EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss M Omollo	**v**	**Governors of Oldfield Primary School**

Heard at: Watford **On**: 4 September 2019

Before: Employment Judge Tuck

Appearances

For the Claimant: In person
For the Respondent: Mr A Ross, Counsel

JUDGMENT

1. The claimant is entitled to holiday pay of 6.92 weeks.

2. This is at a rate of £452.69 gross per week giving a total sum of £3,132.62.

3. The claimant is to give credit for the gross sum of £655.49 paid to her by the respondent in July 2019. The respondent will return to the claimant, within **7 days** of the date of this judgment, the bankers draft by which the claimant had sought to return those monies to the respondent.

4. A gross sum therefore of **£2,477.13** is to be paid by the respondent to the claimant. The respondent will pay this sum less tax and national insurance and will provide to the claimant a full breakdown of deductions made.

5. The respondent's application for costs is refused.

REASONS

1. By an ET1 presented on 20 June 2018, after a period of early conciliation between 24 April 2018 and 24 May 2018, the claimant brought complaints of unfair dismissal and of a failure to pay holiday pay.

2. At a preliminary hearing on 10 January 2019, before Employment Judge McNeill QC, it was determined that the claimant was not an employee and

therefore her claim for unfair dismissal was dismissed. It was further found that the claimant was a worker within section 230(3)(b) of the Employment Rights Act 1996, a so-called 'limb B' worker and was therefore entitled to proceed with her claim for holiday pay. The issue for today's final hearing were clarified by Employment Judge McNeill and are as follows:

Unpaid annual leave/Working Time Regulations

"2.1 …….

2.2 When the claimant's employment came to an end, was she paid all of the compensation to which she was entitled under Regulation 14 of the Working Time Regulations 1998?

2.3 Her claim is likely to raise the following questions:

2.3.1 Limitation and, in particular, whether there was a break of three months or more between any periods in respect of which the claimant claims;

2.3.2 Whether her claim is limited to two years retrospectivity;

2.3.3 How a week's pay is calculated in the claimant's case;

2.3.4 The number of weeks for which the claimant has an entitlement to be paid;

2.3.5 How much pay is outstanding to be paid to the claimant."

3 At the outset of today's hearing, a discussion took place about a complaint that the claimant had included in her witness statement that there was a period of 15 minutes per working day where the claimant was expected to work but was not paid. This was not a claim that was contained in the ET1 and not something which had been canvassed at the preliminary hearing, albeit I accept the claimant's account that it was a matter which she had raised with the respondent in the period whilst she worked there. The claimant accepted that this was not a complaint which was before the tribunal for today's hearing. I recorded that the claimant was not seeking to amend her claim in relation to the complaint about 15 minutes per working day and was looking at holiday pay only and. The claimant confirmed that that was correct and that that was her expectation of today.

Documents and evidence

4 I was provided with a bundle of documents from the respondent running to 135 pages and read such documents as I was referred to. I was also provided with copies of the witness statements which had been produced before the preliminary hearing on behalf of the respondent but was not referred to those and did not read them. I did read carefully the witness statement produced by the claimant and to which she spoke on oath, and the claimant went through each of the attachments to that statement and addressed the relevance of each. I was also provided by the respondent with a written skeleton argument and various copies of law reports which I deal with below.

Facts

5 The claimant is a skilled specialist professional who works as an Applied Behaviour Analysis tutor (ABA). She works with children with autism. As recorded in the judgment from the preliminary hearing, she has her own business and describes herself as a consultant and as self-employed. From 9 December 2014 until 5 March 2018, she worked in the respondent's school. She provided services to two children referred to as 'K' and 'D', working for two or three days each week of term time. She did not work for the school during school holidays. There were a number of written service level agreements between the parties but none of them set out information as to holiday entitlement or rates at which holiday ought to be paid. As was clear from the preliminary hearing, the respondent had not accepted that the claimant was a worker and had not paid her holiday pay. It was accordingly accepted between the parties that the claimant had never been paid in relation to any holiday between December 2014 and the termination of her services in March 2018.

