EMPLOYMENT TRIBUNALS

Claimant: Rian Wispy

Respondent: Quintessentially UK Ltd

Heard at: **London Central (CVP)** **On:** **24 January 2025**

Before: **Employment Judge Leonard-Johnston**

Representation
Claimant: No appearance
Respondent: Mr. N Donaldson, Keystone Law

JUDGMENT ON COSTS

1. Further to the costs order of Employment Judge Withers dated 18 August 2022, relating to costs from 19 January 2022 up to and including the final hearing, the claimant must pay the respondent's reasonable costs of £14,281.

2. The respondent's second application for costs relating to the preparation and attendance at the costs hearing on 24 January 2025 is granted. The claimant must pay the respondent's reasonable costs of £5,708.

REASONS

The hearing

1. The hearing was listed to determine the following points:
    a. A summary assessment of costs further to the costs order of Employment Judge Withers dated 25 August 2022 [**Annex**].
    b. An application by the respondent for costs dated 23 January 2025, relating to this cost hearing itself.

2. The claimant did not attend the hearing. I am satisfied that he was aware of the hearing given the inter-parties correspondence in the week leading up to the hearing. The clerk to the Tribunal made numerous attempts to contact

the claimant by email and telephone and he did not respond. I took into account the claimant's previous behavior in conducting these proceedings as outlined in the judgment of EJ Withers and considered it was in the interests of justice to proceed. In accordance with rule 47 of The Employment Tribunal Procedure Rules 2024 ("the Procedure Rules") the hearing proceeded without the claimant.

3. I note the correspondence from the Claimant in relation to his alleged appeal to the EAT from 2022. Whilst I am not aware of any application on the part of the claimant asking to postpone this hearing, that seems to have been implied from his correspondence. In any event Employment Judge Goodman made a decision on 21 January 2025 not to postpone this hearing on the basis that the claimant had provided a bundle of documents containing a notice of appeal, but no documents to show that this notice of appeal was ever sent to the Employment Appeal Tribunal.

4. I had before me a bundle of documents prepared by the respondent of 168 pages and references in square brackets below are to page numbers in that bundle. I also had before me submissions from the respondent.

5. On the morning of the hearing, I asked the Tribunal to locate an email the claimant says he sent to the Tribunal and the respondent on 7 September 2022 containing a notice of appeal. The respondent, who had seen no correspondence from the EAT in relation to any appeal, had been repeatedly seeking a copy of this email from the claimant. The Tribunal staff located the email, which it turns out was addressed only to the Tribunal, and forwarded it to the parties before the hearing. This email was admitted as evidence.

Background

6. In a judgement dated 11 August 2022, Employment Judge Withers dismissed the claimant's claim for breach of contract. She made the following orders.

   "*2. The claim had no reasonable prospect of success and I have decided that it is appropriate to make a costs order in this case in relation to the respondent's costs incurred after 19 January 2022.*

   *3***.** *The amount of costs payable shall be agreed between the parties, and in the absence of agreement, the parties shall by 4pm on 22 September 2022 submit their written submissions on the amount of costs payable and the claimant's ability to pay (if so desired), or request a hearing to determine the same. In the absence of written submissions or a request for a hearing by that date, the application for costs will be treated as withdrawn.*

7. The reasons given for making the costs order are set out at paragraphs 43 to 66 of the judgment, with her key findings as follows.

   "54. My view that objectively this claim had no prospects of success. An ordinary person would read that the offer was subject to "satisfactory pre-employment checks" and that this meant satisfactory to the respondent. Indeed when I asked the claimant what he understood the term to mean, his definition included "whatever the company deems to be necessary". So

even subjectively, the claimant knew that the respondent itself had to be happy with the pre-employment checks, and it wasn't.

