Case Number 1301980/2018

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Dr RP Wilson		**Midlands Partnership NHS Foundation Trust**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Newcastle-under-Lyme **ON** 16 January 2019

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: Ms C Engopondi (Association Representative)
For Respondent: Ms K Moss (Counsel)

JUDGMENT

The judgment of the tribunal is that:

1 The claimant's application for Employment Judge Gaskell to recuse himself is refused.

2 Pursuant to Rule 72 of the Employment Tribunals Rules of Procedure 2013, upon reconsideration of the Orders made by the tribunal on 30 November 2018, it is now ordered as follows: -

(a) The Deposit Order is varied only as to the date for payment which is extended until today (as the claim has now been dismissed no payment is required).

(b) The Order for costs is confirmed.

3 The claimant's outstanding claim for unpaid holiday pay is not well-founded and is dismissed.

4 The respondent's application for costs will be considered at a Costs Hearing listed in Birmingham on **11 April 2019** at 10am with a time allocation of one day.

REASONS

Introduction

1 On 30 November 2018, I conducted a Closed Preliminary Hearing (CPH) in this case intended to clarify issues and give listing instructions for the Final

Hearing (FH). Ms Moss attended on behalf of the respondent; there was no appearance on behalf of the claimant. It appeared to me that the issues were simple and, had the claimant been present it might have been possible, with the consent and cooperation of both parties, to make a final determination in the claim. Ms Moss took the same view: she attended the hearing with a bundle of evidence and in a position to call two witnesses on behalf of the respondent. Prior to 30 November 2018, the respondent had made an application to convert the CPH into a FH. On 29 November 2018, Employment Judge Woffenden had considered that application and reviewed the file. She refused the respondent's application; but she directed the claimant to attend the hearing with a Schedule of Loss setting out the compensation he was now claiming; showing how it was calculated; and giving credits for payments received from the respondent. Judge Woffenden's order was emailed to the parties at 4:29pm on 29 November 2018. The hearing was scheduled for 10am the following day.

2 There was no explanation from the claimant or his representative for their failure to attend the hearing; no up-to-date Schedule of Loss was provided. It was therefore impossible to resolve any issues with a view to listing a FH.

3 When the proceedings were commenced on 28 April 2018, the principal issue of substance between the part was whether the claimant was a *worker* or an *independent contractor*. Following service of the claim form, the respondent quickly conceded that the claimant was a worker and, in August 2018, the respondent made a payment to the claimant in the sum of £5251.52 - the amount that the respondent calculated as due and owing for unpaid holiday pay.

4 Ms Moss explained to the tribunal that, in the lead up to the CPH on 30 November 2018, the respondent's solicitors had tried tirelessly to obtain from the claimant a statement of what he claimed was still owing and how it was calculated. The respondent had provided to the claimant full details of its calculation and asked for information as to how the claimant's calculation differed from its own. I was told that these efforts have borne no fruit: no up-to-date figure had been provided and no calculation.

5 In the circumstances which the tribunal found itself in on 30 November 2018, I made the following orders: -

(a) An Unless Order for the provision by the claimant by the 14 December 2018 of an up-to-date Schedule of Loss and detailed calculation of his outstanding claim.
(b) An explanation from the claimant for his failure to attend the hearing on 30 November 2018 accompanied by supporting documentation.
(c) A Deposit Order requiring the claimant to pay a deposit of £1000 as a condition of continuing with the claim. It appeared to the tribunal, on the basis of the information provided by Ms Moss, that the claimant was

simply unable to quantify any additional claim - and on that basis it appeared that the claim had little prospect of success.

(d) I ordered that the claimant should pay the respondent costs thrown away by the ineffective hearing on 30 November 2018 which were summarily assessed in the sum of £1380.

6 In purported compliance with the Unless Order, by letter dated 7 December 2018, the claimant's representative filed a Schedule of Loss. (It is arguable that the Schedule filed did not comply with the Order: it was not up-to-date; it was the same Schedule that had previously been filed in July 2018.) A further Schedule was however filed by letter dated 15 January 2019. Ms Moss takes no point: and I have approached today's hearing on the basis that the Unless Order has been complied with.

