Case Numbers: 2700048/2015 & 8 others
2700255/2015 & 4 others
3300888/2015
3301869/2015 & 9 others

EMPLOYMENT TRIBUNALS

BETWEEN

Claimants	and	**Respondent**
Mr J Bate & Others Mr D Hinson & Others Mr M Renwick Mr C Bate & Others		Amey Services Limited

Held at: Watford **On: 13 December 2018**

Before: Employment Judge Smail

Appearances

Claimant: Mr R Kohanzad (Counsel)
Respondent: Mr D Martin (Counsel)

PRELIMINARY HEARING

RESERVED JUDGMENT

1. The dismissal of the claims consequent upon the order of Employment Judge Southam sent the parties on 27 October 2015 is set aside in the cases of the following claimants, it being in the interests of justice that their claims proceed: J Bate, Beattie, Butler, Cooper, Edwards, Higgins, Hinson, Rainey, Clarke, Bradley, Ellis, Renwick, Johal and Redfern.

2. The dismissal of the claim of Mr C Bate is confirmed.

3. The claimants shall indicate to the respondent which documents they need to complete their schedules of loss by 3 May 2019.

4. The Respondent shall provide the documents by 14 June 2019 and may ask the claimants for any documents by that date.

5. The claimants will provide the documents asked for by 19 July 2019

6. The claimants shall serve schedules of loss on the respondent by 31 July 2019.

7. The respondent shall serve counter schedules of loss on the claimants by 30 August 2019.

8. The parties will submit to the tribunal proposed directions for the final resolution of the case by 13 September 2019.

REASONS

1. These are multiple holiday pay claims. They come back before the Tribunal upon remission by the EAT. On 25 November 2016 E.J. Southam granted relief from sanction for failure to comply with an unless order dated 27 October 2015 concerning the provision of further information. The granting of relief was overturned by HHJ Barklem by order dated 20 February 2018. He ordered that in relation to the 15 claimants who had purported to provide further information, a freshly constituted tribunal determine whether there had been material compliance such as to entitle the Tribunal to grant the relief sought. That exercise I consider afresh.

<u>The procedural history of this matter</u>

<u>E.J. Southam</u>

2. The Unless Order dated 27 October 2015 was in these terms:-

> 'Unless by 4pm on Friday, 27 November 2015 the claimants file at the tribunal and serve on the respondent the further information requested at paragraphs 2, 3, 4 and 5(a) of the respondent's request for further information dated 10 June 2015, the claim of any claimant who fails to provide such information will stand dismissed without further order or the need for any hearing.'

3. The relevant paragraphs of the request for further information were in these terms –

> Of: "the claimant believes that his holiday pay should be paid based on an average of his earnings, taking into account all elements of his pay. The claimant believes the underpayment of wages constitutes a series of unlawful deductions."

2. Please identify the terms of the contract to support the claim. If available, please provide a copy of the contract concerned.

3. Please confirm whether it is accepted that the working rule agreement, as varied from time to time, was incorporated into the claimant's contract of employment, at least so far as it relates to the claims before this tribunal. If not, please state the basis for that position.

4. Please state which parts of sections 221 to 224 of the Employment Rights Act 1996 apply to the claimant and the basis for that contention. In particular, please state:

(a) whether it is contended that the claimants' pay for normal working hours (this is defined in section 234) varied with the amount of work done. If so, please state the basis for that contention;

(b) whether it is contended that the claimants pay for normal working hours (this is defined in section 234) varied with the time that work was done within the meaning of section 222(1) of the ERA 1996. If so, please state the basis for that contention;

(c) whether it is contended that the claimant did not have normal working hours, and, if so, the basis for that contention.

5. Please identify the amount that should have been paid in respect of each holiday period and provide a breakdown of the basis for that amount.

In order to present this information, please provide a spreadsheet showing separately the dates of all holiday taken (on which the claimant relies). The spreadsheet should also show, in respect of each period of holiday, the following further details:

(a) the precise elements of pay which the claimant contends should be included in the calculation of pay for the periods that are the subject of the claim;

(b) the total amount of pay the claimant contends should have been paid on each occasion, together with details of any supporting calculation;

(c) the actual amount paid to the claimant by the respondent in respect of that period of holiday.

