EMPLOYMENT TRIBUNALS

Claimant: **Mr. S Lazarou**

Respondent: **Retail Motor Industry Federation**

Heard at: **London Central (via CVP)**

On: **15th November 2021**

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

Representation

Claimant: In person

Respondent: Mr. R Wayman, Counsel

JUDGMENT on remedy and on costs having been sent to the parties on 19th November 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This has been a hearing by video with both parties remote. A face-to-face hearing was not held as it was not practicable in light of public health restrictions. The orders made on remedy and costs are at paragraphs 2 to 5 below.

2. The respondent shall pay to the claimant as compensation for wrongful dismissal the sum of £1,800.94. This is based on one month's loss of net pay.

3. The respondent is ordered to pay to the claimant as compensation for unfair dismissal in the sum of £9,052.80 calculated as follows:

<u>Basic Award</u> £3,150.00

<u>Compensatory Award</u>

Loss of Statutory Rights to long notice £500.00

Loss of earnings from 09.09.19 to 09.12.19 to reflect ***Polkey*** reduction based on 13 weeks loss of earnings at £415.60 net earnings per week

Total: £9,052.80

TOTAL **£10,853.74**

4. Pursuant to Rules 74- 78 and 84 of the Employment Tribunal Rules of Procedure 2013, the claimant is ordered to pay to the respondent a contribution towards the costs of the breach of contract claim in relation to overtime pay summarily assessed in the sum of **£2,742.50**.

5. For the avoidance of doubt, the respondent is ordered to pay to the claimant the net total sum of **£8,111,24** subject to any deduction to be made by the respondent to the Secretary of State for Work and Pensions under **The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 SI 1996/2349**.The claimant was in receipt of Contribution Based Jobseeker's Allowance between 30.08.19 to 20.02.20. No deduction is to be made in respect of the period between 30.08.19 and 09.09.19 as that period relates to the claimant's wrongful dismissal claim.

Liability hearing and application for costs

6. On 12th March 2021, I issued my reserved judgment on liability following a remote hearing which took place by video from 27th to 29th January 2021. At the point when cross-examination ended, the claimant who was a litigant in person had been too unwell to continue the hearing. There was an outstanding application from the respondent for costs in respect of the breach of contract/unlawful deduction from wages claim. This claim was withdrawn in part by the claimant on the first morning of the hearing so far as it related to sick pay, salary increase and unpaid bonus. The remaining elements of this claim which concerned unpaid overtime were struck out on the first day of the final hearing on the ground that it had no reasonable prospect of success pursuant to Rule 37(1)(a). The claimant became unwell on the final day of the hearing and I reserved my decision. I sought written submissions from the parties on the questions of liability and costs only. At that point, and given the state of the claimant's health, I concluded that the question of remedy should it arise could be left to an oral hearing when the matter of costs would be determined. The claimant was also asked to provide information on his means.

7. I found that the respondent had unlawfully wrongfully and unfairly dismissed the claimant. I made a number of adverse findings in my judgement on liability on the claimant's behaviour. As set out below, I have taken those findings into account in deciding the compensation which the respondent should pay the claimant and in particular on the question as to the amount of compensation which it is just and equitable which the respondent should pay to the claimant.

8. The claimant had also brought a claim for breach of contract/unlawful deduction from wages in relation to salary increase, sick pay, bonus and unpaid wages of £31,000. At the start of the hearing on 27th January, the claimant voluntarily withdrew the first three aspects of that claim and they were therefore dismissed on withdrawal. After hearing submissions from the parties, I struck out the claim in so far as it related to unpaid wages under Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 as having no reasonable prospect of success.

Remedy judgment

The issues

9. Before the hearing, I asked HMCTS staff to write to the parties requesting supporting evidence on remedy and indicating that the issues which would be considered at the remedy hearing included:

    a. ***Polkey***. This means that there may have been a chance that the claimant would have been fairly dismissed if a fair dismissal procedure had been followed; and

    b. ***Contributory conduct*** This means did the claimant cause or contribute to his dismissal by blameworthy conduct?

The documents and oral evidence

10. I had the benefit of the claimant's witness statement and documents totalling 63 pages. The claimant gave oral evidence and was cross-examined. The respondent provided witness statements from Mr. Stuart James, director. Mr. James also gave oral evidence and was cross-examined. The claimant had prepared a schedule of loss. The respondent provided a copy of the claimant's payslip for March 2019.

The hearing

11. I explained the Tribunal process and the issues which the Tribunal would consider and invited Counsel for the respondent also to assist the claimant by explaining the legal issues which the Tribunal would consider and how he would approach these. I ensured that there were breaks where possible to enable the claimant to rest and time was allowed for him to prepare his oral submissions in light of the guidance given.

Oral evidence and submissions on remedy

The claimant

12. The claimant acknowledged that his behaviour during the events leading up to his dismissal was relevant to the question of remedy but suggested that his poor behaviour had been triggered by a number of factors. He had been in remission from cancer and was coping with bereavement following the death of his father. Additionally, any volatile behaviour on his part had been caused by the respondent's treatment of him and in particular by its failure to address his grievance and its lack of regard for his health combined with its willingness to use his health issues against him for example apparently discussing his health with his colleagues. He had not been asked for his side of the story by the respondent.

13. His statement further said that he had not been able to obtain work either in his former field of the motor industry nor in the new field of therapy and counselling where he aspired to work having gained relevant qualifications including a Psychology degree. He asserted that he had not relied on state benefits and had instead lived off his savings. He had developed arthritis had had some orthopaedic surgery in September 2020 and awaited further surgery.

14. The claimant's schedule of loss included claims for £500 for loss of statutory rights and £3,020 for salary increases and £879 for bonus due. He claimed future losses for 9.5 months from the hearing date. He said that his employment prospects were poor and exacerbated by the pandemic. He also claimed sums for his company car and pension contributions.

15. During the hearing, the claimant said that his statement was incorrect. He had in fact received Jobseeker's Allowance between 30th August 2019 to 20th February 2020. I found that he did not adequately explain why he had inaccurately stated that he had not relied upon state benefits when he had received benefit for almost six months.

