Appeal No. UKEAT/0103/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 27 & 28 March 2018

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

MR M BRETTLE & OTHERS — APPELLANTS

DUDLEY METROPOLITAN BOROUGH COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MRS KATHERINE FUDAKOWSKI (of Counsel) OH Parsons LLP Churchill House Chalvey Road East Slough Berkshire SL1 2LS
For the Respondent	MR PETER LOCKLEY (of Counsel) Instructed by: Harrison Clark Rickerbys Thorp House 29 Broad Street Hereford HR4 9AR

SUMMARY

PRACTICE AND PROCEDURE - Amendment

PRACTICE AND PROCEDURE - Case management

JURISDICTIONAL POINTS - Extension of time: reasonably practicable

In a multiple holiday pay claim, the parties were unable to reach a mutual understanding of the effect of an ET decision ("the first decision") giving leave for claims to be amended so as to include unlawful deductions from wages claims which post-dated presentation of the claim forms, on the question of time limits.

At a Preliminary Hearing before a differently constituted Tribunal, the Tribunal held that the effect of the first decision was to preclude any argument on time limits and that no residual power to extend time remained ("the second decision"). Those claims that were outside the primary three-month time limit were therefore dismissed.

On appeal from the second decision, the appeal was allowed. The second decision had varied the first decision which it had no power to do under Rule 29 **ET Rules of Procedure** (**Serco Ltd v Wells** [2016] ICR 768), and/or had in any event wrongly interpreted the first decision.

The second decision erred in purporting to preclude the Tribunal from determining the issue of time limits, which had not been decided and on which there had been no evidence or legal argument, since time limits are a jurisdictional issue for the Tribunal to resolve (**Radakovits v Abbey National plc** [2009] EWCA Civ 1346.

The case is remitted back for the Tribunal to decide the time limits issue.

HER HONOUR JUDGE STACEY

1. This is an appeal against the Order of the Employment Tribunal ("ET"), held at Birmingham before Employment Judge Findlay, which was sent to the parties on 27 February 2017 ("the Findlay Order"). It concerns ET practice and procedure: amendments to a claim form and the ability of one Employment Tribunal to vary the decision of another. I shall continue to refer to the parties by their status below.

2. It is necessary to explain the background and history of the case in some detail which is as follows. Mr Brettle and a number of other employees ("the Claimants") of the Respondent Local Authority brought claims for breach of contract and breach of the **Working Time Regulations 1998** in relation to holiday pay following the landmark judgment of the CJEU in **Williams & Others v British Airways plc** [2012] UKSC 43. The Claimants' case raised the important and, at that time, novel issue of whether payments received in respect of entirely voluntary overtime should be treated as forming part of a worker's normal remuneration for the purposes of calculating holiday pay under Regulation 13 of the **Working Time Regulations 1998**.

3. The Claimants succeeded in the ET in Birmingham before Employment Judge Warren and the Judgment was upheld by this Appeal Tribunal by the President in **Dudley Metropolitan Borough Council v Willetts & Others** UKEAT/0334/16 on 31 July 2017. The principle having been established, its application to the 56 Claimants on the facts of each case and the extent to which each is entitled to compensation and in respect of which periods, becomes relevant and necessary to resolve by judicial decision if not by agreement.

4. The Claimants lodged claims for holiday pay on various dates in several batches from 9 July 2014 to 1 November 2016 in general terms, for example:

> **"The Claimants have been working for the Respondent for varying periods of time. The Claimants' earnings vary from week to week. The Claimants also work regular overtime and are paid bonuses. The Claimants are paid holiday pay based on a basic rate. The Claimants believe that their holiday pay should be based on an average of their earnings, taking into account all elements of their pay. The Claimants believe that the underpayment of holiday pay constitutes a series of deductions from their wages."**
>
> **(Claim forms issued on 9 February 2015 (page 50))**

They sought repayment for underpayment of holiday pay entitlement in general terms for the entire period from the commencement of their respective employment dates to date. At the same time the Claimants' solicitors sought pay information and holiday details from the Respondent to enable the calculations to be made.