4. The J Bate multiple was presented on 16 January 2015; the Hinson multiple on 26 February 2015; Mr Renwick's on 6 May 2015; Mr C Bate's multiple on 30 June 2015. OH Parsons, solicitors, act for all.

5. The J Bate details of claim were set out as –

'The claimants have been working for the respondent for varying periods of time. The claimant's earnings vary from week to week, depending on when they work. The claimants work overtime. The claimants are paid holiday pay based on a basic rate. The claimants believe that their holiday pay should be paid based on an average of their earnings, taking into account all elements of their pay.'

6. The Hinson details were fuller in terms of the applicable law but did not set out financial details of the claims, i.e. what precise sums were actually being claimed.

7. The Renwick details were like J Bate's as was C Bate's.

8. At a PH on 22 June 2015 EJ Southam was persuaded that the Respondent would not be required to serve a response in these cases until the request for further information was answered. The Claimants were given until 24 July 2015. At that point the Tribunal was dealing with the first 3 sets of claims. Mr J Bate's multiple was later joined and the same order was made requiring the further information by 23 October 2015.

9. The Claimants' solicitors wrote on 6 October 2015 that there needed to be a distinction between pleading the claim on the one hand and a fully calculated schedule of loss on the other. The latter was not possible, they argued, without prior disclosure from the Respondents.

10. EJ Southam expressed himself as being surprised by the lack of progress. Accordingly, he made the unless order above.

11. O. H. Parsons purported to provide the further information on 27 November 2015. The further and better particulars were said to replace all previous particulars. Information included that the claimants all received a basic salary for working their contractual hours. They can earn site bonus; night/weekend premium; shift pay; overtime; standby payments and call out payments. A schedule attached purported to set out which claimants receive what payments. The individual contracts worked on by the claimants were identified and were purportedly set out in the attached schedule. Four types were identified: Walsall Metropolitan Council, Amey Services Limited, Birmingham City Council, Amey Highways Limited. It was accepted that all of the claimants had the working rule agreement incorporated into their contracts. It was said that all of the claimants were contractually required under either an express or an implied term, to work overtime and to work flexibly evenings and weekends when required. It was said that the claimants believe that their holiday pay should be calculated based on a 12-week average of their actual earnings, including the identified additional payments, calculated in accordance with sections 221 to 224 of the 1996 Act. Specifically, it was argued that due to the claimants pay varying owing to the identified additional payments listed above, that section 222 of the 1996 Act should apply. In the alternative, all the elements of identified additional payments as listed above, be included when calculating normal remuneration. The attached schedule identified which contract they were working under and identified the pay elements received. Not all relevant claimants were in the list, the 2 Bates were missing.

12. On 1 December 2015, E. J. Southam ordered the respondent to file responses. A preliminary hearing was ordered. It took place on 28 January 2016.

13. By letter dated 21 January 2016, the respondent submitted that there had been significant failure to provide the further information requested by them. They were unaware that employment Judge Southam had made an unless order. Their position in the letter of the 21st January was that an unless order should be made.

14. At the PH on 28 January 2016 EJ Southam consider whether the unless order had been complied with. The information provided, in his judgement, did not set out the contractual basis for the assertion that the claimants were entitled to receive additional elements of pay or payment for overtime and, in respect of overtime, the information failed to state whether the overtime was guaranteed and compulsory or not guaranteed but compulsory. The information given was generic and not specific to individual claimants. It should not have been difficult, in his judgement, for the claimant's representatives to provide a pleaded basis for the contractual entitlement to additional payment or payment for overtime worked. The further information document failed to do that. He set out the law that a strike out provided for by an unless order takes effect without the need for any further order if the party to whom it addressed fails to comply with it in any material respect. Partial compliance, he ruled, was not sufficient.

