EMPLOYMENT TRIBUNALS

Claimant: Mr A Peartree

Respondent: Prinsegate Developments Ltd

JUDGMENT ON COSTS

The claimant's application for a Preparation Time Order is upheld and I make an award of £666.50.

REASONS

Introduction

1. For ease of reference I refer to the claimant as Mr Peartree and the respondent as PDL.

2. On 7 December 2022, I conducted a final hearing to determine Mr Peartree's claims (constructive unfair dismissal, holiday pay, arrears of pay and other payments). The claim for constructive unfair dismissal was dismissed upon withdrawal. The remaining claims were upheld, and I awarded Mr Peartree £2,989.74 in compensation. I reserved judgment which was sent to the parties on 19 December 2022.

3. Mr Peartree was a litigant in person in these proceedings. He has applied for a Preparation Time Order ("PTO").

4. A costs order or a wasted costs order may be made either on the Tribunal's own initiative or following an application by a party. A party may make such an application at any stage of proceedings and up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. Before any order is made, the proposed paying party must be given a reasonable opportunity to make representations, either in writing or at a hearing, as the Tribunal may order in response to the application.

5. On 5 January 2023 Mr Peartree applied for a PTO. He claims £1444.

6. PDL resisted the application setting out their reasons in a document entitled "Response to Preparation of Time Order Application".

7. On 25 April 2023, I instructed the Tribunal Administration to write to PDL asking if they wished to have a costs hearing. They were to do so within seven days. They did not reply.

8. On 9 May 2023, Mr Peartree submitted further representations in support of his application to respond to PDL's response.

9. This judgment has been made without a hearing and is based on the application and response and the documents referred therein.

The substance of Mr Peartree's application and PDL's response

10. Mr Peartree's application is very detailed and well laid out. It runs to several pages. I do not intend to repeat verbatim everything in the application. However, the application is broken down into distinct elements which I have reproduced verbatim below.

    The Respondent lied or misled the tribunal.

    The Respondent lied or misled the tribunal on five occasions:

    1) At the start of the hearing the Judge asked if there were any preliminary matters. The Respondent immediately answered "no". This was a lie, there were two. The first related to the Respondents failure to respond to the ET1 before the deadline, the second related to the failure to supply evidence. The Respondent was aware of both of these preliminary matters, having made a submission on the first less than thirty minutes before the hearing (see the attached Witness statement submitted the morning of the hearing) and was aware of the second in advance (see Item 5 below). I clarified that there were two Preliminary matters, the Judge accepted this. Considering the evidence, it is not credible to argue the Respondent made an innocent mistake.

    2) During Mrs Ralph's questioning of me, I referred to a video recording which I understood had been submitted as evidence. This is mentioned in paragraph 30 of the Judgement (attached). The Respondent claimed to have no knowledge of the video and to have never received it. This was a lie. In fact, the Respondent had received the video on three separate occasions (see Item 1 below). Considering this, it is not credible for the Respondent to claim this was an innocent mistake.

    3) While discussing the missing video, the Respondent repeatedly emphasised how difficult it had been to agree the bundle. In fact I had prepared a draft Bundle for the Respondent, the "difficulties" encountered were the Respondent attempting to remove items which proved relevant at the hearing (such as correspondence with Mrs Sinead George and regarding the Registered Office) and were straightforward to resolve. By making these false claims, the Respondent attempted to mislead the tribunal into believing I acted unreasonably.

4) As is discussed further below, the Respondent failed to provide any evidence regarding losses they claimed to have incurred in their ET3 Response (page 39 of the Bundle). Such evidence would have been critical for their case. The fact they did not provide them despite those documents being requested twice by me (pages 148 and 149 of the Bundle) and by the Judge during the hearing, and that they failed to explain their failure to supply evidence despite the Judge stating they had to, strongly indicates that no such losses were incurred. In short, the Respondent lied about them. Further in support of this, in the Respondent's ET3 form (page 36 and 39 of the Bundle) they claim they suffered damages directly resulting from my aborted survey of 242 Lower Road, London, SE8 5DJ totalling £1,300. In fact the survey was re-arranged and undertaken on the same day by Mr Prinse (witness of the Respondent) and is provided in pages 96 to 103 of the bundle. No loss was suffered. During cross-examination, the Respondent claimed the costs incurred were "opportunity costs".

