Case No: 1300537/2015
1303446/2014
(Multi Ref 8459)

EMPLOYMENT TRIBUNALS

Claimants: Mr. M Brettle and others

Respondent: **Dudley Metropolitan Borough Council**

Heard at: **Midlands West** **On:** **22 23 July and 24 25 26 July 2019 (In chambers)**

Before: **Employment Judge Woffenden**

Representation
Claimants: Ms. A Palmer of Counsel
Respondent: Ms. N Owens of Counsel

RESERVED JUDGMENT

1 In relation to the claimants Ahmed, Buirch ,G Butler, Cutler, Davies, Finch, Griffiths, Hancox, Jackson, Jones, Pugh, Richards, Stokes, A Wood, S Wood, Wooldridge, West, Robertson, Colley, Willis, White, and Willett the last alleged deduction/failure to pay was more than 3 months before 18 April 2016.

2 The amended claims were not presented in time despite it being reasonably practicable to do so and are dismissed.

3 The claimants Wood Willis and Cree worked “regular” additional voluntary overtime, so as to require those payments to be taken into account for the purposes of calculating their holiday pay. None of the claimants worked “regular” call out allowances/standby payments so as to require those payments to be taken into account for the purposes of calculating their holiday pay.

REASONS

1 This 5-day hearing had been listed to deal with issues of jurisdiction liability and remedy arising out of holiday pay claims as set out in an agreed list of issues dated 21 August 2019.

Background and History

2 As the parties are no doubt only too well aware the case has been through the Employment Tribunal and the Employment Appeal Tribunal twice. Since the judgment of HHJ Stacey sent to the parties on 1 June 2018 (in which she remitted the case back to the tribunal) there have already been 2 preliminary hearings in relation to its future conduct (on 21 August 2018 and 16 May 2019).

3 I therefore adopt here (with thanks for her brevity and clarity) in large part the background and history to the claims as set out by Ms. Owen in her skeleton argument on behalf of the respondent.

4 The claimants are employees of the respondent holding various positions within the Directorate of Place (historically, the Adult Community and Housing Services Directorate). Most of them hold the position of Quick Response Operatives; however they include Roofers, Electricians, Operations Officers and Storemen.

5 The number of claimants is now 43. All claims are for unauthorised deductions of wages under the Employment Rights Act 1996 ('ERA') and breach of the Working Time Regulations 1998 ('WTR'), regarding holiday pay.

6 There was a dispute between the parties about which figures should be taken into account in the calculation of a "week's pay" for the purposes of calculating their statutory holiday pay or the calculation of their "normal pay" as a matter of contract. This came before E J Warren for a final hearing on 19 April 2016 listed for 3 days. She found for the claimants as to which payments and allowances were to be included in the calculation of holiday pay.

7 At the commencement of that hearing the claimants' counsel applied to amend the claims to cover the same issues for the period from the presentation of the claim form up to the date of the final hearing (i.e. 18 April 2016).

8 It had come about in this way. On 14 April 2016 the respondent's solicitors wrote to the claimants' solicitors attaching a draft agreed list of issues for the final hearing. The claimants' solicitors amended that list to include at paragraph 7 "Are the claimants entitled to claim for deductions suffered since the date of issuing their claim, on which point it is counsel for the claimant's intention to make an application at the outset of the hearing." The respondent's solicitors confirmed its acceptance of the amended draft agreed list of issues pointing out however they did not consent to the application to amend. No prior notice of the claimants' intention to make such an application had been given.

9 The amendment was permitted, by consent, subject to the respondent's reservation of its position on jurisdiction (time limit) issues. However, following

that hearing the parties could not reconcile between them the position regarding the jurisdiction that flowed from the order which EJ Warren made.

10 The matter came before EJ Findlay on a preliminary hearing on 2 February 2017 to determine the meaning (and consequences) of EJ Warren's order. She declined to either exercise any residual discretion to extend time for the amended claims, or to give directions for another Employment Judge on another day to do the same. The effect of this was to dismiss any claims that were brought (by amendment) outside the primary three-month time limit.

11 The claimants appealed against the order of EJ Findlay and were successful before HHJ Stacey. As a result, the case was remitted back to the tribunal.

The issues

12 At the preliminary hearing before EJ Dimbylow on 22 August 2016 the parties had agreed a List of Issues (Jurisdiction Liability and Remedy) to be determined but after discussion with the parties at the commencement of this hearing that list was amended by agreement. Those amended agreed issues were as follows:

Jurisdiction

12.1 In relation to each amended claim was the last alleged deduction/failure to pay more than 3 months before 18 April 2016?