55. I am therefore bound to consider exercising my discretion to make an award of costs.

56. Did the claimant know the claim had no reasonable prospects and when? The claimant made much of the fact that, at the time of these events in November 2021, he was not provided with a straight answer from the respondent as to why it withdrew its offer. However, the respondent set out all of its reasons clearly in its further and better particulars dated 19 January 2022. Given the claimant's evidence that he understood that it was for the respondent to decide if it was satisfied with the pre-employment checks, I consider the claimant knew on 19 January 2022 that the claim had no prospect of success.

57. If I am wrong about whether the claimant knew, and the claimant did not know at that date, I consider that the claimant ought to have known based on the fact all he had to do was read the respondent's reasons for withdrawing the offer in the further and better particulars and apply his mind to the question of whether they demonstrated that the respondent was not satisfied with the pre employment checks. Plainly they were not.

58. I therefore conclude that the threshold for making a costs order is made out. It therefore falls to me to consider all relevant factors in determining whether to exercise my discretion to make an order.

59. I have in mind the case of ***Vaughan v London Borough of Lewisham and others UKEAT/0533/12****, where the EAT upheld a decision to make a costs award of around £87,000 against an unemployed, unrepresented claimant, reiterating the point that a case does not have to be exceptional for costs to be awarded. The claimant's claims in that case were misconceived and the claimant should have appreciated this, so the relevant test had been met.*

60. I consider in this case that the respondent has been put to the time and cost of resisting the claim – a claim which the claimant, based on his own evidence, did in fact appreciate had no prospects of success. Even if I am wrong about that, for the reasons set out above the claimant ought to have known that was the case. There is no suggestion that it would be inappropriate to make a costs order based on the claimant's means. Considering all the relevant factors and notwithstanding that costs are the exception rather than the rule, I conclude that it is appropriate to exercise my discretion to make a costs order in this case."

8. It is clear from the judgment that EJ Withers had made a decision that the requirement in Rule 76(1)(b) of the Employment Tribunal Rules of Procedure 2013 (in force at the time) was met because the claim had no reasonable prospect of success, and that she decided to exercise her discretion to make a costs order taking into account all the circumstances. EJ Withers did not assess the amount of costs because she did not have sufficient information before her to make that determination. She therefore made directions that the costs would be dealt with by written submissions unless either party requested a hearing.

9. Paragraph 66 of her judgment stated:

> "*66. I am hopeful that the amount of those costs can be agreed by the parties without the need for further input from the tribunal. If that is not the case, each party should by 4pm on 22 September 2022 submit its written submissions on the amount of costs payable and the claimant's ability to pay (if so desired), or request a hearing to determine the same. In the absence of written submissions or a request for a hearing, the application for costs will be treated as withdrawn*."

10. On 20 September 2022 the respondent emailed the claimant attempting to agree costs [54]. The claimant replied on 22 September 2022 stating that he had Covid-19 and that he had submitted an appeal to the EAT on 7 September 2022, but he did not engage with the issue of quantum of costs [56]. The respondent then submitted written representations to the Tribunal seeking an assessment of costs on the papers, on 22 September 2022 [57] and providing a statement of costs [67]. The statement of costs included costs incurred including counsel's fees in the date range of 19 January 2022 until 11 August 2022, and totalled £14,281.63.

11. Thereafter there was a very unfortunately delay on the part of the Employment Tribunal in determining the assessment of costs. I have apologised to the parties on behalf of the Tribunal. Whilst no satisfactory explanation can be provided, it appears that the delay was both a result of the administrative backlog in email correspondence as a result of the Covid-19 pandemic and/or the departure of EJ Withers from London Central Employment Tribunal in 2023.

12. The respondent emailed the Tribunal on the following occasions seeking a decision on the assessment of costs;

    a. 17 August 2023 [93]. The respondent also noted that it had not received any evidence that an appeal to the EAT had been submitted. The claimant responded on the same date stating he also awaiting the outcome of the appeal, but provided no evidence of the appeal [94]. The respondent sought evidence again [95] and the claimant failed to provide it [96] and also stated he was considering a judicial review. The respondent asked the tribunal to proceed with the costs assessment.

    b. 20 September 2023 [99], seeking an update from the Tribunal. The claimant replied but again did not provide evidence of any appeal.
    c. 24 September 2023, seeking an update from the Tribunal.

    d. 8 October 2024, seeking an update from the Tribunal.

