EMPLOYMENT TRIBUNALS

Claimant: **Mr A Ghebrehiwt**

Respondent: **Wilson James Limited**

Heard at: **East London Hearing Centre**

On: **3 April 2023**

Before: **Employment Judge Crosfill**

Representation
Claimant: In Person
Respondent: Mr Piers Chadwick, a Consultant

JUDGMENT having been sent to the parties on 6 April 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 The Claimant worked for the Respondent (or its predecessors following TUPE transfers) as a security guard from 21 June 2013 until 11 March 2021 when he was dismissed by the Respondent. The Claimant presented his ET1 on 24 July 2021 section 8 of the ET1 disclosed that the Claimant was claiming unfair dismissal, a redundancy payment, notice pay, holiday pay, arrears of pay and 'other payments'. The case was listed for a final hearing before EJ Wilkinson on 12 and 26 January 2022. EJ Wilkinson reserved his decisions. On 26 July 2022 EJ Wilkinson provided a written judgment and reasons. I understand that the reasons for the delay included the ill health of the Judge. EJ Wilkinson dismissed the Claimant's claims for unfair dismissal and the claim that the dismissal was in breach of contract. His judgment is silent on any other claims.

2 By a notice of appeal dated 12 September 2022 the Claimant appealed the decisions of EJ Wilkinson. He complained in his notice of appeal that EJ Wilkinson had failed to deal with his claims for holiday pay and sick pay.

3 The Employment Appeal Tribunal, in accordance with the 'Burns/Barke' procedure asked EJ Wilkinson to comment upon aspects of the grounds of appeal. In particular EJ Wilkinson was asked to comment on the suggestion that he had overlooked claims for

holiday pay and sick pay. In a response sent to the EAT on 18 November 2022 EJ Wilkinson accepted that a claim for holiday pay had been before him and that he had assumed that it had been resolved between the parties. He said that no claim for sick pay had been referred to before him. Of his own motion EJ Wilkinson stated that the claim for holiday and sick pay should be reconsidered.

4 The Claimant's appeal was dealt with at the sift stage by Clive Sheldon KC sitting as a Deputy Judge of the High Court. He directed that the grounds of appeal relating to the claims for holiday and sick pay should be stayed pending any reconsideration. He held that all other grounds of appeal were not reasonably arguable and that no further action should be taken on the appeal on those grounds. That second decision was of course subject to the Claimant's rights under rule 3(10) of the EAT rules of procedure. I understand that the Claimant has sought an oral hearing in respect of the grounds of appeal relating to the dismissal.

Reconsideration – Legal principals

5 The rules of procedure governing reconsiderations are set out in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The material parts say:

> *Principles*
>
> *70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.*
>
> *Application*
>
> *71. Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.*
>
> *Process*
>
> *72.—(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal.*

Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

Reconsideration by the Tribunal on its own initiative

73. Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused).

6 The situation before me was that EJ Wilkinson had decided of his own motion to reconsider the claims for holiday and sick pay. Acting Regional Judge Russell had decided that the matter should be dealt with at a hearing. She had appointed me to hear the application as EJ Wilkinson had resigned as an Employment Judge and it was not reasonably practical for him to deal with the matter for the purposes of rule 73(3).

7 The test that must be applied in deciding whether or not to revoke or vary a judgment is that set out in rule 70. The question is whether it is in the interests of justice to do so.

The hearing

8 At the outset of the hearing we discussed what issues I needed to determine. It was common ground between the parties that EJ Wilkinson had not made any determination as to whether or not the Claimant was entitled to any accrued but untaken holiday pay at the conclusion of his employment. It was agreed by the Respondent that it was in the

interests of justice for me to reopen the judgment and to deal with the matter de-novo having permitted the parties to give evidence and make submissions. The parties had prepared for the hearing on that basis. The Respondent admitted that some holiday pay was due to the Claimant but the amount was in dispute. The Respondent says that it has always been willing to pay the sum it admits but has not done so pending agreement by the Claimant.

9 There was no agreement between the parties as to whether the test of the interest of justice had been met in respect of the claim for sick pay. The Claimant says that he had brought a claim and in common with the claim for holiday pay, it had been overlooked. On behalf of the Respondent, it was said that no such claim was included in the ET1 but more than that, no evidence was lead in respect of it in the course of a 2-day hearing nor were any submissions made about any such claim.

