Case No: 1302574/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr I Iqbal

Respondent: Proactive Personnel Ltd

Heard at: **Midlands West by CVP** **On:25 July 2022**

Before: Employment Judge Woffenden

Representation
Claimant: Ms S Javed (lay representative and daughter of claimant)
Respondent: Ms S Jones, legal assistant

RESERVED JUDGMENT

The claimant's application for a preparation time order/costs dated 13 November 2019 is refused.

REASONS

1The purpose of the hearing today was to determine the claimant's application for a preparation time order/costs dated 13 November 2019 ('the costs application') , the hearing of which had been postponed from 6 January 2022.

2 The claimant had presented his claim on 23 May 2018.The claim was to have been heard by me over three days (15 17 and 18 October 2019). The costs application was made following a consent judgment sent to the parties on 17 October 2019, the background to which is set out in paragraphs 1 to 7 of my judgment sent to the parties on 14 August 2020.

3 I had before me an indexed bundle of documents (319 pages) ,a list of acts of the respondent on which the claimant relies for the purposes of his claim for costs (as ordered by Employment Judge Routley on 17 June 2022) ('the list of acts'),a supplementary bundle of 20 pages ,a document called 'the claimant's request for costs' which was attached to an email to the tribunal dated 3 January 2022 which the claimant updated after the hearing on 6 January 2022 (the costs request') and a costs schedule.

4 Neither party having addressed me about the respondent's ability to pay during the costs hearing ,I invited them to make submissions in writing about this. Only the claimant's representative replied within the set timescale to the effect the respondent was (in their opinion) able to pay as an established national organisation with 12 branches and over 130 staff .

5 Under rule 76 (1) of the Rules a tribunal may make a costs order and shall consider whether to do so where it considers that-
"(a) *a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or (b) any claim or response had no reasonable prospect of success*."

6 No costs order may be made unless the paying party has had a reasonable opportunity to make representations in writing or at a hearing in response to the application (Rule 77 of the Rules).

7 In deciding whether to make a costs order and if so what amount, the tribunal may have regard to the paying party's ability to pay (Rule 84 of the Rules).

8 Costs in the employment tribunal (though made more frequently than was the case in the past) remain the exception rather than the rule (**Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420)** and are compensatory not punitive. Tribunals must look at the whole picture of what happened in the case and ask whether there has been unreasonable conduct by the respondent in the way the proceedings were conducted and in doing so identify the conduct what was unreasonable about it and what effects it had. Costs should be limited to those which have been reasonably and properly incurred. Even if the grounds under rule 76 (1) (a) and (b) are established the tribunal still has a discretion as to whether to make an order.

9 When considering whether costs should be awarded on the ground of unreasonable conduct, it is the conduct of a party in bringing or defending a claim, or continuing to pursue the claim or defence, that can give rise to an award, and not conduct occurring before the institution of proceedings **(Davidson v John Calder (Publishers) Ltd and Calder Educational Trust *Ltd* [1985] IRLR 97)** .Prior conduct can be relevant to an assessment of whether it was reasonable to bring or defend the claim, but it cannot be treated as the act of vexatiousness or unreasonableness upon which an award of costs can be founded. Reasonableness is a matter of fact for the tribunal and has its ordinary English meaning.

10 A preparation time order is only made where a party is not legally represented and enables that party to be paid in respect of time spent by him and his advisers except for time spent at the final hearing calculated in accordance with a formula set out in the rules. The tribunal makes its own assessment of what is a reasonable and proportionate amount of time to spend on such preparatory work multiplied by £39 an hour (Rule 79 of the Rules). There is no cap on the amount that can be awarded.

11 The costs application was made on the ground that the respondent had acted unreasonably (Rule 76(1) (a) and contained 18 detailed bullet points setting out the reasons why it was averred the respondent had acted unreasonably.

12 The costs request (sent to the tribunal on 20 July 2022) said the costs application was made on under both Rule 76(1) (a) and (b). It comprised 17 pages and . After 5 paragraphs by way of preamble, the next 17 paragraphs set out in narrative form matters which predate the presentation of the claim and the history of the proceedings (as the claimant sees them). The latter includes reference to the management of the case and the conduct of hearings by various Employment Judges(including me).

13 There was a preliminary hearing on 16 June 2022 before Employment Judge Routley at which she ordered the claimant to provide a bullet point list of the acts relied on for the purposes of his application the costs hearing . The list of acts provided by the claimant said it summarised the acts as explained in more detail in Claimant's Request for Costs. It contained 42 numbered paragraphs. The list itself for the most part was generic and did not provide details of the acts ie what was alleged to have been done by whom or when .It was not fit for purpose in identifying clearly the acts on which the claimant relied . I have therefore considered only the grounds as set out in the costs application and the costs request.

14 There was considerable overlap and repetition in those documents.

15 At the commencement of the costs hearing Ms Javed told me she wanted to rely on what she had already provided in writing. I therefore asked Ms Jones to make her submissions which she did orally. I then gave Ms Javed the opportunity to respond to those submissions but for the most part and at length she reiterated the points she already made in writing.