12.2 If so, is the tribunal satisfied it was not reasonably practicable for the claimant in question to have presented the amended claim before the end of the period of 3 months beginning with 18 April 2016?

12.3 If so, was the amended claim presented within such further period as the tribunal considers reasonable?

12.4 if so, is the tribunal bound by **Bear Scotland v Fulton** in relation to:

12.4.1 the effect of gaps of more than three months between alleged deductions/failures to pay (see **Bear Scotland v Fulton** paragraphs 79 to 81 inclusive);

12.4. 2 whether leave from different sources is taken in a particular order of leave (see **Bear Scotland v Fulton** paragraph 82).

12.5 If yes in relation to 12.4.1 above, at which point(s) (if any) was there a gap of more than 3 months between alleged deductions/failures to pay such that the tribunal has no jurisdiction to consider the amended claim?

Liability

13 Have the claimants worked "regular" call out allowances/standby payments and additional voluntary overtime, so as to require those payments to be taken into account for the purposes of calculating their holiday pay?

Remedy

14 Have any or all of the claimants suffered a loss when receiving holiday pay?

15 If so, what is the amount of such loss for each claimant?

Preliminary Issues

16 At the commencement of the hearing Ms. Palmer applied for a stay pending an appeal following **Chief Constable of the Police Service of Northern Ireland v Agnew and Others [2019] NICA**. I declined that application for the reasons I gave at the time.

17 At a preliminary hearing on 16 May 2019 EJ Self had ordered that by no later than 17 July 2019 the parties submit to the tribunal and serve on the other party a skeleton argument in relation to the issues of jurisdiction. Despite the clear and unequivocal statement of EJ Self in the preamble to his order that directions must be complied with by the appointed date the respondent did not comply with that order until 22 July 2019 and I had to extend time for compliance by the claimants until 9:30 am on 23 July 2019.

18 Ms. Owen and Ms. Palmer both confirmed to me that in the absence of an appeal against the judgment of EJ Warren I was not deciding the claimants' application for amendment but determining time limit issues in relation to those amended claims.

Evidence

19 There was an agreed bundle of documents of 499 pages. I have had regard only to those documents to which I was referred in submissions or in the witness statements of Mr. Iain Newman (the respondent's Chief Officer, Finance and Legal) for the respondent and of Ms. Teresa Harrison and Mr. Laurence O'Neill (both solicitors employed by the claimants' solicitors) for the claimants. No witnesses attended and their evidence was not challenged. If her submission on Issue 12 .4.did not succeed , Ms. Palmer accepted the accuracy of the contents of the respondent's schedule ('Schedule 1') which set out (among other matters) how far for 22 claimants (see Ms. Owen's submission at paragraph 43 below) the amended claim was out of time (to the nearest month) and the respondent's schedule concerning the regularity of voluntary overtime ('Schedule 2'). The respondent accepted that in relation to Issue 12.4.1 save for one claimant (Mr. Randle) there were no gaps that would break a series of deductions.

Findings of Fact

20 The claimants had presented their claims on various dates in several batches from 9 November 2014 to 1 November 2016.

21 Mr. O'Neill commenced employment with the claimants' solicitors in August 2015 and managed its holiday pay team. Following a substantial increase in the demand to present claims for holiday pay as a result of a number of authorities that firm presented and managed those claims which their trade union clients had been unable to settle with employers.

22 Mr. O'Neill was aware of what he described as 'the relevant Presidential Guidance issued on updating claims.' In fact the President had not issued guidance but a Practice Direction in December 2014 which was subsequently revoked and replaced by another such Practice Direction in March 2015.The latter ordered in relation to claimants who had previously presented a complaint of alleged non-payment of holiday pay that (if so advised) instead of presenting a new claim to the tribunal to add further such complaint(s) that had accrued or arisen after the presentation of the original claim they could apply to amend the claim. It also set out the procedure to be followed in relation to such an application.

23 Mr. O' Neill knew that the issue of deductions occurring since the presentation of claims was live for all the holiday pay claims he was responsible for managing. He frankly accepted that notwithstanding, the holiday pay team had not presented fresh claims or amended existing claims due to the demand placed on it by the increase in holiday pay litigation. He had formed the view that tribunals took a practical and relaxed view to the requirement to the re-issuing or updating of claim 'every three months' and in support of this view quoted a comment attributed to an Employment Judge that the 'whole purpose of the practice direction was to avoid the nonsense of claimants having to issue a series of claims every 3 months, right up until 3 months before the final hearing". Such 'findings '(though no other comments or details of any relevant experience were given) had led him to understand the need to reissue or update claims 'every three months' was less stringent after the increase in holiday pay litigation and the issuing of the Presidential 'Guidance'. He concluded that not doing so would be very unlikely to stand in the way of an application (to amend) made at the hearing being granted.

