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## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102523/2020**

**Hearing Held via Cloud Video Platform (CVP) on 10-12 May 2021**

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**Employment Judge Sangster**

**Mr Edward Johnston**

**Claimant  
In Person**

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**MPMH Construction Limited**

**Respondent  
Represented by  
Mr A Philp  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that:

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1. The claimant was entitled to the sum of **£1,426.88**, less deductions for tax and national insurance, in respect of holidays accrued but untaken on the termination of his employment. He did not receive this. The respondent is ordered to pay this sum to the claimant.
2. The deposit paid by the claimant in respect of his holiday pay claim shall be refunded to him.
- 30 3. The claimant's claim of unfair dismissal does not succeed and is dismissed.
4. A further hearing will be fixed to consider the respondent's application for expenses.

## REASONS

### Introduction

1. This was a final hearing which took place remotely. This was not objected to by the parties. The form of remote hearing was video. A face-to-face hearing was not held because it was not practicable due to the Covid-19 pandemic and all issues could be determined in a remote hearing.  
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2. The claimant lodged his claim on 11 May 2020. A case management preliminary hearing took place on 29 January 2021. At that hearing it was agreed that the claims being pursued were that of unfair dismissal and failure to pay holiday pay. The respondent denied that the claimant was dismissed and that any further sums were due to him in respect of holiday pay.  
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3. The parties agreed a joint bundle of documents extending to 143 pages, in advance of the hearing. A further document was added, with consent, during the course of the hearing.
- 15 4. The claimant gave evidence on his own behalf and called Graham Hancock (**GH**), the respondent's Operations Director, to give evidence also (a witness order was issued for his attendance).
5. The respondent led evidence from:
  - a. James Snodgrass (JS), the respondent's Managing Director;
  - 20 b. Stephen Keenan (SK), Senior Contracts Manager for the respondent;  
and
  - c. Irene McDonald (IM), Accounts Administrator for the respondent.

**Issues to be Determined**

6. At the case management preliminary hearing on 29 January 2021, it was agreed that the following issues required to be determined:
- 5 a. The claimant claims that his employment ended on 3 April 2020. The respondent states that this was 6 April 2020.
- b. Does the Tribunal have jurisdiction to determine this claim?
- c. If so, is the reason for dismissal one of the potentially fair reasons in s98(2) ERA?
- 10 d. Was the dismissal fair or unfair in the circumstances taking into account the size and business resources of the respondent (s98(4) ERA) namely
- i. Did the dismissing officer have a genuine belief in the conduct alleged?
- 15 ii. Was the dismissing officer's belief genuinely formed?
- iii. Did the dismissing officer's belief follow a reasonable investigation in the circumstances?
- iv. Was the dismissal within the band of reasonable responses?
- e. If the investigation was in any way unreasonable, should any award be reduced to reflect the probability the claimant would have been dismissed in any event had a reasonable investigation been carried out (S123(1) ERA)?
- 20 f. Should any award be reduced due to the claimant's contributory conduct (s123(6)/s122(2) ERA)?
- 25 g. Has the claimant mitigated his loss and if not should there be a reduction in any award to reflect that failure (s123(4) ERA)?

h. Taking the above into account, what (if anything) should the claimant be awarded?