16 I will first address the costs application.

The Costs Application

17 The claimant's first allegation of unreasonable conduct was of the respondent '*knowingly defending claim without merit and unreasonably requiring Claimant to prove it. The Respondent adopted a strategy of denying liability unless the Claimant was able to prove his claim and exploiting the Claimant's lack of awareness of his own legal rights'*.Ms Jones submitted the respondent was entirely justified in defending the claim. It was not unreasonable for the respondent to request evidence to substantiate the claim. The tribunal had written to the claimant on 29 November 2018 to make it clear to him that it was his responsibility to prove his claims for unpaid wages and holiday including the amount of compensation claimed for each claim.

18 In **Chandhok v Tirkey UKEAT/0190/14/KN** the then President of the Employment Tribunal said that the claim as set out in the claim form is not '*just something to set the ball rolling*' but '*sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made -meaning under the Rules of Procedure 2013, the claim as set out in the ET1*.' He went on, at [17], to stress that the starting point is that the parties must set out the essence of their respective cases on paper in the ET1 and the ET3. That process then allows disclosure and witness evidence to be limited around the pleadings to *'keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence'*. A tribunal only has jurisdiction to consider and

rule upon the claims which are made. The claims (and the issues in those claims) detemine the relevance of documents and witnesses. The only claims before me (since I had refused the application to amend) were for unpaid wages and holiday pay . I remind the parties that I heard no evidence ,the credibility of any witnesses was not tested and I made no findings of fact , nor did I determine the claims in the claimant's favour.

19 In his ET1 the claimant had ticked the boxes at section 8 for holiday pay and arrears of pay. No other box was ticked. In the narrative attachment to the ET1 he said he had entered into a temporary employee's agreement and asked the tribunal to determine the relationship between him and the respondent. He also said he sought the court's assistance in clarifying the amount of any holiday due. He asserted he was entitled to the same rights as '*permanent employees* ' in relation to a Bank holiday New Year 2018 and that permanent employees were not required to book bank holidays in advance .He also referred to being TUPE'd and sought clarity why he was not transferred and was seeking compensation for the failure to TUPE. It was made clear to the claimant in the order Employment Judge Findlay sent to the parties on 11 September 2019 (the Findlay Order) that the claim form made no reference to the Agency Workers Regulations 2010 ('the Regulations') and it was not at all clear what type of claim (if any) the claimant was attempting to make as far as TUPE was concerned. In section 9.2 of the ET1 (in which a claimant is asked to give details of how much is being claimed and how it is calculated) the claimant gave none but said ' *compensation/damages to be determined by the Court*' .It is for a claimant (not the employment tribunal) to formulate his or her claim. As HHJ Tucker warned in the case of **C v D UKEAT/0132/19** (19 September 2020, unreported), if a claim is not set out with sufficient precision, valuable time can be lost, costs can increase and there may be a delay in the case being heard, because the parties are not clear precisely what issues are in dispute. That is what happened in the history of this case.

20 In its short manuscript response in its ET3 the respondent said the claimant was a temporary worker supplied to one of its clients and contended he had received all pay entitlements. There was no evidence before me from which I could conclude that the respondent '*knowingly*' defended a claim without merit or unreasonably required the claimant to prove his claim. On the basis of the claim as pleaded it was not unreasonable conduct for the respondent to say in essence in its response that as far as it was concerned it had paid what was due. If the claimant lacked awareness of his legal rights (and what legal rights are being referred to are wholly unclear) ,there was no evidence before me from which I could reach any conclusions about when and how the respondent had exploited this. I conclude there was no unreasonable conduct by the respondent as alleged.

21 The claimant's second allegation of unreasonable conduct was that the respondent failed' *to provide copy of complaints procedure on multiple occasions although this was requested by the Claimant and falsely claiming it had not been requested. As a result a Tribunal Claim had to be initiated as the Respondent refused to clarify matters or provide requested information and documents. The Respondent understood this claim fell under the Agency Workers Regulations 2010 but failed to provide information under part 3 regulation 16 or under the Data Protection Act 2018 and GDPR rules as required.'* Ms Jones submitted that in relation to the complaints procedure this was conduct which predated the presentation of the claim. She said the tribunal had made it clear to the claimant

that there was no claim under the Regulations. Employment Judge Dean (before whom the case had been listed for final hearing on 7 March 2019) had said the claims were of unpaid wages and holiday pay only and told the claimant that if he wanted to add another complaint he would need to submit an application to include the wording of the proposed complaint and explain the delay in bringing it to the tribunal. The claimant had then asked for additional heads of claim to be added in its letter of 16 May 2019 which the respondent had opposed in its letter of 20 May 2019 and ,at the preliminary hearing before Employment Judge Findlay (see the Findlay Order), she had made it clear what the claimant needed to do if he wanted to pursue a claim under the Regulations .The claimant's application to amend was heard and refused on 15 October 2019 .The majority of the preliminary hearing before Employment Judge Findlay was for the claimant's benefit to enable the claimant to amend the E T1 and to confirm what matters were 'live ' before the tribunal. The respondent had been put to the costs of attending that preliminary hearing. The claimant had failed to give any specific examples of what information had not been provided under the Regulations or data protection.