6 The claimant had asked the respondent in July 2016 what her legal employment status was, as she was having to pay tax and national insurance on her fees and was being told when she had to take a lunch break which she said was unpaid. During her e-mail of 4 July 2016, the claimant wrote:

> "I cannot have mandatory rights / regulations imposed on me when paid leave, sick pay, etc are not part of the deal. I have no contract written or implied and I am paid per hour".

7 The claimant, in her oral evidence said that she did not pursue the question of whether she ought to be paid for holiday leave because (i) she had no reason to do so until her dismissal, and (ii) she thought that if she had raised such a question, her position would have been terminated by the school.

8 In a schedule of loss dated 22 July 2018, the claimant sought holiday pay from February 2016 until December 2017 and calculating her rate of pay by reference to the number of hours and days per week she had

interactions with students 'K' and 'D'. In her oral evidence the claimant said that her holiday rate of pay ought additionally to include sums covering consultancy hours at a rate of £50 per hour, and administrative hours at a sum of £15 per hour. She had not calculated how often these were paid to her or how this ought to have impacted on holiday pay sums. The claimant confirmed that at no time had she raised a grievance about holiday pay with the respondent.

9 Having commenced working for the respondent's school on 9 December 2014, and having no contract setting out the applicable holiday year, I am satisfied that the holiday year is from 9 December until 8 December the following year. Each year the claimant would work from 9 December until the end of the school term, prior to Christmas, and then would be on holiday for at least two weeks before returning to the school in January. She would take one week of holiday during February half term and indeed did so in February 2018. She would then work until the Easter holidays in April of each year when she would be on holiday for at least two weeks. She would return after Easter until the May half term when she would have one week of holiday and then work until the end of the summer term in July. She would be off in July and August for six weeks before returning for the new school term in September, and would take part in the half term break in October of each year.

10 The complaint which the claimant makes in these proceedings is not of being unable to take statutory leave but of not being paid for that leave, and it is not in dispute that leave over 5.6 weeks per annum would be unpaid. When the claimant's engagement came to an end on 5 March 2018, 86 days of the claimant's leave year had transpired some 23.5% of the year. As the claimant was entitled to 5.6 weeks of paid leave per annum, this meant that she had accrued the right to 1.32 weeks of paid annual leave during her final leave year. During that leave year she had taken two weeks of unpaid leave in December 2017, and one week of unpaid leave in February 2018. The Claimant's schedule includes a claim in relation to October 2016 but not for October 2017.

Law

11 The Working Time Regulations 1998 provide at regulation 13, that a worker is entitled to four weeks' annual leave in each leave year. Regulation 13A provides for a further 1.6 weeks per annum such that the aggregate entitlement is to a maximum of 28 days leave per annum. Regulation 13(3)(b)(ii) provides that if there is no provision in a relevant agreement setting, the day on which a leave year commences, it will be the day on which the employment has begun and each subsequent anniversary of that date. Regulation 14 provides for compensation related to entitlement to leave and provides that where a worker's employment is terminated during the course of the leave year, and on the date on which the termination takes effect, the proportion of leave taken differs from the proportion of the year which has expired, the employer shall make a payment in lieu of leave. Regulation 16 states that a worker is entitled to be paid in respect of any period of annual leave to which he is entitled

under regulations 13 or 13A at the rate of "a weeks' pay in respect of each week of leave".

12 Sections 221 – 224 of the Employment Right 1996 shall apply for the purposes of determining the amount of a weeks' pay for the purpose of regulation 16. Regulation 30 WTR provides that a worker may present a complaint to an Employment Tribunal that their employer has failed to pay him the whole or any part of an amount due to him under regulations 14(2) or 16(1). A tribunal shall not consider that complaint unless it is presented before the end of the period of three months, beginning with the date on which it is alleged that the exercise of the right should have been permitted, or payment should have been made. Alternatively, the complaint may be presented within such a further period as is reasonable if the tribunal is satisfied that it was not reasonably practicable for the complaint to have been presented before the end of the period of three months.

13 Section 13 of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless it is required or authorised by a statutory provision or relevant provision of the workers contract, or the worker has previously signified in writing his agreement or consent to the making of that deduction. A failure to pay holiday pay constitutes an unlawful deduction from wages.