13. On 11 November 2024 the Tribunal listed this hearing.

14. On 12 November 2024 the respondent once again sought evidence of an appeal from the claimant [106]. The claimant replied saying that the 'respondent had the application', meaning the appeal, but did not engage with the issue of costs.

15. On 19 November 2024 the claimant said in an email that 'I do have an acknowledgement email from ET', but did not provide it.

16. On 19 November 2024 the respondent made an application for specific disclosure of documents relating to his apparent EAT appeal [113]. In reply on the same date the claimant did not disclose the documents. Further correspondence took place.

17. On 15 January 2025 the matter was put before Employment Judge Goodman who asked for a copy of the judgment and cost application. Employment Judge Goodman treated the correspondence as an application to postpone the costs hearing (although I cannot see that claimant specifically asked for a postponement). She made orders for the claimant to disclose information about his alleged appeal by 20 January 2025. The claimant provided a bundle of documents to the Tribunal on 16 January 2024 but did not copy the respondent [134]. He ultimately sent the bundle to the respondent on 21 January 2025 after being chased twice by the respondent's solicitor.

18. Employment Judge Goodman reviewed the papers on 21 January 2025 and confirmed that the claimant had provided no documents to show that the notice of appeal was ever sent to the EAT, and confirmed the hearing on costs would proceed. To the extent that the claimant had made an application for postponement, this had been refused by EJ Goodman on 21 January 2025.

19. The attachment of the documents provided by the claimant on 16 January 2025 included an email [136] with the following details:

> "From: rjwispy68@gmail.com
> To: "LONDONCENTRALET" ;Nathan Donaldson
> Subject: Attached ET1 appeal
> Date: 07 September 2022 15:48:44
> Attachments: t444-eng.pdf ET3.pdf et1_rian_wispy.pdf
> Importance: High
> Sensitivity: Confidential"

20. On 21 January 2024 the respondent's solicitor Mr. Donaldson asked his firm's IT department to check whether the above email had been received by their server. They confirmed it had not [143]. Mr. Donaldson was suspicious that this email was falsified and sought the email as an attachment from the claimant [146].

21. On 23 January 2025 the respondent wrote to the Tribunal

> "It is the Respondent's view that the Claimant continues to conduct his litigation vexatiously, abusively, disruptively or otherwise unreasonably even in respect of the cost application. Therefore, in addition to seeking costs in respect of the substantive hearing, the Respondent also seeks a cost order in respect of the cost hearing and preparation which would have been avoid but for the Claimant conduct. We therefore attach a second Statement of Costs with a Statement of Truth." The respondent was seeking costs in the amount of 6954.60.

Legal framework

22. The Procedure Rules 2024 provide the following relevant provisions:

Costs orders and preparation time orders

73.—(1) A costs order is an order that the paying party make a payment to—
(a) the receiving party in respect of the costs that the receiving party has incurred while represented by a legal representative or a lay representative, or
(b) another party or witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at a hearing.

(2) A preparation time order is an order that the paying party make a payment to the receiving party in respect of the receiving party's preparation time while not represented by a legal representative.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings.
(4) The Tribunal may decide in the course of the proceedings that a party is entitled to either a costs order or a preparation time order but may defer its decision on the kind of order to make until a later stage in the proceedings.

When a costs order or a preparation time order may or must be made

74.—(1) The Tribunal may make a costs order or a preparation time order (as appropriate) on its own initiative or on the application of a party or, in respect of a costs order under rule 73(1)(b), a witness who has attended or has been ordered to attend to give oral evidence at a hearing.

(2) The Tribunal must consider making a costs order or a preparation time order 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 of it, or the way that the proceedings, or part of it, have been conducted, (b) any claim, response or reply had no reasonable prospect of success, or (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which that hearing begins.

