EMPLOYMENT TRIBUNALS

Claimant: Mr J Steel

Respondent: Lauri Swindell

Heard at: Liverpool **On:** 6 June 2023

Before: Employment Judge Horne

Representatives
For the claimant: in person
For the respondent: in person (participation in the hearing permitted by the judge under rule 21 of the Employment Tribunal Rules of Procedure 2013)

Judgment ("the original judgment") was sent to the parties on 21 September 2022. Following a hearing on 6 June 2023, the original judgment was varied in a further judgment ("the reconsideration judgment") which was sent to the parties on 9 June 2023.
The claimant has asked for written reasons for the reconsideration judgment in accordance with rule 62 of the Employment Tribunal Rules of Procedure 2013.

REASONS

Background

1. The parties are siblings who have sadly fallen out.
2. The respondent was the landlord of a pub. The claimant was employed by the respondent to work at the pub. He also lived there. The respondent's business was tied to an agreement with Punch Taverns. Unfortunately, by the end of 2021 it was no longer profitable. Pub Taverns required the respondent to vacate the pub, which meant that the claimant would no longer have a job or a home. There was a brief time during which the pub was shut, but the claimant continued to live on the premises. If the claim were defended, there would be a dispute about whether his employment continued during that time. Eventually, on 3 May 2022, the respondent handed the keys to the pub back to Punch Taverns and the claimant moved out.
3. The original judgment has been enforced and paid in full. I have to decide whether to confirm, revoke or vary the original judgment.

Procedural history

4. The claimant notified ACAS of his prospective claim on 4 April 2022 and was issued with an early conciliation certificate on 16 May 2022.
5. By a claim form presented the same day, the claimant claimed damages for breach of contract by failing to give notice of termination. He also claimed holiday pay, either under the Working Time Regulations 1998 or as damages for breach of contract.
6. In box 5.1 of the claim form, the claimant stated that his employment had ended on 27 March 2022.
7. Box 8.2 of the claim form included these words:

> "I was given no notice of my employment ending and lost 4 days holiday entitlement because of her claimed end date. She claims my employment ended on 14/02/2022 but I was still carrying out duties past that date and have payslips going as far as 27/03/2022. My notice period should've been 4 weeks and given in writing so I am claiming £1804.45 in lost earnings and £260.17 for 29.2 hours of unpaid holiday."

8. The claim was sent to the respondent on 15 June 2022. The accompanying letter informed the respondent that she would need to present a response to the claim by 13 July 2022 if she wished to defend it. At the same time the parties were notified that there would be a hearing on 3 October 2023.
9. The respondent did not present a response by the deadline.
10. The October hearing was cancelled, but judgment was not issued straight away. First, there was some correspondence between the tribunal and the claimant about the correct identity of the respondent. (The substance does not matter: everyone agrees now that the claimant was employed by Lauri Swindell and not by a limited company.) Then, on 24 August 2022, the tribunal wrote to the claimant asking him for further information about how his claim was quantified. The claimant replied on 29 August 2022. His reply repeated his assertion that he had been given no notice of termination. It also calculated his holiday pay in a greater sum than originally claimed. Here was his working out:

> "My average working day was 15.11 hours and I used 24 days of my entitlement during my employment. When my employment ended I was owed 4 days which she refused to honour and equates to £538.66."

11. Attached to his e-mail was a copy of his contract of employment, to which I will return.
12. On 14 September 2022, the respondent sent an e-mail to the tribunal, stating that her husband had various health problems and adding "I am unsure how I submit/answer this claim".
13. Unfortunately, the respondent's e-mail was not uploaded to the tribunal's digital case management system. That was not the respondent's fault: only the tribunal's administrative staff can upload e-mails.
14. Because the respondent had not presented a response to the claim, the file was referred to me to consider issuing a judgment under rule 21 of the Employment Tribunal Rules of Procedure 2013. I accepted the claimant's assertions that he had not been given notice and that his employment had ended on 27 March 2022. I very slightly tweaked his holiday pay calculation to reflect 4 days x 15.11 hours x

£451.07. Likewise, I made a minor alteration to the compensation for lack of notice. I gave judgment in the sum of £1,804.28 for damages for breach of contract and a further £538.52. The judgment was sent to the parties on 21 September 2022.

