EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr C Rowan	**v**	**DWPF Services Limited**

Heard at: London Central (by video) **On**: 17 & 18 October 2022

Before: Employment Judge E Burns
Ms H Craik
Dr V Weerasinge

Representation

For the Claimant: Tim Dracass, Counsel
For the Respondent: John Ratledge, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

(1) The Respondent is to pay the Claimant £24,229.53 within 14 days of the Claimant providing the Respondent and the Tribunal with proof that he has applied to be registered for VAT from 12 August 2020 onwards

(2) The Respondent is to pay the Claimant's legal costs of £1,400 within 14 days.

(3) The time for reconsideration is extended to the 30 November 2022.

REASONS

THE HEARING

1. The purpose of the hearing was to consider remedy and an application made by the claimant dated 15 June 2022 for costs.

2. So far as the matter of remedy was concerned, the claimant was paid a statutory redundancy payment on termination and was not therefore seeking a basic award. The only matter for us to consider was therefore the amount of his compensatory award. The Tribunal had previously determined (by a majority) that any compensatory award would be subject to an 80% Polkey reduction.

3. The costs application was made on the following grounds:

    1. The Respondent, or their representative, acted disruptively or otherwise unreasonably in conducting the proceedings, or a part of them under Rule 76 (1)(a);

    2. The Respondent was in breach of Tribunal Orders under Rule 76(2);

    3. The Respondent caused a hearing to be postponed on the application of the Claimant under Rule 76(2); and

    4. Wasted costs in favour of the Claimant due to the conduct of the Respondent's representative under Rule 80.

    It concerned:

    (a) The postponement of the final hearing which had been due to take place on 9-11 November 2021;

    (b) The Respondent's conduct in connection with two judicial mediation hearings; and

    (c) The Respondent's conduct in relation to preparation for the final hearing which took place on 29 – 31 March and 1 April 2022

4. The hearing was a remote hearing. From a technical perspective, there were a few minor connection difficulties from time to time. We monitored these carefully and paused the proceedings when required. The participants were told that it was an offence to record the proceedings.

5. The claimant gave evidence and for the respondent we heard evidence from Mr Tyerman, the Respondent's CEO.

6. There was an initial agreed trial bundle of 165 pages. The parties agreed that an additional document, produced by the Claimant should be added to it. The panel read the evidence in the bundle to which we were referred and refer to the page numbers of key documents that we relied upon when reaching our decision below in brackets.

7. Two schedules of loss prepared by the Claimant were included in the bundle. One which was undated, but which calculated his losses to 9 November 2021 (107 – 109). The second was also undated but calculated his losses to 18 October 2022 and must have been prepared after the

liability hearing as it applied an 80% *Polkey* reduction. We were also provided with a standalone version of this document which was dated 12 October 2022 in advance of the hearing.

8. During the course of the hearing, the Claimant provided three additional versions of his schedule of loss. One was provided on the morning of the first day of the hearing, one was provided at around lunch time on that day with the third being provided on the morning of the second day of the hearing. We were also provided with two versions of an excel spreadsheet containing calculations that were said to underpin the amounts in the spreadsheet.

9. We explained our reasons for various case management decisions carefully as we proceeded.

10. One issue of note arose, which was the Claimant's VAT registration. The Claimant gave evidence that he had been working on self-employed basis since 12 August 2020 and charging his client VAT, but was not VAT registered and had not paid any VAT to HMRC. When first questioned about his VAT registered status, he said that he had registered a couple of days before the hearing and acknowledged that he would be liable to pay interest and penalties to HMRC as a result of his late registration.

11. At the point of making closing submissions, the Respondent's representative sought disclosure of evidence corroborating what the Claimant had told the hearing. We adjourned the hearing to allow Mr Dracass to take instructions from the Claimant on this point. Given what he told us, the Claimant was recalled and gave further evidence on this point.

12. It transpired that the Claimant had not completed the VAT registration process, but had expected his wife to do this for him. However, when he spoke to her on the evening of the first day of the hearing, he discovered she had not done this. He had, therefore, completed the relevant form and posted it first class that evening, with no proof of posting or signature required in delivery. He had not kept a copy and was therefore unable to provide the tribunal with a copy.

