EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
MR D WARBURTON	**HOMES AND COMMUNITIES AGENCY**

AND

RESERVED JUDGMENT

OF THE EMPLOYMENT TRIBUNAL

HELD AT: Birmingham via CVP

ON: 21 April 2023 and
4 - 5 December 2023

EMPLOYMENT JUDGE Algazy K.C.

Representation

For the Claimant: Mr B. Amunwa - Counsel

For the Respondent: Mr P. Oldham K.C. – Counsel

J U D G M E N T

1. The Respondent's application for the claims to be dismissed upon withdrawal is refused.

2. The Respondent's application for costs is refused.

R E A S O N S

1. INTRODUCTION

1.1 The Claimant has been employed by the Respondent since January 2017 as Head of Public Sector Land. From 9 April 2018 to 31 May 2020, he was on a secondment to the *West Midlands Combined Authority* working as Head of Land and Development. Between 15 June 2020 and 30 October 2022, he was on another secondment to *Urban Splash*, working as national Land Director. Whan that secondment ended on 30 October 2022 , the Claimant returned to the Respondent.

1.2 By a Claim issued on 22 June 2022 [8], the Claimant made claims for breach of contract and deduction from wages. A final hearing was listed for 4 January 2023. The breach of contract claim was withdrawn on 10 September 2022. The deductions claim was withdrawn on 14 December 2022 by an e-mail letter which requested the Tribunal not to dismiss his claims as he wished to reserve his right to pursue the claims in the civil courts. Following an immaterial procedural hiatus, the Respondents applications for the claims to be dismissed and for costs were listed for hearing

on the 21 April 2023. That hearing went part heard to 4 and 5 December 2023. Judgment was reserved.

1.3 Before the Tribunal, there was a combined electronic PDF Hearing Bundle which ran to some 950 pages but which, unhelpfully, was not synchronised to the Bundle pagination/Index. Numbers in Square Brackets in this Judgement refer to the Bundle references, not the PDF references, in the Hearing Bundle. The Claimant originally produced 2 witness statements [620 - 644 & 129 - 153] and, during the period of adjournment, submitted a 3rd statement dated 11 November 2023 which was admitted without objection from the Respondent. This formed part of an additional 36-page bundle produced for the resumed Hearing. The Claimant was cross-examined on 21 April 2023. The Respondent introduced witness statements from Christine Wilson [522 - 525] and Veronica Hill [526-529].The Hearing Bundle also contained 2 witness statements from Karl Tupling, a Director of the Respondent [154-160 and 428-9] Both sides produced helpful Skeleton Arguments. The Claimant also relied on Written Submissions that had been previously submitted [645-672].

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2. THE APPLICATIONS

2.1 The Tribunal was concerned with 2 applications in which the Respondent sought Orders that:

(1) The Claimant's claims be dismissed following withdrawal - The "Dismissal Application"; and

(2) The Claimant pay the Respondent's legal costs following his withdrawal of the claims and/or upon dismissal of the claims if dismissal is so ordered – The "Costs Application".

2.2 The Costs Application was pursued regardless of whether the claims were formally dismissed.

3. THE FACTS

Background to the substantive claims

3.1. The dates of the Claimant's employment and secondments are as set out above.

3.2. The Claimant's contract of employment contains these provisions [168/9]:

"3. Terms and Conditions of Employment

During your employment with the Homes and Communities Agency your terms and conditions of employment will be in accordance with the attached offer letter, this Statement of Written Particulars and the HCA Terms and Conditions of Service. Not all provisions of these Terms and Conditions of Service are contractual and where this is the case, the position will be clearly stated. A copy of the Terms and Conditions of Service is available on HCA net, the Homes and Communities Agency's Intranet.

4. Salary

Your commencing salary will be £83509 per annum within the pay range £65,000 to £85,000. The pay review date is 1 July each year. Details of the performance management scheme that will be applicable to you in this post are available in the HCA Terms

and Conditions of Service. You will be paid calendar monthly in twelve equal payments by credit transfer, on or about the 15th of the month."

3.3. The Claimant's Terms and Conditions of Service [673 – 707] set out the *Performance Management Process* [674-6] which is expressly incorporated into the Claimant's contract of employment. The Conditions provide that:

"…

Formal appraisals will take place annually between May and June, when employees will be judged on how well they have achieved their objectives and competencies. Informal reviews will also take place during the appraisal year. Ideally, this will be on a quarterly basis.

Following completion of the appraisals, Regional/Corporate Directors will submit performance ratings for their employees to the HR Department on the basis detailed below:-

• Not meeting objectives set.

• Meeting objectives set.

• Exceeding objectives set.

Determining Pay Awards

Pay awards will be determined in accordance with the following;

• Not meeting objectives set - No increase

• Meeting objectives set - Standard pay award

Plus any agreed non-consolidated bonus payments

• *Exceeding objectives set - Standard pay award*

plus an additional consolidated bonus payment of up to 5%

plus any agreed non-consolidated bonus payment

…

Paying the Standard Pay Award and Performance Pay

The organisation will enter into negotiations with the appropriate staff representative body regarding the standard pay award, between May and June each year.

