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EMPLOYMENT TRIBUNALS

Claimant: **Mr D Nolan**

Respondent: **Breyer Group plc**

Heard at: **East London Hearing Centre** **On: 1 November 2017**

Before: **Employment Judge Jones (sitting alone)**

Representation

Claimant: Written representations

Respondent: Written representations

JUDGMENT

The judgment of the Employment Tribunal is that the Respondent is to pay the Claimant's costs in the sum of £5,817.

REASONS

1 The Claimant made an application for an Order that the Respondent pays what he referred to in the application as *'additional and unnecessary costs'* incurred in pursuing his remedy in this case. He did so following the judgment that the Respondent had breached Regulation 4(4) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 and had made unlawful deductions from his wages and the remedy judgment promulgated on 15 June after a Remedy Hearing on 9 March. The Claimant's application costs was dated 14 July 2017.

2 The Claimant applied for an Order for costs order under rule 76(1) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 as set out below. The Claimant submitted that the Respondent acted vexatiously, abusively, disruptively, or otherwise unreasonably in the manner in which it defended these proceedings and in particular; the way it dealt with the information the Claimant needed for the remedy part of the Hearing.

3 The Claimant referred to and quoted from the remedy judgement. The Tribunal found that the Respondent had received the correct codes from Kier during the TUPE transfer process on 5 August 2010 but never disclosed them to the Claimant and never paid him in accordance with those codes. This was so even though it is clear that, having had the disclosure, the Respondent would have known what the correct codes were from that date. It was found as a fact that the Claimant continued to be paid incorrectly up to his departure from the Respondent's employment in October 2016.

4 The Claimant submitted that the Respondent should be ordered to pay the costs incurred in attending and preparing for the hearings on 11 July and 23 September 2016 and the final remedy Hearing on 9 March 2017. The hearings on 2016 were both abortive remedy hearings. He contended that costs should be awarded against the Respondent because of its failure or unreasonable conduct in continuing to assert that its codes were correct and failing to provide the Claimant with the necessary information. The Claimant submitted if the Respondent had complied with duty of disclosure or agreed that the codes put forward by the Claimant were the correct ones, the preliminary hearings would not have been necessary or even if they were required, the work to prepare for them would have been significantly less for the Claimant. Also, that had the Respondent agreed that his codes were the correct ones, the matter could have been resolved thereby negating the need for a remedy Hearing.

5 The Respondent opposed the Claimant's application for costs. In its response the Respondent contended that there had been no need for the hearing on 11 July and that it had been adjourned because of the Claimant's failure to serve a schedule of loss and that therefore there should be no award made in respect of the costs of that hearing.

6 The Respondent's case was set out in Mr Jagpal's letters of 1 August and 5 October 2017. In the second letter, he attached some emails that he had previously sent to the Claimant's solicitors. Those were dated 24 May and 13 June 2016. In them he sought to disclose documents to the Claimant which would assist him in providing his schedule of loss. Also in those letters the Respondent did not disagree with the Claimant's case that the calculation of the schedule of loss in this case was difficult and complicated as the amount of compensation due to the Claimant depended on particular jobs he had done over the years together with the actual codes/prices applied to each of those particular jobs. In their response to the application the Respondent stated that it had never concealed any information and that the postponements in July and September 2016 were because of the Claimant's failure to properly prepare.

Law

7 The Claimant's application for costs is made under Rule 76(1)(a) and (b) of the Tribunals Rules of Procedure which states as follows:

> "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 prospects of success; or

(c) n/a"

8 It was the Claimant's contention that rules 76(1)(a) and (b) were engaged.

9 The Tribunal considered the case of *Yerrakalva v Barnsley Metropolitan Borough Counci*l [2012] IRLR 78. In that case Mummery LJ stated that:

> *"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".*

10 The Tribunal was also aware of the case of *Power v Panasonic UK Limited EAT 0439/04* in which Clarke J described the exercise to be undertaken by the Tribunal as a two-stage exercise. First, the Tribunal must answer the question whether the paying party has acted unreasonably, vexatiously, abusively, disruptively, or (as it was an earlier set of rules) brought a claim that was misconceived. If so, the Tribunal should go on to the second part of the test which is to ask itself whether to exercise its discretion by awarding costs against that party. It was also in that case that the EAT made it clear that the principle set out in the case of *Calderbank v Calderbank* has no place in the Employment Tribunal jurisdiction. A Tribunal should not simply award costs because a litigant has failed to beat an offer made between the parties.

