[2020] UKFTT 00150 (TC)

TC07643

VAT – occupational health services – whether exempt or standard rated – whether single or multiple supply – whether Tribunal can decide appeal on basis not put forward by either party – yes – Levob, Mesto and Metropolitan considered and applied – overarching test – appeal refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2014/04016
TC/2017/04923

BETWEEN

RPS HEALTH IN BUSINESS LIMITED

RPS CONSULTING SERVICES LIMITED
t/a RPS BUSINESS HEALTHCARE **Appellant**

-and-

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE ANNE REDSTON
MS REBECCA NEWNS

Sitting in public at the Tribunal Centre, Taylor House, Rosebery Avenue, London on 26 February 2019, 2- 5 July 2019 and 4-6 December 2019

Ms Amanda Brown of KPMG LLP for the Appellants

Ms Jennifer Newstead Taylor of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

INTRODUCTION AND SUMMARY

1. This judgment is about whether occupational health ("OH") services are exempt or standard rated for VAT. At the time the decisions under appeal were made, RPS Group plc had two subsidiaries providing OH services, RPS Health in Business Ltd ("HIB") and RPS Consulting Services Ltd, trading as RPS Business Healthcare ("BHC"). In October 2017, the subsidiaries merged to form RPS Occupational Health Ltd ("RPS OH Ltd"). We have used "RPS" in this Decision to encompass both subsidiaries, unless otherwise required by the context.

2. HM Revenue & Customs ("HMRC") decided that services provided by the Appellants were exempt from VAT because they fell within the "medical exemption" at Value Added Tax Act 1994 ("VATA"), Sch 9, Group 7, Item 1, namely that they were "services consisting in the provision of medical care". The Appellants appealed on the basis that they were making standard rated supplies of information and advice to employers.

Single/multiple supplies

3. RPS provides a wide range of OH services, such as medicals, heath surveillance, vaccinations, sickness absence management and drug/alcohol testing. HMRC's initial position was that these were separate single supplies of exempt services.

4. Following a presentation given by KPMG, acting for the Appellants, HMRC accepted that RPS was providing a single indivisible economic supply of services, made up of two or more elements which were so closely linked that it would be artificial to split them. Both parties were therefore of the view that there was a single supply. However, they disagreed as to its classification: HMRC considered the supply was exempt, and the Appellants that it was standard rated.

5. Both parties also accepted that some services fell on the other side of the line: HMRC accepted that pre-employment medicals, pension scheme medicals, ergonomic assessments, laboratory services and administration charges were all standard rated; the Appellants accepted that executive medicals were exempt.

6. Shortly before the hearing, the Appellants changed their position. Their skeleton argument was filed and served on the basis that RPS was making separate single supplies which were all standard rated other than executive medicals and vaccinations. HMRC objected to this sudden change of position. The Tribunal adjourned the hearing with directions.

7. The Appellants then reverted to their original approach, so that when the hearing resumed, it was again common ground that RPS was making a single supply of services, with HMRC submitting that the supply was exempt, and the Appellants that it was standard-rated, and both accepting that some services fell on the other side of the line.

8. The parties jointly submitted that we could not consider the single/multiple supply question. They said that the adversarial nature of the Tribunal's jurisdiction required us to proceed on the basis that RPS was making a single indivisible economic supply (albeit with exceptions), and we were only able to decide whether that supply was exempt or standard rated. We disagreed, finding that a tribunal cannot decide an appeal on a basis which it considers to

be wrong in law, and we were therefore able to consider and decide whether RPS was making separate single supplies, or a multiple supply.

9. The extent of the disagreement between the parties, and this further disagreement between both parties and the Tribunal on the single/multiple supply question, required us to make extensive and detailed findings of fact, as well as considering the competing legal submissions and explaining our own analysis. As a result, this is a very long decision.

Our decision in summary

10. RPS sometimes provides clients with an OH practitioner, such as a doctor or nurse, who delivers a range of services for a fixed price from an onsite or mobile clinic. RPS also provides some clients with specific services on a bespoke basis. Mr Latter summarised these two approaches by saying:

> "When RPS contracts with client employers to undertake OH services, it is usually by way of a 'comprehensive' contract or an 'individual items of service' contract."

11. We decided that:

(1) where RPS provides an OH practitioner to deliver a range of services for a fixed price from an onsite or mobile clinic, this is a single indivisible economic supply of exempt services, being made up of elements which are so closely linked that it would be artificial to split them;

(2) otherwise, RPS provides separate single supplies on a bespoke basis. The overwhelming majority of these supplies are exempt, with ill-health retirement medicals, medico-legal services, administration charges and training courses being standard rated.

12. We therefore substantially agreed with HMRC on classification, in that we found almost all the services to be exempt. We may have differed from HMRC on the classification of the following services, where they were supplied separately:

(1) ergonomic assessments and employment questionnaires/medicals given to new employees. These are exempt. HMRC had initially accepted they were standard rated, although by the end of the hearing, Ms Newstead Taylor submitted they were part of a single exempt supply; and

(2) training courses and medico-legal services are standard rated; HMRC's position was that they were part of a single exempt supply.

THE DECISIONS UNDER APPEAL

The HIB decision

13. On 18 March 2014, HMRC decided that "the following supplies" fell within the medical exemption:

(1) Sickness Absence Management ("SAM");

(2) manual handling training;

(3) mobile screening;

(4) medicals; and

(5) workplace vaccinations.

14. On 2 July 2014, that decision was upheld on review, and on 28 July 2014, HIB appealed to the Tribunal.

The BHC decision

15. Following an HMRC visit in February 2006, BHC treated its OH services as standard rated. On 26 May 2017, HMRC decided that the services came within the medical exemption and were thus exempt. On 21 June 2017, BHC appealed that decision to the Tribunal.

Tribunal joinder direction

16. On 31 July 2017, Judge Mosedale directed that the two appeals "proceed together and be heard together".

Prospective application of the Tribunal Decision

17. The HIB decision was thus made on 18 March 2014, and the BHC decision on 26 May 2017. However, the parties told us that HMRC had agreed that this Tribunal's Decision in relation to both Appellants would be enforced prospectively from 1 October 2017. If the Appellants succeeded, so that the services RPS supplied were standard rated, RPS would therefore not have to pay over VAT which had not been charged on invoices issued before that date.

18. We pointed out to the parties that the Tribunal only had the jurisdiction to decide whether to uphold or set aside the decisions made by HMRC; we did not have the jurisdiction to make prospective rulings. Any agreement between the parties as to the date of enforcement was not a matter we could decide.

THE EVIDENCE

The documents

19. The Tribunal had the benefit of five Bundles prepared by the Appellants, which included:

(1) the correspondence between the parties, and between the parties and the Tribunal;

(2) the agenda, presentation and other documents relating to a meeting between HMRC and the Appellants in February 2015;

(3) a job specification for an OH technician;

(4) various internal RPS documents, including those relating to procedures, records, certificates, reports and tests; and

(5) documents from or relating to the provision of services by RPS to its clients, including tender documents, proposals, contracts and invoices.

Anonymity

20. The Appellants asked that three of the clients to which RPS provides or provided services be anonymised in this Decision. Ms Brown said that providing details of those clients' OH requirements might be prejudicial to the operation of their businesses, but that the type of business carried out by each of those clients could be identified, and that no similar issue had been identified with RPS's other clients. HMRC did not object to that application.

21. Rule 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") gives the Tribunal a general case management power, which has previously

been used to anonymise persons involved in an appeal. For example, in *Mr A v HMRC* [2015] UKFTT 189 (TC) the Tribunal (Judge Raghavan and Ms O'Neill) found that it was unfair to name the appellant and his employer, because the latter was not a party to the hearing and could suffer damage. A similar decision was made in *A Partnership v HMRC* [2015] UKFTT 0161 (Judge Mosedale).

22. We decided that it was in the interest of justice to exercise our discretion under Rule 5 to anonymise the Decision to remove the names of these three clients, for the reasons given by Ms Brown, while also retaining a reference to the nature of their businesses as being relevant to understanding the type of services with which they were provided by RPS.

23. One of the three clients is involved with team sport, one with the manufacture of food and one with transport, and in this Decision we have called them SportCo, FoodCo and TransportCo.

The witness evidence

24. We were provided with witness evidence from three RPS employees and from Mr James Brown, an employee of Siemens.

Mr Latter

25. Mr Michael Latter is the Senior Business Development Manager at RPS Health, Safety and Environment, a business division of RPS Group plc. He has been employed by RPS since 2011. His current role is selling and developing OH services to a variety of clients in both the commercial and public sector, including managing key accounts. He provided two witness statements, gave evidence-in-chief led by Ms Brown, was cross-examined by Ms Newstead Taylor and answered questions from the Tribunal.

26. Mr Latter was extremely careful to give evidence which he thought would assist RPS, in particular by seeking to avoid confirming that the services provided protected employee's health, for example:

(1) When asked by Ms Newstead Taylor to confirm that RPS "consistently marketed itself on the grounds that its principal purpose of its services is to protect the health and welfare of its workers" he said this marketing was "to get the buy-in from customers…not necessarily that this is what we do". When Ms Newstead Taylor then suggested this showed that "what the clients want…is the protection of their employees' health, because otherwise you would not be using it as the hook", Mr Latter avoided giving a straightforward answer, saying only "that is the way it is positioned".

(2) RPS's own health surveillance procedure document says "attention is focused on primary and secondary prevention". When Mr Latter was asked to confirm that health surveillance was a "preventative measure", he replied "it can be if the manager follows the guidance".

(3) Although RPS carry out vaccinations, Mr Latter said that their purpose was not to protect the health of the employees, but instead:

> "…to help the client employer limit the risk of their employees getting sick or contracting diseases which may result in absence from work, affecting their capabilities within the workplace to perform their role properly, as well as working to prevent any potential litigation that might transpire against the employer if the employee gets sick while working overseas or following a cut or needle stick injury during the course of their employment."

27. At times this tendency led Mr Latter to make assertions which were not borne out by the documentary evidence, for example:

(1) Ms Newstead Taylor took him to a document headed "job specification for OH technician". Under the heading "job overview/purpose" it said that the employee "may be responsible for providing immediate treatment of injuries and illness arising at work on fixed sites and, if necessary, to initiate the medical emergency plan". He was asked to confirm that RPS was recruiting OH technicians "on the basis that their role does incorporate a treatment-led approach". He responded by saying that this was a specification for a role with UK Coal, which was a "unique contract" and "the rest of the technicians do not need to do that type of work". Ms Newstead Taylor pointed out that the document had been put forward by RPS as a generic document, applicable to both HIB and BHC. The Tribunal also noted that the same document had been attached to a letter from RPS to HMRC dated 21 October 2010 in response to an HMRC request for details about the type of work carried out by OH technicians, specifically in order to answer the question "what precisely do the technicians do". RPS's own case was therefore presented on the basis that this document was not specific to UK Coal, but generic.

(2) In his witness statement, Mr Latter repeatedly denied that RPS carried out "diagnosis". Under cross-examination he was taken to the comprehensive booklet RPS had produced for one of its clients, Saipem. This includes references to the OH physician carrying out diagnostic tests **[5/1344 etc]**. Mr Latter was unable to deny the words on the page, but again sought to isolate the example, saying "this is not a typical contract that RPS deals in…we do not have contracts like this". However, when asked by HMRC on 30 August 2016 for sample documentation to explain how the BHC business worked, RPS provided the presentation they had given to Saipem. Again, this contract had been put forward by RPS on the basis that it was typical of the services provided.

(3) Mr Latter's witness statement said that the purpose of manual handling was to provide training "to reduce the risk of those employees being unable to complete the tasks efficiently, or at all" and to "ensure employees remain efficient and able to work". However, having been taken to various documents in the Bundle in the course of cross-examination, he accepted that his evidence on this point in his witness statement was unsupported by the documents. These consistently state that the purpose of manual handling training is to protect staff from injury; none say that its purpose was make staff more efficient.

28. We found Mr Latter to be a partisan witness who was not entirely reliable.

Ms Snagg and Ms White

29. Ms Andrea Snagg signed her witness statement on 12 February 2018, when she was one of two Operations Managers employed by RPS; the other was Ms Fay White. Ms Snagg is a qualified nurse who has worked in OH since 1993, and she began working for RPS in 2015. She managed 32 staff members and was in charge of the "performance, productivity, efficiency and profitability" of her part of the RPS's OH business, as well as "the management of enquiries made to RPS" and "assisting the management team with presenting and selling OH services to the market".

30. She left RPS on 1 February 2019, before the hearing of these appeals and did not attend the hearing. Ms White, who has worked for RPS since 2010, signed a witness statement on 5 February 2019 and a supplementary witness statement on 29 March 2019. She adopted Ms Snagg's witness statement, but some paragraphs were adopted "with qualifications". In making our findings of fact we have only taken into account those parts of Ms Snagg's witness statement which were adopted by Ms White, as Ms Snagg was not present to be cross-examined.

31. Ms White gave evidence in chief, led by Ms Brown and was cross-examined by Ms Newstead Taylor. Ms Newstead Taylor asked us to find that Ms White "had a tendency not to answer the question, to resile from previously agreed evidence in her own witness statements and to duck the questions that she did not like". We agree. Ms White was reluctant to give straightforward answers if she thought that by doing so she might not be helping her employer's case. Examples include the following:

(1) Ms Newstead Taylor asked whether she accepted that there was a diagnostic element to an HIV blood test. Ms White three times avoided giving a simple "yes" to that question, describing it instead as a "screening test", before finally agreeing that "an HIV test would show the HIV virus", but followed that by saying "in terms of an organisation, RPS would not diagnose conditions".

(2) Ms Snagg's witness statement said that when a preplacement medical had identified that a person had a pre-existing condition such as carpal tunnel syndrome, RPS could advise the employer that he should not work with power tools. Having adopted that paragraph, Ms White sought to resile from it in the witness box, before retreating under challenge and eventually agreeing that RPS would be "advising on avoiding certain tasks".

(3) Ms Newstead Taylor asked Ms White whether the purpose of an OH report was "to facilitate a return to work that takes into account that individual's health". Ms White was reluctant to give a straightforward answer. Ms Newstead Taylor had to work through an example before Ms White agreed that the purpose of the report was to "make clear to an employer where an employee's health imposes limits on the activities they can do" and to provide advice on whether there needed to be adjustments to the way the work was carried out.

(4) Ms Newstead Taylor referred Ms White to the employee guidance about completing a pre-placement health declaration, which said that its purpose:

> "is to see if there are any health problems that affect the ability to do the duties of the post or place you at any risk in the workplace and then the company's OH service can then advise management how to adjust your work and/or your work environment."

Ms Newstead Taylor asked her to confirm that an employee reading that guidance would understand the principal purpose of the declaration was the protection of their health. Ms White initially sought to avoid giving a direct answer, and then said that the guidance was "advising that if you are having health problems, that could affect your ability to undertake the duties of your post, rather than protection of health".

32. As with Mr Latter, we found Ms White to be a partisan witness who was not entirely reliable.

Mr Brown

33. Mr Brown provided a witness statement, gave evidence in chief led by Ms Brown, was cross-examined by Ms Newstead Taylor and responded to questions asked by the Tribunal. He is the Health Management "Lead" at Siemens plc, and was responsible for the management of Siemens' OH provision through RPS. At the time he gave his witness statement, Siemens was an RPS client, although this was no longer the case when Mr Brown came to giver oral evidence at the Tribunal.

34. Mr Brown has held the same role for around three years, having previously worked there for over four years as a Health Management Coordinator and an Environmental Protection, Health Management and Safety Graduate. He gave oral evidence led by Ms Brown and was cross-examined by Ms Newstead Taylor. We found him to be an entirely credible and honest witness.

Issues relating to reliance on the evidence

35. The normal position in Tribunal appeals is that the parties seek to rely on documentary evidence which is (a) dated on or before the decision being appealed, and (b) relates only to the particular appellant. However, in this case:

(1) The two decisions had different dates, the HIB decision having been made on 18 March 2014 and the BHC decision being issued over three years later, on 26 May 2017.

(2) The Bundles contained a mix of documents, some relating to HIB and some to BHC. In almost all cases, the Bundle Index stated that these had been provided in the context of both Appellants' appeals and/or concerned both Appellants' business operations. Ms Brown confirmed that this was the Appellants' position.

(3) Some of the contracts for the supply of services were with either HIB or BHC, but in making submissions the parties did not distinguish between the services supplied by the two Appellants, other than that Ms Brown asked us to find that the contract between BHC and UK Coal was atypical (we return to this at §124).

(4) The Bundles also contained numerous documents (including a number of contracts) relating to the merged company RPS OH Ltd, which were dated after the decisions under appeal.

(5) When those decisions were made, some of the contracts in the Bundle had come to come to an end and others had not begun.

36. In general, the parties' representatives and the witnesses treated all the evidence as painting a picture of the services being supplied by the Appellants and as relevant to the issues the Tribunal had to decide. However, both Counsel and the witnesses occasionally sought to avoid an adverse conclusion by submitting that a particular piece of evidence (a) related to a contract which had not been in force at the time of the decisions; (b) had been issued after one or both of the decisions and so had been worded to assist the Appellants' case; or (c) related to a contract which was no longer in force, and so should not be relied on by the Tribunal given that HMRC had agreed only to enforce the Tribunal's judgment from 1 October 2017.

37. However, neither party sought to argue that the nature of the services had changed over the period for which the evidence had been produced (again, with the exception of the UK Coal contract, see §124). Ms White did state that over the 14 years she had worked for RPS there had been "significant changes from a very reactive and treatment led service to a proactive, consultancy led service" and gave two examples of those changes. One of these examples dated from 2004, which was earlier than any of the documentary evidence provided. The second was that RPS practitioners used to dispense paracetamol; no contract in the Bundle referred to dispensing paracetamol. Ms White also referred to SAM having changed since 2007; this was again before the date of any of the documents in the Bundle except the first of three UK Coal contracts. We find that none of the changes to which Ms White referred undermined the reliability of the evidence in the Bundles, and we accepted that evidence as relevant to the services provided by the Appellants. We also found that we had sufficient evidence to make findings of fact as to the position of the typical consumer of RPS's services, and neither party sought to argue otherwise.

THE LAW ON HEATH AND SAFETY

38. There was no dispute that the Health and Safety legislation was part of the context in which RPS's services were provided.

EUROPEAN LAW

39. European Health and Safety law consists of Directive 89/391/EEC (the "Framework Directive") and a number of other directives which deal with specific risk areas.

The Framework Directive

40. The Framework Directive is entitled "on the introduction of measures to encourage improvements in the safety and health of workers at work". The opening recitals read:

> "Whereas Article 118a of the Treaty provides that the Council shall adopt, by means of Directives, minimum requirements for encouraging improvements, especially in the working environment, to guarantee a better level of protection of the safety and health of workers;
>
> Whereas this Directive does not justify any reduction in levels of protection already achieved in individual Member States, the Member State being committed, under the Treaty,
>
> - to encouraging improvements in conditions in this area
> - and to harmonizing conditions while maintaining the improvements made;

> Whereas it is known that workers can be exposed to the effects of dangerous environmental factors at the work place during the course of their working life;
>
> Whereas, pursuant to Article 118a of the Treaty, such Directives must avoid imposing administrative, financial and legal constraints which would hold back the creation and development of small and medium-sized undertakings;
>
> Whereas the communication from the Commission on its programme concerning safety, hygiene and health at work provides for the adoption of Directives designed to guarantee the safety and health of workers."

41. Other recitals include the following:

> "Whereas the incidence of accidents at work and occupational diseases is still too high; whereas preventive measures must be introduced or improved without delay in order to safeguard the safety and health of workers and ensure a higher degree of protection;
>
> Whereas, in order to ensure an improved degree of protection, workers and/or their representatives must be informed of the risks to their safety and health and of the measures required to reduce or eliminate these risks; whereas they must also be in a position to contribute, by means of balanced participation in accordance with national laws and/or practices, to seeing that the necessary protective measures are taken; …
>
> Whereas the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations;
>
> Whereas employers shall be obliged to keep themselves informed of the latest advances in technology and scientific findings concerning work-place design, account being taken of the inherent dangers in their undertaking..."

42. Article 1 of the Directive sets out its Objects. It reads:

> "1. The object of this Directive is to introduce measures to encourage improvements in the safety and health of workers at work.
>
> 2. To that end it contains general principles concerning the prevention of occupational risks, the protection of safety and health, the elimination of risk and accident factors, the informing, consultation, balanced participation in accordance with national laws and/or practices and training of workers and their representatives, as well as general guidelines for the implementation of the said principles.
>
> 3. This Directive shall be without prejudice to existing or future national and Community provisions which are more favourable to protection of the safety and health of workers at work."

43. Article 3 sets out definitions, and defines "prevention" as "all the steps or measures taken or planned at all stages of work in the undertaking to prevent or reduce occupational risks".

44. Article 5 is headed "Employers' obligations", and begins:

> "1. The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work.

2. Where, pursuant to Article 7 (3), an employer enlists competent external services or persons, this shall not discharge him from his responsibilities in this area.

3. The workers' obligations in the field of safety and health at work shall not affect the principle of the responsibility of the employer…"

45. Article 6 is headed "General obligations on employers" and provides as follows:

"1. Within the context of his responsibilities, the employer shall take the measures necessary for the safety and health protection of workers, including prevention of occupational risks and provision of information and training, as well as provision of the necessary organization and means.

The employer shall be alert to the need to adjust these measures to take account of changing circumstances and aim to improve existing situations.

2. The employer shall implement the measures referred to in the first subparagraph of paragraph 1 on the basis of the following general principles of prevention:

(a) avoiding risks;

(b) evaluating the risks which cannot be avoided:

(c) combating the risks at source;

(d) adapting the work to the individual, especially as regards the design of work places, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health.

(e) adapting to technical progress;

(f) replacing the dangerous by the non-dangerous or the less dangerous;

(g) developing a coherent overall prevention policy which covers technology, organization of work, working conditions, social relationships and the influence of factors related to the working environment;

(h) giving collective protective measures priority over individual protective measures;

(i) giving appropriate instructions to the workers.

3. Without prejudice to the other provisions of this Directive, the employer shall, taking into account the nature of the activities of the enterprise and/or establishment:

(a) evaluate the risks to the safety and health of workers, inter alia in the choice of work equipment, the chemical substances or preparations used, and the fitting-out of work places.

Subsequent to this evaluation and as necessary, the preventive measures and the working and production methods implemented by the employer must:

- assure an improvement in the level of protection afforded to workers with regard to safety and health,

- be integrated into all the activities of the undertaking and/or establishment and at all hierarchical levels;

(b) where he entrusts tasks to a worker, take into consideration the worker's capabilities as regards health and safety;

(c) ensure that the planning and introduction of new technologies are the subject of consultation with the workers and/or their representatives, as regards the consequences of the choice of equipment, the working conditions and the working environment for the safety and health of workers;

(d) take appropriate steps to ensure that only workers who have received adequate instructions may have access to areas where there is serious and specific danger…"

46. Article 14 is headed "Health surveillance" and provides:

> "1. To ensure that workers receive health surveillance appropriate to the health and safety risks they incur at work, measures shall be introduced in accordance with national law and/or practices.
>
> 2. The measures referred to in paragraph 1 shall be such that each worker, if he so wishes, may receive health surveillance at regular intervals."

Other directives

47. Following the Framework Directive, a number of other EU directives were promulgated. These deal with specific risk areas, including manual handling, work equipment, personal protective equipment and display screen equipment. However, we were not referred to any of these by the parties, and having considered them after the hearing, we find that it is unnecessary to set them out in this Decision.

UK LEGISLATION

48. The UK's primary Health and Safety legislation pre-dated the Directive and consisted of the Health and Safety at Work Act 1974 ("HSWA") and related regulations; both have been updated over the years in part to take into account the requirements of EU law.

The Health and Safety at Work Act

49. Part I of the HSWA is headed "Health, Safety and Welfare in Connection with Work, and Control of Dangerous Substances and Certain Emissions into the Atmosphere". Section 1 is headed "preliminary" and provides:

> "(1) The provisions of this Part shall have effect with a view to—
>
> (a) securing the health, safety and welfare of persons at work;
>
> (b) protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work."

50. Section 2 is headed "General duties of employers to their employees" and reads:

> "(1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

(2) Without prejudice to the generality of an employer's duty under the preceding subsection, the matters to which that duty extends include in particular—

(a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;

(b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;

(c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees;

(d) so far as is reasonably practicable as regards any place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks;

(e) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.

(3) Except in such cases as may be prescribed, it shall be the duty of every employer to prepare and as often as may be appropriate revise a written statement of his general policy with respect to the health and safety at work of his employees and the organisation and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision of it to the notice of all his employees…"

51. Section 33 provides that an employer commits a criminal offence if he fails to discharge a duty to which he subject by section 2 of the Act, or to "contravene any health and safety regulations or any requirement or prohibition imposed under any such regulations".