13. The claimant anticipated receiving the outcome of his application within 40 days and confirmed he was happy to provide a copy of this to respondent and to the tribunal. He said he had not had to provide a date for registration on the form, but when asked will confirm that he wants to be registered from 12 August 2020. He is in a position to write to HMRC to make this clear.

14. Rather than adjourn the hearing and wait for this additional evidence to become available, the tribunal panel have reached a decision based on the evidence before us. However, we have ordered delayed payment of the remedy to a date 14 days after the Claimant provides the Respondent and the Tribunal with proof that he has progressed the VAT application and told HMRC that he is seeking registration backdated to 12 August 2020. We have also extended the period for reconsideration accordingly so that the respondent can ask us to adjust our decision if it transpires that the Claimant

has not done what he told us he had done. The ability to seek a late reconsideration can be relied upon by both parties.

FINDINGS OF FACT - RELEVANT TO REMEDY

15. Having considered all the evidence, we find the following facts on a balance of probabilities.

16. The Claimant's effective date of termination was 11 August 2020. There were 114 weeks between the date of termination and the date of the remedy hearing.

17. It was not in dispute that his net weekly earnings with the Respondent were £3,113. The only benefit he received was private health insurance, which the parties agreed would be valued at £169.05 per week. His total net weekly earnings were £3,282.05

18. The claimant commenced an appointment working as a self-employed consultant on 12 August 2020. He continued to have this role as at the date of the remedy hearing.

19. For the period from 12 – 31 August 2020, the Claimant charged £4,167 plus VAT of £833 for his services, making a total of £5,000 (82). Thereafter each month he charged £16,667 plus VAT of £3,333 making a total of £20,000 per calendar month. The only month he did not work on this basis was June 2021. This was because he opted to take the month off.

20. The Claimant's invoices do not show a VAT registration number and as set out above, we learned during the course of the hearing that he had not registered for Vat and not made any payments in respect of VAT to HMRC.

21. The Claimant has not yet had all his invoices paid. He does not anticipate any difficulty receiving payment in full, however, and the figures in each version of his schedule of loss assume this will happen.

22. Because the Claimant has been paid against invoices, he has not had income tax or national insurance contributions deducted automatically from his post termination income. When giving evidence, he told the tribunal that he submitted his self-assessment tax form for the tax year 2020/2021 himself in January 2022. A copy of this was not included in the bundle, however. Although he could have submitted his tax return for the tax year 2021/2022 before the hearing and resolved his tax position for that tax year, he had not done so. Instead, he provided an excel spreadsheet setting out his calculations for his net income.

23. The first version of the excel spreadsheet did not accurately take into account the position in relation to national insurance contributions. The amended spreadsheet simply adjusted the figures for the tax year 2021/2022 in order to enable the Claimant to extrapolate an approximation of his net income.

24. With regard to the Claimant's attempts to find another role, the Claimant's evidence was that he had not made any applications for alternative roles since the termination of his employment.

25. The Claimant told us that he accepted the role despite believing that once he was doing it, he would not be in a position to search for alternative employment as the volume of work meant that he would have no free time to do so. He did not, however, take any steps to engage with an executive head-hunter or recruitment agent who could have assisted him, nor has he made any steps to leverage his contacts or experience in the sector in which he worked.

26. In addition, he believed that his chances of finding alternative employment at his previous salary was extremely unlikely. His thinking took into account his age, that he was previously very well paid and had undertaken a very niche specialist role and the impact of the Covid-19 pandemic. He had started to browse the internet for vacancies and jobs posts in the newspaper to see what was available during the redundancy process and discovered that because of the market conditions at the time there were very few advertised jobs in the sector and nothing close to the seniority or salary of the post he held with the respondent.

27. At the time the Claimant accepted the offer, it was on the understanding that there was a prospect of him becoming a permanent employee of the client, earning a salary equivalent to that he had previously earned with the respondent and possibly being given some equity. He raised this matter with his client in August 2021 and again in June 2022 but to no avail. He says he was told that progression to this step would depend on the client's performance and raising sufficient funds. The Claimant currently anticipates having to wait until 1 January 2023 for this to happen. This is a period of 11 weeks after the hearing. It is because of the Claimant's prediction of this event that we have assumed that all outstanding payments due in respect of his consultancy will be made before 31 December 2022.