10 It was the Respondent's secondary position that if I was to conclude the claim had been overlooked I should determine it for myself in the same manner as the claim for holiday pay.

11 I asked the Claimant to explain what his claim for sick pay entailed. The Claimant says that he had taken a period of sick leave when he was self-isolating due to contracting COVID. He says that he is contractually entitled to sick pay and that the Respondent owes him four days' pay. The Respondent says that there is no evidence that the Claimant was ever off sick triggering any entitlement such as sick pay. It says that finding would not be open to me because I am bound by the findings of EJ Wilkinson that the Claimant was absent without leave. There is a further issue which is obvious from the contract of employment and that is whether the entitlement to sick pay was contractual or discretionary. EJ Wilkinson's judgment does not deal directly with any question of whether the Claimant was entitled to payment for the period he says he was unfit for work.

12 The issues I had to determine were therefore:

a. It being common ground that I should hear the holiday pay claim and decide it for myself;

    i. How much holiday had the Claimant accrued in the holiday year in which his contract was terminated; and

    ii. How much holiday had he taken; and

    iii. If the amount accrued exceeded the amount taken what sum is due to the Claimant.

b. In respect of the claim for sick pay:

i. Whether it is in the interests of justice to reopen the issue of whether the Claimant was entitled to any sick pay; and, if it was,

ii. What is the Claimant's contractual entitlement to sick pay; and

iii. Did the Claimant qualify for any payment by reason of being unfit to work – including the question of whether I am bound by findings of EJ Wilkinson about the Claimant's absence; and

iv. if the Claimant did qualify for sick pay what is he owed?

13 I heard from the Claimant himself and I heard from Mr Bosa who is a business partner of the Respondent. His evidence dealt exclusively with the question of whether the Claimant had been properly paid the amount of holiday that is due.

Holiday Pay

14 I should explain briefly the nature of the dispute between the parties. The Claimant says that he is entitled to paid accrued but untaken holiday pay, calculated by reference to a payslip which is found in the original trial bundle at page 340 which shows that he had a balance of 54.13 hours of holiday remaining to him on the date of his dismissal which was 11 March 2021. He says that should be multiplied by an hourly rate of £11.30. The Respondent does not accept that the payslip shows the accrued but untaken holiday. It has produced a list of days it says the Claimant was on holiday extracted from an app onto which rosters and rotas were held. They said it shows that the Claimant has taken holidays and the remaining balance due to him at the concluding of his employment amounted to 10.46 hours. They say that they believed that the hourly rate should be £11.75 per hour equating to a gross pay to £122.91 and they say they have tendered that sum of money to the Claimant. I do note that when that was tendered, it was most recently on condition that the other claim should be dismissed.

15 It was not disputed between the parties that the respondent's holiday year ran from 1 April to 31 March.

16 It follows from what I have said above that the real dispute between the parties concerned how much holiday the Claimant had taken in the leave year in which his employment was terminated. I needed to make a finding of fact in respect of that matter. Such a finding would resolve the dispute between the parties.

17 I make the following findings in order to reach a conclusion on this matter. In his evidence the Claimant did not deal with the issue of how much holiday he had taken by reference to his recollection of when he had taken any holiday. Instead he relied entirely on his final pay slip. The payslips provided by the Respondent to the Claimant are detailed. They include a box which where the 'Holiday Balance' is included. The Claimant

referred to the pay slip provided to him on 11 March 2021 which includes the figure of 54.13 as the amount of hours of holiday remaining

18 When the Claimant was cross examined the electronic record provided by the Respondent was put to him. That recorded 21 working days of paid holiday. In the main there were single days off but there was also a 3 day and then 4 day period over Christmas 2021 and a three day period in August 2020. The Claimant was unable to say whether he had or had not had that time off. His stance was that he considered the payslip to be the best record of the holiday.

19 Mr Bosa had no personal knowledge of whether the Claimant had taken annual leave and if so when. He produced the computer records from the Respondent's system and relied upon them for their accuracy.