7 By a series of letters dated 4, 7 and 9 December 2018, the claimant's representative provided an explanation for her non-attendance at the hearing. Firstly, she had misread the Notice of Hearing - believing that the commencement time was 1pm rather than 10am. She was travelling from South Wales and claims to have commenced her journey at 9:30am or 10am. (It seems to me that leaving South Wales at that time, Ms Engopondi would have been unlikely to arrive in time even for a 1pm hearing. As it was, her journey was affected by adverse weather conditions: it took her 6 hours to get to the Hearing Centre in Newcastle-under-Lyme, and when she arrived, after 5pm the court building was closed. Ms Engopondi states that during the journey she had no telephone signal and no access to Wi-Fi or data to get a message to the tribunal that she would be late. 30 November 2018 was a Friday, Ms Engopondi returned home that night: but the tribunal heard nothing from her by way of explanation until the morning of Tuesday 4 December 2018. She offered no satisfactory explanation for her failure to send an email to the tribunal or to the respondent over the weekend or to call or email on Monday 3 December 2018.

8 In the same series of letters, the claimant applied, pursuant to Rules 70 - 72 of the Employment Tribunals Rules of Procedure 2013, for the reconsideration of the Deposit Order and the Costs Order.

9 Upon receipt of the Reconsideration Application, I directed that the case be listed for hearing today. In the Notice of Hearing, I directed that, immediately following the Reconsideration Hearing, the tribunal would proceed to a FH and the parties should be prepared to deal with all substantive issues.

10 At the commencement of the hearing today, the claimant's representative asked me to recuse myself on grounds of bias. This application was totally unheralded: no notice had been given either to the tribunal or to the respondent of an intention to make such an application notwithstanding that the basis upon which it was to be made had been known to the claimant since shortly after 30

November 2018. It was necessary to consider the recusal application before proceeding to other aspects of the case.

The History of the Claim

11 The claim form was presented on 28 April 2018: it stated that the claimant had been a *worker* employed by the respondent since 19 April 2017; and that his employment was continuing. It was a claim for holiday pay only; this potentially required a declaration of worker status. The claim form did not include any quantification of the claim.

12 Upon issue, of the claim form the claim was listed for FH on 30 November 2018 at 1pm with a time allocation of 3 hours. With the listing notification, was a Case Management Order requiring the claimant to file and serve a Schedule of Loss by no later than 11 June 2018.

13 The Schedule of Loss was filed with the tribunal on 7 June 2018: it calculated the claimant's losses to 15 June 2018 at £6438.21; the calculation was prepared on the basis of adding 12.07% to the claimant's earnings for hours actually worked: firstly, for the period 27 April 2017 to 26 April 2018 and then for the period 27 April 2018 to 15 June 2018. In addition to this specific sum, the claimant also indicated that he was seeking an unquantified award of compensation for the respondent's refusal to permit him to exercise his rights to annual leave under Regulation 13(1) of the Working Time Regulations 1998 (WTR) - the claim was presumably brought pursuant to Regulation 30(1)(a)(i).

14 The response form was lodged with the tribunal on 11 June 2018 denying the claim in its entirety.

15 On 17 August 2018, the respondent wrote to the tribunal and to the claimant clarifying its position: it was conceded that, at all material times, the claimant was a worker as defined by Section 230(3) of the Employment Rights Act 1998 (ERA); and the respondent had calculated sums due to the claimant for holiday pay for the period to 30 June 2018 in the sum of £5251.52. It was also confirmed that the respondent would make further payments in respect of annual leave taken as it accrued. The respondent specifically denied the claim for compensation for refusal to permit annual leave as indicated in the Schedule of Loss.