The Management of Health and Safety at Work Regulations

52. The Management of Health and Safety at Work Regulations 1999 (the "MHSW Regs") were made under the *vires* given by the HSWA. Reg 3 is headed "risk assessment" and subsection (1) provides:

"Every employer shall make a suitable and sufficient assessment of—

(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and

(b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,

for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions. . ..

53. Reg 4 is headed "Principles of prevention to be applied" and reads "Where an employer implements any preventive and protective measures he shall do so on the basis of the principles specified in Schedule 1 to these Regulations". That Schedule is headed "General Principles of Prevention" and reads:

> "This Schedule specifies the general principles of prevention set out in Article 6(2) of Council Directive 89/391/EEC [the Framework Directive]
>
> (a) avoiding risks;
>
> (b) evaluating the risks which cannot be avoided;
>
> (c) combating the risks at source;
>
> (d) adapting the work to the individual, especially as regards the design of workplaces, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health;
>
> (e) adapting to technical progress;
>
> (f) replacing the dangerous by the non-dangerous or the less dangerous;
>
> (g) developing a coherent overall prevention policy which covers technology, organisation of work, working conditions, social relationships and the influence of factors relating to the working environment;
>
> (h) giving collective protective measures priority over individual protective measures; and
>
> (i) giving appropriate instructions to employees."

54. Reg 5 is headed "Health and safety arrangements" and reads:

> "(1) Every employer shall make and give effect to such arrangements as are appropriate, having regard to the nature of his activities and the size of his undertaking, for the effective planning, organisation, control, monitoring and review of the preventive and protective measures.
>
> (2) Where the employer employs five or more employees, he shall record the arrangements referred to in paragraph (1).

55. Reg 6 is headed "Health surveillance" and provides:

> "Every employer shall ensure that his employees are provided with such health surveillance as is appropriate having regard to the risks to their health and safety which are identified by the assessment."

Other Regulations

56. Numerous other sets of regulations have been made under the *vires* given by the HSWA. The parties referred us to some of these by way of illustration.

57. Reg 4 of the Manual Handling Operations Regulations 1992 ("Manual Handling Regs") is headed Duties of Employers", and subsection (1) provides:

> "Each employer shall—

(a) so far as is reasonably practicable, avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured; or

(b) where it is not reasonably practicable to avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured—

(i) make a suitable and sufficient assessment of all such manual handling operations to be undertaken by them, having regard to the factors which are specified in column 1 of Schedule 1 to these Regulations and considering the questions which are specified in the corresponding entry in column 2 of that Schedule,

(ii) take appropriate steps to reduce the risk of injury to those employees arising out of their undertaking any such manual handling operations to the lowest level reasonably practicable…"

58. The Control of Substances Hazardous to Health Regulations 2002 ("Hazardous Substances Regs") provides at Reg 6:

"(1) An employer shall not carry out work which is liable to expose any employees to any substance hazardous to health unless he has—

(a) made a suitable and sufficient assessment of the risk created by that work to the health of those employees and of the steps that need to be taken to meet the requirements of these Regulations; and

(b) implemented the steps referred to in sub-paragraph (a)."

59. Reg 6(2)(h) provides that, in making that assessment, the employer must consider "the results of relevant health surveillance", and Reg 11(1) reads:

"Where it is appropriate for the protection of the health of his employees who are, or are liable to be, exposed to a substance hazardous to health, the employer shall ensure that such employees are under suitable health surveillance."

60. We were also taken to the Control of Noise at Work Regs 2005 ("the Noise Regs"), and the Control of Vibration at Work Regs 2005 ("the Vibration Regs"). Both similarly require the employer to carry out a "suitable and sufficient" risk assessment, which must take into account the results of "appropriate" health surveillance. Reg 7(2) of the Vibration Regs states that health surveillance "shall be intended to prevent or diagnose any health effect linked with exposure to vibration". Documents in the Bundle also referred to the Control of Asbestos Regulations 2012 ("the Asbestos Regs").

61. We are also aware of the Health and Safety (Display Screen Equipment) Regulations 1992 ("the DSE Regs"), also made under the *vires* of the HSWA. The DSE Regs cover display screens, workstations, work surfaces and chairs (Reg 3 and para 2 of the Schedule). They require employers to carry out a workstation assessment, provide health and safety "H&S" training (Regs 2 and 6) and if requested, eyesight checks.

The purpose of this legislation

62. We make the following findings about the H&S provisions set out above. The references to "Article" are to the Articles of the Framework Directive.

(1) The purpose of the H&S provisions is to protect the health of workers, because:

(a) the preamble to the Framework Directive begins by referring to:

(i) the obligation in the Treaty "to guarantee a better level of protection of the safety and health of workers", and

(ii) the Commission communication advocating "the adoption of Directives designed to guarantee the safety and health of workers";

(b) Article 1 says that "the object of this Directive is to introduce measures to encourage improvements in the safety and health of workers at work"; and

(c) Section 1(1) of the HSWA provides that its purpose is "securing the health, safety and welfare of persons at work"; the Act also extends to protecting others "arising out of or in connection with" the activities of workers.

(2) It is the employer's responsibility to ensure that the workers are protected, because:

(a) Article 5 says that "the employer shall have a duty to ensure the safety and health of workers in every aspect related to the work", and Article 6 provides further details.

(b) Section 2 of the HSWA provides that "it shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees".

(3) The employer can enlist "competent external services or persons", but cannot thereby surrender responsibility (Article 5(2)); persons enlisted in relation to prevention of harm must "have the necessary aptitudes and the necessary personal and professional means…[and be] sufficient in number" (Art 7(5)).

(4) The employer must prevent risks arising, see Article 1(2); Article 6 and s 2(2) of the HSWA; Reg 4 and Sch 1 of the MHSW Regs.

(5) The required process for preventing harm includes:

(a) carrying out risk assessments (Article 6(a); MHSW Reg 3);

(b) health surveillance (Article 14; MHSW Reg 6):

(c) training workers (Article 6(1); Article 12; HSWA s 2(2)(c); and

(d) making adjustments for individual workers, see Art 6(2)(d), also set out at Sch 1(d) of the MHSW Regs

63. The more specific regulations concerning (for example) manual handling, hazardous substances, noise and vibration, reflect the same principles. In addition, the Vibration Regs state that health surveillance may extend to "diagnosing" any health effect consequent upon the exposure.

THE FACTS ABOUT THE SERVICES GENERALLY

64. In this Part we make findings of fact about:

(1) the nature of occupational health;

(2) RPS and how it marketed its services;

(3) what RPS's clients required;

(4) what was said to the clients' employees; and

(5) whether there was a confidential relationship between the employees and the OH practitioner.

65. It was not in dispute that all the services provided by RPS were delivered by "a person registered or enrolled" in one of the professions listed in VATA, Sch 9, Group 7, or by someone supervised by a person so enrolled, and we so find/

THE NATURE OF OCCUPATIONAL HEALTH

66. It was common ground that OH is a specialist form of medicine with recognised qualifications, accredited by the Faculty of Occupational Medicine.

67. Ms Brown opened her submissions by taking the Tribunal to an extract from a report published by the Health & Safety Executive. She relied on this as providing "a real understanding of what occupational health is". The extract had been included in a letter sent to HMRC in the course of this dispute, which described the extract as providing "the seminal definition of OH".

68. However, we were not provided with a copy of the report from which the extract was taken. We decided that we should not rely on a report without seeing the original[1], and located it after the hearing. The passage referred to is as follows, although the first sentence (underlined) was not cited in the letter to HMRC:

> "The occupational health (OH) of workers can be improved by a variety of interventions, both aimed at the prevention of health problems and curing or alleviating the illnesses of people who already suffer them. The International Labour Organisation (ILO) recommends that OH services should establish a programme of activity tailored to the undertaking or undertakings they serve, taking into particular account the occupational hazards in the working environment as well as the problems specific to the branches of economic activity concerned. Taking due note of their recommendations, the ILO identified the following necessary requirements for OH services:
>
> - Surveillance of the working environment
> - Surveillance of the workers' health
> - Information, education, training and advice
> - First aid treatment and health programmes
> - Other functions (e.g. analysis of the results of the surveillance of the workers' health and of the working environment, and proposing measures to improve them).

[1] https://www.hse.gov.uk/research/rrpdf/rr410.pdf

69. The letter to HMRC went on to say that "nowhere in what is considered the seminal definition of OH, is medical care of the employees the focus". That observation is clearly incorrect when the full passage is considered, because the (omitted) first sentence states that OH interventions are "aimed at the prevention of health problems and curing or alleviating the illnesses of people who already suffer them". We accept the report's definition of OH with that first sentence included.

RPS AND HOW IT MARKETED ITS SERVICES

70. RPS was established in 1972. Its initial focus was on energy and environmental services. In 2005 it acquired BHC, which had been spun out of UK Coal, see §118. In March 2010 RPS acquired HIB, and in October 2017 the two companies merged to form RPS OH Ltd, a subsidiary of RPS Group Ltd. As at February 2018, the company had over 600 clients in the UK and Ireland.

71. The Tribunal was provided with a variety of evidence as to how RPS marketed its services. In the following paragraphs of this Decision, we first set out that evidence, and then make our findings of fact.

The evidence

72. The evidence about the marketing of the services is taken in part from the RPS website, in part from tender documents and in part from other material.

HIB's website

73. HIB's website said:

> "What is Occupational Health?
>
> Occupational Health actively promotes and maintains good health in the workplace, ensures legal compliance and supports employers and employees when health problems occur. Investing in the health of your employees will make that difference. Making Occupational Health a core function of your business recognises your corporate and social responsibilities. Demonstrating your commitment to the health of your staff will have a highly positive impact on your customers."

74. The website went on to list the benefits to the employer, as being improved staff motivation and performance, better staff attendance and retention, increased productivity, reduction in sickness absence levels, reduced risk and cost of litigation, and increased productivity.

75. Mr Latter agreed during in cross examination that HIB was "presenting itself primarily as promoting health in the workplace", although in re-examination he said that "the actual buying aspects are found in the benefits".

Tender documents

76. RPS's tender for the provision of services to PSA Group opens by saying:

> "Working in partnership with an effective and integrated OH provider will give PSA the tools to make a difference to the health and wellbeing of your workforce."

77. RPS used the same opening paragraph in its tenders for SportCo and TransportCo. Mr Latter accepted that RPS had positioned the health and wellbeing of the workforce "at the forefront" of its marketing.

78. RPS's tender for the PSA work also said, under the heading "brief company overview":

> "Employees are the most valuable assets of a company, so providing Occupational Health Services is an integral part of a company's commitments to its workforce."

Other material

79. RPS's booklet entitled "Occupational Health for the Construction Industry" opens with the following paragraph, which was highlighted in the original text:

> "Occupational Health actively promotes and maintains good health in the workplace to ensure legal compliance and support employers and employees when work impacts health or health impacts work."

80. Underneath, in normal print, the booklet says that RPS works with its clients to support "the management of occupational risk and absenteeism to promote and manage health in the workplace" and "to optimise productivity while enhancing employee morale and helping attract and retain high quality employees".

81. RPS also created a booklet for one of its clients, Saipem, which explained the OH services being provided. The first page contains the words "Saipem Occupational Health Service" and underneath is written "protecting and promoting the health of all at work".

Finding of fact

82. Mr Latter agreed with Ms Newstead Taylor that RPS had consistently marketed itself on the basis that the OH services it was providing would protect and promote the health and welfare of its clients' workforces, and we find this to be a fact.

WHAT THE CLIENT REQUIRED

83. We next considered what the clients required from RPS. Again, we first summarise the evidence and then make findings of fact.

The evidence

SportCo

84. In 2018, SportCo issued an Invitation to Tender ("ITT") for the "Supply of OH Support Services". Under the heading "Specification" it said:

> "Occupational ill health has the potential to impact on the team's short and long-term performance. Therefore, the provision of comprehensive, efficient and effective OH services to the team is a key element within our health and well-being strategy.
>
> We recognise that occupational ill health is preventable and that it is possible to compete at the highest level of sport without causing occupational ill health. Risks to health can be managed by modifying the process to eliminate the risk, controlling and minimising exposure, and taking precautions to prevent adverse effects…

> Occupational ill health refers to all health problems in the work environment. The term covers health problems workers bring to the workplace, as well as health issues caused or made worse by work. It covers serious and fatal diseases, physical effects on skin, breathing, hearing, mobility and functioning, and psychological effects on mental wellbeing.
>
> To be successful in the tender process evidence of effective planning and collaborative delivery must stand out. There must be a clear understanding of how the services provided support risk reduction or containment in both the long and short term."

Lewisham Council

85. In December 2014 Lewisham Council issued an ITT for its OH Service, with the possibility that other local authorities ("Contracting Authorities") might also require services from the successful provider under the same or similar terms. Under the heading "aims and future requirements" the ITT says:

> "The aim of the OH Service is to provided clear medical advice that effectively supports managers in the process of absence management. The Service will provide a range of OH oriented services and specific guidance to HR and managers regarding current and potential staff…
>
> The Service Provider will be required to work in partnership with each Contracting Authority to achieve the following:
>
> - Appropriate OH policies, procedures and systems in place that support the business objectives particularly to promote attendance management, health and wellbeing.
> - Identification of priorities and the development of health and well-being strategies to address organisational needs. The Provision of sound advice on occupational health and employee health promotion, eg specific education programmes or preventative health.
> - Advice, health checks, wellbeing campaigns etc.
> - Collation, analysis and dissemination of essential occupational health management information as required.
> - Raising the awareness to managers and staff on occupational health issues and objective systems to assess and monitor the effectiveness of actions taken.
> - Engagement and gaining commitment from all interested parties.
> - An occupational health services that meets the strategic aims of the Health and Safety Executive and the Contracting Authority."

86. Under the heading "General Requirements", the ITT said that the aims of the specification for OH Services was for the provider to work with the council(s):

> "in reducing employee sickness absence, address the causes of work-related ill health, promote general wellbeing an implement an occupational health management system that is electronically enabled….
>
> The OH…itself is not expected to provide medical treatment or counselling as part of a planned programme of therapy. In carrying out the following responsibilities, the Service Provider must not replace or substitute the

responsibilities of the employees own General Practitioner or other medical adviser…

The desired outcomes include:

- Employing people who are fit to undertake the duties of the roles being offered to them
- Reduction in employee sickness absence through providing managers with the requisite medical advice to promptly support sick staff back to work
- Maximisation of staff productivity and minimising the cost of staff absence by proactively supporting the health and well-being of our staff before they suffer ill health
- Provide a service that demonstrates good value for money…
- 100% compliance with statutory duties and maintenance of high quality auditable management systems.

The Service Provider will work with [the Council(s)] in order to ensure it meets statutory and corporate requirements and supports Contracting Authorities' ambitions of promoting a safe and healthy workplace and workforce. This requirement will include the promotion of health and well-being via the proactive health related employee bulletins on an agreed periodic basis.

The Service Provider will deliver a cost effective OHS…that provides expert advice and guidance to managers regarding medical and other occupational health issues that maximises value for money through the delivery of a timely effective modern and quality OHS."

TransportCo

87. TransportCo also issued its ITT in 2018, stating that:

"[TransportCo] considers priorities for the service are

- High quality at affordable cost
- A flexible model of service…
- Facilities premises and methods of service delivery which support a geographically distributed organisation...
- Pro-active early intervention using telephone case management in order to assist our colleagues and the business in effective planning for return to work or maintaining collegiate at work…
- Provision of clear and informative regular management information…
- Active liaison with and referral to our physiotherapy service where indicated
- Being proactively engaged with [TransportCo] to minimise risks to staff health and wellbeing. This includes assisting [TransportCo] to promote its health and wellbeing agenda…"

Siemens

88. Mr Brown was asked by Ms Brown during evidence in chief what Siemens required from its OH provider, and he replied:

> "There are a variety of factors, I would say, four or five principal factors. One is legislative compliance. The second is protection of health of employees. The third is protection, safety of employees and visitors – general public. The fourth is to manage performance and keep people in productive work. The fifth, probably the smallest element, is reduce risk of litigation from employees in terms of claims."

FoodCo

89. The Tribunal was provided with a contract dated 13 October 2015 for the supply of services from RPS to FoodCo, but we had no earlier documents such as an ITT or a tender. We decided we were unable to make findings under this heading on the basis of that limited evidence.

Mr Latter's and Ms White's evidence

90. Mr Latter's evidence was that the majority of RPS's clients are subject to strict H&S regulation, and that other employers only use an OH provider for "ad-hoc services as and when the need arises". He said that the "drivers" for engaging RPS were "clients' financial profits as functioning businesses and to fulfil their legal and regulatory obligations under health and safety legislation, HSE or other industry specific guidance".

91. Ms White said that "the purpose of providing OH services today is so that employers can keep their staff safe and to encourage employee productivity by monitoring, testing and assessing employees and reporting those results to the business employer".

Assessment of the evidence

92. It is clear from the above that although different clients stress different elements, they all want the employee's health to be protected and/or improved. This lies at the heart of SportCo's ITT: they want to eliminate, control and minimise employees' exposure to health risks, and focus on "health problems workers bring to the workplace, as well as health issues caused or made worse by work". Lewisham's ITT similarly states that the OH provider must promote the employee's "health and wellbeing". TransportCo wants to "minimise risks to staff health and wellbeing", albeit this is the final bullet point, while Siemens placed it second after "legislative compliance".

93. Of RPS's own witnesses, Mr Latter said that legislative compliance was one of two objectives, while Ms White said that the first objective was to keep employees safe. As the purpose of the H&S legislation and regulations is itself the protection of employees' health, see §62, we have taken compliance with H&S law to be part and parcel of the same employer purpose.

94. There are references in this evidence to the employers requiring management information, but for both SportCo and Lewisham these are clearly subordinate to the protection and improvement of employee health: SportCo mentions effective planning and collaborative delivery, but only in passing, and Lewisham puts "advice and guidance to managers" at the very end of its description of "outcomes". It is also bottom of the list given by Mr Brown. The

TransportCo ITT includes one bullet referring to requiring "clear and informative regular management information".

95. Although Mr Latter put business profitability as the first objective, that is not reflected in the priorities set out by the clients themselves.

Finding of fact

96. We find on the basis of the evidence set out above that the clients' main purpose in purchasing services from RPS is the protection of the health of the employees. The provision of management information and advice is of lesser importance, as is business profitability.

WHAT IS SAID TO THE EMPLOYEES

97. We next considered what the employer said to the employees about the OH provided by RPS. The only evidence under this heading is from Siemens. Having summarised that evidence, we make related findings of fact.

The evidence

Siemen's internal website

98. Under the heading "Occupational Health" Siemens internal website asks, "What is the purpose of an Occupational Health Service", and answers that question as follows:

> "An Occupational Health Service is implemented to monitor and protect the health, safety and welfare of the organisation's employees and ensure that they remain fit to work in their specified day jobs."

99. Mr Brown was taken to that passage in cross-examination, and accepted that protecting employees' health is "a core part of why we do this service". He added that Siemens also wanted to "maximise business productivity" but that this would not have been included that on the internal web page because:

> "It is not particularly compelling for an employee to talk about maximising business productivity, keeping them in work, minimising the cost of their ill health or meeting legal obligations, so that is why we would not have put that in that context."

Siemens' Occupational Health Policy

100. Siemens set out their policy on Environmental Protection, Health Management and Safety ("EHS") in a formal policy document, dated November 2015 ("the Policy"). The first page says "we provide a safe work environment and promote the health, safety and well-being of all of our employees".

101. The opening section of the main body is headed "Introduction". It begins by stating that that Siemens is "committed to…promoting the physical, mental and social wellbeing of employees and providing a safe working environment for employees and others". It then says:

> "Zero Harm aims to improve not only our safety processes and the physical environment we work in but also our attitude and behaviours towards safety. Building and supporting an effective safety culture is an important leadership responsibility."

102. The term "zero harm" is defined as "a programme based on the firm belief that all work-related injuries can be avoided". Mr Brown accepted that "zero harm" was "envisaged to be safety focused" but added that Siemens had subsequently "put more emphasis on the health and environmental aspects as well".

103. Under the heading "Policy Statement" Siemens confirmed that it would comply with all applicable legal obligations including the HSWA. Under "Objectives", the Policy states that Siemens have the following strategic objectives:

> - To prevent harm to our employees, third party temporary workers, contractors and other persons who may be affected by our activities, products and services.
> - To protect the health and wellbeing of our employees and to encourage them to adopt healthy lifestyles.
> - To reduce the likelihood as well as the operational and financial impact of any interruption to identify and implement means for the prevention of pollution, to minimise harmful effects on the environment and to reduce the use of energy and other resources in our processes and products.
> - To continually improve performance and where appropriate beyond legal requirements.

104. Under cross-examination, Mr Brown agreed that both the first two bullet points were "focused at protecting health and safety" and that "when you have a bullet point list you try to put the key points further up it". We agree with Ms Newstead Taylor that Mr Brown was thereby agreeing that the Policy was stating that the principal purpose of Siemens' OH services was to protect the health of its employees.

105. Mr Brown also accepted that the references to "operational and financial impact" in the third bullet point were "geared towards pollution incidents" but went on to say that it "should equally refer to the other two" and the policy might "need a tweak". Ms Newstead Taylor submitted that this was not a "particularly compelling argument" given that Siemens are required by statute to have a written statement of their general policy (see HSWA s 2(3)), and thus "if there are important matters they will appear in the policy", and as written it is "very clearly focused on the protection of health". We agree.

106. Mr Brown also said that the Policy was "read by everyone" and continued:

> "I certainly would not want to dismiss the importance of promoting and protecting health and safety as a genuine business requirement. It is not the only one and I think in certain communications we would change the emphasis to be a message that suits the audience. If you are talking to lawyers, you are going to emphasise legal compliance; if you are talking to employees, you are going to emphasise the benefits to themselves."

Finding of fact

107. We agree with Mr Brown that an employer may well change the focus of his statements depending on the audience. But we were provided with no Siemens documents which gave a different message, and Mr Brown himself accepted that the website and the Policy clearly stated that the focus of its OH policy was to protect the health of employees.

108. We find as a fact that clients told employees that the purpose of OH provision was the protection of their health; this is consistent with our earlier findings at §62, §68-9; §82 and §96.

CONFIDENTIALITY AND DUTY OF CARE

109. Mr Latter accepted in cross-examination that:

(1) the employee's consent is required before an employer can refer him to an OH practitioner, and by giving that consent the employee has confirmed he understands the reason for the referral;

(2) the OH practitioner needs the employee's permission to obtain information from a GP or other medical professional;

(3) a duty of care is owed by the OH practitioner to the employee;

(4) the employee can say who has copies of the reports produced by the OH practitioner;

(5) if consent is withdrawn, the OH practitioner cannot provide the reports to the employer; and

(6) OH medical information about an employee which is in the possession of the OH professionals is confidential.

110. Mr Latter also agreed that it was "a confidential process that is very much in the control of the employee". Mr Brown similarly accepted that "every step along the way, their consent is required, and if their consent is not given, the next step does not happen".

111. We therefore find that RPS's OH practitioners owed a duty of care to the clients' employees; had a confidential relationship with those employees, and employees could decide for themselves whether they consented to RPS giving information to their employer.

THE SERVICES OFFERED AND PROVIDED

112. We next make findings about the services provided by RPS to its clients, and offered to its potential clients. All the paragraphs in this part of our decision are findings of fact. This part of our Decision is lengthy because it forms the basis for later findings on (a) the type of services offered and/or provided by RPS, and (b) whether they were single supplies or a multiple supply.

113. In addition, it was part of RPS's case that the contracts with UK Coal were "unique" and should be disregarded; Mr Latter made a similar submission in the course of his oral evidence about the Saipem contract. To decide if they were correct, we needed to consider the other contracts in some detail.

114. We have begun with the simpler arrangements and moved on to those which were more complex, and have dealt separately with the clients about which we were provided with significant amount of information: UK Coal; SportCo; TransportCo; the PSA Group; Siemens; Saipem and FoodCo. We then make findings about RPS's use of third parties. Detailed findings about specific services are set out later in our Decision, see §§191ff.

Contracts for one or few services

115. Some clients and potential clients were provided with, or offered the provision of, either a single service or a small number of services:

(1) On 17 October 2012 RPS quoted for the provision of 180 tetanus vaccinations across three sites to a company called Land and Marine, including the completion of a related health questionnaire. This was priced at a fixed fee to cover up to 180 employees.

(2) RPS have a number of pension scheme clients to which they provide "medical reviews on a regular basis", including Scottish Public Agency Pension Scheme, ITV Pensions, Rio Tinto Pensions, British Coal Pensions and Siemens Benefits Schemes.

(3) A contract was agreed between BHC and Carillion dated 25 June 2010, together with a detailed price list running to over two pages; a variation to that agreement for the provision of drug and alcohol testing was agreed on 19 July 2016. The testing was split between "for cause" testing, pre-employment and random testing, and medication advice. Under both the contract and the variation, the services were supplied via a subcontractor, Express Medicals Limited, with which RPS had a separate contract**.** However, testing was later moved in-house, because in a 2019 tender (see §142) RPS said that the previous year they had undertaken "over 1000 tests for Carillion and Siemens...Analysis was undertaken at our inhouse laboratory…based in Ellesmere Port".