Discussion and conclusion

20 Having heard the evidence and having spent some time with the documents, I reached the following conclusions. I started by trying to ascertain how the figure of 54.13 hours was consistent with the holiday record held by the Respondent. The answer is fairly straightforward. What I find has happened is that the holiday balance is ascertainable firstly by doing the following sum. By multiplying 5.6 weeks of annual leave by 50 hours that which was the Claimant's average contracted hours according to his contract of employment, reaching a total of 280 hours. The holiday year runs from the 1 April through to the 31 March. Since the Claimant was dismissed on the 11 March, there were 20 days outstanding. So, in order to work out the total amount of holiday the Claimant was able to take in that particular year, it is necessary to multiply 280 firstly by 345 and then divided by 365. That gives an accrued holiday entitlement based on a 50 hour week of 264.65 hours. Taking the number of days holiday that the Claimant took from the records the Respondent has produced, there are 21 days of holiday. If one deducts 21 days at 10 hours a day, that give rise to a figure of 54.67 hours. So close to the figure on the pay slip as to indicate that that was the method of calculation.

21 I find that the holiday balance or on the payslip that the Claimant was given was calculated by that method. It follows that the balance of holiday entitlement shown on the payslip relied upon by the Claimant is predicated on the Claimant working for 50 hours per week.

22 Within the trial bundle however, I have got numerous schedules of when the Claimant did and did not work throughout 2020 and early part of 2021. From those schedules, it is clear that the Claimant did not always work for 10 hours a day for 5 days a week. There are numerous occasions where he worked 12 hours shift and some occasions where he worked 10 hour shifts. The hours vary. It is also clear from some of those documents that at least some of the holidays had been recorded on the Respondent's system correspond with those documents. I find that the Claimant did not always work for 50 hours a week and therefore the figure for accrued but untaken holiday shown in the payslip is not accurate.

23 I will need to make a finding of facts as whether or not the Claimant took the 21 days holiday that the Respondent says that he did. The Claimant does not say that he did not, he puts the Respondent to proof. I find that more likely than not that the holiday records produced by the Respondent are accurate and do reflect the times the Claimant had off. The varying shift pattern is reflected in that schedule with some days the Claimant took off been calculated as 10 hours and other days had been calculated as 12. Whilst the records of the actual shifts worked by the Claimant were incomplete those I was provided with are consistent with the holiday record. The final piece of evidence that supports the Respondent's case is that the calculation I have set out above (based on an assumption that the Claimant worked for 50 hours a week) is consistent with the Claimant being paid for 21 days when he did not work. The total amount of time off was 248 hours.

24 My findings are sufficient for me to calculate for myself what sums are properly due to the Claimant in respect of accrued but untaken holiday. The method of calculation is that set out in regulation 14 of the Working Time Regulations 1998. I have set out the calculations in a schedule to the judgment and shall not repeat them here. I should say that I have used the hourly rate proposed by the Respondent which is marginally higher than that suggested by the Claimant and slightly higher than the rate shown in the payslips. My understanding is that the difference is explicable by the fact that there were some occasions when the Claimant worked overtime. It is correct that holiday pay should reflect overtime. Neither party asked me to investigate whether the rate was exact by reference to overtime actually worked by the Claimant. It seems to me that the Respondent's concession is actually slightly generous. I should explain that the difference between the Respondent's calculation and my own is that the Respondent miscalculated the multiplier when assessing the accrued but untaken leave given the date that the Claimant was dismissed.

25 In the light of the concession made by the Respondent that the issue of holiday pay had been overlooked by EJ Wilkinson and that it would be in the interests of justice to reconsider this point I have done so and substitute a finding that the Claimant was entitled to 16.66 hours of accrued but untaken holiday pay and order the Respondent to pay that.

The claim for sick pay

26 I then turn to the issue of the sick pay. The first question I needed to determine in order to decide whether it is in the interest of justice to reconsider this claim is whether it was brought in the first place. There is no mention per se of sick pay in the ET1, the closest that the Claimant gets to raising the claim is by ticking the boxes in section 8 of the ET1 and he ticks the following boxes, notice pay, holiday pay, arrears of pay and other payments. What I take from that is that the Claimant did intend to make a claim for something in addition to notice pay and holiday pay. Ticking a box saying arrears of pay could only sensibly be thought to be a claim that some pay was due and had not been paid. I should take a liberal approach to the construction of an ET1 completed by a litigant in person. That said, even a liberal construction would ordinarily require at least some

detail from which a reasonable reader could understand the claims that were being brought even if it were necessary to give further information in respect of a claim.

