Appeal No. UKEAT/0008/18/RN
UKEAT/0009/18/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 & 10 August 2018

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

UKEAT/0008/18/RN

KIER HIGHWAYS LIMITED — APPELLANT

(1) MR S CUNNING & OTHERS
(2) AMEY SERVICES LIMITED
(3) SKANSKA CONSTRUCTION UK LIMITED — RESPONDENTS

UKEAT/0009/18/RN

AMEY SERVICES LIMITED — APPELLANT

(1) MR S CUNNING & OTHERS
(2) KIER HIGHWAYS LIMITED
(3) SKANSKA CONSTRUCTION UK LIMITED — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For Amey Services Limited	MR DALE MARTIN (of Counsel) Instructed by: Bird & Bird LLP 12 New Fetter Lane London EC4A 1JP
For Mr S Cunning & Others	MS MELANIE TETHER (of Counsel) Instructed by: Thompsons Solicitors LLP Condor House 5-10 St Paul's Churchyard London EC4M 8AL
For the other parties	No appearance or representation by or on behalf of the other parties

SUMMARY

PRACTICE AND PROCEDURE - Case management

PRACTICE AND PROCEDURE - Striking-out/dismissal

In a holiday pay claim multiple, there was no error of law in the ET finding that the Claimants had been in material compliance with an Unless Order. The ET had not adopted a global approach to material compliance but had considered each claim individually. The ET had considered, and been entitled to reject, the many detailed points advanced by the Respondents concerning the further information and calculation schedules supplied by the Claimants. The claims in which the Claimants are seeking to recover their "normal remuneration" (as recently comprehensively analysed in **Dudley Metropolitan Borough Council v Willetts** [2017] IRLR 870) instead of their normal basic pay which had been the basis for the calculation of their holiday pay hitherto, have not therefore been automatically struck out and may proceed to a Full Hearing.

HER HONOUR JUDGE STACEY

1. The case comes before this Appeal Tribunal for the determination of two appeals by Amey Services Limited and Kier Highways Limited against the Judgment of the Employment Tribunal ("ET") sitting in the Watford region before Employment Judge Smail sitting alone at a Preliminary Hearing on 4 September 2017 ("the Smail Judgment"). The Judgment and Reasons were sent to the parties on 7 November 2017. The ET held, amongst other things, that the Claimants were not in breach of an Unless Order, their claims had therefore not been struck out and they could proceed to a Full Hearing. The appeals seek to challenge that conclusion and asks this Tribunal to declare that all the claims were struck out.

2. The Respondents to the appeal, Mr Cunning and others, are the Claimants before the ET. Amey Services Limited ("Amey") are the First Respondent, Kier Highways Limited ("Keir"), the Second Respondent, and Skanska Construction UK Ltd ("Skanska"), the Third Respondent before the ET. I shall continue to refer to the parties as they were before the ET, except where it is necessary to distinguish between the Respondents, when I shall refer to them by name.

The History of the Proceedings

3. Briefly, the history and background is as follows. The Claimants work as highway maintenance operatives in the road construction industry. Following developments in the jurisprudence of the calculation of holiday pay following the landmark judgment in **British Airways plc v Williams** [2011] IRLR 948 CJEU, the Claimants brought claims for arrears and underpayment of holiday pay in the ET, relying on the **Working Time Regulations 1998** SI 1998/1833 ("WTR") and that they had been subjected to an unlawful deduction of wages under Part II **Employment Rights Act 1996** ("ERA 1996"). The holiday pay calculation issue has been

recently comprehensively set out in **Dudley Metropolitan Borough Council v Willetts** [2017] IRLR 870: the overarching principle in the calculation of holiday pay by reference to a worker's "normal remuneration" is the maintenance of normal pay, in other words, the pay that is normally received by the worker when he or she is working. As a result, where, traditionally, holiday pay has been calculated only by reference to basic pay without including overtime, shift allowances and various other payments and premia that are commonplace in many industries, there are likely to have been underpayments. A considerable number of claims have been lodged in the ET since **Williams**, sufficient to generate a specific **ET Presidential Practice Direction**[1]. The impact of time limits and limitation periods has also generated a considerable body of case law, see for example **Bear Scotland Ltd v Fulton** [2015] IRLR 15.

4. Three sets of multiple claims for a number of employees were lodged: Mr Cunning and 19 others on 18 March 2015; Mr McDonnell and 2 others on 15 May 2015; and, Mr Simmons and 6 others on 29 June 2015, against their then employer, Amey as the Respondent. There were originally 30 Claimants in total. The claims, formulated in fairly general terms, stated that their holiday pay had been calculated solely by reference to their basic contractual pay and hours ("basic pay") without taking account of various additional elements such as overtime, standby payments, shift premium/allowances, commission and other payments, resulting in an underpayment of their holiday pay entitlement. A notice of appearance resisted the claims in equally general terms but admitted that holiday pay had historically been calculated on the basis of basic contractual hours of work. Mr Martin accepted that Amey have in effect acknowledged that in general terms the calculation of holiday pay by reference to basic, rather than normal, pay

[1] Employment Tribunals (England and Wales) Direction of the President in the matter of claims brought in Employment Tribunals (England and Wales) in respect of the calculation of unpaid holiday pay (2015).