5. In the pleadings, the Respondent consistently took the time limits point and expressly reserved their rights to argue that the claims had not been brought within three months of the date of any alleged underpayments, and that there had been gaps which would not enable the Claimants to succeed in arguing that earlier payments amounted to a series of deductions and that it had been reasonably practicable for the Claimants to have lodged their claims timeously and the Tribunal should not exercise a discretion in the Claimants' favour. The law concerning time limits in these types of holiday pay claims has been authoritatively decided in **Bear Scotland Ltd v Fulton & Another** [2015] ICR 221.

6. The day before the case came before Employment Judge Warren on 19 April 2016, the Claimants' lawyers applied to amend the claim form "to bring the claims up to date" with no further details. That was a perfectly appropriate application in line with **Prakash v Wolverhampton City Council** UKEAT/0140/06, and it was entirely sensible to include matters arising that post-dated the issuing of claim forms to avoid a proliferation of claims and,

A at that time when the fees regime was in place, the costly issuing of new proceedings in respect of either continuing allegations or fresh allegations arising from the same set of facts and circumstances. It is an approved practice reflected in an ET Presidential Direction.

B

7. In a Judgment sent to the parties on 10 August 2016, following the three-day hearing that took place in April ("the Warren Decision"[1]), Employment Judge Warren decided a number of issues concerning the Claimants' entitlement. The relevant parts for today's hearing

C are as follows:

> **"Leave is given for the claims to be amended so as to include unlawful deductions from wages claims from the date of presentation of the claim form to date."**
>
> **(Paragraph 1, page 164 of the bundle)**

D

The Reasons at paragraphs 13 to 18 provide as follows:

> **"13. If so [referring to whether or not the Claimants have suffered a loss when receiving holiday pay] do the losses constitute a series of deductions and at which point is there a gap of longer than 3 months such as to break the series for jurisdictional purposes? (Issue 6)**
>
> E **14. Are the claimants entitled to claim for deductions suffered since the date of issuing their claim, on which point it is Counsel for the [Claimants'] intention to make application at the outset of the hearing? (Issue 7)**
>
> **Application for leave to amend the claim**
>
> **Having heard submissions from both parties:-**
>
> F **Leave is given to amend the claim to cover the same issues for the period from presentation of the ET1 to 18 April 2016. I have applied the principles set out in *Prakash v Wolverhampton City Council* UKEAT/0140/06 and *Selkent Bus Company v Moore* [1996] IRLR [661].**
>
> **Reasons**
>
> **15. These spring from an identical factual background to the pre claim issues. It prevents the need for an expensive and complicating series of fresh claims, on exactly**
> G **the same issues and based on the same facts. The respondent is aware that the situation is ongoing for all claimants who are still employed by them, and therefore meets both *Selkent* (cited above) and the Overriding Objective to deal with cases justly, efficiently, and economically.**
>
> **16. The respondent's original response will be taken to cover the same period in the same terms as the original claim, with the added assertion that some or even all of the 'new' claims may be out of time, and their position in this regard is noted as reserved.**

H

[1] The Decision is described as a Judgment, but the matter that is the subject of this appeal was considered by Employment Judge Findlay to be a case management Order pursuant to Rule 1(3) **ET Rules of Procedure**, which is not challenged by the parties and I have not therefore considered the matter in detail. I shall refer to the ruling as a Decision.

17. It was agreed that I would decide certain principle issues of liability first. Once they have been concluded, and if any claim survives, those claims will be the subject of detailed examination between the 2 legal teams, to establish which if any survive the out of time issue, without further argument, and whether quantum can be agreed without the need for a Remedy Hearing.

18. Of the agreed list of issues I have been invited to consider 1, 2, 3, and 4, having already decided 7, reserving 5, and 6."

8. The meaning of those paragraphs has given rise to complications and a lack of common understanding. The parties did not agree about the meaning of those paragraphs, and in particular where the granting of the amendment left the Respondent's argument on time limits.