16. On the question of costs, the claimant said that he had not understood that he had brought two separate claims for breach of contract and unfair dismissal. He claimed that Employment Judge Glennie's Case Management Orders dated 5th November 2019 did not refer to a separate claim. He said that he had found the Tribunal process confusing and should not be liable for costs.

The respondent

17. Mr. James' evidence was that the claimant would have been dismissed had it followed a correct procedure. He said that the claimant's poor behaviour and lack of self-control had affected his line manager, Ms Heidi Coward. The evidence of Ms. Coward that she was scared of the claimant and felt physically threatened by him had not been challenged by the claimant at the hearing. Although Mr. James accepted that the respondent should have carried out a more detailed investigation, this would not have changed the outcome. At the hearing, the claimant had displayed aggressive and volatile behaviour and a loss of self-control. In the circumstances, and any further discussion with the claimant would not have made any difference.

18. For the respondent, it was also submitted that it would have faced the risk of a constructive dismissal claim from Ms Coward had it failed to deal with the claimant's behaviour.

19. The respondent disputed that it had any obligation to pay bonuses or to give salary increases. These were a matter of discretion for the respondent. The claimant had requested payment of a bonus and a salary increase during his employment and had those requests turned down. It submitted that while there had not been a complete failure of mitigation by the claimant, there had been some failure to mitigate as there appeared to be gaps in the claimant's job applications.

20. In relation to ***Polkey*** and contributory fault, the respondent submitted that the claimant's continued volatile behaviour made his dismissal inevitable at some point. His employment had been marked by his constant inability to accept any responsibility for his own behaviour and his always attributing blame for workplace disputes to others. This meant, the respondent said, that there should be a 75% to 100% reduction to any award to take account of the claimant's conduct. The respondent accepted that it had failed to interview Ms. Coward during the disciplinary process. Had she been interviewed; however, it was highly improbable that the claimant would have been exonerated of the charges against him. At this point in his employment, the claimant's angry behaviour was escalating and his dismissal was inevitable.

The Law

Basic award

21. The basic award for unfair dismissal is calculated on the basis of a week's pay as set out in Chapter 2 of Part XIV of the ERA 1996.

Compensatory award

22. The compensatory award is according to s.123 of the ERA 1996 "such amount as the tribunal considers just and equitable in the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer)". Accordingly, the purpose of compensation for unfair dismissal is 'is to compensate and compensate fully, but not to award a bonus'; per Sir John Donaldson in ***Norton Tool Co Ltd v.Tewson [1973] WLR 45***. Neither is compensation designed to punish the employer.

Mitigation

23. Tribunals are required to consider in relation to the compensatory award, the extent to which the claimant has mitigated any losses he suffered due to the acts of the respondent. The claimant is expected to take reasonable steps to blunt the effect of any losses suffered as a consequence of his dismissal. The burden for approving failure to mitigate is on the respondent; ***Fife v. Scientific Furnishing Ltd [1989]IRLR 331***. If the claimant has failed to take a reasonable step, the respondent must prove that the claimant acted unreasonably; ***Wright v. Silver Line Care Caledonian Ltd UKEAT/0008/16***. It may be reasonable for the claimant to attempt to minimise loss by retraining; ***Orthet Ltd v. Vince-Cain UKEAT/2004/0801_03_12-8***

Polkey

24. S.98A(2) ERA 1996 requires the Tribunal to consider whether had a fair procedure been adopted, the claimant would have been dismissed in any event. This is necessarily a speculative exercise as acknowledged by Pill LJ in ***Scope v Thornett [2006] EWCA Civ 1600*** at paragraph 36:

> "Any assessment of a future loss, including one that the employment will continue indefinitely, is by way of prediction and inevitably involves a speculative element. Judges and Tribunals are very familiar with making speculations based on the evidence they have heard. The Tribunal's statutory duty may involve making such predictions and tribunals cannot be expected, or even allowed, to opt out of that duty because their task is a difficult one and may involve speculation".

25. In considering ***Scope*** in ***Software 2000 Ltd v Andrews [2007] IRLR 568***, Mr. Justice Elias as he then was said that that case:

> "emphasises that the task is for the Tribunal to identify and consider any evidence which it can with some confidence deploy to predict what would have happened had there been no unfair dismissal. To fail to do this could lead to overcompensating the employee, which would not be a just outcome…
>
> The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed.

26. The principles to be applied can be found in paragraph 54 of ***Software 2000 Ltd v Andrews [2007] IRLR 568.*** In considering ***Polkey***. In summary, having considered the evidence, Tribunals may determine that one of the following four outcomes applies-
    (i) that if a fair procedure had been followed, the employer would have been able to show – the onus being firmly on the employer – that on the balance of probabilities that the dismissal occurred when it did in any event,
    (ii) that there was a chance of dismissal but less than 50% in which case compensation should be reduced accordingly,
    (iii) that employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the ***O'Donoghue*** case; or
    (iv) that employment would have continued indefinitely.

27. In ***O'Donoghue v Redcar and Cleveland BC [2001] IRLR 615***, the Court of Appeal held that a Tribunal was entitled to find on the evidence that an employee unfairly dismissed on by reason of sex discrimination would have been fairly dismissed for misconduct six months later in any event because of her antagonistic and intransigent attitude.

Contributory conduct: basic award

28. The basic award may be reduced where the tribunal "considers that any conduct of the complainant before the dismissal… was such as it would be just and equitable to reduce or reduce further the amount of the award to any extent"; s.122 ERA 1996. Conduct which was

not known to the employer and cannot have caused or contributed to this to the dismissal can still be taken into account in relation to the basic award; ***Parker Foundry Ltd v. Slack [1992] ICR 302.***

29. This entails a three-stage test: first an identification of the conduct, second an assessment of whether the conduct was blameworthy and third, an assessment as to whether it is just and equitable to reduce the basic award. In identifying the conduct and considering whether or not it was blameworthy. ***The focus must be on the conduct and not on the respondent's assessment of it; Singh v. Glass Express Midlands Ltd [2018] UKEAT/0071/18/DM***

Contributory conduct: compensatory award

30. Where the tribunal "finds that the [act] was to any extent caused or contributed to by the action of the complainant, [the tribunal] shall reduce the amount of the compensatory award by such proportion as it considers just and equitable"; s.123(6) ERA 1996. Only events which take place before dismissal can render it just and equitable to reduce the compensatory award; ***Soros v Davison [1994] ICR 590***.