Performance related payments (excluding the Standard Pay Award) will be determined by the Chief Executive.

…"

3.4. The Standard Pay Award ('SPA') is separate to performance related pay, the Performance Award ('PA') and is not subject to the discretion of the Chief Executive. The Claimant's claim was said to be advanced in respect of monies alleged to be owed under the SPA. There appears to have been a degree of confusion about the nature of the Claimant's claim and whether or not he was in fact seeking a PA - see e.g. Karl Tupling's 2nd Witness Statement.

3.5. Furthermore, it emerged from the Claimant's 3rd Witness statement that from 2019 onwards, the SPA was decoupled from the *Performance Management Process* and was no longer dependent on the need for objectives to have been met or

exceeded. As explained by the Claimant in his 3rd Witness Statement :

> **“ <u>2019-2020</u>**
>
> ***The SPA***
>
> **14.The Respondent’s practice changed in 2019, when it decoupled the SPA from the Performance Management Scheme in the Conditions. This is illustrated by Exhibit DW/1, which is a printout of the page on the Respondent’s Intranet published on 11 February 2020 regarding the implementation of the 2019 SPA (‘the 2019 Pay Award’). It states that:**
>
> ***‘Unlike previous years, the pay award is not tied to performance ratings, which means that all colleagues irrespective of performance are eligible’.***
>
> **15. The announcement confirms that the award (i.e. the SPA) would be in the form of a salary increase of £545 per annum.”**

It is the subject of complaint by the Claimant that this was not previously made clear by the Respondent and that the Exhibit DW1 should have been disclosed as a relevant and disclosable document.

3.6. In addition to the Claimant’s contract and the Terms and Conditions applicable to his contract, the Claimant also relies on a commitment that he maintains was made in his favour by the Respondent in a letter to him dated 31 July 2019 [708/9]:

“ I am sorry to advise that following the recent process, your substantive job was not initially matched to any jobs in the new structure. We appreciate that this may be an unexpected or

disappointing outcome, so I would like to advise you of what happens next.

I am aware that .you are currently on secondment until 31 May 2020 and I confirm that your secondment will continue in line with the terms of the secondment agreement. This process relates to your substantive role that you will revert into at the end of your secondment. Homes England commits to providing you with a post commensurate with your current grade and responsibilities if you return to the agency following your secondment. We cannot guarantee the same post as when you left."

Underlining added.

3.7. The Claimant maintains that the 2017 Terms and Conditions of his employment together with the 2019 commitment from the Respondent constitute, what were described in his submissions as, the "Core Obligations" owed to him by the Respondent.

3.8. The Respondent introduced a new operating structure and pay and grading scheme in 2019. It is succinctly described and explained in the Respondent's written submissions as follows:

" (3) In 2019, while he was seconded, the Respondent adopted a new operating structure (but not a new pay and grading scheme at this point). No "fit" in the new structure was found for the Claimant's substantive post. His secondment continued. In 2021 he was assigned the post of Head of Public Land albeit under the new structure. This is the post which the Claimant asserted in his claim he had not accepted (though this makes no difference to the jurisdiction issue).

(4) The Respondent then redesigned its pay and grading scheme. New pay grades, referred to as "levels", were introduced. These came into effect on 1st January 2022.

(5) Each level had a salary range with a mid-point of 100% and a range of 85%-115% around it. If an employee's salary, at the time of introduction of the new pay grades, was at 85%-100% of the level assigned to their post, they would get a 2% pay increase backdated to July 2020 upon agreeing to the

new level. If their salary was above 115% i.e. the top point, the employee was put on "marked time".
(6) All "Head of" posts were assigned either level 17 or (like the Claimant's) level 18. Level 18 had a salary range of £59,504-£80,506 (mid-point £70,005) so that the Claimant, whose salary was above the 100% figure, would not have been entitled to the 2% pay rise even assuming he had accepted the new level. Indeed his salary was over the 115% figure and so his salary is on marked time.
(7) Levels 19-20 were Assistant Director posts. "

3.9. In a document entitled *Revised Proposal to Change the Existing Pay and Grading Structure at Homes England* to which the Claimant was taken in his cross-examination [239/240], the position is set out as follows:

"Figure 1: Implementation of the New Pay and Grading Structure

35. As shown in Figure 1, the implementation will take place in three steps:

Step 1: Assimilation to the new grade structure: The existing jobs have already been mapped into the new job. levels in the proposed grading structure as reflected in the Homes England Job evaluation Framework. In this step, each job will be now mapped into the new pay level (point) corresponding to the new job level. The colleague who holds the job then transfers into the corresponding pay level.

Step 2: Alignment to the new pay structure: The colleague's pay is then reviewed against the pay range connected to the new level where the job was placed. This positioning will identify whether their pay falls within the range, above the maximum or below the minimum. We aim to uplift the salary for all the jobs Level 18 and above to at least 85% of the new pay range.
For more details refer to Annex B.

Step 3: Application of the 2020/21 Pay Award: Following Step 2, we will have a revised pay for the jobs that will fall into the following scenarios:

Scenario 1: Positive Pay Adjustments:
Figure 1: Implementation of the New Pay and Grading Structure

For colleagues, whose revised pay is less than or equal to the 105% of the proposed pay range, we recommend the following pay uplifts:

• Case 1: The revised pay is between 85%-100% of the proposed pay range. In this case we will apply a 2% consolidated uplift.