(4) On 25 October 2012 RPS quoted for the provision to PHS Waste Management of "initial baseline medicals" for up to 15 employees, plus a health surveillance medical on completion.

(5) RPS agreed a contract effective from 1 September 2012 with SCA Hygiene ("SCA"), for the provision of an OH Nurse on site for 2 days a week for 47 weeks a year, for a fixed annual fee. There were a separate charges for the following, if required by SCA:

   (a) additional days at the same rate;

   (b) an OH physician at an hourly rate;

   (c) a report prepared by an OH physician at a fixed cost;

   (d) GP/consultant reports and lab tests, charged at cost plus 15%; and

   (e) copy medical reports at a fixed cost.

Contracts for a wider range of services

116. The Tribunal was also provided with a number of other contractual or related documents, including those summarised below.

(1) A letter dated 2 February 2016 to Celanese Acetate Ltd from RPS setting out the services being provided and revised pricing. These were the provision of an OH Nurse for two days a month; various management referrals using RPS clinic facilities, various pre-placement assessments and telephone advice on a usage basis, with a higher price for advice from a physician than a nurse. Laboratory tests were charged at cost plus 15% and there was a separate cost for the provision of copy medical reports.

(2) A Schedule of Costs for services provided to Scottish Resources Group for the following:

(a) An annual retainer payable in quarterly instalments for ongoing telephone access to an OH physician as required.

(b) A fixed fee for the provision of a monthly clinic.

(c) Pre-employment assessments by questionnaire, each for a fixed price, and associated telephone queries charged at an hourly rate.

(d) Clinic consultations with an OH Physician in relation to sickness absence referrals, and the related report, for a fixed price.

(e) Executive medicals for senior staff.

(f) Mobile health surveillance on site with separate charges for medicals and for cholesterol tests.

(g) Tests to comply with the Vibration Regs, commonly referred to as hand arm vibration syndrome or HAVS tests. There are five levels or "tiers" of tests, with Tiers 4 and 5 assessments being for the most serious cases. RPS offered to provide tests for the first four Tiers, each at a different price.

(3) A letter to Crown Speciality Packaging ("Crown") dated 2 August 2012, **renewing** an earlier contract, setting out the services and the pricing. The services were delivered by a specific, named OH Adviser, who was located on the client's site, to provide annual health surveillance and sickness management. Crown paid an annual fee on the basis of a daily rate for 24 days a year. The following additional services were offered:

(a) Executive medicals, each at a fixed price.

(b) Manual handling training provided on-site, over seven sessions, for a fixed price for the seven sessions.

(c) OH Physician services on an ad hoc basis, with a fixed price for a 60 minute appointment.

(d) Physiotherapy services using RPS clinics, with different prices for initial and follow-up appointments.

(e) Third party costs (including GP/consultant reports and lab tests) were charged at cost plus 15% and there was a separate charge for the provision of copy medical reports.

UK Coal

117. UK Coal originally had its own in-house OH services, which were provided onsite from a permanent health centre at Mansfield Woodhouse, and from mobile clinics at various collieries and surface mining sites.

118. That part of UK Coal was spun out as BHC, which was purchased by RPS in 2005. The contract between BHC and UK Coal entered into from 1 January 2005 covered up to 8 mining sites and 20 surface mining sites for up to 6,500 UK Coal employees. In exchange for an annual fixed fee the contract stated that BHC would:

(1) provide the OH centre at the Mansfield Woodhouse site, and equip it as necessary to carry out the examinations and surveillance set out below. Separate schedules to the contract gave a list of specific requirements, including the provision of chest X-ray facilities, and equipment for testing auditory and pulmonary function, and for carrying out electro-cardiograms ("ECGs");

(2) provide other locations with:

(a) mobile x-ray units; and

(b) mobile units for health surveillance; and

(3) employ the following staff, "primarily for the purposes of this contract";

(a) at least three full-time OH physicians;

(b) at least 12 full time OH nurses;

(c) a radiographer, a toxicologist, a medical technician, all to be available as and when required; and

(d) administrative support staff.

119. The services to be supplied for the onsite and mobile clinics included:

(1) Medical surveillance of workers in accordance with the various H&S legislation and regulations, including the Control of Lead at Work regulations and the Fire and Rescue Regulations.

(2) Pre-employment medicals; annual medicals for senior staff, and four-yearly medicals and X-ray checks for all staff.

(3) Screening for hearing, lung function, alcohol and drug abuse and VDU usage.

(4) Management referrals, including return to work after illness and ill-health retirement.

(5) Provision of a database on hazardous substances.

(6) Maintenance of medical records for employees.

(7) Advice on first aid training and on ionising radiation.

(8) Provision of emergency medical services for serious injury, illness and following disasters.

(9) Management of the supply of controlled drugs and related training.

(10) Assessments for manual handling.

(11) Ergonomic assessment of workplaces in the context of the usage of VDU screens.

(12) Advice to management on the H&S Regs and the medical aspects of litigation.

120. That contract was extended to cover calendar year 2011 for a different annual fee. A new contract was subsequently agreed on 29 November 2012 which took effect from 1 January 2013**.** It specified a fixed annual fee for mobile X-ray provision and a further fixed annual fee for specified services at specified sites**,** with other services (including those carried out by subcontractors and third parties) to be charged at cost plus 10%. Services to be supplied under this contract were the same as in the earlier contract, with the following exceptions:

(1) the requirement to provide a toxicology database and a toxicologist had been removed;

(2) the requirement to provide emergency medical services was expressed as the provision of emergency cover for 20 days a year, plus emergency phone support at all times; and

(3) the number of physicians had been reduced to one, and the number of nurses to two.

121. On 17 December 2014, RPS agreed a new contract with UK Coal for the period to 31 March 2016, under which one OH nurse was provided for three half day sessions a week, and a physician was to visit once a month. The new fixed cost included most of the previous specified services, but excluded the following, which were to be charged on a usage basis:

(1) Management referrals.

(2) Ill health retirement cases.

(3) HAVS assessment at Tiers 3 and 4.

(4) Physiotherapy and counselling, both provided via third parties.

122. In addition to the previous specified services, the fixed cost also included:

(1) Ongoing telephone access to the lead Occupational Physician and Nurse as required.

(2) Supply and distribution of morphine.

(3) Medicals for part time rescue brigade.

(4) Provision of medical information to the Mine Manger and regular information on the management of the OH services.

(5) Assistance with back to work scheme.

(6) Agreeing a programme of proactive health awareness campaigns.

(7) Archiving and acting as custodian medical records.

123. The supply of X-ray screening was no longer a separate fixed cost but was instead charged on an incurred basis.

Atypical contract?

124. Ms Brown described the UK Coal contracts as "very unusual", because RPS was not providing OH services "in the sense that we are all looking at them". Mr Latter said the UK Coal contracts were "unique" because they included certain services which were not provided to other clients. He referred to:

> "working as members of rescue teams, providing advice on training of first aid personnel, and providing training to UK Coal employees in dispensing certain controlled medicines…provid[ing] emergency medical services for serious illness and injury in emergencies and disasters."

125. However, we see no reason not to place weight on the evidence provided by the UK Coal contracts, because:

(1) Most of the tasks undertaken by the on-site staff were exactly the same as those being provided to other clients, as is clear from our other findings of fact in this part of our Decision.

(2) RPS's tender for the SportCo contract included offering an emergency response service, including resuscitation, defibrillation and anaphylaxis, see §133. Mr Latter said in his oral evidence that in fact this was not included in the final contract, but as Ms Newstead Taylor pointed out it was nevertheless put forward by RPS as part of its service offering.

(3) When RPS advertised for an OH technician, the job description said that the successful applicant "may be responsible for providing immediate treatment of injuries and illness"; the scope of the advertised role was described as including first aid. As noted earlier in this Decision, Mr Latter was taken to this advertisement in cross-examination, and said it was for a specific post at UK Coal, and that "the rest of the technicians do not need to do that type of work"; that evidence was challenged by Ms Newstead Taylor on the basis that the Bundle Index referred to the advertisement as "generic RPS documentation applicable to HIB and BRC". We reject Mr Latter's evidence on this point. Not only was there no reference in the advertisement to it being for a specific post, but on 21 October 2010, RPS provided it to HMRC in response to a request for details about the type of work carried out by OH technicians in order to answer the question "what precisely do the technicians do". We find that this advertisement was not specific to UK Coal, but a generic document.

126. The only feature of this contract which we did not identify in any other documents was the provision of training to UK Coal employees in dispensing certain controlled drugs. That is a minor difference and not a reason for us to ignore the UK Coal contracts or treat them as in a class of their own. They were not.

SportCo

127. As noted at §128 above, SportCo issued an ITT in 2018. RPS provided a tender document in response, was invited to give a presentation, won the assignment, and agreed a contract for services. We summarise the key points of each below. In addition, we were provided with one invoice for services.

The SportCo ITT

128. SportCo issued an ITT for the following.

(1) The development and maintenance of an "occupational risk profile matrix" to provide a clear understanding of each department's OH risk profile; how to contain, control and reduce the identified risks and how to monitor for early warning signs and identify the appropriate management process, together with a clear understanding of the legal requirements for health screening.

(2) The provision of onsite services in relation to:

(a) Display screen assessments.

(b) Health surveillance in relation to vibration, noise, hazardous substances, manual handling and repetitive activities, paint and lead.

(c) Travel vaccinations, to be provided at one of at least three clinics on site; in addition, an annual overall risk assessment is required to cover the year's programme of events.

(d) Employee assessments.

(e) Drug/alcohol screening on request.

(f) Assessments of the working environment of pregnant workers.

(g) Flu vaccinations.

(h) Night shift health assessments.

(i) Emergency response (i.e. radiation exposure).

(j) Safety steering committee presentations.

129. The ITT continued by saying that "the majority of services will need to be delivered on site" either by using available space or by providing mobile units.

130. In addition, SportCo required the provision of pre-employment health screening and "fitness for task" checks for both new and existing employees, and the provision of information, advice, guidance and support to the relevant members of SportCo's own staff.

RPS's tender document

131. RPS's tender document says, at the third paragraph "RPS tailors provision to suit the client's needs" The next page says:

> "RPS will design a bespoke Occupational Health services based on your requirements. We appreciate that no two organisations are the same and that flexibility is required when providing Occupational Health provision."

132. RPS confirmed it would provide the services listed at §128(2) on SportCo's sites, but said that it could also offer remote services supported by its London office, adding "our approach is flexible".

133. In response to the requirement for emergency response cover, RPS said that it would be provided on SportCo's site using a pool of OH physicians operating a rota cover to ensure that the necessary support was provided, and continued:

> "A similar emergency response service is provided to other key RPS contracts. An example is UK Coal, where underground problems resulted in immediate advice being given followed by out of hours visits by the Medical Director."

The presentation

134. RPS's presentation to SportCo focused on detailed delivery of particular services, including the provision of a "tailored travel health service with a choice of delivery" either on site or at a MASTA travel health clinic. It said that given SportCo's current travel programme, provision would include a list of six required vaccinations, with the possibility of rabies in addition. The range of post-travel screening was set out, including responding to life-threatening and other serious infectious diseases.

The contract

135. The contract's start date was 1 November 2018. Schedule 3 sets out the pricing of the services being supplied, including the following:

(1) An onsite mobile unit at a daily rate. plus an onsite OH Adviser ("OHA") at a daily rate.

(2) Night shift support (where the OHA is present outside a standard 8 hour day) charged at higher rates.

(3) Services provided other than onsite:

  (a) Advice from an OHA.

  (b) Drug and alcohol testing.

  (c) On-call service, depending on the notice given.

  (d) Face to face appointment with an OH physician.

  (e) Skype consultations.

(4) Vaccinations at cost plus 10%.

Invoice

136. The invoice was for December 2018, and charged SportCo for 12 specific days when an OHA was onsite, at the agreed daily rate, plus specific costs for one each of the following

(1) vaccination consultation;

(2) isocyanate testing;

(3) referral to an OH clinic; and

(4) the cost of a refrigerator.

TransportCo

137. We were provided with (a) an undated ITT, but we find from the Bundle Index that it was issued in February 2019; (b) RPS's tender document and related presentation; (c) the contract; and (d) one invoice.

The ITT

138. The ITT said that TransportCo required the following services:

(1) Statutory and periodic medicals.

(2) Pre-placement medicals.

(3) Drug and alcohol screening both pre-placement, on promotion to a safety critical role, and "for cause".

(4) Sickness absence management.

(5) Health surveillance.

(6) Medication checker service for safety critical staff.

(7) Engagement with TransportCo's third party suppliers for effective referrals to physio and employee assistance services.

(8) Advice on policy/legislative changes.

(9) Support for wellbeing initiatives.

139. The ITT continues by saying that the services must not only comply with the relevant H&S law, but also with the published industry requirements which apply to particular types of transport operatives, and are to be delivered flexibly "from several provider sites" close to the locations where TransportCo operates: clinics are to be "no more than 15 minutes" from those locations. Although TransportCo has space for clinics at a small number of locations, the applicant must additionally provide "appropriate premises/facilities/mobile units".

RPS's tender document and presentation

140. RPS's tender document says that "RPS tailors provision to suit the client's needs"; will provide "a flexible model of service" and has "the flexibility to adapt services following initial set up in accordance with findings of usage". RPS confirmed it would provide the services listed at §138.

141. In relation to the location requirements, RPS said that it "uses mobile units" and has clinics at two specific sites, as well as providing services remotely from its London office. In relation to other locations, it could use third party premises as a temporary solution, but its preference would be to open further clinics of its own and carry out the work in-house.

142. Under the heading "drug and alcohol screening", the text includes the following:

> "Last year we undertook over 1000 tests for Carillion and Siemens to Network Rail Standards. Analysis was undertaken at our inhouse laboratory, We undertook a similar number of tests to Eurotunnel Standards. Again, analysis was undertaken at our inhouse laboratory based in Ellesmere Port. The London Clinic also undertook a number of assessments to London Underground standards."

143. Under the heading "medication checker for safety critical staff", RPS stated that for eight years it has partnered with "Chemists on call" to provide an online checking system for all medications being taken by staff, and that the service is operated by a team of internal specialist pharmacists supported by nurse/medical administrators and referring OH physicians.

144. The presentation reiterated the same points, adding some further detail.

Contract

145. The contract for services was signed on 27 June 2018. It largely repeated what was in the ITT. Schedule 4 set out the agreed prices. This extends to over three pages, setting out various costs including those of:

(1) RPS's advice line, charged on an annual basis;

(2) the mobile unit, which has a minimum daily cost;

(3) responding to medication enquiries, charged on an hourly basis;

(4) numerous different assessments, medicals and examinations, each pried separately;

(5) the following services provided by an OHA and the same services provided by a physician, with the latter at higher prices:

(a) consultations;

(b) case conferences;

(c) management referrals;

(6) pension fund applications;

(7) ECG, lung function and blood pressure testing, priced per test; and

(8) attendance at health events on site, per day.

Invoice

146. We were provided with a single invoice from RPS to TransportCo for February 2019. This extends to over four pages of very small print, setting out each of the services provided and the individual cost of each service. These include a range of assessments, medicals, screening, tests, referrals and medication advice.

PSA Group

147. The covering letter to RPS's tender document to work with the PSA Group was dated 27 June 2016, and says that the proposal has "been prepared to meet your specific requirements". The first page repeats the statement seen in other tenders that "RPS tailors provision to suit the client's needs". The next page says that "the service is often bespoke to meet complex challenges in unique work settings or to meet disparate geographical needs", and that:

> "The hazards and risk profiles for each company will be quite different. Working in genuine partnership with organisations of all sizes, we aim to deliver a flexible range of proactive forward thinking and cost effective services…"

148. RPS confirmed that it can "meet each of the requirements detailed in PSA's specification document" (with which the Tribunal was not provided). To demonstrate this was the case, RPS provided examples of services it was currently providing to other clients, and continued "we would like to highlight at this point that each of our clients has a service that is tailored to meet the needs of their business and it would be our intention to offer this flexibility to PSA".

149. Examples of the services provided to other clients included medical reviews to pension schemes; health and well-being assessments; individual health checks; flu vaccinations; HAVS testing; a solution-focused counselling service; a physiotherapy advice line; return to work assessments; health assessments for working at height and in confined spaces; and assessments relating to working with power tools, display screens, lead, asbestos and electricity.

150. RPS stated that "our operating model is to bring service delivery to PSA employees rather than employees having to travel to RPS clinics…we propose that access to Occupational Health is available five days a week through your dedicated OHA attending the Tile Hill and Pinley House sites in Coventry five days a week. We would also provide an Occupational Health Technician 52 days per annum to deliver PSA's Health Surveillance programme. Under the heading "ill-health retirement assessment", the proposal also states that "RPS is able to provide an Occupational Physician to act as Medical Adviser to PSA".

151. The services were priced as follows:

(1) Provision of an OH Assistant for five days a week, 47 days a year, for a fixed price, with additional days at a daily rate; the price "includes fill administrative and account management support".

(2) Provision of a OH technician for 52 days a year, for health surveillance, for a fixed price and with additional days at a daily rate. The price included organising a recall programme, and management information.

(3) In relation to sickness absence support, telephone referrals to an OH Assistant, and to an OH physician, both charged on a usage basis, and face to face OH physician consultations, again charged on a per consultation basis.

(4) Physiotherapy assessments charged on a unit basis.

(5) Flu vaccinations, priced per unit.

Lewisham Council

152. As noted earlier in this Decision, the Tribunal was provided with Lewisham's ITT. We infer from Mr Latter's evidence that RPS submitted a tender for this work, but we had no evidence as to whether or not RPS won the contract, and if so, on what terms.

153. We have therefore made no further detailed findings as to the services offered or provided, other than to note that Lewisham required that the successful firm provided the OH from suitably equipped premises at a location convenient for the staff, which it was to pay for and maintain.

Siemens

154. In relation to Siemens, the Tribunal was provided with a "Framework Services Agreement" ("the Framework") and an Amendment Agreement ("the Amendment"). The Framework was undated, but the Amendment refers to it as having an effective date of 13 October 2013, and we have taken that to be the case. The Amendment had an effective date of 13 October 2014. In addition, we were provided with an extension agreement ("the Extension") with an effective date of 1 October 2016.

The Framework

155. By the Framework, RPS was engaged to supply "the Services". Clause 2 was headed "Call-Off of Services" and began:

> "2.1 Siemens shall be entitled to call-off the provision of Available Services from [RPS] from time to time by giving a notice in writing identifying the Available Services required. Each such notice shall be a confirmed PO [Purchase Order] effective on being signed and dated by an authorised signatory of Siemens and provided to [RPS]. [RPS] shall do no work unless provided with a Confirmed PO therefor.
>
> 2.2 The effect of a Confirmed PO coming into existence shall be that it is incorporated into this Agreement and the services and charges specified in it become Services and Charges…"

156. “Available Services” were defined as “the services, including any Deliverables, described in Part A of Schedule 1”. RPS was therefore engaged as a supplier of all the services listed at Part A of Schedule 1, but particular services from that list were only to be provided after Siemens had issued RPS with a confirmed purchase order.

157. There were no changes to that basic approach in either the Amendment or the Extension. The Bundle contained no examples of confirmed purchase orders. Although we were provided with invoices, these are uninformative: they refer to an attached “load file” which has not been supplied.

158. Schedule A sets out the Services, divided into five “Service Packages”. The first is entitled “Health Surveillance, Statutory Medicals & Health Assessments”. That in turn is divided into “Core Service Scope” and “Additional Service Scope”. Under the first heading are the following:

(1) Health surveillance (on-site), which included lead in blood testing, other biological monitoring (eg chromium), lung function testing, audiometry, HAVS testing, skin surveillance, eye testing and fork-lift truck/HGV driver assessments.

(2) Statutory/Other medicals (on site/at service provider facility depending on appropriateness), which included the following: radiation, personal track safety, asbestos, rail specific and other safety critical medicals (working at height/confined spaces).

(3) Health Assessment Questionnaire for night workers.

(4) Ergonomic Health Assessments as required in special circumstances when the expertise of Siemens internal EHS team is deemed insufficient, to be provided either on-site or at an RPS facility, depending on appropriateness.

(5) Non-travel related vaccines (eg Tetanus, Hepatitis B and antibody testing) and drug and alcohol tests undertaken as part of a medical.

159. All of the above could be provided on-site by RPS staff. Some of the services were to be carried out by an RPS OH physician, some by an OH adviser, and some by an OH technician. There were different day and half-day rates for the physician, adviser and technician. For example, only an OH physician could carry out a HAVS Tier 4 test, or an initial lead in blood test, but an OH adviser could carry out HAVS Tiers 1-3 and an annual review for lead in blood. An OH technician could carry out a HAVS Tier 1 test.

160. In addition, there was an individualised charge for any “drug and alcohol, diagnostic and blood, and urine tests”. For instance, the time spent by the OH physician on-site carrying out a blood lead test was included in the day/half day rate, and there was then a further £11 charge for the blood test. If any of the specified services were provided off-site, they were each individually priced. For example, a lung function test cost £25, and a lead in blood test cost £75, plus a further £11 for the blood test.

161. In addition to those specified services, RPS was required to:

(1) provide an online surveillance/medical/health assessment database to remind employees when a new surveillance/medical/health assessment was due, following previous utilisation of the service;

(2) consult with the nominated OH contact within Siemens as to whether recommended adjustments are reasonable before submitting a final report; and

(3) provide Siemens with management information including service utilisation by sector/division including the cost and dates of appointments and the percentage of appointments that picks up a health condition that requires reasonable adjustments.

162. The second Service Package was headed "sickness absence management and other health services". As the name indicates, the related services were sickness absence consultations and "management referral" consultations, in each case between the OH professional and the employee. These were priced on a per consultation basis, with the cost of an initial consultation provided by an OH physician costing over three times more than one provided by an OH adviser. There were further specified fees for follow-up consultations, again depending on whether they were provided by a physician or an adviser. RPS was required to provide Siemens with similar management information as in respect of the first Service Package.

163. The third Service Package was pre-placement health assessments, divided into pre-placement heath questionnaires and pre-placement medicals, and related management information about usage as above. Each pre-placement questionnaire reviewed by an OH professional was individually charged at a fixed price; there were also a fixed charge for a "standard" pre-placement medical, with specific medicals charged at the rates set out in relation to the first service packages.

164. The fourth Service Package was drug and alcohol testing, split as follows:

(1) On-site random testing, with a fixed OH practitioner attendance cost, plus a per-employee cost.

(2) "for cause" testing, with a fixed call-out charge plus a per employee cost, both of which were around three times higher than the on-site random testing. RPS was required to provide 24/7 cover for "for cause" testing, with a 24 hour turn around for results.

(3) Training courses for managers about (a) drug and alcohol awareness and (b) internal delivery of drug and alcohol testing; delivered either as separate half day courses or as a single one day course; priced on a full day/half day basis.

(4) The supply of drug and alcohol testing equipment of various types, each separately priced.

(5) A 24 hour helpline for rail employees to check if they are safe to work when on a specific medication, this was priced on a per call basis.

165. The fifth Service Packages was traveller health checks, divided as follows:

(1) Full medical and/or consultation delivered by either an OH physician or an OH adviser, priced on a usage basis, with the former costing around twice the latter, and the costs of any vaccines being separately priced and additional.

(2) Travel vaccinations, charged as the cost of an OH adviser attending on site for a day or half day or the pro-rata cost of the time if delivered offsite, plus the cost of the vaccines in both cases.

(3) Diagnostic testing for particular diseases as required by the authorities in the countries being visited, again charged as the cost of an OH adviser attending on site for a day or half day, or the pro-rata cost if off-site, plus the laboratory cost.

166. A separate schedule to the contract set out the charges. Reviewing a pre-placement questionnaire cost £20, which was at the low end of the pricing spectrum; most medicals and assessments cost £75 or more. There were additional charges for IT administration support provided by RPS on a per hour basis**.** If RPS supplied services other than those set out in the Framework, a price was to be fixed in relation to the average prices charged to RPS's other customers.

The Amendment

167. The Amendment required that RPS provide a named PH physician, Mr Kapoor, for "additional services" at a fixed day rate; Siemens agreed that they would pay for a minimum of 63 days per annum in 2015, and a minimum of 50 days in 2016. Examples of these "additional services" included:

(1) performing medicals/surveillance/referrals at local Siemens sites;

(2) developing a stress mitigation strategy;

(3) liaising with Siemens staff to ensure that the company was compliant with "local market medical practice/legislation"; and

(4) carrying out a "medical analysis" of health and sickness data and making recommendations.

168. The Amendment added some further services to those in the Framework, of which the following were to be provided on-site:

(1) Workplace assessments, charged at a daily rate on the basis that up to four assessments would be carried out by an OH Adviser during that time.

(2) Wellbeing seminars charged at a daily rate.