9. At the end of the Warren Decision the following case management Orders were made:

"The parties have agreed to undertake the following work based on the outcome of this judgement, and so I order them to:-

1. Identify those individuals whose cases where liability cannot be resolved liability [sic] based on the above findings.

2. Identify those cases where the figures cannot be agreed for remedy, and those for whom remedy remains an issue.

3. Identify those who have limitation issues which cannot be resolved between the parties.

4. There will be a telephone case management hearing on the 17 June 2016 to discuss progress, and the results of the above are to be emailed to the Tribunal by 9.30am on that date."

10. The detailed examination and discussion between the parties referred to in paragraph 17 of the Warren Decision duly took place (although not as quickly as had been hoped), but the parties failed to agree and applied for a further hearing before the ET. The case came before Acting Regional Employment Judge Findlay.

11. It is common ground that there are three possible meanings to the contentious paragraphs in the Warren Decision, which Employment Judge Findlay quite rightly later characterised as being to some extent a Consent Order.

- Interpretation one: that the Claimants had been given permission to amend the claims in respect of the period from the date of the initial lodging of the ET1 to 18 April 2016, and those claims had been found to be in time.
- Interpretation two: that leave had been given to amend in the sense that the Claimants were allowed to assert the allegation without having to lodge fresh claims whilst both sides had the right to argue whether or not any or all of the claims were in time in respect of the period from the lodging of the claim forms to 18 April 2016.
- Interpretation three: that the time limit point was decided in the Respondent's favour and that any claims where there was a series of deductions punctuated by a three-month gap did not constitute a series, so that the deductions pre-dating or post-dating the three-month gap were out of time and would be dismissed.

12. In the initial discussions between the parties after the Warren Decision, the Claimants sought to persuade the Respondent that the correct interpretation was interpretation one. That was not accepted by the Respondent and was seemingly conceded by the Claimants since 13 claims were then withdrawn, which, I am told, were hopelessly out of time when their first claim forms were submitted. There is no further discussion about those and no challenge to those withdrawn claims.

13. Thereafter, the Claimants contended for meaning two and the Respondent for meaning three and the parties were unable to agree which interpretation was correct. Although, as previously mentioned, there was an appeal from the substantive finding that the Claimants were entitled to holiday pay calculated by reference to their actual pay in the preceding reference

A period including entirely voluntary overtime, there was no appeal against paragraphs 1 and 13 to 18 of the Warren Decision at that time.

B 14. The parties were seeking to agree the pay and holiday pay data and dates of employment and deductions and reach a common understanding of the facts in each of the extant claims. When it transpired that they did not agree on the meaning of paragraph 1 of the Warren Decision, they referred the matter back to the ET. At that time, Employment Judge Warren was

C absent on long-term sick leave with no indication of her expected return, so Acting Regional Employment Judge Findlay considered the matter in Employment Judge Warren's absence, firstly at a telephone case management discussion on 23 November 2016. The issue was

D identified as being whether "the tribunal has a discretion to extend the time for the bringing of the claims (even where there is more than a three month gap between alleged underpayments), and that the discretion should be exercised in this case" At both parties' request she agreed to

E try and understand the effect of the Warren Decision at a Preliminary Hearing which took place on 2 February 2017 and it is her Decision described as an Order[2] ("the Findlay Order") that is the subject of this appeal.

F 15. In the opening sentence of her Order, Acting REJ Findlay observed that an unfortunate situation had arisen in relation to a case management Order. She decided that paragraph 1 of the Warren Decision was a case management Order and that accordingly the Tribunal had the

G powers conferred on it by Rule 29 which provides that:

> **"29. The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. The particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."**

H

[2] It is a moot point whether the Decision is an Order or a Judgment as defined in Rule 1(3) **ET (Constitution & Rules of Procedure) Regulations 2013**, but nothing turns on it so I shall continue to use the terminology given to the document by Employment Judge Findlay.