27 The Claimant produced a schedule of loss, there are two versions that both appear to be completed by the Claimant, one in hand and one in type. There was very little difference between them but they are both based on a pro-forma which is focused on claims of unfair dismissal and unlawful discrimination. Within the pro-forma there is no scope or no obvious place for including claims of wages. As such I do not place any weight on the absence of a sick pay claim in those documents as limiting any claim in the ET1 for 'arrears of pay'.

28 At the final hearing, the Claimant produced written submissions in support of his claim. There is very little within those submissions which would tell a reasonable reader precisely what the Claimant is claiming in respect of sick pay. However, he does say that he had time off sick in January 2021. At the final hearing, the Claimant relied upon written submissions as is his right to do so and they do refer, in passing, to the claim of sick pay.

29 It is unfortunate in this case, and possibly a product of the hearing being conducted by video, but there was not a careful note and agreement made at the outset of the hearing as to what issues would be dealt with by the judge. It is also unfortunate as the parties are aware that the judge became unwell after the hearing, he overlooked the claim for holiday pay as I previously indicated.

30 I have come to the conclusion that the Claimant has brought a claim for 'arrears of pay'. He has not clearly articulated at any stage what that claim was about but it could quite properly describe the claim that he has explained before me. In a number of cases it has been held that the 'interests of justice' test is broad enough to include rectification of procedural mishaps or slips. Here in my view there was such a procedural mishap in that the judge did not take the step of identifying the issues with the parties. In my view it is in the interests of justice to reconsider the failure to include any reference to the claim for arrears of pay/sick pay in the original judgment. It was agreed by the Respondent that if I cane to that conclusion I should determine the claim from scratch subject to any relevant findings of fact made by EJ Wilkinson. That is what I did.

<u>The contractual provisions in respect of sick pay</u>

31 I make the following findings about the terms that govern the pay during any sickness absence.

32 In the agreed bundle there was a contract of the employment that the parties agreed governed their relationship. Clause 8 of that contract deals with sickness and absence. Clause 8.1 imposed an obligation to report any absence through ill health as soon as possible. It is stated that a failure to do so may lead to the non-payment of sick pay. Clauses 8.2 – 8.4 mirror provisions in the statutory sick pay scheme including waiting days and a maximum payment of 28 days.

33 There is an appendix to the contract, the material parts of that addendum start at page 170 of the original bundle. Paragraph 6 is headed Company Sick Pay. Paragraph 6.1 says *'the company operates a discretionary sick pay scheme that you will be automatically eligible for once you have completed your probationary period*. *Your entitlement is as shown below'.* A table then sets out that during a probationary period, no company sick pay is payable, after completing the probation period but under 5 years of service at 4 weeks of sick pay are payable. For more than 5 years' service, 8 weeks is payable.

34 Clause 6.2 provides in common with statutory sick pay, the first three working days of any period of absence are not paid. It provides if the period of sickness is longer than seven days, a medical certificate must be submitted so that sick pay could continue. Failure to provide a valid medical certificate will result in your absence being treated as unauthorised, and as such unpaid, and may result in disciplinary action. Paragraph 6.3 says company sick pay will not be payable if medical certificate is not sent to us within 14 days of issue. Paragraph 6.4 deals with the calculation of a 12 month rolling period and paragraph 6.6 says the company reserves the right to withhold CSP, company sick pay *'if it is considered you are abusing the scheme, for example by high level of short absence or where you got good reason to believe that you are not incapable of work through illness on one or more of the days being claimed. The company also reserves the right to withhold company sick pay if it comes injured in taking part in what is considered to be dangerous sport. The company has the right to terminate your employment at any time during the absence of the proper process even though the time given notice you remain entitled to sick pay under the sick pay scheme. The company has a formal absence monitoring procedure which will be invoked if your sickness level is at an unacceptable level'*.