(3) The Tribunal may also make a costs order or a preparation time order (as appropriate) on the application of a party where a party has been in breach of any order, rule or practice direction or where a hearing has been postponed or adjourned.

(4) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal must order the respondent to pay the costs incurred as a result of the postponement or adjournment if— (a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing, and (b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment

The amount of a costs order

76.—(1) A costs order may order the paying party to pay—
(a) the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;
(b) the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined—
(i) in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998(33), or by the Tribunal applying the same principles;
(ii) in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019(34), or by the Tribunal applying the same principles;

(c) another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses for the purpose of, or in connection with, an individual's attendance as a witness at a hearing;
(d) an amount agreed between the paying party and the receiving party in respect of the receiving party's costs.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative must not exceed the rate under rule 77(2) (the amount of a preparation time order).

(3) A costs order under sub-paragraphs (b) to (d) of paragraph (1) may exceed £20,000

Ability to pay

82. In deciding whether to make a costs order, preparation time order, or wasted costs order, and if so the amount of any such order, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay

23. Costs orders are the exception rather than the rule in employment tribunal proceedings, but that does not mean that the facts of the case must be exceptional (**Power v Panasonic (UK) Ltd UKEAT/0439/04**). In terms of abusive, disruptive or unreasonable conduct, "unreasonableness" bears its ordinary meaning and should not be taken to be equivalent of "vexatious" (**National Oilwell Varco UK Ltd v Van de Ruit UKEAT/0006/14).**

24. Guidance has been given by the Court of Appeal in **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78** on the approach to assessing unreasonable conduct at paragraph 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 it had".

25. In relation to the assessment of costs the EAT provided guidance in **Sumukan (UK) Ltd and anor v Raghavan EAT 0087/09** that the tribunal must state on what basis and in accordance with what established principles it is awarding any sum of costs; on what basis it arrives at the sum; and why costs are being awarded against the party in question.

26. The purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the paying party (**Lodwick v Southwark London Borough Council 2004 ICR 884)**. Rule 82 permits the tribunal to take into account a party's ability to pay when assessing both whether to make a costs order and if so, for how much. However, the tribunal is not required to do so. The Court of Appeal in **Yerrakalva** held that costs should be limited to those 'reasonably and necessarily incurred'. However, the tribunal does not need to identify a direct causal link between the unreasonable conduct and the costs claimed (**MacPherson v BNP Paribas (London Branch) (No 1) [2004] ICR 1398**).

Assessment of costs pursuant to the EJ Withers order

27. It is not for this Tribunal to re-open the decision of EJ Withers on whether to exercise discretion to make a costs order; the reasons why the order is being made is set out in the judgment annexed to this decision. There has been a finding that the claimant acted unreasonably in pursuing a claim that he knew (or ought to have known) had no reasonable prospect of success. The matter before me is to assess the amount of costs to be awarded pursuant to that order. I take into account her findings in relation to the claimant's behavior in making this assessment, the key findings of which are set out above.

28. The claimant did not attend this hearing despite being on notice of it. He was aware from paragraph 62 of Employment Judge Withers' decision that if he wished to raise matters relating to his ability to pay he should do so, but he has not raised any such matters, or made any submissions or representations in relation to the assessment of costs.

29. The respondent submits that the claimant has not only caused unnecessary costs in pursuing the unmeritorious claim but has exacerbated costs by his failure to comply with case management orders and his excessive correspondence. I have taken into account that the claimant is a litigant in person and I assess his conduct less harshly than I would a party who is legally represented. I do note however that the claimant is a well-educated professional and has previous experience in Tribunal claims. Having heard no evidence from the claimant, I accept the respondent's submission, supported by the itemized statement of costs, that the claimant failed to comply with orders and engaged in excessive correspondence and that his behavior up to and including the hearing, where he was difficult and evasive, was unreasonable. The unreasonable conduct of the claimant in the proceedings is a relevant factor to take into account in assessing the quantum of costs.