31. The claimant's conduct must be 'culpable or blameworthy'. Case law establishes that conduct must be foolish or perverse or unreasonable in the circumstances; ***Nelson v BBC (No.2) [1980] ICR 110***. Misconduct does not have to rise to the level of gross misconduct for a deduction to be made for contributory fault; ***Jagex v McCambridge [2020] IRLR 432.***

32. In considering whether or not a reduction should be made under s.123(6), the Tribunal must consider

> "the actual conduct of the claimant and whether that conduct, if blameworthy, caused or contributed to the actual dismissal. (S.123(6)) does not direct tribunals to answer the different, counterfactual question of whether the respondent would have dismissed the claimant for that conduct if it had acted properly, reasonably or fairly. "; ***Renewal UK Services Ltd v Payment UKEAT/0109/21/DA***

Conclusions and reasons on remedy

Wrongful dismissal

33. The claimant was entitled to one month's notice under his contract of employment. I ordered that the respondent should therefore pay the claimant the sum of £*1,800.94* net pay. Given the shortness of this period, the question of mitigation did not arise. The effect was that the compensatory award does not begin until 9th September 2019.

Unfair dismissal

34. I first dealt with the claimant's inclusion of heads of claim for bonus and pay rises and the question of mitigation. I found that he was not entitled to any sums for bonus or pay increases. I accepted the evidence of Mr. James which was consistent with the respondent's position at the liability hearing that those payments were entirely discretionary. I noted that the claimant had requested both payments in the past and that they had been refused. I also noted that part of the respondent's consideration includes taking into account the views of the employee's line manager. I thought it unlikely that Ms. Coward would have supported such requests.

35. The respondent had failed to show on balance that the claimant had not made efforts to mitigate his loss. The claimant had looked for work in two areas: the motor industry and in the health sector. He had obtained a degree in Psychology and an array of counselling and therapy qualifications. He had applied for a wide range of positions in both sectors and across two geographical areas having moved home. The positions applied for by the claimant included entry-level positions. I was not persuaded by the respondent's argument that there were significant gaps in the claimant's efforts to look for work. I accepted the claimant's evidence that he had registered with a number of job search websites and continued to apply for vacancies throughout this period not all of which

were displayed on the website. I also took account of the fact that the claimant was looking for work during the pandemic which significantly limited job opportunities given that many employers furloughed staff rather than recruiting new staff.

Basic award

36. The claimant was born on 14th September 1959. He was employed by the respondent between 1st March 2015 and 9th August 2019 which produced a basic award of *£3,150*.

Polkey

37. I found that there was evidence of sufficient reliability relating to the claimant's behaviour to require me to engage in the ***Polkey*** exercise. I based this on the large number of adverse findings in the liability judgment on the claimant's behaviour. I considered the application of each of the four outcomes in the ***Software 2000 Ltd v Andrews [2007] IRLR 568*** in turn. I did not consider on the balance of probabilities that had a fair procedure been followed that the claimant would have been dismissed in any event. It is likely that a reasonable employer would have taken into account the claimant's concerns about his health and the impact on his health of working long hours which might have been articulated during a fair process and that he would have received a final written warning rather than a dismissal.

38. Turning to the second possible outcome in the ***Andrews*** case I did not think that it could be established that there was a chance of dismissal at that stage. I think that there was strong mitigation in terms of the claimant's health concerns. I note that he is a cancer survivor who might therefore be expected to have continuing concerns about his health. A further mitigating factor was the respondent's discussions with the claimant's colleagues which might be expected to have an unsettling effect.

39. I found, however, on balance, moving to the third outcome in ***Andrews*** that the claimant would have been dismissed within a further four months for other instances of conduct or flashpoints which would have led to the disciplinary process being invoked. His poor behaviour in the workplace predated recent events. There is evidence that the claimant from the early days of his employment by the respondent struggled to see others' points of view and easily lost his temper when there were disagreements. I note that he had had flashpoints with colleagues as far back as 2016. A number of managers had felt the need to speak to him about his attitude. The claimant accepted that he could be overly defensive and abrupt.

40. His behaviour was deteriorating and was increasingly extreme. He showed himself to be unwilling to accept Ms. Coward's authority on many matters even on the reimbursement of the cost of buying low value items of work clothing. He told Mr. Perks that he thought the working relationship between he and Ms. Coward had completely broken down.

41. At paragraph 36 of the liability judgment, I noted Ms Coward's oral evidence in which she said that he spoke to her more than once in an aggressive tone and that during telephone conversations she had to threaten to end the call. She also noted in her oral evidence that she considers that the claimant's volatile behaviour towards her should have been addressed much earlier. (I noted a typographical error in my judgement here which referred to 18th March 2021 and which should have been 18th of March 2019).

42. I found in paragraph 40 of the liability judgment that there was a pattern whereby the claimant deflected criticisms of his behaviour onto others. An example of that was on 26th April 2018 where the claimant undermined Ms Coward's presentation to a large group of staff which led a colleague to become angry and challenge the claimant's behaviour. This provocation did not however excuse the claimant's total loss of self-control. The claimant showed no insight into his own inappropriate behaviour in a very public work setting and focused entirely on the behaviour of his

colleague. It was clear however, that the claimant notwithstanding provocation had entirely lost control of himself in a work setting.

43. From paragraph 53 onwards of my liability judgement, I noted the claimant's increasingly disproportionate reaction to emails from Ms Coward. Despite clear warnings from senior managers, for example, Mr. Frank Harvey as discussed in paragraph 56 of the liability judgment, the claimant failed to check his behaviour.

44. I found that by the beginning of 2019, the relationship between the claimant and his line manager, Ms Coward had deteriorated, and this had led to a further escalation in his poor behaviour. For the claimant, he said that his behaviour had been caused by the respondent's failure to adjust his working hours to avoid his having to travel excessive distances to customers premises. I also accept that the respondent's obtaining anonymous statements from a number of colleagues was distressing to the claimant. This is all context for but cannot excuse his progressively intemperate behaviour in work settings. Instances of poor behaviour by the claimant predated the grievance and disciplinary process.