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### Findings in Fact

- 5 7. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
8. The respondent carries out construction refurbishment and maintenance works for the NHS, Local Authorities, Further Education and commercial clients. They have approximately 35 employees.
- 10 9. The claimant commenced employment with the respondent on 26 February 2018, as a construction site manager. He remained in that role throughout his employment. He initially reported to GH, but after around 6 months of his employment, SK became his line manager.
- 15 10. The claimant signed a contract of employment on the commencement of his employment. He was entitled to a salary of £47,000, plus a car allowance of £6,000 per annum. That remained the case throughout his employment. The claimant was contracted to work from 8am to 5pm, Monday to Thursday and 8am to 4pm on Friday. The contract of employment stated that the claimant was required to give one month's notice in writing to terminate his employment with the respondent. The contract also specified that the employee could be placed on garden leave, or a payment in lieu of notice could be made on termination.
- 20 11. The respondent's holiday year runs from 1 January to 31 December annually and the claimant was entitled to 29 days' annual leave, inclusive of recognised public holidays. His contract of employment stated that *'Further details relating to holiday entitlement are set out in the Employee Handbook.'* The Annual Holidays policy within the Employee Handbook stated that employees are *'not normally permitted to carry over accrued annual holiday from one holiday year to the next. Holidays not taken within the holiday year will be lost.'*
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12. On 2 December 2019, the claimant was assigned to a new project, working at the Golden Jubilee Hospital in Clydebank (the **Project**). The Project was due to be completed in 3 phases: phase 1 initially, followed by phases 2 & 3 running concurrently. The whole project was due to be completed in 16 weeks, with phase 1 taking 10 weeks and phases 2 & 3 taking 6 weeks. When he was asked to work on the Project, the claimant mentioned to SK that he had holidays to take before the year end. SK stated to the claimant that he felt that that would not be a good idea, given the tight deadlines on the Project. SK stated that it would be preferable for the claimant to carry these forward to the next holiday year. The claimant agreed to do so.
13. On 16 December 2019, the claimant emailed IM, GH and SK about his holidays. He stated that he had 12 days to be carried over to the next year, as it had not been possible to take them. He requested that IM confirm to him the next morning that this was agreed. As he did not hear back from her, he continued to chase for confirmation over the next few days, sending at least 6 emails. On 20 December 2019, following a further prompt for a response, IM stated to the claimant *'Yes I got it Eddie but it is [SK] who needs to agree this'*.
14. On 15 January 2020 the claimant emailed IM, copied to SK, and stated *'Spoke to [SK] this morning and has agreed to add 12 days to my allocation for this year if you could amend, thanks.'* She did not respond. On 22 January 2020, the claimant sent a further email to IM, again copied to SK, forwarding the previous email and asking *'Did this get sorted?'*. She responded stating *'If [SK] has agreed it then its ok – I have put a note on your holiday entitlement form.'*
15. On Monday 9 March 2020, SK arrived at the site the claimant worked at 16:05 and the claimant was not there. He sent an email to the claimant at 16:21 stating *'I have arrived on your job 16:05 to speak to you about progress and outstanding works. I am surprised that all are on site are the two agency joiners that were packing up, no labourer no Lee or Jason, but more importantly no [Site Manager]. Can you please let me know tomorrow exactly what joinery work was done today and how many hours worked. As you know*

we are under real pressure to deliver this project and everyone leaving site early certainly doesn't help.' SK's email was copied to GH who sent a further email to the claimant at 18:56 stating '*Eddie I presume you have a valid reason for not being on site and leaving operatives unsupervised.*' That email was copied to SK and JS.

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16. The claimant responded at 18:59 stating '*Not waiting until tomorrow to report to you, please see below. I know you were on site at 5 past 4 as I past you at lights. As you know I have to be away at 4 or its 7 before I get in. If you had called I would have held back.*' He went on to explain what work had been undertaken on site that day and that, when he gets home, he continues to work. He then stated '*After careful consideration over the weekend and now today of your actions, I have no option but to hand in my 4 week notice as from today. I can say I have not had any grief from directors, but considering everything I think this is the best thing for myself. I have enjoyed the hospital work, very satisfying although trying at times. Although not contacted other contractors as yet, I intend to continue in this field. Because I fell I am professional and fully committed, I will continue over the next four weeks to do the best job I can, and I would suggest you get a replacement in for the last week so I can handover.*'

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17. On Friday 20 March 2020 SK attended the site where the claimant worked and asked him if he would be prepared to stay on to finish the Project. At that stage, phase 1 was coming to an end and phases 2 & 3 were due to commence. The respondent accordingly envisaged it would take approximately 6/7 weeks to complete the Project. It was agreed that he would consider this over the weekend and let SK know the following Monday, if he was prepared to do so. The claimant did not contact SK on the Monday. SK accordingly informed GH on 27 March 2020 that the claimant had not agreed to stay on to complete the Project, so they would require to inform the client and identify a replacement for the claimant.