16 By letter dated 17 September 2018, the claimant's representative wrote to the tribunal confirming that the claim for refusal to allow leave was withdrawn. In the same letter, the respondent's representative acknowledged payment of the sum of £5251.52 but stated that the respondent had refused dialogue with the claimant and that the claimant did not agree the respondent's method of calculation. The respondent's method of calculation was exactly that contended

for by the claimant in his original Schedule of Loss; and the calculation was set out in a spreadsheet provided to the claimant. Two further payments have since been made to the claimant such that the total amount now paid for annual leave is £6946.67. Bearing in mind that the respondent's approach to the calculation had been exactly that which the claimant contended for it was difficult to understand why it was that the claimant was now asserting that the method of calculation was wrong even more surprising that the claimant did not set out an alternative method.

17 There was considerable correspondence - principally from the respondent addressed to the claimant seeking clarification of the claimant's position and how the case was now put. Much of this correspondence was copied to the tribunal and resulted in an Employment Judge directing that the hearing on 30 November 2018 should be converted to a CPH with a view to clarifying the issues. The time of the hearing was amended from 1pm until 10am. Following further correspondence, Judge Woffenden made the Order referred to in Paragraph 1 above in the hope that the claimant's position would become clear at the Hearing on 30 November 2018.

18 In the absence of the claimant and his representative on 30 November 2018, progress was impossible. Furthermore, it appeared that the claimant was either unable or unwilling to properly particularise his claim following the payments already made by the respondent. It was against this background that the Orders of the 30 November 2018 were made.

19 With her letter of 7 December 2018, in purported compliance with the unless order, the claimant's representative filed a Schedule of Loss as at 30 November 2018. This now calculated the outstanding holiday pay at £3284.14; it maintained the claim for compensation for breach of Regulation 13(1) WTR which had previously been withdrawn; it included a claim for unpaid sick leave of £565.06; and an unquantified sum for unpaid pension contributions. There was no claim before the tribunal for either sick leave or unpaid pension contributions and there had been no application to amend the claim for these to be included.

20 At the hearing today, the claimant's representative produced a further Schedule of Loss; this time calculating the outstanding holiday pay at £2669.18 together with outstanding sick leave of £565 05. The claim for outstanding pension contributions was not pursued and that the claim for breach of Regulation 13(1) WTR was, once again, withdrawn. In this Schedule the claimant also included a claim for interest: calculated in the sum of £451. The total was now £3685.23.

Recusal Application

The Law on Recusal

21 In ***Mulegta Guadie Mengiste Addis Trading Share Company -v- Endowment Fund for the Rehabilitation of Tigray Addis Pharmaceutical Factory Place Mesfin Industrial Engineering Plc*** **[2013] EWCA Civ 1003 (CA)**, the Court of Appeal provided the following guidance - "*Judicial recusal occurs when a judge decides that it is not appropriate for him to hear a case listed to be heard by him. A judge may recuse himself when a party applies to him to do so. A judge must step down in circumstances where there appears to be bias, or, as it is put, "apparent bias". Judicial recusal is not then a matter of discretion. The doctrine of judicial recusal is a subject of wide importance: see Judicial Recusal - Principles, Process and Problems, Grant Hammond J, (Hart) (2009). An independent judiciary is an essential requirement if the rule of law is to be maintained. Courts need to be vigilant not only that the judiciary remains independent but also that it is seen to be independent of any influence that might reasonably be perceived as compromising its ability to judge cases fairly and impartially. Judges who have a financial interest in a case are automatically disqualified. Depending on the circumstances, judges can also be disqualified by other matters, such as an involvement with one of the parties in the past. The ability of the judge to deal with the matter uninfluenced by such matters is not the issue: it is a question that, to maintain society's trust and confidence, justice must not only be done but be seen to be done. Hence it is common ground in this case that a judge should recuse himself from hearing an application if there appears to be bias*".