24 As far as these claims were concerned, Mr. O'Neill decided the appropriate time to make the application was at the final hearing. In his view the application could not have been made 'meaningfully' before then because the necessary work to reveal the position as far as when deductions had occurred and what time limit issues there might be had only be completed shortly before the hearing. Further it would be very time consuming and not cost effective to reissue or update claims 'every three months' in managing 'high volume low-value claims.'

25 As far as whether additional voluntary overtime was 'regular' in the relevant leave year April 2015 to March 2016 the respondent accepts Mr. Wood Mr. Willis and Mr. Cree worked regular voluntary overtime. In that holiday year Mr. Forest worked overtime on 2 occasions in April 2015, 5 in May 2015, 3 in June 2015 and 4 in July 2015 ; Mr. West on 2 occasions in April 2015 ,2 in May 2015 , 2 in June 2015 and 2 in July 2015; Mr. Garratt on 4 occasions in April 2015 and 4 in July 2015 ;and Mr. Colley on 2 occasions in April 2015 ,3 in May 2015 ,3 in June 2015 and 3 in July 2015. The other claimants worked no voluntary overtime during that holiday year.

26 As far as whether call out allowances/standby payments were 'regular' these concern 11 claimants in total. Mr. Taylor Mr. Forest Mr. West Mr. Garratt Mr. Colley Mr. Wood Mr. Willis and Mr. Cree did not attract any such payments. Mr. Jackson worked 'on call' from April to October 2015 after which he ceased to do so. Mr. Pugh worked 'on call' for 7 days in April 2015 after which he ceased to do

so. Mr. Stokes worked 'on call' from April to October 2015 after which he ceased to do so.

27 In relation to the 22 claimants (Ahmed, Buirch ,G Butler, Cutler, Davies, Finch, Griffiths, Hancox, Jackson, Jones, Pugh, Richards, Stokes, A Wood, S Wood, Wooldridge, West, Robertson, Colley, Willis, White, and Willett) the position as far as the last underpaid pay date and how far out of time the amended claim is concerned is set out in Schedule1 attached.

The Law

28 Under regulation 30(2) WTR, a claim must be brought within three months of the date on which payment was due for each period of leave. Under section 23 (2) (a) ERA , a claim must be presented within three months of the last date of payment of wages from which the deduction was made and where a complaint is brought in respect of a series of deductions the reference to payment is to the last deduction in the series (Section 23 (3) ERA).Under regulation 13 (1) WTR a worker is entitled to four weeks' annual leave in each leave year and under regulation 13 A WTR a worker is entitled in each leave year beginning on or after 1 April 2009 to a period of additional leave of 1.6 weeks. The aggregate entitlement under both regulations is subject to a maximum of 28 days (regulation 13 A (3) WTR).

29 In **Fulton & Ors v Bear Scotland Ltd & Ors [2015] IRLR 15** Langstaff P held that:

"whether there has been a series of deductions or not is a question of fact: "series" is an ordinary word, which has no particular legal meaning. As such in my view it involves 2 principal matters in the present context, which is that of the series through time. These are first a sufficient similarity of subject matter, such that each event is factually linked with the next in the same way as it is linked with its predecessor; and second, since such events might either be stand-alone events of the same general type, or linked together in a serious, a sufficient frequency of repetition. This requires both a sufficient factual, and a sufficient temporal, link."

30 Langstaff P also held that the legislation should be interpreted as meaning that a series of deductions separated by a gap of more than 3 months from a later deduction or series could not be linked to the latter.

31 Further Langstaff P in paragraph 82 of **Bear Scotland** (having first said it was not necessary for the employment appeal tribunal to consider this) said: "However, in case this issue goes further, I shall deal with it." and went on to say that it was for the employer to direct when Regulation 13 leave should be taken and regulation 13 A was described in WTR as "additional leave" which suggested that the dates of it should be the last to be agreed upon during the course of a leave year.