A results in a lower payment. Since these proceedings were instituted Amey has introduced additional payments for holiday pay for its current workers.

B 5. The three sets of proceedings were consolidated. In due course Kier and Skanska were joined as Respondents, as the employment of some of the Claimants transferred to one or other of those companies by operation of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE") following a service provision change. Over time the number of C Claimants has dwindled, some have withdrawn their claims, and some are no longer union members and therefore no longer represented by the union's lawyers and their claims have fallen by the wayside.

D 6. At a Preliminary Hearing on 7 December 2015 before Employment Judge Southam (the 7 December 2015 PH), who at that time was co-ordinating the holiday pay claims in the Watford region, it was ordered that further information be provided by the Claimants. In summary they E were required: (1) to identify the terms of the contract said to support the claim, together with a copy of the contract where available; (2) to state which parts of sections 221 to 224 **ERA** applied, which deals with the calculation of a week's pay; (3) to explain the basis of the claim if it extended F beyond the **Working Time Directive** ("WTD") EU minimum leave period of four weeks under Regulation 13 **WTR**, to include the additional period provided by Regulation 13A **WTR**; (4) to set out the periods of holiday in which a claim was made and (5) to provide the calculations. The G wording of the Order was as follows:

> **"1.** ***Further Information***
>
> **By 29 February 2016, the claimants shall give to the respondent the following further information in respect of all of the claimants:**
>
> **1.1. Identity in each case the terms of the contract said to support the claim, and provide a copy of the contract concerned, where it is available.**
>
> **1.2. State which parts of sections 221-224 Employment Rights Act 1996 apply to that claimant, and the basis for that contention. In particular, they are to state:**

H

1.2.1. Whether it is contended that the claimants' pay for normal working hours (this is defined in section 234 of that Act) varied with the amount of work done? If so, they are to state the basis for that contention;

1.2.2. Whether it is contended that the claimants' pay for normal working hours varied with the time that work was done within the meaning of section 222(1) Employment Rights Act 1996? If so, they are to state the basis for that contention;

1.2.3. Whether it is contended that the claimants did not have normal working hours, and, if so, the basis for that contention; and

1.2.4. The basis on which the claimants assert that their claims extend to a period of more than four weeks leave per year, in particular under Regulation 13A of the Working Time Regulations 1998, given the purely domestic nature of the right;

1.3. In each case, the dates of each period of holiday in respect of which a claim is made in these proceedings.

1.4. Identify the amount that the claimants contend should have been paid in respect of each holiday period, and provide a breakdown of the basis for that amount. The claimants shall [provide] this information in tabular form, showing, in respect of each period of holiday, the following:

1.4.1. The precise elements of pay which the claimants contend should be included in the calculation of pay for the periods that are the subject of the claim;

1.4.2. The total amount of pay the claimants contend should have been paid on each occasion together with details of any supporting calculation; and

1.4.3. The actual amount paid to the claimants by the respondent in respect of that period of holiday."

7. I note in passing that Employment Judge Southam and the parties appeared comfortable at that stage with a lack of precision and indeed flexibility concerning the issues, and the observation at paragraph 3 of the 7 December 2015 PH:

> **"3. It was not appropriate to agree any list of issues at this stage. The parties are aware of the issues that are likely to arise within claims of this kind, and will be expected in due course to agree a list of issues to be determined, but the precise wording of some issues will depend on how the various claimants put their respective cases, as to which I have ordered further information (see below)."**

8. Further information was served on 13 March 2016. Amey then applied for a further Preliminary Hearing which took place on 25 April 2016 again before Employment Judge Southam (the 25 April 2016 PH) at which further information was ordered from the Claimants, preceded by the following observation:

"*Other Matters*

4. I made the following case management orders. These are not entirely for the purpose of the preliminary hearing. I was persuaded that, to enable the claims to be progressed beyond that hearing, some further information is required from the claimants." (Case Management Summary)

"1. *Further Information*

The claimants shall provide to the respondent, by 24 June 2016, further information in accordance with the order made on 7 December 2015, sent to the parties on 8 December 2015 so as to identify:

1.1. The contractual basis for the payment of each additional element of pay which the claimants say should be included in the calculation of their holiday pay;

1.2. The basis, if so claimed, for any contention that contractual holiday pay should be calculated and paid similarly to a calculation of holiday pay in respect of regulation 13 (Directive) leave;