28. The Claimant says he has kept his eye on the job market (via newspapers and the internet) since termination, but has seen no suitable opportunities advertised.

29. In addition, his evidence was that there were a number of positive reasons why he wished to continue in his current role, including his existing personal relationship with the client, the work involved and the opportunity to travel.

30. The Respondent says that the Claimant ought to have been able to find a role that matched his previous salary within six months of the termination of his employment. The evidence it provided in support of this was very limited and certainly did not extend to evidence of particular job vacancies for which he could have applied. Mr Tyerman gave evidence that based on his own experience of the specialist sector he and the Claimant worked in, there were plenty of job opportunities for which the Claimant could have applied.

31. In addition, Mr Tyerman produced an extract from the 2020 salary survey produced by Michael Page which suggested a reasonably positive recruitment activity in the niche markets of Infrastructure Equity (5/5) and Infrastructure Debt (3/5). The Claimant accepted in his evidence that he had the skill set and experience to apply for the roles that were categorised as Director and Managing Director level roles on this document. The salary ranges for such roles were £130,000 to £200,000 and £180,000 to £350,000.

LAW – RELEVANT TO REMEDY

Compensation for Unfair Dismissal

32. Compensation for unfair dismissal is in two parts, a basic award and a compensatory award. As indicated above the basic award was not in issue in this case.

33. Section 123 of the Employment Rights Act 1996 provides for the compensatory award to be "such amount as the tribunal think is just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer." It is subject to the relevant maximum cap in place at the date of the dismissal. The relevant cap in this case was £88,519

34. All elements of an employee's net remuneration package are taken into account when calculating the compensatory award. This includes salary, pension and other benefits. There is no requirement that entitlement be contractual in order to be included.

Mitigation

35. When considering what level of compensatory award to make, the tribunal must take mitigation into account.

36. The claimant is under a duty to take reasonable steps to mitigate any loss and this must be taken into account by the tribunal. Account by way of mitigation includes any earnings and benefits that are not recouped.

37. The question of reasonableness as it relates to mitigation is to be determined by the tribunal itself taking into account all the circumstances. The Claimant's wishes and views are factors we must consider, but are not determinative.

38. The burden of proving a failure to mitigate is on the respondent (*Fyfe v Scientific Furnishing Ltd [*1989] IRLR 331). The respondent has to prove that the claimant acted unreasonably. If the claimant has failed to take a reasonable step, the respondent has to show that any such failure was unreasonable (*Wright v Silverline Car Caledonia Ltd* UKEATS/0008/16).

39. The tribunal must:

(a) identify what steps the claimant should have taken to mitigate his losses

(b) consider whether it was unreasonable for the claimant to have failed to take any such steps;

(c) if so, identify the date from which an alternative income would have been obtained; and

(d) reduce the amount of compensation by the amount of income which would have been earned.

Tax

40. When making an award of compensation, the tribunal must take account of tax payable on the various elements of the award. It may therefore be necessary, in accordance with the principles in *British Transport Commission v Gourley* [1955] 3 All ER 796, once the amount of the award has been calculated using net figures for earnings and pension loss, to 'gross up' the award so as to ensure that the claimant is not left out of pocket when any tax required to be paid on the award has been paid.

41. Unfair dismissal compensation awarded to a claimant is taxable pursuant to Chapter 3 of Part 6 of the Income Tax (Earnings and Pensions) Act 2003.

42. Subject to the application of the post-employment notice pay provisions contained in sections 402C - E, the first £30,000 of any award is treated as free from tax by section 403. To the extent that an award exceeds £30,000 it is subject to income tax (at the current rate) and employer national insurance contributions, but not employee national insurance contributions.

43. HMRC Guidance (EIM13890) says that where an employment tribunal makes an explicit finding that an employer was entitled to summarily dismiss a claimant, HMRC should treat the post-employment notice pay as zero meaning there is no tax liability in respect of it.