• Case 2: The revised pay is between 100%-105% of the proposed pay range. In this case we will apply a 1% consolidated uplift.

Scenario 2: Neutral Pay Adjustments

For colleagues, whose revised pay is greater than 105% of the proposed pay range, we are proposing the following pay options:

• The revised pay is between 105%-115% of the proposed pay range. In this case those colleagues between 105% to 115% will receive a non-consolidated lump sum of up to £525. This will be capped at 115% meaning those in receipt of this award will not be paid more than those above 115%.

• The revised pay is greater than 115% of the proposed pay range. Where pay is above 115% there will be no pay award and we will follow a marked time approach, i.e., until the pay range catches up impacted colleagues will not qualify ”

3.10. It was the Claimant's position that his case more properly fell into scenario 1, case 1 as he was not remapped in 2019 and he remained in the position he was in under his 2017 contract. Whereas the Respondent maintains that the Claimant falls to be considered as fitting into scenario 2, bullet 2 thereby placing the Claimant on marked time as regards the pay award in question.

3.11. It is against that backdrop of disagreement that the Claimant issued a claim in which he sought to recover the non-performance related pay award (SPA) for the year 2020/2021.

Procedural Chronology

3.12. ACAS Early Conciliation commenced on 15 April 2022 and ACAS issued a certificate of Early Conciliation on 26 May 2022.

3.13. The ET1 was received by the Tribunal on 20 June 2022. The Claimant sought a stay on his claim until 12 August 2022 in order to "…obtain and consider further information relating to my case." It is convenient to set out the ET1 rider [729] in full:

> **" Warburton v Homes and Communities Agency (trading as Homes England) 'The Agency'.**
>
> My employment with Homes England commenced on 1st January 2017. My substantive post with Homes England dates from this time (as set out in a Role Profile). I have been on two consecutive external secondments from/outside of Homes England since 9th April 2018. My current secondment ends on 30th September 2022 and I will, therefore, return to Homes England on the 1st October 2022. My substantive role I was undertaking whilst within Homes England prior to my secondment (and asset out in the above referenced Role Profile) was a senior post with significant weight, and significant budgetary and staffing responsibilities. I was a member of the Regional Management Team, managing team of 13 people and reporting direct to and deputising for a Director-level post. On 31st July 2019, Homes England wrote to me (whilst I was on secondment) stating that I had not been matched/slotted in the roles created as part of a restructure undertaken by Homes England at the time, but that if I returned to Homes England

following my secondment I would be 'provided with a post commensurate with (my) current grade and responsibilities'. Notwithstanding this, on 5th October 2021 Homes England subsequently proposed to me (as part of a pay and grading review) that upon my return to Homes England it was to place me in a role that would carry significantly less weight and responsibility than my substantive post, and is at a significantly lower salary: in the range of £50,813 - £80,506; compared to that of my substantive post of £66,635 - £87,138. Homes England did not reference or evaluate my substantive post (my Contract of Employment and associated Role Profile from 2017) as part of formulating its proposal to place me in a lower grade role. I contested this proposal through the Homes England grievance process, but the Agency rejected my appeal. And on 31 January 2022 Homes England confirmed that the grade of post and therefore any role offered when I returned to the Agency was to be one which carries significantly less weight and responsibility than my substantive post, and provides a significantly lower salary. I have not accepted this proposal. Despite Homes England's commitment and obligation to provide me with a post commensurate with the grade and responsibilities of my substantive post, and notwithstanding the fact I remain on secondment and so have not yet returned to Homes England, the Agency has already implemented its proposal (31 January 2022) which has had the effect of placing me on 'marked time', and so ineligible to benefit from any pay awards made by the Agency to other members of staff. If Homes England had not breached its obligation above and so had I not been placed on 'marked time' as a result, I would have been eligible for a 2020/21 pay award (awarded February 2022) of 2% backdated to July 2020. This means that to date Homes England has withheld £3,436.01 from my salary; and this figure is continuing to increase each month by £143.17.

There is a **breach of contract** in that Homes England has changed the terms of my employment by significantly reducing the weight and responsibilities of my substantive post (despite its commitment to me in its letter of 31 July 2019); and has significantly reduced my salary band which has resulted in an **unlawful deduction of wages** as this has made me ineligible for a pay award provided to other Homes England staff."

3.14. The ET3 dated 19 July 2022 was accepted by the Tribunal on 5 August 2022. The Response/Grounds of Resistance [32/3] was a succinct document which is reproduced below:

"1. The Claimant has been on secondment since April 2018, while retaining a substantive post in the Respondent. At the start of his

secondment, his substantive post was Head of Public Sector Land, one of five such posts in the organization.