15. At the time of signing the judgment, I believed that the respondent was not interested in defending the claim at all. That this was my view at the time is clear from a letter that I caused to be sent at the same time as the judgment. The letter explained why I was allowing the claimant to recover an amount of holiday pay greater than that which he had originally claimed. It recorded my view that the respondent would have been unlikely to have presented a response even if the claim form had claimed the higher amount.

16. I formed this view without knowing the full facts. The respondent had in fact e-mailed the tribunal, indicating her wish to defend the claim and asking for guidance, but I did not know that because her e-mail had not been uploaded as it should have been.

17. The respondent did not satisfy the judgment. The claimant took enforcement action. Bailiffs attended the respondent's property, following which the respondent paid the judgment sum in full.

18. On 3 March 2023, nearly 6 months after the judgment was sent to the parties, the respondent sent an e-mail to the tribunal, which read, relevantly:

> "I am writing to follow up on my appeal of the tribunal case that I am a respondent to… I called to chase up progress and they said that I must email again. I received a letter end of June 2022 (our post is a pain sometimes). I saw the letter briefly and saw the court date of 3rd October and put the letter to one side to deal with when I could focus (I knew this was coming due to ACAS calling me and telling me that my brother Jake Steel had set it up). Unfortunately at the time my Partner/Husband was in and out of hospital due to have surgery and he had surgery in beginning of July to correct problems in a surgery that nearly killed him as a gastric bypass went wrong in 2020 and he was given a 50/50 shot to survive and placed in a coma it was a long two years of recovery in this time and he finally got the revision surgery to fix the ongoing effects the week after I received the letter and I was preparing for that whilst still caring for him, my two businesses, our 4 children and 3 step children and various other responsibilities including sorting out a temporary residence ready for his return from hospital as our flat above the pub we usually live in wasn't suitable. I wasn't capable of dealing with this letter when I received it, I was under a lot of stress and pressure so I thought I could deal with it as soon as things got a bit easier in a week or two. He was in and out of hospital from beginning of July until September by the time he was healthy enough to be recovering and only returned to work on a phased return scheme of 2 hours a day and working up to his full contract hours of 8 hours a day which he has only reached in January this year. Unfortunately by the time I was able to deal with this matter mentally I then saw there was a deadline of July for all the evidence I have to be submitted and I had missed that, I called loads of times and didn't get a reply and I emailed with no response either as I didn't realise and thought with it being heard in October and

> my partners recovery shouldn't of been so difficult I would of had more time. And I closed one business down in August due to all the stress and personal mental health struggles. I have all the evidence to prove I had no wrong doing and I owe Jake Nothing! He had his notice, his employment ended and his p.45 and all his holidays owed were paid up to that date and i incurred costs of over £1000 allowing him to live at the property rent FREE until his new accommodation was suitable for him to move into. I keep trying to appeal this and have been told to email again following a call I made today. I had a high court bailiff arrive and had to pay £3590.00 I wish to appeal and claim the money Jake has wrongfully claimed from me back. Can I please have a response how to progress and I can then submit any evidence needed."

19. When this e-mail was referred to me, I treated it as an application for reconsideration of the judgment. I gave the application preliminary consideration under rule 72(1) of the Employment Tribunal Rules of Procedure 2013. I considered the respondent's explanation for the delay in applying and decided that it was sufficiently capable of belief to merit consideration at a hearing. The question of whether the claimant was given notice or not appeared to be a relatively simple one. I did not think that there would be a significant disadvantage to the claimant if I were to list a hearing to consider that question. I therefore extended the time limit for her reconsideration application. I also formed the view that there was a reasonable prospect of the judgment being revoked or varied. The respondent was saying that she had given notice of termination. If that assertion was correct, the claimant would not be entitled to recover damages for wrongful dismissal, or at least would not be able to recover damages for the full notice period. I therefore listed the application for a hearing. The parties were informed that the hearing would take place on 6 June 2023. They were also informed of my reasons for listing the hearing.