16. She set out the parties' respective positions about what had happened at the Warren Hearing: the Respondent considered that it had consented to the amendment subject to reserving the right to argue that some or all of the amended claims were out of time, and the Claimants' position was also that the amendment had been granted by consent subject to the Respondent reserving its right to argue the time point in due course. Neither party by that stage was contending for interpretation one. Acting REJ Findlay stated:

> **"6. The <u>first issue</u> I have to determine today is whether by allowing that amendment in the way that she did, Employment Judge Warren reserved to the tribunal any residual discretion to allow the claims added by amendment to proceed even if, according to the appropriate time limits under Regulation 30(2) of the Working Time Regulations, the claims added by amendment would have been out of time at the point the amendment was allowed.**
>
> **7. To put it another way, it is an application for me either to decide now to exercise any such residual discretion as exists, or to give directions for a Hearing at which another Judge will determine whether or not to exercise it, but that presupposes both that such a residual discretion exists and that, if so, it was reserved by Employment Judge Warren to be used at some later time."**

17. Regulation 30(2) of the **Working Time Regulations 1998** provides that:

> **"(2) An employment tribunal shall not consider a complaint under this regulation unless it is presented -**
>
> > **(a) before the end of the period of three months … beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;**
> >
> > **(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months."**

18. Acting REJ Findlay concluded that the Respondent's submission, interpretation three, was the correct interpretation of the Warren Decision and in her Order explained it at paragraphs 20 to 24 as follows:

> **"20. <u>Analysis:</u> I have concluded that whether or not, in a situation such as this, (which involves not adding a cause of action arising out of, broadly, the same set of circumstances as the original claim - such as in [*Transport and General Workers Union v Safeway Stores Ltd* UKEAT/0092/07] or [*Cocking v Sandhurst (Stationers) Ltd* [1974] ICR 650] etc - but a situation where a new cause of action accrues *after* the original claim - i.e. as occurred in *Prakash* - although in *Prakash* there was no suggestion that the claim sought to be added was out of time) the Employment Tribunal has, under its case management powers, a residual discretion to extend time beyond that found in the**

relevant statute, Employment Judge Warren was not intending either to exercise such a power here or to reserve it to be exercised on a subsequent occasion.

21. She clearly accepted the concession made by the respondent on the terms that it was made (see paragraph 16 and 17 of her reasons); that is that the new claims could be added subject to the question of whether they were in time under the relevant statutory provision, that is, Regulation 30(2) of the Working Time Regulations.

22. It seems to me that this is clear from the terms of paragraph 16, but even if it is not, under paragraph 17 she left it to the two legal teams to decide which, if any, of the additional claims survived the out of time issue. This does not suggest to me that anyone thought at the time that Employment Judge Warren was reserving any residual discretion that the Employment Tribunal may have to extend time in otherwise out of time claims, quite the opposite; nor would, in my view, an objective bystander have thought that this was what the respondents were agreeing to, or what the Judge was directing.

23. For those reasons I consider that no residual power to extend time was reserved by Employment Judge Warren to be exercised at any later time in relation to any of the claims which were added by amendment and by consent at the April hearing, and nor was Employment Judge Warren purporting to extend time in any such claim which would otherwise be out of time under the applicable statutory test.

24. I therefore decline to either exercise any such residual discretion myself or to give directions for myself or another Employment Judge to exercise it at any future date. No such power was reserved by the terms of the agreed amendment, quite the opposite. I did consider, having heard the parties' submissions, whether it would be necessary in the interests of justice for me to disturb Employment Judge Warren's order in any way, but I have concluded that it would not be necessary to do so and, in particular, I take account of the public interest in the finality of judgments and orders and the fact that this was an amendment made after an agreed concession by the respondent."

19. The Findlay Order recorded matters which Mr Lockley considers amount to findings of fact concerning events at the Warren Hearing at paragraphs 3 and 4:

"3. Before going on to the reasons that Employment Judge Warren gave for these decisions, I should say that Mr Stokes, [counsel for the Respondent] who was present at the hearing in question, told me that the application to amend was made very close to the hearing date and, as can be seen, various points of principle were to be decided at that hearing. He says that, on behalf of his clients [the Respondents], he consented to [all] the amendment[s] subject to reserving the right to argue that some or all of the new claims were out of time.