22 I accept what Ms Jones' submission. The alleged unreasonable conduct predated the presentation of the claim and cannot be treated as the acts of vexatiousness or unreasonableness upon which an award of costs can be founded. Further there was no claim under the Regulations so what the respondent may or may not have understood or whether it did or did not provide information under the Regulations is irrelevant .The tribunal does not have jurisdiction in relation to data protection and there was no such claim before it. These matters formed no part of the way the respondent conducted the proceedings. I conclude there was no unreasonable conduct by the respondent as alleged.

23 The claimant's third allegation of unreasonable conduct is that the '*Reply to Claim was misleading and false. For example the Respondent was aware the Claimant was not a worker as claimed but an agency worker under the AWR 2010 as stated in the Respondent's Terms of Engagement and other correspondence including their agreement with the Hirer. It also falsely states the Respondent had provided information to the Claimant they had not including timesheets, holidays requested, payslips and pay rates. Respondent chose not to inform Court their Reply to Claim was incorrect even when they say they became aware of this. This was obstructive to the Court and the Claimant who remained unclear what the Respondent was disputing and therefore took up more time.'* Ms Jones submitted that the respondent had accepted the claimant was a worker for the purpose of his claims for unpaid wages and holiday pay. If this had been disputed by the respondent it would have affected his ability to pursue such a claim. Whether the respondent referred to the claimant as an agency worker or not was irrelevant because there was no claim under the Regulations. She had not drafted the ET3 and was not sure what documents had been provided to the claimant. Ms Javed had complained about the submission of without prejudice documents to the tribunal (which the respondent had maintained were 'open') but those documents clearly set out the respondent's position .It could not be said that the respondent was being obstructive and not making the tribunal aware of its position when the claimant had fought to keep the documents in question away from the tribunal. No costs should be awarded on that basis.

24 There was no claim under the Regulations in the ET1.It is not unreasonable conduct for a respondent not to respond to matters which are not pleaded. The

respondent said in its response it had documentary evidence (which it said it had given to the claimant) to substantiate its contention it had paid the claimant what he was entitled to. There is no evidence before me from which I could conclude that the respondent had '*falsely*' stated in the response that information had been provided to the claimant. The claimant has not identified when the respondent is said to have chosen not to inform the 'Court' their reply to the claim was incorrect and even if this did amount to unreasonable conduct on the part of the respondent I am unable to reach any conclusions about what effects this had. The claimant simply asserts this 'took up more time'.

25 The claimant's fourth allegation of unreasonable conduct was '*Unreasonably rejecting claim fell under the AWR*'. Ms Jones submitted that the claimant had made no claim under the Regulations and the respondent had not been unreasonable. As there was no such claim this should not be considered in the costs application.

26 As I have already said there was no claim under the Regulations in the ET1 and in those circumstances, if the respondent did reject the claim fell under the Regulations, it was not unreasonable conduct to do so.

27 The claimant's fifth allegation of unreasonable conduct was that the respondent was '*evasive throughout proceedings and therefore progress could not be made and matter took up disproportionate amount of the Claimant's (and his representative) and Court's time. The correspondence is therefore extensive (hundreds of emails) as the Respondent did not address issues over a long period although the Claimant and his representative attempted to narrow issues (for example requests for documents, why the Respondent had not incorporated regular overtime into holiday calculations and why the Claimant was repeatedly misinformed about his legal rights in regards to pay and holiday entitlement). Ms Jones assured the Court she would submit a further more detailed Reply (and an Order was not necessary) but then did not. We do not believe she ever intended to do this. This was unfair as Claimant did not understand Respondent's position until receipt of their schedule of loss and witness statements*' Ms Jones submitted the claimant had sent many emails about matters which were not in the claim (HMRC TUPE and the Regulations) to which the respondent had always tried to respond . She submitted it was incorrect for the claimant to say he did not understand the respondent's case until exchange of witness statements and the schedule of loss. On 5 July 2019 the respondent had sent a detailed letter to the claimant which made the respondent's position clear and referred to relevant case law. Ms Javed had asserted that she had not intended to serve a more detailed reply but she relied on the correspondence dated 5 July 2019 which set out the response which it was always intended would be submitted. There were several delays in getting information to the claimant for which she apologised . Ms Javed referred to 100s of emails .If the respondent was evasive as alleged it would not have responded especially since the correspondence related to matters which were not part of the claim but took up a lot of time (the Regulations TUPE and HMRC).She drew my attention to what Employment Judge Findlay had observed in the Findlay Order in which she said the tribunal's file was noteworthy for the amount of combative correspondence received from the claimant's representative Ms Javed. She said the respondent felt this was an abuse of process. She said the tribunal had been forced to intervene regularly in correspondence between the parties.