22 The classical statement of principle is the speech of Lord Hope in ***Porter -v- Magill*** **[2002] AC 3578 (HL)**: the test which a tribunal should consider when an application for recusal is made is "*whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*"

23 Guidance was also given by the Court of Appeal in its judgment on the conjoined appeals in ***Locabail (UK) Limited -v- Bayfield Properties Limited and others*** **[2001] AER 65 (CA)**. That guidance, so far as it relates to apparent bias, includes the following: "*The mere fact that a Judge, earlier in the same case or in a previous case, had commented adversely on a party or a witness, or found the evidence of a party or witness unreliable, would not by itself found a sustainable objection. In contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the Judge and any member of the public involved in the case; or if the Judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or in a case where the credibility of any individual were an issue to be decided by the*

Judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings the Judge had expressed views, possibly during the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind; …"

24 In ***Mulegta Guadie*** a party had brought proceedings in Ethiopia and lost. It then acquired new evidence and brought proceedings in the High Court in England. The defendants applied for stay of those proceedings. It was common ground that the only basis on which that application would fail was a contention by the claimant that it would not have a fair trial in Ethiopia. The stay application was heard by Peter Smith J. The claimant relied on an expert on Ethiopian law known by the alias "Mr Jones". The Judge rejected almost all the evidence of Mr Jones, who he considered had been "destroyed as a witness in cross-examination", though he accepted a small part of it. The stay application succeeded. In his judgment he criticised Mr Jones in strong terms. The defendants made a wasted costs application against the solicitors for the claimant. They applied to the Judge for him to recuse himself. He declined to do so. He went on to make a wasted costs order. The substantive judgment in the Court of Appeal was that of Arden LJ. She noted that in almost every case the Judge who heard a substantive application was the right one to deal with consequential issues as to costs, but there were exceptions, and this case was one. That was for three reasons: (a) the Judge had made criticisms of Mr Jones which went beyond what was necessary for his evaluation of his evidence; (b) he had made criticisms of the solicitors in "absolute terms" which did not leave open the possibility that some explanation might be forthcoming in evidence or submissions from the solicitors; and (c) the criticisms of the solicitors were repeated and augmented by fresh ones.

25 ***Ansar -v- Lloyds TSB Bank Plc*** **[2006] EWCA Civ 1462 (CA)** concerned an application by a claimant in proceedings in the Employment Tribunal to a Regional Chairman (now called Regional Employment Judge) to direct that a particular Chairman (now Employment Judge) should not be further involved in case management of the case because the claimant had made allegations of bias against the Chairman in previous proceedings. The Regional Chairman declined to do so. A directions hearing was listed before the Chairman concerned. The claimant applied to him to recuse himself. He declined to do so. The claimant appealed. The EAT (Burton J, its then President, presiding) rejected the appeal. The Court of Appeal rejected a further appeal. In so doing it approved the judgment of Burton J. Burton J quoted the following passage from the judgment of Chadwick LJ in ***Dobbs v Theodos Bank NB*** **[2005] EWCA Civ 468 (CA)**: "*It is always tempting for a Judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course, because the Judge will know that the*

critic is likely to go away with a sense of grievance if the decision goes against him. .. But it is important for a Judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If Judges were to recuse themselves whenever a litigant … criticised them …. we would soon reach the position in which litigants were able to select Judges to hear their cases, simply by criticising all the Judges they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a Judge felt obliged to recuse himself simply because he had been criticised – whether that criticism was justified or not".

The Basis of the Application

26 The claimant's representative asserted that, in making the Order that I did on the 30 November 2018, I had displayed bias against the claimant. She disputed Judge Woffenden's Order was properly so described - it was merely a letter she claimed. Further, the letter was not addressed to the claimant but to his representative. For an Unless Order, a Deposit Order, and the Costs Order to be made against him in his absence demonstrated no "*fairness or equality*".

Discussion & Conclusions – Recusal Application

27 I confirm that I have no bias against the claimant; and none in favour of the respondent. I have had no prior dealings with either party or with the claimant's representative. Ms Moss has previously appeared before me in her professional capacity, but I have never had any knowledge or contact with her otherwise. I made the Orders that I did on the basis of the papers available to me. The making of the Orders did not involve any adverse findings against the claimant other than his apparent inability to quantify his claim. When the application for reconsideration was received I took steps to ensure that it was listed promptly.