11 It is in the second part of the exercise that the Tribunal could consider the paying party's ability to pay and whether that should influence its decision to make an order for costs or how much to order the paying party to pay.

12 The Tribunal is aware that the fundamental principle in the employment tribunal is that costs are the exception rather than the rule and that costs do not follow the event.

13 The question of unreasonable conduct and how it can affect the issue of costs was explored in the cases of *Daleside Nursing Home Ltd v Matthews* UK EAT20519/2008 and *Dunedin Campbell Housing Association Limited v Donaldson* UK EAT0014/09. In those cases the court held that where a litigant had lied that may be taken as unreasonable conduct. Indeed to not to take such a lie as unreasonable conduct may be considered to be perverse on the part of the Tribunal. There is no rule of law that a lie on its own must mean the costs order should be made but it will be taken into consideration as part of the assessment of the case. In the case of *Arrowsmith v Nottingham Trent University* [2011] EWCA Civ. 797 Rimmer LJ held that in such a case:

> *"it will always be necessary for the tribunal to examine the context and to look at the nature, gravity and affect of the lie in determining the unreasonableness of the alleged conduct…. Where, in some cases, a central allegation is found to be a lie, that may support an application for costs, but it does not mean that, on every occasion that a claimant fails to establish a central plank of the claim, an award of costs must follow."*

14 Rule 77 provides that a party may apply for a costs order at any stage up to 28 days after the date on which the judgement finally determining the proceedings were 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.

15 Rule 78 addresses the issue of the amount of costs orders. It states that a costs order may order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of costs of the receiving party. The order can also be for the paying party to pay an amount arrived at after 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. A costs order may also order the paying party to pay the receiving party a specified amount as reimbursement of all part of a tribunal fee paid by the receiving party or in relation to witness expenses. If the paying and receiving parties agree as to the amounts payable then the costs order can also be made in that amount.

16 The Tribunal makes the following findings on this matter.

Findings of fact

17 In December 2015 the Claimant complained that the Respondent had breached Regulation 4(2) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and that he had suffered unlawful deductions of wages. He complained that the Respondent had failed to pay him the amounts that he had been paid under his contract with Kier's which was also subject to an annual increase of 3% on the codes cited in the National Schedule of Rates. The Respondent defended the matter which was set down for a full hearing on 20 and 21 April 2016.

18 In its Response to the claim, the Respondent's case was that it had not received any information from Kier about the SOR codes which the Claimant referred to, but that as far as it was concerned the Claimant was contractually entitled to be paid at the rate of £370.80 per week. In contradiction of that position, Mr Prouten's live evidence in the Hearing was that the Claimant and his colleagues had been on version 5 of the SOR codes when they transferred under TUPE from Kier. However, on the second day of the Hearing, during Mr Watt's evidence (the Respondent's witness) about the grievance appeal that he conducted, he confirmed that Kier had provided the Respondent with the applicable codes to the Claimant's work and that they were a set of bespoke version 6 SOR codes. Kier had sent the codes over to the Respondent as an attachment to an email dated 5 August 2010 as part of its due diligence disclosure in the TUPE transfer process. It had never been the Respondent's case that the TUPE Regulations did not apply or that there had been an economic, technical, or organisational reason entailing changes in the workforce or that the terms of the

contract permitted it to make such a variation. The Respondent's case has simply been that the Claimant has been better off under the way in which they decided to pay him as opposed to paying him in accordance with contract. In its ET3 it stated that the Kier SOR codes were impractical. It also confirmed that the Respondent had not paid the Claimant for toolbox talks, training or abortive calls.