20. By e-mail on 28 April 2023, the claimant queried my decision to list a reconsideration hearing. His e-mail read:

> "Thank you for the update to this case. I am confused about the conditions in which this reconsideration hearing has come about. The respondent had several months to state some defence or even acknowledgement of the case. I still have the sealed copies of the letters that I sent to the respondent in April to try to come to an out of court settlement which were returned to my address. The respondent has no interest in justice and I believe that this is simply the latest effort to disrupt my life further. ACAS attempted early conciliation on 05/04/2022 and the respondent refused to agree to anything. The tribunal service sent out the original hearing date on 26/07/2022 after receiving no response from the respondent. She then had a further two months where she didn't attempt contact. Even after the ruling, she had 14 days for reconsideration and 42 days to appeal, why has she waited six months? I had to instruct the high court to retrieve the money owed and that didn't happen until 21/02/2023, so clearly that is the only reason she has emailed to you on 03/03/2023. I have all of the evidence to support my claim without a doubt. This entire process has severely affected my mental health and the last correspondence I had with the respondent was foul and involved threats. It has taken an entire year for this issue to

> be resolved and now I have to relive all of it over again. I am trying to secure the time away from work in order to attend as I'm an emergency worker, what should I do if I can't make that date."

21. I caused a reply to be sent on 1 June 2023. The reply included the following passage:

> "The claimant has written to the tribunal to say he is "confused about the conditions in which this reconsideration hearing has come about". The remainder of his email appears to set out the claimant's reasons for disagreeing with the decision to have a reconsideration hearing. It is not clear which part of the procedural history the claimant would like the tribunal to clarify. If what the claimant really wants is for the tribunal to explain why the reconsideration application has not simply been dismissed, that explanation can be found in the tribunal's letter of 18 April 2023.The claimant has also asked what he should do if he is unavailable to attend the reconsideration hearing. The tribunal cannot give advice, as it might give the appearance of taking sides. The parties may wish to read the Presidential Guidance -Seeking a Postponement of a Hearing. Rule 42 of the Employment Tribunal Rules of Procedure 2013 enables a party to make written representations, but the parties should be aware that the tribunal may need to hear oral evidence on 6 June 2023 if there is a dispute about what happened. If there is a problem in attending a tribunal hearing centre, the tribunal may consider ordering the hearing to take place on a remote video platform."

Reconsideration hearing

22. The reconsideration hearing proceeded on 6 June 2023 with both parties appearing in person.

23. At the reconsideration hearing, the claimant relied on a bundle of documents and the respondent relied on two bundles. One (R1) was 24 pages long and the other (R2) consisted of 32 pages.

24. The claimant's bundle included the contract of employment that he had previously provided.

25. The contract was dated 12 April 2021.

26. Clause 18 fixed the start of the holiday year at 6 April.

27. Clause 19 entitled the claimant to 28 days' paid holiday in each holiday year.

28. Clause 21 provided:

> "Upon termination of employment, the Employer will pay compensation to the Employee for any accrued and unused holiday days."

29. Clause 51 of the contract stated:

> "The Employee and the Employer agree that reasonable and sufficient notice of termination of employment by the Employer is the greater of four (4) weeks and any minimum notice required by law. However within the Employers ability ideally this will be given but the Employer understands and agrees that a two (2) week notice period is also valid and may be given if needed."

30. Clause 57 of the contract stated, relevantly:

> "Any notices, deliveries, requests, demands or other communications required here will be deemed to be completed when hand-delivered, delivered by agent, or seven (7) days after being placed in the post, postage prepaid, to the parties at the following addresses or as the parties may later designate in writing."

31. The parties' postal addresses were written underneath the clause.

32. Included in the claimant's and respondent's bundles were threads of WhatsApp messages which the parties acknowledged to be genuine.