2. Over the course of 2020-2021, the Respondent undertook a pay and grading review of posts in the organisation.

3. At the same time, the Respondent restructured, and the Head of Public Sector Land roles were absorbed into the revised organisational structure at Levels 17- 18 within the new proposed pay structure. The Claimant's post was assessed at Level 18. This took effect from 1st January 2022 and the Claimant has held this post and been paid accordingly since then. The Claimant made a job evaluation review request asserting that his job had been incorrectly graded as part of the pay and grading review. On 31st January 2022, the Respondent informed the Claimant that the request had not been granted.

5. As part of the pay and grading review, pay for employees whose pay was greater than 115% of the maximum of the new pay range for the applicable Level was not reduced but was subject to "marked time". This meant that their salary would increase only when the maximum for the pay range caught up over a period of time.

6. This applied to the Claimant's pay.

7. The Claimant has been paid in accordance with his contractual rights.

8. It is not accepted that, as alleged, the Claimant's post has significantly less weight and responsibility than the post he had at the start of his secondment, or that there has been a breach of any obligation arising out of the post given to him. But in any event, this is not relevant to the claim. The scope and depth of the role has changed, in line with organisational redesign activity 2016-18. The objective of this redesign was to provide external agency partners with a consistent experience in addition to ensuring further assurance and expertise through tighter decision making. This redisciplining of role and responsibility was realised through the narrowing and deepening of the relevant 'Head Of' roles. The Claimant was informed and formally consulted throughout this redesign process, a fact substantiated by the Claimant's application to a redesigned 'Head Of' role via the relevant redeployment process at the time. The Claimant continues to be paid at the rate of pay to which he is contractually entitled and in line with the level of all other 'Head Of' roles agency wide, determined through the pay and grading programme."

The question of whether the Tribunal had jurisdiction under Part II of the ERA in respect of the unlawful deductions claim (the

"jurisdiction issue") is not directly raised in the manner that it is subsequently pleaded in the Amended Grounds of Resistance (the "AGOR").

3.15. On 5 August 2022, the Employment Tribunal directed the parties to exchange documents and fully cross-referenced witness statements by 30 September 2022. The date for exchange was extended on several occasions and exchange eventually took place on 25 November 2022.The Respondent filed further evidence in reply on 9 December 2022 together with an application to admit that evidence as detailed below.

3.16. The Claimant received written Advice [742-751] dated 7 September 2022 which was disclosed to the Tribunal for the present Hearing. Following that advice, the breach of contract claim was withdrawn on 10 September 2022. The Claimant specifically asked that the claim not be dismissed so that he could pursue the breach of contract claim in the civil courts, if necessary. It was submitted by the Claimant that the approach taken to the deductions claim was appropriately cautious and based on the material available at the time. The Respondent's position was that, by this time, the Claimant should have been advised that his unlawful deductions claim was doomed to failure as it was not for a quantifiable sum.

3.17. Also on 10 September 2022, the Claimant sought Further Information from the Respondent [925]:

"Dear Ms Hill
I refer to the Homes England defence - Response/Grounds of Resistance document – as submitted to the Tribunal.
It is unclear in this document what the Agency is saying was the contractual or other basis for the changes to my pay scale and wages and/or the imposition of 'marked time'.
As such, please would you clarify as a matter of urgency the contractual or other basis upon which Homes England considers it was authorised

to change my pay scale and wages and/or to impose 'marked time' resulting in a reduction to my wages."

3.18. The Respondent provided a 'holding' response on 18 October 2022 [40]:

" Please also be advised that requested in your emails to me dated 10 Sept 2022 (subject 'Urgent Clarification Request') have been receiving attention and I hope to revert shortly."

The Respondent wrote further on 20 October 2022 [42]:

'Dear Mr Warburton

I am writing to you regarding your emails (and/or attached letters) to me dated (i) 10 September 2022; and (ii) 13 September 2022.In respect of (i) above, the information requested is receiving our attention and I will revert as soon as I can.

….'

This holding email was written over a month after the request was made.

3.19. In fact, what happened was that on 8 November 2022, [33-34] the Respondent submitted an application to amend its Grounds of Resistance attaching the draft AGOR. The Respondent also requested an extension of time for the exchange of witness statements and documents until 25th November 2022. The covering email contained these passages:

"(1) Application to amend the ET3

The Claimant's claim is for unlawful deductions under Part II of the ERA 1996.

By email of 10 September 2022 (and letter of the same date) the Claimant asked the Respondent for information about the basis on which it asserted in the original ET3 that the Respondent was contractually entitled to pay him at his current rate of pay.

The Respondent believes that the most helpful way for it to reply to this request is by way of proposed amended grounds of resistance attached, which will clearly enumerate the legal bases on which the Respondent says that it was entitled to pay him as it has done. The amendments will allow clarity for the Claimant as to the case which he will have to meet, and also for the Tribunal in the issues which it is being asked to determine.

The amendments will set out points which the Respondent would be entitled to make at the hearing of the claim in any event, and so they have the effect of giving both the Claimant and the Tribunal advance notice of these issues which they would not otherwise have had.

The amended grounds also take the opportunity to explain points which the Respondent will make at the trial of the claim in other respects.

Witness statements have not yet been exchanged (see application below) so that the parties can provide any extra evidence they wish in respect of the proposed amended grounds without there having to be a second round of evidence."