19 Mr Watts had the email and a set of codes sent over to the Tribunal and the Claimant's Counsel on the second day of the Hearing during his evidence. It was the Respondent's case that those codes had been attached to the email. The Claimant contended that the codes were not the ones that had been applied to his contract while he was employed by Kier.

20 The Claimant's live evidence in the liability Hearing was that the codes in the bundle from page 170 onwards had been given to him by the manager at Kier and were the relevant SOR codes, version 6, with yearly 3% increases added on. It was his case that those codes should be applied to his work. This was disputed by the Respondent. It was his case that he had sent them to the Respondent in 2013.

21 Even though the Respondent now says that it had always been candid about the email of 5 August 2010, it is noted that it was not referred to in the Response to the claim. The Response stated that it had not been possible for the Respondent to continue to operate the Kier SOR codes and that instead, the Claimant was paid an average salary as he declined to sign up to the Respondent's terms and conditions.

22 The Respondent had the codes from the date of the transfer but the Claimant was not paid according to them. Although Mr Watts discovered the email and codes at the time of the grievance appeal they were not given to the Claimant and he was not informed that the Respondent now had that information.. Having found that information, the Respondent did not start to pay the Claimant in accordance with the correct codes at that time.

23 Instead the Respondent responded to his grievance by offering him new terms and conditions which he considered to be less favourable than his Kier terms and conditions and he therefore refused to accept them. The Respondent did allow him to submit claims using a different set of codes. It then deducted 40% from the money due to him. It was never the Respondent's case that this was in accordance with his Kier contract which meant that it was in breach of the TUPE Regulations. In the liability Hearing, the Respondent's case was that the Claimant had accepted new terms and conditions and had, in effect, given up his Kier terms. There was no evidence that he had done this. The Claimant had always protested and insisted on his Kier terms. This was evidenced by the number of meetings he had with management, his grievance, his appeal and his decision to bring this claim to the employment tribunal while he was still employed by the Respondent. This is detailed in the judgment on the liability Hearing.

24 Although the Respondent was sent the applicable codes by Kier in August 2010 this had not been disclosed to the Claimant or to the Tribunal until the second day of the hearing in April 2016. The Claimant had been complaining about this internally since 2010. In addition to attaching the relevant codes, the email from Kier informed the Respondent the Claimant was entitled to a minimum bonus pay value for any single

order at a rate of £11.49, that he would be paid if he had an abortive visit on a prearranged call and that if while on a specific job and the material costs in excess of the bonus paid, the operative (i.e. the Claimant) would be paid the actual material costs plus £14 per hour of their time. The Claimant's contract with Kier provided for the Claimant to be paid a set amount for his attendance at toolbox talks and training. Although he was TUPE transferred to the Respondent, it failed to comply with any of these terms of his contract and the Tribunal found that he was never paid in accordance with those.

25 On 21 April, this Employment Tribunal gave judgment that the Respondent had made unauthorised deductions from the Claimant's wages and had breached the TUPE Regulations. The Tribunal ordered the clauses of the Claimant's contract to be restored to that of his Kier's contract and that there should be a remedy hearing listed for 11 July.

26 Following the liability Hearing in April the Tribunal in its written judgment ordered the Respondent at paragraph 59 to pay the Claimant in accordance with the bespoke Kier SOR codes that were sent to them in August 2010. Also, the Respondent was ordered to pay the Claimant in accordance with the custom and practice document also signed in August 2010 and included in the document provided to the Claimant and also provide to the Respondent on the Claimant's transfer. The Respondent was ordered to restore the terms of the Claimant's contract to that which he had with Kier prior to the transfer.