32 In **Agnew** the Northern Ireland Court of Appeal (delivered on 17 June 2019) reached a different conclusion from **Bear Scotland** on both those points. In relation to the former it held whether there is a series is 'question of fact to be decided in each individual case' and a series was not ended ,as a matter of law,

by a gap of more than 3 months between unlawful deductions nor is it ended by a lawful payment. 'In relation to the latter it held 'A worker has an entitlement to all leave from whatever source and there is no requirement that leave from different sources is taken in a particular order.' It agreed with the reasoning of the tribunal which was that 'The description of the eight days or 1.6 weeks provided by the Regulations as "additional" says nothing about a strict succession of types of annual leave. If it were to do so, it would have said that in terms and it would have dealt also with the issues of succession in relation to leave provided under the conditions of service or leave provided as a carryover of other types of annual leave. It did not do so. It seems to the present tribunal that reading into the words "additional leave", the proposition that there must be a strict succession of annual leave, is a step too far." It concluded that "the only sustainable interpretation is that days of annual leave awarded on whatever basis form part of a composite whole. Any individual leave days taken from that pot are not possible of being allocated between one category or another. Each day's annual leave therefore must be treated as a fraction of the composite whole."

33 Under section 23(4) ERA where an employment tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the end of the relevant period of 3 months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

34 In relation to complaints presented to an employment tribunal on or after 1 July 2015 an employment tribunal is not to consider so much of a complaint as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of 2 years ending with the date of the presentation of the complaint.

35 What is '*reasonably practicable* 'is a question of fact for the tribunal. The burden of proof lies on the claimants. Tribunals must make findings on the relevant start date of any limitation period and when that period expired.

36 The word' *practicable* 'is to be given a liberal interpretation in favour of the employee **(Dedman v British Building and Engineering Appliances Ltd [1974] 1AER 520).**

37 May LJ described the relevant test in this way: '*We think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done - different, for instance, from its construction in the context of the legislation relating to factories compare Marshall v Gotham Co Ltd [1954]AC 360,HL. In the context in which the words are used in the1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable as the equivalent of "feasible" as Sir John Brightman did in [Singh v Post Office [1973],CR437 NIRC] and to ask colloquially and untrammelled by too much legal logic-"was it reasonably feasible to present the complaint to the employment tribunal within the relevant 3 months?"-is the best approach to the correct application of the relevant subsection*."(**Palmer and Saunders v Southend-on-Sea Borough Council [1984] ICR at 384,385).** He said the factors could not be described exhaustively but listed a number of considerations which might be investigated including the

manner of, and reason for the dismissal, whether the employer's conciliatory appeals machinery have been used, the substantive cause of the claimant's failure to comply with the time limit whether there was any physical impediment preventing compliance, such as illness, or a postal strike, whether, and if so when, the claimant knew of his rights, whether the employer had misrepresented any relevant matter to the employee, whether the claimant had been advised by anyone, and the nature of any advice given, and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

38 In **Dedman** Lord Denning MR also stated (at 381):
"If a man engages skilled advisers to act for him — and they mistake the time limit and present [the complaint] too late — he is out. His remedy is against them." In **Marks and Spencer plc v Williams-Ryan [2005] IRLR 562** it was held that if a solicitor was retained and failed to meet the time limit because of his negligence the adviser's fault defeats any attempt to argue it was not reasonably practicable to make a timely complaint to the employment tribunal.

39 It was held by Simler P in **Dudley Metropolitan Council v Willetts** that in a case where the pattern of work, though voluntary, extends for a sufficient period of time on a regular and/or recurring basis to justify the description "normal", the principle in **British Airways v Williams [2012] ICR 847** applied and it would be for the fact-finding tribunal to determine whether it is sufficiently regular and settled for payments made in respect of it to amount to normal remuneration. This was approved by the Court of Appeal in **East Midlands Ambulance Trust v Flowers UKEAT/0235/17.**

Submissions

40 Both Ms. Owen and Ms. Palmer had prepared written skeleton arguments and made brief oral submissions on Issues 12.1 to 12.5 and 13 above.

41 After submissions Ms. Palmer confirmed written reasons would be requested. I decided to reserve judgement and postpone the remaining issues to a later date.

42 Both Ms. Owen and Ms. Palmer chose to address Issue 12.4 first.

43 Ms. Owen submitted that as far as Issue 12.4.1 was concerned **Agnew** was not binding on employment tribunals in England and Wales; it was persuasive only on appellate tribunals and courts. **Bear Scotland** bound employment tribunals unless and until overturned by an appellate tribunal or court. As far as Issue 12.4.2 was concerned she accepted that the remarks of Langstaff P were obiter but they were persuasive and should be applied. In **Agnew** (though part of the ratio of that decision) it was not binding and should not be persuasive. The **Agnew** approach to how days counted was complicated and therefore unattractive. The claimants had failed to set out what their case was in practice in relation to each claimant if the **Agnew** approach was adopted.