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18. On 2 April 2020, GH informed the client that the claimant had resigned and a replacement Site Manager would be put in place. Phase 1 was about to complete that week, with phases 2 & 3 commencing on Monday 6 April 2020. The client stated that they did not feel that phase 1 had gone well and requested that the replacement be put in place for the commencement of phases 2 & 3.
19. JS, GH & SK met at 10am on Friday 3 April 2020. They discussed the feedback from the client and agreed that the claimant should leave immediately and be placed on garden leave for the remainder of his notice period. At that stage, JS & GH understood that the claimant's employment was due to terminate on 9 April 2020, given the contractual requirement to give 1 month's notice. As the claimant had only given 4 weeks' notice, and this was accepted, his employment was in fact due to terminate on Monday 6 April 2020.
20. At around 10:40, GH called the claimant, asking him to attend a meeting later that day with GH, JS and SK. The claimant attended the meeting at around 13:00. At the meeting, the claimant was informed by JS that he would cease work immediately and be placed on garden leave for the last week of his notice period. He was informed that this was due to client feedback that phase 1 had not gone that well and the fact that they were keen to put a new Site Manager in place for the commencement of phases 2 & 3 the following week. The claimant asked if they would elaborate on what the client had said and was informed that they would not. He was asked if he wanted to take his personal belongings with him that day, or return for them on Monday. He stated he would take them with him that day. He left the office, then went to the site to collect his belongings.
21. In line with the notice given by the claimant, which was accepted, his employment terminated on 6 April 2020.

22. From 4 April 2020 onwards the claimant corresponded with the respondent in relation to the termination of his employment. He stated he had been summarily dismissed and was entitled to notice of termination, as well as payment in respect of accrued holidays for 2019 and 2020. The respondent stated that the claimant had resigned on 9 March 2020 and, at the meeting on 3 April 2020, he was placed garden leave for the remainder of his notice period. The claimant did not dispute that he had resigned, stating that this was *'due to bullying by [GH] and [SK] with regards to my hours worked when in fact I was doing between 12 and 13 hours per day when contracted to do 9'*. He stated however that he had agreed with SK that his resignation would be postponed/withdrawn, to allow him to complete phases 2 & 3 of the Project.
23. In relation to holidays, JS confirmed in an email on 8 April 2020 that the claimant had taken 22 days of his holiday entitlement in 2019, so would not have 12 days to carry forward. The claimant accepted this. JS highlighted however that holidays cannot normally be carried over and asked the claimant to provide confirmation that this was authorised. The claimant confirmed he would do so.
24. The claimant received his final salary payment on 29 April 2020. This included the following:
- a. Salary of £2,038.45 gross, over half of his normal monthly salary;
  - b. Car allowance of £230.77 gross, just under half of his entitlement for the full month; and
  - c. £882.63 in respect of pay for 4.33 holidays accrued. This represented his accrued holidays for 2020. He did not receive any payment on the termination of his employment in respect of his 2019 holiday entitlement.

