THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		***Respondent***
Mr J Marrin	**AND**	Witton Castle Country Park Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: Middlesbrough **On: 30 August 2018**

Before: Employment Judge Morris (sitting alone)

Appearances

For the Claimant: In person
For the Respondent: Mr G Bealey, Consultant

RESERVED JUDGMENT ON COSTS

Employment Tribunals Rules of Procedure 2013 ("the Rules")

The judgment of the Employment Tribunal is as follows:

1 The respondent's application under Rule 76(1) of the Rules that a preparation time order be made in its favour against the claimant in respect of preparation time for the substantive hearing of the claimant's claims is granted to the limited extent more fully explained in the Reasons below.

2 The claimant is ordered to pay to the respondent the sum of £600 in 12 monthly instalments of £50.

3 The respondent's application under Rule 76(1) of the Rules that a preparation time order be made in its favour against the claimant in respect of preparation time for this costs hearing is dismissed.

4 The claimant's application under Rule 76(1) of the Rules that a preparation time order be made against the respondent in his favour in respect of preparation time for this costs hearing is dismissed.

5 The application of Mr Thomas Hague that an order be made under Rule 76(5) of the Rules that the claimant should reimburse him his costs of travelling 110 miles to and from the substantive Tribunal hearing is dismissed.

REASONS

Representation and evidence

1 The claimant appeared in person. The respondent was represented by Mr G Bealey, consultant.

2 Neither party gave or called witnesses to give evidence to the Tribunal and relied instead upon submissions.

3 The Tribunal had before it a number of documents in bundles produced by the parties and reference was also made to the bundles that had been before the substantive hearing in February 2018. In pursuit of some clarity in these Reasons, except where otherwise stated, the numbers of documents contained within the bundle prepared on behalf of the respondent will be prefaced with the letter "R" while documents contained within the bundle prepared by the claimant relating general matters will be prefaced with the letter "C". The claimant also submitted a bundle of documents relating to his ability to pay but as, unhelpfully, they are not numbered it is not possible conveniently to cross refer to them in these Reasons.

Context

4 By email dated 3 April 2018 (R1) the respondent applied for a preparation time order in accordance with Rules 75 and 76 of the Rules. The bases of the application were that the claimant had "acted vexatiously and unreasonably in the bringing of the proceedings and in the way that the proceedings were conducted and that the claim had no reasonable prospect of success". It was confirmed in the application and at the hearing that the respondent was not legally represented in this matter.

5 By email dated 9 April 2018 the claimant objected to the respondent's application, in particular he had not acted vexatiously or unreasonably and believed that his claim did have reasonable prospects of success. Reasons given include that the respondent had put forward some arguments that he believed to be totally untrue, others could not have been reasonably foreseen by him and others were based upon the Tribunal's judgement, which could not have been determined before the outcome of the substantive hearing.

6 Additionally, by email from the claimant to the respondent dated 10 August 2018 he had advised that he would be applying at the costs hearing for the following:

- a preparation time costs order;
- costs regarding time spent and travel costs incurred for the hearing as well as accommodation in Middlesbrough;
- a wasted costs order, unless it falls under preparation time, on the basis of the representative's conduct, which had "led to increased time spent and costs incurred in preparation for the original Hearing, which would not have been incurred otherwise".

7 A separate issue is that by email of 28 March 2018 Mr Thomas Hague, who had attended the substantive hearing as a consequence of a witness order obtained by the claim, applied that an order be made by the Tribunal that the claimant should reimburse him his costs of travelling 55 miles to and from the Tribunal on each of 19 and 20 February 2018 at 45p per mile at the current Tribunal rates.

8 The claimant responded to Mr Hague's application by email of 28 March 2018 explaining that Mr Hague had attended the Tribunal in a works vehicle and not his personal vehicle and it was therefore not reasonable for him to claim personal expenses. Mr Hague countered that although he had used the company vehicle he had paid for the diesel himself to which the claimant responded that the works vehicle was fuelled using a company fuel card (C207).

The law

9 So far as is relevant to these proceedings, relevant provisions of the Rules provide as follows:

> **When a costs order or a preparation time order may or shall be made**
>
> 76(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.
>
> **The amount of a preparation time order**
>
> 79(1) The Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of—
>
> (a) information provided by the receiving party on time spent falling within rule 75(2) above; and

(b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.

(2) The hourly rate is £33 and increases on 6 April each year by £1.

(3) The amount of a preparation time order shall be the product of the number of hours assessed under paragraph (1) and the rate under paragraph (2).

Ability to pay

84 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.

10 The Rules also make provision whereby a Tribunal may order a party to pay a witness a specified amount in respect of "necessary and reasonable" expenses: Rules 75(1)(c), 76(5) and 78(1)(d). As Mr Hague is no longer pursuing his application in this regard it is unnecessary to set out those provisions in these Reasons.