15. The respondent had accepted that the claimants had provided the information sought a paragraph 3 of the request for further information and the Judge was of the view that they had complied with the request for information at paragraph 5(a). The fact, however, that the claimants had not supplied the information requested at paragraph 2 of the request was fatal to the claims. That failure, ruled Judge Southam, led inevitably to the claims being dismissed by virtue of the terms of the unless order. He ruled that the question of discretion only arose if there should be an application to set aside the unless order under rule 38(2). Counsel for the claimants did not have instructions to make such an application that day. Under the rule, the claimants had 14 days from the date on which notice was given to the parties that the claims were struck out to make such an application. He confirmed his ruling that the claims had been automatically struck out. In those circumstances, the proceedings were at an end, subject only to the possibility of an application under rule 38(2) to set aside the unless order and further, the possibility of an application for costs. Mr Martin, counsel for the respondent, was persuaded to postpone his application for costs.

16. By letter dated 12 February 2016, and in time, the claimant's representatives applied for a review of the strike out. They did so, contending that it would be in the interests of justice for at least four reasons as set out. First, the fact that no notice that the claims were struck out, or would be struck out, was given prior to the hearing, which meant

the claimants had no opportunity to consider their position prior to the hearing. Secondly, they argued it was not certain that the unless order was absolutely clear in its terms as to what was expected of the claimants in order to comply with. Thirdly, that the claimants had materially complied with the order in the way that they understood it. Fourthly, the serious nature and consequences of the strikeout sanction in view of the claimant's alleged failure and the intrinsic merit and potential value of the claims.

17. By letter dated 19 February 2016. The respondents applied for wasted costs and set out their grounds of opposition to the relief application. By letter dated 13 April 2016 OH Parsons opposed the costs application. They explained in relation to their letter of 27 November 2015 that they sought instructions and provided what information they had been given. The PH for 13 June 2016 was postponed to a 2-day hearing because both sides felt 1 day was insufficient. Originally listed for 30 and 31 August it was put back to 24 and 25 November 2016 because of the availability of OH Parsons.

18. Witness statements had been ordered for that hearing. Mr O'Neill, a solicitor at OH Parsons adopted a draft statement from a paralegal called Peter Welsh. The copy of Mr Welsh's statement is unsigned but was adopted in a signed statement of Mr O'Neill. He detailed the steps that OH Parsons had taken to collate the information requested by the Respondent.

19. By a document dated 22 November 2016, OH Parsons served a purportedly much fuller response to question 2 in the Request for Further Information. They set out the relevant terms under –

    (a) the Walsall Metropolitan Council contract; the Claimants engaged under that contract were Beattie and Higgins;

    (b) the Amey Services Limited contract, relevant to Johal, Cooper, Edwards and Bate;

    (c) the Birmingham City Council contract, relevant to Bradley, Clarke, Coney, Ellis, P Evans, B Evans, Green, Hall, Hinson, Johnson, Rainey, Redfern, Schneider and Sewell;

    (d) the Amey Highways Contracts, relevant to Butler, Renwick and Yates.

    Copies of such contracts that had been sent to OH Parsons were disclosed. Copies were missing for Coney, P Evans, B Evans, Green, Hall, Johnson, Schneider, Sewell, Yates and Bostock.

20. By a reserved Judgment dated 7 December 2016, Employment Judge Southam revoked the strike outs and ordered wasted costs against OH

Parsons of £26,000. At this point O. H. Parsons were no longer acting for Johnson, P and B Evans, Hall, Schneider and Sewell. E J Southam chose to admit the document dated 22 November 2016. He made reference to Hylton v Royal Mail Group UKEAT/0369/14/DA , which suggested that where the claim has been struck out because of a failure to provide information but by the time of an application for relief the information has been supplied, the court will grant relief. He did not find, however, that this address the situation where the detailed document was served the day before the preliminary hearing when there was inadequate time to consider its contents.