44 Ms. Palmer accepted that as far as Issue 12.4 .1 was concerned **Agnew** was not binding but contended it was correctly decided and the claimants reserved the right to argue the point on appeal. However, the position was different in

relation to issue 12.4 .2. The remarks of Langstaff P were clearly obiter and although the tribunal was not bound by **Agnew** it was obliged to consider both authorities. The Northern Ireland tribunal had said it was not bound by **Bear Scotland** and had given detailed reasons. It had concluded the different types of leave were distributed proportionately in each day of leave which she submitted was fair avoided the problem of whether employees elected or employers get to decide when to take Regulation 13 leave and provided legal certainty.

45 In relation to issue 12.1 Ms. Owen submitted that only 22 of the 43 remaining claimants needed to rely on the amended claim to claim their alleged losses. Contrary to the Claimants' schedules of loss from which it appeared three claims out of those 22 were in time in relation to the amended claim ,on the respondent's inspection of their holiday records the gaps between the last deduction and the amendment application were approximately 5 ,4 and 7 months respectively. Therefore all 22 claims related to underpayments made more than 3 months prior to 18 April 2016 and were prima facie out of time.

46 Ms. Palmer accepted that if **Bear Scotland** was followed, for the purposes of Issue 12.1 all the claims were out of time (except on appeal it would be argued **Agnew** was correct). She conceded that if on the other hand **Agnew** was followed it was likely the claimants' schedules of loss would have to be recalculated because they had hitherto been prepared on the basis that **Bear Scotland** was correctly decided. All claims were however in time because in 2016 Easter fell in March so there were two public holidays on Friday 25 March and Monday 28 March shortly before the amendment dated 18 April 2016 was made.

47 In relation to issue 12.2 Ms. Owen addressed the factors in **Palmer and Saunders**. The reason for the delay on the part of the claimants' solicitors appeared to be overwork but she submitted legal professionals were under a duty only to take on work which they have the capacity to complete to the professional level required. SRA principles require they act in their clients' best interests and provide the best service to them. Insufficient manpower to deal with holiday claims when inundated with them was not a sufficient reason for failing to update the claimants' claims in the period between presentation of the claim forms and 18 April 2016.The claimants' solicitors should have communicated with their clients and warned them of the risks. She referred to Mr. O'Neill's reliance on what he said was an accepted practice within Employment Tribunals that did not require claimants to abide strictly by the need to update their claims every three months but claimants could not rely on such a perceived practice to circumvent legislative time limits. Neither Presidential Guidance nor the purported approach of tribunals could alter jurisdictional requirements of amended claims. Although Mr. O'Neill suggested the quantification/particularization of the claims would have been an issue until shortly before the final hearing in April 2016 she observed the original claim forms lacked particularisation and amended claims could also have been presented protectively in the same way. This was no excuse not to amend earlier than 18 April 2016.It was submitted that the claimants were aware of their legal right to holiday pay because they had already presented claims. They were represented throughout and would have been (constructively) aware of the relevant time limits. There was no misrepresentation by the respondent or physical impairment. The fault lay with their legal representatives rather than the claimants but the **Dedman** principle applied and

they are fixed with the former's mistake; their remedy is against those representatives. It was therefore reasonably practicable for the claimants to have applied to amend their claims in time at regular three-month intervals.

48 As far as Issue 12.3 was concerned Ms. Owen invited me to consider the dates in the Schedule 1 which showed the 22 claimants' amended claims were between I month and 18 months out of time. She submitted all legal professionals knew (or ought to know) claims must be updated and what needed to be done to protect their clients' interests. It made no difference if the amended claims were 1 day or 2 years out of time.

49 Ms. Palmer (at my invitation) clarified that she had not intended to accept the claimants' solicitors had been negligent when having referred the tribunal to the **Dedman** case and the guidance in **Palmer and Saunders** she had said in paragraph 16 of her written submissions that it would be invidious to 'visit the negligence of the solicitors on the claimants themselves'. She said it was not for the advisers but for the claimants to get their amended claims in on time. The claimants had their representative chosen for them by their union, the representatives did not report back to the claimants and the legislation was complicated. The chances of them being able to bring a negligence claim against their representatives were in practice negligible. In relation to Issue 12.3 it was 'again' a question of fact for the tribunal to decide (paragraph18 of her written submissions).