28 Applying the principles set out in ***Porter***, my judgment is that a fair-minded observer properly informed as to the circumstances and knowing of the absence without explanation of either the claimant or his representative, would not have concluded that there was any possibility of bias.

29 Applying the principles to be discerned from ***Ansar*** and ***Dobbs***, my conclusion is that it is my obligation to continue to hear the case notwithstanding that this application, and the manner of its making, cause me considerable discomfort.

30 Accordingly, the application for recusal is refused.

Application for Reconsideration

Deposit Order

The Law - Deposit Orders

31 **The Employment Tribunals Rules of Procedure 2013**
Rule 39: Deposit orders

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

Jansen Van Rensburg -v- Royal Borough of Kingston-upon-Thames
UKEAT 0096/07 (EAT)
Before making a deposit order, the tribunal must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.

32 The position as at 30 November 2018 was that the respondent had made payments of outstanding holiday pay to the claimant using the method of calculation contended for in the claimant's original Schedule of Loss. The claimant had indicated that the payment was not acceptable and that he challenged the method of calculation. Despite many requests from the respondent, the claimant had not provided an alternative method of calculation or provided a figure. The claimant had failed to comply with the Order made by Judge Woffenden and was neither present nor represented at the Hearing without any explanation. My judgement is that, on this basis, I was entitled to conclude that the claimant had little prospect of success in establishing a claim for monies beyond those which had already been paid.

33 In deciding to make a Deposit Order, I took account of what was known of the claimant's ability to pay. Namely, that his earnings for his employment with the respondent were in the region of £40,000 per annum.

34 Of course, in considering the Reconsideration Application it is right that I should take account of evidence and other matters coming to light after the date of the hearing on 30 November 2018. Since that date, the claimant has filed two further Schedules of Loss: contending for different figures for the outstanding holiday pay; neither containing a detailed calculation; one including a claim for compensation in respect of a head of claim previously withdrawn; and both containing claims for compensation for claims which have never been presented to the tribunal (sick leave and pension contributions). On the basis of this, my judgement remains that the claimant has little prospect of success in establishing a claim for any further sums outstanding. Accordingly, Pursuant to Rule 70 of the Employment Tribunals Rules of Procedure 2013, the decision to make a Deposit Order is confirmed.

35 The date for payment of the deposit is now past: but the application for reconsideration was made within time. Accordingly, no sanction can apply to the claimant in respect of the period between the making of the application and its consideration today. It is proper therefore for the Order to be varied as to the date of payment. If it were not that the Substantive Hearing is to proceed today, I would vary the date to allow a further period of seven days for payment of the deposit. In the event, this is unnecessary; the claim is to be disposed of today. Therefore, as a matter of formality only, I vary the time for payment until 4pm today. But, for the reasons stated, no actual payment is expected.

Costs Order

The Law - Costs

36 **The Employment Tribunals Rules of Procedure 2013**

Rule 74: Definitions

(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.

(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—

(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;
(b) is an advocate or solicitor in Scotland; or
(c) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

(3) "Represented by a lay representative" means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings.

Rule 75: Costs orders and preparation time orders

(1) A costs order is an order that a party ("the paying party") make a payment to—

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;
(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or
(c) another party or a 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 the Tribunal.

(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means

time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(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. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

Rule 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; or
(b) any claim or response had no reasonable prospect of success.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall 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.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative,

where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

Rule 77: Procedure

A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

Rule 78: The amount of a costs order

(1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;
(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;
(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;
(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or
(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(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 shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

Rule 84: Ability to pay

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

37 **DECIDED CASES: COSTS**

Beynon & others –v- Scadden & others **[1999] IRLR 700 (EAT)**
Gee –v- Shell UK Ltd. **[2003] IRLR 82 (CA)**
An award of costs in the employment tribunal is the exception rather than the rule. Costs are compensatory not punative.