5) As noted in paragraph 61 of the Judgement (attached) the Respondent, when attempting to explain why the accountant running their payroll had labelled a payment as "commission" and not "bonus" on my payslip, said "that is how the accountant words things". The Judge found this explanation "unsatisfactory", further noting "the value of the payment suggests that it was calculated by reference to a percentage and bears all the hallmarks of a commission." Additionally, the Respondent refers the commission scheme in various e-mails (see page 108 and 111). It is not credible for the Respondent to claim this was an innocent misunderstanding. The Respondent was aware it was a commission scheme, had advertised it to staff as a commission scheme and was attempting to mislead the Tribunal as part of their defence.

<u>Behaved unreasonably by not disclosing documents.</u>

The Tribunals instructions (pages 23-24 of the Bundle) were that at least six weeks before the hearing we were to exchange evidence ("you must send all relevant documents you have in your possession or control even if they do not support your case"). The Respondent claimed to have suffered various losses in their ET3 form (page 39 of the Bundle). I requested evidence from the Respondent on 14th August and again on 17th October (pages 148- 149 of the Bundle). I also sent multiple chasers (such as in the letter on page 49 of the Bundle). The Respondent did not provide any of the requested evidence or information by the deadline of October 26th. The Respondent's legal representative acknowledged this in an e-mail 23rd November (Item 5 below). On November 24th, without explanation, the Respondent provided a single piece of the requested evidence. No comment was made regarding the various other outstanding items.

This issue was raised at the beginning of the hearing. The Judge stated the requested documents were relevant and the Respondent must provide them. Time had overtaken some of them, but those that the Judge stated must be provided included:

• Evidence of losses claimed by the Respondent relating to "lost" work and a negligence claim.
• Evidence of mitigation actions taken by the Respondent for the above losses.
• Evidence relating to targets which the Respondent claimed I failed to meet.

• Notes of a meeting between myself and the Respondent in February 2022. The Judge gave the Respondent 30 minutes to provide the above and stated that an explanation for them not being provided earlier would be required. The Respondent provided various documents but only one actually met the above criteria (notes of the February meeting). The only explanation provided by the Respondent was via their legal representative who advised the Tribunal that the blame was on the Respondent itself (Prinsegate) for not providing the documents.

<u>Has not complied with other directions from the tribunal without good reason.</u>

As per the Tribunal instructions (page 16 of the Bundle), the Respondent was required to provide a written response to the ET1 form by 17th August 2022. They failed to make a response until 14th October (pages 36-42 of the Bundle), claiming not to have received the Tribunal documentation (pages 53 – 54 of the Bundle) until I had personally undertaken my own investigations and on 3rd October (47-50 of the Bundle) wrote to the Respondent's registered office, trading address, solicitors office, and six different e-mail addresses. That came after months of attempts by me to reach out to the Respondent and their solicitor, which are outlined in a timetable within the aforementioned letter.

The Respondent applied for an extension of time on the basis of not having received the Tribunal documents. At the hearing, the Judge extended time having considered the Respondents witness statement, a letter by Regional Employment Judge Wade from August, and that the balance of prejudice favoured the Respondent (paragraph 14). I accept the Judge's ruling. In relation to my Preparation Time Order I request the tribunal not to re-consider it, but whether the Respondent acted reasonably in not complying with the Tribunal's instructions in regard to the Preparation Time Order legislation.

In a letter dated 22nd August (page 43 of the Bundle) Judge Wade does not explain on what basis the tribunal believed the forms were not satisfactorily served. It follows that there are two possibilities; 1) the address I provided to the tribunal was incorrect, or 2) the notification forms were lost in the post.

Regarding the postal address, the address I provided in the ET1 claim form was 20-22 Wenlock Road, London, N1 7GU (page 5 of the Bundle). As per the Respondent's Companies House record and witness statement, this address is correct. It follows tribunal letters were sent to the correct address.

It is impossible to prove if the documents were lost in the post, however from 27th July to 3rd October I sent three letters tracked delivery to the Respondents Registered Office. As per pages 61-70 of the Bundle, all were received, signed for, opened, and then sent back to me. The Respondent's Registered Office address is a serviced office used by many firms. Having sourced a telephone number for them, I called and spoke to a receptionist of 20-22 Wenlock Road on 20th September at 12.36pm. The receptionist informed me of the arrangement the Respondent has with them is that clearly marked Government post is forwarded to their trading address, everything else is returned. I asked about letters from the Employment Tribunal, she confirmed such letters would be returned to the sender.