21. He went on to consider the reason for default. He found that the reason was because not all claimants had provided the required information. Therefore, O. H Parsons had provided generic information. He found that to be a deliberate failure, but was not defiant or contemptuous. Nor had there been a persistent failure in the sense of multiple separate failures (paragraph 30 of his decision). He found that there had been substantial, but not material compliance with the orders request number 3 had been complied with, as had request number 5(a). He suggested that if an employer makes an additional payment to a worker employed by him, it is reasonable to infer that the payment is made to a contractual obligation and he did not think that the respondent was prevented from considering the detail of the case in the absence of production of the particular contractual provision relied upon, which might well not exist in documentary form.

22. As to prejudice: Judge Southam found any prejudice to the respondent would be compensated by a costs order. The delay in the case resulting from the failure to comply was to the prejudice of the claimants rather than the respondent. In terms of promptness: the application for relief was made promptly, but the information necessary to comply with the order certainly was not provided promptly, he found. As to a fair trial, provided the claimants provide the necessary information, a fair trial was possible. And that there had been 'substantial although not material compliance' with the order. The balance was in favour of granting relief. If he did not grant relief, claims which are of the type that have succeeded would be defeated.

EAT

23. The matter went to the EAT on 14 December 2017, and judgement was handed down on 20 February 2018. HHJ Barklem ordered first that the appeal be allowed in relation to the six claimants in respect of whom no particulars had been provided and the four claimants in respect of whom the late provided particulars indicated that the information required was not available. These cases would be struck out. In respect of the remaining 15 claimants the matter be remitted to a freshly constituted tribunal to ascertain whether there had been material compliance such as entitle the

employment tribunal to grant the relief. The cross-appeal against the wasted costs was dismissed.

24. HHJ Barklem ruled that Judge Southam had erred by failing to assess whether there had been material compliance with the unless order in all respects including request 4 and not merely request 2. In that absence, the finding that a fair trial was still possible was perverse. There should have been an assessment of the adequacy of the material served in relation to request 2, however late it was served. It was for the freshly constituted tribunal to reconsider the application afresh. The Tribunal was invited to consider the question of compliance with the terms of the unless order in full, including all requests in the request for information which were the subject of the order. It remains the case, however, that only requests 2 and 4 fall for consideration. The respondent does not contend that there was failure to comply with the others. It accepts that there was compliance.

The discretion exercised afresh

The Law

25. I remind myself of some guidance in the authorities.

26. In Neary v St Albans Girls School [2010] ICR 473 (CA) Smith LJ was dealing with the 2004 procedural rules. There was no requirement to apply specifically the considerations in CPR rule 3.9 (1) or section 33(3) of the Limitation Act 1980. There is a duty on the judge to decide the case rationally and not capriciously, and to make his decision in accordance with the purpose of the relevant legislation, taking all relevant factors or circumstances into account. He must also avoid taking irrelevant factors into account. The judge must make clear the factors he has regarded as relevant. In paragraph 60 of the judgement is a reference to the principle that it is well established that a party guilty of deliberate and persistent failure to comply with a court order should expect no mercy. At paragraph 64 we are reminded that the overriding objective requires that the management of the case should result in the case being dealt with justly as between both parties. It also requires the judge to consider the appropriate use of the resources of the court or tribunal. It is entirely within the overriding objective for a judge to take the view that enough is enough. That stage will more readily be reached in a case of deliberate and persistent failure to comply than one where there is some excuse for it.

27. Underhill J (as he then was) interpreted Neary in Thind v Salvesen Logistics Ltd UKEAT/0487/09/DA as involving a broad assessment of what is in the interests of justice, and the factors which may be material to that assessment will vary considerably, according to the circumstances of the case and cannot be neatly categorised. They will generally include, but may not be limited to, the reason for the default, and in particular whether

it is deliberate; the seriousness of the default; the prejudice to the other party; and whether a fair trial remains possible. The fact that an unless order has been made, which of course puts the party in question squarely on notice of the importance of complying with the order and the consequences if he does not do so, will always be an important consideration.