Order of Adjustments

44. The order in which the various adjustments that can be made to awards of compensation are made, can change the overall amount awarded. The leading case on the order in which adjustments should be made is *Digital Equipment v Clements* [1997] EWCA Civ 2899 which confirms the order is as follows:

(1) Calculate total losses suffered
(2) Reduce by the amount of earnings which have mitigated C's loss (or any sum representing a failure to mitigate)
(3) Apply any *Polkey* deduction to reflect the chance that C would have been dismissed in any event
(4) Any grossing up (*Hardie Grant London v UK Aspen* UKEAT/0242/11RN)
(5) Application of the statutory cap, if relevant

ANALYSIS AND CONCLUSION AS TO REMEDY

45. We do not consider that it was unreasonable for the Claimant to have accepted the consultancy position. For all the reasons he gave in his evidence, it was an excellent opportunity for him. We are satisfied that, at the time of he took the role, it offered him the best route to potentially fully mitigating his loss. The market conditions at the time were adversely affected by Covid which would have made it challenging for him to find a new role, when taken together with his age and the fact that his confidence had been bruised as a result of the redundancy process.

46. In addition, it was not unreasonable for him to be optimistic that the role might lead to a further increase in his remuneration in a relatively short time scale. We therefore consider that he acted entirely appropriately and took all appreciated steps to reasonably mitigate his loss for the first twelve months after his dismissal.

47. In August 2021, however, he discussed the possible increase to his remuneration. It was at the point, when he learned that that increase had not transpired and would not transpire any time soon, that we consider he was under a duty to take steps to look for an alternative role. Instead, on his own evidence, he did nothing at all, other than occasionally glance at the job section in his usual newspapers.

48. By this time, he had been working in his role for a year and his confidence should have recovered. He had new skills and experience to leverage. If time was an issue, he could have signed up with an executive search agency to help him. From August 2021, our conclusion is that the Claimant ought to have taken steps at that point to try and mitigate his ongoing loss.

49. Having found that the Claimant had failed to mitigate his loss, we next considered, had he taken the step of looking for an alternative role, what his chances would have been. We do not consider it would have been as easy as the respondent suggested. The claimant's age would have counted against him. He had a great deal of specialist skills and valuable experience, however. In addition, the negative impact of the Covid virus had been dramatically reduced because of the successful vaccine roll out in the UK and other places in the world.

50. Although the respondent did not provide evidence of any particular vacancies the claimant could have applied for, in our judgment, such opportunities would have existed and would have been known about by specialist head-hunters working in the subject area. We also judge that they would have been in the salary range shown on the Michael Page report.

51. Our conclusion is that had the Claimant begun a job search in August 2021, he would have been successful in finding an alternative position by the following Spring. We do not consider he would have fully mitigated his loss at this point, however, and consider his starting salary would have been in the region of £250,000. His losses would have been fully mitigated by 31 December 2022.

52. There were 124 weeks and 4 days between 12 August 2020 and 31 December 2022. We have treated this as being 124.5 weeks. The claimant's net weekly losses from his employment with the respondent were not disputed. His total loss, before mitigation is taken into account, is calculated by multiplying £3,282.05 by 124.5 which comes to £408,615.23

53. Having not been provided with adequate evidence or calculations by either side in relation to the Claimant's net earnings from his consultancy role, we have undertaken our own calculations. We have based our calculations on the date of the invoices. Having not been provided with adequate information to enable us to make the exact calculations, we consider the approach we have adopted is permissible. However, either party can apply for a reconsideration if the calculations need to be adjusted and they can provide us with appropriate evidence to support such an application.

54. Our detailed calculations for the period are shown in the appendix.

55. The period from 12 to 31 August 2020 was 20 days. We have rounded this up and treated it as three weeks. The Claimant's net earnings during this period were £2,696.94.

56. The Claimant's net weekly earnings during the period from 1 September 2020 to 5 April 2021 were £2,276.10 The period was 31 weeks in total. The Claimant's net earnings during this period were 31 x £2,276.10 which equalled £70,559.10.