33. Within the thread were:

    33.1. A message from the respondent to the claimant on 28 January 2022, giving him notice that his employment would end on 14 February 2022;

    33.2. A further message from the respondent stating that she was unsure when she would have to hand the keys of the pub back to the brewery;

    33.3. An agreement that the claimant would live rent-free at the pub and continue to manage the property until Punch Taverns took possession;

    33.4. A message from the claimant to the respondent shortly after 14 February 2022 stating that he was "now unemployed".

34. There were no messages in the thread that could have been reasonably understood as an offer by the respondent to withdraw the notice. Nor was there any request from the claimant that the notice be withdrawn.

35. The respondent's bundle contained correspondence between her and Punch Taverns. On or about 27 January 2022, she was given two weeks' notice to quit the pub. The notice period was extended by agreement very shortly afterwards.

36. The claimant's bundle included a pay slip and tax form P45, both dated 27 February 2023. The pay slip referred to a small amount of holiday pay.

37. During the hearing, the respondent told me why she had left it so long after the judgment to write to the tribunal to try and defend the claim. Her explanation was broadly consistent with her e-mail of 3 March 2023. She said she had "phoned and phoned and never got anywhere". On one occasion when she telephoned the tribunal, "they passed me onto to a different line". She said that she had tried telephoning both before and after the judgment was sent to her.

38. The claimant accepted that the respondent's husband had been ill, but said that his illness had started in 2020, and that the respondent had been able to carry on running two businesses during that period. The respondent could, he said, have taken simple steps to defend the claim had she wanted to do so. In his words, "I don't believe an e-mail takes a very long time". According to the claimant, he had sent letters to the respondent which had been returned undelivered. His contention was that she had demonstrated "a course of conduct of ignoring [the claim]".

39. None of these oral statements were made to me under oath. I gave the parties the opportunity to require the other party to take an oath or affirmation to confirm the truth of what they had told me. I informed the parties that, if a party gave sworn evidence, the other party would have the chance to ask them questions. I reiterated this point in the context of the respondent's assertion that she had made repeated telephone calls to the tribunal. The claimant told me he doubted that this assertion was true. I specifically told him that I would be likely to accept it as true if it was capable of belief and the claimant had declined my invitation to ask the

respondent questions about it. In reply, the claimant said that he did not want her to take an oath and did not want to ask her any questions.

40. The claimant accepted that the message on 28 January 2022 "could be construed as notice". He accepted that he had not done any work in his role after 14 February 2022, and that he had not at any time prior to bringing the claim either disputed the validity of the notice or asserted that he was still an employee. His arguments were:

    40.1. That the message on 28 January 2022 was ineffective to terminate the contract because it was not one of the prescribed methods of communication in clause 57; his employment therefore continued until after 27 March 2022;

    40.2. Alternatively, if he had been given notice on 28 January 2022, it was too short. Clause 51 required that the notice period should be 4 weeks unless a 2-week notice period was "needed". According to the claimant, the respondent did not need to give the shorter notice period.

41. During the reconsideration hearing, I asked the claimant how and when he thought his contract of employment had come to an end. I did not find his answers particularly easy to follow. He stated that a WhatsApp message from the respondent dated 31 March 2022 amounted to a termination of the contract without notice. He also stated that he believed his employment had been terminated when he received the pay slip on 27 February 2022 referring to holiday pay. Neither of these communications could have caused the contract of employment to end on 27 March 2022.

42. The parties disagreed over the calculation of holiday pay. The issues were not easy to define. The respondent relied on the fact that her accountant had calculated the claimant's holiday pay for her. The claimant calculated compensation for untaken annual leave at a daily rate, rather than in units of weeks as the Working Time Regulations 1998 provide.

43. The parties agreed that the claimant's hourly rate of pay was £8.91. The claimant told me that on average he had worked 50.6 hours per week. The respondent said she thought that was high, bearing in mind the number of hours per week that the pub was open. Nevertheless, she said that she would not be able to contradict what the claimant said if allowed to give evidence.

44. It was common ground that the claimant worked a 5-day week.

45. It was common ground that the claimant had taken 24 days' annual leave during the leave year. That amounts to 4.8 weeks.