45. Not only did he lose his temper during formal meetings to do with his grievance, but he also lost his temper during a telephone conversation with Miss Farmer when he shouted at her and called her a liar. This demonstrated that by this time, the claimant found it impossible to exercise self-control in workplace interactions. I was therefore satisfied that there was reliable evidence that the claimant would probably have been dismissed.

46. I noted that the disciplinary process including the appeal stage moved quickly as might be expected in an organisation of the respondent's size. For instance, the claimant was written to during his sickness absence between 25th March and 19th July 2019. A disciplinary meeting took place promptly on 8th August 2019 shortly after his return. A disciplinary appeal hearing took place in the claimant's absence on 29th August 2019.

47. My decision was therefore that the claimant would not have remained employed indefinitely by the respondent but that his employment would have been brought to an end by other instances of his confrontational attitude. I held therefore that applying ***Polkey*** and the ***Andrews*** outcomes that the claimant would have been dismissed within four months for further instances of unacceptable conduct.

Contributory conduct

48. Given the close overlap between ***Polkey*** and contribution, my decision was that it would not be just and equitable to make a further percentage reduction for contributory conduct. This would however I consider have been at least 75%.

*Compensatory award taking into account **Polkey***

49. Accordingly, this meant that after the four-week contractual notice period, the claimant suffered a net loss of £415.60 per week for 13 weeks (that is from 9th September 2019 to 9th December 2019) making a total net loss of *£9,052.80* including the claimant's medical expenses policy valued at £15 per month.

Total unfair dismissal award

50. This resulted in a total award for the unfair dismissal claim of £10,853.74.

Costs judgment

51. The claimant was ordered to pay to the respondent a contribution towards the costs of the breach of contract claim in relation to overtime pay summarily assessed in the sum of **£2,742.50**.

52. The background to the award of costs was as follows:

First Employment Tribunal claim

53. The claimant's first claim (2201491/2019) which was received on 17th April 2019 was brought while he was still employed by the respondent. He described the type of claim as "unfair treatment, bullying and discrimination by perception. Pay and bonus was refused due to sick time off following an attempt to raise an informal grievance". When asked to specify the compensation or remedy sought, he replied:

> " I have worked out that since starting with the company I have worked over 2000 unpaid hours beyond my contractual hours which is about a year's salary of around £31,00. I was not paid for the last sick period and the current one."

54. The Tribunal wrote to the claimant on 29th June 2019 to say that it had accepted his claim as a claim for "unpaid pay and bonus and listed it accordingly".

55. The respondent's grounds of resistance which were dated 16th July 2019 denied liability. The respondent said that the claimant was not entitled to overtime as remuneration for any additional hours of work over his contractual 40 hours per week had to be agreed with the claimant's line manager. No such agreement had been reached and the claimant had not in fact been paid any overtime during his employment. The claim to bonus was also resisted on the ground that the respondent's bonus scheme was non-contractual and discretionary.

56. A copy of the claimant's principal statement of terms and conditions was attached to the grounds of resistance. That document said that the hours of work were 40 hours per week but that flexibility was required. The principal statement was supplemented by an employment agreement which was also attached to the grounds of resistance. The employment agreement provided as follows in relation to the claimant's hours of work:

> "Your official hours of work are as detailed in your Principal Statement. Due to the nature of your position with the RMIF however you are expected to be flexible and to work any additional hours that are reasonably required to fulfil the responsibilities of your job or meet the needs of the business with further remuneration as agreed with your line manager,"

57. The respondent said that the claim was vexatious and unreasonable and that it would seek legal costs. On the same day as the grounds of resistance were submitted, the respondent wrote to the claimant inviting him to withdraw the claim. The letter said that the claimant was aware that he was not entitled to overtime pay as set out in his contract. In any event, any such overtime would have to be authorised by his line manager and no such authorisation had been provided. He was also warned that the respondent would make an application for costs.

Second Employment Tribunal claim

58. The claimant's second claim (2203115/2019) for unfair dismissal was received on 21st August 2019. He claimed unfair dismissal, notice pay, holiday pay and arrears of pay. The respondent resisted the claims and said that the claimant had been dismissed for gross misconduct and that all sums due to the claimant had been paid to him.

Preliminary hearing on 5th November 2019

59. A preliminary hearing to identify the issues and to make case management orders was first listed for 2nd October 2019. That hearing was postponed until 5th November 2019 so that both claims could be considered and case managed together. At that hearing, Employment Judge Glennie clarified that there were three claims: unfair dismissal, wrongful dismissal (notice pay) and unlawful deduction from wages. In relation to the latter claim, he indicated that this claim "will involve consideration of whether the respondent failed to pay remuneration that was due to the claimant". Employment Judge Glennie ordered that the claims be heard together. He

further ordered that the respondent should make any request for further information about the claims and the claimant respond by 19th November 2019 and 3rd December 2019 respectively.

Claimant's response to request for further and better particulars of unpaid wages claim

60. The claimant provided further information to the respondent and to the Tribunal on 21st November 2019. This information however only consisted of a schedule of loss. The claimant did not identify the contractual basis for his claims for unpaid overtime, bonus and sick pay. The respondent wrote to the claimant on 25th November 2021 in plain language thus:

> "Your case is that you are owed wages. Our client's case is that they have paid you everything due and owing under your contract. If you are relying on a written document in support of your case you need to tell us what that document is. Alternatively, if you are relying on an oral promise you need to tell us details of that promise i.e. when it was made, who by etc and what was said.
>
> As things stand we do not know why you say you are owed money. For example you say as follows:
>
> 'Contract states that position was subject to moving to Hampshire'. We do not understand to what document you are referring. Please send us a copy and explain why this relates to unpaid overtime.
>
> You also say in relation to sick pay and bonuses 'see company's criteria and my work diaries'. Again this is insufficient evidence. It is not for us to work out your case. You need to set out the legal basis upon which you are entitled to a pay rise and bonus etc"

Claimant's acceptance that there was no contractual basis for his unpaid overtime claim