The submissions

11 As intimated above, the respondent's representative and the claimant both made oral submissions, the former by reference to a skeleton argument. It is not necessary for me to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from the findings and conclusions below. Suffice it to say that I fully considered all the submissions made and the parties can be assured that they were all taken into account in coming to my decision. That said, I set out below the key points made in submissions by the respondent's representative and the claimant.

The respondent's application in respect of the substantive hearing

12 The application addressed separately subsections (a) and (b) of Rule 76(1) set out above: namely that the conduct of the claimant had been vexatious and unreasonable and his claims had never had any reasonable prospect of success. It was accepted that such awards are rare but this is an appropriate case.

Vexatious and unreasonable conduct

13 Points made with regard to this aspect included the following:

13.1 The claimant had insisted that the respondent produce a bundle of some 530 document, when the respondent considered that only about half that number was necessary, and had then provided a further bundle at the substantive hearing itself.

13.2 The claimant had downloaded documents after he had been suspended and had taken without any lawful authority personal data of customers of the

respondent in breach of the Data Protection Act. The claimant's response that he had the documents already on his 'phone and laptop misses the point. He had shown a wanton disregard for people's personal data for which there was no justification and therefore his conduct had been unreasonable

13.3 The claimant must have been involved in putting forward the evidence of two of his witnesses, Gareth Evans and Adam Hague, which was found to be entirely fabricated and had not been mentioned until the exchange of witness statements. The claimant now criticised the contradictory evidence given by Thomas Hague but he was the claimant's witness.

No reasonable prospect of success

14 Points made with regard to this aspect included the following:

The claim for bonus and commission

14.1 This claim could not succeed given the terms of the respondent's scheme (which was operated at the sole discretion of the respondent), of which the claimant was fully aware, including that no payment was to be made after resignation and payments would only be made for fully completed sales in each year of the scheme.

The claim of constructive dismissal

14.2 As to this claim, the respondent was going about its business entirely lawfully investigating a potential fraudulent claim for bonus and commission by one of its employees (the claimant) and potentially bullying of an employee by a manager (the claimant), both of which the claimant had brought to its attention. The process had been conducted entirely properly and the Tribunal had found that the decision to suspend the claimant was because his continuing presence at work might influence the recovery of documents and he might speak to customers.

14.3 The claimant had said that his suspension on 4 January was the last straw but he had accepted that it was entirely reasonable for the respondent to investigate both of the above issues and the Tribunal had found that the decision to suspend could not amount to a final straw. The claimant was fully aware of why he was suspended yet he ploughed on with an unwinnable claim just to inconvenience the respondent at considerable cost

14.4 There was nothing in the respondent's behaviour which could even come close to giving the claimant reason to resign.

14.5 Although the claimant had said that he was not re-fighting his claim he was doing the opposite and failed to understand that his claim had been rejected. Even if the claimant had a genuine belief as to his prospects of success when he submitted his claim it became very clear at the response stage that he would not succeed yet he had continued to pursue his claims, which was unreasonable.

15 More generally, a costs warning had been sent to the claimant on 17 January 2018, after the exchange of witness statements, advising him to seek legal advice. His only response was to issue the respondent with a similarly worded costs warning and he continued to pursue his claim. The claimant had deliberately used the Tribunal process as a way of getting back at the respondent causing it significant inconvenience and costs. Also, a further costs warning in respect of the preparation for the costs hearing and that hearing itself had been sent to the claimant on 6 June 2018.

16 The claimant had responded that it had taken a hearing to find out that he was wrong but that was not the case. In any course of events it becomes clear: the ET3, the bundle of documents and then the exchange of witness statements. A reasonable thinking man such as the claimant must consider the possibility that he does not have a claim. Further, when he gets a costs warning advising that he should take advice even a stupid man would think. He had said that he could not afford the solicitor's fees but he has a responsibility to take advice before a claim and there are endless sources of free advice available.

17 it was accepted that the claimant was a litigant in person but before embarking on a five-day hearing involving complex litigation a reasonable person would get advice unless he was trying to cause as much pain, disruption and expense as possible. It was not because he had a claim but because he had a chip on his shoulder.

Calculation

18 The preparation time spent on behalf of the respondent (and therefore excluding the time spent at the full merits hearing and this costs hearing) totalled 131 hours which, at the hourly rate of £37, produced a total of £4,847. The respondent sought an order for that amount. If, however, the Tribunal was unwilling to make an order for that full amount, the preparation time spent on behalf of the respondent from the costs warning on 17 January 2018 to the date of the merits hearing was 51 hours producing a figure of £1,887 and the time spent from the costs warning on 6 June 2018 to the date of the costs hearing was 6 hours producing a figure of £222.