28. Underhill J included his observations by restating that all cases turn on their own facts. He certainly would not wish it to be thought that it will be usual for relief to be granted from the effect of an unless order. Provided that the order in itself has been appropriately made, there is an important interest in employment tribunal's enforcing compliance, and it may well be just in such a case for a claim to be struck out even though a fair trial would remain possible.

29. In Opara v Partnerships in Care Ltd UKEAT/0368/09/LA HHJ Richardson observed that when a tribunal is considering whether to grant relief against a sanction, the main focus will be on the default itself. First, the magnitude of the default; secondly, the explanation for the default; thirdly, the consequences of the default party and the proceedings; fourthly, the consequences of imposing the sanction on the parties and the proceedings; and fifthly, the promptness of the application remedy the default.

30. In Johnson v Oldham Metropolitan Council UKEAT/0095/13/JOJ Langstaff J sought to explain Marcan Shipping (London) Ltd v Kefalas & Another [2007] EWCA Civ 463 where Pill LJ said that it should now be clearly recognised the sanction embodied in an unless order in fully takes effect without the need for any further order if the party to whom it is addressed fails to comply with it in any material respect. Langstaff J emphasised the word 'material'. It followed that compliance with an order need not be precise and exact. '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 that it has to meet or, it may be, to 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 the claim, of which nine 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.

31. Langstaff J further provided useful dicta in Hylton v Royal Mail Group UKEAT/0369/14/DA. The purpose of case management orders is in general to make sure, where that remains possible, that there should be a

fair hearing of the allegations made by one party against the other. Where accusations have been made on a very generalised basis, as in that case, clarity of the accusation is needed. The respondent is entitled to know what it is being accused of, and the tribunal cannot adjudicate properly unless that is the case. Unless and until that is done, it is difficult if not impossible to have a fair trial. As observed in Johnson v Oldham, parties are entitled to know the case against them. It must usually be the case that, where a claim has been struck out because of the failure to provide such information, but by the time of an application for relief the information has been supplied, the court will grant relief. The purpose of the orders would have been achieved. Again, as observed in Johnson, the approach should be facilitative rather than penal. That cannot, however, apply where there has been no compliance, even at this stage of seeking relief from the order, which was made. Orders are there to be observed. As was said by Mr Justice Underhill in the case of Thind v Salvesen Logistics Ltd, every case turns on its own facts and it should not be thought to be usual that relief will be granted from the effect of an unless order. Provided that the order itself has been appropriately made, there is an important interest in employment tribunal's enforcing compliance. And it may well be just in such a case for a claim to be struck out even though a fair trial would remain possible.

32. In Enamejewa v British Gas Trading (1) and Centrica plc (2) UKEAT/0347/14/DXA Mitting J observed that nothing in rule 38 prohibits an employment judge considering whether or not to revoke or set aside an unless order from taking into account events which have occurred subsequent to the making of the order. And there is no reason of principle why that should be so. Something that has occurred subsequent to the making of an unless order may make it in the interests of justice that the unless order should be revoked. This is a separate consideration to whether or not the unless order should have been made in the first place.

33. Our present case also displays some similarities with Amey Services & others v Cunning & others 2018 UKEAT/0008/18/RN. This case also involved the present respondents, Amey Services Ltd, and the interpretation and application of unless orders made by Employment Judge Southam before his retirement, a caseload that I have inherited. A regrettable amount of satellite litigation has ensued.

Discussion

34. The request for further information is made at the pleading stage. The Respondents have chosen to defend in this manner - to request further information at the pleading stage and to seek an unless order and enforce it all before disclosure and Schedules (and Counter-Schedules) of loss. Accordingly, the procedural context is understanding what is claimed against them. That is the 'materiality' of the procedural context. Precise

liquidated claims cannot be expected at this stage. That can be expected following disclosure and the Claimants' Schedules of Loss.

35. In basic terms, the Claimants' claims are not difficult to understand. They say their holiday pay excluded elements of pay other than basic pay when these should have been included.