50 As far as Issue 13 was concerned Ms. Owen and Ms. Palmer both submitted this was a question of fact for the tribunal ((**Patterson v Castlereagh Borough Council [2015]NICA 47** and **East of England Ambulance Trust v Flowers**) but Ms. Owen submitted there was no regularity about the payments in question and Ms. Palmer submitted they were regular 'while they happened'.

Conclusions

Jurisdiction

51 I too shall deal with Issue 12.4 first. In relation issue 12.4.1 I accept the submission of Ms. Owen. I am bound by **Bear Scotland**.

52 Turning to issue 12.4.2 I agree that paragraph 82 of **Bear Scotland** was obiter dicta. I have carefully considered **Agnew** and **Bear Scotland.** I agree that a worker has an entitlement) to all leave from whatever source but although an individual employer and the individual worker may regard annual leave entitlement as a composite whole as the commentator observed in *Harvey on Industrial Relations and Employment Law* (paragraph 163) it may nonetheless important for them both to know what category of leave is being taken on each occasion of leave 'for at least two reasons: the rate of holiday pay due may be higher for reg 13 leave, reflecting its source as the WTD, and entitlement to pay in lieu of leave not taken on termination of the contract may be different as between statutory and contractual leave. Both employers and workers can in principle stipulate the order in which leave is taken in any leave year, but it is unlikely that many do.' The commentator describes the approach of Langstaff P in **Bear Scotland** as 'sensible' (albeit this was prior to the handing

down of **Agnew**) in 'circumstances where the point affects the parties' entitlements and obligations.'

53 In my judgment the word 'additional' in Regulation 13A (1) WTR does connote the successional nature of types of leave. It means 'extra or supplementary to what is already present or available' (Concise Oxford English Dictionary).Regulation 13 A WTR leave is added to the Regulation 13 WTR which is already available for workers .The Regulation 13 WTR is the first element of the aggregate entitlement to annual leave and it is therefore logical and sensible that it is taken first. I conclude that for the 22 claimants identified in paragraph 27 above the amended claims are not in time because the last alleged deductions/failures to pay were more than 3 months before 18 April 2016.

54 Was it reasonably feasible for those amended claims to have been presented in time? Considering the non-exhaustive factors in **Palmer and Saunders** the substantive cause of the claimants' failure to comply with the relevant time limit was because the solicitors' firm which had acted for all of them throughout decided not to do so until the final hearing. Having accepted instructions on behalf of the claimants who had been referred to them by their trade union clients as demand increased the holiday pay team lacked the capacity (but did not put in place adequate resources) to manage them. There was no evidence before me of any advice to the claimants such they could make an informed judgment about making amendment applications or fresh claims themselves or alternative arrangements for representation. Although Mr. O' Neill was aware both of the need to make amendment applications or make fresh claims in relation to post claim presentation deductions and of the Practice Directions , due to a combination of commercial self-interest and his unreasonable perception of an attitude of lassitude on the part of employment tribunals formed on the basis of a single comment by a single employment judge (which concerned the presentation of fresh claims not the requirement to amend existing claims) he decided to apply to amend the claims at the last possible moment before the final hearing. I do not see how any lack of quantification / particularisation prevented the making of amendment applications on a protective basis as had been the case with the original claims. There are no special reasons why his failure to act could be considered reasonable such as for example being misled in some way by the respondent. It was the negligent fault of the claimants' solicitors which led to the failure to amend the claims in time and, applying the **Dedman** principle, the claimants are fixed with the consequences. The practicability of the pursuit of claims for negligence against them is not a matter for me in considering the test of reasonable practicability. I am therefore not satisfied on the evidence before me it was not reasonably practicable for those claimants to have presented the amended claims before the end of the period of 3 months beginning with 18 April 2016.

55 For the sake of completeness there were no gaps of more than three months between alleged failures to pay such that the tribunal has no jurisdiction to consider the amended claims save in the case of Mr. Randle.

Liability

56 I conclude that in relation to additional voluntary overtime the pattern of payments revealed for those claimants who performed it (other than Wood Willis and Crea) did not extend for a sufficient period of time on a regular and/or recurring basis for it to justify the description 'normal' remuneration. It occurred on a few occasions for a few months and having ceased did not recur. I reach the same conclusion in relation to Jackson Pugh and Stokes in relation to call out allowances/standby payments.

Employment Judge Woffenden
Date: 31 July 2019

Reserved Judgment & Reasons Sent on:
02 August 2019