35 I need to make findings of fact in respect of the question of whether the Claimant was absent from work in circumstances where he was entitled to sick pay. However, unless it is in the interests of justice to depart from them I am also bound by the findings of fact made by EJ Wilkinson. EJ Wilkinson's finding of facts supporting his conclusion that the dismissal was not unfair, and that the dismissal was not wrongful are binding upon me. EJ Wilkinson found that the Claimant was absent without leave for the period which he claimed sick pay and that amounted to gross misconduct. Those findings are inconsistent with the Claimant's case that he was absent from work through ill health and was entitled to the benefit of the company sick pay scheme. The parties had every opportunity to present their evidence and make any submissions they chose in respect of those findings. I am not persuaded that there is any reason for me to depart from the findings insofar as they impinge on the issue of the entitlement to sick pay.

36 Were I at liberty to depart from EJ Wilkinson's findings of fact about the reasons for the Claimant's absence I consider that the evidence before me as to why the Claimant was absent from work is somewhat unsatisfactory. He has told me that he had symptoms of COVID and was self-isolating from 27 January 2021. The period for which he claims sick pay is for the days he says that he self-isolated (less the days of waiting time provided in the contract). However, that also at various point the Claimant has said the reason for his absence from work is the need to care for his vulnerable mother. Indeed he has sought to introduce a claim on the basis that he had time off for caring responsibilities. I accept that he has not been clear whether the responsibilities to his mother

corresponded exactly with the period for which he claims sick pay. I have to make findings on the balance of probabilities. The evidence before me is scant and there is little more than an assertion that the Claimant was self-isolating. It is notable that the period of absence corresponded with the commencement of disciplinary proceedings. The Claimant maintained a refusal to attend meetings throughout the disciplinary process. Having regard to the evidence as a whole I am not satisfied that the Claimant has shown that it is more likely than not that his absence throughout this period was because of ill-health. As such he would not be entitled to sick pay.

37 In any event I consider that my own finding in respect of the reason for the Claimant's absence is academic in the light of the terms of the company sick pay scheme. Whether the scheme is wholly discretionary or not clause 6.6 clearly provides a discretion to withhold sick pay in circumstances where *'we have good reason to believe that you were not incapable of work through illness'*. I am bound by the findings of EJ Wilkinson as to the Respondent's belief that the Claimant was absent without leave, there is a contractual discretion to withhold sick pay in those circumstances. EJ Wilson has found that the Respondent did believe that the Claimant had absented himself from work without leave (see paragraph 320. He has found that the belief was reasonable (paragraph 34). The Claimant is unable to satisfy me that the contractual discretion ought to have been exercised in his favour. It follows that the Claimant has not satisfied me that he has a contractual right to sick pay.

38 If the claim was limited to statutory sick pay, that is not a matter that can be brought in the employment tribunal, either can the claim of breach of contract because it is a statutory scheme by way of a welfare benefit or indeed his claim for wages would be clear authority to the contrary binding on me.

39 For the reasons set out above I do not find that the Claimant was entitled to contractual sick pay and vary the judgment of EJ Wilkinson only to the extent necessary to expressly include that that claim should be dismissed.

A Preparation Time Order

40 The Claimant applied for a preparation time order against the Respondent. The basis of his application was set out in his written submissions provided for the final hearing before EJ Wilkinson. In summary he says that failures of the Respondent to comply with the directions of the Employment Tribunal in respect of the exchange of documents and witness statements justify a preparation time order in this case. The Claimant said that he had spent 36 hours preparing for the case and sought a preparation time order of £1,440.00.

The legal principles to be applied

41 The jurisdiction to make an order of costs is found in schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) 2013. The material parts of rule 76 provide:

> *'76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
>
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
>
> *(b) any claim or response had no reasonable prospect of success.*
>
> *(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.'*

42 There is essentially a 2 (or perhaps 3) stage test. Other than in defined circumstances, before there is any jurisdiction to award costs at all the tribunal must be satisfied that one or more of the threshold conditions set out in Rule 76(1)or (2) has been satisfied. If, and only if, it has should the tribunal move on to consider whether, in the circumstances of the particular case, it is right to make a costs order. Finally, it is necessary to decide what amount, if any to award. See ***Monaghan v Close Thornton Solicitors*** **[2002] EAT/0003/01**

43 Notwithstanding the existence of the jurisdiction to award costs the exercise of that jurisdiction remains exceptional ***Gee v Shell Ltd*** **[2003] IRLR 82**.