(3) A senior chartered physiotherapist to visit the site; carry out job task analysis of different roles, and produce a bespoke exercise programme, charged at a daily rate, and a slightly lower rate for follow-up visits to train core staff members in the exercises.

(4) "Face-fit" testing, to be delivered and priced on a bespoke basis.

169. The following were to be provided at other locations:

(1) Advanced colour vision test priced on a per test basis.

(2) Physiotherapy session, priced on a session basis.

(3) Home visit to employee, priced on a fixed basis.

170. Other services included by the Amendment included:

(1) A supplementary charge for fast-track referrals.

(2) Narcotics detection dog and handler, charged for a four hour session.

(3) Drug and alcohol booklets, charged per 100 copies.

(4) Bespoke drug and alcohol policy, charged on a fixed price basis.

The Extension

171. The Extension set out a summary list of the services provided under the Framework and the Amendment. This is followed by a list of "core requirements" which RPS were required to provided, including:

(1) conducting all health surveillance and fitness medicals "to legally required or industry standard";

(2) travel medicals;

(3) diagnostic tests e.g. HIV and polio as required for Siemens employees to enter specific countries;

(4) OH referrals;

(5) pre-placement health questionnaires;

(6) drug and alcohol testing; and

(7) medication advice line to be available to all Siemens employees at all times.

172. Management information was to be provided quarterly; this covered service utilisation, performance against KPIs, reasons for referrals and outcomes. The Extension also restructured the Service Packages so that they were divided as follows:

(1) On site attendance by an OH physician, adviser or technician, with charges for each being on a day basis, half day basis and hourly basis.

(2) Wind-turbine medicals, at a clinic or remote location, including HAVS testing, with different prices for initial and review medicals, and separate charges for a chester step test (to test fitness).

(3) Three packages relating to medicals:

(a) rail medicals and London Underground medicals, off-site, separately charged;

(b) Eurotunnel medicals, off-site, separate charges for "safety critical" and "non-safety critical medicals, and for new starters, annual review and three yearly review; and

(c) other medicals, off-site, of numerous different types, all separately priced.

(4) Health surveillance, off-site, including HAVS; eye and colour testing; lung function, skin and audiometry surveillance and night worker questionnaire, all separately priced.

(5) Hep B questionnaire, vaccination and testing, all separately priced; development of stretching programme for a fixed price and a separate price for implementation and training; physiotherapy priced per session; workplace and ergonomic assessments both individually priced.

(6) OH referrals differentially priced depending on whether initial or additional; whether carried out by OH physician or adviser, with an additional charge for an emergency referral, and a fixed cost for a home visit by an OH physician.

(7) Five packages relating to drug and alcohol testing with numerous different elements, all separately priced.

173. All vaccinations and diagnostic tests not listed in the above packages were to be charged at cost plus 10%.

Saipem

174. The Tribunal was provided with a booklet produced by RPS for Saipem's employees, explaining the services provided, plus two invoice-related documents.

The Booklet

175. The Booklet opens by saying that RPS provides the following services.

(1) Specialist medical services, being HSE approved medical examiners for radiation, asbestos and lead; travel medicine and managed health surveillance programmes including a recall system.

(2) Staff productivity and staff retention enhancement service made up of staff wellbeing programmes and prevention; stress management advice: executive health screening, DSE, workstation and ergonomic assessments and proactive sickness management.

(3) Medical assessment services, namely offshore gas medical assessments; pre-placement assessments; 24/7 drug and alcohol testing service; health surveillance for HAVS, respiratory, hearing, skin, biological monitoring following exposure to toxins; and asbestos, radiation and lead medicals.

(4) Advice services, being medical advisory re offshore oil and gas; OH policy advice, OH audits, health surveillance programmes, OH training and SAM advice.

(5) Occupational hygiene, being managements system advice and development for legionella, asbestos and lead, and testing for the same; and offshore health risk assessments.

(6) Executive medicals.

(7) World-wide travel health service including an "extensive range of vaccinations" and comprehensive advice.

176. The Booklet also includes "instructions for the examining physician" when carrying out the "medical fitness and examination procedure". He is required to complete the medical report form, which includes the following requirements:

(1) record the employee's responses to all queries, and report his observations thereon;

(2) explain to the employee "the importance and the implication of correct and accurate declaration of current and past medical history";

(3) summarise the employee's medical history and state his observations thereon;

(4) carry out a chest X-ray every two years;

(5) carry out drug/alcohol testing on new employees and then periodically for those working offshore, and onshore employees in "safety sensitive positions";

(6) test for TB and hepatitis;

(7) carry out the additional tests required of catering personnel;

(8) vaccinate for hepatitis, tetanus and typhoid, and check whether other vaccinations were required by the work location of the employee; and

(9) write his comments and recommendations and confirm or otherwise whether the employee is fit.

177. Having carried out those procedures, the OH physician was required to complete the "medical fitness form" and return it to the employer. Where cases needed a "longer time to complete the diagnostic procedures or treatment before final judgment of fitness is given", the report was to be delayed and the employee's file was marked "pending"; he was not to be deployed until after the report was received.

A unique contract?

178. During cross-examination, Mr Latter said:

(1) this was a "unique contract"; RPS did not provide this type of diagnosis and examination for other clients;

(2) it was "part of a strategy to get into the oil and gas markets" but RPS does not "deal in these contracts any more"; and

(3) as Saipem was based in Aberdeen, RPS outsourced all the services to other providers.

179. Firstly, we do not accept that all the services were outsourced. On the contrary, the Booklet includes maps showing the location of (a) RPS's staff, many of whom are based in London, and (b) RPS's own clinics in Aberdeen, London and other locations.

180. We also do not accept that this was a unique contract. The diagnostic tests and vaccinations listed above were also offered by RPS to other clients. Moreover, when asked by HMRC on 30 August 2016 for sample documentation to explain how the BHC business worked, RPS provided the presentation they had given to Saipem, and when asked by HMRC to provide further documentation following the first day's hearing in this appeal, Mr Latter attached the Saipem booklet to his second witness statement as an exhibit; he signed that statement on 29 March 2019, just over two months before he gave oral evidence in this appeal, and his witness statement does not say that there was anything unusual about the Saipem contract. We find as a fact that the Saipem guidance was representative of the instructions given by RPS to its OH physicians, whether they were directly employed or providing services on an outsourced basis.

Pricing

181. At the back of the Booklet is a detailed four page price list setting out the cost of each of the individual elements provided by RPS. Before any service was ordered, the Saipem employee was told to ensure that he has identified the correct cost centre and reference number.

182. We were provided with a two further documents:

(1) a "sample" invoice for (a) a medical with a chest X-ray and (b) a stress test, both separately priced; and

(2) a summary document which listed 36 invoices, all dated 29 January 2016, and giving the total of each invoice but not the related services. One of those invoices is the "sample" invoice.

183. On the basis of that invoice evidence, together with the information in the Booklet, we find that RPS was supplying Saipem on a bespoke basis, so in response to particular orders for specific services.

FoodCo

184. As noted earlier in this Decision, the Tribunal was provided with a copy of the contract between RPS and FoodCo. It stated that the services are to be provided on site at premises provided by FoodCo on the following basis:

(1) FoodCo's main location being staffed on an "as required" basis by RPS employees,

(2) a secondary site being staffed for a minimum of 3 days a week, to deliver 1.75 days of health surveillance and 1.25 days of management referrals; and

(3) a third location to be serviced from a mobile unit 12 times a year, seven of which were to be during unsocial hours and the rest during normal office hours.

185. The contract provided for a day rate to be charged for on-site management referral; a different day rate for on-site health surveillance and three separate day rates for the mobile unit depending on the time of day.

186. Unhelpfully, parts of the contract were redacted to remove much of the pricing information, but from what remains it is clear that services provided offsite were costed on a usage basis, including (a) HAVS Tier 4 testing and radiation medicals and (b) certain consultations with an OH physician, including for early retirement.

187. Most of the services were carried out on-site or in the mobile unit, and were included in the day rate, unless they came within the exceptions set out in the previous paragraph. The services are set out in detail in the contract, and included:

(1) Under the heading health surveillance and recall:

(a) completion of pre-employment questionnaires and recommendations as to appropriate tests based on occupational hazards;

(b) a range of tests including HAVS, vision, audiometry, blood pressure, lung function (spirometry), ionising radiation and musculo-skeletal assessments;

(c) night worker and fork-lift truck medicals;

(d) notification of any workplace diseases;

(2) conducting the new starter health assessments and managing all relevant paperwork;

(3) conducting face to face assessments following a management referral, and carrying out workplace assessments;

(4) making physiotherapy and counselling referrals;

(5) providing information to management about the number of management referrals, health surveillance appointments, and various other statistical reports.

The use of third parties

188. It is clear from the findings above that RPS sometimes subcontracted work to other providers, see "Chemists on call" at §143 and Express Medicals at §115. However, the clients'

only contract was with RPS and it was RPS who billed the clients for the services. We find that although the services were delivered by a third party, they were supplied by RPS.

189. Moreover, the use of third parties was exceptional. Mr Latter's second witness statement said that employers " are keen to ensure that as much of the service as possible is provided by RPS in-house". That is consistent with the TransportCo proposal, in which RPS said that its preference was to set up its own clinics rather than using third party premises, and with the PSA proposal, which states that "in the majority of cases" the services are delivered by their own staff, but that "in certain areas" RPS may subcontract the provision. The proposal continues (emphasis added):

> "third party OPs [Occupational Physicians] are vetted via our medical director through interview, analysis of service and test cases…reports for all cases referred to third party practitioners are sent back to an RPS OP for overview and approval. The subcontractors would be reviewed as part of our internal audit mechanism as they work for RPS."

Findings as representative of the client base

190. We made the above findings on the evidence put forward by the Appellants as representative of their client base, plus the evidence provided by the UK Coal and Saipem contracts, which we found to be essentially similar to the others.

FINDINGS OF FACT ABOUT SPECIFIC SERVICES

191. In this part of our Decision we make findings of fact about specific services supplied by RPS. We have cross-referred to our earlier findings about particular clients, but as those are representative of its client base, the findings in this part relate to RPS's services generally. They are therefore findings as to what the typical consumer was purchasing from RPS.

DIAGNOSIS, VACCINATIONS AND TRAVEL SERVICES

Diagnosis

192. RPS provides the following services to some of its clients. All require a diagnosis to be carried out by RPS employees or subcontractors:

(1) Diagnostic tests for illegal drugs and alcohol, both "for cause" and on a random basis (Carillion, UK Coal and Siemens).

(2) Tiers 4 and 5 HAVS testing, to assess damage to nerves and blood vessels for employees who work with vibrating machinery (Scottish Resources, Siemens, FoodCo).

(3) X-rays to check for pulmonary diseases (UK Coal, Saipem).

(4) Diagnostic tests for various medical conditions, including TB, HIV, hepatitis and Polio (UK Coal, Siemens, Saipem).

Vaccinations

193. RPS also provides vaccinations for some clients (Land and Marine, SportCo; PSA, Siemens, Saipem);. Mr Brown accepted, and we agree, that "vaccination is a preventative measure – [it] prevents somebody from catching whatever the disease is that you are vaccinating against". Ms Snagg's unchallenged evidence, adopted by Ms White, was that RPS offered vaccinations against influenza, diphtheria, tetanus and Polio (DTP), typhoid, hepatis A and B, yellow fever and rabies, and it is clear from the Saipem guidance that RPS also offered other vaccinations, together with a "pre or post physician review".

Travel advice

194. In addition to vaccinations required for overseas travel, RPS provided a broader travel advice service (SportCo, PSA, Siemens, Saipem). The Saipem guidance stated that the purpose of providing employees with travel health advice, including immunisations and the dispensing of malaria medication is "to protect individuals from the risks of disease when travelling abroad". That evidence is consistent with the priority given to this service by SportCo, see §128(2) and §134, and we accept it.

TREATMENT

First aid and emergencies

195. The Tribunal was only provided with a job specification for an OH technician, and not for an OH nurse or physician. For the reasons explained at §25(3) we have found that job specification to be generic, in other words, representative of role carried out by OH technicians. It is clear from that document that RPS supplied clients with first aid and immediate treatment of onsite injuries and illness. The service was not required by all clients but was supplied to UK Coal and formed part of RPS's tender to SportCo.

Physiotherapists and cardiologists

196. RPS provides physiotherapy services (Crown, UK Coal, PSA, Siemens); it employs some physiotherapists and engages others via subcontractors. Physiotherapists provide a variety of services, including manual handling training, workplace assessments and assessment/interventions for musculoskeletal conditions**.**

197. RPS also provides cardiologists: for example, RPS billed TransportCo invoice for the cost of a "referral to cardiologist", and Mr Latter agreed under cross-examination that their purpose was "to enable diagnosis and treatment of whatever the heart-related problem is". We accept that evidence.

Drug and alcohol treatment

198. In addition to drug and alcohol testing, RPS offered rehabilitation and treatment to employees who had drug and alcohol problems: the SportCo tender says RPS will provide "support, treatment and rehabilitation for employees in need to help mitigate the effects of drug and alcohol". It was also offered in the TransportCo tender, and the PSA tender stated that:

> "RPS has both the skill and capability to support any positive [drug and alcohol] test results by providing advice to assist with rehabilitation, along with the laboratory capability to undertake all analysis and confirmatory testing".

199. Drug and alcohol treatment also formed part of the tenders for TransportCo and SportCo, with RPS offering SportCo "support, treatment and rehabilitation for employees in need to help mitigate the effects of drug and alcohol".

HEALTH SURVEILLANCE

200. RPS's procedures guidance "covers all client companies", and defines health surveillance as "a collective term for a variety of procedures designed to monitor the health of the individual or group". It may include:

(1) review of medical records;

(2) completing medical questionnaires;

(3) interview/consultations with an OH nurse or physician;

(4) medical examinations by an OH nurse or physician; and/or

(5) physiological and biological tests.

201. The same guidance states that the purpose of health surveillance is to:

(1) identify at an early stage any adverse health effects caused by work;

(2) identify work related disease from the analysis of records;

(3) measure the absorbing of toxic substances in the body;

(4) measure changes in physiological parameters such as lung function; and

(5) identify and protect those who may be at particular risk of developing adverse health effects.

202. The guidance continues:

> "Attention is focused on primary and secondary prevention. Primary prevention is the identification and modification of those behaviours which are likely to result in adverse health effects…secondary prevention is the identification of illnesses at an early stage when intervention can result in effective management."

203. RPS's role in the provision of health surveillance for its clients is explained as follows:

(1) identify any person at work who may be suffering ill-health as a result of their work;

(2) provide feedback on the adequacy of control measures in the workplace;

(3) reduce and prevent the incidence of ill-health arising from work-related activities;

(4) manage individual problems arising therefrom;

(5) ensure compliance with the relevant H&S regulations; and

(6) promote the general good health of the clients' employees

204. We heard a lot of evidence about the scope and purpose of health surveillance as delivered by RPS, and having carefully considered all that evidence, we accept the above as a fair summary, and find that the primary purpose of health surveillance is to protect the health of the employees.

MEDICALS

Statutory medicals

The legal requirements

205. As already noted at §§59-60, health surveillance is required by many statutory provisions, including the Noise Regs, the Vibration Regs and the Asbestos Regs. Some regulations explicitly require that this surveillance includes a medical. For example, Reg 23(1)(c) of the Asbestos Regs specifies that "each employee who is exposed to asbestos is under adequate medical surveillance by a relevant doctor", and continues at subpara 2:

> "The medical surveillance required by paragraph (1)(c) must include—
>
> (a) a medical examination not more than 2 years before the beginning of such exposure; and
>
> (b) periodic medical examinations at intervals of at least once every 2 years or such shorter time as the relevant doctor may require while such exposure continues,
>
> and each such medical examination must include a specific examination of the chest."

206. Similarly, Reg 11(5) of the Hazardous Substances Regs provides that where an employee is exposed to a hazardous substance, the health surveillance "shall include medical surveillance under the supervision of a relevant doctor at intervals of not more than 12 months or at such shorter intervals as the relevant doctor may require".

207. Some regulations are less specific. Reg 7(5) of the Vibration Work Regs sets out what the employer must do when (emphasis added) "as a result of health surveillance, an employee is found to have an identifiable disease or adverse health effect <u>which is considered by a doctor or other occupational health professional</u> to be the result of exposure to vibration". However, it was common ground that the H&S Executive guidance required that Tiers 4 and 5 HAVS assessments be carried out by an OH physician.

"Other" medicals

208. In addition to the medicals and tests which the parties identified as being required by H&S legislation and the related regulations, we were told that various industries also had requirements for medicals to be conducted. In the documents, these are generally referred to as "other medicals" or "industry-required medicals".

209. Mr Latter's witness evidence was that "these projects have strict civil standards that employees must meet before they can be permitted to work on those projects" and that "RPS is an Assessed Occupational Health Provider for rail workers and has accreditation under the Railway Industry Supplier Qualification Scheme which provides the industry-wide OH standards for workers who maintain the railways".

The regulations

210. Although we were not taken to the relevant provisions, rail medicals are also a regulatory requirement. Regs 8 and 13 of the Train Driving Licences and Certificates Regulations 2010. Regs provide that a driver must "pass periodic medical and psychological examinations" carried out "by or under the supervision of a recognised doctor". Schedule 1 to the Regulations

specifies that initial medical examinations must contain both medical and psychological components, with the former including:

(1) a general medical examination;

(2) examinations of sensory functions (vision, hearing, colour perception);

(3) blood or urine tests, testing among others for diabetes mellitus, insofar as they are necessary to judge the candidate's physical aptitude;

(4) an ECG at rest;

(5) tests for psychotropic substances such as illicit drugs or psychotropic medication and the abuse of alcohol calling into question the fitness for the job;

(6) cognitive tests for attention and concentration; memory; perception; reasoning and communication; and

(7) psychomotor tests for reaction time, and hand coordination.

211. Those regulations were laid under EU Directive 2007/59/EC, headed "in the certification of train drivers operating locomotives and trains on the railway system in the Community"; the First Recital states that its purpose is to ensure the safety of the railway network.

212. The RPS Occupational Health Service Directory sets out a list of other medicals, including those for night workers, food handlers, those working in confined spaces, those working at height, wind turbine workers, and drivers of forklift trucks ("FLT"); light goods vehicles ("LGV") and passenger carrying vehicles ("PCV"). Many of these other medicals are also required or underpinned by specific regulations. We set these out below, together with one example from our earlier findings of fact:

(1) The night worker medical is recommended by the Working Time Regulations, which implemented Directive 2003/88/EC. The purpose of that Directive is to improve workers' safety, hygiene and health at work, see Recital (4). RPS offered to provide night worker medicals to SportCo.

(2) The food handler medical is recommended best practice by the Food Standards Authority in order to comply with Directive EC/852/2004 on the hygiene of foodstuffs; the "principal aim" of that Directive is "to ensure a high level of consumer protection with regard to food safety", see Recital (7). RPS provided these medicals to Saipem.

(3) The Safety, Health and Welfare at Work (General Application) Regulations 2007, Part 6, Chapter 2, Protection of Pregnant, Post Natal and Breastfeeding Employees ("the Pregnancy Regulations") require that once an employer is aware that an employee is pregnant, he must carry out a risk assessment to protect her health and that of her unborn child. RPS offered to provide these assessments to SportCo.

(4) The same regulations at Part 6 Chapter 3, Night work and shift work, require employers to carry out a night worker health assessment for the protection of the health of those employees. RPS offered to provide these assessments to SportCo.

(5) The Confined Spaces Regs 1997, made under the *vires* of the HSWA, are aimed at protecting the health and safety of employees, and, requires employers to "ensure compliance with" those regulations and carry out confined spaces assessments. RPS provided these assessments to Siemens.

(6) Working at heights medicals are carried out in order that the employer complies with the HSWA, the MHSW Regs and the Work at Height Regs 2005, of which Reg 6 specifically requires that a risk assessment be carried out under Reg 3 of the MHSW Regs. RPS provided these to Siemens

HSWA based medicals, and driving medicals

213. The RPS Occupational Health Service Directory also stated that RPS provided the following:

(1) Wind turbine medicals carried out in accordance with the guidance published by Renewables UK; this in turn is derived from the HSWA and the near-identical requirements of maritime law. RPS provided these to Siemens.

(2) FLT, LGV and PCV medicals follow the guidance of the DVLA and the HSE. We make the reasonable inference that the purpose of these medicals is to ensure that the driver can operate the vehicle safely. FLT and HGV medicals were provided to TransportCo.

When statutory/other medicals are carried out

214. Statutory/other medicals are carried out in four situations:

(1) on a regular basis as part of health surveillance;

(2) when an existing employee is to be moved to a new role within the same organisation, and the new role requires one or more medicals to be carried out;

(3) when a new employee has been offered and has accepted a job; and

(4) when a job offer is conditional on the individual passing a medical.

215. The medicals are the same in each of those situations, other than that an OH practitioner may need to take more details from a person who is being assessed for the first time.

Statutory/other medicals as part of health surveillance

216. RPS frequently refers to statutory medicals and the related screening as forming part of health surveillance: for example, the procedures guidance on audiometry tests say that they are "usually undertaken as part of a client's health surveillance". An advertisement for the RPS mobile service states that it delivers "tailored health surveillance/screening programmes direct to you". The TravelCo Schedule for Services states that all screening will be carried out as part of health surveillance, with referrals being made to the OH physician as appropriate. Ms Snagg's witness statement (adopted by Ms White) also emphasises that RPS staff carry out statutory medicals and other health surveillance from mobile screening units.

217. References to health surveillance, medicals and health assessments in the following documentation are clearly describing the same services:

(1) PSA was offered health assessments for working at height and in confined spaces; working with power tools, display screens, lead, asbestos and electricity and HAVS testing.

(2) SportCo's ITT referred to health surveillance for vibration, noise, hazardous substances, manual handling and repetitive activities, paint and lead.

(3) Under the Siemens Framework, RPS supplied health surveillance (on-site) including lead in blood testing, other biological monitoring (eg chromium), lung function testing, audiometry HAVS testing, skin surveillance, eye testing and FLT/HGV driver assessments.

(4) RPS provided Saipem with "specialist medical services" including medicals for radiation, asbestos and lead, and health surveillance for "HAVS, respiratory, hearing, skin, biological monitoring following exposure to toxins, asbestos and lead medicals".

218. We find that the statutory/other medicals are linked to and part of the overall process of health surveillance. In coming to that conclusion we have not overlooked Mr Latter's and Mr Brown's evidence that these medicals were not part of health surveillance because medicals looked at the position at a point in time, and health surveillance "looks at health over a period of time". We find this to be a distinction without a difference. Clearly, all medicals and checks take place at "points in time", but it is through these medicals and checks that the surveillance is carried out.

New employee questionnaires and medicals

219. As the RPS Guide supplied to client's managers ("The Guide") explains, anti-discrimination law contained in or deriving from the Equality Act 2010 means that job applicants cannot normally be required to complete health declarations or questionnaires. As a result, the normal process is that individuals are sent a health declaration to complete after they have been offered a job, but before they commence work.

220. There is a legal exception to that general rule if a function intrinsic to the job has particular health requirements. However, we were not provided with any evidence of employers offering jobs conditional on passing a medical. For example, Siemens have many roles with particular health requirements (such as working on wind-turbines), but their policy was never to offer a job on condition of passing a medical.

221. The Guide therefore does not have a section called "pre-employment" but only "pre-placement"; the witnesses also referred to pre-placement as encompassing new employee medicals.

222. In 90% of cases, the health declarations completed by the new employees disclose no medical issues. These declarations are retained by the client, and RPS does not become involved. If the employee "declares a health condition", the client requests a template health questionnaire from RPS; the employee completes that questionnaire, and it is sent to RPS for review by an OH adviser. In a minority of cases, the person is then required to undergo a statutory or other medical.

223. There are three possible outcomes of that medical:

(1) The RPS OH practitioner confirms the individual is fit to take on the role without any adjustments.

(2) The practitioner provides the individual and the employer with advice as to how to manage the work to protect the employee's health; this may include making adjustments to the working environment.

(3) The employer cancels the job which has been offered and accepted, because:

(a) the practitioner advises that the individual is not fit to undertake the role; or

(b) the employer decides that it is not practical to implement the recommended adjustments.

224. However, the Guide says that the third outcome happens only in "exceptional cases". The usual position is that the process "is of mutual benefit to employer and employee" because it identifies "which workers are likely to have a particular need for workplace adjustment/modification".

225. Ms White said that the purpose of the process was to ensure employees' health and safety "will not be adversely affected by the role". Where the individual is being placed in a safety-critical role (such as working on a wind-turbine) Mr Brown's evidence was that "the key factor" in the medical was "protecting the safety of the employee and those around them". Mr Latter accepted that these assessments were "carried out to ensure that the proposed work will not adversely affect any underlying health condition the individual might have", but he continued:

> "The main underlying purpose is not to help the employee, but it is rather to inform the client employer about changes that may need to be made to facilitate the employee taking on the new role, and it is then up to the client employer to implement any recommendations made by RPS."