3.20. The Respondent maintains this communication amounted to a 'fair warning" and a "clear warning" to the Claimant as to merits and costs. The Claimant denies that it can properly be viewed as even an implied costs warning. I accept the Claimant's submission that it does constitute a " hard clear warning" as to costs.

3.21. Mr Amunwa provided an advice update (disclosed for this Hearing) on 11 November 2022 [762] which contained the following paragraphs:

" ….

- *The proposed amended defence raises several new lines of defence, including a point that the Tribunal lacks jurisdiction to hear the claim because the alleged deductions are in fact unquantifiable damages claims for loss of a chance;*

- *My preliminary view is that the new lines of defence do not affect my assessment of the merits, primarily because Mr Warburton's argument is that the Respondent did not lawfully vary his contract, that his original contractual terms continue to apply and that therefore changes made to his rate of pay are*

unauthorised. He is not arguing, as I understand it, that the Respondent should have graded him differently – the argument is that his role was not included in the 2019 job evaluations at all – a point which the proposed amended defence does not address. "

3.22. The Claimant's response dated 11 November 2022 [430-438] included the following passages which were highlighted by the Respondent in its submissions:

"• These are substantial, opportunistic and prejudicial proposed amendments, which, 5 months after the claim was filed, would derail the trial listed in January 2023 by reason of its consequential impact on the case management steps. Furthermore, they lack both clarity and particularity. They extend the range of issues in the case in a disproportionate manner, with two layers of new, additional and alternative arguments in what is intended to be a relatively summary trial of alleged unlawful deductions;

….

• I am advised that it is unusual, particularly at this late stage in the proceedings, for a Respondent to seek to amend its GoR. Indeed, much of the legal guidance concerns amendments to ET1s rather than ET3s. The practical consequences of the amendment are significant. I am a litigant-in person who is bringing a claim against a government agency where I remain employed. The proposed amendment exacerbates an already difficult situation for me.

….

I wish to point out that I fully reserve my position on costs. I regard the Respondent's conduct, as outlined above, to be inimical to the overriding objective and to amount to unreasonable conduct such that rule 76(1)(a) and/or (b) of the 2013 Procedure Rules is engaged. Therefore, irrespective of the outcome of the application, I put the Respondent on notice that I will be seeking an order for my legal costs of, connected to and/or arising from its application."

3.23. The Claimant takes issue with the Respondent's characterisation of his response as unreasonable in light of the fact that:

- no more than a 2-hour Hearing was listed for 4 January 2023 ;and
- an application to rely on the AGOR had now been made: and

- an extension for the date of exchange of witness statements previously ordered was being made to 25th November 2022.

3.24. I pause in the narrative to deal with any suggestion that the Claimant was not acting as a Litigant in Person given the assistance he was receiving from his Union (The FDA) and/or Mr Amunwa. The FDA did assist the Claimant with the ET1 albeit that the Union Representative was not legally trained or familiar with Employment Tribunal procedure. As regards Mr Amunwa, the Tribunal was reminded that a Direct Access Barrister is not formally on the record unless he/she is able to, and has agreed to, litigate on a client's behalf. Mr Warburton was not, of course, in the same position as a wholly unassisted litigant and I take that fully into account.

3.25. Witness statements were exchanged on 25 November 2022 and the Respondent sought to introduce a further witness statement of Mr Tupling on 9 December 2022 [425-427]. This 2nd statement, says the Claimant, served to introduce further areas of confusion in that:

- It conflates performance with the SPA; and
- It suggests (at §6) that Agency employees who are seconded get any performance related pay according to the host organisation's performance related pay scheme if it has one.

The Respondent accepted that the further Tupling statement did not assist in advancing clarity on the dispute between the parties.

3.26. In the Respondent's letter to the Claimant of Friday, 9 December 2022 [417- 423], the Respondent declined to provide the Claimant

with documents that he had requested on 2nd December 2022 and also sought to explain the Agency's view that the Tribunal did not have jurisdiction to determine his claim. A formal costs warning was included in that letter.

3.27. On Sunday, 11 December 2022, Mr Amunwa provided a further advice update (disclosed for this Hearing) [763-765]. That advice concluded as follows:

> *"In summary we are at a fork in the road and reluctantly I have concluded that the safest approach is to make a tactical retreat from the Tribunal, enabling you to pursue an alternative civil claim for breach of contract."*

3.28. The Respondent criticises the Claimant for reaching that analysis and conclusion only at this stage, suggesting that little, if anything, had changed between September 2022 and 11 December 2022. However, as the Claimant points out with some justification, matters had moved on. It is patently the case that:

- Documents had now been exchanged;
- The Respondent was seeking to introduce further evidence;
- The Defence had been, in the words of the Claimant, "reconstructed and upgraded" in the draft AGOR. Permission to amend was yet to be formally granted;
- A formal costs warning had now been sent.