1.3. The dates of the applicable leave year; and

1.4. Any contractual term which specifies the order in which leave shall be taken." (Order)

9. There is no finding in the 25 April 2016 PH Order as to the extent of compliance with the 7 December 2015 PH Order. Amey then applied for a strike out of the Regulation 13A claims, and Orders and directions were made for an open Preliminary Hearing on 12 July 2016, which was subsequently withdrawn. A further Preliminary Hearing was conducted on 17 October 2016, again before Employment Judge Southam, in which he ordered:

"2.1. The claimants shall by 3 February 2017 update, revise and/or provide the further information ordered by the orders of paragraph 1 of the order made on 7 December 2015 and, where it imposes an additional requirement, by paragraph 1 of the order of 25 April 2016, so as to set out their individual cases and to eliminate inconsistencies in information already supplied

2.2. The claimants shall also, if so advised, by the same date, supply the wording of any amendment to the basis of the their respective claims (as distinct from the dates of holidays the subject of the claim)."

10. On 20 February 2017, further information was provided by eight of the Claimants.

11. A further Preliminary Hearing was conducted on 27 February 2017, again before Employment Judge Southam, when an Unless Order was made.

"2. *Further Information: Unless Order*

The claimants shall by 5 May 2017 comply with order 2.1 of the tribunal orders made and sent to the parties on 17 October 2016, including, for the avoidance of doubt, the previous orders to which that order refers.

UNLESS the claimants comply, the claim of any claimant who fails to comply shall be struck out without further order or the need to hold a hearing."

12. The Order went on to explain that after receipt of the further information, the Respondents were tasked with drawing up the first draft of a list of issues which would then be commented on, and hopefully agreed, by the Claimants.

13. Further information and schedules of losses were supplied in relation to the remaining 15 Thompsons represented Claimants by 5 May 2017, contained in a number of lever arch files[2].

14. The two Claimants who are no longer represented by Thompsons, but had been, Mr Patterson and Mr Simmons (and whom Ms Tether no longer represents), had provided further information and calculations through Thompsons in similar format to those of their colleagues, by 5 May 2017.

15. The case then came before Employment Judge Smail on 4 September 2017 at a Preliminary Hearing which is the subject of this appeal ("the Smail Judgment"). Skeleton arguments were prepared and exchanged, sequentially as I understand it, in advance of that hearing and they were before me too. One of the principal issues before Employment Judge Smail was whether there had been compliance with the Unless Order, it being common ground that if not, it would automatically follow that the claims had been struck out.

[2] The precise number remains a mystery: the totality of the further information was before me in two lever arch files, but it was referred to as being contained in four lever arch files in the Order. In any event, the information was voluminous.

16. I am informed by Mr Martin today, that he spent three hours in front of Employment Judge Smail going through each and every way in which he considered that the information provided was defective. Mr Airey, solicitor for the Claimants, argued that the further information supplied complied with the Unless Order. I was not told how long his submissions took.

17. It is necessary to set out Employment Judge Smail's findings and conclusions in full:

> **"8. On 5 May 2017 Thompsons on behalf of the 27 Claimants represented by that firm served on the Respondents in respect of each Claimant an individual statement of further information and a Schedule of Loss as best they could particularise, they say, on the information in the Claimants' possession or as disclosed so far by the Respondents.**
>
> **9. It is the first respondent's submission as put by Mr Martin that the statements of further information and schedules of loss are not adequate for the purposes of the Unless Order. For these purposes, all respondents are adopting the position of Mr Martin because the first respondent was the only respondent at the time of these earlier Orders and subsequent TUPE transfers to the second and third respondents had not as yet taken place. They have now. The Second and Third Respondents from now on will have to decide the format of legal representation with due regard to any conflict of interest there may be. The singular term 'Respondent' hereinafter relates to the relevant Respondent which may ultimately be liable to a Claimant.**
>
> **10. Each statement of further information purports to set out the contractual basis for each additional element of pay, contentions in respect of the application of sections 221-224 of the Employment Rights Act 1996, contentions as to holiday pay entitlement being more than 4 weeks a year, the dates of the leave year and any contractual term which specifies the order in which leave shall be taken. The schedules in the form of spreadsheets then set out holiday dates and amounts claimed as best calculated on existing information.**
>
> **11. In my judgment, the further information and the schedules are sufficient for the Respondent to know the case it has to meet. They are also sufficient for the Respondent to start to prepare counter-schedules. Indeed, just about all of the information required will be in the Respondent's control anyway whether before or after a TUPE transfer.**
>
> **12. Indeed, if the Respondent knows it owes the Claimants' money it should calculate what is owed and pay up. The Tribunal should only be asked to adjudicate matters were there is a bona fide dispute as to liability or quantum, and if to the latter only, then liability in principle should be conceded.**
>
> **13. There are problems with the unless order. It purports to make subject to the unless order all previous orders on further information, however widely drawn, and includes an obligation 'to eliminate inconsistencies in information already supplied'. It might be thought that an unless order in those broad terms is almost bound to generate satellite litigation. Be that as it may, it is my duty to consider whether the unless order has been satisfied and it is my Judgment that it has.**
>
> **14. Mr Martin has made a number of criticisms of the information supplied. In terms of timing, he says the Claimants have not distinguished between Reg 13, Reg 13A and contractual leave. However, in the further information statements each Claimant asserts that the order of leave is Reg 13, then 13A then contractual. That is in keeping with authority, also.**
>
> **15. He complains that average pay has been calculated over 3 months and not the statutory 12 weeks prescribed. I reject the suggestion that this is likely to be a material error. It is easier to calculate average pay over 3 months when the frequency of payment is monthly. Otherwise costs have got to be incurred in altering the calculation which is not likely to give a materially different figure as to average, anyway.**