226. We prefer the evidence of Mr Brown and Ms White, and find that the primary purpose of new employee questionnaires and the related medicals is to protect the health of the employee.

227. In coming to that finding, a key factor is that these individuals already have a job offer, and it would be "exceptional" for the job to be withdrawn as the result of a medical. Instead, if the individual was found to have a health condition which was relevant to the role he had been offered (and accepted), the employer would make the necessary adjustments. The primary purpose is thus not to allow the employer to make a decision on recruitment; that decision has already been made. Neither is it to allow that employer to decide whether to withdraw a job offer which has been accepted. Although that does exceptionally occur, it is not the purpose of the procedure. As Mr Brown said, even in a safety-critical scenario, the purpose is "protecting the safety of the employee and those around them".

When a job offer is conditional on the individual passing a medical

228. As noted above, we had no evidence that employers in fact offered jobs conditional on the applicant passing a medical. Were that situation to exist, we would find that the main purpose of the questionnaire and related medical would be to enable the employer to make a decision as to whether or not to offer the individual the job.

Whether statutory/other medicals involved diagnosis and treatment

229. There were conflicts in the evidence as to whether statutory/other medicals involved a diagnosis.

The witness evidence

230. Each of the three witnesses used similar wording in their witness statements about whether medicals included diagnoses:

(1) Mr Latter: the OH report "will not suggest a diagnosis, an underlying cause of the test result, or any kind of treatment".

(2) Mr Brown: "RPS does not provide any kind of diagnosis or treatment",

(3) Ms White: "The OHA/OHP will not offer any kind of diagnosis or suggest a cause of the particular readings to the employee being screened, nor will they suggest any kind of treatment".

231. Mr Brown and Ms White both caveated their evidence by saying that RPS did provide a diagnosis when carrying out HAVS Tier 4 assessments, and Mr Latter accepted this in oral evidence**.**

232. Under cross-examination, Mr Brown initially declined to say whether testing blood for diseases was "diagnosis", saying it "would depend on the definition of diagnosis". However he subsequently agreed that RPS would diagnose whether an employee was suffering from a disease relevant to overseas travel, such as yellow fever, TB and HIV, and would inform the employee of that diagnosis.

The Saipem guidance

233. The only evidence provided to the Tribunal which set out the instructions given to the examining OH professional is that in the Saipem guidance. This was written by RPS, and gave detailed instructions (see §176) to physicians carrying out statutory medicals (lead, radiation, asbestos etc), and "other" medicals, such as those for catering staff.

234. The process clearly required that physicians make diagnoses. Not only did they have to carry out a range of tests, including for TB, hepatitis, drugs, alcohol and hepatitis, but they had to consider the results of those tests, and were barred from returning the medical fitness form until they had completed those "diagnostic procedures". Mr Latter agreed under cross-examination that the physicians were "providing both diagnostic procedures and treatment" to Saipem, but as we noted at §178, he did not accept that this was the position generally. However, we have already rejected that evidence, and found that the Saipem guidance was representative of the instructions given by RPS to its OH physicians more generally, both those employed by RPS and those who were providing their services on an outsourced basis, see §180.

Discussion and finding

235. As noted at §28 and §32, we found Mr Latter's and Ms White's evidence to be not entirely reliable. Mr Brown was a credible witness, who accepted that RPS practitioners carried out diagnoses. The Saipem guidance was written by RPS; it is the only example of instructions given to physicians, and we have not accepted that there is anything unique about the contract between Saipem and RPS. We find as a fact that RPS's OH physicians carried out diagnoses and treatment as part of statutory and other medicals.

Ill-health retirement medicals

236. Mr Latter accepted in his oral evidence that ill-health retirement medicals are carried out on employees "who are unwell" to determine whether that person is permanently incapacitated or whether there is an adjustment available that would allow the work to be carried out without damage to his health.

237. RPS can be instructed to carry out these medicals either by the employer or by pension scheme trustees. Although Mr Latter said that the latter are "rare", we note that in the PSA tender, RSA said it provides "medical reviews on a regular basis" to the Scottish Public Agency Pension Scheme, ITV Pensions, Rio Tinto Pensions, British Coal Pensions and Siemens Benefits Schemes.

238. We considered whether the typical employer's primary aim in ordering these medicals was to identify possible adjustments to prevent damage to the employee's health, or whether it was to give him information to make a decision on termination of the employment. We took into account that these medicals are bought and sold as "ill-health retirement medicals". From that title we infer that the primary purpose of the typical employer is to decide whether or not to terminate the employment on health grounds.

239. Where the instructions come from the pension trustees, the process is the same, but the purpose is to establish whether the person meets the criteria for which the trustee can pay out the pension before the scheme's normal retirement date.

SICKNESS ABSENCE MANAGEMENT

240. The parties agreed that the term "Sickness Absence Management" was the same as "Management Referrals", although as is clear from our findings below, a manager could refer an employee to RPS under this heading because of concerns about his health, even though the employee had not gone off work through sickness. In this Decision, we have used the abbreviation "SAM" to cover both types of management referral.

What is sickness absence management?

241. RPS's OHS Directory defines SAM as:

> "medical case management and support to a client company to assist in the management of employees who require rehabilitation, to assist in their return to work. It is designed to minimise lost time due to absence by providing quality medical support to employees and managers."

242. The clients' managers refer employees to RPS practitioners for a "consultancy and advisory service tailored to the circumstances of the individual employee". The RPS Directory says:

> "referral triggers may include illness, whether work-related or otherwise, absence due to such illness, effects of illness on ability to work, return to work after illness, advice regarding prognosis (eg likelihood of future illness/absence), incidents or accidents at work, potential stress or depression, and frequent or long term absences."

243. The Siemens guidance to employees says that "the overriding objective is to support your recovery and return to work" and that "maintaining business performance while supporting you at times such as these is important to us". It also says:

> "Where there is no indication of a foreseeable return to work, we may need to advise you that your job is at risk. We will discuss suitable alternative roles, a phased return, and whether you are eligible for ill-health retirement".

244. Although Mr Latter said in his witness statement that SAM "has nothing to do with the prevention of illness, the diagnosis of illness or any kind of treatment or cure for the employee",

when Ms Newstead Taylor referred him to the Siemens guidance, he agreed that Siemens was telling its employees that it would consider the outcomes of the SAM process "with the aim of helping them recover their full health". He also reluctantly accepted that the outcome of the SAM process could prevent further damage to an employee's health by recommending adjustments to his working environment.

245. We accept the passages set out above from the Siemens guidance, and find that SAM's main purpose is to support the employee's recovery from a health problem, and that maintaining business performance is a secondary objective.

ADVICE, INFORMATION AND REPORTS

246. The outcomes of the surveillance, assessments, medicals and consultations carried out by RPS staff are reported to the clients' management, providing the employees give consent. For example:

(1) after certain medicals and screenings, RPS provides the employer with a fitness certificate;

(2) after a SAM consultation, RPS provides a report setting out recommendations as to whether the employee can return to work, and whether adjustments are recommended; and

(3) some employers are also provided with reports on employee attendance at appointments and/or assessment/surveillance outcomes, and statistical analyses of these.

The purpose of this information

247. We have already found as a fact that clients' main purpose in purchasing services from RPS is the protection of the health of the employees, and that the provision of management information and advice is of lesser importance, see §96. It follows from that finding that the typical employer wants information and advice which summarises and gives conclusions about the OH services provided to the employees; he does not want information and advice *per se.* In other words, the information and advice are by-products.

OTHER SERVICES

248. RPS also provided the services set out below, with example clients noted in brackets:

(1) Manual handling training (Crown, UK Coal, Siemens, PSA, Saipem and SportCo). Mr Latter accepted that the purpose of this training was to protect employees from injury, and we agree. That is also consistent with the purposes of the Manual Handling Regs, which require training where the activities involve a risk of injury to the employee, see §57.

(2) Ergonomic assessments (UK Coal, PSA, Saipem, SportCo, Siemens). The PSA proposal explains that RPS provides two levels of assessment, a questionnaire and an "advanced workstation assessment". The assessments meet the requirements of the DSE Regs, the purpose of which is to protect employees' health, and we find that this is also the purpose of the assessments.

(3) Executive health assessments (Scottish Resources Group, Crown and Saipem). Both parties have always accepted that the purpose of these assessments is to prevent and/or detect illness and to monitor employees' health, and we agree.

(4) Medication checker (TransportCo, SportCo, Siemens). RPS provided an online checking system for medications taken by employees, operated by a team of specialist pharmacists supported by nurse/medical administrators and OH physicians. Although provided by a third party, it was "integrated into [RPS's] OH services". We make the reasonable inference that its purpose is to protect the health of the employees and the health of their co-workers and the public.

(5) Well-being assessments/campaigns for employees (Lewisham; TransportCo and Saipem). These are self-evidently to prevent illness and protect health.

(6) Training courses for staff about (a) drug and alcohol awareness (b) internal delivery of drug and alcohol testing (c) the supply of controlled drugs and (d) first aid (Siemens and UK Coal). Their purpose is to enable the employer's staff to protect the employees' health.

(7) Administration charges. There was little evidence of these. Both parties accepted that they included cancellation fees, and we also noted that some clients were charged separately for the provision of copy medical reports (SCA, Celanese Acetate, Crown).

(8) Advice on the implications of H&S legislation, and related medico-legal issues This was provided to UK Coal, and in reliance on Mr Latter's second witness statement, we find that RPS also provided reports for clients and solicitors following employee claims for compensation or damages. The purpose of the advice and reports is to support a person fighting a legal case.

249. RPS also charged clients for the costs of certain items of equipment, such as the refrigerator shown on the SportCo invoice; it also sold certain equipment, such as that relating to drug and alcohol testing supplied to Siemens staff.

THE PERCENTAGES

250. When making final submissions, both parties referred to the percentage of RPS's services which came under the above headings. However, the witness statements contained only one relevant piece of evidence: Mr Latter said vaccinations were approximately 0.5% of RPS's business and manual handling was "an extremely small percentage".

251. During Ms White's evidence in chief, Ms Brown referred to health surveillance, SAM and medicals, and then asked "what value those elements drive your business overall in terms of percentage". Ms White said "we keep a dashboard on a monthly basis of the work that comes into RPS" and "about 30% of the work that comes into us the bookings are for management referrals"; around was 30% was for "pre-placement including the questionnaires" and 30% was "for fitness medicals and health surveillance".

252. We find as a fact that the dashboard was keeping track of the number of bookings, not their value, despite Ms Brown having phrased her question in terms of values. We come to that finding because:

(1) Ms White referred to keeping a dashboard of "bookings" for "the work that comes into us";

(2) given the huge variety of pricing structures, it is highly improbable that a dashboard could keep track of the each of the services being booked on a value basis;

(3) Ms White is as an operational manager, so it is unlikely that her team would be tracking sales by value; that is likely to be the role of the accounting department; and

(4) Ms White also said that 30% of the bookings were for "pre-placement including the questionnaires". The pricing makes it clear that the questionnaires were low value items: Celanese Acetate, for example was charged £27 for a questionnaire and £140 per hour for an OH physician; Siemens was charged £20 for the questionnaire, with most medicals and tests costing over £75. If Ms White is correct that pre-placements account for 30% of RPS bookings, this can only be a reference to bookings by number, it cannot be a reference to bookings by value.

253. In evidence-in-chief, Mr Brown was asked "how would you say proportionately [Siemens] cover the different areas". In response, he provided the following analysis, saying "I understand it is broadly typical of the wider base":

(1) pre-placement questionnaires were around 1% of cost;

(2) pre-placement medicals were "a much higher percentage…because we have a much higher percentage of people who need medicals";

(3) the "biggest single source of spend" was "on-site OH provision", primarily the time cost of the OH adviser and physician;

(4) the next biggest was "fitness medicals";

(5) SAM was 11%;

(6) drug and alcohol testing was another 10-11%;

(7) health surveillance, fitness medicals, SAM, and drug and alcohol testing together came to around 70-80% of spend;

(8) nothing else was more than 6%;

(9) in the final two years, well-being checks were 5-6%; and

(10) physiotherapy and vaccinations were less than 1% and tier 4 HAVS testing around 0.1%.

254. Ms Newstead Taylor pointed out that there was no supporting objective documentary evidence for any of the figures provided by Ms White and Mr Brown. She submitted that while the witnesses were no doubt "doing their best", the Tribunal should treat their evidence with "an element of caution".

255. We too have concerns about the weight that can be placed on this oral evidence We note in particular that:

(1) Ms White's evidence relates to the number of bookings and not the value of the services provided

(2) There was no explanation as to how. the dashboard operated, which clients were involved, when it began operating, or how (if at all) the figures had changed over time.

(3) Many services are provided onsite or from mobile units in exchange for a fixed fee, it is not clear whether these are recorded on the "dashboard" or whether the dashboard only records services which are supplied following a specific order.

(4) Siemens' biggest source of spend was "on-site OH provision", but this was priced on the basis of the day rate charged by the OH practitioner in attendance, and so does not give a picture of the services supplied by that practitioner. In other words, it is unclear how his statement that on-site OH provision was "the single biggest source of spend" reconciles with his list of "core elements".

(5) Although Mr Brown said that he "understands" the Siemens OH spend to be "broadly typical of the wider base", he did not explain the basis for that knowledge. He does not work for RPS and it is clear from our findings of fact that RPS have a wide range of different contracts with its clients

(6) Mr Brown said that in the final two years well-being checks increased to 5-6%, and it is therefore possible that there were other changes during the life of the Siemens contract.

256. We therefore agree with Ms Newstead Taylor that we should place limited weight on the oral evidence. Taking into account also our other findings of fact, we do however accept that:

(1) HAVS Tier 4, vaccinations, physiotherapy, referrals to cardiologists and manual handling training are each a small part of the services RPS provides to its clients generally.

(2) Most but not all clients require SAM and health surveillance, including statutory and/or other medicals.

(3) Many clients require drugs and alcohol testing, and the costs involved were significant. Where it is provided, we accept Mr Brown's estimate of 10-11% of total spend as being typical, taking into account also that in 2018 RPS carried out 1,000 tests for only two clients, Carillion and Siemens, see §142.

VAT LAW

257. There were two key issues of VAT law: the meaning of single multiples supplies and the exemption for medical care.

THE CASE LAW ON SINGLE/MULTIPLE SUPPLY

258. In this part of our Decision, we begin by setting out the key passages from the two leading CJEU authorities, *Card Protection Plan Ltd v C&E Comrs* (Case C-349/96) [1999] STC 270 ("*CPP*") and *Levob Verzekeringen BV v Staatssecretaris van Financiën* (Case C-41/04) [2006] STC 766 ("*Levob*"), and the summary of the CJEU case law in *Honourable Society of Middle Temple v HMRC* [2013] UKUT 250 ("*Middle Temple*"). We then consider some specific cases on which the parties relied.

CPP, Levob and *Middle Temple*

259. In *CPP* at [30] the CJEU held:

> "28. However, as the court held in *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* (Case C-231/94) [1996] STC 774 at 783, [1996] ECR I-2395 at 2411-2412, paras 12 to 14, concerning the classification of restaurant transactions, where the transaction in question comprises a bundle of features and acts, regard must first be had to all the circumstances in which that transaction takes place.

> 29. In this respect, taking into account, first, that it follows from art 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, second, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.
>
> 30. There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied..."

260. In *Levob*, the CJEU reiterated the points made in *CPP* at [28]-[29] and continued:

> "21. In that regard, the Court has held that there is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal supply, whilst one or more elements are to be regarded, by contrast, as ancillary supplies which share the tax treatment of the principal supply (*Card Protection Plan* [1999] STC 270, [1999] 2 AC 601, para 30…).
>
> 22. The same is true where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split."

261. They went on to hold at [27] that:

> "with regard to the question whether such a single complex supply is to be classified as a supply of services, it is vital to identify the predominant elements of that supply."

262. In *Middle Temple* at [60] the UT (Judges Sinfield and Gort) helpfully summarised the CJEU case law:

> "(1) Every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split.
>
> (2) The essential features or characteristic elements of the transaction must be examined in order to determine whether, from the point of view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply.
>
> (3) There is no absolute rule and all the circumstances must be considered in every transaction.
>
> (4) Formally distinct services, which could be supplied separately, must be considered to be a single transaction if they are not independent.
>
> (5) There is a single supply where two or more elements are so closely linked that they form a single, indivisible economic supply which it would be artificial to split.

(6) In order for different elements to form a single economic supply which it would be artificial to split, they must, from the point of view of a typical consumer, be equally inseparable and indispensable.

(7) The fact that, in other circumstances, the different elements can be or are supplied separately by a third party is irrelevant.

(8) There is also a single supply where one or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services which share the tax treatment of the principal element.

(9) A service must be regarded as ancillary if it does not constitute for the customer an aim in itself, but is a means of better enjoying the principal service supplied.

(10) The ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.

(11) Separate invoicing and pricing, if it reflects the interests of the parties, support the view that the elements are independent supplies, without being decisive.

(12) A single supply consisting of several elements is not automatically similar to the supply of those elements separately and so different tax treatment does not necessarily offend the principle of fiscal neutrality."

Other judgments relied on by the parties

263. We were also referred in particular to *Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank* (Case C44-11) [2012] STC 1951 ("*Deutsche Bank*"), *Město Žamberk v Finanční ředitelství v Hradci Králové* (Case C18/12) [2014] STC 1703 ("*Mesto*"), *Metropolitan International Schools Ltd v R&C Commrs* [2017] UKUT 431(TCC), STC 2523 ("*Metropolitan*"), and *Odvolací finanní editelství v Baštová* (C-432/15) ("*Baštová*"), and we

264. Baštová summarise the main points of those cases below.

Deutsche Bank

265. The facts of *Deutsche Bank* are at [9]-[10] of the CJEU judgment:

"[9] In 2008, Deutsche Bank provided, either itself or through subsidiaries, portfolio management services to client investors. Those client investors instructed Deutsche Bank to manage securities, at its own discretion and without obtaining prior instruction from them, in accordance with the investment strategy variants chosen by them and to take all measures which seemed appropriate for those purposes. Deutsche Bank was entitled to dispose of the assets (securities) in the name and on behalf of the client investors.

[10]. The client investors paid an annual fee amounting to 1.8% of the value of the managed assets. That fee consisted of a share for asset management amounting to 1.2% of the value of the managed assets and a share for buying and selling securities amounting to 0.6% of the value of the assets. The fee also covered account and portfolio administration and front-end fees for the

> acquisition of shares, including units in funds that were managed by undertakings belonging to Deutsche Bank."

266. The question before the Court was whether there was a single supply of exempt financial services, made up of:

(1) deciding, on the basis of expert knowledge and observation of the markets, what securities should be bought or sold, and when; and

(2) implementing those decisions by actually buying and selling the securities

267. It was accepted that the Bank also provided the two elements separately (see [24]) and that when that was the case, the first would be standard rated, and the second exempt. The Court held that "the average client investor, in the context of a portfolio management service…seeks precisely a combination of those two elements" and decided:

> "[27]…those two elements are therefore not only inseparable, but must also be placed on the same footing. They are both indispensable in carrying out the service as a whole, with the result that it is not possible to take the view that one must be regarded as the principal service and the other as the ancillary service.
>
> [28] Consequently, those elements must be considered to be so closely linked that they form, objectively, a single economic supply, which it would be artificial to split."

268. The Court went on to conclude that as both of the elements were on an equal footing, the service was therefore to be taken as a whole. As the exemption was to be interpreted strictly, the supply was not exempt.

Mesto

269. The facts of *Mesto* are at [9] of the judgment:

> "In return for payment of an entrance fee Město Žamberk provides a municipal aquatic park, in which there are, in particular, a swimming pool divided into several lanes and equipped with diving boards, a paddling pool for children, water slides, a massage pool, a natural river for swimming, a beach-volleyball court, areas for table tennis and sports equipment for hire."

270. The Court had to decide whether this was a single complex supply which was exempt from VAT as "the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education". It said at [32]:

> "As regards the existence of a single complex supply in the main proceedings, it is necessary to examine whether the facilities in the aquatic park at issue form a whole so that access to the whole constitutes a single supply which it would be artificial to split. In that regard, if, as in this case, the only type of entrance ticket offered for the aquatic park gives access to all of the facilities, without any distinction according to the type of facility actually used and to the manner and to the duration of its use during the period of the entrance ticket's validity, that fact constitutes a strong indication of the existence of a single complex supply."

271. The Court held at [33] that the issue was whether:

> "…in the context of such a single complex supply, the predominant element is the opportunity to engage in sporting activities falling within art 132(1)(m) of the VAT Directive or, rather, pure rest and amusement…"

272. It concluded at [37] that it was a matter for the national court to determine whether "access to an aquatic park offering visitors not only facilities for engaging in sporting activities but also other types of amusement or rest may constitute a supply of services closely linked to sport".

Baštová

273. The facts of the case are set out at [14]-[15] of the judgment:

> "[14] Ms Baštová is a taxable person for VAT purposes by virtue of an economic activity consisting in the operation of horse racing stables with a capacity of 25 places, in which she breeds and trains her own horses and those of other owners which have been entrusted to her to be prepared for races. In addition to the racehorses, Ms Baštová had in her stables two horses which she used for agrotourism and training young horses, and breeding mares and foals, from which she hoped to derive future income from participation in races or from sales.
>
> [15] In connection with that activity, Ms Baštová earns two types of income, which constitute the subject matter of the main proceedings in the present case. The first type consists of prizes obtained by her own horses for being placed in races and the trainer's share of prizes won in races by the horses of other third parties. The second type of income results from the operation of racing stables and consists in payments made by horse owners for training their horses for races, and payments made for stabling and feeding the horses."

274. The CJEU considered whether this was a single supply, and said:

> "[74] In the present case, the referring court has stated clearly that the supply of services at issue, as it appears from the contracts concluded between Ms Baštová and the horse owners and which consists of three components (training the horses, the use of sporting facilities and the stabling, feeding and other care of the horses), constitutes a single composite supply of services. That conclusion applies where the contracting parties are in fact seeking a combination of the three components to that supply, where the use of the sporting facilities is objectively necessary to train the race horses and where the supplies linked to the stabling, feeding and care of the horses are primarily intended to accompany and assist their training and the use of sports facilities.
>
> [75] Thus, subject to determination by the referring court, the information contained in the order for reference appears essentially to indicate that the training services and use of the sporting facilities constitute two components of that composite supply which are, in the light of its purpose, of equal status, whereas the supplies linked to the stabling, feeding and care of the horses are of an ancillary nature in relation to those two components. In so far as only the use of the sporting facilities falls within the scope of the reduced rate provided for in Article 98 of the VAT Directive, read in conjunction with point 14 of Annex III thereto, that reduced rate cannot be applied to the single composite supply at issue in the main proceedings (see, by analogy, judgment

> of 19 July 2012, *Deutsche Bank*, C-44/11, EU:C:2012:484, paragraphs 41 to 43).
>
> [76] If, on the other hand, the referring court were to conclude, on the basis of the facts at issue in the main proceedings and having regard in particular to the contracts concluded between Ms Baštová and the horse owners, that the training of the horses constituted the main component of the single composite supply, the same conclusion would apply and it still would not be possible, pursuant to Article 98 of the VAT Directive, read in conjunction with point 14 of Annex III thereto, to apply the reduced rate of VAT to that supply."

Metropolitan

275. The facts of *Metropolitan* are set out in the headnote:

> "The taxpayer school provided distance-learning services. One element of all the courses was the provision to customers of a set of manuals. Customers would read the manuals before taking a multiple-choice test. The test was submitted online and marked by a computer. The customer would be notified of his or her result and provided with a progress report (which was generated by a computer). On successful completion of the test, the customer would be sent the next manual. In addition to the manuals, tests and progress reports, the school provided certain other services to its customers, including phone and/or email support from tutors, payment of the examination fee for suitable courses if a customer passed the requisite multiple-choice tests, and on some courses the provision of material on DVD and the hosting of a virtual chat room."

276. The FTT had decided that there was a single zero-rated supply of manuals (books) with all other elements being ancillary; the FTT also noted that it would also have been artificial to split the elements.

277. At the UT, Ms Mitrophanos, Counsel for HMRC, submitted that the CJEU had now introduced a new "overarching" test. She relied on *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* (Case C-231/94), as well as a number of UK authorities, notably *College of Estate Management v C&E Comrs* [2005] UKHL 62 ("*CEM*"); *Byrom v R&C Comrs* [2006] EWHC 111 ("*Byrom*") and *Beynon v C&E Comrs* [2004] UKHL 53 ("*Beynon*"). The UT first considered *Faaborg-Gelting Linien* (emphasis in the original):

> "[65] …[The case] concerned restaurant facilities on a ferry. It was necessary to decide whether what was supplied was goods (food) or services in order to determine where they were supplied for VAT purposes. The CJEU held that the supply was a supply of services because services other than the provision of food were supplied:
>
> > '14. Consequently, restaurant transactions are characterised by a cluster of features and acts, of which the provision of food is only one component and in which services largely *predominate*. They must therefore be regarded as supplies of services ...' (Our emphasis.)
>
> [66] Ms Mitrophanous seemed to rely on this as an instance of a different test, namely whether there was an 'overarching' supply, even though that sort of test was not expressed in the judgment in that case. We do not think that that is correct. The paragraph sets out the basis of the decision--of the two potential characterisations (goods or services) the characteristics representing services

supplied the relevant characterisation because they predominated, not because the supply of services was an appropriate over-arching description."