28 As far as the latter point is concerned I agree that Employment Judge Findlay made such an observation concerning the tone of the claimant's correspondence. However the respondent has not made an application about abuse of process or for costs for unreasonable conduct by the claimant and I am concerned here with the claimant's allegations of unreasonable conduct on the respondent's part. The claimant says the respondent was evasive throughout but there is no evidence before me from which I could reach such a conclusion. The main thrust of the claimant's fifth allegation is that the respondent failed to amend its response (though it said it would) and never intended to do so. There is no evidence from which I could draw the latter conclusion. By 5 July 2019 the respondent had clarified its position in correspondence in relation to what it then saw as issues in the case or points that needed addressing. I note before me Ms Jones has apologised for but did not explain the delays in providing information (delays in getting information from her colleagues referred to in correspondence is not an adequate excuse) or why it took her until 5 July 2019 to write what she intended to be the response. However, even if this was unreasonable conduct it is difficult to say what difference in terms of costs or the conduct of the claim it would have made if the claimant had had any such information sooner. By the time the claim came before me it did not appear the issues in dispute had in fact been narrowed; both parties were still evidently unaware of the issues to be determined in the claim because it was necessary for me to address this at the commencement of the hearing.

29 The claimant's sixth allegation of unreasonable conduct was that the '*Respondent attempted to shift liabilty (sic) by falsely suggesting Hirer was to blame for failings however did not want Hirer or their representative Ms Bell to be included in Proceedings - Claimant sought further clarity regarding this but it was not provided and therefore Claimant had to seek Court Order for Ms Bell (on behalf of Hirer) to attend as a witness. Ms Bell's statement supports Claimant's claims against Respondent and contradicts Respondents assertions Ms Bell and Hirer were to blame for Claimant's losses. Ms Bell stated she, like the Claimant and his representative, found the Respondent extremely obstructive'*. Ms Jones said the claimant's application for a witness order for Ms Bell did not make any reference to Ms Bell being called to clarify liability .She referred to paragraph 10 of the costs request in which Ms Javed had referred to Ms Bell's witness statement which had sections which talked about comparable employees and the respondent's alleged failings under the Regulations but this should be disregarded because there was no such claim before the tribunal. She said Ms Javed had also referred at paragraph 14 of that document to an internal email (contained in the bundle) in which Ms Jones had written to a colleague that '*If we have done everything possible to ensure we have collected the relevant information and it is the Hirer who has withheld information ,we could potentially draw them into proceedings and/or use this as a defence*.' Ms Jones submitted in the absence of a claim under the Regulations this was irrelevant and the contents of the internal email had formed no part of any pleading in the proceedings. I agree .I do not consider there was any unreasonable conduct by the respondent as alleged.

30 The claimant's seventh allegation of unreasonable conduct was that '*The Respondent systematically and unlawfully underpaid agency workers holiday pay with no clear explanation for this failure over a number of years. Teresa Bell on behalf of the Hirer has confirmed the Respondent was aware of their policies in relation to pay including holiday pay. Respondent has attempted to disguise wilful unlawful actions over a period of years by claiming ignorance although those*

involved were senior managers with approximately 10 years experience each in the industry. These systematic unlawful practices have affected many others causing significant loss of pay and are suspected of being reflective of fraud due to evasive and unreasonable conduct.'Ms Jones submitted there was no evidence of this ;the claimant's claim related to the claimant and no other workers. As far as Ms Bell is concerned it was clear she was not acting on behalf of her employer; Ms Javed had confirmed in the email of 22 January 2019 that her employer had been prevented her from assisting the claimant. The extent of documentation Ms Bell had given to the claimant was unknown. She might have breached the terms of the agreement between the respondent and the hirer but in any event although it was said she had 10 years' experience in the industry she was not a legal expert nor did she calculate pay.

31 The above is a very serious allegation but there is no evidence before me from which I could conclude that the respondent acted in the way alleged and in any event I am concerned with the respondent's conduct in these proceedings. In these proceedings there was no claim under the Regulations.

32 The claimant's eighth allegation of unreasonable conduct was of a '*failure to comply with Court Orders more than once: Reply was served late, Directions were not complied with (including disclosure - timesheets and holiday forms missing and some documents disclosed late, March Hearing Bundle was not held together using tags or contained in ring binder as Ordered but using sharp metal stationary that Judge Dean advised must not be used, Chronology was limited to end of June 2018 and insufficient time given to consider this (less a working day)*.' Ms Jones submitted that so far as she was concerned the response was presented in time. There were 11 emails to the claimant containing disclosure one of which was too large and exceeded the relevant size restriction. It was not until the following day that the respondent became aware it had not been sent and the respondent notified the claimant why it had failed and sent the documents immediately. There was no malice and a hard copy was posted to the claimant. The hearing bundle was held together by a metal clip .She had not been aware this was not permitted and had apologised .There was no delay and this was at the respondent's expense in any event so she was not sure why this has been mentioned. The claimant had not explained the significance of the chronology so she was unable to comment further. She also referred me to the bundle for this hearing which the clamant was meant to try and agree with the respondent but this had not been done. The respondent had asked for some documents to be included but this was not done because the claimant had believed they should not be included.