16. He says that whilst contentions are made in the statements of further information as to the applicability of ss 221 to 224 ERA 1996, indeed sometimes in the alternative, the basis for them is not there stated. This does not in my judgment amount to a material point. Elsewhere in the further information the contractual terms relied upon are set out. In any event the *evidence* relating to the contentions would be looked at later in the process. The Claimants do not at this stage have to lay out all the evidence. They have to set out their case. They have done this. The Respondent can now prepare its case.

17. Mr Martin has pointed to some calculations which appear to be erroneous or which contain omissions. The unless order is not to produce error free calculations. Error can be addressed in counter schedules.

18. Accordingly, these claims proceed. I invite the parties to agree directions as to the future conduct. There will be a telephone preliminary hearing between the lawyers and myself to make orders.

19. There are significant number of amendments. It was mooted that these be saved for the final hearing but I wonder whether there is a course open to us whereby these may be determined in advance. Failing that, Schedules and Counter Schedules of Loss will have to cover the amendments as though granted, so that there is preparation for all eventualities."

The Appeal

18. Both Kier and Amey sought to appeal the Smail Judgment on similar grounds which came for sift before Her Honour Judge Eady QC who considered that two of the proposed grounds raised arguable questions of law: ground 3, that it was a misdirection to approach the question of material non-compliance globally or generally, rather than in respect of each Claimant, relying on an assertion that 15 of the Claimants had not calculated payments due in respect of certain periods/dates of leave; and ground 6(g) that compliance with an Unless Order is not a matter of discretion (based on a value judgment as to general sufficiency, or at all) but a question to which there was a right or wrong answer, and, in relation to the calculations, when provided, the information did not even purportedly comply with the statutory method of calculation and the ET had therefore reached the wrong answer when concluding that there had been compliance.

19. Amey (but not Kier) exercised its right pursuant to Rule 3(10) to an oral hearing which came before Mrs Justice Simler P and the ambit of the appeal was extended to cover all of the sub-paragraphs in ground 6 (which has a number of sub-paragraphs) and grounds 5 and 7, since there was arguable linkage or overlap with the grounds on which the appeal had been permitted

to proceed. It would enable the Appellants to explore fully their overarching concern that there had been a global approach to the question of material compliance with the Unless Order and a lack of attention to the detail provided. Ground 5 criticised the Smail Judgment for not addressing the matter of compliance with the Unless Order by the unrepresented Claimants and sub-paragraphs 6(a)-(f) and (h) addressed what were said to be specific shortcomings in the further information provided as follows: (a) some of the Claimants had advanced claims for in excess of 5.6 weeks per annum; (b) some had not distinguished between Regulation 13 and Regulation 13A leave periods claimed for; (c) there were inconsistencies in the approach of the Claimants in relation to Regulation 13A; (d) there were inconsistencies concerning the case on normal/non-normal working hours; (e) there were allowances in the schedules provided that were not in the further information; (f) there were inconsistencies as between some of the schedules and the further information from which the schedule was said to be compiled about the leave years; and, finally, (h) the calculations which had been provided did not comply with the statutory method of calculation.

20. Ground 7 sought to attack the adequacy of the ET's reasons and, as explained by Simler P in her decision allowing the appeal to proceed to a Full Hearing, if Mr Martin were to succeed on his detailed points, he may also have a reasons argument.

21. Mr Martin's application for an amendment to include the claims of Mr Wheeler and Mr Miller in the list of the Claimants who had not supplied calculations in ground 6(g) was allowed.