27 At paragraph 60, the Respondent was ordered to cooperate with the Claimant's solicitors to provide evidence of the jobs the Claimant did from 2010 to enable him to prepare his schedule of loss. The Claimant was still seeking information from the Respondent some months later, as is demonstrated by the copies of emails sent by Mr Jagpal to the Tribunal in defence of the application for costs. The Respondent did not comply with those orders to immediately change the way it paid the Claimant. Instead, they continued to pay the Claimant in accordance some codes but with a 40% reduction, up until his resignation from the Respondent's employment in October 2016.

28 The Respondent failed to restore the clauses in the Claimant's contract and failed to pay him for toolbox talks, abortive calls or in accordance with the correct codes up the date that the Claimant left his employment with the Respondent and despite the successful liability Hearing in April 2016.

29 In preparing his schedule of loss for the Remedy Hearing, in addition to an agreement on the correct codes to be applied to his work, the Claimant needed information from the Respondent on the number of toolbox talks between the date of his TUPE transfer in 2011 and his claim so that he could calculate the amount he should have been paid for attendances as part of his remedy. He also needed information from the Respondent on the abortive calls and the occasions when he was entitled to be paid material costs. Without that information the Claimant could not have calculated his remedy.

30 In emails sent in May and June 2016 those representing the Respondent did send some information with regard to toolbox talks and training to the Claimant to

assist him in calculating his remedy.

31 On 30 June 2016 the Respondent wrote to the Claimant solicitors and the Tribunal proposing that the remedy hearing set for 11 July be postponed. The Claimant had not yet finalised his Schedule of loss. Mr Jagpal expressed sympathy for the Claimant's solicitors in the process of calculating the Claimant's schedule of loss. He stated that the Respondent did not at this stage criticise the Claimant for the delay and that it appreciated that recalculating his salary over a period of some 4-5 years would be a time-consuming exercise particularly in view of the number of documents that would need to be considered. The Respondent also envisaged that it would be a time-consuming process for it to prepare a counter schedule over the same period. The Claimant opposed this application for postponement but sought the unusual step of requesting that the 1 July be used instead for a case management discussion in relation to a remedies hearing - given the volume of paperwork involved and the difficulty in getting an agreement on the codes that should be applied and in calculating the Claimant's losses.

32 The main question in preparation for the remedy Hearing was which set of codes were the ones that had been used to pay the Claimant when he was employed by Kier. Was it the ones that the Claimant put in the original bundle of documents, was it the set the Respondent sent to the Claimant and the Tribunal on the second day of the liability Hearing or was it something else. During the course of this litigation, the Respondent has produced three different documents which it stated was the document that had been attached to the email sent to it by Kier in August 2010. That was discussed in the paragraphs 11 and 29 of the Remedy judgment and reasons document. The Tribunal has no confidence that the Respondent has been transparent in this regard.

33 A set of codes were forwarded by the Respondent to the Tribunal on the second day of the liability Hearing in April 2016. The Respondent's case was that those were the codes that had been sent to it by Kier in August 2010. Between the liability Hearing and the first listed remedy hearing on 11 July, Mr Prouten sent an email to the Claimant with an entirely different set of codes attached which he stated were the correct codes that needed to be applied to the Claimant's work following the Tribunal's judgment. It is likely that this is what prompted the Claimant's solicitors to request that the hearing on 11 July be turned into a case management discussion so that he could seek orders for disclosure in relation to the codes. Orders were made and subsequently, the Tribunal made an order to assist the Claimant to try to obtain information from Kier to assist.

34 At the remedy hearing on 9 March 2017, the Respondent produced in their bundle of documents, a totally different document which they stated was the correct document setting out the codes that should be applied to the Claimant's contract and to calculate his remedy. The Tribunal found this to be the Respondent's attempt to mislead the Tribunal and the Claimant. The Respondent's evidence has been unreliable in relation to the identity of the actual document sent to it by Kier and attached to the email of 5 August 2010.