33 As far as the allegation that the response was served late is concerned the tribunal file shows that Ms Jones wrote a letter to the tribunal (copied to the claimant) in which she explained why she thought the response (which had been rejected because it was late) had not been received by the tribunal until 2 July 2018 when it should have been received by 27 June 2018. Employment Judge Lloyd granted an extension of the time limit to enable the response to be accepted. He would not have done so if he thought the respondent had acted unreasonably in this regard. The parties were informed of this by a letter from the tribunal on 26 July 2018.The claimant has not identified what directions were not complied with or when this happened. Ms Jones has provided an explanation in relation to late disclosure and for the metal clip on the bundle .The claimant has not explained the significance of the chronology ending in June 2018. The claim related only to the period up to 16 March 2018 (see the Findlay Order paragraph

3) It may be that the respondent's conduct of the proceedings could have been improved upon but the test is that it was unreasonable and I am not satisfied that the matters set out by the claimant in the eighth allegation amount to unreasonable conduct.

34 The claimant's ninth allegation of unreasonable conduct was that '*The Respondent often provided documents with little time to consider them (less than one working day) and being required to agree these or a Bundle e.g. chronology, agreed statement of facts, Bundle'*.Ms Jones said that no specifics of the occasions were provided by the claimant to enable her to respond but she said that the two main bundles for the hearing had been prepared by the respondent and were extremely large (1076 and 444 pages respectively) It was time consuming and difficult to agree the bundle with the claimant. The respondent had not submitted anything late and ,if it had ,this was not done maliciously. The respondent would not deliberately delay matters because that would put more pressure on the respondent. I am not satisfied in the absence of specific occasions that the matters set out by the claimant in the ninth allegation amount to unreasonable conduct nor am I able to reach any conclusions about what effects this may have had.

35 The claimant's tenth allegation of unreasonable conduct was that '*on multiple occasions the Respondent submitted without prejudice documents to the Court although the Claimant objected to this and referred to without prejudice negotiations in correspondence to the Court. Judge Woffenden removed this document from the Bundle and explained this was not permitted although the Respondent's legal advisor would be aware of this'.* Ms Jones submitted that again the claimant had not made it clear in the application exactly what documents were being referred to but she assumed it was her letter of 5 July 2019 because she had agreed and it had been removed it from the bundle for the October hearing. Employment Judge Routley (who on 17 June 2022 made case management orders about certain documents to be included in the bundle for the costs hearing) had confirmed the respondent was entitled to rely on it because the right to refer it to the tribunal had been reserved. The claimant had sought to include it in a redacted form .If he had truly believed it was without prejudice it would have been excluded. She submitted that it appeared the claimant's concern was that if it was seen in its entirety it would show the respondent was not being obstructive evasive or vexatious as alleged .

36 The claimant has not identified the multiple occasions to which reference was made. However ,in relation to the final hearing, I had advised the parties that without prejudice correspondence should not be in the bundle for the final hearing and it was removed. I am not satisfied that Ms Jones' inclusion of such documents amounted to unreasonable conduct; even if she ought to have been aware as a legal assistant that such correspondence should not be included, there is no evidence before me from which I could conclude she did so deliberately.

37 The claimant's eleventh allegation of unreasonable conduct was that in '*January 2019 Hearing had to be adjourned due to Respondent not providing relevant documents in order for Claimant to calculate losses.'* Ms Jones submitted that the respondent had provided all payslips in April 2018. There had been disclosure and an Subject Access Request was also made and the information was sent twice (a memory stick on 13 December 2018 and a hard

copy on 18 December 2018).Disclosure was also made but after the date of the January hearing on 21 January 2019 and as required by the order of the tribunal. The hearing was postponed at the claimant's request dated 15 November 2019 on the grounds that the respondent had not provided information (despite having said mid July 2019 it would be provided within a month) required to enable him to prepare for the meeting. Ms Jones did not object to the request and apologised for the delay which she attributed to having not received the requisite information from other departments and proposed the information be provided by 14 December 2018.She also referred to the fact that the claimant had estimated his losses to be about £1000 plus damages for holidays and wages lost or paid and sought a breakdown of how the figure had been calculated as required by the notice of hearing .

38 The latter point was a reference to the sole case management order then in place which required the claimant to set out within 4 weeks from 30 May 2018 what remedy the tribunal was being asked to award and any evidence and documentation supporting what is claimed and how it was calculated. Ms Jones had written to the tribunal pointing out the claimant's noncompliance There was no other order for disclosure in place. I granted the claimant's application for a postponement and decided the case management order dated 30 May 2018 should be replaced with orders for mutual disclosure (14 December 2018) the agreement and preparation of a bundle (21 December 2018 and the exchange of witness statements (14 January 2019).The adjournment was not solely due to the respondent having not provided relevant documents but also because (as appeared to be the case) the claimant had not complied with the case management order dated 30 May 2018 and case management orders were needed to enable the parties to get ready for the final hearing .