I quote below from the Government's website regarding registered offices (https://www.gov.uk/limited-company-formation/company-address); "If you choose to use a third party agent to handle your mail, you must make sure that the service includes sending all of your company's mail to your registered office address." "You may be breaking the law if you choose to receive only some of the mail sent to your company (for example, by using a service which stops junk mail)."

If using a Registered Office to stop junk mail is a breach of the law, then using the Registered Office to stop receiving Employment Tribunal notices is certainly is too. I informed the Respondent of this by letter on 6th October. The Respondent's replied claiming the matter was of low priority and made vague and unsubstantiated threats (see Item 3 below).

Having had further time to consider the witness statement the Respondent submitted on the morning of the hearing (I only had 30 minutes at the hearing itself), in paragraph 9 the Respondent's legal representative claimed the evidence I provided (pages 61-70 of the Bundle) does not prove the Respondent's registered office forwarded post to their trading address and described their registered office service as "wholly unreliable". There are 4 points to make; 1) serving notice on a Registered Office is legally sufficient, there is no requirement to forward it onto their trading address; 2) the Respondent's witness is a Director of a Limited Company, by law he is required to ensure adequate postal arrangements with the registered office, if the arrangements were inadequate then he broke the law; 3) the Respondent could have provided their contract with the Registered Office as evidence but chose not to; 4) I informed the Respondent of the issue on 6th October and the response was dismissive and threatening (see Item 3).

To conclude, on the balance of probabilities the claim form was satisfactorily served. It was sent to the correct address and post was being accepted on behalf of the Respondent by the Registered Office. On the balance of probabilities, their Registered Office opened the tribunal documents before returning them to sender. The Respondent's Registered Office fell short of legal minimum standards. The Respondent is aware and has taken no action to rectify. It is not in the interests of natural justice for the Tribunal to consider knowingly breaking the law to be a reasonable excuse to not following Tribunal instructions.

<u>The Respondent has little or no likelihood of successfully defending the claim.</u>

Of the six items included in the claim I was successful on five. The sixth item was regarding an unfair dismissal claim which was dismissed by withdrawal after I learnt I did not meet eligibility criteria. Considering the above points, the Respondent had little to no likelihood of defending the claim.

The tribunal may note the amount I claimed exceeds the awarded. This is because I was claiming a gross amount, unaware the tribunal only awarded net amounts.

My learning disability

This may not be relevant; however I ask that if the tribunal decides to make a Preparation Time Order that when considering the time I took to complete

tasks it consider in my learning disability, dyslexia (see attached dyslexia report).

11. PDL's response to the application is as follows:

2. The Respondent respectfully requests that the Tribunal refuses the Claimant's Preparation of Time Order for the following reasons:

a) The Respondent had every right to defend itself against the Claimant's claim because his performance in the role of Graduate Surveyor was consistently below the level expected of him. For instance, he would sign off a property when it clearly was not completed to a reasonable standard. The Respondent had photographs and emails from clients contained in the trial bundle to show this. The Respondent was therefore within its rights to believe that it had reasonable prospects of success in the case.

b) At no time during the case did the Respondent deliberately lie or mislead the Tribunal as alleged or at all. As the Respondent is a member of a profession, as is their representative, it would not have occurred to them to lie to the Tribunal. It simply would not have been in their best interests to do so.

c) At no time did the Respondent behave unreasonably. Rather, it assisted the Tribunal as requested.

d) At no time did the Respondent fail to comply with Tribunal Directions. As it had a legal representative, directions and deadlines were complied with as a matter of priority.

e) The Claimant may have been successful in his claim but that does not automatically mean that he is entitled to a Preparation of Time Order, and the Respondent argues that this should be denied.

f) At no time did the Respondent fail to comply with rules set by Companies House in relation to its registered address. It therefore denies that the Claimant should be entitled to 10 hours of preparation in relation to this and 8 hours of preparation with witnesses.

g) The Respondent denies that the Claimant is entitled to 17 hours of preparation time relating to the bundle because the Respondent's representative was responsible for compiling this and submitting it to the Tribunal.

h) The Respondent denies that the Claimant is entitled to 6 hours of preparation time for his Witness Statement as this is viewed as excessive, even when the Claimant's dyslexia is taken into account.