35 By contrast, the Claimant has consistently relied on the documents that were produced from page 170 of the original bundle of documents as being the codes that

applied to his work and which he stated in evidence had been given to him by manager before he left. The Respondent disputed that those were the applicable codes and because of that dispute, there were two abortive remedy hearings to try and independently ascertain what the applicable codes were. Unfortunately, the enquiries of Kier, revealed that they no longer had the codes available. They provided payslips which were of limited assistance to the Tribunal.

36 The Respondent appeared to also attempt to mislead the Tribunal in respect of the Claimant's claim for payment for toolbox talks and training in accordance with the express term in his Kier contract. Having clearly stated at the liability Hearing that the Respondent does not pay for toolbox talks and training, Mr Prouten gave different evidence at the remedy Hearing. He stated that the Respondent had already paid the Claimant for toolbox talks and training and that those items did not need to be included in his remedy.

37 The Tribunal sought to ensure that it calculated the Claimant's remedy on the correct codes applicable to his contract with Kier which transferred under TUPE to the Respondent.

38 In the end, the Tribunal's judgment was that, in contrast to the Respondent, the Claimant had been consistent in his reliance on the codes that he produced in the bundle of documents for the liability Hearing and that those were most likely to be the correct codes. The Claimant's remedy was calculated in accordance with those codes.

Applying law to facts

39 It is this Tribunal's judgement that the response in this case had no reasonable prospect of success. The Respondent knew, having investigated the Claimant's grievance and found the email of 5 August 2010 and the documents attached; (if it had not already been aware), that the Claimant was not being paid in accordance with the terms of his contract that had been in operation when he was employed by Kier and which should still apply following his transfer to its employment. This was well before the Claimant issued his claim in the employment tribunal.

40 The Respondent's defence was never that the TUPE Regulations did not apply. It was not the Respondent's defence that it had a valid reason for not complying with the terms and conditions of the Claimant's contract with Kier. Also, it was never the Respondent's case that it had paid the Claimant for training days, toolbox talks or aborted calls; in accordance with his contract. As such, the Respondent did not have any reasonable prospect of succeeding in its defence to this claim.

41 In addition, the Respondent has relied on three versions of a document in its defence of the amounts the Claimant sought as his remedy. The Claimant and the Tribunal had to seek disclosure from Kier, which was not forthcoming because of the time that has elapsed since the Claimant left Kier. All of this could be avoided if the Respondent had paid the Claimant in accordance with the original documentation, either when he transferred in August 2010 or when Mr Watts discovered the attachment to the email when he was considering the Claimant's grievance or in response to the liability judgment in April 2016.

42 In relation to the Respondent's position that it is the Claimant's fault that the remedy hearing did not go ahead on 11 July or 23 September, it is this Tribunal's judgement that those dates were not effective because although the Respondent did provide some information by email to the Claimant, it failed to disclose the codes that it had received from Kier or because having done so in April 2016 at the liability Hearing, it sought to obfuscate matters by producing another set of codes in June 2016. Another set was produced in March 2017 at the effective remedy Hearing. It was because of the lack of transparency from the Respondent that the Tribunal authorised the Claimant to seek detailed information from Kier to assist in calculating the remedy due to the Claimant.

43 Because of the lack of transparency on the part of the Respondent and the difficulty in obtaining information it was not unreasonable of the Claimant to ask the Tribunal to conduct a preliminary hearing on 11 July to make directions for the collation of evidence in this case. It is likely that the request for the hearing to be turned into a preliminary hearing came after Mr Prouten sent the Claimant the second, different sent of codes. The discussion at that preliminary hearing was helpful in clarifying further issues between the parties and working out what was required.