44 In ***Barnsley*** BC ***v Yerrakalva*** **[2012] IRLR 78** CA Mummery LJ said:

> *"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it, and what effects it had."*

45 There is no need for the tribunal to find a causative link between the costs incurred by the party **making** the application for costs and the event or events that are found to be unreasonable, see ***McPherson v BNP Paribas*** **[2004] ICR 1398 CA**

Discussion

46 The Claimant has set out within the written submissions that had been heard for the liability hearing a description of what he says were failures by the Respondent to comply with orders of the employment tribunal that were originally made on the 18 August 2021. This claim that was identified as an unfair dismissal claim and was placed on what was

referred to as the fast track. In such cases the Tribunal sends out a notice of hearing including case management orders without awaiting a response.

47 It is evident from the file that the notice of hearing was sent to the Respondent at its head office but shortly before ET3 was sent to the Tribunal by Mr Chadwick from his office. There is correspondence within the bundle where Mr Chadwick acknowledges that he is playing catch-up because he had been unaware of the hearing date or the directions. Mr Chadwick on behalf of his clients had written to the tribunal asking for a notice of hearing. I am satisfied that whilst the ET1 had come to Mr Chadwick's attention he had not known that a hearing date had been set and directions made. I accept his clients ought to have provided him with the notice of hearing.

48 It is clear from the file that there was always going to be difficulties with the direction that the parties agree a bundle of documents. The Claimant had informed the Tribunal that that was never going to be possible as the parties had diametrically opposed views of the case. Ultimately, the parties were able to put all relevant documents before EJ Wilkinson before the hearing on the 12 January 2022.

49 The Claimant is correct to say that the Respondent did not comply with the orders of the Tribunal on time. The Claimant sets out a chronology of the default between paragraphs 7.2 and 7.17 of his written submissions for the first hearing. I accept the Claimant's factual assertions in those paragraphs and have concluded that the Respondent was late in complying with almost all of the directions. The principle reason appears to have been the fact that their representative was unaware of the directions.

50 My conclusion that the Respondent had failed to comply with the Tribunal's directions means that the threshold condition for making an order for a preparation time order has been met. There are two basis for that. Rule 76(2) is met because of the failure to comply with an order. In addition it was held in ***McPherson v BNP Paribas*** that a failure to follow orders may also be unreasonable conduct of the litigation. Where as here there are a number of failures I consider that it was unreasonable for the Respondent to fail to follow the directions made. The failure of the Respondents to draw the orders to the attention of their representative is of itself unreasonable.

51 The threshold conditions being passed I have a discretion as to whether or not to proceed to make a preparation time order. I pause there and note that it is a regrettable feature of employment tribunal litigation that the orders made by the tribunal are commonly not followed. Parties often agree between themselves to vary timetables. Itis unfortunately common for parties to fall out over the content of bundle. It is common for parties to arrive to the tribunal, as they have done here, with rival bundles. I do not condone any of those things. The orders that are made are straightforward and designed to be followed. The parties are required to have regard to the overriding objective, which is not optional, it requires the parties to co-operate with each other.

52 Whilst the Respondent was late in complying with orders that did not necessitate the postponement of the hearing before EJ Wilkinson. I accept a point made by the Claimant that additional documents were produced during that hearing but it is clear to me

that they were documents requested by the judge. In any event it is not at all unusual for additional documents to be produced during a hearing.

53 In the exercise of my discretion I should have regard for the outcome of the proceedings. The Respondent has successfully resisted almost all of the Claimant's case bar a minor miscalculation of holiday pay. It has no doubt incurred time and costs in defending these proceedings.

54 It seems to me that the conduct of the Respondent does not come close to the sort of conduct which would justify a preparation time order. If I were to do so in this case, I would be doing so in a very large number of cases and frequently against litigants in person. I make it plain that I do not condone the behaviour. Cost orders in the tribunal remain the exception rather than the rule. Consistency is required and I find that the level of unreasonable behaviour is not in this case sufficient that I would make a preparation time order.

Employment Judge Crosfill
Date: 29 June 2023