i) The Respondent denies that the Claimant is entitled to 4 hours of preparation time to carry out legal research as he could have taken advice from a free service such as Citizens' Advice Bureau.

j) The Respondent denies that the Claimant is entitled to 4 hours of preparation time to prepare questions for the Tribunal Hearing as this is excessive, even when the Claimant's dyslexia is taken into account.

k) The Respondent denies that the Claimant is entitled to 2 hours of preparation time to review the ET3 Response as this is excessive, even when the Claimant's dyslexia is taken into account.

l) The Respondent denies that the Claimant needed to practise questioning prior to the Hearing and denies that he is owed 1 hour of preparation time to do so.

m) The Respondent denies the allegations made by the Claimant in relation to the bonus and commission payments. The explanation was that there had been an innocent misunderstanding, and the Respondent stands by this assertion.

3. The Respondent need not respond to the question of why the ET3 Response was not submitted to the Tribunal in time because an application was made to the Tribunal, and it was granted. It is not the Claimant's place to question a decision made by the Tribunal.

4. It is the Respondent's position that it considered all of the evidence that the Claimant wished to have included in the bundle, but it made compelling arguments against some of that evidence being admitted. In the Claimant's emails in the bundle he attaches to his application for this Order clearly show that he agreed to the bundle compiled by the Respondent.

5. All of the evidence required by the Tribunal was provided by the Respondent.

6. In paragraph 40 of the Judgment from the full merits hearing, the Judge found the Claimant 'disingenuous'. He purports to have worked to the recommended standard for the Respondent but he did not do so.

Therefore, the Respondent vehemently denies that he is entitled to costs and respectfully requests that the Tribunal does not grant this Order.

12. On 9 May 2023, Mr Peartree made further representations regarding PDL's response to his application. These are supplemental to and do not supersede the original application. He stated:

• Paragraph 2. a): "The Respondent had every right to defend itself against the Claimant's claim because his performance in the role of Graduate Surveyor was consistently below the level expected of him. For instance, he would sign off a property when it clearly was not completed to a reasonable standard. The Respondent had photographs and emails from clients contained in the trial bundle to show this." During the hearing the Respondent claimed I had failed to "meet targets" but provided no evidence of this. My performance at Prinsegate was covered in paragraphs 56 and 57 of the Judgement, which included the Judge asking the Respondent if there had been any issues with me or my performance, none were found. While at Prinsegate every survey I submitted was on time, I received no complaints and all feedback (including from the Respondent) was positive. On my last day I returned all equipment in good working order, had completed all surveys assigned to me, finished reviewing all checking assignments I had, and maintained professionalism

throughout. As part of their case Prinsegate referred to a complaint received months after my departure. Despite my repeated requests the Respondent failed to provide any evidence of the complaint until the Judge forced them to on the day of the hearing. The Respondent only provided the initial complaint e-mail, withholding everything else, and had in any case not accepted any liability I had even made a mistake. The Respondent has not provided any evidence of "not completed to a reasonable standard" properties I "signed off" because they do not exist. The Respondent claims photographs and/or e-mails from clients are contained in the trail bundle, in fact they are not. The Respondent has fabricated these claims.

• Paragraph 2. b): "At no time during the case did the Respondent deliberately lie or mislead the Tribunal as alleged or at all. As the Respondent is a member of a profession, as is their representative, it would not have occurred to them to lie to the Tribunal." It is not clear exactly what the Respondent means by "a member of a profession", I suspect it as an attempt to use membership of the Royal Institution of Chartered Surveyors (RICS) as a defence. The Respondent fails mention they are under active investigation by the RICS for breaches of their code of conduct.

• Paragraph 4: "It is the Respondent's position that it considered all of the evidence that the Claimant wished to have included in the bundle, but it made compelling arguments against some of that evidence being admitted." The Respondent has made no "compelling arguments". No attempt to argue, explain or defend their withholding of evidence has ever been made by the Respondent despite the Judge stating they must provide one during the hearing.

• Paragraph 4: "In the Claimant's emails in the bundle he attaches to his application for this Order clearly show that he agreed to the bundle compiled by the Respondent." The deadline for exchanging evidence had already passed by the time it came to agreeing the bundle (see pages 23-24 of the bundle). I had at no point agreed to the Respondent withholding evidence, however by the time it came to agreeing the bundle I knew they were not going to provide it (as it mostly did not exist) and I feared the hearing might be delayed or I may be considered unreasonable if I refused to agree the bundle. To restate, the evidence the Respondent withheld was vital if they intended to win, including evidence of actual loss, evidence of mitigation, correspondence between us, etc. It is beyond reasonable doubt the Respondent withheld these because it would harm their own case (a breach of the tribunal instructions on pages 23-24 of the bundle) or because they did not exist.