14 Section 23 of the Employment Rights Act 1996 provides that a worker can present a complaint to an Employment Tribunal in relation to a deduction within a period of three months beginning with the date of payment of the wages from which the deduction was made. If there is said to be a series of deductions, the time limit runs from the last deduction or payment in that series. Section 23(4) ERA provides that where the Employment Tribunal is satisfied that it was not reasonably practicable for a complaint under this section to have been presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable. Section 23(4A) ERA 1996 was inserted by the Deduction from Wages (Limitation) Regulations 2014. This provision applies to all complaints to tribunals made on or after the 1 July 2015 and provides that an Employment Tribunal is not to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

15 In Bear Scotland v Fulton [2015] ICR 221, EAT, it was held that whether underpayments in respect of annual leave to which claimants were entitled under regulation 13 of the Working Time Regulations 1998 constituted "a series of deductions" from their wages within the meaning of section 23(3) of the ERA 1996 was a question of fact. A "series" requires a sufficient similarity of subject matter to link each event factually with the next and sufficient frequency of repetition. Langstaff P held that in considering a series of deductions the phrase had to be understood within its legislative

context which had a three month limitation period and so construed where three months passed jurisdiction was extinguished and could not be regained by a late or non-payment more than three months later even if that payment had similar features and formed part of the same series. Therefore, if there were a series of deductions but there was a gap in time of more than three months between two of those payments, the series would be broken for the purposes of the Employment Rights Act and a claim for unlawful deductions for the earlier period would be out of time.

16 Although not necessary to determine the issue in that case, Langstaff P went on to express a view about the power of an employer to control when leave is taken. He held that in the absence of detailed contractual provisions, the power of an employer to exercise control - which is inherent in every contract of employment - means that it is entitled, within reasonable bounds, to direct when holiday should be taken. Employers therefore may direct when within the leave year regulation 13 holiday shall be taken and as regulation 13A is described as 'additional leave', this suggests it comes after the regulation 13 leave.

17 The claimant referred to the judgment of the ECJ in the case of King v Sash Window Workshop [2018] ICR 693. In that case, the court held that national provisions preventing a worker from carrying over (and where appropriate, accumulating until termination of his employment) paid annual leave rights not exercised in respect of several consecutive reference periods, were precluded. The judgment of the Employment Appeal Tribunal in that case [2015] IRLR 348, demonstrates that the questions which were referred to the European Court of Justice concerned a category of holiday pay where leave had not been taken by a worker because they could not afford to take it knowing that it would be unpaid. Two further categories of holiday pay which had been determined by the Employment Tribunal at first instance in King, and which had not been subject to further appeal concerned (i) payment for untaken leave in the final year of employment, and (ii) pay for leave which had been taken but had not been paid. It is to be noted that that case was determined before the Deduction from Wages (Limitation) Regulations were drafted or came into force.

18 I was also referred to the case of the Harper Trust v Brazel [2019] EWCA Civ 1402, handed down on 6 August 2019. This case provides guidance as to how the question of a weeks' pay is to be interpreted for term time only workers and how sections 221 to 224 of the Employment Rights Act 1996 ought to be applied.

19 The conclusion of all arguments I provided to each of the parties a copy of Chief Constable of the Police Service of Northern Ireland v Agnew [2019] NICA 32, a judgment of the Northern Ireland Court of Appeal handed down on 17 June 2019. This judgment is not binding on Employment Tribunals in England but is of persuasive authority. The Court in that case considered a number of issues, two of which are of interest for the purposes of determining this case. The first is the interpretation of the