Ability to pay

19 The claimant was able to pay the costs application. In this respect reliance was placed upon recruitment literature relating to where the claimant was now employed (R 23 to 28) and, more specifically, upon his payslips (R 29 to 35), which revealed that he had earned £18,114 (net) in the six months from July to December 2017 demonstrating an annual net income of £36,228. The claimant had a well-paid job though his fortunes might ebb and flow. The respondent will accept payment by instalments over a period of one year.

The claimant's response

Vexatious and unreasonable conduct

20 The claimant answered that he had not been unreasonable. The respondent had made no attempt to resolve the dispute informally earlier. Further, the respondent had been unwilling to engage with him with regard to the production of the bundle of documents, which had been changed around and removed, and had not responded to

emails: reliance being placed upon numerous documents in the claimant's bundle, which he worked through in considerable detail. The unprofessional treatment he received from the respondent's representative had led to him raising the matter of the bundle with the Tribunal, which had resulted in the Private Preliminary Hearing by telephone on 26 January 2018.

21 The bundle could have been smaller but that was impossible to achieve without communication. It contained documents that he expected to need in order to address the allegations the respondent had made against him and establish his claims for commission and bonus.

22 He had not downloaded anything after he was suspended (he already had documents on his 'phone and computer) and if he had been in breach of the Data Protection Act so had the respondent in sending him unredacted personal information of its customers.

23 The respondent's claim that Mr Evans and Mr Hague had fabricated their evidence was without foundation and unbelievable. Both stand by their evidence.

No reasonable prospect of success

24 The claimant disputed that his claim did not have reasonable prospects of success. At no time had he falsified records and he expected to show that the respondent had suspended him unfairly. He accepted that he had agreed that a reasonable employer could have done what the respondent did in suspending him for such allegations but he thought the question he had been asked was hypothetical. Further the act of suspending him was entirely out of the normal behaviours of the respondent. He did not think the respondent was at all reasonable but did not put that across very well. Further, four of the allegations were fictional. He did not make clear in the Tribunal that this was the case but he had expected the respondent to have to investigate despite his resignation, especially as he had been told it would.

25 The final straw was when he had been suspended because of the way he was being treated.

26 It was completely wrong to claim that he had used the Tribunal process to get back at the respondent as he had worked there for eight years. The respondent had relied upon a badly worded email that he had sent and the Tribunal had determined that that was enough in the eyes of the law to justify suspension, the emphasis appearing to be on the word "could". The claimant could not possibly have known that as a litigant person. While the Tribunal determined that he had not been constructively dismissed he did not see any grounds to suggest that he had been unreasonable in any way in any of his actions.

27 If the respondent genuinely thought that his claim had no reasonable prospects of success it could have asked for a deposit order. Instead it had awaited the outcome and the costs application was opportunistic.

28 The respondent's representative had said that his claim for a bonus payment could not succeed on any reading of the contract but correspondence from Mr Paul Allison (page 553 of the claimant supplementary bundle at the substantive hearing)

demonstrated that payments were made outside the contract and that page had been removed from what was intended to be the agreed bundle. Mr Evans was paid more than two months after he had resigned and this was still normal practice eight months after the claimant had left. He fully expected that the respondent would go beyond the contract. He did not know of any scenario where it had ever been applied. That page 553 also demonstrated that after Mr Evans had left the respondent's employment someone had worked on his behalf to get the paperwork so that he could be paid. This was the norm but the respondent chose not to do so for him for whatever reason. Similarly, in Mr Allison's letter to the claimant dated 30 January 2017 (C355) he had stated, "Once we receive all the necessary paperwork in respect of these deals we will pay the commission owed". The claimant had thought that this would override the strict wording of the respondent's scheme. He may not have brought it up at the substantive hearing but he had been exhausted. He had then been told that "issues" had arisen (C369) and had asked for explanations but nothing had been forthcoming. On the basis that he had been told that he would be paid and Mr Evans had been paid he thought that he would receive his payments and, when he did not, that his claim to the Tribunal was justified. The contract was at odds with what was going on in practice. He understood that legally he was not entitled but as a litigant in person he thought that could not be fair. He had enquired about obtaining legal advice but simply did not have the £390 requested by the solicitors to assess his case and advise on the merits and the prospects of success (C204).

29 At the Preliminary Hearing on 26 January 2018 it is recorded that the respondent's representative had "conceded this morning that the matters for which the claimant was suspended would not have led to his dismissal in any event and that is not an argument which the respondent will now pursue". The respondent had then changed its position to suit, which was not the action of someone who thinks there is no reasonable prospect of success.

30 The decision at the substantive hearing had been that many companies might have behaved differently but that the respondent did not have to. The claimant accepted that that is the law but it took a hearing to sort it out. If there had been no reasonable prospect of success his claim could have been thrown out at the Preliminary Hearing.