I hope the above is considered further justification for a Preparation Time Order Judgement.

If I may be allowed one final point, in paragraph 6 the Respondent refers to the Judge's "disingenuous" comment. I politely and respectfully believe the comment was a misunderstanding. Despite my requests (pages 148 and 149 of the bundle), The Respondent withheld my resignation letter until a few weeks before the hearing. This was long after the Tribunal deadline for exchange of evidence and bundle agreement (pages 23-24 of

the bundle), I therefore mistakenly dismissed it. At the hearing, the Respondent claimed I had attempted to 'hide' this letter. The Judge advised the letter to be relevant and was critical of me, not allowing me a chance to explain. Looking back, I suspect a part of the misunderstanding was that the Judge believed the Respondent's claims I had attempted to hide the letter when, from my perspective, I was simply following the tribunals instructions regarding deadlines (pages 23-24 of the bundle). The Judgement states that if I had spoken to a solicitor about a sabbatical then I must also have done so about non-payment of wages. In fact, my conversation with a solicitor on sabbaticals had taken place around the New Year, months prior to the non-payment of my wages and I had not even received it in writing. I was not aware of the apparent inconsistency, nor was I asked about it. This misunderstanding has allowed the Respondent to claim a victory, despite them having found to have illegally withheld my wages. In e-mail correspondence post-hearing the Respondent has claimed "many professionals would have willingly foregone £2.9k to avoid being permanently discredited on public record, otherwise it could haunt them for the rest of their lives", that it "can go against any testimony you ever give for the rest of your life", and "this may therefore be a big problem for you in the future". I appreciate it is not strictly relevant to the matter at hand, but I politely request this matter is commented on in any Judgement.

Applicable law

13. Rule 75 (1) (a) of the Tribunal Rules gives the Tribunal the power to make a costs order against one party to the proceedings (the "paying party") to pay the costs incurred by another other party (the "receiving party") on several different grounds. Rule 76(1) sets out the grounds for making a costs order are which as follows:

    a. A party (or that party's representative) has acted vexatiously, abusively, disruptively, or otherwise unreasonably in the bringing or conducting of proceedings (or part thereof).

    b. A claim or response had no reasonable prospect of success.

    c. A hearing has been postponed or adjourned on the application of a party.

14. Under rule 76(2), a Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a tribunal has been postponed or adjourned on application of the party.

15. Mr Peartree relies on rules 76(1)(a)(b) & 76(2).

16. The Tribunal has the power to make an order in favour of a litigant in person who may well have spent a great deal of time in preparing their case. This is known as a PTO. The power to make a PTO is contained in rule 76 (coupled with rule 75 (2)). The grounds for making a PTO are identical to those for making a general costs order against a party under rule 75 (1) (a).

17. Preparation time means 'time spent by the receiving party (including by any employees or advisers) in working on the case, **except for time spent at the final hearing'** (rule 75(2)).

18. The number of hours in respect of which a PTO can be made will be determined by the Tribunal according to the actual time spent and the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work (rule 79).

19. The hourly rate as of 6 April 2023 is £43 and increases by £1 on 6 April every year. If the Tribunal makes an award it is the formula is Time x 43.

20. Rule 76(1)(a) imposes a two-stage test. The Tribunal must first ask itself whether a party's conduct falls within rule 75(1)(a). If so, it must ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party. If a party's representative has acted vexatiously, abusively, or disruptively or otherwise unreasonably in the bringing or conducting of the proceedings the Tribunal may make a costs order against the party in question.

21. 'Unreasonable' has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' (**Dyer v Secretary of State for Employment EAT 183/83**). It will often be the case, however, that a Tribunal will find a party's conduct to be both vexatious and unreasonable.

22. In determining whether to make an order under this ground, a tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct (**McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA**).