Salinas –v- Bear Stearns International Holdings Inc. & another
[2005] ICR 1117 (EAT)
The reason why costs orders are not made in the vast majority of employment tribunal cases is that the high hurdle has to be overcome for a costs order to be made has not, in fact, been overcome.

Beynon & others –v- Scadden & others **[1999] IRLR 700 (EAT)**
Monaghan –v- Close Thornton Solicitors **UKEAT/0003/01**
Beat –v- Devon County Council & another **UKEAT/0534/05**
Lewald-Jezierska –v- Solicitors in Law Ltd. & others **UKEAT/0165/06**
The tribunal must not move straight from a finding that conduct was vexatious, abusive, disruptive, unreasonable or misconceived to the making of a costs order without first considering whether it should exercise its discretion, to do so.

Dyer –v- Secretary of State for Employment **UKEAT/0183/83**
Whether conduct is unreasonable is a matter of fact for the tribunal to decide. Unreasonableness has its ordinary meaning.

Kaur –v- John Brierley Ltd. **UKEAT/0783/00**
An award of costs against the claimant was upheld in a case where the claimant had failed, despite several requests, to properly set out her claim. She proceeded with the claim only to withdraw at the commencement of the trial.

Vaughan –v- Lewisham LBC (No 2) **[2013] IRLR 713 (EAT)**
There is no requirement for the receiving party to have written a costs warning letter. It is not wrong in principle for an employment tribunal to make an award of costs against a party which that party is unable to pay immediately in circumstances where the tribunal considers that the party may be able to meet the liability in due course.

Discussion & Conclusions – Costs Order

38 I was satisfied that the claimant's failure to attend the hearing on 30 November 2018 without explanation; his failure to provide an up-to-date schedule of loss and calculation despite requests from the respondent and his failure to comply with Judge Woffenden's Order amounted to unreasonable conduct within the provisions of Rule 76(1)(a). I was further satisfied that the respondent had incurred costs in attending by counsel that day and it appeared likely that such costs would have been incurred unnecessarily because either the claimant would not in fact pursue the claim by complying with my Orders or alternatively he would comply and that would then need to be a further Hearing. In those circumstances, I concluded that it was proper to make a Costs Order in respect of the costs incurred by the respondent for attendance on that day.

39 As to the amount of those costs, I was provided with a Schedule of Costs, and, in my judgement, the costs claimed in the sum of £1380 was manifestly reasonable.

40 As with the Deposit Order, I took account of what I knew of the claimant's ability to pay – namely, his level of earnings from his employment with the respondent.

41 In reconsidering the Costs Order, I have taken account of the information provided to me today; and the explanation for non-attendance. My judgement is that it is unreasonable for the claimant's representative not to have properly read the Notice of Hearing and to have been aware of the appointed time; it also appears that she did not allow sufficient time for her journey; and I do not accept that it was impossible for her to communicate with the tribunal at some point during the journey to advise of her difficulties. Further, the credibility of her account is undermined by her failure to communicate with the tribunal and with the respondent at the earliest opportunity after the appointed time – namely, by email over the weekend; or on Monday 3 December 2018 at the latest.

42 My judgement is that the Costs Order was properly made: upon reconsideration the Order is confirmed.

Substantive Claim

43 Although I had already considered and rejected the recusal application, before embarking on consideration of the substantive claim, I did consider whether it was proper for me to do so having previously made a Deposit Order; and, to that extent, having reached a preliminary conclusion as to the claimant's prospects of success. Under the Employment Tribunals Rules of Procedure 2004, having previously made a Deposit Order, would have been an automatic

bar to my engagement in the substantive consideration of the claim; however, that restriction was removed in the 2013 Rules.

44 I concluded that this was a proper case for me to consider the substantive claim notwithstanding the making of the Deposit Order. This was because of the circumstances in which the Deposit Order was made: namely, the absence of the claimant and his representative at the hearing; their failure to provide up-to-date information; and their failure to comply with Judge Woffenden's order. It is clearly implicit in my Order, that as and when up-to-date information was provided, I could well take a different view as to the strength of the claim.