## Submissions

### *Respondent's submissions*

25. The respondent lodged a written submission, which was supplemented by an oral submission.



26. The respondent submitted that the respondent's evidence and that of GH was credible and should be preferred to that of the claimant. The claimant's position was undermined by the fact that he advanced three separate arguments, namely i) that his resignation was in the heat of the moment; ii) that it had been agreed it had been withdrawn; and iii) that it had been agreed that his employment would continue until the conclusion of phases 2 & 3 of the Project. His evidence regarding his holiday pay claim was also contradictory.
27. The respondent submitted that the claimant was not dismissed. Rather, the claimant resigned. This was not done 'in the heat of the moment', it was a considered decision, as evidenced by the terms of his letter of resignation. He resigned giving 4 weeks' notice. The claimant could not withdraw his resignation unilaterally. There was no agreement to withdraw the resignation, or to extend the period of notice given. In the absence of this, the claimant's resignation stood. The Tribunal were referred to the cases of **Harris & Russell Ltd v Slingsby** (1973) ICR 554 (NIRC) and **CF Capital Plc v Willoughby** (2011) EWCA Civ 1115 (CA).
28. The respondent had an express contractual right to place the claimant on garden leave, which they did during the meeting on 3 April 2020, believing that the claimant still had a week of his notice period to run.
29. The claimant is not entitled to any further holiday pay, as he was not permitted to carry over any holidays from 2019 to 2020. He was paid his full entitlement for 2020.
30. Following a Preliminary Hearing on 18 September 2021, the claimant was ordered to pay deposits of £250 for each of the four claims advanced at that stage. Deposit Orders were issued on 29<sup>th</sup> September 2020. The Claimant subsequently paid deposits for his unfair dismissal and holiday pay claims but withdrew the remaining claims. Those claims were dismissed by judgment sent to the parties on 14<sup>th</sup> December 2020.

31. If the claimant is unsuccessful with either of his claims then the Tribunal should order that the deposits be paid to the respondent and fix a separate hearing to determine what, if any, award of expenses should be made to the respondent.

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*Claimant's submissions*

32. The claimant also lodged a written submission, which was prepared following receipt of the respondent's written submission.
33. He stated that his evidence should be preferred to that of the respondent.
- 10 34. SK stated to the claimant at the start of December 2019 that, with the commencement of the Project, it was not a good time to take holidays and that these should be carried over. The claimant agreed to this and then sent numerous emails to try to ensure this was documented.
- 15 35. He agreed with SK that he would stay to complete the Project. Garden leave was not mentioned during the meeting on 3 April 2020. Rather, he was told that he was being dismissed with immediate effect.

**Relevant Law**

20 *Unfair Dismissal*

36. Section 95 of the Employment Rights Act 1995 (ERA) under the heading of "Circumstances in which an employee is dismissed" states:
- 25 (1) *For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) .... only if) –*
- (a) *the contract under which he is employed is terminated by the employer (whether with or without notice),*
  - (b) *.....*
  - (c) *.....*

(2) *An employee shall be taken to be dismissed by his employer for the purposes of this Part if-*

(a) *the employer gives notice to the employee to terminate his contract, and*

5 (b) *at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;*

10 *and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.*

37. In ***Harris & Russell Ltd v Slingsby*** (1973) ICR 554 (NIRC) Sir Hugh Griffiths stated that:

15 *"the court is satisfied that where one party to the contract gives a notice determining that contract he cannot thereafter unilaterally withdraw the notice. It will, of course, always be open to the other party to agree to his withdrawing the notice, but in the absence of agreement the notice must stand and the contract will be terminated upon the effluxion of the period of notice"*

20 38. This was approved by the Court of Appeal in ***CF Capital Plc v Willoughby*** (2011) EWCA Civ 1115 (CA) at paragraph 37 which states:

25 *"The 'rule' is that a notice of resignation or dismissal (whether given orally or in writing) has effect according to the ordinary interpretation of its terms. Moreover, once such a notice is given it cannot be withdrawn except by consent."*

### *Holiday Pay*

39. The entitlement to holidays is regulated by the Working Time Regulations 1998 (the **Regulations**). They are made to give effect to the Working Time Directive 93/104/EC and require to be construed purposively in light of that.

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40. The Regulations provide for an entitlement to annual leave under Regulations 13 and 13A, which amount to a total of 5.6 weeks per annum, capped at 28 days.

5 41. Regulation 13A(7) states that ‘A *relevant agreement may provide for any leave to which a worker is entitled...to be carried forward into the leave year immediately following the leave year in respect of which it is due.*’

10 42. Case law has also established that entitlement to unused holidays should be carried over where the worker did not have an effective opportunity to take their holiday entitlement (***Max-Planck-Gesellschaft zur Forderung der Wissenschaften eV v Shimizu*** (C-684/16) EU:C:2018:874).