22. There has been no appeal by Skanska of any aspects of the Smail Judgment.

The Relevant Legal Principles

23. The applicable law is agreed between the parties and is uncontroversial. Rule 38 of the **Employment Tribunal Rules of Procedure 2013** states:

> **"(1) An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred.**
>
> **(2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.**
>
> **(3) Where a response is dismissed under this rule, the effect shall be as if no response had been presented, as set out in rule 21."**

24. ETs have wide powers to order the production of further and better particulars and further information and to allow claims to be amended. The purpose of further information is to prevent adjournments and to enable the parties to know the case they have to meet, so that there can be a fair trial (see **Hylton v Royal Mail Group Ltd** UKEAT/0369/14/DA paragraph 14, per Langstaff P for example). The observation of Woods J in 1991 that the purpose of an Order for the provision of further information is not to be oppressive, nor for the production of evidence and that complicated pleading battles should not be encouraged in the ET, still holds good today.

25. An Unless Order is a conditional Judgment and takes effect without the need for further Order if the party to whom it is addressed fails to comply with it in any material respect. The only relief for a party in default is to apply for relief from sanction and avail itself of Rule 38(2). Mr Martin placed particular reliance on the graphic image used in **Scottish Ambulance Service v Laing** UKEATS/0038/12/BI paragraph 35, that in a case where an Unless Order has been made, the Tribunal has already addressed the question of whether or not the "deadly sword" of strike out should fall on the party against whom the Order is sought and decided that unless a particular direction is complied with, it should.

26. Interestingly, I note in passing that neither of the skeleton arguments before the hearing of Employment Judge Smail on 4 September 2017, address the relief from sanction point. Both of them focus only on whether there has been compliance, so it would appear that there was no argument or discussion about that at the hearing, but I can be corrected if I have misunderstood about that and it may be relevant when it comes to disposal.

27. Both parties agree that in a multiple claim such as this, or indeed any claim, an ET must approach the question of material compliance in respect of each claim individually. If the Smail Judgment failed to do so, it would amount to an error of law.

28. In the context of Employment Tribunal proceedings, the proper approach to an Unless Order is set out in **Johnson v Oldham Metropolitan Borough Council** UKEAT/0095/13/JOJ by Langstaff P:

> **"7. The phrase used by Pill LJ in *Marcan* was, "…any material respect": I would emphasise the word "material". It follows that compliance with an order need not be precise and exact. It is agreed by counsel before me that Employment Judge Feeney in adopting a test of substantial compliance therefore adopted one in accordance with the law. I would make this comment however: "material" may be a better word than "substantial" in a case in which what is in issue is better particularisation of a claim or response. That is because it draws attention to the purpose for which compliance with the order is sought; that it is within a context. What is relevant, i.e. material, in such a case is whether the particulars given, if any are, enable the other party to know the case it has to meet or, it may be, enable the Employment Tribunal to understand what is being asserted. To use the word 'substantial' runs the risk that it may indicate that a quantitative approach should be taken: thus, where 11 matters must be clear to enable a party to deal fairly with a claim, of which 9 have been provided but not 2, which remain necessary, compliance has not *materially* been provided because the purpose of seeking compliance has not been achieved in the context; the other party still cannot obtain a fair trial. To adopt a quantitative approach may erroneously lead the Judge in such a case to conclude that there had been sufficient compliance (9 out of 11) even if the further particulars remained necessary before a fair trial could take place. Substantial compliance has thus in my view to be understood as equivalent to material compliance not in a quantitative but in a qualitative sense."**

29. An Unless Order must identify with clarity what is required for compliance. As set out in paragraph 14 of **Mace v Ponders End International Ltd** UKEAT/0491/13/LA this is for a number of reasons: (1) so that the party who has to comply is in no doubt as to what is necessary for compliance; (2) to enable the Tribunal to decide whether there has been material compliance;

and (3) to avoid satellite litigation as to whether a person has or has not materially complied with the Order.

30. It is important not to confuse compliance with an Order with the question whether the particulars or further information provided are factually correct or legally sustainable, **Wentworth-Wood & Others v Maritime Transport Ltd** UKEAT/0316/15/JOJ:

> **"49. It is important not to confuse compliance with the Order with the question whether the claims set out in the schedules are factually correct or legally sustainable. The Respondent is at liberty to argue before the Employment Tribunal that the Claimants' claims are factually wrong or legally unsustainable; but all that is required for compliance with the Unless Order is that full particulars of the amount must be given."**

31. Finally, a party is only required to do what is possible: if there is no further information to provide, such as where there are gaps in the records, a party is entitled to say that there is no further information available to it to provide. In a case such as this, where it is for the Claimants to prove their claim, any lacunae in the evidence is likely to be in the Respondents' favour and they are thus entitled to know in the further particulars what those gaps are.

Discussion and Conclusions

Ground 3

32. Turning now to the specific grounds of appeal allowed by the President of this Tribunal to be advanced at this hearing, I will start in numerical order with ground 3 and paragraphs 10 and 11 of Judge Smail's Order. The concern of Mr Martin is that the Tribunal has misdirected itself as to the question of material non-compliance, because it has not addressed in relation to each and every Claimant the detailed observations that Mr Martin made during the course of the hearing.