61. The claimant did not engage with the substance of the respondent's email to him. The respondent wrote to the Tribunal also on 25th November 2019 saying that the claimant had failed to provide further and better particulars in relation to his claim for unlawful deduction of wages most notably the contractual evidence he relied on for his claim for £31,000 outstanding wages. The claimant responded to the Tribunal and the respondent on at 12.21 on 25th November 2019 saying "the documents that support my claim are already in the hands of (the respondent)". Later that day at 13:26, he sent a second email to the respondent and the Tribunal as follows:

> "My case, as stated in the ET1 and at the preliminary hearing, is for unfair treatment, bullying, malicious withholding of pay rise and bonus and subsequent unfair dismissal, for taking legitimate time off sick, and following my attempts to put forward a grievance.
>
> The calculation for unpaid overtime, as detailed in my statement (my emphasis) <u>is not in my contract, and I have never stated it was</u>. The documents I refer to would support the many extra hours worked whilst doing my duties. This was requested by way of compensation of the initial ET1 as it was asked for, and before I was unfairly dismissed"

62. The claimant therefore accepted in November 2019 that there was no legal basis for his claim to unpaid overtime.

63. On 17th December 2019, the respondent wrote to the Tribunal to say that the claimant had not clarified the basis of his claim for unlawful deduction of wages:

> "The claimant's case is a significant claim for outstanding wages (over £40,000). At present our clients are being severely disadvantaged and prejudiced by the claimant's lack of co-operation."

EJ Glennie's further case management orders

64. On 2nd January 2020, Employment Judge Glennie advised the parties that he considered that the claimant had not provided sufficient particulars of his claim for unpaid wages. He made detailed case orders requiring the claimant to provide in summary, the contractual provisions he relied upon, breakdowns of the claims for £31,000 for additional hours and £1,110 for pay rise and bonus and details of the basis on which he claimed pay rises and bonus with supporting documentation by 15th January 2020.

Respondent's strike out application warning dated 3rd January 2020

65. On 3rd January 2020, the respondent wrote to the claimant again stating that he had failed to comply with Employment Judge Glennie's orders and warning him that should he fail to co-operate and address each of the three orders made that it would apply to strike out his case for failure to follow the case management orders. The claimant responded but did not provide the specified information stating only that "outstanding pay is an aspect of my claim".

66. The respondent replied on 7th January 2020:

> " You simply have not answered (EJ Glennie's) request in relation to points 1,2 and 3. In these circumstances we ask you for one final time to comply with the Orders failing which we will apply to strike out your claim for unpaid wages.
>
> In summary you need to set out the contractual document that you say entitles you to payment for overtime. If it was an oral agreement, you need to state who it was with, when and what words were used. This is very clear from point 1 of Judge Glennie's order. If you are unable to do this because there was no such contractual agreement, you need to say so.
>
> Similarly, in relation to point 3 of Judge Glennie's order you need to refer to the relevant document and the words used etc.
>
> You have also failed to provide any breakdown of your additional hours in any event, see point 2. We will not enter into any further correspondence on this matter and if you do not comply we will simply make an application to strike out your claim,"

67. The claimant replied on 9th January 2019 enclosing a statement where he said:

> "There is no contractual information for the provision of payment for overtime. However, as stated it was anticipated from the start of my contract that extra hours would be worked…. Conversations and correspondence with my line managers (my emphasis) <u>though not agreed for actual overtime pay</u>, will show that the extra hours worked were expected and indeed completed"…. It was also discussed within these conversations the issue of sick pay, pay rise and bonus.
>
> HC clearly states that 'this was at the discretion of SJ and, that he does not have to justify the reasons for not paying overtime, bonus or sick'"

68. His statement was accompanied by further documents and voice recordings of various meetings. The respondent wrote to him also on 9th January 2020 to say that

> "It is not for us to wade through voice recordings and documentation to see whether we can establish what contractual claims you are relying on. You must do that task and then send out the contractual terms, i.e. who said what to whom and when".

69. The claimant sent further emails to the Tribunal and the respondent on 9th January 2020 to say that it was up to the respondent to read the documents and to listen to the recordings which he had provided. On 10th January 2020, he sent a further document to the respondent. The document which ran to 5 pages did not identify a contractual basis for the unpaid wages claim. The respondent wrote to the claimant pointing out this omission. The claimant replied on 10th January 2020 saying:

> "… <u>I do not have any contractual documents for entitlement for pay regarding the extra hours…</u> (My emphasis) The contract agreement is unclear on this issue of extra pay as it was not anticipated that it would be challenged on…. This aspect of my grievance led to my dismissal, and for which has been accepted by the courts for inclusion of the case "

Respondent's strike out application dated February 2020

70. On 6th February 2020, the respondent notified the claimant that it had applied to the Tribunal to strike out his claim. On 11th February 2020, the respondent sent a copy of the bundle for

the unfair dismissal claim to the claimant and confirmed that as it was applying to strike out that part of his claim which related to unpaid wages, it had not included documents relating to unpaid wages. The claimant replied saying that he was pursuing all aspects of his claim and objected to the strike out application. He asked the respondent to include documents including his work schedule and diary for 2018 to 2019 and his monthly returns for 2018 and 2019 to show the mileage and distances completed.

71. The respondent wrote to the claimant on 14th February 2020 saying:

> " As we have repeatedly said, we are not prepared to embark on a time-consuming exercise relating to your claim for unpaid wages because we have applied to strike out your claim for failing to comply with the Court Order.
>
> We challenged your claim for unpaid wages at the very beginning in our ET3 response. If you look at it we said it was unreasonable and vexatious and should be struck out."

Preliminary hearing to consider respondent's strike out application

72. On 21st February 2020, a preliminary hearing was listed for 7th April 2020. The preliminary hearing was to determine "whether the claimant's complaint of unlawful deduction from wages should be struck out on the grounds that he has not complied with the Tribunal's orders to provide further information and/or that it has no reasonable prospect of success". In the event, that hearing did not take place due to the lack of a judge and the dislocation caused by the pandemic.