44 Addressing the four points of reference which make up the Claimant's application for costs, it is this Tribunal's judgment that the additional costs incurred in correspondence with the Respondent in relation to the relevant codes, the application for specific disclosure against Kier and attendance at the hearings in July and September would on balance not have been required had the Respondent produced the correct codes in April or at some point before the original listing of the remedy Hearing on 11 July 2016. The Respondent conducted its case unreasonably in failing to do so. The Respondent could have agreed that the codes produced by the Claimant in the beginning of these proceedings and which had been emailed by the Claimant to the Respondent before the Claim was issued, were in fact the correct ones. Had the Respondent agreed that it had not paid the Claimant in accordance with his contract as far as the toolbox talks, training and aborted calls were concerned, then those figures could have been agreed. As those were still in dispute, the Claimant then had to request disclosure from the Respondent in relation to the amount of money owed to him under those headings. The Respondent's counter schedule was unhelpful and misleading and did not assist the Tribunal because it had attempted to show that the Claimant had been paid for toolbox talks, training and aborted calls when it had always been the Respondent's case in this litigation that it does not pay for those items.

45 Taking into account the principle discussed in the case of *Daleside Nursing Home* set out above, it is this Tribunal's judgement that the Respondent conducted its defence of the remedy claim in an unreasonable manner. It has attempted to obfuscate matters by producing 3 different versions of the applicable codes and by claiming that it had paid for matters that had stated earlier in the litigation that it did not pay. It is this Tribunal's judgment that the Respondent should pay the Claimant's additional costs incurred in seeking his remedy. The Claimant has not sought all his costs but only those incurred because of the lack of transparency and the obfuscation by the Respondent.

46 Therefore in accordance with the case of *Power v Panasonic UK Ltd*, in relation

to the first part of the exercise, the Tribunal finds that the Respondent has acted unreasonably in its defence of the Claimant's remedy claim.

47 The Tribunal now turns its attention to the second part of the test in which it has to ask itself whether it is appropriate to exercise its discretion by awarding costs against the Respondent.

48 The Respondent is a public limited company. The Respondent has not sought to make a case that it would be financially difficult for it to comply with an order for costs in this case.

49 The Claimant is seeking an order for costs in total of £5,817. That is made up by the Claimant's solicitor's time in applying for an order for specific disclosure, instructing Counsel and for the remedy hearing. In addition, costs have been claimed in relation to attendances on Counsel in conference and Counsel's attendances at the hearings in July and September 2016 as well as 9 March 2017. The Claimant is only claiming the cost in relation to the remedy. The Claimant's costs schedule does not include any costs in relation to the liability hearing in April in which Miss Millen, his counsel, also attended. The solicitor's costs claimed are unlikely to be all costs the Claimant incurred in preparing for the remedy hearing.

50 It is this Tribunal's judgement that the costs claimed have been incurred reasonably and that the amounts quoted are also reasonable, appropriate and proportionate in the circumstances. This was a complicated matter and the Claimant needed assistance from solicitor and from experienced counsel to present his case and to pursue his remedy. The Claimant's case was not simply that he had not been paid his wages. His remedy needed to be calculated specifically in relation to codes for each particular job, as well as the amounts due to him for toolbox training and abortive jobs. Because the added complication that the Respondent defended the remedy claim by trying to confuse the Claimant and the Tribunal over which codes were applicable by producing three sets of codes over the course of the litigation, by changing its position on the payments due to the Claimant for toolbox talks and other training and other matters; the Claimant had to incur additional costs in pursuing his remedy and attending/preparing for additional hearings necessary to do so. For those reasons it was appropriate to have experienced counsel and solicitor acting for him in that regard.

51 In the circumstances the Tribunal's judgment is to award the Claimant's costs in full of £5,817. This is a total of solicitor's costs of £2,667 and counsel's fees which came to a total of £3,150.

52 The Respondent is ordered to pay the Claimant that sum forthwith.

53 The Claimant has also applied for the Respondent to refund the Issue fee and the Hearing fee which came to a total of £390. Following the judgment in the Supreme Court in the case of *R (on the application of UNISON) v Lord Chancellor* 2017 UKSC 51 it is appropriate for the Claimant to seek reimbursement of those fees from Her Majesty's Courts and Tribunals Service (HMCTS) and the Tribunal office will be able to clarify how to make such a claim, if such clarification is required.

54 The tribunal orders the Respondent to pay the Claimant's costs in the sum of £5,817.

Employment Judge Jones

29 November 2017