39 The claimant's twelfth allegation of unreasonable conduct was that in '*March 2019 Hearing was adjourned and Judge Dean instructed Respondent their witnesses needed to be in attendance and to revise calculations incorporating regular overtime. The revised calculations were not provided until mid-July 2019 after the Claimant contacted the Court. The Respondent had substantially altered the way in the calculations were done and not simply factoring in overtime in order to further limit liability. The Respondent had admitted unlawful deductions and underpayment for all assignments but had now decided they were no longer owed for assignment 2 and 3 because they argued they were out of time. This was legally incorrect and we found this position morally abhorrent but consistent with the Respondent's underhand conduct.'* Ms Jones submitted that Employment Judge Dean had said that witnesses should be in attendance and revised calculations were required. The postponement was for several reasons and was not limited to the absence of the respondent's witnesses and the calculations. Employment Judge Dean had asked her if she could explain the calculations and she had said she could not because a colleague had prepared them. She had then prepared a calculation and provided it on 5 July 2019.Another factor was the size of the bundle and the time estimate for the hearing (1 day) .Mrs. Bell was in attendance but she had not prepared a witness statement and Employment Judge Dean had said such a witness statement was required because the respondent could not cross-examine her without such a witness statement. As far as the out of time point was concerned in July 2019 the respondent had notified the claimant of the **Bear Scotland** case the effect of which was that the respondent had concluded no payments for two assignments was payable and only the third assignment could be considered. She submitted contrary to what was said by Ms Javed the respondent's position was legally

correct and the respondent had not been underhand about it; if it had been aware of the case earlier it would have notified the claimant.

40 Employment Judge Dean's note indicates there were a number of problems at the final hearing listed for 7 March 2019 (time estimate 1 day) ;no witness statement had been prepared for Ms Bell who did not know the purpose of her giving evidence; the claimant wanted to amend the claim to include matters in relation to which the tribunal had no jurisdiction (tax and NI) and a TUPE claim but Employment Judge Dean told the claimant the only claims then before the tribunal were holiday pay and unpaid wages and other matters needed to be the subject of an amendment application; she noted Ms Jones was not proposing to call a witness to introduce its evidence . The parties agreed there were papers to be read and it would take longer than lunch time to complete the evidence and submissions. Employment Judge Dean therefore decided to postpone the case in view of the impossibility of concluding the case that day. She made no orders about the revision of calculations. It is entirely reasonable for the respondent to make admissions if appropriate and to draw to the claimant's attention to a relevant case on which it intended to rely in relation to the issue of time limits (a jurisdictional issue) . There is no evidence to support the assertion of consistently underhand conduct. I do not consider there was any unreasonable conduct by the respondent as alleged .

41 The claimant's thirteenth allegation of unreasonable conduct was that the *'Respondent insisted Claimant calculate losses over a three year period although they could have done this when they accepted monies were owed and were best placed to do so. This would have saved time and costs but demonstrates their lack of cooperation and obstructive behaviour. As a result the Court ordered the Respondent to produce a schedule of loss also*. 'Ms Jones submitted that the claimant was required to prove his losses and it was not for the respondent to prove the claimant's case for him. The respondent had prepared and provided its calculations and co-operated with the claimant.

42 On 8 January 2019 on my own initiative I decided to make orders there should be a schedule of loss served by the claimant and a counter schedule served thereafter by the respondent because I thought this would be of help to the parties and the tribunal in narrowing the issues in dispute (both liability and remedy) in dispute in relation to the claims of unpaid wages and holiday pay . I do not consider there was any unreasonable conduct by the respondent as alleged.

43 The claimant's fourteenth allegation of unreasonable conduct was that the '*Respondent's documentation was inconsistent due to records being incorrect and therefore this led to calculations being revised more than once and took up further time. The Respondent provided more than one schedule of loss which took up more time and start and end dates for assignments were not consistent either*. ' Ms Jones submitted that the claimant had failed to provide any specific examples of any such incorrect records. I agree. I am not satisfied that the matters set out by the claimant in the eighth allegation amount to unreasonable conduct.

44 The claimant's fifteenth allegation of unreasonable conduct was that '*The claim involved the need for complex calculations requiring considerable time. Extensive excel spreadsheets had to be produced incorporating detailed formulas in order to calculate corrected weekly cumulative pay and holiday hourly*

pay rates. It also involved crossreferencing hundreds of documents (weekly timesheets, weekly payslips, holiday booking forms and bank statements) for a three-year period.' Ms Jones submitted that the respondent had manually prepared its calculations as set out in its letter of 5 July 2019.It had had to bear its own costs in preparing the calculations and believed that the claimant should also bear his own costs.