4. Mr Wilson, [who appeared before Employment Judge Findlay but was not present at the earlier hearing], acknowledged that what Mr Stokes says happened is in accord with the note of counsel who was present, Mr Gidney, and it is consistent with what Employment Judge Warren herself said at paragraphs 16 and 17 of her Order. It follows that the Order should have been recorded as being a Consent Order; that is, that the amendment was granted by consent, and subject to the limitations described by Mr Stokes."

20. The appeal against the Findlay Order came on the sift before His Honour Judge Richardson who permitted the case to proceed to a Full Hearing, identifying the confusion in the Warren Decision: "On any view paragraph 1 of the order dated 5 August 2016 [the Warren

Decision] is unsatisfactory; it grants leave to amend to include unlawful deduction of wage claims from the date of presentation of the claim form to date without making any provision relating to time limit issues, whereas the reasons (see paragraph 15) seem to make it clear that time limit issues were to remain in play".

21. It is common ground that as at 19 April 2016, neither the Claimants, nor the Respondent, nor Employment Judge Warren knew the details about the dates on which Regulation 13 deductions had been made in relation to any of the then 56 (now 43) Claimants, and whether deductions had been made with gaps of more than 3 months either before or after the lodging of the claims in 2014 and up until the amendment on 18 April 2016 - it was acknowledged that that work had yet to be done. Nor were the circumstances and matters that a Tribunal would need to take into account in considering the exercise of its discretion to extend time before either the Warren Tribunal or at the Findlay Hearing.

22. Before the Findlay Hearing the parties had agreed between themselves that 42 of the remaining 43 Claimants had not had a relevant deduction made within three months of 18 April 2016 and that their claims were, on the face of it, out of time. In relation to one individual - Simon Wooldridge - the parties could not agree the date on which relevant deductions were made and could not therefore agree whether, or when, the primary limitation period had expired. Mr Lockley concedes that this is an issue that must therefore be determined at a Tribunal hearing. But he says in relation to the remaining 42, the Claimants are precluded by the Warren Decision, as understood, or varied, by the Findlay Order, from any consideration and the claims, at least in respect of the 18 April 2016 amendment, must be dismissed. Ms Fudakowski on the other hand says that there is all to play for with all the remaining 43 Claimants, and will, in due course, rely on the Tribunal's discretion as described by Underhill P

in **Transport and General Workers Union v Safeway Stores Ltd** UKEAT/0092/07 to extend time. She accepts that there is no ambiguity in the Findlay Order, but submits that it is wrong in law.

23. Mr Lockley further contended that what he describes as the findings of fact in paragraphs 3 and 4 of the Findlay Order lead to the inevitable conclusion that interpretation three is indeed the correct one and that this Tribunal cannot go behind those facts. I cannot, however, accept the submission since all that is being recorded in paragraphs 3 and 4 of the Findlay Order is that Mr Stokes had reserved the right to argue that some or all of the new claims were out of time. It does not resolve the issue of which of interpretation two or three is correct, but in fact tends to support Ms Fudakowski's position. But I agree with Mr Lockley that interpretation one is unarguable on the basis of paragraphs 3 and 4.

Discussion and Conclusion

24. The time limit position in Regulation 30(2) in underpayment of annual leave entitlement pursuant to Regulation 13 **Working Time Regulations 1998** is now settled law following **Bear Scotland Ltd v Fulton**. It is also settled law that the ET has a discretion to extend time, even where it was reasonably practicable to have brought a claim within the three-month primary period - see **TGWU v Safeway Stores Ltd**. Tribunals are required to consider and in appropriate cases exercise their discretion, or not, having considered the matter judicially and taken the relevant circumstances of the case before them into account. Time limits are for judicial determination and not negotiation by the parties; **Radakovits v Abbey National plc** [2009] EWCA Civ 1346.