23. A persistent failure to provide information may be held to be unreasonable. In **Kaur v John L Brierley Ltd EAT 783/00**, for example, K and her advisers persistently failed to identify the unlawful deduction they were alleging had been made from her wages. This was despite repeated and reasonable requests from the employer's solicitors. Although she was not able to provide any explanation for this failure, K pursued the proceedings, causing the employer to incur additional and wholly unnecessary costs. When the final hearing was imminent, K withdrew. The employment tribunal hearing the employer's application for costs ordered K to pay costs to be assessed in the county court. This decision was upheld by the EAT.

24. Another relevant factor is the extent to which the tribunal considers that a party is being truthful in evidence. In **HCA International Ltd v May-Bheemul EAT 0477/10** the EAT noted the rejection in **Daleside** of any general principle and added: 'A lie on its own will not necessarily be sufficient to found an award of costs. It will always be necessary for the tribunal to examine the context and to look at the nature, gravity, and effect of the lie in determining the unreasonableness of the alleged conduct.' This statement was subsequently endorsed by the Court of Appeal in **Arrowsmith v Nottingham Trent University 2012 ICR 159, CA**.

25. Rule 76(1)(b) also follows a two-stage test. The Tribunal has a duty to consider making an order where this ground is made out but there a discretion whether actually to award costs. Whether or not the party has

received legal advice or is acting completely alone may be an important consideration when deciding whether or not to make a costs order against him or her.

26. Rule 76(1)(b) differs slightly from the previous Tribunal Rules 2004, rules 40(3) and 44(3) of which provided that a costs order or PTO could be made against a party where the bringing or conducting of the proceedings was misconceived. 'Misconceived', however, was defined by Reg 2(2) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 SI 2004/1861 as including 'having no reasonable prospect of success'. Much of the old case law concerning this ground for awarding costs will still be relevant, particularly since it tended to treat the term 'misconceived' as synonymous with having no reasonable prospect of success. Under rule 76(1)(b), the focus is simply on the claim or response itself.

27. Costs can, of course, be awarded against respondents as well as claimants on the 'no prospects of success' ground.

28. In **Opalkova v Acquire Care Ltd EAT 0056/21** the EAT considered the test for determining whether an employer's response has no reasonable prospects of success. O's ET1 alleged six causes of action. One was conceded by AC Ltd before the hearing took place, and two were upheld by the employment tribunal. The other three claims were dismissed. In refusing O's application for a PTO, the tribunal commented that it could not be said that AC Ltd's response had no reasonable prospect of success, because three out of the six complaints were successfully defended. Furthermore, the successful claims involved potentially complex areas of employment law (national minimum wage and working time), and AC Ltd had relied on the outcome of an HMRC compliance check and had taken advice from an accountant.

29. On appeal, the EAT held that the tribunal had erred by considering whether the ET3 as a whole had reasonable prospects of success. Having reviewed the definitions of 'claim' and 'complaint' set out in rule 1 of the Tribunal Rules, the EAT confirmed that 'claim', in the present context, means each separate cause of action, not the whole of the proceedings brought in the claim form, and that each cause of action must be considered separately. There were three key questions: first, did the response have no reasonable prospect of success when submitted, or did it reach a stage where it had no reasonable prospect (the objective 'threshold' test for making a preparation time order)? Secondly, at the stage when the response had no reasonable prospect of success, did the respondent know that was the case? Thirdly, if not, should the respondent have known? In considering the third question, a tribunal is likely to assess a legally represented respondent more rigorously. The EAT added that the complexity of the successful claims, and the fact that AC Ltd had relied on a compliance check and taken advice from an accountant, did not go to the objective test of whether the responses had reasonable prospects of success. These factors were relevant only to the tribunal's discretion to make a preparation time order under rule 76(1)(b) and/or to the question of whether AC Ltd acted unreasonably under rule 76(1)(a) in defending or maintaining the defence to those claims.

30. When costs are awarded under rule 76(2), as distinct from rule 76(1)(a), there is no need to find that a party has acted 'vexatiously, abusively, disruptively or

otherwise unreasonably'. It is sufficient that he or she is clearly responsible for the breach.

31. It is important to recognise that even if one (or more) of the grounds is made out, the Tribunal is not obliged to make a costs order. Rather, it has a discretion whether or not to do so. As the Court of Appeal reiterated in **Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420, CA**, costs in the employment tribunal are still the exception rather than the rule. It commented that the Tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where the general rule is that costs follow the event, and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the employment tribunal, by contrast, costs orders are the exception rather than the rule. If the Tribunal decides to make a costs order, it must act within rules that expressly confine its power to specified circumstances, notably unreasonableness in bringing or conduct of the proceedings.