57. The Claimant's net weekly earnings during the period from 6 April 2021 to 5 April 2020 were £2288,89. The period was 52 weeks. The Claimant did not, however, work during June 2021. His total net earnings were therefore 48 x £2,288.89. This gives total net earnings during this period of £109,866.87

58. Had the claimant started earning £250,000 gross from 6 April 2022 onwards, based on the tax and National Insurance rates in force at the time, we have calculated that for the thirteen week period between 6 April to 5 July 2022, his net weekly earnings would have been £2,705.68. His total earnings would have been 13 x £2705.68 which equals £35,173.93

59. For the 25.5 weeks week period between 6 July and 31 December 2020 his net weekly earnings would have been £2,712.58. His total earnings were during this period would therefore have been therefore have been 25.5 x £2,712.58 which equals £69,170.70.

60. We have therefore calculated the claimant's loss overall, taking into account his actual earning and the earnings he should have had, had he taken reasonable steps to mitigate his loss as £121,147.67.

61. When the 80% Polkey reduction is applied, this comes to £24,229.53. As this figure is under £30,000 we have not grossed it up, on the basis that Mr Dacross said the Claimant was only seeking the compensation to be grossed up if it exceeded £30,000.

FINDINGS OF FACTS RELEVANT TO COSTS APPLICATION

62. Having considered all the evidence, we find the following facts on a balance of probabilities.

November 2020 hearing

63. At a case management hearing held on 29 April 2021, this case was listed for a final hearing between 9 -11 November 2021. The orders made envisaged disclosure taking place by 21 May 2021, with a final bundle being produced by the Respondent by 10 August 2021 and exchange of witness statements by 28 September 2021.

64. The parties agreed an extension of time for disclosure to 18 June 2021. Unhappy with the disclosure received from the Respondent, the Claimant's representative wrote to the Respondent's representative on 1 July 2021. Within its letter, he listed a number of categories of documents that he would have expected to have been disclosed and asked that the Respondent search again.

65. The Respondent's representative replied on 27 July 2021 disclosing a limited number of additional documents and to say that further documents would be forthcoming. In fact, nothing further was disclosed despite a good deal of chasing by the Claimant's representative.

66. On 15 October 2021, the Respondent's representative emailed the Claimant's representative to request an extension of time to produce the hearing bundle to 18 October 2021 (from 1 October 2021) to which the Claimant's representative agreed, but warned that there could be no further slippage in the dates without prejudicing the upcoming hearing.

67. On 18 October 2021, the Respondent's representative emailed the Tribunal, into which we were copied, to confirm that the Respondent had fully complied with its disclosure duties. An incomplete paginated bundle was sent to the Claimant's representative on 20 October 202.

68. The assurance provided by the Respondent's representative was not correct. On 28 October 2021, the incomplete bundle was superseded by approximately 100-120 pages of previously undisclosed documents (which accounted for approximately a 25% increase in the case papers). The documents were integral to the case and were in the possession of the Respondent when disclosure should have taken place.

69. No explanation was put forward by the Respondent at the time as to why the documents had not previously been disclosed. Mr Tyerman told us at the hearing that he had only become involved in the litigation at around this time and he was not able to provide any reason why the documents had not been disclosed previously.

70. Given the short amount of time before the hearing listed, the Claimant's representative considered that the Respondent's late disclosure of

documents had effectively rendered preparation for the hearing impossible. The Claimant applied to the Tribunal for the final hearing to be postponed on those grounds on 29 October 2021. The tribunal granted the Claimant's application on 2 November 2021.

Judicial Mediation

71. During the Preliminary Hearing on 29 April 2021, the Respondent agreed to partake in judicial mediation with the Claimant. Judicial Mediation was scheduled for 27 July 2021.

72. At 16:51 on 26 July 2021, the Respondent's representative sent an email to the Tribunal, copying in the Claimant's representative, stating that they had not received authorisation from the Respondent's legal expenses insurer to engage in mediation and needed to do so before the mediation took place.

73. The Respondent's representatives were aware of the date of the mediation as they were present at the Preliminary Hearing when it was agreed that a judicial mediation should be listed. They ought to have sought the requisite authority from the legal expenses insurer straight away, notwithstanding that they did not receive the notice of hearing directly. The notice of hearing was sent to the Respondent and should have been forwarded on and was also referred to in correspondence between them and the claimant's representative.