Claimant's awareness that there were separate unfair dismissal and unpaid overtime claims

73. A series of emails took place between the claimant and the respondent from 14th February 2020 to 17th March 2020 regarding his attempts to obtain copies of documents from the respondent. It is clear from this correspondence that the claimant was aware that he was pursuing separate claims for unfair dismissal and for unpaid wages. The respondent's email of 14th February 2020 at 9.30am declined to provide copies of documents relating to the unpaid wages claim unless the claimant could show that they were also relevant to the unfair dismissal claim. The claimant's replies show that he clearly knew that he was pursuing separate unpaid wages and unfair dismissal claims. For instance, on 14th February 2020 at 11.12 am, he wrote:

> " As for striking out that part of the claim, there are elements for which are relevant to the unfair dismissal"

74. He wrote to the Tribunal on the same day at 4.24pm also distinguishing between the separate claims which he was pursuing thus:

> "I have received several emails from the respondents' solicitors indicating that part of my claim is in the process of being struck out, and that they will not respond to anything related to this. They are also delaying sending documents requested regarding my claim for unfair dismissal."

75. In further correspondence with the respondent, the claimant repeatedly referred to needing documents to support his unfair dismissal claim – see his emails dated 24th February 2020 at 11.41 am, 6th March 2020 at 2.32 pm and 16th March 2020 at 16.11.

76. On 18th March 2020, the claimant wrote to the respondent. The information provided still did not contain the information and documents specified by Employment Judge Glennie. He supplied copies of emails which had passed between him and the respondent relating to the hours he had worked and recordings of grievance meetings and hearings. He not only failed to identify the contractual basis for his claim, but enclosed a witness statement which stated:

"Over dozens of emails sent to MILS I have constantly stated the reasons of my claim and (my emphasis) I have never claimed to have had a contract, written or verbal, to say that I would be paid overtime."

77. The claimant therefore accepted again in writing that he had no basis to pursue a claim against the respondent for contractual overtime. In his statement he quoted selectively from his terms and conditions of employment failing to cite the provision which stated that prior authorisation was required from his line manager in order to be paid overtime.

Statement from respondent's legal representative

78. Mr. Baylis submitted a statement in support of the respondent's application to strike out the claimant's claim for unlawful deduction from wages on two grounds, first, on the basis that the claimant had failed to comply with Employment Judge Glennie's orders and second, on the basis that this claim had no reasonable prospect of success.

Strike out of breach of contract/unlawful deductions claim re unpaid overtime

79. Paragraphs 17 to 19 of my liability judgment summarise my decision to strike out the claimant's breach of contract/unlawful deductions from wages claim for £31,000 of unpaid overtime under Rule 37(1)(a). At the hearing, the claimant accepted orally as he had on at least four occasions in writing as described above that his employment agreement did not contain any term entitling him to be paid overtime in the absence of agreement from his line manager. He could not provide any evidence of a verbal agreement that he was entitled so to be paid. He sought to pursue a convoluted argument that his contract did not say in terms that he would not be paid for additional hours. I rejected this argument for the reasons given orally at the time and set out in summary form in my liability judgment.

Application by the respondent for costs

80. The respondent gave notice of its intention to seek costs relating to the breach of contract/unlawful deductions claim relating to overtime on the final morning of the hearing on 29th January. The claimant was too unwell to continue with the hearing at this stage and I therefore asked for the parties to make written submissions on liability and costs.

Submissions on costs

Respondent's submissions

81. The respondent argued that from the outset it had shown that the claimant had no contractual entitlement to overtime, that it considered this claim to be vexatious and unreasonable and would seek its costs of defending this claim. It had put the claimant on notice of this by writing to him in plain language on 16th July 2019, inviting him to withdraw the claim and warning him again about costs.

82. It submitted that the claimant had repeatedly and unreasonably failed to comply with Employment Judge Glennie's orders to provide further and better particulars and to identify the contractual basis of his claim.

83. In emails and in his own written statements including his witness statement for the preliminary hearing, the claimant had accepted that he had no contractual entitlement to overtime pay. For this reason, the Tribunal had struck out the claim as having no reasonable prospect of success, thereby engaging the Tribunal's jurisdiction to make a costs order.

84. The respondent submitted that the claimant had acted vexatiously. He had repeatedly been advised by the respondent that he had to identify the contractual basis for his overtime claim and had freely admitted there was none. His conduct had put the respondent to considerable expense.

85. The respondent sought the following costs:
    - Invoice no.1 – breach of contract claim £825 (payment in full)
    - Invoice no.2 – strike out application £605 (payment in full)
    - Invoice no.3 – final hearing £4,250 (30% = £1,275)
    - Invoice no.4 – final hearing £4,500 (30% = £1,350)

Claimant's submissions

86. The claimant relied on two main arguments. First, he argued in essence that he had not understood that he had brought a separate breach of contract claim in his first ET1. He said that in Section 8 of the ET1 form he had claimed "Unfair Treatment, Discrimination by Perception and Bullying, not Breach of Contract". Under Section 9.1 of the ET1 form which is headed 'What Would You Want if your claim Is Successful?' he ticked Compensation Only. Under Section 9.2 of 'What Compensation or Remedy you seeking? Adding "I briefly laid out the many extra hours I worked. This was a remedy request for my claim". In making oral submissions, he said that he was not bringing a separate claim for overtime but wished it to be part of the remedy for his unfair dismissal claim.

87. His second argument was that Employment Judge Glennie merged both ET1s into one claim and that he understood this to be unfair dismissal only. He relied upon the respondent's letter dated 16th July 2019 saying that it "refers to the claim as per ET1 April 2019 and not for the changed combined claim."

88. In support of this argument, the claimant said that the case management orders from the preliminary case management hearing did not refer to a breach of contract claim adding"

> "It merely stated I am to provide information about the claims and a timescale for procedure. Judge Glennie had my statement which explained my claim…
>
> If you look at your correspondence you will see it was yourselves that wanted to interpret this as a claim for breach of contract and so made it the case. I was merely responding to your letters and requested for particulars related to my claims not for breach of contract and for which the court confirmed. This is why I was confused and kept reiterating the reasons for my claim".