278. The UT went on to say that whether the concept had been relied on in UK judgments made no difference to their decision (so what followed was clearly *obiter*) but that they would express some views on Ms Mitrophanos's submissions. The passage reads:

"[76] There are good reasons for saying that [the overarching test] has or may have a part to play in at least some cases. First, it seems to have been the sort of point taken by the majority of the House of Lords in *CEM* . Second, in some cases at least it may reflect how the typical consumer (whose viewpoint is critical - see *Mesto)* views a transaction. It would be entirely consistent with a regime in which a supply question has to be answered by reference to the view of the typical consumer of the supply. Third, in many cases a consideration of the point may assist in deciding whether a given element predominates or not in the eyes of the typical consumer for the purposes of the legislative provision in question. Thus in the circumstances of *Byrom*, the *Mesto* question would be what the typical consumer thinks he or she is acquiring. In order to determine that, a *Mesto* analysis has to consider the elements in the supply, and whether they fall predominantly within the relevant characterisation or not by judging their relative importance from the point of view of the typical consumer. It may be that, as in *Byrom*, there is a main element which, at least quantitatively, predominates over the others. But if the consumer thinks that he or she is acquiring something larger, that is to say massage parlour services, then the licence of the room cannot be said to predominate for the purposes of the *Mesto* test. Whether or not it is a separate test, the factor is at least capable of being a counterweight to an element that might otherwise be thought to predominate or, within a *Mesto* test, an indication of the qualitative importance attached to other elements by a typical consumer. It may be that *Beynon* is an example of that. We do not think that if the consumer would have an overall perception it could be ignored consistently with *Mesto*.

[77] To that extent, therefore, the reasoning underpinning a separate 'overarching' test has a part to play in the reasoning in other tests. We would, were it necessary, be minded to go further and say that there may be some cases where the economic realities justify its application as a separate test. We say this for two reasons. First, as appears above, the CJEU has recognised the difficulties in prescribing definitive tests for all cases in relation to the 'number of supplies' point, and that is capable of applying to the characterisation point as well, bearing in mind its close relationship to the 'number of supplies' point. Second, there may well be cases in which the economic realities, which again underpin the exercise, require it to be adopted. Whether or not the present case is one of them is not something we have to decide, because we can reach our decision on other grounds by reference to the other tests, where available.

[78] On the basis of those authorities we find:

(1) The *Mesto* predominance test should be the primary test to be applied in characterising a supply for VAT purposes.

(2) The principal/ancillary test is an available, though not the primary, test. It is only capable of being applied in cases where it is possible to identify a principal element to which all the other elements are minor or ancillary. In cases where it can apply, it is likely to yield the same result as the predominance test.

> (3) The 'overarching' test is not clearly established in the ECJ jurisprudence, but as a consideration the point should at least be taken into account in deciding averments of predominance in relation to individual elements, and may well be a useful test in its own right."

THE LAW ON THE MEDICAL EXEMPTION

EU law

279. Article 132(1) of Council Directive 2006/112/EC (the "Principal VAT Directive" or "PVD"), formerly Article 13A(1)(c) of the Sixth VAT Directive, provides that member states shall exempt the supplies there listed. These include at (b) and (c):

> "(b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature;
>
> (c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned."

280. It was common ground that the only relevant provision for the purposes of this case was the medical exemption at Article 132(1)(c), and that the purpose of that provision was to reduce the cost of medical care and make it more accessible to individuals, see *Finanzamt Dortmund-West v Klinikum Dortmund gGmbH* (C-366/12) [2014] STC 2197 at [28].

UK law

281. VATA s 31(1) gives effect to Article 132(1), and reads:

> "A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 and an acquisition of goods from another member State is an exempt acquisition if the goods are acquired in pursuance of an exempt supply."

282. VATA Schedule 9 gives effect to Article 132(c) by exempting, as Item 1 of Group 7:

> "The supply of services consisting in the provision of medical care by a person registered or enrolled in any of the following—
>
> (a) The register of medical practitioners
>
> (b)-(c)…
>
> (c) Any register kept under the Health and Social Work Professions Order 2001;
>
> (d) The register of qualified nurses, midwives and nursing associates maintained under article 5 of the Nursing and Midwifery Order 2001."

283. The register kept by the Health Professions Council under the Health and Social Work Professions Order incudes occupational therapists, paramedics and physiotherapists.

284. Note 2 to Item 1 states that the medical exemption also covers services supplied "by a person who is not registered or enrolled in any of the registers or rolls specified in those paragraphs where the services are…directly supervised by a person who is so registered or enrolled". It was common ground that all the services supplied by RPS were either provided by a person who was a qualified person for the purposes of the exemption, or was supervised by such a person.

The case law on the medical exemption

285. We were referred to the following case law on the medical exemption:

(1) *Commission v United Kingdom* [1988] (Case 353/85).

(2) *D v W* (Case C-384/98) [2002] STC 1200.

(3) *Commission v France* (Case C-76/99).

(4) *Ambulanter Pflegedienst Kügler GmbH v Finanzamt fur Korperschaften in Berlin* (Case C-141/00) ("*Kügler*").

(5) *d'Ambrumenil v C&E Commrs* (Case C-212/01); *Unterpertinger v Pensionversicherungsanstalt der Arbeiter* (Case C-307/01) ("*d'Ambrumenil*").

(6) *Financampt Kyritz v Peters* (C-700/17) ("*Kyritz*").

286. The CJEU's conclusions in *DvW* were as follows:

> "[18] …the concept of provision of medical care does not lend itself to an interpretation which includes medical interventions carried out for a purpose other than that of diagnosing, treating and, in so far as possible, curing diseases or health disorders.
>
> [19] So, services not having such a therapeutic aim must, having regard to the principle that any provision establishing an exemption from VAT is to be interpreted strictly, be excluded from the scope of Article 13A(1)(c) of the Sixth Directive and are therefore subject to VAT."

287. In *Commission v France*, the CJEU noted at [22] that "the Sixth Directive does not include any definition of the concept of activities 'closely related to hospital and medical care'" but continued:

> "that concept does not, however, call for an especially narrow interpretation since the exemption of activities closely related to hospital and medical care is designed to ensure that the benefits flowing from such care are not hindered by the increased costs of providing it that would follow if it, or closely related activities, were subject to VAT."

d'Ambrumenil

288. The question referred to the CJEU in *d'Ambrumenil* was as follows:

> "Is article 13(A)(1)(c) of the Sixth Directive to be interpreted as covering the following activities when performed in the exercise of the medical profession as defined by the member state:
>
> (a) conducting medical examinations of individuals for employers or insurance companies;
>
> (b) the taking of blood or other bodily samples to test for the presence of viruses, infections or other diseases on behalf of employers or insurers;

(c) certification of medical fitness, for example, as to fitness to travel;

(d) giving certificates as to a person's medical condition for purposes such as entitlement to a war pension;

(e) medical examinations conducted with a view to the preparation of expert medical reports regarding issues of liability and the quantification of damages for individuals contemplating personal injury litigation;

(f) the preparation of medical reports

(i) following the examinations referred to in (e), and

(ii) based on medical notes without conducting a medical examination;

(g) medical examinations conducted with a view to the preparation of expert medical reports regarding professional medical negligence for individuals contemplating litigation; and

(h) the preparation of medical reports

(i) following the examinations referred to in (g), and

(ii) based on medical notes without conducting a medical examination."

289. At [52] and [57], the CJEU reiterated the points cited at §286 above from *DvW,* and continued:

"58. While it follows from that case-law that 'the provision of medical care' must have a therapeutic aim, it does not necessarily follow therefrom that the therapeutic purpose of a service must be confined within an especially narrow compass (see, to that effect, *Commission* v *France*, paragraph 23). Paragraph 40 of the judgment in *Kügler* shows that medical services effected for prophylactic purposes may benefit from the exemption under Article 13A(1)(c). Even in cases where it is clear that the persons who are the subject of examinations or other medical interventions of a prophylactic nature are not suffering from any disease or health disorder, the inclusion of those services within the meaning of 'provision of medical care' is consistent with the objective of reducing the cost of health care, which is common to both the exemption under Article 13A(1)(b) and that under (c) of that paragraph (see *Commission* v *France*, paragraph 23, and *Kügler*, paragraph 29).

59. On the other hand, medical services effected for a purpose other than that of protecting, including maintaining or restoring, human health may not, according to the Court's case-law, benefit from the exemption under Article 13A(1)(c) of the Sixth Directive. Having regard to their purpose, to make those services subject to VAT is not contrary to the objective of reducing the cost of health care and of making it more accessible to individuals.

60. As the Advocate General correctly pointed out in paragraphs 66 to 68 of her Opinion, it is the purpose of a medical service which determines whether it should be exempt from VAT. Therefore, if the context in which a medical service is effected enables it to be established that its principal purpose is not the protection, including the maintenance or restoration, of health but rather the provision of advice required prior to the taking of a decision with legal consequences, the exemption under Article 13A(1)(c) does not apply to the service.

61. Where a service consists of making an expert medical report, it is clear that, although the performance of that service solicits the medical skills of the provider and may involve activities which are typical of the medical profession, such as the physical examination of the patient or the analysis of

his medical history, the principal purpose of such a service is not the protection, including the maintenance or restoration, of the health of the person to whom the report relates. Such a service, whose purpose is to provide a reply to questions set out in the request for the report, is effected in order to enable a third party to take a decision which has legal consequences for the person concerned or other persons. While it is true that an expert medical report may also be requested by the person concerned and may indirectly contribute to the protection of the health of such person, by detecting a new problem or by correcting a previous diagnosis, the principal purpose pursued by every service of that type remains that of fulfilling a legal or contractual condition in another's decision-making process. Such a service cannot benefit from the exemption under Article 13A(1)(c).

62. It follows that supplies of services such as those described in paras (d)-(h) of the question referred, although effected in the exercise of the medical profession, do not constitute “the provision of medical care” within the meaning of article 13(A)(1)(c). The purpose of such services is to provide expert reports concerning a person’s state of health and covering, in particular, the injuries or disabilities by which he or she is affected, in order to treat administrative applications, such as applications for the payment of a war pension, or for the purposes of court proceedings for compensation, such as claims for damages for medical negligence.

63. In relation to services consisting in the provision of medical certificates of fitness, for example certificates of fitness to travel as mentioned in para (c) of the question referred, it is necessary to take into consideration the context in which those services are performed in order to establish their principal purpose.

64. Where fitness certificates are required by a third party as a condition precedent to the exercise by the person concerned of a particular professional activity or the practice of certain activities requiring a sound physical condition, the principal purpose of the service effected by the doctor is to provide the third party with a necessary element for taking a decision. Such medical services are not intended principally to protect the health of the persons who wish to carry on certain activities and cannot therefore be exempt under Article 13A(1)(c).

65. None the less, where the purpose of a certificate relating to physical fitness is to make clear to a third party that a person's state of health imposes limitations on certain activities or requires that they are carried on under particular conditions, the protection of the health of the person concerned may be regarded as the principal purpose of that service. Therefore, the exemption under Article 13A(1)(c) may apply to such a service.

66. Considerations similar to those set out in paragraphs 63 to 65 of this judgment apply in relation to the services described in paragraphs (a) and (b) of the question referred. Where medical examinations and the taking of blood or other bodily samples are carried out with the aim of enabling an employer to take decisions on the recruitment of, or on the duties to be performed by, a worker or to enable an insurance company to fix the premium to be paid by an insured person, the services in question are intended principally to provide that employer or that insurance company with evidence on which to take its decision. Such services do not therefore come within the meaning of "provision of medical care" exempted under Article 13A(1)(c).

> 67. By contrast, regular medical checks at the behest of certain employers and certain insurance companies may satisfy the conditions for exemption under Article 13A(1)(c), provided that such checks are intended principally to enable the prevention or detection of illness or the monitoring of the health of workers or insured persons. The fact that such medical checks take place at a third party's request, and may also serve the employers' or insurance companies' own interests, does not preclude health protection being regarded as the principal aim of such checks."

290. At [68] and [69] of its judgment, the CJEU decided that items (a) to (c) of the questions referred were within the medical exemption, but the others were not.

Kyritz

291. The CJEU held in *Kyritz* that the medical exemption did not require that medical care "be supplied within the framework of a confidential relationship between the person providing the care and the person being treated" and that "to add such a condition is unwarranted in light of the objective of that provision of reducing the cost of medical care and making that care more accessible to individuals".

THE PARTIES' SUBMISSIONS AND THE TRIBUNAL'S JURISDICTION

THE PARTIES' POSITIONS OVER TIME

292. RPS asked the Tribunal to find that it had made a single standard-rated supply of OH services, being the provision of information and advice to its clients. HMRC's position was that RPS had made a single exempt supply of medical services. However:

(1) their positions changed significantly over time, particularly in relation to the single/multiple supply question;

(2) RPS accepted that some of its services were exempt and so fell outside the single standard-rated supply, namely the administration of vaccinations where these were supplied separately, and executive health assessments in all cases; and

(3) HMRC had initially accepted that pre-employment medicals, ergonomic assessments, laboratory services and administration charges fell outside the single exempt supply, and were standard rated. However, at the end of the hearing Ms Newstead Taylor submitted that these were a *de minimis* part of the single exempt supply.

Before the first hearing

The HIB decision

293. On 28 May 2010, HIB informed HMRC that it was providing a single standard rated supply, other than when it occasionally "administers vaccinations…outside of the customer's usual contractual arrangements" and when it "runs a separate service of health promotion".

294. On 21 October 2010, HIB said that its clients were purchasing "one service by choosing from a menu of services tailored to their needs" and "in most cases the client will not even be aware of the component parts of the service as what is required is determined by the [RPS] staff member", and that it would be artificial to split that service.

295. On 20 November 2010, Ms Jane Price of HMRC responded, saying:

> "it is not accepted that HIB is providing a single supply. What is apparent from the literature provided and from your letter is that clients get, in each case, a unique package of services tailor-made to their individual needs. So clients in effect get a unique aggregate of distinct separate services which they pick out from HIB's menu. It is therefore completely wrong to argue that we are trying to split artificially one supply down to its separate elements because the clients' focus is wholly on choosing what individual distinct services they want, not on some overarching supply."

296. There is then a gap in the correspondence which lasted over two years. On 25 March 2013, RPS asked HMRC to review the position on the basis that all services were standard rated, other than executive health assessments which were exempt. RPS noted that HMRC accepted that the following services were correctly classified as standard rated:

(1) pre-employment medicals;

(2) medicals for determining the entitlement to join a pension scheme;

(3) ergonomic assessments;

(4) laboratory services; and

(5) administration charges.

297. Ms Price responded by sending RPS a copy of the earlier correspondence, including her letter of 20 November 2010. On 16 May 2013, RPS wrote again, attaching sample contracts, and saying that they now also accepted the provision of physiotherapy services was exempt.

298. On 22 July 2013, Ms Price asked RPS to confirm that it accepted it was making separate supplies and not a single multiple supply. On 9 December 2013, RPS said that the question was "not relevant" as "all the HIB services were fully taxable".

299. On 18 March 2014, Ms Price pointed out that RPS had already accepted that executive health assessments were exempt, and that the single/multiple supply issue would therefore "clearly" need to be addressed, but that there was "no mileage to be gained by considering this any further at this stage". She went on to say that apart from medicals to determine entitlement to join a pension scheme, and possibly pre-placement assessments, HMRC's position was that the other services were exempt. This letter is the first of the two decisions under appeal to this Tribunal.

300. On 16 April 2014, Mr Fleming of KPMG wrote a detailed letter to HMRC, saying that all RPS's services were standard rated, other than medicals to determine entitlement to join a pension scheme and pre-employment medicals. He agreed that "at this stage" the single/multiple supply question "does not need to be progressed".

301. On 12 July 2014, Ms Price's decision was upheld on review. RPS appealed to the Tribunal on the basis that HMRC had wrongly classified as exempt some of "the wide range of services" provided by RPS; instead "each of the services are taxable".

302. On 28 July 2014, KPMG appealed to the Tribunal on behalf of RPS. The grounds of appeal listed five types of service, and ended by saying "each of the services are taxable supplies of consultancy services". On 23 September 2015, HMRC submitted their Statement

of Case, which asked the Tribunal to conclude that "the relevant services all fall within the scope of the medical exemption" and that Ms Price's decision should be upheld.

The BHC decision

303. Meanwhile, on 9 February 2015, a meeting had taken place between KPMG and HMRC, during which KPMG explained why they considered RPS (ie, both BHC and HIB) to be making a single supply; they subsequently provided HMRC with a copy of the PowerPoint presentation used at the meeting. The nub of KPMG's argument was that RPS provides the customer with the information required to make decisions in respect of their employees, and it would be artificial to split (a) that information and (b) the monitoring and assessments from which the information was derived.

304. On 9 June 2015, Mr Neil Parkes of HMRC wrote to RPS, stating that HMRC now accepted that BHC had made a single supply, but that in their view it was a single exempt supply of medical services, not a single standard rated supply of advice**.**

305. After some further correspondence, Mr Fraser of HMRC issued his decision on 26 May 2017, stating that "the principal element of the supply is the provision of healthcare" and this was exempt. On 21 June 2017, KPMG appealed to the Tribunal on behalf of RPS, submitting that "each of the services are taxable supplies of consultancy services, none of which falls within the medical exemption".

306. On 13 October 2017, HMRC submitted their Statement of Case, which had been drafted by Mr Ewan West of Counsel. It says**:**

> (1) RPS had previously appealed the HIB decision concerning "five categories of supplies", which he defined as "the Relevant Supplies";
>
> (2) HMRC have now made this second decision that "in substance the supply of occupational health (comprising the Relevant Services) by BHC is to be treated as an exempt supply".

The position at this stage

307. As can be seen from the above summary that the position was far from clear:

> (1) the HIB decision, the grounds of appeal and the Statement of Case all refer to there being separate supplies, but neither party focused on the single/multiple supply issue;
>
> (2) the BHC decision refers to a single supply, but the grounds of appeal say that "each of the services are taxable supplies"; and
>
> (3) the BHC Statement of Case:
>
> (a) refers to "five categories of supplies" and
>
> (b) also seeks to treat the two decisions as essentially the same.

The first hearing

308. The hearing was listed for three days, to begin on 26 February 2019. However, events did not unfold as expected.

RPS's skeleton argument

309. On 8 February 2019, RPS's skeleton argument was filed and served. It stated that:

> "The Appellants, contrary to their position adopted in the previous correspondence, are now in agreement with HMRC that the supplies should properly be recognised as multiple supplies[2] which, in consequence, each fall to be analysed separately."

310. Later in the skeleton Ms Brown said "it appears to be common ground that the services fall to be analysed separately in this appeal". On the same day, KPMG filed and served a Notice stating that RPS wished to amend their grounds of appeal, on the basis that they now accepted that workplace vaccinations were exempt.

311. On 13 February 2019, HMRC's Solicitor's Office wrote to KPMG, expressing astonishment at this change of position; pointing out that it had been RPS which had consistently argued that it was making a single supply, and that HMRC had been persuaded of this following the meeting on 9 February 2015. Their letter continued:

> "This issue of whether the services in dispute fall to be considered as a single supply or multiple supplies is key to the appeal. The Appellants now purport to completely change the basis of their case (and the agreed position) by way of an assertion in their Skeleton Argument and by seeking to amend their grounds of appeal to remove workplace vaccinations."

312. HMRC invited RPS to revert to its original position, or to seek to agree how the matter should be addressed "given that the parties' pleadings would need to be amended to address the single/multiple supply point, the need for further disclosure would need to be considered and that further evidence may need to be served", and that as a result an adjournment was the only reasonable course. HMRC also objected to the application to amend the grounds of appeal, because consenting "would effectively mean the Respondents agree that the services in issue fall to be considered separately as multiple supplies".

313. On 14 February 2019, KPMG replied, accepting that the parties had previously agreed RPS was making a single supply, but saying that they had both recognised each of the services would need to be considered separately. KPMG went on to confirm that RPS's position was now that "the tax liability of each of the Relevant Services should be determined on a stand-alone basis", and that the Tribunal no longer had to consider workplace vaccinations. KPMG suggested that the Tribunal could approach its judgment by considering each of the services separately, and if it agreed with one party or the other that they were all exempt, or all standard rated, there would be no need to address the single/multiple supply point.

314. On 18 February 2019, HMRC notified the Tribunal that it would be applying to vacate the hearing to allow for consideration of its position in the light of RPS's change of position. On the same day, HMRC wrote to KPMG saying:

> "The basis on which the Appeals have been litigated has now changed and the Appellants must adequately set out their case by amending their pleadings. Any hearing that does not deal with the single/multiple supply position, now that it is in issue, cannot be the correct approach to the issues."

315. On 19 February 2019, KPMG applied to the Tribunal:

[2] This reference to "multiple supplies" was to separate single supplies, as is clear from what follows. At various points during the hearing, the same phrase was used with the same meaning.

(1) objecting to the proposed vacation of the hearing on the basis that RPS wanted to draw this issue to a close, and noting that the dispute had been running for nine years;

(2) asking "to revert to the position that the supplies [RPS] make[s] form a composite single supply" and in consequence to amend their skeleton argument to reflect the single complex supply position;

(3) withdrawing their application to amend the grounds of appeal, and

(4) stating that it would now contend that the supply of vaccinations was ancillary.

316. HMRC did not object to RPS reverting to its previous position, and on 25 February 2019, RPS filed and served an amended skeleton argument on the basis that it was making a single supply of standard-rated services.

During the first hearing

317. At the first hearing the Tribunal expressed disquiet at the Appellants' changes of position. In particular, we noted that RPS's reversion to the "single supply" approach appeared to be driven by its wish to deal expeditiously with the hearing rather than by a change of view. Ms Brown said that RPS "didn't care" whether there was a single supply, or multiple supplies, and that the single/multiple issue was "a red herring", which might in any event be resolved through witness evidence.

318. Ms Newstead Taylor disagreed, saying:

(1) the single/multiple issue had to be determined before it was possible to consider whether the supply or supplies was exempt or standard rated;

(2) she could not resolve the single/multiple supply issue only by cross-examination;

(3) RPS's amended skeleton argument was not completely clear on the Appellants' position;

(4) it was not in the interests of justice to continue with the hearing if there was doubt over the point; and

(5) if the single/multiple supply point was now in issue, HMRC may want further disclosure.

319. Ms Brown denied that there was any continuing cause for HMRC to be concerned and submitted that if the parties agreed that there was a single supply, that was the only issue before the Tribunal, which then had no jurisdiction to consider the single/multiple supply question.

320. After a short adjournment the Tribunal decided it was not in the interests of justice to continue with the hearing when RPS had changed its position twice on the single/multiple supply point, only reverting back to a single supply to prevent the hearing being vacated. We agreed with Ms Newstead Taylor that the single/multiple question was likely to be a precursor issue, and that the parties needed to have adequate time to consider whether they remained of the view that RPS was making a single multiple supply, or many separate single supplies.

321. We adjourned the hearing with directions ("the February Directions"), which included the following:

(1) HMRC was to identify any further evidence which they wanted RPS to disclose in the context of considering the single/multiple supply issue, and RPS was to disclose any evidence relevant to that issue, including any documents or information reasonably requested by HMRC;

(2) RPS and HMRC were then each to confirm whether they were making a submission that RPS was making multiple supplies and if so, whether that submission was in the alternative; and

(3) if necessary and appropriate, the parties were to file and serve amended skeleton arguments and Bundles.

After the first hearing

322. On 14 March 2019, HMRC wrote to KPMG asking for:

(1) disclosure of "any marketing or promotional material (or similar documentation and correspondence) and invoices" for the services supplied to Siemens, FoodCo, Saipem, and UK Coal; for contractual documentation relating to Saipem and any further contractual documentation in relation to UK Coal, so that, together with the documents already in the Bundles, RPS would have disclosed "a full set of documentation (contracts, any addendums, agreements, marketing/promotional material or correspondence and invoices)" in respect of those four clients; and

(2) a list of "all distinct and independent supplies" being provided to clients, and whether any were ancillary or incidental, with reasons as to why a service was a "distinct and independent supply" or otherwise.

323. On 29 March 2019, Ms Brown wrote to HMRC, stating that RPS's position was that it was making a single supply of standard rated services, and that further documents would be provided. Those documents were served on HMRC and then filed with the Tribunal. Of the disclosure requested by HMRC, RPS provided the following:

(1) In relation to Siemens: The Extension to the Framework, two invoices (but as noted at §157 above, without the attached detail) and a two page document created by RPS for Siemens, called "a Guide to Occupational Health". The Bundles for the First Hearing had already contained the Framework and the Amendment. RPS therefore did not provide the requested marketing information, and the invoices were incomplete.