3.29. The Claimant's submission is that, rather than take up time opposing the Respondent's amendment application, a cold hard look and appraisal of the litigation position was taken. That consideration led to a sensible and practical stance as set out in the without prejudice save as to costs ('WPSATC") letter sent by the Claimant on 13 December 2024 [439]. The letter contained this explanation and proposal:

"While I remain confident that my case may be distinguished from the case law regarding jurisdiction, (which itself recognises that factual issues concerning payable wages may require determination by the Tribunal), particularly given that the Respondent did not follow its own procedures in relation to its decision-making in my case, I am mindful of the need to avoid the escalation of costs on either side, including the risk of onward appeals on the jurisdiction point in an area of law that is not straightforward (as illustrated in part by the nature of the Respondent's proposed defence/s).

I therefore propose the following:

- *The Respondent agrees not to pursue any application for costs in these proceedings;*
- *The claim be withdrawn but not dismissed, fully reserving my right to seek a remedy in the civil courts."*

3.30. That offer was rejected in a WPSATC letter from the Respondent the next day [766- 769] and a counter proposal made on the basis that the Agency would settle the claim, without seeking costs, on the basis that the be claim was dismissed upon withdrawal.

3.31. The Claimant wrote to the Tribunal the same day,14th December 2022, as follows [441]:

" Having reconsidered the matter, I wish to withdraw my Claim. I ask the Tribunal not to dismiss my claim, and I wish to reserve my right to pursue that claim, if necessary, in the civil courts."

3.32. A Tribunal Legal Officer dismissed the claim on 14 December 2023 [572/3] but that was set aside by EJ Perry in a judgment dated 19 January 2023 [578-579] In addition, a Notice of Costs Hearing was also sent out for 21 April 2023 which Hearing was also to determine the Dismissal Application. That was the first day of the present Hearing which did not conclude on that day. The parties were unable to reconvene until 4 & 5 December 2023 when judgment on the Respondent's applications was reserved.

4. THE LAW

4.1 The Parties submitted Skeleton Arguments which were augmented by detailed oral submissions which contained reference to authorities not all of which I needed to consider in light of my conclusions. However, I carefully considered all the submissions in the course of my deliberations and no discourtesy is intended to the industry of Counsel by not specifically referencing every submission made or authority relied on.

Dismissal Application

4.2 Rule 52 of the Employment Tribunal Rules provides:

> *"52 Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—*
>
> *(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or*
>
> *(b) the Tribunal believes that to issue such a judgment would not be in the interests of justice."*

4.3 I specifically invited submissions on how the Tribunal should go about the task of deciding whether any given case fell within the exceptions in rule 52 (a) or (b). At the start of the resumed Hearing, Mr Oldham directed my attention to the case of **Baker v Abellio London Ltd, 2017 WL 05471876 (2017)** and in particular the following paragraphs: §16, §35, §40 and §§45-46. Other than

some broad general observations made in that case, I did not derive much assistance on this topic from the **Baker** case.

Costs Application

4.4 The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237 provide as follows, insofar as is material:

> ***"51 End of claim***
> *Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.*
> *……*
> ***76.— When a costs order or a preparation time order may or shall be made***
>
> *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;*
>
> *(b) any claim or response had no reasonable prospect of success …"*

4.5 From the submissions of the parties and consideration of relevant authorities, the following principles and guidance emerge:

i. The correct approach in Employment Tribunals is that orders for costs in Employment Tribunals are the exception, not the rule - **Gee v Shell UK Ltd [2003] IRLR 82(CA).**

ii. Notwithstanding that costs orders remain the exception rather than the rule, the facts of a case need not be exceptional for a costs order to be made. The question is whether the relevant test is satisfied - **Power v Panasonic (UK) Ltd UKEAT/0439/04 and Vaughan v London Borough of Lewisham and others UKEAT/0533/12.**

iii. The Tribunal has a wide and unfettered discretion. The EAT will not use "legal microscopes and forensic toothpicks" to "tinker" with the Tribunal's exercise of discretion - **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78** in which Mummery LJ said at § 41:

"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 if had."

iv. Where a costs application is made by the Respondent, it is for the Respondent to satisfy the Tribunal that it has jurisdiction to make a costs award ("Stage 1"). If so established, it is then for the Tribunal to satisfy itself that it is right and proper to exercise the discretion to award costs, having regard to all the relevant factors ("Stage 2"). The burden is not on the Claimant to establish why costs should not be awarded under rule 76.

"25. The words of the Rules are clear and require no gloss as the Court of Appeal has emphasised. They make clear (as is common ground) that there is, in effect, a three-stage process to awarding costs. The first stage - stage one - is to ask whether the trigger for making a costs order has been established either because a party or his representative has behaved unreasonably, abusively, disruptively or vexatiously in bringing or conducting the proceedings or part of them, or because the claim had no reasonable prospects of success. The trigger, if it is satisfied, is a necessary but not sufficient condition for an award of costs. Simply because the costs jurisdiction is engaged, does not mean that costs will automatically follow. This is because, at the second stage - stage two - the tribunal must consider whether to exercise its discretion to make an award of costs. The discretion is broad and unfettered. The third stage - stage three - only arises if the tribunal decides to exercise its discretion to make an award of costs, and involves assessing the amount of costs to be ordered in accordance with Rule 78"

- **Haydar v Pennine Acute NHS Trust UKEAT/0141/1** per Simler J, as she then was.