46. At the conclusion of the hearing, just after I announced judgment orally, the respondent reminded me that the claimant had lived rent-free at the pub for the whole of the period 14 to 28 February 2022. The claimant agreed that this was the case. He accepted that he would have had to pay rent if he had been employed during that period. The parties did not agree about the amount of rent that the claimant would have had to pay. The claimant said it was £50.00 per week. The respondent said it was £100.00 per week.

Relevant law

47. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides the tribunal with a general power to reconsider any judgment "where it is necessary in the interests of justice to do so".

48. The making of reconsideration applications is governed by rule 71. One of the procedural requirements of rule 71 is that the application must be made within 14 days of the date when the original judgment was sent to the parties.

49. A time limit imposed by the rules (including rule 71) can be extended under rule 5.

50. Rule 72(1) states that an employment judge must 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, the application must be refused.

51. Rule 71 continues:

> "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."

52. If the application is not refused under rule 72(1), it must be dealt with in accordance with rule 72(2), which provides:

> "(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."

53. The overriding objective of the 2013 Rules is to enable the tribunal to deal with cases fairly and justly. By rule 2, dealing with cases fairly and justly includes putting the parties on an equal footing, avoiding delay, saving expense, and dealing with cases in ways that are proportionate to the complexity and importance of the issues.

54. The old Employment Tribunal Rules of Procedure 2004 required that judgments could be "reviewed", but only on one of a prescribed list of grounds. One of those grounds was that "new evidence [had become] available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time." This proviso reflected the well-known principle applicable to civil appeals derived from *Ladd v. Marshall* [1954] 3 All ER 745, CA.

55. The current 2013 Employment Tribunal Rules of Procedure replaced the old list of grounds with a single test: a judgment will be reconsidered where it is "necessary in the interests of justice to do so". There is no specific provision for fresh evidence. Nor is there any express prohibition a party relying on evidence about which he knew or ought to have known before the judgment was given. Nevertheless, the "interests of justice" test must, in my view, incorporate a strong public interest in the finality of litigation, even if it is not as inflexible as the proviso in the 2004 Rules. Where a party could reasonably have been expected to rely on the evidence first time around, it would take a particularly good reason to give that party a fresh opportunity to rely on it. Such reasons might include where a party has genuinely been ambushed, or where the party asked for an adjournment to

obtain the further evidence and that request was refused by the tribunal: see *Outasight VB Ltd v. Brown* UKEAT 0253/14.

56. Rule 21 specifies the consequences for a respondent who has failed to present a response. They are entitled to notice of any hearing, but can only participate to the extent that the judge gives permission.

57. A respondent who has not presented a response has no automatic right to participate in the determination of the claimant's remedy. The overriding objective may, nonetheless, require in individual cases that the respondent have an opportunity to make representations about the claimant's remedy, either in writing, or sometimes at a hearing. In simple cases, where liability and remedy are typically determined at the same hearing, a respondent cannot complain if the respondent is denied the chance to participate in a remedy hearing. For authority for these propositions, see *Office Equipment Systems Ltd v. Hughes* [2018] EWCA Civ 1842.

58. Where a claimant's remedy has been determined purely on the basis of information provided by the claimant, and a respondent (who has failed to present a response) applies to have the judgment reconsidered on the basis that the claimant's figures were wrong, it may offend justice and common sense for the tribunal to fail to give the respondent an opportunity to comment on the claimant's calculations or to reconsider the judgment: *Talash Hotels v. Smith* UKEAT 0050/19.

59. If a respondent who has not presented a response wishes to contest liability (that is to say, whether or not the claim is well founded at all), the tribunal must pay particular attention to the balance of disadvantage before permitting the respondent to participate: *Limoine v. Sharma* UKEAT 0094/19.

60. By rule 41, the tribunal is not bound by the strict rules of evidence.

61. Where an employer purports to dismiss an employee in repudiatory breach of contract, for *contractual* purposes, the employment does not terminate until the employee accepts the repudiation by agreeing that they are no longer employed: *Geys v. Societe Generale* [2012] UKHL 63.