33. It has been helpful for me to see the detailed skeleton arguments before the Smail Tribunal and I have also had the opportunity to go through the detail of the further information provided by the Claimants prior to that hearing (additional preparation time and a two-day time estimate was provided for this appeal hearing for that purpose). The point can be dealt with shortly: as is recorded in the Smail Judgment in paragraph 10, each statement of further information in relation to each of the Claimants and the accompanying spreadsheets purports to provide the information ordered and the amounts claimed calculated as best they can, on the existing information. The information and spreadsheet is clearly laid out adopting a uniform and helpful format, using the headings and categories identified in the various Employment Judge Southam Orders.

34. I do not conclude that Employment Judge Smail has misdirected himself and there is nothing to suggest that he has not looked at each one individually, considered the information provided and concluded that each is in material compliance of the Order: indeed he clearly states that "*Each statement ... purports to set out*" all the various categories of information sought in the various Orders, demonstrating that he has carefully looked through each one in order to make his assessment.

35. Having, at Mr Martin's request[3], considered the information provided by each Claimant in some detail by reference to the Unless Order, I would agree with Employment Judge Smail's assessment that each of the represented Claimants appear to have provided as much detail as they could and have attended conscientiously to the provision of the information sought. The gaps in some calculations, such few as they were, were explained and clearly identified: for example, the Claimant explaining that he had not retained his pay slip for the period in question and the

[3] And initially somewhat reluctantly, as the role of this Tribunal is not to conduct a re-hearing, but to identify legal errors.

Respondent had not yet produced it. There is no error of law identified in Amey's ground 3 in Employment Judge Smail's approach and conclusions: he has considered each of the claims. Eight of the Claimants had provided the information sought by 27 February 2017 and the remaining 15 of the union represented Claimants had materially complied by 5 May 2017. There was nothing to suggest in any of the Orders that the eight that had previously complied were required to resubmit the information again, which as Ms Tether observed, would be pointless.

36. Before turning to the next ground, it is first necessary to explore the underlying difficulty identified by Mrs Justice Simler P when she allowed the appeal to proceed to a Full Hearing on fuller grounds, that the Unless Order is badly drawn and ill-defined. The reference back to two earlier Orders, which are themselves not entirely clear, adds to the lack of clarity. It would have been much better if what was required of the Claimants had been set out in a single self-contained document, without leaving the Claimants having to rifle back through previous Orders to understand what was being asked of them. Furthermore, there are subtle variations in the wording in the different Orders, and where the wording is inconsistent it is unclear which Order the Claimants are intended to follow. Furthermore paragraph 2.1 of the Employment Judge Southam Order of 17 October 2016 is confusing and fails to identify in respect of which Claimant and in what respect the 7 December 2015 Order "*imposes an additional requirement*" and where inconsistencies are said to exist. It would be particularly confusing for the Claimants who are unrepresented.

37. Mr Martin rightly observes that there has been no appeal or request for a reconsideration of any of the Orders themselves and argues that it is now too late to quibble over the wording of the Unless Order and the previous Orders. In one sense he is right, but as the EAT observed in **Wentworth-Wood** "*the party who has to comply with [an Unless Order] must be able to see*

from its terms what is required to comply with it; an Order cannot be read expansively against the party who has to comply" (paragraph 44). In other words, the Respondent cannot now take advantage of infelicitous wording to obtain a strike out of the claims for non-compliance, where the meaning of what is required is unclear.

38. The purpose of the further information and compliance with an Order is to enable the party seeking the information to know what case it has to meet. Employment Judge Smail correctly found that the Respondents were able to do so from the information provided in relation to the Claimants. There had been material compliance sufficient for a Respondent to respond in the form of a counter-schedule as suggested by Employment Judge Smail.

39. Where the Claimants had no further information to provide, they said so. The Respondents now know where there are gaps in the Claimants' evidence, which the Claimants may or may not be able to fill by asking the ET to draw inferences, by for example previous pay patterns: the Respondents know the case they have to meet. But the Claimants cannot provide what they do not have, and explaining that they do not have any further information does not make them in breach of an Order.

Ground 5

40. Turning next to ground 5, the criticism is that the Employment Judge's Judgment only purports to resolve the issue of compliance with the Unless Orders for those Claimants represented by Thompsons instructed by the union and the Employment Judge has failed to address the matter of the two Claimants, Mr Simmons and Mr Patterson, who were by then unrepresented.

41. It is correct that the unrepresented Claimants are not separately referred to in the Smail Judgment and that they have not participated in this appeal. However these two Claimants had provided the further particulars sought when they were previously represented by Thompsons at FI/777-786 and FI/739-776 respectively. For example, we can see from the helpful summary prepared by both parties that Mr Simmons was not claiming more than 5.6 weeks holiday pay per annum, and that Mr Patterson had no missing calculations in the documentation provided and that whilst the Respondents accepted that the calculations for Mr Simmons complied with the statutory method the parties disagreed in relation to Mr Patterson.