Discussion and conclusions

The Respondent lied or misled the tribunal.

32. Mr Peartree identifies five occasions during the hearing where he says PDL lied or misled the tribunal, taking each of these in turn I find as follows:

    a. When I invited the parties to tell me if there were any preliminary matters, this was an invitation to address me on anything that needed to be dealt with prior to the hearing of evidence. **I do not accept that PDL lied or misled the tribunal as claimed.** There was an issue regarding a failure to respond to the ET1. Peartree had applied to the Tribunal on 14 October 2022 to have the response lodged late. I dealt with this preliminary matter having heard representations from both parties and exercised discretion in favour of Peartree to allow the response to be filed late.

    b. Mr Peartree refers to paragraph 30 of my judgment. This refers to a voicemail and not a video recording.

    c. Having reviewed the correspondence relating to agreeing to the bundle, **I do not accept that this is evidence of lying or misleading the Tribunal.** Bundles are frequently difficult to agree.

    d. Paragraph 13 of the grounds of resistance sets out the losses that PDL alleges they suffered as a result of Mr Peartree performing his role [39]. Evidence of such losses was not provided to the Tribunal. Having reviewed my notes of evidence, Mr Prinse was cross examined on this, and he did not say that there was any documentary evidence quantifying this loss. The gist of his evidence was that he was taken away from work that he could have done, and he had to deal with it. He said there was a complaint "and possibly a claim. There is a negligence claim". He went on to say that PDL had suffered disruption and suffered a loss. Given that this is pleaded in the Response I would have expected PDL to have produced supporting documentation to vouch for the claimed losses and the alleged negligence claim. They did not do that, and I am not satisfied with the explanation provided. I

agree with Mr Peartree that this suggests that no losses were incurred. That being the case, **this should not have been pleaded in the response**. There is a duty of candor in pleadings. The pleadings form the foundation of the case that has to be determined by the Tribunal. They are fundamentally important and provide the basis of the issues to be dealt with by the Tribunal. Put at its highest, **I believe that PDL misled the Tribunal in this regard.**

e. Mr Peartree refers to paragraph 61 of the judgment where I found Mr Prinse's interpretation of the word "commission" unsatisfactory. However, **I do not accept that this is tantamount to lying or misleading the Tribunal**. At its highest, Mr Prinse's explanation was implausible given the surrounding evidence. That should not be conflated with lying or misleading the Triubunal.

Behaved unreasonably by not disclosing documents.

33. The Tribunal issued standard case management orders [23]. The parties were to send each other documents relevant to the claim and were required to do this six weeks before the date of the final hearing. The parties were required to agree the hearing bundle four weeks before the date of the final hearing [24]. PDL was required to prepare the bundle. This would have included documents supporting PDL's allegation that they had suffered loss as a result of Mr Peartree's actions as set out in the grounds of resistance. These documents were not disclosed despite Mr Peartree requesting them on 14 August and 17 October 2022. One of these documents was only provided at the final hearing after I had ordered PDL to do so. In this regard, **PDL were in breach of the case management order regarding disclosure of documents relevant to the claim.** The fact that the documents were only disclosed on being ordered to do so at the time of the hearing despite the antecedent history of there being requested by Mr Peartree **indicates unreasonable behaviour on the part of PDL. It amounts to a persistent refusal to disclose relevant documents.**

Has is not complied with other directions from the tribunal without good reason.

34. If PDL wished to defend Mr Peartree's claims, it was required to file its response within 28 days of service of the claim. Mr Peartree refers to a letter in the hearing bundle which is the acknowledgement of claim [16]. This is not a case management order or other direction. It is a standard letter the Tribunal administration issues to a respondent. It simply notifying PDL that the Tribunal administration had received a claim which it was passing on to PDL with instructions about defending the claim. The fact that PDL did not respond to the claim within the 28-day deadline is irrelevant for the purposes of this allegation of non-compliance. PDL certainly placed itself in jeopardy because it did not comply with the deadline of 28 days and had to apply to the Tribunal to be allowed to file its response late. However, that was a separate matter which resulted in my dealing with it at the final hearing when I allowed the response to be lodged late. I was satisfied with the explanation provided by PDL.

The Respondent has little or no likelihood of successfully defending the claim.