phrase “a series of deductions” – in relation to which the Northern Ireland Court of Appeal disagreed with the judgment of Langstaff P in Bear Scotland Limited v Futlton. The Northern Ireland Court held that ‘series’ is an ordinary word though in the context of the relevant legislation it is a ‘series through time’ and whether there has been a ‘series of deductions through time’ is a question of fact. A three month gap breaking a series of deductions would, the Court found, lead to arbitrary and unfair and there was nothing in the legislation which expressly imposed a limit on the gaps between particular deductions making up a series. It was therefore held that on a proper construction of the Northern Ireland legislation (which is in the same terms as the Employment Rights Act), a series is not broken by a gap of three months or more. The other issue was whether annual leave entitlement had to be taken in a particular order and whether the suggestion in Bear Scotland that regulation 13, leave of 20 days had to be taken first with regulation 13A additional leave of 8 days being taking second, and any further leave entitlement, for example contractual leave entitlement, being taken only thereafter. The suggestion that is the correct approach by Langstaff P in Bear Scotland was obiter, ie not part of the essential rationale for his judgment. As set out by the Northern Ireland Court of Appeal, the Bear Scotland approach is such as to lead to an increased chance of a gap of three months or more between underpayments of holiday pay and a breach of a series of deductions. NICA noted that as far as individual employers and workers are concerned, the split between the three categories of leave (reg 13, 13A and contractual) has no real importance or importance at all. Both the individual employers and individual worker look at annual leave entitlement as composite whole. It concluded that the only sustainable interpretation is that a day of annual leave form part of a composite whole - any individual leave day must be treated as a fraction of the composite whole. At paragraph 119, Stephens LJ held that “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.”

Submissions

20 Mr Ross for the respondent produced a skeleton argument and made further oral submissions.

20.2 He highlighted that in her schedule of loss, the claimant’s last deduction about which she complained was the December 2017 holidays, such that her claim was out of time and any series of deductions before then must also have been out of time. He said that the claimant had not put forward any explanation for her failure to bring a claim earlier and that she had been aware since December 2014 that she did not meet the criteria for self-employment for tax purposes and as set out in her statement, she said that she had raised with the respondent the issue of her employment status and rights and benefits but that the respondent had not progressed the matter. He therefore submitted that it had been reasonably practicable to have brought a complaint within three months of the December 2017 holiday and the additional period in any event was too excessive so as to be reasonable.

20.3 Mr Ross submitted that if the respondent had designated which school holiday weeks were to be paid annual leave, the claimant would exhaust her entitlement to paid leave each year by taking two weeks paid leave in December, one in February and the remainder in the Easter holiday in April. As for leave thereafter, would be unpaid, she would have breaks in excess of three months, such that she could not claim a series of deductions. In any event even if she could claim a series of deductions, that could only be for a period of two years prior to her ET1 in June 2018.

20.4 Mr Ross highlighted that in July 2019, the respondent had sought to make a payment to the claimant to reflect holiday pay for the 2017/2018 leave year and had made a payment into her account in the gross sum of £655.49, from which it then deducted an erroneous overpayment of £160.50. He contended that as her 2017/2018 entitlement had therefore, as of today's date, been paid in full, she could not claim underpayment for 2017/2018, was part of a series of deductions to any earlier periods. It was not in dispute that the claimant regarded that payment to her as "illegal" and asked for the payment to be reversed. The respondent did not do this and the claimant therefore sent a bankers draft for the net sum which had been received into her account to the respondent. The respondent still has that bankers draft locked in its offices.

20.5 As to the amount of a weeks' pay the respondent set out payment or payments made to the claimant between 19 November 2017 and date on which her employment ended in March 2018. Ignoring weeks in which no monies were received, the average in the twelve weeks prior to the claimant's engagement ending was £452.69.

21 In her submissions the claimant said:

21.2 that she had not pursued a right to annual leave during her engagement at the school as she would not have been able to carry on in post had she have done so.

21.3 that she did not understand the issue that her claim was out of time because she had never claimed before

21.4 in answering the questions posed in the list of issues, she said that she ought to have her annual leave for all the years of her employment because the respondent knew that it ought to have been paying her holiday pay and she had never been able to find alternative work during summer holidays given the nature of her work – so in fact the thirteen weeks leave per annum had been akin to an enforced unpaid suspension and thought she ought to be paid for thirteen weeks each year.

21.5 As to the rate of pay, the claimant said that in addition to being paid holiday pay reflecting the hours she spent with students 'D' and 'K', she ought also to be paid in relation to administration and consultancy duties albeit she hadn't calculated any figure for this or given any evidence as to frequency of such payments.

Conclusions on the issues

22 When the claimant's employment came to an end in March 2018, she had not accrued annual leave which had been untaken such that she was entitled to a payment in lieu in leave on termination. What had occurred in that final year is that she had taken annual leave but had not been paid for it. That is not a claim under regulation 14 of the Working Time Regulations but rather is a claim under regulation 16 WTR or else section 13 of the Employment Rights Act.