(2) In relation to FoodCo, no further information was provided. The Bundles for the First Hearing contained the contract between RPS and FoodCo, and RPS did not provide marketing material or invoices HMRC had requested.

(3) In relation to Saipem, a schedule listing 36 invoices dated 29 January 2016, and one of those invoices. In addition, RPS provided the booklet created by RPS for Saipem's employees, which explains the services in detail and runs to 70 pages. We noted that from the correspondence between the parties that on 9 February 2015, RPS had previously provided HMRC with a presentation given to Saipem, although that document was not in the Bundles provided for the hearing.

(4) In relation to UK Coal, the extension contract for calendar year 2011 and a related invoice for one month of services provided under that contract**.** RPS had already

provided the 2005 contract, the 2013 contract and the 2014 contract. The requested promotional material was not provided.

324. RPS also supplied the following additional material for which disclosure had not been requested:

(1) in relation to SportCo: ITT, the tender, the presentation and the contract together with a pricing table, an invoice and the attached analysis; and

(2) in relation to TransportCo: the ITT, the tender, the presentation and the contract, together with an invoice including the detailed "load file" setting out the services and their costs, and a document containing advice**.**

325. On 18 April 2019, HMRC notified the Tribunal and RPS that no further documents were required. On 24 May 2019, in compliance with the February Directions, HMRC wrote to KPMG to say they remained of the view that there was a single supply of exempt medical services and were not making a submission in the alternative. They asked KPMG to clarify whether RPS was making a submission in the alternative. On 7 June, KPMG responded, saying:

> "if the Tribunal (on its own motion and contrary to the submissions of the parties) determines that the Appellant makes multiple supplies, the Appellant's position is that every individual referral, medical, surveillance test and vaccination undertaken by the Appellant on the instruction of a client must be an independent supply. It will then be necessary for the Tribunal to determine the liability of each such supply...However, that exercise will essentially follow the framework of the parties' respective skeleton arguments to date. The tribunal will need to determine the liability of referrals, each type of disputed medical (HMRC have already accepted pre-employment medicals are taxable, the Appellant has accepted that executive medicals are exempt), and, in theory, each of the health screening tests. In the latter case, however, the Appellant considers that the Tribunal's approach can be relatively generic as the screening tests all objectively serve the same purpose and will therefore all be either exempt or taxable…"

JURISDICTION TO DECIDE SINGLE/MULTIPLE SUPPLY ISSUE

326. As is clear from the foregoing analysis, the parties' positions on whether RPS was making a single multiple supply changed significantly over time. In addition, both parties always accepted that there were exceptions to that single supply. Those exceptions were initially expressed as falling outside the single supply; by the end of the hearing, we were asked to treat them as ancillary to, or as a *de minimis* part of, that single supply.

327. The Tribunal was concerned about this issue throughout the hearing. However, the parties' view was that once they had jointly agreed there was a single supply, we had to proceed on that basis, because in an adversarial system the Tribunal has no jurisdiction to decide an issue which was not in dispute.

The nature of the Tribunal's jurisdiction

328. We identified a small number of authorities on whether the Tribunal (or a court) can take a position not adopted by either of the parties, and we referred the parties to *Ulster Metal*

Refiners v HMRC [2017] NICA 26, which discussed and distinguished *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041 ("*Al-Medenni*").

329. In *Al-Medenni*, the claimant's case at the employment tribunal had been that he had been injured because of the negligence of a particular named employee. The judge found for the claimant on the basis that the injury had been caused by a different, unnamed employee. The Court of Appeal held that the tribunal had no jurisdiction to decide the case on the basis of this "third man" theory. Lord Dyson, giving the only judgment with which Brooke and Tuckey LJJ both agreed, said at [21]:

> "It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness."

330. In *Ulster Metal*, the Court of Appeal in Northern Ireland considered that judgment in the context of an MTIC, where the FTT had decided that the appellant had carried out a different type of MTIC fraud from that pleaded by HMRC. At [41] McBride LJ, giving the judgment of the Court, said *Al-Medenni* does not lay down:

> "a general principle that a tribunal can never find for a claimant on the basis of a 'third man theory'. Rather we are satisfied that it is open to a tribunal or court to raise a 'third man theory' when there is evidence or material before it to support such a theory."

331. He continued at [43]:

> 'When a tribunal wishes to find for a claimant on the basis of a 'third man theory' there are a number of steps that it must take to ensure that the defendant is afforded a fair trial. In particular it must inform the parties clearly of the 'third man theory' and then afford to the parties sufficient opportunity to respond to the new case and if necessary permit an adjournment to allow the parties time to make decisions about what further investigations they should carry out, what further evidence or disclosure they should seek, what further witnesses they should call and what further submissions they should make. These steps are essential and central to meeting the requirement of a fair hearing as they ensure the party has an opportunity to know exactly the case he has to meet and an opportunity to meet it."

332. In *Tower M'Cashback v HMRC* [2011] UKSC 19 at [15], Lord Walker approved this passage from the High Court judgment of Henderson J, as he then was, see [2008] EWHC 2387 (Ch) at [115]:

> "There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of

> the duties of the commissioners[3] in exercise of their statutory functions to have regard to that public interest."

333. Ms Brown also alerted us to the helpful case of *General Motors UK v HMRC* [2015] UKUT 605 (TCC) ("*GMUK*") (Henderson J and Judge Sinfield) where one of the grounds of appeal was that the FTT had misdirected itself by finding for the appellant on the basis of a calculation methodology not put forward by either party. The UT held at [68]:

> "The FTT were not, however, confined to choosing whether to accept or reject Mr Robinson's model[4] in its entirety. So far as they could properly do so, it was their duty (applying their own expertise as a specialist tribunal) to ascertain the true amount of VAT (if any) which GMUK had overpaid. This result could be achieved either by the FTT performing the appropriate calculations itself, or by stating the principles by reference to which they considered the calculation should be made. In performing this task, the FTT had to act with procedural fairness, and there had to be a proper evidential foundation both for their findings of fact and for their conclusions. But their preferred solution did not have to be one for which either side had specifically contended, either before or in the course of the hearing."

334. At [69] of *GMUK* the UT referred to *C&E Commrs v Pegasus Birds Ltd* [2004] EWCA Civ 1015 ("*Pegasus Birds*"), where Carnwath LJ said at [38] that "The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer", and Chadwick LJ had stated that "the underlying purpose of the legislative provisions [was] to ensure that the taxable person accounts for the correct amount of tax". The UT in *GMUK* found that this was a principle "of general application", and was not confined to "best judgment" cases such as *Pegasus Birds.*

Our conclusion

335. *Tower* concerns direct tax, but in our judgment the basic principle must be the same when considering VAT. The Tribunal has to have regard to the public interest, and for that reason cannot decide an appeal on a basis which it considers to be wrong in law, even though both HMRC and the taxpayer are in agreement on the point.

336. In accordance with the authorities cited above, we find that the Tribunal can take a different view from both parties, if that answer is correct in law given the facts as found. However, the Tribunal must act fairly, and afford the parties the opportunity to deal with the issue; this may include the offer of an adjournment, see *Ulster Metals* and *GMUK* cited above.

Application to this appeal

337. Both parties were made aware of our continuing concerns about the single/multiple supply. The first hearing was adjourned with directions for the parties to consider that point. Although both then proceeded on the basis that there was a single multiple supply, their new skeleton arguments covered the issue and explained why they each considered RPS was making a single supply.

[3] The words "the commissioners" is a reference to the commissioners of income tax, so now the Tribunal
[4] Mr Robinson had provided the model on which the appellant had relied.

338. When the hearing resumed in July 2019, we said that although we had not yet been taken to most of the evidence, and had not come to any conclusion on this issue, we remained concerned. We offered the parties a further adjournment, and said that if this was refused, we would note the parties' positions in our judgment and that they had made no submissions in addition to those in their skeletons. We told the parties that we might give judgment in the alternative, noting that our role was "to make a legally correct decision"**.** We made a similar comment on the final day.

339. In our view, we acted with procedural fairness. The parties had been given one adjournment, and offered a second; they had covered the issue in their skeleton arguments, and although detailed submissions were not made during the hearing, both Counsel often returned to the point in the course of the hearing, and the Tribunal frequently made them aware that the issue remained live.

The evidence

340. Both parties reminded us that, following the issuance of the February Directions, HMRC had asked for further evidence, only some of which had been supplied. They submitted that, in the absence of that evidence, the Tribunal may not be in a position to decide whether individual services were exempt or standard rated.

341. We disagree, because:

(1) RPS was originally content to argue that it was making separate single supplies on the basis of the evidence before the Tribunal at the first hearing. We subsequently had the benefit of the extensive new evidence (running to over 500 further pages) provided for the second hearing. Having been served with that evidence, and before RPS confirmed whether it was running a "separate supplies" argument in the alternative, HMRC said no further documents were required.

(2) RPS provided some of the evidence requested by HMRC following the February directions, and added further documents of a similar type and nature.

(3) The documents RPS did not supply were marketing material and invoices. The Bundles contained several examples of the former, and Mr Latter agreed that RPS had consistently marketed itself on the basis that the services it was providing would protect and promote the health and welfare of its clients' workforces. They also supplied a number of invoices, and although some of this evidence was redacted or incomplete, it was sufficient to show how clients were billed for the services provided.

(4) The Tribunal was provided with a very large volume of evidence, both written and oral. The five Bundles contained over 1,400 pages; there were four witness statements, and the three witnesses (Ms White replacing Ms Snagg) were cross-examined over two days. With submissions, the hearing lasted seven days.

Conclusion

342. For the reasons set out above, we decided we had jurisdiction to decide the single/multiple supply issue on the basis of the submissions and the evidence before us, and that we were able to make sufficient factual findings to decide the classification of each of the separate single supplies.

MS BROWN'S SUBMISSIONS

The skeleton argument

343. In her skeleton argument, Ms Brown said:

> "the Appellants offer to undertake a series of activities selected by the client which, when taken together, represent the provision of information and advice provided to the client employers to facilitate effective workforce management…the component elements/activities are indissociable and inseparable."

344. She divided the "component activities underlying the supply" into "SAM, medicals/assessments, screening/surveillance and manual handling training". She said that the provision of executive medicals was exempt, as was the supply of vaccinations when provided as a stand-alone service (as had been the position with Land & Marine, see §115(1))

Ms Brown's oral submissions in opening

345. In opening, Ms Brown followed her skeleton, saying there was a single supply of "information and advice…starting from, in many instances, the high level risk assessment that needs to be taken, all the way through to the monitoring and surveillance that is part of the overall management of workforce", but that executive medicals were exempt because they were "not a supply to the employer; it is to the employee paid for by the employer".

346. She also said that RPS was making **"**a single supply that consists of a number of core elements which are of equal status and a number of ancillary elements", and that there was no single predominant element. She submitted that the *Levob* predominance test had two variants: that in *Deutsche Bank/Baštová* and that in *Mesto/Metropolitan.* She said that *Deutsche Bank* was a new departure in EU case law, so that where there was a single supply made up of two elements which were equally predominant, one of which was exempt and one of which was not, the single supply could not be exempt. Applying that analysis, she submitted that there were three "core elements" to RPS's single supply, being SAM, fitness to work assessments and health surveillance, all of which were on an "equal footing" and that "everything that is not one of those three core element is irrelevant in determining the liability of the supply" and is ancillary.

Ms Brown's Reply

347. In Reply, Ms Brown spent some time setting out the parameters of what she said were the three core elements. Our understanding is that her position was as follows:

(1) Within SAM she included:

(a) all advice about adjustments to the employee's work environment, and the medicals which take place as part of that process; and

(b) pre-placement declarations and questionnaires (even though these did not concern the management of sickness)**.**

(2) Within "fitness medicals" she included statutory medicals, other medicals and pre-placement/pre-employment medicals, and also drug/alcohol testing and the medical advice line. She said that the key factor with all of these was that they were "stop/go decisions".

(3) Under "health surveillance" she did not include any test for which the outcome was a "fit to work" certificate, including the statutory medicals.

348. Ms Brown ended by saying that "there are three clear groups [which] can be interwoven with each other".

Other points

Submission on disability and equality law

349. At the very end of the hearing, during her Reply, Ms Brown submitted that the requirement on employers to make "adjustments" for particular employees was derived not from H&S law, but from the Equality Act 2010, and that the purpose of that legislation was not the protection of employee health. As we understand her case, she was seeking to position SAM, one of her three core elements, as being for the purpose of complying with the Equality Act, rather than to protect employees' health under the HSWA and related regulations.

350. Ms Newstead Taylor objected, saying that it had not been part of Ms Brown's submissions until that point; that the relevant legislation had not been included in the Bundle, and that HMRC had no notice of the point and been unable to consider it.

351. We agree that this is a new point, because:

(1) Ms Brown's only previous reference to the Equality Act in the context of avoiding discrimination when making offers of employment; that was when she was taking the Tribunal through the documents, including the RPS Guide supplied to client's managers which discusses that point, see §219.

(2) the other evidence contained only passing references to the Equality Act in the context of SAM:

(a) Ms Snagg's witness statement, adopted by Ms White, which had said that OH practitioners would consider a number of factors when making recommendations following a SAM consultation; she gave six examples of possible factors, one of which was "whether the Equality Act might apply".

(b) Mr Latter was cross-examined on whether RPS gave medical advice, and as part of his response offered "a scenario" where an employer might refer an employee for SAM, to be sure there was no underlying medical problem, so as to avoid a potential unfair dismissal claim based on a failure to comply with the Equality Act.

(c) Ms Brown had taken us to a single reference in the Siemens documents which (among many other recommendations) advised managers to "be aware of any requirements under the Equality Act to make reasonable adjustments" in the context of SAM.

(3) In addition, Mr Brown said in his oral evidence that Siemens found "the Equality Act not particularly relevant" in the context of their OH provision.

352. We also agreed with Ms Newstead Taylor that it was too late for Ms Brown to raise this new submission. Had it been included in her skeleton, or in her opening, Ms Newstead Taylor would have had the opportunity to cross-examine the witnesses.

353. It would not in any event have made any difference to the outcome of this appeal. It was clear from the evidence, and formed the basis of our findings of fact, that SAM's main purpose was to support employees' recovery from health problems.

Confidential relationship

354. Ms Brown had submitted that medicals and consultations were supplied "to the employer and not the employee and so [are] outside any confidential relationship". However:

(1) we have found as a fact (see §111) that RPS's OH practitioners owed a duty of care to the employees, and that the relationship between them and the employees was confidential; and

(2) in any event, a confidential relationship is not a precondition for the medical exemption to apply, see *Kyritz* issued on 18 September 2019.

355. In the light of *Kyritz*, Ms Brown accepted at the end of the hearing that this submission could not succeed.

Other

356. For completeness we add two further points:

(1) Although RPS occasionally subcontracted its services, Ms Brown did not seek to argue that the use of third parties made any difference. We have in any event found as facts that the clients' only contract is with RPS and they are billed by RPS for these services. There would have been no basis for such a submission.

(2) It is clear from the case law that the objective of the medical exemption is to reduce the cost of health care and to make it more accessible to individuals, see *Commission v France.* Ms Brown did not seek to argue that RPS's supplies were outwith the exemption because they were supplied to employers. Ms Newstead Taylor pre-emptively drew our attention to *City Fresh v HMRC* [2015] UKFTT 364 (TC) where the FTT (Judge Short and Mr Coles) held at [36] that "the legal form of the person providing medical care is not relevant, neither is the fact that the recipient is not the final patient; there is no need for supplies of medical care to be made direct to the final patient". We agree. It forms no part of the relevant test either in the statute or the case law.

MS NEWSTEAD TAYLOR'S SUBMISSIONS

In the skeleton argument

357. In her skeleton argument Ms Newstead Taylor submitted that there was a single supply made up of five components:

(1) sickness absence management;

(2) medicals;

(3) health surveillance checks;

(4) manual handling training; and

(5) vaccinations.

358. These were the five supplies listed in the HIB decision, and referred to as "the Relevant Services" in BHC's Statement of Case. Ms Newstead Taylor's submission was then expanded as follows:

> "These five generic components can be further divided into individual components, for example, medicals cover a range of medicals and health surveillance covers a range of health checks…[and] the components of the OH Services are not dependent on each other in order to be delivered. They could be supplied separately and the customers are free to choose which of the components they require at any given time."

359. Ms Newstead Taylor said RPS was nevertheless was not making separate single supplies. The typical consumer wanted a supply of OH services and the separate elements formed "objectively, a single, indivisible economic supply, which it would be artificial to split", see *Levob.*

Opening oral submissions

360. In her opening oral submissions, Ms Newstead Taylor relied on the "predominance" test in *Mesto.* This was not a change of position from her skeleton argument, as the UT in *Metropolitan* had said that test was "essentially what had already been decided in *Levob*". She disagreed with Ms Brown's submission that there were two separate lines of authority, namely that in *Deutsche Bank/Baštová* and that in *Mesto/Metropolitan,* Ms Newstead Taylor said that the former were simply applications of the *Levob* test and had not introduced a new legal principle.

361. She accepted that "pre-employment medicals and medicals for determining the entitlement to join a pension scheme are standard rated", but asked for time to take instructions on ergonomic assessments, laboratory services and administration charges, all of which HMRC had previously agreed in correspondence were standard rated.

The final day

362. On the last day of the hearing, as Ms Newstead Taylor brought her submissions to a close, her position changed: she submitted that the "predominant element" was "on-site OH provision" which included provision in mobile units**.** She acknowledged that this was a new argument. The Tribunal asked for clarification, and she asked for a short adjournment. The argument was then withdrawn.

363. Ms Newstead Taylor also put forward a further new analysis, namely that SAM was the predominant element because**:**

(1) unlike some other elements, it was not sector specific but instead a "universal" requirement, because every client had employees;

(2) Ms White had said that 30% of the dashboard bookings were for SAM, so this was quantitively the most significant; and

(3) SAM was also more time consuming and expensive than, say, fitness medicals because SAM can continue for a number of months.

364. We noted that although Ms Brown had also included SAM as one of her three core elements, she had placed medicals, pre-placement declarations and questionnaires under that heading, whereas Ms Newstead Taylor had excluded all three.

365. Ms Newstead Taylor submitted that none of the other elements could be predominant, because:

(1) although medicals were important, they could not be the "predominant" element because they were "sector specific" and because they were cheaper than SAM;

(2) in reliance on Ms White's dashboard, it followed that total spend on medicals combined with health surveillance was also 30%, but this could not be the predominant element because:

(a) it was a combination of two separate services, health surveillance and medicals;

(b) many health surveillance tests were relatively low cost; and

(c) the tests varied between different clients;

(3) none of drug/alcohol testing, physiotherapy, vaccinations or manual handling training were significant enough to be predominant; and

(4) the services HMRC had previously accepted were standard rated, namely pre-employment medicals, medicals for determining the entitlement to join a pension scheme; ergonomic assessments, laboratory services and administration charges, would be standard rated if sold alone, but otherwise were *de miminis* and/or qualitatively unimportant.

366. Ms Newstead Taylor also submitted that the case could, in the alternative, be decided based on the "overarching" test referred to in *Metropolitan*, saying **t**hat "the overarching characteristic of the appellants' supply of OH services is for the protection of health of employees"; this was the view of the "typical consumer" and "the economic reality".

THE TRIBUNAL'S VIEW

APPLICATION OF THE CASE LAW TO THE FACTS OF THE CASE

367. In *CPP* at [29], the CJEU said that the starting point was to establish "the essential features of the transaction" to determine whether the supplier is making "several distinct principal supplies or a single supply", and to do so recognising that "every supply of a service must normally be regarded as distinct and independent". In *Levob* the Court said that when those "essential features" are identified, there will be a single supply if "two or more elements or acts supplied by the taxable person to the customer…are so closely linked that they form, objectively, a single, indivisible economic supply".

368. In the next part of this Decision, we set out the essential features of the transactions entered into by RPS and then consider whether they are a single multiple supply or several separate single supplies. In summary, we found that:

(1) where RPS provides an OH practitioner to deliver a range of services for a fixed price from an onsite or mobile clinic, this is a single multiple supply;

(2) otherwise, RPS is providing separate single supplies on a bespoke basis.

369. Our explanation as to why we have not accepted the position of either party is set out in the next part of our Decision.

On-site/mobile provision of a range of services for a fixed fee

370. RPS contracted to supply many clients with on-site OH practitioners operating from a fixed base at the client's site(s), or from a mobile unit. The practitioners provide a range of agreed services for a fixed daily or half-day rate. For example:

(1) SCA Hygiene: OH Nurse for 2 days a week for 47 weeks a year, for a fixed annual fee.

(2) Celanese Acetate: OH nurse for two days a month, to provide a range of services for a fixed annual fee.

(3) Crown: a specific named OH Adviser, to provide annual health surveillance and sickness management charged at an annual fee calculated based on a daily rate for 24 days.

(4) UK Coal: in the first contract, three OH physicians and 12 OH nurses providing a wide range of services for a fixed annual fee; the range of services was reduced in the second contract and again in the third, with RPS then supplying one OH nurse for three half day sessions a week, and one physician once a month.

(5) SportCo: RPS provided an onsite mobile unit at a daily rate and an onsite OH Adviser at a daily rate, to provide a range of services, including health surveillance and vaccinations.

(6) PSA: RPS offered to provide PSA with an OH Assistant for five days a week, 47 days a year, for a fixed price, with additional days at a daily rate. The tasks were not specified in the documentation, but they did not include health surveillance, as this was the role of an OH technician, and was separately priced.

(7) Siemens: although the Siemens main contract provided a structure within which many separate services could be supplied (see further below), by the Amendment, RPS provided a named PH physician, Mr Kapoor, for "additional services" at a fixed day rate for a minimum of 63 days in 2015, and 50 days in 2016; these services included the provision of medicals/surveillance/referrals at local Siemens sites.

371. As is clear from the findings earlier in our decision, and as summarised above, there was no separation of individual OH services in the above contracts by type or volume or price. A range of different services were provided, including medicals, health surveillance, vaccinations and SAM. The typical customer wanted an single service made up of a number of elements, for which a single price was paid.

372. Although the facts are clearly very different, the position is essentially that set out in *Mesto,* where the CJEU held that:

> "if, as in this case, the only type of entrance ticket offered for the aquatic park gives access to all of the facilities, without any distinction according to the type of facility actually used and to the manner and to the duration of its use during the period of the entrance ticket's validity, that fact constitutes a strong indication of the existence of a single complex supply"

373. Here, the typical consumer paid an agreed price for a mixture of services, without any distinction as to the type of service actually used or to the manner or duration of that use, within the day or half-day for which the consumer had paid to access the services. This comprised a single service from an economic point of view and should not be artificially split. The fact that

RPS was, in other circumstances or under other contracts, willing to supply the different elements separately does not change that answer: it was also the position in *Deutsche Bank*, see [42] of that judgment.

The use of premises

374. We did not overlook the fact that in some cases, the supply also included equipping a room or providing a mobile unit from which the OH practitioner provided services. For example:

(1) UK Coal: RPS provided the OH centre at the Mansfield Woodhouse site, and equipped it as necessary to carry out the examinations and surveillance; it also provided a mobile X-ray unit and a second mobile unit to carry out health surveillance;

(2) SportCo: the majority of services were delivered on site either by using available space or via mobile units, which RPS was required to provide;

(3) Lewisham: the provider was required to pay for a location equipped to supply the OH services to the employees.

375. The provision of the premises, and/or the equipping of premises, are minor elements of the single complex supply. It would be entirely artificial to split out these elements and treat them separately. The typical customer is purchasing a single service of OH for a single price, and the premises/mobile unit is clearly not the predominant element.

Additional services

376. Where a client has contracted with RPS to be provided with (a) the services of an on-site or mobile OH practitioner to deliver a range of OH services; and (b) additionally has has the option of being supplied with specifically identified and priced extra services, those extra services are not part of the single supply. The typical consumer would regard these as separate, optional and where selected, additional. For example:

(1) UK Coal's third contract was for an OH practitioner for 2 days a week, but HAVS assessments, physiotherapy, counselling, ill-health retirement and management referrals were each separately ordered and charged on a usage basis. These were clearly additional;

(2) RPS offered to provide PSA with off-site services, including drug/alcohol testing and vaccinations, in addition to the on-site services, but any such off-site services were separately priced; and

(3) TransportCo had the option of receiving further services, including ECGs, lung function and blood pressure tests. These were not part of the service provided by the mobile unit, see Schedule 4 of the contract at §145.

Conclusion

377. We find that the typical consumer received a service consisting of one or more practitioners to deliver a range of OH services for a fixed price and that the single composite supply could also include a room or a mobile unit and the related equipment.

The bespoke services

378. Apart from the single supply of onsite/mobile services for a fixed price, RPS does not provide a single indivisible multiple supply to all clients; instead, it offers and supplies a

bespoke basket of separately identified and separately priced services. This is clear from our findings of fact, which we summarise here:

(1) Some clients require only a single service (Land and Marine – tetanus vaccinations; PSA – medicals for pension schemes; Carillion – drug and alcohol testing).