74. On 27 July 2021, the parties attended a Preliminary Hearing with Employment Judge Clark during which the Respondent agreed to reschedule mediation. The mediation was rescheduled for 27 September 2021.

75. The Order dated 27 July 2021 stated that the Respondent must ensure that a decision-making authority is present/fully available at the rescheduled mediation.

76. By the time of the rescheduled mediation on 27 September 2021, the Respondent's legal expenses provider had confirmed its position. It was not prepared to fund a mediated settlement. Mr Wylde nevertheless attended the judicial mediation with a view to paying any agreed settlement out of the Respondent's own funds. The parties spent several hours at the mediation, but no agreement was able to be reached.

Conduct Preparing for Final hearing in March 2022

77. The Respondent disclosed a further 80 pages of previously undisclosed documents to the claimant on 7 March 2022. This was three days before the parties intended to exchange witness statements.

78. As before, no explanation was given by the Respondent at the time as to why those documents had not been previously disclosed. Mr Tyerman told is at the hearing that the late disclosure on this occasion was because the Respondent disclosed a number of documents that it was seeking to rely on to support what was being said in Respondent's witness statements. His

position was that these were not documents that the Respondent had realised it had to disclose.

79. One of the areas of disagreement between the Respondent's representative's and the Claimant's representatives was the way in which the documents were added to the existing bundle. The Claimant's representative wanted the Respondent to add the additional disclosure in chronological order, but it instead wanted to simply add the documents at the end of the existing bundle.

80. The late disclosure of documents also meant that some changes were required to the Claimant's witness statement to address the additional documents.

81. On 17 March 2022, the Respondent amended the bundle further by removing several documents from it, which were marked 'without prejudice'.

82. This late disclosure of further documents change to the bundle disrupted the Claimant's preparation for the final hearing, which was listed for 29 to 31 March 2022, but not did not prevent the hearing from proceeding.

83. On 30 March 2022, the Respondent disclosed an email between Mr Wydle and its HR advisor, Mrs Tyerman, during the course of the final hearing. When asked why the email had not been disclosed earlier, Mrs Tyerman said that the email had been provided to the solicitors acting for the Respondent and she could not explain why it had not found its way into the bundle.

LAW – RELEVANT TO COSTS APPLICATION

84. The tribunal rules enable a legally represented party in employment tribunal litigation to make an application for a cost order.

85. When considering whether or not to award costs, the relevant tests (known as the "threshold tests") which the tribunal must apply are found in Rule 76 which says:

> *(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 …. unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
>
> *….*
>
> *(2) A Tribunal may also make such an order where a party has been in breach of any order ……."*

86. Under Rule 80, an order can be made against a representative rather than a party and is called a wasted costs order. Rule 80 says:

"(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or

(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay."

87. The tribunal must consider an application in three stages:

- we must first decide whether the relevant threshold test is met
- if we are satisfied the relevant threshold test has been met, we should then decide if we should exercise our discretion to award costs (the rules say "may" rather than "must")
- we should then decide the amount of the costs to be awarded

Each case depends on the facts and circumstances of the individual case.

88. The overriding objective in Rule 2 and Rule 84 is also relevant. It says:

*"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." (emphasis added)*

89. We emphasise the word "may" because the tribunal is permitted but not required to have regard to the means of the party against whom the order is made. A tribunal can make an award even if the paying party has no ability to pay, provided that we have considered means. We must do this even when the paying party does not raise the issue of means directly. We must say whether or not we have taken the paying party's means into account.

90. The principle that costs are intended to be compensatory not punitive also means that where costs are claimed because a party has acted unreasonably in conducting a case or breached an order, the costs awarded should be no more than is proportionate to the loss caused to the receiving party by its behaviour. In other words, the party is entitled to recover the cost of any extra work that had to be undertaken, but no more than that.

ANALYSIS AND CONCLUSIONS

91. We consider that the costs threshold test was met in relation to the Respondent's late disclosure ahead of the final hearing listed for November

2021. My Tyerman accepted that the Respondent was at fault. This was not a minor slip up in relation to the preparation for the hearing, but was so significant that the hearing had to be postponed. In our view this was both unreasonable conduct and there was a breach of a tribunal order.