35. Mr Peartree withdrew his claim of constructive unfair dismissal. He had to do so because he did not have the requisite qualifying service. He succeeded with his remaining claims. Looking at each of the claims separately, I find as follows:

    a. The holiday pay claim. In paragraph 73 of my judgment, I found that Mr Peartree's contract of employment did not give PDL the right to recoup holiday pay on the basis that PDL relied upon. There was no evidence of carelessness or negligence on the part of Mr Peartree. This ought to have been apparent to PDL from the outset of these proceedings and given my concerns about the failure to provide any supporting evidence about the alleged losses that PDL suffered and in the absence of any formal claims against it, **PDL had little or no likelihood of successfully defending holiday pay claim**. They could not exercise the right of set-off.

    b. Arrears of pay. As with the holiday pay claim, PDL relied upon a contractual provision to withhold payment of Mr Peartree's salary. In paragraph 74 of my judgment I noted that this contractual provision was contingent upon Mr Peartree being careless or negligent. There was no evidence of such carelessness or negligence and PDL failed to establish this. Furthermore, Mr Peartree was justified in terminating his employment with immediate effect because of PDL's failure to provide him with his bonus/commission. This ought to have been apparent at the time when PDL defended the claim. **PDL had little or no likelihood of successfully defending unauthorised deductions of wages claim**.

    c. Other payments. I dealt with these in paragraphs 75-78 of my judgment.

        i. In paragraph 75 of my judgment, I found that Mr Peartree had a legitimate expectation that he would be paid a commission. However, I believe that there was a genuine dispute about the circumstances under which a commission would be paid. Consequently, **I find that PDL had a reasonable likelihood of successfully defending this claim** which could only be determined once the evidence had been considered and findings of fact made thereon.

        ii. In paragraph 76 of my judgment, I found that Mr Peartree was entitled to a £100 bonus. Mr Peartree had been provided with metrics on 1 April 2022 which indicated that he met the minimum threshold to be entitled to his bonus. Resisting payment was not justified. However, because the pleaded case was that the payment of a bonus was discretionary, **PDL had a reasonable likelihood of successfully defending the bonus claim**.

        iii. The parties agreed that PDL should pay Mr Peartree £355 for expenses. It is unclear from the grounds of resistance how PDL justified withholding payment of Mr Peartree's expenses. **PDL**

had little or no likelihood of successfully defending expenses claim.

iv. PDL was entitled to set off training expenses against any sums due to Mr Peartree.

36. I have identified examples of PDL's unreasonable behaviour. I have found that some but not all of the responses had little or no likelihood of successfully defending the claims. I have found that PDL failed to comply with the direction of the Tribunal relating to disclosure. The costs jurisdictions I have identified above are engaged and I have decided to make a PTO.

37. I am making an award of £666.50 comprising the following elements:

a. Preparing Trial Bundle – Peartree was responsible for preparing the bundle. I disallow the entries for 15-25 October 2022. I allow 1.5 hours for the entries on 8 & 9 November 2022. **£64.50**
b. Writing witness statement – Mr Peartree's statement is 12 pages and comprises 37 paragraphs. It cross refers to the bundle. I allow the claimed 5 hours. **£215**
c. Legal/tribunal research. Mr Peartree is a litigant in person. He chose not to be represented, which is his right. It is entirely reasonable and proper that he should conduct legal and tribunal research to gain understanding of the applicable law and how tribunals operate. It would have been irresponsible of him if he had not done so. He was right to do so given his duties under the overriding objective. I allow the four hours claimed. **£172**
d. Preparing questions for cross examination of respondent. It is entirely reasonable to prepare questions for cross examination in advance of the hearing. Indeed, it would be remiss not to. One of the purposes of exchanging witness statements in advance of a hearing is to enable a party or their representative to consider what challenges they wish to make of a particular witness's evidence. They prepare questions for cross examination based on the witness statement(s). I allow the four hours claimed. **£172**
e. Review Respondent's ET3 form. Whilst I accept that this is a necessary activity, I do not think two hours is appropriate. Neither the ET3 nor the grounds of resistance are lengthy or complex. I allow one hour. **£43**

f. Q & A practice with friend for cross examination of me by Respondent. This appears to be coaching a witness. In our jurisdiction (unlike in the US), this activity is not permitted. I disallow this claim.

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Employment Judge A.M.S. Green

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Date 25 May 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

.25/05/2023

FOR THE TRIBUNAL OFFICE