30. I have scrutinised the statement of costs provided by the respondent's solicitors [67]. I take into account that the respondent's solicitors did not charge their full hourly rate and a number of items are listed as not billed. Overall I view the statement of costs provided by the respondent's solicitors to be entirely reasonable and proportionate in the circumstances.

31. In all the circumstances of the case I consider it is in the interests of justice to exercise my discretion to award the respondent the full amount set out in its statement of costs, of £14 281. This relates to reasonable costs incurred in the period of 19 January 2022 up to and including the hearing of 11 August 2022, as ordered and for the reasons given by EJ Withers.

Application for costs dated 23 January 2025

32. The claimant has been put on notice of the application for costs and has not appeared or given any explanation for his non-appearance. I am satisfied that he has been given an opportunity to make submissions in relation to this costs application but has chosen not to do so. The claimant has a history in these proceedings of ignoring emails and/or replying selectively as it suits him.

33. The respondent submits that an order for costs should be made:

    a. under Procedure Rule 74(2)(a) on the basis that he has vexatiously, abusively, disruptively or otherwise unreasonably since the judgment of EJ Withers, including by engaging in fraudulent behavior, and/or
    b. under Procedure Rule 74(3) on the basis that the claimant has breached case management orders and the Procedure Rules in relation to the assessment of costs.

34. The behavior relied upon is set out in Mr Donaldson's oral submissions and paragraph 68 of the respondent's submissions as follows.

    a. The claimant failed to comply with the order of Employment Judge Withers to attempt to agree costs. Indeed, he has not engaged at all in relation to assessment of costs.

    b. The Claimant sent a key email to the Employment Tribunal of 16 January 2025 07:45 without copying in the Respondent, in breach of Rule 90. It is submitted this was deliberately done because it was clear the respondent had been chasing these details for many months.

    c. Until 16 January 2025, the Claimant failed to send evidence relating to an alleged appeal to the Respondent notwithstanding its solicitors repeatedly requesting copies of the same.

    d. The claimant failed to comply with the direction of Employment Judge Goodman dated 15 January 2025. Whilst the claimant provided a bundle of documents to the Tribunal, he did not copy the respondent and did not provide the email he sent to the EAT, correspondence from the EAT or the reference number for the EAT.

    e. The respondent submits that the claimant has provided a falsified document to the Tribunal. The Claimant adduced a PDF copy of an email that he purportedly sent to the Employment Tribunal and the respondent's solicitor of 07 September 2022 15:48:44 ("the 7 September 2022 email") [136]. The respondent solicitor had serious concerns that this document has been falsified by the Claimant on the basis that:
        i. The respondent's solicitor has never received or seen such email before.
        ii. The respondent's solicitor's IT department confirmed from a search of the central server that such email was never received by the firm [143-144].
        iii. The semi colon after the Employment Tribunal's email address is misaligned, suggesting it has been added to the PDF document.
        iv. Though the Employment Tribunal's email address has an embedded hyperlink to the Employment Tribunal's email address, the reference to the Respondent's solicitors email address does not have an embedded hyperlink [143].
        v. The respondent's solicitor have advised the Claimant of its concern regarding the veracity of such document and

requested a copy of the email itself rather than a PDF version. The claimant has not replied.

vi. The Tribunal located an email received from the claimant on 07 September 2022 15:49, which was identical to the 7 September 2022 email provided by the claimant, save that it did not contain ' ;Nathan Donaldson'. The respondent submits that there is clear evidence that the claimant has falsified the email he provided to the Tribunal on 16 January 2025 in order to make it appear that he copied the respondent into the email relating to his appeal.

35. On the evidence before me I find that the claimant has not complied with the order of Employment Judge Withers to attempt to agree costs. The claimant has only partially complied with the order of Employment Judge Goodman. He provided the alleged 7 September 2022 email but did not provide any of the documentation requested relating to an alleged EAT appeal or answer Employment Judge Goodman's clear request for details of the EAT appeal.