92. We also consider the threshold was met in relation to the Respondent's failure to speak to their legal expenses provider in preparation for the first judicial mediation. This omission led to the first judicial mediation having to be postponed. In our view, this was also unreasonable conduct.

93. We do not, however, consider that the respondent behaved unreasonably by participating in the judicial mediation that took place in July 2021. Mr Wylde had authority to agree a settlement with the claimant and to fund it directly from the Respondent's own monies if he had wished.

94. We also do not consider that the Respondent behaved unreasonably in relation to the further late disclosure in March 2020. This did not prevent the final hearing from taking place.

95. We have decided to exercise our discretion in relation to award the claimant costs in relation to the two matters which meet the threshold. The Respondent provided no evidence to show the respondent was not capable of paying the costs. Although the claimant was extremely disorganised in relation to the numerous versions of his schedule of loss, his lack of preparedness did not prevent the remedy hearing proceeding and does not in our judgment justify not making a costs award in his favour where there were significant failing on the Respondent's side that led to hearings being cancelled.

96. Having reviewed the Claimant's schedule of costs, it appears to us that he is only claiming for the additional work that was required to deal with the Respondent's unreasonable conduct and therefore is entitled to the costs. This is the entirety of the £1,300 incurred in November 2021, but only £100 in respect of the first judicial mediation. We have not awarded him the costs of making the fuller costs application because the costs of the first application are encompassed in the £1,300. We have made the award without adding VAT, in light of the fact that the Claimant is about to become VAT registered.

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Employment Judge E Burns
28 October 2022

Sent to the parties on:

28/10/2022

For the Tribunals Office

Appendix

Calculations

Net Earnings from Consultancy

12 – 31 August 2020

The claimant earned £4,167 (net of VAT). This was a period of 20 days. We have treated this as being 3 weeks. This gives a weekly amount of £1,389 (£4,167 divided by 3).

The applicable tax rates for the Claimant (who did not qualify for a personal allowance, based on his overall earnings) were:

Basic rate – 20% up to £37,500 per annum which converts to £721.15 per week (calculated by dividing by 52)
Higher rate – 40% between £37,500 and £150,000 which converts to between £721.15 and £2,884.62 per week
Additional rate – 45% of £150,001 and above which converts to £2,884.62 and above

The applicable Class 4 NI rates

NIC free – up to £9,500 per annum which converts to £182.69 per week
Standard rate – 9% between £9,500 to £50,000 which converts to £182.69 to £961.54 per week
Higher rate – 2% of £50,000 and above which converts to £961.54 and above per week

The Claimant would have paid the following tax and NI per week:

Basic rate tax: 20% of £721.54 =	£144.23
Standard rate tax: 40% of (£1,389 - £711.58) =	£267.14
Standard rate NI: 9% of (£961.54 – £182.69) =	£70.10
Higher rate NI: 2% of (£1,389 - £961.54) =	£8.55
Total	£490.02

The Claimant's weekly net earnings were therefore £1,389 - £490.02 = £898.98

When multiplied by 3 this gives a figure of **£2,696.94**

1 September 2020 to 5 April 2021

The Claimant earned £16,667 (net of VAT) per month. This equates to a gross weekly amount of £3,846.23 (£16,667 x 12/52)

The same weekly tax and NI rates referred to above applied.

The Claimant would have paid the following tax and NI per week:

Basic rate tax: 20% of £721.15 =	£144.23
Standard rate tax: 40% of (£2,884.62 - £721.15) =	£865.38
Higher rate tax: 45% of (£3,846.23 – £2,884.62) =	£432.73
Standard rate NI: 9% of (£961.54 – £182.69) =	£70.10
Higher rate NI: 2% of (3,846.23 - £961.54) =	£57.69
Total	£1,570.13

This gives net weekly earnings during this period of £2,276.10

When multiplied by 31 weeks, this gives total earnings of **£70,559.10**

6 April 2021 to 5 April 2022

The Claimant earned £16,667 (net of VAT) per month. This equates to a gross weekly amount of £3,846.23 (£16,667 x 12/52).