v. Unreasonableness has its ordinary meaning. It is not equivalent to vexatious - **Dyer v Secretary of State for Employment UKEAT/183/83.**

vi. It is a matter of fact for the Tribunal as to whether conduct is to be considered as unreasonable - **Dyer (op cit).**

vii. It is not unreasonable conduct for a claimant to withdraw a claim. The Tribunal's should not adopt a practice on costs which would deter applicants from making sensible litigation decisions - **McPherson v BNP Paribas [2004] ICR 1398.**

viii. Even late withdrawals should not necessarily be visited by a costs award as it would tend towards discouraging people from taking a cold, hard look at their case if matters

such as that were thought to be not reasonable, because that would tend to suggest that departing from a case at the last minute will be regarded as unreasonable conduct – **National Oilwell Varco (UK) Ltd v Van de Ruit UKEATS/0006/14/JW (2014)** per Stacey J at § 7.

ix. A failure to accept an offer not to pursue a party for costs (as in the instant case) does not, of itself, constitute conduct that is to be considered unreasonable - **Lake v Arco Grating (UK) Ltd UKEAT/0511/04**.

x. Where both rule 76(1)(a) and (b) are relied on and the conduct said to be unreasonable under (a) is the bringing or continuation of claims which had no reasonable prospect of success, the correct approach for the Tribunal to adopt is to consider these questions:

"Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that"

- **Radia v Jefferies International [2020] IRLR 431** per HHJ Auerbach at §64.

xi The legal test is the same whether a party is represented or not but the fact that a party is unrepresented is a relevant consideration in the exercise of discretion - **Gee v Shell UK Ltd [2003] IRLR 82** and **Vaughan v London Borough of Lewisham and others UKEAT/0533/12 - §25** approving **AQ Ltd v Holden UKEAT/0021/12 - §41.**

5. CONCLUSION

Dismissal application

5.1 This is urged on the Tribunal by the Respondent in these terms in its written submission:

"The claims should be dismissed because there is no "legitimate reason" (in the words of r 52(a) for the Claimant's wish to reserve a right to bring the withdrawn claims in another forum; and/or because it would be in the "interests of justice" (in the words of r 52(b)) to dismiss the claims."

5.2 The wording of rule 52 is, of course, mandatory unless the Claimant can bring himself within one of the exceptions:

"…*the Tribunal shall issue a judgment dismissing it…"*

A reason commonly advanced by Claimants for not dismissing a withdrawn claim is the desire, as here, to preserve the right to pursue the claim in another forum.

5.3 In the instant case, the Respondent accuses the Claimant of being a "reckless litigator" and argues that it should not be vexed by further costs and time taken in defending the same hopeless claims elsewhere.

5.4 In exchanges with the Parties, I suggested that, on one view, the Tribunal was effectively being asked to rule on an application for summary judgment in the potential County Court Claim that Mr Warburton might chose to make. The Claimant submits that there are enough tools in the County Court to deal with unmeritorious claims and that it would not be appropriate to engage in a summary merits assessment outside extreme cases. Further, that

the Employment Tribunal should not act as a gatekeeper to the jurisdiction of the County Court.

5.5 Moreover, the Claimant maintains that the claim based on what he describes as the “Core Obligations” is in fact meritorious and is not one pursued by a reckless litigator. It is also the case that the Claimant’s most recent witness statement would seem to contradict the Respondent’s suggestion, in its written submission, that no further evidence would be available to the Claimant in the County Court.

5.6 For its part, the Respondent continues to maintain that the claims would have no reasonable prospect of success in the County Court or elsewhere as they are dependent on the Claimant showing that the Respondent breached its wide discretions as to a number of different issues. It does so by reference to such authorities as **Clark v BET plc [1997] IRLR, Clark v Nomura Int’l plc [2000] IRLR 766, Kingston Upon Hull City Council v Schofield and others UKEAT/0616/1** and **Coors Brewers Ltd v Adcock and others [2007] ICR 983.**

5.7 However, I consider that if the Tribunal were to adopt the approach contended for by the Respondent on the facts above set out, it would be akin to the exercise of an exorbitant jurisdiction. That is not a course which I am prepared to take in this case. The complexities of the claims, defences, arguments and counter arguments in this case have evolved over time and have continued to evolve. This has even occurred in the period between the first Hearing in April and the resumed Hearing in December 2023. I am far from satisfied that it would be appropriate at this stage for the Tribunal to engage in the exercise that the Respondent invites the Tribunal to undertake. There may well be cases where such a course would be appropriate. In my judgment, this is not such a case.

5.8 If Mr Warburton chooses to pursue, what the Respondent maintains are, hopeless claims in the County Court, he will do so in a costs bearing jurisdiction. A forum in which there are ample procedural avenues open to the Respondent to shut down the claims if it is correct in its evaluation of the prospective claims.

5.9 I am not prepared to deprive the Claimant of the opportunity to pursue his claims elsewhere. I decline to dismiss the claims following the Claimant's withdrawal. The Claimant has expressed at the time of withdrawal a wish to reserve the right to bring such further claims and I am satisfied that he has a legitimate reason for doing so. In addition, the Tribunal believes that to issue a dismissal judgment would not be in the interests of justice in the circumstance above set out.