62. Where the employer acts in repudiatory breach of contract by purporting to dismiss without notice, and the employee does not accept the repudiation, the employee is not entitled to sue for wages indefinitely beyond the termination date: *Geys, per* Lord Wilson. It is still the general rule that damages for wrongful dismissal are limited to wages for the notice period, even where the employee does not accept the repudiation: *Adesoken v. Sainsbury's Supermarkets Ltd* [2017] EWCA Civ 22, *obiter per* Elias LJ.

63. The rule in *Geys* does not affect the date of termination for the purposes of a statutory claim: *Duniec v. Travis Perkins Trading Co Ltd* UKEAT 0482/13. A claim under the Working Time Regulations 1998 is a statutory claim.

Conclusions

Approach to reconsideration and respondent's participation

64. I must decide whether or not it is necessary in the interests of justice to reconsider the original judgment. I must also consider whether or not to give permission to the respondent to participate in the reconsideration hearing. Although these two steps follow in sequence (permission to participate coming at a logically prior stage to

reconsideration of the judgment), I have decided to take the two steps together and consider the balance of disadvantage in the round.

65. In my view, the balance of disadvantage favours:

    65.1. allowing the respondent to make representations that the original judgment was based on information that was obviously wrong;

    65.2. allowing the respondent to rely on evidence that shows that the original judgment was based on information that was obviously wrong;

    65.3. varying the original judgment, to the extent that it was based on information that was obviously wrong; and

    65.4. otherwise confirming the judgment and disregarding the respondent's evidence and representations about the merits.

66. I have reached the conclusion that this approach is necessary in the interests of justice. It adequately protects the claimant against disadvantages that would otherwise be caused by the delay. Where there is doubt, it is resolved in favour of maintaining the judgment as it is. Disadvantages such as fading memories are less significant where the facts are obvious.

67. I have, of course, also considered the impact of this approach on the respondent. She remains at some disadvantage. She would be at a much greater disadvantage if I decided to ignore the points that she makes that are obviously correct. I did wonder whether I should nevertheless take that strict line with the respondent, on the basis that, although it causes her hardship, it is a hardship she has brought on herself by failing to present a response and by waiting nearly 6 months to challenge the judgment. In my view it would be unfair to take such a harsh approach. The respondent did take proactive steps to try to defend the claim. She telephoned the tribunal repeatedly. Before the judgment was issued, she e-mailed the tribunal indicating her wish to defend the claim and seeking guidance. It is not her fault that her e-mail was not picked up before I issued the judgment.

68. I have taken into account the text message exchange between the claimant and the respondent. True it is that this is new evidence, which the respondent could reasonably have been expected to have relied on it prior to the original judgment being issued. Nevertheless, there is a particularly good reason for its being admitted into evidence. It clearly demonstrates that the claimant was given notice of termination. There is no dispute that the messages were sent. The arguments put forward by the claimant are about their contractual significance. That is a matter of interpretation of the contract: a task which is no more difficult now than it would have been had the respondent introduced the text messages promptly.

<u>Breach of contract</u>

69. The respondent gave the claimant notice of termination.

70. I do not think that clause 57 assists the claimant. This is for two reasons.

    70.1. Clause 57 does not say that notice cannot be given using a messaging app. It is a deeming clause. The parties' intention, so far as I am able to ascertain it objectively, was that certain methods of communication (such as post) should be automatically treated as effective, even if it could not be proved that the recipient had actually read or received the communication. Had the

parties intended clause 57 to be an exclusive list of the ways in which notice of termination could be given, I would have expected them to have used clearer wording. It would have been relatively simple to insert the word "only" to achieve the desired effect. I have also taken into account that this is a contract for the electronic age. The parties entered into it in April 2021, when wet-signed letters were very much the exception between employers and employees. If clause 57 were an exclusive list, it would mean that notice could not even be given by e-mail. That would be remarkable.

70.2. In any case, if the respondent breached clause 57, that does not mean she did not give notice of termination. It just means that the method of communication was in breach of contract. If that is the correct analysis, the claimant is not entitled to be treated for contractual purposes as still employed beyond the expiry of the notice period. This is for two reasons. First, if there was a repudiatory breach by purporting to dismiss the claimant by the wrong method, the claimant accepted the repudiation by informing the respondent he was unemployed. Second, even if he did not accept the repudiation, he cannot claim damages for loss of unearned wages beyond the contractual notice period.