The law

89. The Tribunal has the power to award costs under Rule 76(1)(a) of the 2013 Employment Tribunals Rules of Procedure 2013 where a party, in the opinion of the Tribunal, acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing or conducting proceedings or under Rule 76(1)(b) if any claim or response had no reasonable prospect of success. Costs are defined in Rule 74 as "fees, charges, disbursements or expenses". The Tribunal's discretion to award costs must be exercised judicially; ***Doyle v NW London Hospitals NHS Trust UKEAT/0271/11/RN.***

90. Where the Tribunal considers that any claim or response has no reasonable prospect of success, it is required to consider whether an award of costs should be made; Rule 76(1)(b). When the Tribunal is considering whether or not to make an award under this provision, it must focus on how things would have appeared to the party at the outset of the proceedings and any relevant stage in the course of proceedings; ***Radia v Jefferies International Ltd UKEAT/0007/18/JOJ.*** An award of costs can be made on the basis that a claim or response had no reasonable prospects of success even where the relevant party had a genuine belief in the merit of their claim or response. The Tribunal can take account of whether a claimant ought to have known that the claim had no reasonable prospect of success; ***Keskar v Governors of All Saints (CoE) School [1991] ICR 493.***

91. By virtue of Rule 77, no costs order may be made until the relevant party has had a reasonable opportunity to make representations in writing or at a hearing.

92. In assessing the level of costs, the Tribunal may carry out a detailed assessment or make a summary assessment (in that case not exceeding an amount of £20,000); Rule 78(1). Any summary assessment should take into account the overriding objective.

93. Rule 84 empowers but does not oblige the Tribunal to have regard to the relevant party's means or ability to pay. The means of a paying party can be considered twice – first in considering whether an award should be made and secondly, where an award is to be made, in determining how much should be awarded. Means can include equity in a home, even if it is not readily realisable; ***Shields Automotive Ltd v Grieg UKEAT/0024/10***. A Tribunal may make an award of costs against a party in circumstances where a party is currently unable to pay but may be able to meet their liability in due course; ***Vaughan v Lewisham LBC (No.2) [2013] IRLR 713(EAT).***

94. In considering whether or not to exercise its discretion to make an order for costs, the Tribunal must follow the three-stage approach set out in ***Hossaini v EDS Recruitment [2020] ICR 491***. First, the Tribunal must determine whether or not its jurisdiction to make a costs award is engaged i.e. whether there has been unreasonable conduct or if a claim or response had no reasonable prospect of , second, it must consider the discretion afforded to it by Rule 76 and determine whether or not it considers it appropriate to make an award of costs in the particular case and finally, only then should it turn its mind to determine how much to award. It should set out its findings about the paying party's ability to pay and say how this has influenced its decision to award costs or the amount of costs to be awarded; ***Jilley v Birmingham & Solihull Mental Health NHS Trust UKEAT/0584/06.***

95. The test for unreasonable conduct under Rule 74(1)(a) is a "wide and objective one" and it may include having an "unreasonably distorted perception of matters"; ***Brooks v Nottingham University Hospitals NHS Trust UKEAT.0246/18/JOJ.***

96. So far as litigants in person are concerned, the Tribunal should take care not to apply the standards expected of a legal professional; ***Solomon v University of Hertfordshire UKEAT.0258/18/DA.*** Unrepresented parties are however not to be spared from findings that their conduct of litigation was unreasonable; ***Liddington v 2Gether NHS Foundation Trust [2016] UKEAT/0002/16.***

97. Under Rule 78(1)(b) the Tribunal may determine the amount of the costs to be awarded by the application of the principles of detailed assessment which apply in the County Court.

Conclusions and reasons on cost award

(i) Was the jurisdiction to consider making a costs award engaged?

98. The Tribunal's jurisdiction to consider making a costs award in relation to the overtime claim was engaged by virtue of my decision on the strike out application namely that it had been unreasonable for him to bring this claim. This meant that I had next to consider whether or not it was appropriate to exercise my discretion to make a costs award.

(ii) Was it appropriate to make a costs award?

99. The second issue to consider was whether or not it was appropriate to make an award of costs in this case. The claimant not only had no reasonable basis to bring a claim for unpaid overtime, but this was signaled to him by both the respondent and Employment Judge Glennie on numerous occasions. He was informed by the respondent in clear and straightforward terms by letters on 16th July 2019 and on 25th November 2019 that his contract of employment clearly specified that overtime would only be remunerated with the approval of line managers and that no such approval had been given. He was invited to withdraw this claim and was

warned that if he failed to do so the respondent would seek costs.

100. The respondent's letter to him dated 25th November 2019 which I reproduce again below could hardly have made things clearer

> "Your case is that you are owed wages. Our client's case is that they have paid you everything due and owing under your contract. If you are relying on a written document in support of your case you need to tell us what that document is. Alternatively, if you are relying on an oral promise you need to tell us details of that promise i.e. when it was made, who by etc and what was said.
>
> As things stand, we do not know why you say you are owed money".

101. The claimant, however, simply refused to engage with the respondent's letters and repeatedly wrote to it asking it to send him copies of documents relating to this claim such as records of the hours he had worked and printouts of his diary.

102. I found that the claimant was fully aware at all times from the outset of his claim until the hearing on 27th January 2021 that there was no contractual basis whatsoever for him to bring a claim for overtime payments. Indeed, he confirmed in writing to the respondent on the following four occasions that he had no contractual right to paid overtime: 25th November 2019, 9th January 2020, 10th January 2020 and 18th March 2020. He also readily accepted verbally at the hearing on 27th January 2021 that there was no contractual basis for this claim. He failed to provide any evidence of a verbal agreement entitling him to such pay.

103. In opposing the costs application, the claimant sought to argue that he had not been aware that he was pursing a breach of contract claim for overtime quoting selectively from the party and party correspondence and from Employment Judge Glennie's case management orders. I found his explanations disingenuous. He is clearly an intelligent man and I found that he understood throughout that he was pursuing separate claims for unpaid overtime and unfair and wrongful dismissal for the following reasons.

104. First, he said on his first claim form under the section 8 heading - type of claim "unfair treatment, bullying and discrimination by perception. (My emphasis) <u>Pay and bonus was refused"</u> This clearly showed that he understood that he was bringing a claim for pay that was due to him. The reference to pay could not reasonably be read as being confined to salary increases. It is noted that the claimant's written submission for costs selectively quoted from Section 8 omitting the reference to pay and bonus by saying that he only claimed "Unfair Treatment, Discrimination by Perception and Bullying (sec 8), not Breach of Contract". This was a distortion of what he actually wrote on his first ET1. The failure to include the words "pay and bonus was refused" was misleading.