Ability to pay

31 As to his ability to pay the amount of any preparation time order the claimant submitted a bundle of documents (referred to above) including copies of his credit card and bank statements (the latter for the last six months); documents relating to his outstanding student loan; a P60 End of Year Certificate to 5 April 2018 showing total earnings for the year of £32,983.85; 7 payslips issued by Verdant Leisure 2 Limited dated 25 January to 26 July 2018 showing net earnings totalling £19,442.76.

32 Referring to the above documents, the claimant explained that on 19 January 2017 he had had to charge £10,000 to his Virginmoney credit card and transfer that amount into his bank account to cover his expenditure. He had been unable to repay other than a small part of that loan and by 14 August 2018 his balance stood at £9, 241. His other credit card statements for August 2018 showed a balance of £516.22 being due to HSBC, a balance of £3,470.31 being due to M&S, a balance of £587.34 being due to Halifax and a balance of £1304.31 being due to Tesco. His current account with HSBC showed a negative balance of £1,057.31 as at 24 August 2018 and that he had a

personal loan of £7,043.40. The HSBC current account statement showed income and expenditure.

33 The appellant explained that he had expected to earn more in his new employment but it was a hard climate. In addition to his basic gross pay of some £2,916 a month he had earned only one commission in February, two commissions in March, more in April and May but that had dipped in June before coming up a bit again in July.

34 He further explained that he had commenced studies with the Open University in 2014 and had a year or two to go. He had incurred a debt of £13,000 and understood that he would have to start to repay that soon. He expected that to be 6% of his income over £21,000.

35 As an example of his circumstances, the claimant's car had been off the road in need of repair since February but he could not afford that so had had to borrow his mother's car to travel to the substantive hearing and had similarly done so today.

The claimant's application

36 The claimant explained that the respondent had served him with a costs warning in respect of the costs hearing so he had done the same. He confirmed, therefore, that his application for a preparation time order was in respect of the costs hearing alone. He accepted (as had been submitted on behalf of the respondent) that any such application in respect of the substantive hearing had been made more than 28 days after the promulgation of the judgement and therefore, in accordance with Rule 77 of the Rules, would be significantly out of time. Similarly, he accepted that his application for a wasted costs order had been made out of time and did not seek to pursue it.

37 Thus, the claimant's application was limited to his preparation for the cost hearing in respect of which he submitted a document headed "Timesheet" showing time spent over 12 days from 25 July to 29 August 2018 totalling 45 hours 15 minutes. The claimant was unable to provide details of the work he had undertaken in the time recorded other than to say that it had all been preparation for the costs hearing.

The respondent's response

38 The time spent by the claimant had not been well spent because he had not addressed the issues at the costs hearing but had tried to re-fight the substantive case. The representative stated that the preparation had taken him 6 hours and he could not see how the claimant had expended over 45 hours. An additional point was that the claimant's bundle of documents had not been sent to the respondent before today and it could have been.

Further correspondence

39 On 5 September 2018, and therefore some time after the conclusion of the costs hearing, the claimant wrote to the Employment Tribunal attaching documents that he said further explained his situation, one of which is a HSBC bank statement showing transactions between the end of July and beginning of September 2018. Observations on behalf of the respondent were sought and were submitted by email of 10 September 2018. The claimant and respondent commented further by emails of 15 and 18 September respectively. I have taken this correspondence into account but have not

given a great deal of weight to it given that it arose after the costs hearing but particularly because it adds little to the matters that were fully explored at that hearing.

Consideration

40 The above represents a summary of the submissions relevant to and upon which the I based the Orders that I have made in this case having considered those submissions and the corroborative documentary evidence in the light of the relevant Rules, general law and the case precedents in this area of law.

41 Before dealing with the detail of the respective applications, it is appropriate that I should set out some general consideration at this juncture.

42 First, there are the Rules those relevant being set out above in respect of which I only make two preliminary points. The first is that the grounds upon which a preparation time order can be made are discretionary ("A Tribunal may make a … preparation time order …") albeit that a Tribunal is under a duty to consider making an order when those grounds are made out ("… and shall consider whether to do so …"). Thus there is a two-stage approach: first the Tribunal is to consider whether a party's conduct falls within Rule 76(1); secondly, if so, it must consider whether it is appropriate to exercise its discretion. The second preliminary point is that, in accordance with Rule 84, a person's ability to pay is a consideration in deciding both whether to make a preparation time order and, if so, of what amount.

43 Secondly and importantly, the claimant is and was a litigant in person and it is appropriate that such litigants be judged less harshly in terms of conduct than a litigant who is professionally represented: AQ Limited v Holden [2012] IRLR 648. That is not to say that litigants in person are immune from such orders but proper allowance must be made for their inexperience, lack of objectivity and limited knowledge of the law and practice.

44 The respondent relies upon the claimant's conduct having been vexatious. In Attorney General v Barker [2000] 1 FLR 759 it is said "the hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".