Request 2

36. Request 2 asked the Claimants to identify the terms of the contract to support the claim. If available, they were further asked to provide a copy of the contract concerned. In the further particulars of 27 November 2015, the principal contracts under which the identified Claimants worked were identified as were the additional types of pay that were excluded from basic pay in respect of them.

37. In the further response dated 23 November 2016, OH Parsons introduced the further information as follows-

> 'Below, to the extent possible, the claimants set out more specifically, the terms relied upon under each contract. Where the contracts refer to centrally negotiated terms (usually nationally negotiated terms, i.e. Red book or Green book). We set out the specific terms of each employee's contract that go toward the claim (i.e..terms relating to holiday entitlement, pay and working hours) and, at the end of each section dealing with each contract, set out the terms which the claimants believe government or regulate the payments they are claiming should be included in their holiday pay.'

38. The entries then follow the main contracts. So, in respect of the Walsall Metropolitan Council Contract the terms are identified for Mr Beattie and Mr Higgins as are the types of payment excluded from the calculation of holiday pay. Under the Amey Services Limited contract the terms are identified for Mr Johal, Mr Cooper, Mr Edwards and Mr J Bate as are the types of additional pay excluded from holiday pay.

39. The Birmingham City Council terms in respect of the remaining claimants Bradley, Clarke, Ellis, Hinson, Rainey, and Redfern are all then identified, as are the excluded types of payment. Similarly, the relevant terms are identified under the Amey Highways contracts for Mr Butler and Mr Renwick. The excluded payments are identified for Mr Butler but not Renwick. Renwick's information in this regard was however contained in the 27 November 2015 particulars: standby, callout, overtime and nightwork were excluded.

40. The individual contracts where available have been disclosed.

41. There is no information, whether November 2015 or November 2016 in respect of Mr C Bate. No relief can be ordered in his case, therefore. I have considered the position individually for each Claimant.

42. In terms of request 2 there was material compliance with that part of the unless order following the further information of November 2016. The Respondent is told what contractual terms are in play. **They have a very clear account of what is alleged.**

43. I am aware that the November 2016 information and disclosure was disclosed the day before the preliminary hearing on 24 November 2016. It was however in clear terms and was readily understandable. The information was provided before the hearing of the application for relief and the materiality of its contents could be determined. In any event it I before me as I exercise the discretion afresh. It would be wrong to exclude it.

44. The November 2015 was not as full. I have read the witness statement of Peter Welsh, which was adopted by Mr O'Neill. Mr Welsh sets out in detail the actions undertaken by O. H Parsons to obtain all relevant information. Mr Welsh says the following –

> 'For our part, I believe we tried to obtain instructions and comply with directions as best we could but in difficult circumstances and in many cases without evidence. When I eventually submitted my reply to the unless order, I thought it would be enough to satisfy the order and get us to the next stage in the litigation. In hindsight, perhaps the most significant issue that led to the claims being struck out was that I failed to set out the precise terms of contract on which the claimants base their claims. However, I was at that date unable to do that as I did not have all of the claimant's employment contracts. The claimants Rainey, Johan and Redfern sent us what evidence they had and, had we satisfied the unless order and got to the disclosure stage, they may have been able fully to plead their claims.'

45. I do not infer bad faith from this on the part of OH Parsons. I do not infer a deliberate, contumelious decision flagrantly to flout an order of the tribunal, such as to disqualify the claimants from relief. It is right that the disclosure stage follows the pleading stage. It was not an entirely misplaced belief that any missing information would be provided by disclosure.

46. In terms of the magnitude of the breach, it is right to observe that the information requested was not exclusively in the domain of the Claimants. One might have thought that the information was also discoverable from the information that the Respondent itself held or ought to have held. I appreciate that the Respondent is under no obligation to put the Claimants' cases together. However, they ought to know what contracts their employees work under and have payslip records as to what they were paid.

47. Insofar as the respondents were prejudiced by incurring legal costs to enforce the tribunal orders and unless order, they have been compensated by the very substantial costs order for £26,000 made directly against the solicitors by Employment Judge Southam on 7 December 2016.