The applicable tax rates for the Claimant (who as above did not qualify for a personal allowance, based on his overall earnings) were:

Basic rate – 20% up to £37,700 per annum which converts to £725 per week
Higher rate – 40% between £37,700 and £150,000 which converts to between £725 and £2,884.62 per week
Additional rate – 45% of £150,000 and above which converts to £2,884.62 and above

The applicable Class 4 NI rates were:

NIC free – up to £9,568 per annum which converts to £184 per week
Standard rate – 9% between £9,568 to £50,270 which converts to £184 to £966.73 per week
Higher rate – 2% of £50,270 and above which converts to £966.73 and above per week

The Claimant would have paid the following tax and NI per week:

Basic rate tax: 20% of £725 =	£145.00
Standard rate tax: 40% of (2884.63 - £725) =	£863.85
Higher rate tax: 45% of (£3,846.23 – £2,884.62) =	£432.73
Standard rate NI: 9% of (£966.73 – £184) =	£70.45
Higher rate NI: 2% of (£3,846.23 - £966.73) =	£45.32
Total	£1,557.35

This gives net weekly earnings during this period of £2,288.89

When multiplied by 48 weeks, (the claimant did not work during June 2021) this gives total earnings of **£109,866.87**

Earnings from Employment paying a salary of £250,000 6 April – 31 December 2022

Had the claimant obtained a job paying him £250,000 a year, this would have equated to gross weekly earnings of £4,807.69.

The applicable tax rates for the Claimant (who did not qualify for a personal allowance, based on his overall earnings) were:

Basic rate – 20% up to £37,700 per annum which converts to £725 per week when divided by 52
Higher rate – 40% between £37,700 and £150,000 which converts to between £725 and £2,884.62 per week
Additional rate – 45% of £150,000 and above which converts to £2,884.62 and above

The applicable Class 1 NI rates between 6 April and 5 July 2022 were:

NIC free – up to £12,570 per annum which converts to £190 per week
Standard rate – 9% between £9,880 to £50,270 which converts to £242 to £967 per week
Higher rate – 2% of £50,270 and above which converts to £967 per week

The Claimant would have paid the following tax and NI per week:

Basic rate tax: 20% of £725 =	£145.00
Standard rate tax: 40% of (2884.63 - £725) =	£863.85
Higher rate tax: 45% of (£4,807.69 – £2,884.62) =	£865.38
Standard rate NI: 9% of (£967 – £190) =	£102.95
Higher rate NI: 2% of (£4,807.96 - £967) =	£124.82
Total	£2102.00

This gives net weekly earnings during this period of £2,705.68

When multiplied by 13 weeks, this gives total earnings of **£35,173.93**

The applicable Class 1 NI rates between 6 July and 31 December 2022 were:

NIC free – up to £12,570 per annum which converts to £242 per week
Standard rate – 13.25% between £12,570 to £50,270 which converts to £242 to £967 per week
Higher rate – 3.25% of £50,270 and above which converts to £967 per week

The Claimant would have paid the following tax and NI per week:

Basic rate tax: 20% of £725 =	£145.00
Standard rate tax: 40% of (2884.63 - £725) =	£863.85
Higher rate tax: 45% of (£4,807.69 – £2,884.62) =	£865.38
Standard rate NI: 9% of (£966.73 – £184) =	£96.06
Higher rate NI: 2% of (£4,807.69 - £967) =	£124.82
Total	£2,095.11

This gives net weekly earnings during this period of £2,712.58

When multiplied by 25.5 weeks, this gives total earnings of **£69,170.70**

Final Calculation

Net losses from employment with the respondent for the period 12 August 2020 to 31 December 2022	£408,615.23
Less	
Net actual earnings from consultancy between 12 and August 2020	(£2,696.96)
Net actual earnings from consultancy between 1 September 2020 and 5 April 2021	(£70,559.10)
Net actual earnings from consultancy between 6 April 2021 and 5 April 2022	(£109,866.87)
Net earnings between 6 April 2022 to 31 December 2022 had the claimant taken reasonable steps to mitigate his loss	(£35,173.93)
Net earnings between 6 April 2022 to 31 December 2022 had the claimant taken reasonable steps to mitigate his loss	(£69,170.70)
Total	**£121,147.67**