23 Regulation 16(1) WTR provides that the worker is entitled to be paid in respect of any period of annual leave to which he is entitled, and regulation 30(1)(b) provides that a complaint can be made to a tribunal if the employer has failed to pay the worker for the whole or part of any amount due to him under regulation 16(1).

24 The claimant took a week of annual leave in February 2018 for which she was not paid and I find that this was in breach of the Working Time Regulations, and that further or alternatively it amounted to an unlawful deduction from her wages which were due to her in February 2018.

25 The claimant had taken leave in December 2017 for which she was not paid and again I find that her claim in relation to December 2017 is well founded. I accept the calculation of Mr Ross that the entitlement to paid annual leave which had accrued in the claimant's final leave year, between 9 December 2017 and 5 March 2018, was 1.32 weeks and accordingly award the claimant that sum.

26 The claimant, I find, had taken leave in October 2017 half term and also in July and August 2017. I did not find that her omitting October 2017 from her schedule ought to deprive her of this claim when all parties were aware that the school closed for half term. She did not receive any payment for annual leave in her leave year that ran from December 2016 to December 2017. I do not accept that the respondent can retrospectively, having been silent at the time, in tribunal, classify paid leave as being at the beginning of the leave year, so as to frustrate a claim for a series of deductions. Accordingly, I am satisfied that the failure to pay the claimant 5.6 weeks annual leave in her leave year December 2016 to December 2017 formed part of a series of unlawful deductions during which there was never a gap of more than 3 months up to her final deduction in February 2018.

27 There was, however, a gap in the series of deductions prior to summer 2017 to the annual leave year between 2015 and 2016 and the significant period of time which elapsed between periods when the claimant was entitled to paid annual leave was such as to break the series of deductions.

28 The claimant is therefore entitled to be paid annual leave of 6.92 weeks – 5.6 weeks for 2016 – 2017 and 1.32 weeks for 2017 to the date of termination in March 2018. If I was wrong as to the series of deductions being broken, in any event the claimant's claim for unpaid annual leave could only encompass the period from 20 June 2016 which is two years

prior to her presenting her claim to this tribunal by operation of section 23(4A) of the Employment Rights Act 1996.

Weeks' Pay

29 The calculation set out by the respondent at page 62 of the bundle before me correctly applies sections 221 to 224 ERA 1996 and the Court of Appeal judgment in Brazal v Harper. It looks at the sums received by the claimant in the previous twelve weeks during which she earned wages and takes an average of those in the sum of £452.69. I accept that calculation. The claimant was unable to give any evidence as to additional consultancy or administration payments that she had received in the relevant twelve week period and was unable to give information as to how those sums were paid to her as a 'limb B' worker.

How much pay is outstanding to be paid to the claimant

30 I find that the claimant is entitled to 6.92 weeks of holiday pay at a gross rate of £452.69 per week, totalling £3,132.62. The claimant is to give to credit for the gross sum of £655.49 which the respondent sought to pay to her in July 2019. The respondent, via Mr Ross, and those instructing him, today has confirmed that it will, within seven days of this judgment, return to the claimant a bankers' draft by which she sought to return those monies that the respondent had paid. The claimant is therefore due to be paid a gross sum of £2,477.13 from which the respondent is to deduct tax and national insurance contributions and to provide the claimant with a full breakdown.

Costs

31 At the conclusion of the hearing the respondent made an application for costs in the sum of £8,438.88. I was provided with a skeleton argument, the cases of Coppell v Safeway Stores plc [2003] IRLR 734, Power v Panasonic UK Limited UKEAT/0439/04 and Vaughan v London Borough of Lewisham [2013] IRLR 713. The respondent had made a number of attempts to negotiate with the claimant and in particular relied upon having made an offer on 19 February 2019 of £5,011.90, having explained its' method of calculation and then offering £500 more than it could considered to be the maximum value of the claimant's holiday claim of 1.7 years at 5.6 weeks per annum (1.7 years being a period of two years prior to the ET1 to the effective date of termination). The claimant made a counter-offer on 21 February asking for either £8,110.83 or else £9,878.96. It seems that there may have been an attachment to the e-mail setting out some method of calculation but that was not before me. In response the respondent endeavoured to explain clearly the case law in King and in Harper and increased its' offer to £5,160 so that the claimant would not have to repay the overpayment she had received, and she would receive £5,000 net of that overpayment. I did not have any written response from the claimant to that letter. Mr Ross accepted that this case contained complex legal issues but contended that the conduct of the claimant had been