45 The thrust of the fifteen allegation appears to be a complaint about how long it took the claimant to make necessary preparations for the hearing of his claim but does not contain an allegation of unreasonable conduct on the part of the respondent which (as Ms Jones said) had to undertake a similar process.

46 The claimant's sixteenth allegation of unreasonable conduct was that there were '*further dishonest submissions to the Court including claims the Respondent had made payment to HMRC under an incorrect NI number and the matter was resolved. HMRC dispute this and advise they are still awaiting some £4000 that have been deducted from the Claimant's wages for the 2017-18 period. The Respondent is not advising why this matter remains unresolved and is not likely to unless further proceedings are initiated and continue to delay responding to queries about this'*. Ms Jones submitted that the tribunal had confirmed in September 2019 that the tribunal had no jurisdiction in relation to HMRC and this was therefore irrelevant .In any event the allegations were untrue .A colleague had made several calls and eventually got an email address for HMRC .On 21 November 2019 the colleague emailed HMRC explained what had happened and asked for the reallocation of the deductions. The respondent had paid the correct amount. There was no follow up from the claimant or HMRC and the respondent believed the matter was closed.

47 The sixteenth allegation is of dishonesty. This is a serious allegation and requires cogent evidence (not an assertion) to support it. However, whatever issues there were with HMRC, this was not a claim before the tribunal. The tribunal has no jurisdiction in these matters as was clearly explained to the claiamnt by Employment Judge Findlay (see the Findlay Order) and this is wholly irrelevant for the purpose of a costs application in relation to the respondent's conduct in these proceedings.

48 The claimant's seventeenth allegation of unreasonable conduct was of the respondent '*fraudulently amending date on a document signed by Claimant and not responding to why this was done for over a year'*. The eighteenth allegation of unreasonable conduct was that '*the Respondent manufactured assignment documents (for Employment Tribunal purposes) but had not been provided to Claimant as claimed'*. Ms Jones said that the document in question was an interview check list. It was an internal document to ensure that all candidates were dealt with in the same way. A consultant had amended the date to ensure the claimant was paid on time .She submitted this was irrelevant to the claim. She also denied that the assignment documents had been fabricated and in any event that had nothing to do with the claim.

49 These too are serious allegations of fraud and fabrication of documents and require cogent evidence (not assertions) to support them. There is none. In any event I accept Ms Jones submission that these matters have nothing to do with the claimant's claim.

The Costs Request

50 I have carefully considered the contents of the costs request. To the extent that in the first 17 paragraphs the claimant raises allegations about conduct which predate the presentation of the claim these cannot be treated as the act(s) of vexatiousness or unreasonableness upon which an award of costs can be founded (see paragraph 9 above).Further it is not relevant to an assessment of whether it was reasonable for the respondent to defend the claims of holiday pay and unpaid wages. The claimant alleges that he was never given a clear response to his holiday pay queries .However it is clear that after his 'letter of claim' dated 19 February 2018 in which he sought confirmation of his holiday entitlement (in particular in relation to New Years' Day 2018) and how holiday was booked (but not about its computation) the respondent replied to what it described as his email of complaint and set out its position as far as these matters were concerned and advised if the claimant was dissatisfied to contact ACAS . The response was consistent with the respondent's response to the claimant's letter of claim dated 19 February 2018. In the preamble (paragraph 2) the claimant alleged the ET3 was factually incorrect and believed to be deliberately misleading. It had denied the claim and falsely stated the claimant had received all pay entitlements .They did not inform the 'Court' the claimant was an agency worker due to their awareness they were in breach of the Regulations ,The ET3 falsely claimed the claimant had been supplied with documents when he had not .There was no factual or legal basis for the defence, which was described as an '*exercise in subterfuge*'. For the sake of completeness I have already addressed the respondent's response within paragraph 20 above and have already stated there was no claim under the Regulations before the tribunal .The allegation is that the claimant **believed** the ET3 to be deliberate misleading. That he believed this to be the case is not evidence that the respondent had acted in a way which was deliberately misleading. The word '*subterfuge* ' implies deceit (yet another serious allegation) but again there is no evidence to support this.

51 Paragraph 18 sets out what the ET1 says and contains no allegation of unreasonable conduct on the part of the respondent. As far as paragraph 19 (a complaint about the adequacy of the response) is concerned again this has been addressed in paragraph 20 above.

52 In Paragraph 20 the claimant complains of deliberate impediment by the respondent in the calculation of monies due, the dishonest suggestion by the respondent that they had been unable to gather documents and that the court was deliberately misled by the respondent. Despite the serious nature of the allegations made there is no evidence to support them .Paragraph 21 (in which the claimant explains the rationale for obtaining a witness order for Ms Bell) contains no allegation of unreasonable conduct by the respondent .

53 In paragraph 22 the claimant complains about the non-provision of a P45 and PAYE reference number. However, the unreasonable conduct must relate to the way these proceedings were conducted by the respondent and the tribunal has no jurisdiction in relation to those matters.