15 43. Regulation 14 sets out the entitlement where a worker’s employment starts and/or ends in the leave year.

### Discussion & Decision

44. The Tribunal considered each head of claim in turn.

#### *Holiday Pay*

20 45. The Tribunal did not accept the assertion by the respondent’s witnesses and GH that carry over of holidays could only be authorised by a director of the company. This did not accord with:

- a. the terms of the respondent’s handbook, which was silent on the point;
- b. the evidence of GH who stated on several occasions in his evidence that  
25 SK would normally deal with all issues re holidays and that he trusted him to do so; and
- c. the emails from IM dated 20 December 2019, stating ‘*it is [SK] who needs to agree this*’, and 22 January 2020, stating ‘*If [SK] has agreed it then its ok*’.

46. In addition, there were a number of contradictions in the respondent and GH's evidence, which undermined their credibility in relation to whether director approval was actually sought or was required, such as:

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a. SK stated that he spoke to GH about the claimant's request to carry over holidays and that GH indicated that he would deal. GH's evidence was that SK did not discuss this matter with him.

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b. SK stated that he expressly stated to IM, immediately following receipt of the email from the claimant dated 15 January 2020, that he did not have any authority to agree to the carry-over of holidays and it required to be agreed by a director. IM however then sent an email on 22 January 2020 stating *'If [SK] has agreed it then its ok.'* This contradicted SK's evidence.

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47. The Tribunal accordingly concluded that director approval was not required to carry over holidays.

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48. The Tribunal considered whether there was any agreement between the claimant and SK, to allow the claimant to carry over holidays to 2020. The Tribunal found that there was. The Tribunal accepted as credible the claimant's position that he was advised by SK, his line manager, in December 2019, to carry over holidays which the claimant did not have the opportunity to take in 2019 due to business commitments, namely the commencement of the Project, with tight timescales. As a result of the commencement of this Project on 2 December 2019, the claimant was deterred by SK from taking his remaining annual leave entitlement during December 2019. SK led him to believe that he would not lose his holiday entitlement, but instead that it would be carried over to 2020.

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5 49. The Tribunal concluded that thereafter, on 15 January 2020, SK expressly agreed to the claimant carrying over his untaken leave entitlement from 2019 to 2020. The Tribunal reached this conclusion as a result of the following:

a. The contradictions in the respondent and GH's evidence in relation to holidays, as outlined above, which undermined their credibility in relation to this element of the claim;

10 b. The terms of the email from the claimant, dated 15 January 2020, which was sent to the IM and copied to SK, with a further copy being sent to both parties on 22 January 2020. This stated that SK had agreed to add 12 days to the claimant's holiday entitlement for the current year (2020). The Tribunal concluded that the claimant would not send such an email, copying in SK, the individual who he stated he reached the agreement with, if he had not do so. Further, if SK had not reached such an agreement with the claimant, he would have immediately responded stating this and the matter would likely have been treated seriously, possibly meriting disciplinary action.

20 50. IM, on behalf of the respondent, confirmed the agreement reached in relation to the carry-over of holidays on 22 January 2020. This, taken together with the previous emails, amounted to a relevant agreement for the purposes of the Regulations.

25 51. It was accepted by the claimant that his initial view that he had 12 days to carry over was incorrect. He accepted that he had taken 22 days of his holiday entitlement in 2019. The remaining entitlement was to 7 days. That entitlement was carried forward into 2020, as per the agreement the claimant reached with SK, as confirmed by IM. That agreement was reached because  
30 the claimant did not have the opportunity to take his full leave entitlement in 2019. Due to the demands of the Project, he was deterred from doing so by

SK. The claimant was entitled to carry over his holidays to the next year as a result.