36. On the evidence before me I find that the claimant never lodged an appeal with the EAT. He filled out the appeal form and emailed it to the London Central Employment Tribunal, but did not submit an appeal to the EAT in accordance with the Employment Appeal Tribunal Rules 1993 as amended. On the balance of probabilities, taking into account that he is a litigant in person, but also his litigation experience, education and qualification, I find that the claimant was aware that he did not properly institute an appeal with the EAT in September 2022. I find that the correspondence he has engaged in with the Tribunal and the respondent alleging an outstanding appeal is deliberately misleading.

37. I have considered the email of 7 September 2022 provided by the claimant on 16 January 2025, the respondent's submissions on this, and the email actually received by the Tribunal, seen by me on 24 January 2025. I find on balance that the claimant did not at the time include the respondent's solicitor as a recipient to that email. This is on the basis that the email received by the Tribunal did not include Mr. Donaldson as a recipient, and the evidence that the servers at Keystone Law have no record of any attempt to send an email to their server. It is clear to me that the real email sent on 7 September 2022 is not the same as that provided by the claimant as purported evidence that he filed an appeal. Accordingly, I find that the claimant has falsified a document for the purpose of misleading the Tribunal in these proceedings. I find that he attempted to mislead the Tribunal in order to disrupt or delay the costs hearing from proceeding or otherwise cause further mischief to the respondent. Needless to say, this is an extremely serious matter. The claimant has engaged in conduct calculated to disrupt the judicial process. The claimant has acted unreasonably from the outset of these proceedings, and should never have brought the misconceived claim against the respondent. But his conduct in relation to costs and his alleged appeal to the EAT goes beyond unreasonableness. His conduct firmly falls within the category of abusive, vexatious and disruptive.

38. Turning to whether I should exercise my discretion to award costs, I take into account that the claimant's behavior is at the more serious end of the

scale of behavior falling within Rule 74(2)(a). His behavior could have had the effect of prejudicing the course of justice, which is extremely serious.

39. In relation to the impact on the respondent, if the claimant had complied with Employment Judge Withers' order this hearing could have been avoided. The respondent has been forced to engage in many months of correspondence that also could have been avoided had the claimant conducted himself reasonably.

40. The Claimant has been previously found to conduct his litigation unreasonably and present claims that are an abuse of process, in the claim of **Mr R Wispy v Proficient Security Limited 3201448/2018**.

41. The claimant has not provided any information as to his ability to pay a costs order.

42. Taking into account the whole picture of these proceedings, and the effect of the claimant's behavior, I consider it appropriate to exercise my discretion to make a costs award against the claimant, in respect of the costs incurred by the respondent preparing for and attending this hearing.

43. In respect of assessment of costs, again, I do not take in the ability of the claimant to pay because he has not provided any evidence of his financial situation.

44. I have scrutinised the respondent's second statement of costs. The respondent's solicitor has not increased the charged rate since 2022, which even then was a low rate. He has removed items that cannot reasonably be connected to the claimant's conduct. The one exception to this is an item relating to payment of counsel fees which I have deducted from the total. I have also deducted 3 hours from the fee for attendance at the hearing because it finished early. Save for those items the statement of costs is entirely reasonable and proportionate. I award the respondent the total of £5708.

45. Looking at the awards in total in the context of these proceedings, I find that the unreasonable and exceptional behavior of the claimant justifies the size of the awards made against him.

46. For completeness, I note that the two costs awards combined total £19,989 and therefore do not exceed the cap in Rule 76(3). Even if the total was higher than £20,000 I would not have applied the cap to these costs orders. The two costs orders are distinct and relate to separate time periods and stages of proceedings and contain no duplication. Each cost order therefore attracts a separate cap of £20,000 (see comments EAT in **James v Blockbuster Entertainment Ltd EAT 0601/05**).

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Employment Judge Leonard-Johnston

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Case No: 2207352/2021

Date 2 February 2025

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

7 February 2025

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FOR EMPLOYMENT TRIBUNALS