45 It is on this basis that, when listing the Re-consideration Hearing, I directed the parties to be ready to deal with all substantive issues and there was no objection from either party to that proposed course.

The Claim

46 It is important to note that, in the claim presented on 28 April 2018, the claimant claimed a declaration that he was a worker (and therefore entitled to holiday pay); and he claimed money for unpaid holiday pay for the period from the commencement of his employment with the respondent on 19 April 2017. He is not entitled to claim money (as opposed to leave) for the subsequent incomplete year of his employment (unless his employment is terminated during that year which it has not been). There is no claim in the claim form for unpaid sick pay or pension contributions: absent any application to amend the claim (and there is no such application), such claims which now appear in the claimant's latest Schedule of Loss clearly cannot be considered. Further in the latest Schedule of Loss, for the first time, the claimant includes a claim for interest calculated at £451: there is no jurisdiction for the Employment Tribunal to award interest in such cases.

47 By an open letter to the tribunal and to the claimant, on 17 August 2018, the respondent conceded the claimant's worker status. It has subsequently made payments to reflect unpaid holiday pay during the period from the commencement of employment on 19 April 2017 to the date of that concession. Thereafter the claimant has no entitlement to claim money but simply to take paid leave.

48 In his initial Schedule of Loss dated 11 June 2018, the claimant calculates the amount of holiday pay owing by adding 12.07% to the pay received for hours worked during the year. [***This calculation is derived from the fact that an employee working five days each week for 52 weeks each year has a statutory entitlement to 28 days annual leave; 28 days is 5.6 weeks; this means that the number of weeks in work for such an employee is 46.4***

weeks; 5.6 is 12.07% of 46.4. This method of calculation is advocated on the ACAS website.]

49 In calculating the payments to be made for the period up to the date of the concession, the respondent applied exactly the same method of calculation. It is now apparent that the difference between the sum initially claimed by the claimant and the sum paid by the respondent is accounted for by the fact that the respondent worked with the exact number of hours worked by the claimant - whereas the claimant's calculation was based on an over-estimate.

50 In that initial Schedule of Loss, the claimant also indicated that he was seeking an unquantified award of compensation for the respondent's refusal to permit him to exercise his rights to annual leave under Regulation 13(1) of the Working Time Regulations 1998 (WTR) - the claim was presumably brought pursuant to Regulation 30(1)(a)(i). By a letter dated 17 September 2018 addressed to the tribunal and copied to the respondent the claimant expressly withdrew this claim.

51 The claimant's second Schedule of Loss is dated 30 November 2018 this time the total claim for annual leave is calculated at £7934.60 (notwithstanding that the period for which there was a valid claim had not changed) and giving credit to the sum of £5251.52 already paid there was a balance claimed of £2683.08. The claimant again used the 12.07% calculation set out above. The claimant now added the claims for unpaid sick leave and pension contributions and retained the claim under Regulation 30 - previously withdrawn.

52 The claimant's third Schedule of Loss is dated 16 January 2019: outstanding annual leave is now calculated at £2669.18; the claim for pension contributions appears to have been withdrawn; the claim for sick leave is retained; and there is an interest calculation in the sum of £451. This produces a total claim of £3685.23.

53 There is no coherent calculation of the holiday pay balance claimed at £2669.18. This Schedule maintains for the first time that the claimant is a "*shift worker*" as defined in Section 221(1) of the Employment Rights Act 1996 (ERA). This appears to be an inaccurate legal reference – Section 221 contains no such definition. But the point the claimant sought to make was that his working hours might vary and therefore the calculation of sums due to him during annual leave should be calculated by reference to his average earnings during the period of 12 weeks prior to the leave being taken (Section 224 ERA). No figures were provided in the Schedule for the hours said to be worked during the 12 weeks prior to any period of leave and therefore there was no calculation of what was owing based on such methodology.