25. Acting REJ Findlay had effectively been requested by the parties to revisit the ambiguous and confusing decision of another Judge who was not available to review or reconsider it. No doubt at the time it appeared to be a sensible and pragmatic way forward consistent with the overriding objective in order to avoid delay and it was a course being urged on her by the parties. With the benefit of hindsight it would have been better if the parties had appealed the Warren Decision, rather than refer it back to the Tribunal. But at the time for appealing they were unlikely to have appreciated that the other side understood the Warren Decision differently, they may not have anticipated that they would be unable to agree matters, and they would not have known that Employment Judge Warren was unavailable to consider the matter herself. Asking Acting REJ Findlay to revisit and re-interpret the Warren Decision unfortunately, but probably inevitably, has led to more complications and delay, since one or other side was bound to dislike the conclusions of the Findlay Order and seek to challenge it.

26. In order to understand whether EJ Findlay had the jurisdiction it is first necessary to consider the Warren Decision. It seems to me clear that the only possible meaning of paragraph 1 of the Judgment and paragraphs 17 and 18 of the Reasons in the Warren Decision, is exactly what both counsel at the hearing from paragraphs 3 and 4 of the Findlay Order appeared to understand: that the claims could be amended as at 18 April 2016, but the time limits points remained in play, and the Respondent's agreement to the amendment being allowed did not amount to a concession that the amended (or indeed original) claims were in time. EJ Warren had decided the Claimants' in principle entitlement to Regulation 13 leave pay broadly in the Claimants' favour (liability issues 1 to 4) and had granted leave for the Claimants to amend their claims (issue 7), leaving issues 5 and 6: had the Claimants suffered a loss and were the claims in time with unbroken series of payments for jurisdictional purposes. The use of the

phrase "further argument" in paragraph 17 following the parties' legal teams subjecting the claims to detailed examination in the following passage:

> **"to establish which if any survive the out of time issue, *without further argument*[3], and whether quantum can be agreed without the need for a Remedy Hearing."**

can therefore only be a reference to the parties needing to argue the matter further before the Tribunal, because of their inability to agree the point themselves. In other words, a further hearing might be required to determine both quantum and the time limits point if they could not agree. It was for that reason that case management Order 3 was made - to identify those Claimants who had limitation issues which could not be resolved. If the Tribunal had somehow declined any residual jurisdiction on time limits, it would be of no interest to the Tribunal to know who they were, there would be nothing to be resolved and there would have been no need for the Order. Paragraph 3 of the case management Orders is wholly consistent with the Claimants' arguments.

27. I therefore agree with HHJ Richardson that the Warren Decision leaves all time limit issues in play, for judicial determination at a later stage in the absence of the agreement of the parties. It is for that reason that the parties were to identify those who had limitation issues that could not be resolved between the parties for further discussion with the Tribunal at a case management conference. The reservation of the Respondent's rights was to avoid interpretation one. EJ Warren appears from her Judgment to have heard no argument on the time limits point and the discretion to extend and could not therefore have made a reasoned decision.

28. The Findlay Order therefore effectively varies the Warren Decision by conferring a meaning which cannot have been intended, and her variation of the Warren Decision fell outside her jurisdictional powers under the **ET Rules of Procedure 2013**. In **Serco Ltd v**

[3] Italicisation mine.

Wells [2016] ICR 768 HHJ Hand QC noted that the principle underlying the **ET Rules of Procedure** discouraged a Judge of equivalent jurisdiction from looking again at another's Order. Any interference with a previous interlocutory Order by a Judge of equivalent jurisdiction had to be "necessary in the interests of justice" in accordance with Rule 29, which was to be interpreted as requiring a material change of circumstances since the Order was made, or that the Order had been based on a material omission or misstatement, or some other substantial reason necessitating the interference. Whether or not a subsequent event amounted to a material change in circumstances was a matter of jurisdiction and not a question of the exercise of discretion. It is to be decided by taking an objective view of the factual matrix in that regard.