45 The respondent also relies upon the claimant's conduct having been unreasonable in respect of which I have considered and applied the guidance given in Yerrakalva v Barnsley Metropolitan Borough Council [2011] EWCA Civ 1255 in which Mummery LJ said as follows:

> "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".

46 A further general consideration is that the respondent wrote to the claimant on 17 January 2018 making him aware that the respondent considered that his "claim has no reasonable prospect of success, is vexatious, and your conduct of it is unreasonable", and that and order would be sought that he paid the respondent's costs. He was advised to take legal advice on the implication of the warning. A further costs warning letter was sent to the claimant 6 June 2018 in respect of the costs hearing when the claimant was informed that the respondent would be prepared to engage in conciliation and was again advised to take legal advice.

47 Finally, in Yerrakalva the Court of Appeal reiterated that costs in the Employment Tribunal are still the exception rather than the rule. A Tribunal's power to order costs is more sparingly exercised and more circumscribed than in the ordinary Courts.

The respondent's application

48 It is appropriate that I should follow broadly the structure of the respondent's application. I therefore deal first with the assertion that the claimant's conduct was vexatious and unreasonable. I explore the two principal bases of the respondent's application in more detail below but record at this stage a more general finding that for the reasons below I do not accept the submission made on its behalf that the claimant had deliberately used the Tribunal process as a way of getting back at the respondent or that he was trying to cause as much pain, disruption and expense as possible not because he had a claim but because he had a chip on his shoulder. Further, once more for the reasons below, I do not accept that the claimant's conduct comes close to meeting the definition of "vexatious" in Barker.

49 First the respondent cites the issue of the bundle of documents. I am satisfied that central to this aspect of the respondent's application is that the claimant was a litigant in person with no previous experience of being in that position and, as indicated above, probably suffered from a lack of objectivity and limited knowledge, if any, of the practice and procedures of the Tribunal in these respects. It is apparent from the voluminous correspondence between the parties relating to the preparation of the bundle that the claimant did seek to liaise with the respondent's representative to produce an agreed bundle and did not consider that he received the cooperation to that end that he expected. This led to the Preliminary Hearing on 26 January 2018 when the Employment Judge notes that he, "reminded the parties of their obligation to cooperate with each other in preparing this matter efficiently for the final hearing". I do not suggest that the respondent's representative behaved unprofessionally but in his dealings with the claimant he does not appear to have made allowances as might have been reasonable when dealing with a litigant in person. Had he adopted a less formal approach that might have avoided, first, the unwieldy joint bundle and, secondly, the claimant having to produce a supplementary bundle of his own to which reference was required during the substantive hearing. In the circumstances I do not consider that the claimant "acted vexatiously, abusively, disruptively or otherwise unreasonably" in respect of the production of the bundle.

50 Next, the respondent asserts that the claimant acted unreasonably, "in that he must have been involved in putting forward the evidence of two of his witnesses which was found to be entirely fabricated". I made no finding that the evidence of the two witnesses referred to, Mr Evans and Mr Adam Hague, was entirely fabricated. It is right that I preferred the evidence of Mr Thomas Hague in these respects and gave reasons

why but that is not the same thing. The fact that evidence of one witness is preferred, on balance of probabilities, to the evidence of another witness does not necessarily mean that the evidence of the second witness has been fabricated. My notes of this part of my Reasons for my judgement that I announced orally is simply that I found it "unlikely" that the conversations reported by Mr Evans and Mr Adam Hague had occurred. In any event, if one or other of these witnesses fabricated his evidence that could have been for a number of reasons and there is no evidence to satisfy me that the claimant was "involved" in that fabrication. Moreover there is abundant authority that false evidence alone will not necessarily be sufficient to found an award of costs: see for example Arrowsmith v Nottingham Trent University [2012] ICR 159. In all the circumstances, I do not consider that in this respect either the claimant "acted vexatiously, abusively, disruptively or otherwise unreasonably".

51 I next turn to the respondent's assertion that the claimant's claims never had any reasonable prospect of success and address first (as does the respondent) the claim for bonus and commission. Key aspects of the respondent's Commission and Bonus Scheme include as follows:

a. it operated for each calendar year;

b. figures are to be calculated by reference to a "completed deal" (which I found applied equally to the payment of bonus and commission), which term is comprehensively defined but, in essence, involves the receipt by the respondent of, first, full payment from the customer and, secondly, all necessary documents;

c. the respondent,

> "reserves the right to withhold payment, reduce or not pay any qualifying commission or bonus payment where: –
>
> 1. Sales force employee has provided notice to terminate or is serving a notice period or on termination of any reason."