42. It is also noteworthy that Mr Martin's submission before the 4 September 2017 hearing does not deal separately with the two unrepresented Claimants.

43. I therefore conclude that Employment Judge Smail did not err in concluding that the information provided on their behalf whilst they were represented by the union solicitors was in material compliance with the Unless Order. Mr Martin explained that it is a somewhat academic matter in any event as the unrepresented Claimants do not appear to be actively pursuing their claims now that they have lost the benefit of union representation.

Ground 6

44. The next ground is 6 with its 8 sub-paragraphs. The question that Mr Martin asserts is that, in a number of specific respects in addition to ground 3 of the grounds of appeal discussed above, the Employment Judge was wrong to conclude that there had been material compliance in relation to some Claimants and some aspects of their claims. I remind myself again that the issue is not about whether further information is factually correct or legally sustainable, it is about

material compliance, and whether a Respondent knows sufficient in a qualitative sense about the case it has to meet. Compliance with an Order need not be exact or precise (**Johnson v Oldham**).

45. Ground 6(a) concerns the period of holiday pay claimed per annum. The significance is that different provisions apply to different periods of leave: Regulation 13 leave entitles workers to 4 weeks in accordance with the **WTD**; Regulation 13A to 5.6 weeks which is a purely domestic statutory right; and for periods beyond 5.6 weeks, the basis of a claim will be contractual. Mr Martin objects to the 20 Claimants whose claims for underpayment of holiday exceeds 28 days per annum, since he considers only these have any chance of success, but as Ms Tether observes, the ET had acknowledged that some of the Claimants sought to amend their claims so as to advance contractual as well as Regulation 13 and Regulation 13A claims and that application was pending before the ET. Whether or not Mr Martin's prediction about the Claimants' prospects of success in relation to their Regulation 13A and contractual claims is accurate, does not mean they have not complied with the Order.

46. Nor does Mr Martin's point that the different sources of entitlement is unhelpful in identifying time limits in relation to each of the three kinds of leave constitute non-compliance with the Order, but is an issue best addressed and clarified in a counter-schedule. Employment Judge Smail was entitled to conclude there had been material compliance with the Order.

47. There are two insuperable problems for the Respondents in ground 6(b) on the identification of Regulation 13 as distinct from Regulation 13A leave: firstly the Unless Order does not require their separate identification; and secondly, as Mr Martin effectively concedes in his skeleton argument and as was identified by Employment Judge Smail in his Order, the Respondents know that Regulation 13A leave follows on from Regulation 13 leave. In further

information served by the Claimants as long ago as June 2016, the Claimants accepted that in accordance with **Dudley MBC v Willetts** certain pay elements were not sought in relation to the Regulation 13A periods. There is therefore no error of law in Employment Judge Smail's conclusion that there has been material compliance in this regard.

48. Ground 6(c) dovetails with ground (b) as it also concerns the distinction between Regulation 13 and Regulation 13A leave. It seeks to explore discrepancies between the further information provided by each of the Claimants and the calculations provided in their respective schedules. Employment Judge Smail was not in error in concluding that there had been material compliance and that any wrinkles (if there were any) would best be ironed out in a counter-schedule.

49. Ground 6(d) concerns the statutory calculation of a week's pay and the definitions of employments with normal working hours set out in sections 221 to 224 **ERA 1996** and the requirement in the Order of 7 December 2015 for the Claimants to state which parts of those sections apply to them. On the face of the further information provided, all the Claimants have complied. Most have claimed Normal Working Hours and some claimed No Normal Working Hours and, in the alternative, Normal Working Hours. It will be for the Tribunal to determine, failing agreement, whether the contention is accurate as a matter of fact and law. The Respondents know the type of claim they have to meet. Although many of the Claimants have not, in the most recent information provided, identified which type of Normal Working Hours applies to them, Employment Judge Smail was entitled to conclude it did not amount to a failure materially to comply with the Order.

50. The second line of attack under this paragraph is an allegation that the Claimants have not set out the basis for contending for their chosen category of working pattern by reference to sections 221 to 224 **ERA 1996**. Employment Judge Smail referred to this as "*not ... a material point*" (paragraph 16 of the Employment Judge Smail Judgment) and he was right to do so. These are holiday pay claims for workers with written contracts of employment provided by their employer and whose pay is calculated by their employer who is required by law to prepare itemised pay slips for each of its employees. The Claimants are in material compliance with the Unless Order and the Respondents know the case they have to meet from the information provided. It is an entirely different case from, for example a discrimination claim, where a Respondent might be wholly unaware of the basis of a particular allegation made by a Claimant, in which case material compliance might require fuller information.