105. Second, on receipt of his first claim, the Tribunal wrote to the claimant on 29th June 2019 to say that it had accepted this claim as a claim for "unpaid pay and bonus and listed it accordingly". The claimant did not challenge this characterisation of his claim.

106. Thirdly, Employment Judge Glennie carefully explained the nature of the three different claims the claimant was bringing at the case management hearing on 5th November 2019 as unfair dismissal, wrongful dismissal (notice pay) and unlawful deduction from wages- (here the jurisdictions for unlawful deduction and breach of contract exactly overlap). In relation to the latter claim, Employment Judge Glennie indicated that this claim "will involve consideration of whether the respondent failed to pay remuneration that was due to the claimant". This could have left the claimant in no doubt that he was bringing a claim for unfair dismissal and a separate claim for unpaid wages. He cannot reasonably have understood that he was only bringing an unfair dismissal claim in light of these clear case management orders.

107. This can only have been reinforced by Employment Judge Glennie's subsequent letter to the parties on 2nd January 2020 stating that he considered that the claimant had not provided sufficient particulars of his claim for unpaid wages. The claimant was specifically directed to provide a breakdown of his claims for unpaid wages including the £31,000 claimed for overtime and the contractual basis for those claims.

108. Fourthly, the respondent wrote to the claimant warning him that it would seek to strike out his claim for unpaid wages as he had not complied with Employment Judge Glennie's orders. It added, again in plain language:

> "In summary you need to set out the contractual document that you say entitles you to payment for overtime. If it was an oral agreement, you need to state who it was with, when and what words were used. This is very clear from point 1 of Judge Glennie's order. If you are unable to do this because there was no such contractual agreement, you need to say so.
>
> Similarly, in relation to point 3 of Judge Glennie's order you need to refer to the relevant document and the words used etc.
>
> You have also failed to provide any breakdown of your additional hours in any event, see point 2. We will not enter into any further correspondence on this matter and if you do not comply, we will simply make an application to strike out your claim."

109. By this point, the claimant can have been in no doubt that in addition to his unfair dismissal claim that he was pursuing a separate claim for unpaid overtime whether this was characterised as a claim for unlawful deductions from wages or for breach of contract (both claims being interchangeable so far as the claimant was concerned). The essence of this claim that is for unpaid overtime was clear.

110. Fifthly, the claimant's own correspondence to the Tribunal and to the respondent as described at paragraphs 73 to 75 acknowledged that he was bringing a separate claim for unpaid overtime.

111. The claimant disputed this in his oral submissions saying that the overtime payments were part of the compensation which he sought from the respondent. Compensation cannot be sought however unless there is a valid legal basis or cause of action to do so. The claimant pursued his meritless claim for unpaid overtime right up to the final hearing despite clear and direct warnings from the respondent and Employment Judge Glennie that there was no legal basis for this claim. Defending this claim consumed much time for the respondent including providing copies of documents of no relevance.

112. Throughout the hearing, the claimant made wide and unfocussed allegations about what he perceived to have been unfair treatment by the respondent throughout his employment. He was advised on a number of occasions that the Tribunal did not have jurisdiction to consider general allegations of unfair treatment and he was given appropriate guidance as to how he might put his case. I considered that while a degree of latitude should be given to the claimant as a litigant in person, he had been given adequate information by the respondent and by Employment Judge Glennie from an early stage on the need to identify a legal basis for his unpaid overtime claim. The claim was for a substantial amount of money that is £31,000. His pursuit of this claim in the face of such unambiguous warnings and his own frequent written acknowledgements that there was no legal foundation to this claim clearly justified the making of an award of costs.

113. In reaching this decision, I have taken into account the information available to me about the claimant's means. He was asked to provide information on his income and savings. The claimant wrote to the Tribunal on 12th March 2021 to say that his main asset was his home and that he had £1,900 in his current account and that he did not receive benefits. He also

clearly had an undisclosed amount of savings as he said “I am currently living on my savings that were meant for my retirement in a few years from now and will eventually run out”. The Tribunal had asked him to specify the precise amount of his savings but he failed to do so. His failure to answer this direct question led me to conclude that his savings were not of a trivial amount.

114. He later told the hearing in November 2021 that he had claimed benefits for a short period but had mainly lived on his savings and planned to live on his remaining savings for the next four years until he reached state retirement age. He had also sold his home and moved to a cheaper area. I therefore concluded that the claimant’s means taking into account his savings were not such as to prevent me from exercising my discretion to make an award of costs.

(iii) How much costs should be awarded?

115. The respondent had prepared a detailed schedule of costs. As the first two invoices related solely to the unpaid overtime claim and to the strike out application, I determined exercising my broad discretion that those costs should be awarded in full. The claimant pursued a claim which had no reasonable prospects of success. This claim was of substantial value namely £31,000 and therefore required significant preparation by the respondent. The respondent’s difficulty in doing so in the absence of the claimant’s response to case management orders and repeated correspondence can only have made the respondent’s task more demanding. I saw no reason, taking into account the claimant’s means as discussed below, why those costs should not be awarded in full.

116. I was invited to award 30% of the respondent’s costs for the final hearing. This was on the basis that the respondent had had to prepare in full for the unpaid overtime claim and that the number of pages in the breach of contract bundle were roughly 30% of the size of the unfair dismissal bundle. I concluded that 15% of those costs should be awarded. I took into account the fact that pressure on Tribunal time and the dislocation caused to hearings by the pandemic meant that there had not been a separate preliminary hearing to consider the strike out application. It was not in accordance with the overriding objective to penalise the claimant for this. I also noted that many of the documents in the breach of contract document were print outs of salary records and cannot have taken as much time to prepare as sourcing more inaccessible and older documents for the unfair dismissal claim. I therefore awarded £637.50 and £675 accordingly making a total award of costs of £2,742.50.

117. In reaching this decision, I took the claimant’s means into account. He had savings of an undisclosed amount but which were clearly sufficient to meet his living costs until retirement some 4 years hence without needing to apply for further social security benefits. He also implied that he had realised equity on the sale of his home and his move to a lower cost area.

Employment Judge B McKenna
19th December 2021
JUDGMENT SENT TO THE PARTIES ON 20/12/2021

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