48. A fair trial can be held. It will be a matter of record how the holiday pay of the claimants was calculated. It should be evident from payslips. If relevant items of pay over and above basic pay were missed out, that can be remedied.

Request 4

49. This asked –

> 4. Please state which parts of sections 221 to 224 of the Employment Rights Act 1996 apply to the claimant and the basis for that contention. In particular, please state:
>
> (a) whether it is contended that the claimants' pay for normal working hours (this is defined in section 234) varied with the amount of work done. If so, please state the basis for that contention;
>
> (b) whether it is contended that the claimants pay for normal working hours (this is defined in section 234) varied with the time that work was done within the meaning of section 222(1) of the ERA 1996. If so, please state the basis for that contention;
>
> (c) whether it is contended that the claimant did not have normal working hours, and, if so, the basis for that contention.

50. It was answered in the November 2015 response as follows: specifically, it is argued that due to the claimants pay varying because of basic pay and [the additional payments listed] that section 222 of the 1996 Act should apply.

51. Section 222(1) of the Employment Rights Act 1996 falls under the heading 'remuneration varying according to time of work'. It provides that the section applies if the employee is required under the contract of employment in force on the calculation date to work during normal working hours on days of the week, or at times of the day, which differ from week to week or over a longer period so that the remuneration payable for, or apportionable to, any week varies according to the incidence of those days or times.

52. The contractual details provided in November 2016 may then be checked against it.

53. So, the Respondent knows how it is being put. It will have to be put clearly in the Schedule of Loss which will compute the actual claim. However, at the pleading stage, it is sufficient to answer as was answered in November 2015. The Respondent knows the case it is to meet. A similar approach was supported by HHJ Stacey in Amey Services Ltd & Others v Cunning & Others [2018] UKEAT/0008/18/1008, at paragraph 50.

54. This request was materially complied with in November 2015.

Conclusions

55. Accordingly, in my judgment it is in the interests of justice for the orders dismissing the remaining Claimants' claims, other than that of Mr C Bate, to be set aside and for those claims to proceed.

56. Mr Martin submits that the merits of the Claimants' claims are irrelevant. That is not entirely right in my judgement. There will be cases where the procedural default is so serious that even a good case should not be allowed to proceed. Of course, if claims were unarguable, there would be no point in ordering relief. Neither of those circumstances represents this case.

57. There has been material compliance in respect of request 2 from the further particulars in November 2016. The respondent knows precisely the case against it. The Respondent does not seek to strike the claims out on the basis of merits. Nor does it seek a deposit on merits. It can be inferred, and is in any event apparent, that these claims have reasonable prospects of success. The deficiency of the request 2 information was primarily the failure to set out the individual terms and conditions. That has been cured by the further information in November 2016. That information would have come to light in due course anyway through the disclosure process.

58. Furthermore, the information was not in the exclusive domain of the claimants. The respondent might have known the terms of the contracts of its employees working for it, one might have thought.

59. The respondent, further, has the benefit of a generous costs award directly against the claimants' solicitors to compensate it for costs incurred in enforcing employment Judge Southam's orders.

60. The case must now proceed to schedules of loss and counter schedules of loss. In my experience of holiday pay cases, it is at this stage that the claims most sensibly might settle. Claimants are entitled to disclosure of any documentation in the respondent's possession, which might assist them in putting together their schedules.

61. However, I would like to make it clear that the schedules of loss must be comprehensive and must set out definitively the amounts specifically claimed by the claimants. It is beyond the resources of the tribunal to fill in the gaps of the schedule loss. The Claimants must put this together. The respondents will have the opportunity to challenge or correct the detail in a counter schedule. The tribunal will be happy to rule on questions of principle; for example, on what type of pay ought to be included in the calculation. However, most of these points have been covered already in the authorities.

62. Whilst the tribunal has the resources to rule on questions of principle, it is for the parties to complete the detail. I have provided for a generous timeline in the orders above.

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Employment Judge Smail

27 March 2019

South East Region

27 March 2019

Judgment sent to the parties on

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