51. The third line of attack in this ground is what is said to amount to unresolved discrepancies in the various tranches of information provided at various times. In simple terms Mr Martin asserted that for some of the Claimants, information provided pursuant to the Order in 2017 differed from the information provided in 2016. The additional further information had of course been provided because the Respondents had asked for it as they had been critical of the information previously provided. It is implicit that the additional further information is intended to supersede the earlier information provided. If they consider any inconsistencies demonstrate a weakness in the Claimants' case they can no doubt rely on it at the substantive hearing. It does not, however, amount to non-compliance with the Unless Order.

52. Ground 6(e) concerns eight of the Claimants said to have provided inconsistent details as between the further information provided and the schedule of calculations. It concerns some elements of pay such as allowances for emergency call out and bank holiday allowances which

feature in the schedule of calculations, but not the further information. The Claimants do not accept that there have been the inconsistencies alleged and that all payments claimed in the calculations have been heralded in the further information provided.

53. It was not Employment Judge Smail's task at the Preliminary Hearing to make findings of fact, but even if he had agreed with Mr Martin that there had been several glitches or errors, they were minor and Employment Judge Smail was entitled to consider that they would not, or did not, constitute a material non-compliance with the Unless Order.

54. Four Claimants are criticised in ground 6(f) of the grounds of appeal for advancing in their schedules claims in respect of leave years not mentioned in earlier particularisations of their claims. However it is hard to see how the Respondents can legitimately complain: they wanted further information and went to the trouble of obtaining Tribunal Orders to obtain it. They cannot now complain and object because they have received it.

55. Ground 6(g) - that 15 Claimants had not supplied all of the calculations in respect of their claims - is a repetition of ground 3. Where there were gaps in the calculations, they were explained by for example missing pay slips. Employment Judge Smail was entitled to conclude that there had been material compliance by each of the Claimants who had done the best they could from the information they had.

56. Ground 6(h) concerns the method of calculation of holiday pay. The criticism of the Claimants' schedules has two aspects: the reference period used, both the calculation dates and the period used (said to have been 3 months instead of the 12-week period referred to in the

A statute); and secondly, an alleged failure to account for and exclude, non-working time, such as for sickness and periods of unpaid leave.

B 57. The Claimants did not accept the criticisms in relation to many of the Claimants, and for others, such as Mr Miles, explained that since he was paid monthly it was impossible to use the statutory method of calculation with only monthly pay slips. It was a simple enough task to pro rate a 12-week period from 3 months so as to obtain an accurate result and the Claimants C considered that the Respondents were being obtuse.

58. There are different views as to the correct methodology of calculation and the interplay D between the traditional rules for calculating pay in sections 221 to 224 **ERA 1996**, which pre-date the **WTR**, and the UK's obligations under the **WTD** is a developing area. It is not a simple exercise, perhaps more of an art than a science, notwithstanding the technical formulation of E sections 221 to 224. But paragraph 1.4 of the 7 December 2015 Order, incorporated into the Unless Order, required the Claimants to provide their calculations and provide a breakdown for them, and that is exactly what they have done. Any concerns the Respondents have about the methodology adopted by the Claimants can be addressed in a counter-schedule, but the Claimants F have done what was asked of them. Employment Judge Smail was entitled to conclude that the Claimants were in material compliance with the Unless Order.

G 59. Ground 7 seeks to attack the sufficiency of Employment Judge Smail's reasons. As Simler P noted in her reasons giving authority to the appeal to proceed, ground 7 was essentially parasitic on ground 6 and over lapped with ground 3. If, on the detailed points advanced by Mr H Martin in ground 6 he had been able to demonstrate an error of law, it could perhaps also have amounted to an insufficiency of reasoning on the Employment Judge's part. However, in spite

of his determined efforts, Mr Martin has not succeeded in making any inroads on his detailed points and Employment Judge Smail set out his reasons for his decision in sufficient detail. It was not a fact finding exercise and he rightly sought to avoid being drawn into satellite litigation. This ground too must fail.

60. I have gone through each of the points raised by Mr Martin in detail as requested to do, but the conclusion is best succinctly summarised in the preliminary concern of Simler J at the Rule 3(10) Hearing, that the points of detail raised in ground 6 are more relevant to the accuracy and correctness (as a matter of fact and law) of the particulars provided, rather than whether there was material compliance with the Order. Furthermore, as Ms Tether points out, the concerns that Mr Martin raises do not tally precisely with the wording of the Unless Order in any event. The wording of the Unless Order enabled the Claimants to formulate and frame their claims with considerable flexibility and freedom, and they have provided the information sought as best they can.

61. For the above reasons I reject the appeal. It therefore also follows that there are no issues to resolve concerning Skanska (who did not appeal Employment Judge Smail's Judgment), or Keir (who did not seek a Rule 3(10) Hearing to expand their grounds of appeal following HHJ Eady QC's Rule 3(7) ruling).

62. The Claimants' claims have not been struck out and may proceed before the ET.