(2) Others require a small number of services (PHS – medicals and health surveillance for selected employees).

(3) As discussed in the immediately preceding section of this Decision, some clients who were supplied with on-site/mobile service also require bespoke additional services for a separate charge (SCA; Celanese Acetate, Crown and UK Coal). For example, Crown was provided with health surveillance and sickness management as part of the onsite single supply, but executive medicals, manual handling physio and lab costs were separately supplied and priced.

(4) Some clients required a wider range of services provided in different ways, see the detailed findings for SportCo, TransportCo, FoodCo, Siemens and Saipem. The tender documents explicitly state that all the services are "bespoke" and "flexible" and based on the client's needs and requirements. RPS's tender for PSA work said that this was "to meet complex challenges in unique work settings or to meet disparate geographical needs" because "the hazards and risk profiles for each company will be quite different". Although many clients are provided with medicals, health surveillance and SAM, these are selected on an item by item basis by the clients. For example, RPS could not supply any service whatsoever to Siemens until it received a specific Purchase Order.

379. The typical customer therefore has "the ability to choose…whether or not to be supplied with an element"; this "a genuine freedom…which reflects the economic reality of the arrangements between the parties". The UT in *Middle Temple* said this was an important factor in determining whether there was a single supply or several independent supplies, and that this conclusion would be further supported if there was separate invoicing and pricing, as is the case here, see [60(10) and (11)].

380. Although the UT also said the ability to choose and separate pricing were not "decisive", the separate elements are offered as individual services by RPS and purchased as such by the typical consumer: there is nothing here to displace the rule that "every supply must normally be regarded as distinct and independent". Apart from the onsite/mobile services provision, no essential features are "so closely linked" that it would be artificial to split them.

The separate supplies

381. Based on our findings of fact, we find that RPS makes the following separate single supplies:

(1) Diagnostic tests for:

(a) illegal drugs/or alcohol;

(b) various medical conditions, including TB, HIV, hepatitis and polio, each individual and separate;

(c) HAVS Tiers 4 and 5;

(d) X-rays for lung conditions.

(2) Vaccinations.

(3) Travel health advice where provided and charged separately from vaccinations.

(4) Supplies of the following types of treatment:

  (a) first aid;

  (b) physiotherapy;

  (c) cardiologists; and

  (d) drug/alcohol treatment.

(5) Health surveillance.

(6) New employee questionnaires.

(7) New employee medicals.

(8) Pre-placement questionnaires.

(9) Pre-placement medicals.

(10) Statutory or "other" medicals linked to health surveillance.

(11) SAM.

(12) Manual handling training.

(13) Executive health assessments.

(14) Well-being assessments/campaigns.

(15) Medication checker/advice line.

(16) Ergonomic assessments.

(17) Ill-health retirement medicals.

(18) Administration charges.

(19) Training courses.

(20) Medico-legal advice and related services.

(21) Sale of equipment.

THE TRIBUNAL'S RESPONSE TO THE PARTIES' SUBMISSIONS

382. As is clear from the above analysis, we have come to our own conclusions rather than adopting the final positions taken by either party. In this part of our Decision we explain why we disagreed with both parties.

Ms Brown's submissions

383. Ms Brown submitted that there was a single supply of advice and information to the clients' management. However, on the basis of our findings of fact:

(1) In purchasing services from RPS, the typical clients' main purpose is protecting the employees' health.

(2) The delivery of information to the clients' management is the consequence of those services: in other words, the clients want to know the outcome of the OH provision, so

they can monitor compliance with the legislation and regulations and minimise the risk of legal action. But that information is a by-product.

(3) In some cases, the OH practitioners do not only give information (such as whether an employee has tested negative following a statutory medical), they provide advice – for example as to whether the employer should introduce adjustments. But that advice is again the transmission to the employer of the OHP's assessment of the employee's situation, after having carried out the medical.

384. Ms Brown also said that the single supply consisted of a number of core elements of equal status, plus a number of ancillary elements, and that the former were SAM, fitness to work assessments and health surveillance. We were unclear exactly how this reconciled with her original position that there was a single supply of advice and information to the clients' management, but in any event we do not accept it. RPS consistently marketed itself on the basis that it would "design a bespoke OH service based on [the client's] requirements"; this was because "the hazards and risk profiles for each company will be quite different", as in RPS said in the PSA tender. The three elements identified by Ms Brown do not "form a single, indivisible economic supply which it would be artificial to split". As our findings of fact make clear, they are either separately supplied and separately priced, or formed part of the on-site/mobile single supply, which we considered at §§370ff.

385. Contrary to Ms Brown's submissions, there is no parallel with *Deutsche Bank.* In RPS's case "the average client" does not seek "precisely a combination of those [three] elements". On the contrary, the average client either requires an onsite/mobile OH service, or picks and chooses what it wants from a menu of options. Some clients do require SAM, medicals and health surveillance; others do not.

386. We therefore did not need to consider the parties' submissions as to whether there were two separate lines of CJEU authority, namely that in *Deutsche Bank/Baštová* and that in *Mesto/Metropolitan.* Had that issue been relevant, we would have agreed with Ms Newstead-Taylor that *Deutsche Bank* was another application of the predominance principle, as was made explicit in *Metropolitan* at [55].

Ms Newstead Taylor's submissions

387. Ms Newstead Taylor's final position was that RPS was providing a single supply of which the predominate element was SAM. We cannot accept that. Some clients did want SAM; others did not.

388. Her submission was also heavily dependent on the very weak evidence about the percentage of client spending on different services, and that evidence simply cannot form a reliable basis for the finding she is asking us to make. Indeed, it was Ms Newstead Taylor herself who asked us to treat the witnesses' oral evidence as to percentages with "an element of caution". For the reasons set out at §255, we agreed.

389. Ms Newstead Taylor also submitted, as part of the same argument, that all other elements were *de minimis* or unimportant. Again, that is not consistent with the facts. Medicals and health surveillance which are separately ordered and paid for, are not part of a single supply of SAM. Those orders are triggered by completely different requirements from SAM, and the same is true of manual handling training and other elements.

The overarching test

390. Ms Newstead Taylor's final submission was that "the overarching characteristic of the appellants' supply of OH services is for the protection of health of employees". There is, as we have already noted, no binding UK precedent or CJEU case law establishing this as a separate test.

391. Moreover, were we to accept her submission that the overarching test should be used to classify all of RPS's services as a single supply, we would have to disregard the long-established starting point that "every supply must normally be regarded as distinct and independent". It would also remove the need to show either that "one or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services" or that "two or more elements are so closely linked that they form a single, indivisible economic supply which it would be artificial to split". It would be enough simply to find that the supplies fell within some overall generic description, here "the protection of health of employees". In our judgment that cannot be sufficient.

392. We do however accept that, where those other well-established tests show that there is a single supply, as is the case with the onsite/mobile services, the "overarching" test can be a considered to establish the classification of that supply. We return to this at §444.

The changing parameters

393. As is clear from our summary of the parties' submissions, both Counsel repeatedly changed the parameters of what they said constituted the predominant element(s) of the single supply.

Ms Brown

394. Ms Brown's skeleton began by saying that the component elements were "SAM, medicals/assessments, screening/surveillance and manual handling training", all of which underlay the single supply of advice/information. In her oral submissions these four categories (two of which were compounded) had become "SAM, fitness to work assessments and health surveillance", with SAM including pre-placement declarations and questionnaires, even though these did not concern the management of sickness; fitness medicals included the medication advice line which did not involve a medical, and health surveillance excluded statutory medicals, despite these being part and parcel of the same process (see §§216-218). The extent of Ms Brown's difficulties were exemplified by her final submission that "there are three clear groups [which] can be interwoven with each other".

Ms Newstead Taylor

395. Ms Newstead Taylor's skeleton stated that RPS was supplying five generic components: SAM, medicals, surveillance, manual handling and vaccinations; she accepted that customers were free to choose which of those components were to be supplied. However, she went on to say that there was nevertheless a single supply, and glossed over the inherent difficulty of reconciling those two positions.

396. On the final day of the hearing, Ms Newstead Taylor correctly identified that the provision of onsite and mobile OH provision constituted a single supply, but because HMRC remained wedded to the concept that RPS was making one overall single supply, she initially submitted that the onsite/mobile provision was the predominant element in that supply, and then abandoned the point because it could not be reconciled with the fact that many customers did not receive that onsite/mobile provision. Her second new argument was that SAM was the predominant element. For the reasons set out at §§387-8, this attempt to fit the case law to the facts was clearly flawed.

Conclusion

397. Neither Counsel was able to put a coherent and consistent case for RPS making a single supply because it was not possible to fit the facts to that submission. In coming to that conclusion, we mean no disrespect: both Counsel were doing their best to put their client's cases.

Mr Latter's evidence

398. We noted that our own analysis is consistent with the facts as summarised by Mr Latter, who said:

> "When RPS contracts with client employers to undertake OH services, it is usually by way of a 'comprehensive' contract or an 'individual items of service' contract."

399. He described the "comprehensive" contract as follows:

> "In this contract, RPS is paid a regular retainer to deliver all OH services described within the contract at the client employer's site. The price is broken down by the types of staff attending the client employer on a daily rate basis…The number and types of tests or assessments performed by RPS may vary month to month depending on the client employer's requests and requirements, but the client employer will pay the same monthly fee subject to any specific additional service."

400. He described the "individual items of service" contract like this:

> "Under this type of contract, RPS is paid on a per activity basis and provides the services to the client employer as and when they are required and requested by the client employer. RPS will then invoice the client employer for the relevant OH services as and when they are performed. The prices of each type of screening test or assessment are detailed within the contract...So, for example, if RPS carries out twenty lung function tests and ten pre-placement assessments on Siemens employees in one month at Siemens' request, an invoice will be prepared by RPS and sent to Siemens to bill them for those specific activities."

THE CLASSIFICATION OF THE SUPPLIES

401. RPS therefore makes (a) a single multiple supply of on-site/mobile OH practitioner(s) providing a range of services, which are not separately priced or charged; and (b) a large number of separate single supplies. In the next section of this Decision, we first consider the classification of the separate single supplies, and then of the single multiple supply.

Separate supplies classified as exempt

402. We find, by applying *d'Ambrumenil* and the other case law set out earlier in this Decision, that the following individual supplies are classified as exempt. We come to these conclusions in reliance on our primary finding of fact, that the purpose of RPS's OH provision is to protect the employees' health.

Diagnostic tests and treatment

403. In *DvW* the CJEU held at [18] that "the concept of provision of medical care does not lend itself to an interpretation which includes medical interventions carried out for a purpose other than that of diagnosing, treating and, in so far as possible, curing diseases or health disorders". It is implicit in that judgment that diagnosis and treatment have the necessary "therapeutic aim" as being for the "purpose of protecting, including maintaining or restoring, human health", see *D'Ambrumenil* at [59].

404. We find that the following tests have a therapeutic aim, namely the diagnosis of diseases or health disorders for the benefit of the employee's health:

(1) diagnostic tests for illegal drugs and alcohol;

(2) diagnostic tests for various medical conditions, including TB, HIV, hepatitis and polio;

(3) Tiers 4 and 5 HAVS tests to assess damage to nerves and blood vessels for employees who work with vibrating machinery; and

(4) X-rays to assess for lung conditions.

405. Although HMRC accepted in their earlier correspondence that "laboratory services" were standard rated, Ms Newstead Taylor's position at the hearing was that providing blood tests, HIV tests and TB were part of providing "diagnosis", and we agree.

406. Supplies of first aid; physiotherapy and drug/alcohol treatment are each "treatments" with a therapeutic aim, and are therefore exempt, again see *DvW* at [18]-[19].

407. The services provided by cardiologists have a therapeutic aim, namely the diagnosis and treatment of whatever the heart-related problem in order to protect or restore the health of the relevant employee, and so are exempt, see *DvW* and *d'Ambrumenil* at [60]-[61].

Vaccinations and travel

408. Vaccinations are "medical interventions of a prophylactic nature" and are therefore exempt, see *d'Ambrumenil* at [58].

409. We have found as a fact that the purpose of travel health advice is the protection of employees' health, and it too is exempt.

Pre-employment/new employee questionnaires and medicals

410. Although the parties referred to "pre-employment" medicals, our findings of fact show that there is no evidence of job applicants being required to have medicals. Instead, questionnaires and medicals are provided to individuals who had applied for, been offered, and have accepted a job. We considered whether these questionnaires/medicals fell within [61] of *d'Ambrumenil*:

> "Where a service consists of making an expert medical report…whose purpose is to provide a reply to questions set out in the request for the report, is effected in order to enable a third party to take a decision which has legal consequences for the person concerned or other persons…the principal purpose pursued by every service of that type remains that of fulfilling a legal or contractual condition in another's decision-making process."

411. The alternative was that they came within [65], where the CJEU said (emphases added):

> "where the purpose of a certificate relating to physical fitness is to make clear to a third party that a person's state of health imposes limitations on certain activities or requires that they are carried on under particular conditions, the protection of the health of the person concerned may be regarded as the principal purpose of that service.

412. We have found as facts that the purpose of these questionnaires/medicals is to protect the health of the individual employees and to identify any necessary modifications when they begin work; it is not to decide whether to offer a person a job, or whether to withdraw an offer which has already been made and accepted. We therefore find that the provision of a medical report on a new employee is within [65] of *d'Ambrumenil*, and so exempt.

413. We had no evidence of a client either (a) refusing to offer a job until after the applicant had satisfactorily completed the questionnaire and/or medical, or (b) making a job offer conditional on the individual satisfactorily completed the questionnaire and/or medical. As we noted at §220, such conditions are legal under the Equality Act if their aim is to establish whether the applicant can carry out a function intrinsic to the job. Were such situations to exist, the main purpose of the related OH procedures would be to enable the employer to make a decision as to whether or not (a) to offer the individual the job or (b) to confirm the conditional offer which had been made. In those situations, the OH provision would fall within [61] of *d'Ambrumenil* and be standard rated.

Health surveillance and associated statutory/other medicals

414. *D'Ambrumenil* at [67] reads:

> "regular medical checks at the behest of certain employers and certain insurance companies may satisfy the conditions for exemption under Article 13A(1)(c), provided that such checks are intended principally to enable the prevention or detection of illness or the monitoring of the health of workers or insured persons. The fact that such medical checks take place at a third party's request, and may also serve the employers' or insurance companies' own interests, does not preclude health protection being regarded as the principal aim of such checks."

415. We have found as a fact that the purpose of health surveillance (including the associated medicals) is the "primary and secondary prevention" of ill-health in the workplace, to reduce its incidence and improve employee health. In addition, most of the particular medical and surveillance tests are prescribed by H&S regulations, and their purpose is also to protect employees' health, see §62.

416. We considered whether the position was any different for the sub-group of "other" medicals, when the statutory obligation did not derive from the H&S regulations, but from other law. For example, the statutory purpose of food handler medicals is "to ensure a high

level of consumer protection with regard to food safety" and the statutory purpose of train driver medicals is to ensure the safety of the railway network. However, there was no evidence that employers had any different purpose in relation to these medicals than in relation to the statutory medicals, namely the protection of their employees' health, and we have therefore not distinguished this sub-group of medicals from those where the statutory requirement is provided by the HSWA and related regulations.

417. That is sufficient to decide this point, but we also found as a fact that OH physicians carry out both diagnoses and treatment as part of statutory and other medicals, see §235. These are therefore medical interventions carried out for the purpose of diagnosing, treating and, in so far as possible, curing diseases or health disorders, see *DvW*.

418. We find that the supply of health surveillance and medicals is exempt.

SAM

419. The purpose of SAM is to support the employee's recovery from a health problem, with other objectives being secondary. It thus falls within the medical exemption, because its principal purpose is the restoration of health, see *d'Ambrumenil* at [60].

Manual handling training

420. The purpose of manual handling is to protect employees from injury, and its principle purpose is thus the protection of health. It is therefore within the medical exemption, see *d'Ambrumenil* at [60].

Executive health assessments

421. Both parties agreed these were exempt, although Ms Brown said this was because they were "not a supply to the employer; it is to the employee paid for by the employer". We find that these services were exempt, but not because they were supplied to the employee. On the contrary, they were supplied to the employer. They are for the purpose of the "protection, including the maintenance or restoration, of health" and come within the exemption for that reason, see *d'Ambrumenil* at [60].

Well-being assessments/campaigns

422. The explicit purpose of well-being assessments and campaign is to protect and improve employee health, and they are exempt for that reason. Of course, on the facts of this case, all RPS's services were provided by a registered or enrolled medical practitioner or under their supervision; a well-being campaign which did not meet that condition would not be within the exemption.

Medication checker

423. The purpose of the online medication checker is to protect the health of the employees and the health of their co-workers and the public. We considered whether this was "medical care", given that its purpose is to protect not only employees but also others with whom they come into contact.

424. In *Commission* v *France* at [23] the CJEU, considering the meaning of that term in Article 132(1)(b) of the PVD, said "that concept does not, however, call for an especially narrow interpretation". In *d'Ambrumenil* at [58] the CJEU applied that principle to Article

132(1)(c). Taking the same approach, we find that the supply of advice via the medication checker is exempt.

Ergonomic assessments

425. HMRC have consistently taken the position that ergonomic assessments are standard rated. Ms Newstead Taylor said that this was consistent with Notice 701/57 on Health Professionals and Pharmaceutical products". Para 4.11 is headed "Risk assessments including advice on ergonomic layouts", and reads:

> "These identify risk in the workplace, quantify it and advise on measures to control it - for example, by issuing protective clothing or changing procedures. Whilst many are undertaken as a result of statutory health and safety requirements, these are generally not undertaken by health professionals in the exercise of their respective professions. As such they're taxable whether undertaken by a registered or non-registered health professional."

426. Ms Newstead Taylor could not explain to the Tribunal why an OH practitioner providing an ergonomic assessment was not doing so in the exercise of his profession. She simply said that HMRC were not seeking to change the position from that taken in the Notice.

427. We were unable to understand the reasoning in the Notice, particularly as these assessments are provided to satisfy the H&S requirements of the DSE Regs. On the facts of this case, all these ergonomic assessments are by a registered or enrolled medical practitioner, or under their supervision, and we find that they are exempt.

Separate supplies classified as standard rated

428. We find that the following individual supplies are classified as standard rated.

Ill-health retirement medicals

429. Both parties agreed that where RPS was supplying this service to pension scheme trustees, it is standard rated, and we agree. The purpose is not to protect, improve or restore a person's health, but to enable a third party (the pension trustees) to have the information necessary to decide whether the employee is entitled to receive his pension before the specified retirement age.

430. Where RPS is instructed by the typical employer to carry out an ill-health retirement medical, the purpose is to decide whether or not to terminate the employment on health grounds, see §238. The supply is therefore standard rated for the same reason as in the previous paragraph.

Administration charges

431. The only examples of administration charges were cancellation fees and charges for copy medical reports. HMRC had consistently accepted these were standard rated, and we agree: they do not come within the exemption.

Training courses

432. RPS provides a number of different types of training courses to clients' staff and managers, about (a) drug and alcohol awareness; (b) the delivery of drug and alcohol testing; (c) the supply of controlled drugs and (d) first aid. Their purpose is to enable the employer's staff to protect the employees' health. We find that this purpose too remote from the scope of

the medical exemption, even taking into account the need to avoid an "especially narrow interpretation".

433. Our reading of the relevant provisions is that these courses also fall outside the scope of the educational services exemption, although we had no submissions on this point. We find that these services are standard rated.

Medico-legal services

434. The provision of advice or reports in order to defend an employer against a legal claim by an employee is clearly standard rated: the main purpose is not the protection of the health of the employee, see *d'Ambrumenil* at [62].

Equipment

435. RPS charged its clients for the cost of certain items, such as the refrigerator shown on the SportCo invoice, and it sells clients certain items, such as the drug and alcohol testing equipment provide to Siemens. These are supplies of goods. The examples with which we were provided were all standard rated, although the classification would be a question of fact and law in each case.

436. The above conclusion does not apply to equipment used by RPS to deliver these separate individual services, because the OH is predominant and the equipment used to deliver the services forms a minor part of that single service, again see *Levob.*

The single multiple supply of on-site/mobile services

437. To determine the classification of the single supply of onsite/mobile services, we first summarised the relevant case law and then applied it.

The Mesto *test*

438. In *Metropolitan* the UT determined at [78] that "the *Mesto* predominance test should be the primary test to be applied in characterising a supply for VAT purposes". The CJEU set out the relevant principles at [29] of their judgment in *Mesto*:

> "In order to determine whether a single complex supply must be categorised as a supply closely linked to sport within the meaning of art 132(1)(m) of the VAT Directive although that supply also includes elements not having such a link, all the circumstances in which the transaction takes place must be taken into account in order to ascertain its characteristic elements and its predominant elements must be identified (see, to that effect, in particular, *Faaborg-Gelting Linien*…"

439. In *Faaborg-Gelting Linien,* the CJEU had decided that restaurant facilities on a ferry was a supply of services because services other than food were supplied, holding that:

> "restaurant transactions are characterised by a cluster of features and acts, of which the provision of food is only one component and in which services largely predominate. They must therefore be regarded as supplies of services…"

440. In other words, *Faaborg-Gelting Linien* was decided on the basis that "the characteristics representing services supplied the relevant characterisation because they predominated", see *Metropolitan* at [66]. *Mesto* was similar, in that there was a basket of many elements, all of

which were available to the typical consumer. The CJEU said at [33] of *Mesto* that the national court had to decide whether "the predominant element is the opportunity to engage in sporting activities falling within [the exemption] or, rather, pure rest and amusement". Thus, if the predominant reason for the typical consumer entering the park was to enjoy the exempt sporting activities, the whole supply was exempt; but if the predominant reason was rest and amusement, the whole supply was standard rated.

Application of that test

441. We have already found that RPS was making a single indivisible economic supply consisting of one or more OH practitioners to deliver a range of OH services for a fixed price. This situation was similar to that in *Faaborg-Gelting*, where there was "a cluster of features and acts", and where the CJEU had determined that standard rated services predominated over zero-rated food.

442. It is clear from our detailed analysis earlier in this Decision that the services provided by RPS are almost all for the purpose of "the protection, including the maintenance or restoration, of the employees' health". The exceptions are ill-health retirement medicals, medico-legal services, administration charges and training courses. Of those exceptions, ill-health retirement medicals and medico-legal services were not provided to the typical consumer as part of the single supply of onsite/mobile OH services; they were only available on an as-required, bespoke basis, and we therefore do not consider them further. The typical consumer therefore regarded itself as purchasing a single service characterised by the exempt elements, which are therefore predominant.

443. That answer is not changed by the inclusion of premises costs and equipment. The predominant element was the OH services; the premises/equipment formed part of the single supply and provided the mechanism by which that predominant element was delivered.

Overarching test

444. In *Metropolitan*, the UT said that the overarching point should be "taken into account" in considering predominance. The application of that "test" leads to the same outcome: looked at as a whole, the typical consumer is purchasing a single supply of OH service which is exempt.

445. As already explained at §§378ff, the position is entirely different where RPS is supplying individual services on a bespoke basis. It is not possible simply to apply an overarching test when it is clear from considering the essential elements there is no single indivisible economic supply which it would be artificial to split.

OVERALL CONCLUSION AND APPEAL RIGHTS

The Tribunal's decision

446. For the reasons set out above, we conclude that:

(1) RPS is making a single supply of exempt services when it contracts to provide one or more staff to deliver a range of OH services from an onsite or mobile clinic for a fixed price, because that supply falls within the medical exemption; and

(2) RPS is making separate single supplies of services when it contracts to provide separate services, each of which has been selected by the client and is separately priced.

These services are all exempt as falling under the medical exemption, except for ill-health retirement medicals, medico-legal services, administration charges and training courses.

Decision in the alternative

447. If we were to be wrong in our conclusions on the single/multiple supply issue, or if (contrary to our analysis at §§326ff) we did not have the jurisdiction to decide the appeal on a different basis from that put by either party, we would have found that RPS was not making a single supply of information and advice, but was instead providing a single supply of services within the scope of the medical exemption.

448. We would have come to that conclusion for the following reasons.

(1) It is clear from the findings of fact that from the point of view of the typical consumer, the purpose of the supply made by RPS is to protect the health of the employees.

(2) The typical employer does not contract with RPS simply to comply with the HSWA and related regulations. In any event, the purpose of those provisions is to require employers to protect their employees' health, so that by complying with the law, the typical employer is taking forward that purpose.

(3) The typical employer does not require information and advice *per se.* He wants information and advice which summarises and gives conclusions about the OH services provided to the employees. The information and advice are simply a by-product of the essential elements.

(4) All the individual elements of the supply are exempt, with the exception of retirement medicals, medico-legal services, administration charges and training courses.

Right to apply for permission to appeal

449. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE REDSTON
TRIBUNAL JUDGE

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