Costs application

5.10 The Respondent relies on both the "unreasonable/vexatious conduct" ground - r 76(1)(a) and the "no reasonable prospect of success" ground – r 76(1)(b) in respect of its costs application.

No reasonable prospect of success – r 76(1)(b)

5.11 The Respondent asserts that the Tribunal very obviously had no jurisdiction to hear either the breach of contract claim or the deductions claim. Therefore, that is sufficient to demonstrate that the claims had no reasonable prospect of success for the purposes of r 76(1)(b). I disagree that both claims fall to be so considered.

5.12 Whilst the breach of contract claim clearly could not proceed on jurisdictional grounds, the position with regard to the deductions claim was/is more nuanced and less clear cut.

5.13 The Claimant has chosen not to run the risk that the deductions claim will fail on jurisdictional grounds in the Employment Tribunal. However, the Claimant says that the withdrawal of his deductions claim was a tactical one and he still maintains that his case can be distinguished from case law, such as **Schofield** and **Coors (op cit)**, regarding jurisdiction in respect of unlawful deductions claims. That stance is informed by the submission that it is accepted in the relevant authorities that factual issues concerning "payable wages" may nonetheless require determination by the Tribunal and he relies on the fact that the Respondent did not follow its own procedures in relation to its decision-making process in his case. In any event, the Claimant's position is that, on the facts, there was no discretion that resided with the Respondent.

5.14 Having regard to those matters, I accept the Claimant's submission that the instant facts do not support a finding that the costs jurisdiction under r 76 (1)(b) is engaged here. If I am wrong about that, I do not consider that it would be right and proper to exercise my discretion to order costs based on the same reasoning.

5.15 I address the breach of contract claim and r 76(1)(b). The Claimant's claim was received by the Tribunal on 20 June 2022 and the Claimant sought a stay on his claim until 12 August 2022. The ET3 is dated 19 July 2022 and was accepted by the Tribunal on 5 August 2022. The Claimant received advice from Mr Amunwa on 7 September 2022 regarding the breach of contract claim, amongst other matters, and promptly withdrew it on 10 September 2022. Even if it can be said that the costs jurisdiction is formally engaged, I do not consider that this Claimant, a litigant in person in receipt of the limited assistance available to him pre-issue, who made the initial error of issuing a breach of contract claim whilst still employed should be visited by an Order for costs.

I decline to exercise my discretion to make an award on these facts – Stage 2.

Unreasonable/Vexatious conduct – r 76(1)(a)

5.16 I approach the Respondent's submission on r 76(1)(a) – unreasonableness in bringing and conducting the claims by reference to the cases of **Barnsley Metropolitan Borough Council** and **Radia** cited above.

5.17 In respect of the contract claim, I do not consider that the Claimant's initial mistake in bringing this claim and his prompt withdrawal on receipt of appropriate advice can properly be called unreasonable or vexatious. Stage 1 has not been reached and I would have declined to order costs in my discretion at Stage 2 if the costs jurisdiction had been engaged.

5.18 I turn to deal with the unlawful deductions claim. The chronology regarding this claim and the Respondent's responses is set out above. The jurisdiction issue in respect of the deductions claim was squarely raised in the draft AGOR submitted on 8 November 2022 for which permission had yet to be granted. The Claimant received advice on 11 November 2022 which provided comfort that the claim was still viable. The Respondent's costs letter was sent on 9 December 2022. Further advice was provided to the Claimant on 11 December 2022 following which he sought to compromise his withdrawal on 13 December 2022. When that failed, he withdrew his claim on 14 December 2022. In my judgment, when the background facts above set out are factored in, that chronology does not approach the threshold of unreasonableness or vexatious conduct.

5.19 Nor am I persuaded that the additional 4 factors prayed in aid in support of the charge of unreasonableness, at paragraphs 28 to 33 of its written submission, render the Claimant's conduct unreasonable or vexatious:

- The timing of the withdrawal is explained by the relevant chronology.
- The timing, extent and level of legal advice available to the Claimant, as well as his willing acceptance of same, does not point to unreasonable behaviour by the Claimant.
- The allegedly "clear" costs warnings said to have been given by the Respondent did not formally crystalise until its 9 December 2022 letter, which prompted rapid advice and withdrawal within days.
- The allegation of a "new claim" in the Claimant's witness statement has been overtaken by events as above explained, even if the Respondent was correct to so characterise it, a matter not accepted by the Claimant.

5.20 In reliance on the above analysis of the Claimant's conduct, the relevant chronology and background facts, I conclude that the Respondent has not persuaded me that "Stage 1" of the costs exercise that the Tribunal must undertake has been established so that the jurisdiction of the Tribunal to award costs has been established.

5.21 Even if I had been so persuaded, or if I am wrong in that determination, I would still need go on to satisfy myself that it is right and proper to exercise my discretion to award costs, having regard to all the relevant factors - "Stage 2". I repeat and rely on my conclusions in respect of Stage 1 to decide that it would not be right and proper to exercise my discretion in favour of awarding costs against the Claimant.

5.22 The Respondent's applications both fail and are dismissed.

Jacques Algazy K.C.

Employment Judge Algazy K.C.

Signed **11 February 2024**