52 The claimant's position, however, was that the respondent did not strictly enforce the letter of the Scheme in at least two respects: first, that if one employee had resigned other employees would pursue the collation of necessary documentation so that the former employee would receive payments that he had earned; secondly, that the respondent's practice was to pay bonus and commission that had been earned by a departing employee. In this he is supported by the fact that, first, the respondent did pay a bonus to Mr Evans even after his employment had terminated and, secondly, Mr Paul Allison wrote to him on 30 January 2017 (ie. after he had resigned) confirming payment in the following terms, "Once we receive all necessary paperwork in respect of these deals we will pay the commission owed".

53 In accordance with the Scheme that had been agreed by the claimant, I was satisfied that the respondent was, on the face of it, entitled to withhold payment to the claimant as the payments would have fallen due after he had given notice to terminate his employment. In delivering my Reasons for my judgement I explained that I had used the phrase "on the face of it" as it is well-established that in the exercise of such discretionary powers an employer must act in good faith and rationally, and not

perversely or irrationally: see, for example, Clark v Nomura International plc [2000] IRLR 766, Horkulak v Cantor Fitzgerald International [2005] ICR 402, CA and Keen v Commerzbank AG [2007] ICR 623, CA and that this was of some relevance in this case as the respondent had paid Mr Evans his bonus that fell due after he had left his employment. The issue therefore became whether, in not paying the claimant in the way it had paid Mr Evans, the respondent was perverse or irrational. During the substantive hearing I had pressed Mr Paul Allison on this point and was satisfied with his answers that the respondent elected to exercise its powers to withhold bonus from the claimant for good reason and not irrationally. I thus found that the respondent was entitled to withhold the commission of £5,000 from the claimant in accordance with the rules of its Scheme.

54 Notwithstanding that my ultimate findings included that each of the commissions claimed by the claimant related to deals that had not been "completed" prior to him giving notice of the termination of his employment and that the respondent had not acted perversely or irrationally in withholding the bonus payment from him, that was at the conclusion of the hearing where the respondent's evidence had been tested, including by my questioning of Mr Allison. In all the circumstances and especially given the claimant's knowledge of the practice of the respondent in these regards, which departed from the letter of the Scheme, and the letter from Mr Allison referred to above I do not consider that at any stage earlier than the conclusion of the substantive hearing when I made my findings it could be said that the claimant's monetary claim "had no reasonable prospect of success".

55 There remains the constructive dismissal claim. I explained when giving my Reasons for my judgement that the claimant had failed to satisfy me as to each of the matters he relied upon as entitling him to resign. These included that he considered that he had been 'sent to Coventry', had roles taken away from him (for example in respect of the appointment of a sales executive and responsibility for trade sales and 'buy ins') the appointment of the new General Manager and the deletion of his 'live chat' account. Crucially, the claimant had asserted that his suspension constituted the 'last straw' in this case. That being so, the two allegations that had led to the claimant's suspension were pursued with him in cross-examination. First, he agreed that for one employee to arrange a sale and put it into the name of another employee "should not be done" and that it would amount to "deliberate falsification of records", which is given as an example of gross misconduct in the respondent's Employee Handbook. Further, he agreed that if an employer suspected such a transfer of sales, it had a right to investigate such suspicions (albeit suggesting that he would expect the starting point to be a 'phone call). It was then put to the claimant that at the very least his email of 21 December 2016 raised suspicions that something was going on which should not be, and he answered, "Yes, I think it does" adding "I can see why the company would want to investigate".

56 Moving on to the offensive text that the claimant sent to Mr Evans, it was put to the claimant that his telling an employee in his team to "Fuck off home then" was something an employer needs to look into. He agreed and also agreed that it could look to his manager as the claimant's inappropriate management of his staff. Further, he agreed that it could constitute gross misconduct under the respondent's disciplinary procedure, "Using …. offensive language towards …. other employees", and that the respondent had a duty to look into it.

57 As set out above, at the costs hearing, the claimant accepted that a reasonable employer could have done what the respondent did in suspending him for the allegations raised against him but explained that he thought the question he had been asked at the substantive hearing was hypothetical. I do not accept that explanation. I am satisfied that the questions asked by the respondent's representative and the implications of those questions were clear even to a litigant in person. In short, the claimant conceded that the respondent was entitled to investigate each of the allegations. From there it was a small step for me to find, as I did, that it was reasonable for the respondent to suspend the claimant because his presence at work could jeopardise the investigation in two principal ways: first, both allegations involved Mr Evans and the claimant could seek to influence what he had to say; secondly, the investigation would involve looking back through sales documentation and possibly speaking to customers – although that would be a last resort.

58 As I observed when giving my Reasons, it is well established that a course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident, even though the last straw by itself does not amount to a breach of contract – see Lewis v Motorworld Garages Ltd [1986] ICR 157 CA. In Omilaju v Waltham Forest London Borough Council [2005] ICR 481 CA the Court of Appeal explained that the act constituting the last straw does not have to be of the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence: "an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the acts as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective."