52. The claimant received 4.33 days holiday pay on the termination of his employment. This amounted to £882.63. He did not receive any payment in respect of the 7 days' holiday carried over from 2019. He is entitled to the further sum of £1,426.88, less deductions for income tax and national insurance contributions, in respect of the remaining 7 days of his accrued holiday entitlement.

*Unfair Dismissal*

53. The claim advanced was one under s.95(1)(a) ERA only. The claimant did not assert that he was constructively dismissed.

54. It was not in dispute that the claimant resigned on 9 March 2020, giving 4 weeks' notice. The claimant asserted that his resignation was given 'in the heat of the moment' and was therefore not valid. The Tribunal did not accept that this was the case, given the terms of the email sent by the claimant on 9 March 2020 confirming his resignation. This stated that the claimant was resigning '*after careful consideration over weekend*'. He stated that he had '*not had any grief from directors, but considering everything I think this is the best thing for myself*'. The Tribunal also noted that, at no point prior to the submission of his ET1 did the claimant assert that his resignation was not valid as it was given in the heat of the moment, despite the fact that a significant number of detailed emails were sent by him to the respondent following the termination of his employment. The Tribunal concluded that this undermined the claimant's credibility on this point.

55. In the alternative, the claimant's position was that he had agreed with SK, on 13 March 2020, that his resignation would be withdrawn or at very least delayed, to allow him to complete the Project. The respondent stated that, while the claimant was asked on 20 March 2020 whether he would be prepared to stay on, the claimant did not agree to this.

56. The Tribunal preferred the evidence of the respondent relation to this for the following reasons

5 a. The evidence of the claimant was contradictory in relation to this element of his claim. He stated in resignation email of 9 March 2020 that he had *'not had any grief from directors'*. However, in his email of 8 April 2020 to JS he stated *'I claim that the resignation was due to bullying by [GH] and [SK] with regards my hours worked when in fact I was doing between 12 and 13 hours per day when contracted to work*  
10 *9'*. In his further particulars submitted to the Tribunal, dated 27 July 2020 he stated that *'the problems in March had indeed been rectified during a meeting on 13<sup>th</sup> March with my line manager [SK]'*. No evidence was led which explained how, in the claimant's view, the issues which led to his resignation had been rectified less than a week  
15 later. No credible explanation was provided to the Tribunal as to why, having stated on 8 April 2020 that his resignation was due to bullying by his line manager and a director of the company, he would have withdrawn/delayed his resignation.

20 b. Given the approach the claimant took to the issue of holiday carry over, (sending at least 8 emails to try to ensure that this was documented), the Tribunal concluded that, if the claimant had reached an agreement that his resignation would be withdrawn/delayed, the claimant would have taken a similar approach and taken steps to ensure that this was documented. No such emails or evidence was presented to the  
25 Tribunal.

57. In light of the above, the Tribunal concluded that there was no agreement to withdraw the claimant's resignation or extend the claimant's notice period. Once given, resignation cannot be unilaterally withdrawn or varied. As there was no such agreement, the claimant's resignation of 9 March 2020 remained  
30 effective.



58. The Tribunal found that, at the meeting on 3 April 2020, the claimant was placed on garden leave for the remainder of his notice period. He was not dismissed.

59. In light of the above, the claimant's claim does not succeed and is dismissed.

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### **Deposit Order**

60. Rule 39(5) of The Employment Tribunals Rules of Procedure states that:

10 *'If the Tribunal at any stage following the making a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order*

*a. The paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and*

15 *b. The deposit shall be paid to the other party (or if there is more than one , to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.'*

20 61. Given that the claimant's claim for holiday pay was upheld, the deposit paid in respect of that claim shall be refunded.

62. A separate hearing will be fixed to determine what, if any, award of expenses should be made to the respondent and to hear submissions from the parties on whether the reasons given in this judgment are substantially the same as those stated in the deposit order, for the purposes of Rule 39(5).

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Employment Judge: Mel Sangster  
Date of Judgment: 05 June 2021  
Entered in register: 14 June 2021  
and copied to parties

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