29. Applying **Serco Ltd v Wells** to the facts here, there has been no change in circumstance since the Warren Decision beyond the parties disputing what the words of the Decision meant, and it was not therefore necessary in the interests of justice for case management Order to be varied and revisited by the alternative wording provided by EJ Findlay and she was acting outwith her case management powers. The Claimants' appeal succeeds on that ground alone.

30. However, if Rule 29 enabled Acting REJ Findlay to revisit the Warren Decision in the way that she did, she erred in law in concluding that it meant that the Tribunal did not have the residual power contended for it by the Claimants for the reasons set out above. The facts and circumstances relevant to the question of time limits were not and could not have been known at the time that Employment Judge Warren made her Order: it had not been argued before her and no relevant facts had been found. These cases are always fact, context and circumstance specific and without making or setting out agreed facts and circumstances and hearing the respective parties' arguments a reasoned judicial decision cannot be made.

A

31. If the Respondent's interpretation was correct, the ET would have in effect abrogated its responsibility to resolve employment disputes that the parties cannot, by asking the parties to resolve the matter between them, with no further recourse to the ET on the point in issue in the event of continuing disagreement. **Radakovits v Abbey National plc** [2009] EWCA Civ 1346 makes clear that time limits are for judicial determination and not agreement by the parties.

B

C

32. If the Claimants had made a concession that they would not be seeking to argue that the Tribunal had a discretion to extend time then that would be a different matter. But no-one is suggesting that, and if that were the case, it would be recorded in the clearest terms on the face of the Decision, which it is not. Paragraphs 3 and 4 of the Findlay Order also confirm that no such concession was made by the Claimants.

D

33. In summary, interpretation two is the only possible meaning of the Warren Decision, the Findlay Order cannot stand and the appeal must be allowed.

E

34. Mr Lockley submitted that Warren Decision should have been appealed by the Claimants and, as it is now too late for them to do so, it cannot be revisited by this Tribunal. However, since the issues in both the Warren and Findlay Decisions are intertwined and have been thoroughly addressed by both parties in this appeal and my ruling on the Findlay Judgment inevitably involves an analysis of the Warren Decision, the only sensible permissible way forward is for this Tribunal to re-state, in hopefully less ambiguous terms, the conclusions in Warren Decision on the time limits point, to enable the litigation to proceed and the remaining outstanding matters to be resolved.

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35. On the point under appeal, the meaning of the Warren Decision is that in relation to the Claimants who have limitation issues which cannot be resolved between the parties, the issue as to whether the Employment Tribunal has discretion to extend time shall be determined by the Employment Tribunal at a hearing.

36. If, however, it were the case, that the meaning I have ascribed to the Warren Decision cannot be construed from the decision itself, this appeal would be one of the very rare occasions where it would be appropriate for this Tribunal to exercise its powers of substitution to retake a case management Order of substitution pursuant to section 35 of the **Employment Tribunals Act 1996** (**TGWU v Safeway Stores Ltd**), since there is only one possible meaning for the Warren Decision, as set out in paragraph 35, which is that the ET must decide if it has discretion to extend time in relation to any claims brought or amended outside the primary three-month time limit. For the reasons set out above, any other meaning is plainly and unarguably wrong.

37. The appeal is therefore allowed, and the issue of whether time should be extended to validate any claims that are out of time shall be considered by the Employment Tribunal.

38. Whilst there is every confidence in EJ Findlay's ability to determine the matter[4], noting that there will be no saving of time if the matter is referred back to the same Tribunal, and that it will facilitate an earlier hearing date if it can be heard by any one of the Employment Judges in the Birmingham region, and understanding that the choice is between the same or a differently constituted Tribunal (rather than any Tribunal), I remit the case to a differently constituted Tribunal, simply in order to facilitate an early hearing, to decide whether or not the

[4] And Employment Judge Warren has returned to work to a different region.

Tribunal has jurisdiction to determine any of the 43 remaining Claimants in light of Regulation 30(2) **Working Time Regulations 1998** and **TGWU v Safeway Stores Ltd** and any other authorities relevant to the issue of Tribunal time limits, and, if so, to determine any matters relating to remedy that the parties are unable to resolve between themselves.