unreasonable within the definition of rule 76 of the Employment Tribunal Rules of Procedure because the claimant has rejected generous settlement offers and behaved in an intransigent manner, refusing to engage in settlement negotiations. The respondent drew the claimant's attention to the legal costs that it would incur if she did not engage in settlement sums and which it did thereafter incur. Whilst the issues were complex, the essential point on which the claimant seemed to differ from the respondents he said, was whether she would be able to go back for more than two years and that was not a complex issue.

32 In response, Ms Omollo pointed that out it was a complex case and it became apparent that she had sought to set out various calculations, including a calculation which she sought to make by using a government website which came up with a figure of £7,500. She said that she believed that she believed that she had a case and believed that what had happened to her had been unfair. She had, of course, by this point engaged in and attended the preliminary hearing as to her employment status. She thought that the £500 which was put into her account in July 2019 was their final offer and was "a fake payment" which was unreasonable. The claimant told me about her means and said that she earns between £500-£600 per week. She told me about her outgoings for travel, rent, bills, food and so forth which amounts to £1,200 per month. She said that she is always overdrawn and is the guardian of her brother who has a brain injury and that that costs a great deal and that she hadn't been able to afford legal advice beyond one consultation with a barrister when she was told that she would get between £6,000 and £7,000 as compensation in this case. It is unclear whether that consultation was before or after the preliminary hearing in January of this year.

Law

33 Rule 76 of the ET Constitution & Rules of Procedure Regulations 2013 provides that a tribunal may make a costs order or preparation time order and shall consider whether to do so where it considers that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably, either in the bringing of the proceedings or in the way in the proceedings or part have been conducted. It is well established and was repeated in the case of Coppell v Safeway Stores that a party failing to beat an offer that has been made to it will not result automatically in costs being made in an employment tribunal. As HHJ Peter Clark held in Power v Panasonic, having an unrealistically optimistic schedule of loss can indicate an unreasonable approach to pleadings and I accept Mr Ross' submission that a claimant's unreasonable refusal of an offer of settlement and intransigent are relevant factors for a tribunal to take into account in deciding whether or not to award costs.

Conclusions

34 Consideration of an award of costs involves a two stage process. The first question is whether the claimant's conduct has passed the threshold of

being unreasonable. Was the unreasonable to refuse an offer of £5,000 net and to seemingly withdraw from negotiations thereafter, not giving a proper explanation as how she had arrived at a figure of somewhere between £8,000 and £10,000. I accept entirely that the law concerning the calculation of holiday pay is complex and it is difficult for a litigant in person to negotiate. However, I do accept on the correspondence shown to me by the respondent that the claimant did fail to engage with what was a very well explained and generous offer made to her and was obviously in excess of this sum that she has finally be awarded. I do accept that the claimant's behaviour has crossed the threshold of being unreasonable in this case.

35 I do have regard to the fact that this school is having to pay a sum of £8,500 in legal fees out of its' budget in addition to the award made today. However, whilst finely balanced I have declined to exercise my discretion as to the awarding of costs. I find that the claimant has given honest and candid evidence in these proceedings, that she did have a very real sense of injustice at being subjected to control such that she was a worker and yet not receiving the benefits of being a worker by way of payment for annual leave or indeed any further benefits. The claimant did not entirely refuse to engage in settlement negotiations and having come up with many different ways of looking at her weeks' pay and periods for which she might be entitled to payment as well as being sceptical of legal advisers for the respondent who have maintained that she was not a worker until January of this year, when the tribunal found to the contrary. She did not, I find, appreciate how generous an offer £5,000 was. In these circumstances I do not consider it appropriate to make an award of costs against her.

_____
Employment Judge Tuck

Date: …1 October 2019

Sent to the parties on: ...25.10.19.....

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For the Tribunal Office