71. That conclusion does not of itself mean that the award of damages for breach of contract should be revoked altogether. I have also considered the claimant's alternative argument that the notice period of two weeks was too short. In my view, that argument is not obviously wrong. There is room for argument about whether the two-week notice period was "needed" or not. On the day the respondent gave notice to the claimant, she was unsure when Punch Taverns would take possession. Because it is not obvious who would win on this issue if I were to allow it to be fully contested, I have decided to vary the judgment rather than revoke it. The assessment of damages is on the basis that the claimant was entitled to four weeks' notice, but was in fact only given two.

72. Had the claimant been given four weeks' notice, he would have received an extra two weeks' pay. He would also have been entitled to additional compensation for his accrued annual leave, but I deal with that element separately under the heading of holiday pay.

73. The claimant accepted that, had he received four weeks' notice, he would have had to pay rent during that period. There was a disagreement about how much rent he would have had to pay: £50 or £100 per week. I did not think that the answer to that dispute was obvious. I therefore reduced the claimant's damages by the lesser of the two amounts.

74. Two weeks' pay would have been £902.23 gross. After deduction of £100.00 for rent, the award of damages is £802.23.

75. The original judgment is varied accordingly.

<u>Holiday pay</u>

76. I treated the holiday pay claim as a claim both under the Working Time Regulations 1998 and as a claim for damages for breach of contract.

Working Time Regulations

77. The original judgment under the Working Time Regulations 1998 cannot stand. It was based on information that was obviously wrong. Contrary to what the claimant stated in his claim form, his employment did not end on 27 March 2022. It ended on 14 February 2022 when his two weeks' notice expired.

78. The rule in *Geys* cannot assist the claimant here. This is a statutory claim.

79. By the termination of his employment on 14 February 2022, the claimant had been employed for 315 days since the start of his holiday year. That amounts to 86.3% of the holiday year in which he had been employed.

80. For the purposes of regulation 14, his annual leave entitlement on termination of employment was:

    (5.6 weeks x 86.3%) – 4.8 = 0

81. If the original judgment had been based purely on the claimant's statutory entitlement, I would have revoked it altogether.

Damages for breach of contract

82. The original judgment, to the extent that it was for contractual holiday pay, was based on information that was obviously wrong. Even for contractual purposes, the date of termination was not 27 March 2022 as the claimant had stated. For the reasons I have given above, it is obvious to me that the claimant was given notice that expired on 14 February 2022, and nothing in clause 57 changes that.

83. As I have also explained, the dismissal was nevertheless wrongful, because the notice that was given was two weeks shorter than the contractual notice period. As part of his damages, the claimant is entitled to be restored to the position that he would have enjoyed under clause 21 had the contract been lawfully terminated. Had he been given the correct notice, he would have been compensated for untaken holiday based on a termination date of 28 February rather than 14 February 2022.

84. The claimant would have been employed for 90% of the holiday year. His contractual entitlement to compensation under clause 21 would have been:

    (28 days x 90%) – 24 days = 1.23 days.

85. The claimant told me that his average day's gross pay was 15.11 hours x £8.91 per hour = £134.63. Those figures are not obviously wrong. The respondent was unable to contradict them directly.

86. The claimant is accordingly entitled to additional damages for wrongful dismissal as follows:

    £134.63 per day x 1.23 days = £165.59.

87. When I announced the judgment orally, I reached a calculation that was, in fact, overly generous to the claimant. I calculated the holiday pay element of his damages at £382.35, having calculated (erroneously) that the claimant would have been entitled to an additional 2.84 days' pay. I do not propose to do anything about that at this stage. The margin of error is relatively small. If a party asks for the award to be further reduced, I will consider such an application.

Employment Judge Horne
10 August 2023

SENT TO THE PARTIES ON
22 August 2023

FOR THE TRIBUNAL OFFICE