54 In paragraph 23 the claimant complains about the non-provision of a contract of employment under the Regulations but there was no such claim before the tribunal so this is irrelevant for the purposes of a costs application. He also complains that the respondent told the tribunal the claimant was not an employee when the P45s and P60s state the respondent was his employer. In

the context of a claim for non-payment of wages and holiday pay this issue is irrelevant. This was made abundantly clear to the claimant during the preliminary hearing conducted by Employment Judge Findlay (see paragraphs 14 15 and 16 of the Findlay Order) . It cannot amount to unreasonable conduct by the respondent.

55 In paragraph 24 the claimant complains of the non-provision of a wage slip in relation to the consent judgment settlement monies but (whether or not this ought to have been provided to the claimant) this was not conduct of the respondent in the way the proceedings were conducted. The proceedings (for liability purposes) were at an end on signing of that judgment .

56 In paragraph 25 the claimant complains of the alleged effect of the respondent's '*general unlawful conduct'* on the claimant's tax affairs but any such conduct (whatever it was -which is not particularised) is wholly irrelevant for the purpose of a costs application in relation to the respondent's conduct in these proceedings. As far as paragraph 26 is concerned (which concerns the rescheduling of the hearing on 7 March 2019) I have already addressed this in paragraph 39 above.

57 In paragraph 27 the claimant says he did not understand Employment Judge Dean's instructions about adding to his claim but that cannot be an allegation of unreasonable conduct on the respondent's part .

58 In paragraph 28 the claimant sets out the matters he sought to include in his claim in his letter of 16 May 2019 and the respondent's response but fails to explain why this amounts to unreasonable conduct by the respondent.

59 In paragraph 29 the claimant says the respondent always understood the claimant was making a complaint/claim were about the Regulations but no such claims were ever before the tribunal.

60 Paragraphs 30 to 35 contain no allegations of unreasonable conduct on the part of the respondent ;they set out an account of the hearings before Employment Judge Findlay and before me.

61 In paragraph 36 the claimant alleges a evasive and dishonest strategy in dealing with the claimant's complaints and claim intended to avoid openly acknowledging their (the respondent's) deliberate systematic unlawful practices. This is a serious allegation of wrong doing and as I have previously stated requires cogent evidence (not an assertion) to support it. There is none. It also complains of the respondent's alleged failure to narrow the issues and clarify points raised with them but implicitly acknowledges that by 5 July 2019 (3 months before the final hearing) by its letter to the claimant of same date the respondent had addressed this. If so and this was unreasonable conduct ,it is difficult to say what difference in terms of costs or the conduct of the claim it would have made if the claimant had had any such information before 5 July 2019 . This would not apparently have encouraged settlement at an earlier stage because although an offer of £3000 to settle the claim (quantified in the sum of £496.13) was made in the respondent's letter of 5 July 2019 it was evidently rejected and by the time the matter came before me the parties still had not identified the issues in dispute.

62 In paragraph 37 the claimant complains of non-adherence to the ACAS Code :Disciplinary and Grievance Procedures. Had the claims succeeded then unreasonable noncompliance with a relevant code might have had relevance to the issue of compensation but the unreasonable conduct alleged predated the presentation of the claim and cannot be treated as an act of unreasonableness upon which an award of costs can be founded.

63 Paragraphs 39 and 40 contain no allegations of unreasonable conduct on the part of the respondent ;they simply identify the individuals at the respondent who the claimant said handled his complaints and allege that the respondent was aware of the Regulations and had intentionally not complied with the complaints regime thereunder, notwithstanding its documentation. As has already been stated no claim under the Regulations was ever before the tribunal.

64 Paragraph 41 contains an allegation of the lack of a genuine dispute as to monies owed borne out of wilful intentional systematic unlawful conduct aimed at cheating the claimant and others out of their pay to the respondent's financial gain. At the risk of repetition these are serious (and wholly unparticularised allegations) of wrongdoing and require cogent evidence (not assertions) to support them. There is none. It was also claimed that the respondent was '*reasonably aware'* that monies were due but dishonestly claimed otherwise. The response was not prepared by Ms Jones but by a colleague .Ms Jones took over conduct of the proceedings after her return from maternity leave in July 2018.I do not know (because there is no evidence about this) what that colleague knew or did not know (or ought to have known) at the time the response was prepared but there is no evidence of dishonesty. The response was consistent with the respondent's response to the claimant's letter of claim dated 19 February 2018 (see above paragraph 50). It was alleged there was not a grain of truth in the response. The respondent accepted in a revised calculation that £496.13 gross was owed to the claimant in its letter of 5 July 2019 and made an offer to settle of £3000 but it does not follow that at the time the response was presented the response to the claim as it was pleaded had no reasonable prospect of success. It was also claimed the respondent was not compliant with the Regulations but there was no such claim before the tribunal.

65 As set out above looking at the whole picture of what happened in this case I have not found that the respondent has acted unreasonably as alleged in the way it conducted the proceedings or that the response had no reasonable prospect of success. It follows that the application for a preparation time order or a costs order is refused.

Employment Judge Woffenden

Date 14/11/2022