54 The claimant's representative sought to rely on the case of ***Brazel -v- The Harpur Trust*** **UKEAT/0102/17 (EAT)**: in that case a part-time Music Teacher working during term time had sought holiday pay calculated based on the methodology of Section 224 ERA; the ET had disallowed this calculation preferring the addition of 12.07% of the sum earned over an entire year; the EAT (HHJ Martyn Barklem) overruled this approach and agreed that the Section 224 calculation was correct. In ***Brazel*** there was a clear advantage to the claimant in applying the Section 224 calculation because her working time was not evenly spread over a 12-month period but was compressed into school term time; whereas her holidays were compressed into school holiday periods. Using the weekly average of earnings over the 12 weeks immediately prior to the commencement of the school holiday produced holiday pay for Mrs Brazel which exceeded 12.07% of the total earned over the year. As previously stated however, the claimant in this case produced no evidence as to what his hours of work or earnings were during any 12-week period preceding any period of leave. Indeed, during the period with which the claim is concerned (April 2017 to April 2018) no specific periods of leave have been identified.

The Evidence

55 The claimant gave evidence on his own account: he had previously prepared a witness statement; he was cross-examined; and I had the opportunity to ask questions. The respondent relied on a witness statement from Mr Matthew Woolrich - HR Manager: Mr Woolrich attended the hearing but was not required to give oral evidence as there was no challenge to the contents of his witness statement. In addition, I was provided with a bundle of documents running to some 186 pages: I have considered those documents in the bundle to which I was referred by the parties during the Hearing.

56 The following evidence emerged during cross-examination the claimant: -

(a) He agreed that his calculations of outstanding holiday pay were based on him working a fixed number of hours each month; but this was not in fact the case. His hours varied: he worked sessions of 3.75 hours and over the period from April 2017 - July 2018 the number of sessions worked in a month ranged from as few as 4 to as high as 14. The spread was reasonably consistent over the year unlike the position of a part-time teacher whose working hours were compressed into school term time.

(b) The claimant conceded that he had no contractual entitlement to sick pay.

(c) The claimant accepted that the calculations prepared on his behalf were fundamentally flawed: they assumed a regular number of hours each week (in one Schedule of Loss this was stated to be 12 hours; in another 11.25 hours); the rate of pay for these regular number of hours had then been multiplied by 52 weeks to give an annual earnings figure; and then the holiday pay claim had been calculated at 12.07% of that figure. Put

another way, this would mean that 5.6 weeks of holiday was to be taken in addition to 52 weeks of work in any year. The claimant stated that his understanding had been that he continued to accrue entitlement to annual leave whilst he was on annual leave.

(d) The claimant was shown a calculation of the monies paid to him by the respondent. He agreed that the calculation was correct.

Discussion & Conclusions

57 It is arguable that the claimant was entitled to have his holiday pay calculated using the methodology at Section 224 ERA: but, he failed to identify any specific periods of leave; and accordingly, he failed to identify any 12 week reference period from which an average should be taken. On this basis his claim could be dismissed for lack of particularity.

58 However, bearing in mind that there was a relatively even spread of his hours over the year, I am satisfied that the methodology employed by the respondent (and until today contended for by the claimant) is satisfactory and is as recommended by ACAS. In the circumstances, on the balance of probabilities, I am satisfied that the sum paid by the respondent extinguishes the claim.

59 I am therefore satisfied that this claim was fully extinguished by the respondent’s letter of 17 August 2018 which openly concedes the claimants worker status and makes the correct payment of the outstanding holiday pay.

60 For these reasons, the claim having been fully extinguished, the claim as now presented to me is dismissed.

Further Application for Costs

61 Following the dismissal of the substantive claim, the respondent made a further application for costs to cover the entirety of the proceedings. There was insufficient time to hear argument from both representatives in respect of the application; and accordingly, that application will be considered at a Costs Hearing before me listed in Birmingham on **11 April 2019** at 9:45am with a time allocation of one day.

62 If, pursuant to Rule 84, the claimant wishes me to consider his ability to pay when deciding whether to make an order for costs and in deciding the amount of any order, he shall provide at the Hearing a detailed statement of his financial position including his household assets and liabilities; income and expenditure.

Employment Judge
5 April 2019