59 Given that legal analysis, on the basis of the claimant's evidence, particularly in answering questions as summarised above, I did not find that the respondent's investigation of its concerns and suspending the claimant during the course of that investigation could amount to a final straw in that even though the claimant perhaps genuinely was upset by his suspension, it did not contribute, even slightly, to the breach of the implied term of trust and confidence.

60 In coming to my judgement I applied the guidance drawn from leading case on constructive dismissal Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA that has stood the test of time for some 40 years including that for an employer's conduct to give rise to a constructive dismissal it must involve a repudiatory breach of contract: "conduct which is a significant breach going to the root of the contract of employment; which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract." I remarked that in this case, there were matters that an employer might have handled better but I was not satisfied that any such matters came close to amounting to "a significant breach going to the root of the contract". In making that finding I repeated the point that I had had to make often to the claimant during the course of the substantive hearing that matters arising after or

coming to the knowledge of the claimant after his resignation (the alleged dismissal) cannot be brought into account when considering whether there has been a repudiatory breach and, therefore, a dismissal.

61 Thus I found that the claimant had failed to make out that he had terminated his contract of employment in accordance with section 95(1)(c) of the Employment Rights Act 1996, "in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct", which would have constituted a dismissal; for the reasons explained above, that is particularly so in relation to his reliance upon his suspension as the 'last straw' entitling him to resign.

62 The question now, of course, is whether that finding at the conclusion of a five-day hearing should have been apparent to the claimant before that conclusion such that he could reasonably have seen that his claim, "had no reasonable prospect of success". I have referred above to a "legal analysis", which once more brings into play the fact that the claimant was a litigant in person lacking in knowledge of the law by reference to which he could have undertaken an equivalent analysis. He had, however, received a warning from the respondent that it considered that his claim had no reasonable prospect of success and was advised to take legal advice on the implications of that warning. Indeed he had approached solicitors in London in January 2017 but considered that he could not afford what they regarded as a "nominal charge" of £325 plus VAT to assess his case and obtain advice "on the merits and prospects of success" (C204. Additionally, the claimant could have accessed to sources of advice that are either free or available on a 'no win no fee' basis but he chose not to do so.

63 The claimant's claims involve fairly complex legal issues and, if not at the time that he presented his claim to the Tribunal then certainly after he had received the respondent's formal response and the statements of evidence to be given by its witnesses I consider that it would have been reasonable, especially in light of the costs warning, for him to have sought advice as to his prospects of success whereupon an analysis similar to that that I undertook in coming to my judgement would have been undertaken. Central to any such analysis are the concessions referred to above that the claimant made during cross-examination: first, that at the very least his email of 21 December raised suspicions that something was going on which should not be and warranted investigation and, secondly, that his offensive text message to Mr Evans was something that the respondent had a duty to look into. As explained above, it follows from that that the claimant's assertion that his suspension (that I found was a reasonable act for reasons that the claimant accepts warranted investigation) is unlikely to amount to a 'last straw' upon which the claimant could rely to claim constructive dismissal. I am satisfied that any competent adviser would have advised similarly.

64 In short, I am not satisfied that the claimant can continue to assert that his claim had reasonable prospects of success when that assertion is based upon his assessment as a layman without having sought advice: as was stated in Scott v Inland Revenue Commissioners Development Agency [2004] ICR 1410, the key question in this regard is not whether a party thought he or she was in the right but whether he or she had reasonable grounds for doing so. I consider this question to be particularly apposite in this case.

65 Thus I find that it is made out that the claimant's claim of constructive unfair dismissal had no reasonable prospect of success. That being so, applying the two stage approach referred to above, I have a duty to consider whether to exercise my discretion to make a preparation time order as sought by the respondent.

66 In doing so I bring into account the above considerations including, for example, that the claimant was a litigant in person, that he had received a costs warning and that he made concessions as to the reasonableness of the respondent's conduct which, had he sought advice, is likely to have made it clear to him that he had no reasonable prospect of success in respect of his unfair dismissal claim. I also take his point, however, that the respondent did not apply at an earlier stage for a preliminary hearing to determine the prospects of success of his claim, which might have been struck out or a deposit order made. I accept that the lack of any such application is not decisive but neither is it irrelevant.

67 In deciding whether to make a preparation time order, I have also had regard to the claimant's ability to pay in accordance with Rule 84. I accept the claimant's evidence that, broadly speaking, his salary now is approximately half that which he received from the respondent. I also accept that the transactions shown on his HSBC current account statement show expenditure upon what might be termed mainly standard outgoings such as in respect of utilities, insurances, mortgage and credit card repayments and payments to the appellant's wife and daughter with no obvious extravagances being apparent in either that account or the credit card accounts. That said, the claimant's basic salary is £35,000 per annum plus commission, which is shown upon the payslips he has submitted as ranging from between £1,000 and £2,000 each month. That being so, I am satisfied that the claimant does have the ability to pay something. I return below to the question of quantification.

