews were inappropriately dispensed with in many cases. [paras.15A(ii), 15(B), 15(C)(i)-(ii), 15(D)(i)-(ii), 19, 20(i)-(v) and (vii)]

(iii) In the case of at least one LSI interviewee (Mrs Anyon), no agreed Job Profile or equivalent was produced. [paras.15A(ii)-(iii), 15(B), 15(C)(i)-(ii), 15(D)(ii), 20(i)-(v)]

(iv) In that same case, despite the absence of an agreed Job Profile and an assurance that all JEGS documents would be considered by the JEGS Evaluation Panel, in fact her JAF was not. [paras.15(A)(iii)-(iv) and (vi), 15(B), 15(C)(i)-(ii), 15(D)(ii), 20(i)-(v)]

(~~i~~v) Inconsistency in the evidence-gathering process as between the LSI post and the CCIIS post, in that CCIIS interviewees generally benefitted from

significant assistance from their Line Managers in completing the JAF, whereas at least some LSI interviewees did not, and CCIIS interviewees benefitted from a day-long site visit as opposed to predominantly short telephone interviews for LSI interviewees. [paras.15(C)(i), 15(B), 15(D)(i) and (iii), 18, 19, 20(i)-(v) and (vii)]

(vi) Inconsistency in the scoring, quality assurance, Evaluation Panel and sign off processes in that different grades were attributed to each role despite the skills and tasks required and responsibilities involved being materially the same. While the Claimants are not presently privy to how those processes were conducted, as a minimum there is reason to believe the two posts have been treated differently from each other in relation to the autonomy involved in them, without proper or rational basis. To produce the outcomes that occurred, the information fed into the JEGS software at the scoring stage must have been inaccurate and/or inconsistent; the quality assurance process cannot have been properly undertaken (particularly bearing in mind comparable Charity Commission posts had been explicitly raised); and earlier defects must have been repeated or compounded at the Evaluation Panel and sign off stages. [paras.15(A)(iv)-(viii), 15(B), 15(C)(i)-(ii), 15(D)(i)-(iii), 18, 19, 20(i)-(v) and (vii)]

48. Further or alternatively, in breach of the express terms contained in the CSMC, the 2013 Guide, the JEGS Handbook, the Guidance and the DWP Guidance on Pay and Reward at paras.10-19 above, and/or the implied terms at para.20 above, the Defendant undertook a JEGS process that was pre-determined:

(i) The inference to be drawn from the matters pleaded at paras.21-24, 26, 34 and 39-40 is that the cost of applying HEO status to the LSI post was considered prohibitive by the Senior Leadership Team and that consideration filtered down to the conduct of the JEGS process through Jackie Skinner and Paulene Pearson of HR. It consciously or subconsciously thereby influenced the outcome, when cost is entirely irrelevant to the grading of a post as it stands at the time of the JEGS evaluation. [paras.15(A)(i)-(vii), 15(B), 15(C)(i)-(ii), 15(D)(i)-(iii), 17-19, 20(i)-(vii)]

(ii) Alternatively, the outcome was pre-determined in the sense that the defective evidence gathering process was causative of it, in whole or in part. [paras.15, 20(i)-(v) and (vii)]

49. Further or alternatively in breach of the express terms contained in the CSMC, the 2013 Guide, the JEGS Handbook, the Guidance and the DWP Guidance on Pay and Reward at paras.10-19 and/or the implied terms at para.20 the Defendant:

(A) Took into account irrelevant considerations ~~contrary to express and/or implied terms of the contract (including the implied duties to exercise discretion in a Wednesbury/Braganza reasonable manner),~~[paras.15(A)(iv)- (viii), 15(B), 15(C)(i)-(ii), 15(D)(i)-(ii), 18-19, 20(i)-(v) and (vii)]~~, namely: -~~:

(i) The financial implications of ~~awarding HEO status;~~the LSI post being graded at HEO (consciously or subconsciously);

(ii) ~~The Defendant impermissibly focussed upon the~~The "caseload" or type of investigations undertaken rather than the skills and tasks required ~~to undertake the role. It is the latter upon which the JEGS exercise is focussed~~and duties involved;

~~vii.~~ ~~The Defendant took into account factors that were incorrectly understood, namely;~~

(iii) An incorrect stance that LSIs are subject to Team Leader supervision~~. The Claimants assert that that Team Leaders are not involved in cases and do not undertake supervision.~~ in the conduct of their investigations and/or as to LSIs' level of autonomy generally;

~~The Defendant~~

(B) Failed to take into account relevant considerations ~~and/or afforded them inadequate weight, namely:~~ [paras.15(A)(iv)-(vi), 15(B), 15(C)(i)-(ii), 15(D)(i)- (iii), 18, 19, 20(i)-(v) and (vii)], namely:

~~(a) Surveillance work;~~

(i) The iniquity of treatment of the LSI post as compared to the CCIIS ~~cohort and FIU (EO) investigators all of whom had received HEO grade~~post;

(ii) The need for parity and/or consistency across the Department;

(iii) The need for parity and/or consistency across the Civil Service, in that ~~the LSI team~~equivalent posts elsewhere are ~~performing work regarded as~~graded at least at HEO ~~and in some instances SEO status in other departments~~;

(iv) A recognition that the level of knowledge required to undertake LSI work is akin to NVQ level 4, which is a factor in favour of HEO status in comparable circumstances.

~~A failure~~

50. Further or alternatively, in breach of the express terms at paras.10-19 and/or the implied terms at paras.20 including the implied term that workplace grievances will be promptly and effectively resolved, the Defendant:

~~vi.~~ (i) Failed to provide any ~~or any~~ adequate reasons for the ~~scoring~~outcome of the JEGS process ~~contrary to the express and implied terms~~;

~~vii. A failure on the part of the Defendant's HR department to comply with [40]- [42] JEF ([17] above);~~

~~A failure to conduct an investigation and/or review whether in general and/or following representations made by~~ that would enable the Claimants ~~and/or the PCS.~~to understand it so as to render the right to seek a review of the outcome meaningful. [paras.15(B), 15(C)(iv), 15(D)(i)-(ii), 19, 20(i) and (iii)-(vii)]

(ii) Failed promptly and effectively to resolve the Claimants' complaints about the JEGS process [paras.15A(viii), 17 and 20(vi)], by never providing the outcome of the work undertaken on Mr Foley's behalf (para.39 above), and by taking 7 months to decide not to re-evaluate 138

27 the LSI post, when re-evaluation was needed particularly in light of the aforementioned absence of answers from Mr Foley.