68 In summary, considering all such matters in the round I have decided to exercise my discretion to make a preparation time order.

The respondent's application in respect of the costs hearing

69 The respondent's application that a preparation time order be made in relation to its preparation time in respect of the costs hearing appears to be based on an apparent misunderstanding referred to by the respondent's representative at the costs hearing that it was the claimant who had "insisted on a hearing". That, however, is not the case. The claimant's response to the respondent's application stated only, "Should the Tribunal deem it necessary to hold costs hearing …". As was explained to the parties in correspondence I did consider it necessary for there to be a hearing for two principal reasons: first, and most importantly, in his written response the claimant had referred several times to matters that indicated the need for evidence to be presented and tested; secondly, the claimant was a litigant person and I had found him better able to express himself orally than in writing.

70 Thus, the costs hearing arose primarily from the respondent's application. It cannot be said, therefore, that the claimant acted unreasonably etc in that respect. As such I do not make a preparation time order in the respondent's favour in respect of its preparation for the costs hearing.

The amount of the order

71 In summary, as explained more fully above and quoting selectively from Rule 76(1), I do not consider that the claimant "acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that proceedings (or part) have been conducted". Neither do I consider that the claimant's claims for bonus or commission "had no reasonable prospect of success". I do consider, however, that the claimant's claim to have been constructively unfairly dismissed "had no reasonable prospect of success".

72 The respondent's representative submitted records of his time recording and explained that from the date of the costs warning on 17 January 2018 to the date of the merits hearing time he had spent in total 51 hours which, at the current hourly rate of £37 produces a figure of £1,887.

73 That preparation time, of course, related to the entirety of the case and it is only the claimant's claim of unfair dismissal that I consider to have had no reasonable prospect of success. In the absence of any evidence as to how much of the preparation time related to that aspect that the claimant's claim a 'broad brush' approach has to be adopted. In light of the time spent on each aspect of his claim at the substantive hearing, I am satisfied that it is reasonable to attribute 60% of that total figure to the preparation in respect of the unfair dismissal aspect: ie. £1,132.

74 In this regard also I consider the claimant's ability to pay in accordance with Rule 84 and repeat the point made above as to the claimant's relatively straightened circumstances compared with when he was employed by the respondent. Nevertheless, the 13 full monthly payslips that were presented at the costs hearing reveal a total net income of some £37,556, which averages at £2,889 per month. Thus, I am satisfied that the claimant is able to pay something.

75 Once more considering everything in the round I am satisfied that it is reasonable to order the claimant to pay to the respondent a total of £600 in 12 monthly instalments of £50; the respondent's representative having stated that it would accept payment by instalments over a period one year. I so order.

The claimant's applications

76 As indicated above, the claimant accepted that any costs application in respect of the substantive hearing had been made more than 28 days after the promulgation of the judgement and therefore, in accordance with Rule 77 of the Rules, was out of time. Similarly, he accepted that his application for a wasted costs order had been made out

of time. He did not seek to pursue either of these applications and confirmed that his application for a preparation time order was in respect of the costs hearing alone.

77 As also indicated above the claimant explained that the respondent had served him with a costs warning in respect of the costs hearing so he had done the same. That 'tit-for-tat' approach appeared to be the sole basis for his application. He did not argue that in respect of the costs hearing the respondent or its representative had "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" as is provided for in the applicable Rule 76(1)(a). Further, although the "Timesheet" submitted by the claimant showed time spent over 12 days from 25 July to 29 August 2018 totalling 45 hours 15 minutes, he was unable to provide details of the work he had undertaken in the time recorded other than to say that it had all been preparation for the costs hearing.

78 Fundamentally, the claimant has failed to satisfy me that in relation to the preparation for the costs hearing, the above requirements of Rule 76(1)(a) are met in this case. As such, I dismiss the claimant's application that I should make a preparation time order against the respondent in his favour.

Mr Hague's application

79 Finally, I address the application of Mr Thomas Hague that an order be made by the Tribunal that the claimant should reimburse him his costs of travelling 110 miles to and from the substantive Tribunal hearing.

80 On 12 June 2018 the claimant wrote to Mr Hague stating, amongst other things, "In the interests of resolving this I am prepared to pay you the increased amount of £25, as a goodwill gesture to draw a line on the matter." On 19 June Mr Hague responded, "… I will accept the below proposal of £25 …" and confirmed by email of 2 July that he had received the claimant's cheque. From that and the fact that Mr Hague did not attend the hearing to pursue his application it can be inferred that that application is withdrawn and I dismiss that application.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 25 SEPTEMBER 2018