EMPLOYMENT TRIBUNALS

Claimant: Mr Steven Abrahams

Respondent: Loading Bay Specialists Ltd

Heard at: Watford Employment Tribunal by CVP **On:** 6-8 March & 22 April 2024

Before: Employment Judge Young
Members: Ms B Osborne
Mr N Boustred

Representation
Claimant: Mrs Kirsty Abrahams (wife of the Claimant) Lay representative
Respondent: Mr Chris Plume (HR consultant)

JUDGMENT having been sent to the parties on 24 May 2024 by EJ Young and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. At a preliminary hearing on 6 September 2023, EJ Tuck KC by case management order sent to the parties on 5 October 2023 at paragraph 7 ordered "*By 29 September 2023 the claimant must send the respondent copies of any other documents relevant to those issues. This includes documents relevant to financial losses and injury to feelings."* And at paragraph 8, the case management order stated "*8. Documents includes recordings, emails, text messages, social media and other electronic information. You must send all relevant documents you have in your possession or control even if they do not support your case. A document is in your control if you could reasonably be expected to obtain a copy by asking somebody else for it."*

2. On 15 September 2023, Mr Plume wrote to the Claimant by email at 16:12 addressed to Mrs Abrahams *"The Employment Judge also ordered that the Claimant is to provide to the Respondent additional documents no later than 29th September 2023. For the avoidance of doubt, we will require to be submitted as evidence all emails, correspondence, between the Claimant*

and Fen-Bay Services Limited as well as copies of job applications and dates of any interviews attended by the Claimant." [80]

3. Mrs Abrahams responded to Mr Plume's email on 21 September 2023 at 11:15 *"Following on from your request for all emails, correspondence, between the claimant and Fen-Bay services ltd to be provided as evidence, the claimant is happy to uphold your request and supply correspondence with Fen-Bay although does not recall it being ordered during the preliminary"* [79]. The Claimant complained to the Employment Tribunal that on 29 September at 15:44 the Respondent had not provided disclosure by 22 September 2023 in accordance with EJ Tuck's order and so the Respondent should be struck out [56-57]. However, in the Respondent's response to the Claimant's strike out application the Respondent explained that there had not been compliance as the request for documentation by the Claimant had not been clarified until 28 September 2023.[60-63] The Respondent indicated that disclosure would take place by 5 October 2023.

4. By email at 09:26 on 30 October 2023 [#17] the Respondent requested the consent of the Claimant to allow Fen-Bay to confirm whether the Claimant commenced employment with Fen-Bay and if so what dates he was employed. Mrs Abrahams replying on behalf of the Claimant by email on the same day at 10:48 refused [#17].

5. The hearing was listed for 3 days by CVP from 6-8 March 2024 on 6 November 2023. The Employment Tribunal heard evidence from the Claimant and the Claimant's wife, and on behalf of the Respondent, Mr Nixon, the Respondent's former general manager. The Employment Tribunal was provided at that stage with a 206 page bundle. Numbers contained in square brackets are a reference to that evidence bundle.

6. The Claimant suffers from depression and anxiety. The Claimant also recently received a diagnosis of autism and ADHD a couple of months before 6 September 2023 preliminary hearing. The Claimant requested that the Employment Tribunal make sure that he understands questions – giving clarification, giving time for the Claimant to process the question and retain information, he requested breaks, and the Employment Tribunal needed to make sure that it was not confusing for him. Questions needed to be straight questions. The Claimant also requested additional breaks if he was shaking and tapping his knee as well as ad hoc breaks as an when needed as reasonable adjustments. The Employment Tribunal ensured that those reasonable adjustments were made.

7. On 6 March 2024, the Respondent made an application to make an amendment to their response form. It was the Respondent's case that the Claimant went to work for Fen-Bay Services Ltd ('Fen-Bay') immediately after the Claimant resigned. The Claimant told Ms Thorpe, the Office Manager at the Respondent's that he was going to work for Fen-Bay, it was not in the Respondent's ET3 because the Respondent didn't speak to Fen-Bay until some months later after submitting the ET3. The Claimant opposed the application because the Claimant did not tell Ms Thorpe that he went to work for Fen-Bay. Mrs Abrahams representing her husband admitted that the issue of the Claimant working for Fen-Bay was brought up at the preliminary hearing in respect of disclosure and that there were references to the issue in

documents in the bundle. The Employment Tribunal made a decision that an amendment was not required as the Respondent could ask questions of the Claimant in respect of Ms Thorpe's evidence.

8. In the Claimant's witness statement, the Claimant states at paragraph 19 "*emailed FenBay I made my excuses and turned the job down they didn't respond and I haven't spoken or heard from them since*."

9. In cross examination it was put to the Claimant that Mr Nixon the former General Manager of the Respondent when the Claimant was employed had spoken to Scott Rouse, a sub contractor of the Respondent, who told Mr Nixon that he had spoken to the Claimant a week after leaving the Respondent and that he was working for Fen-Bay. The Claimant's evidence was that it was a complete fabrication and that Fen-Bay would be in breach of the GDPR and that it was completely untrue. Contained in the bundle was an email to the Claimant dated 22 October 2023 signed by Mr Scott Rouse stating that he did not tell Mr Nixon that the Claimant was working elsewhere [173]. Mr Rouse was not called as a witness. The Claimant was then asked by the Employment Tribunal if he had any contact with Fen-Bay after his refused the job in his email dated 21 October 2022. The Claimant's evidence was that he did not have any contact he said that he did not hear anything back and didn't receive any emails from Fen-Bay.

10. On 7 March 2024, the Claimant was asked in cross examination what efforts he had made to look for work in the 23 weeks that he was claiming losses for in his schedule of loss [53-55] (from 7 November 2022- 17 April 2023). The Claimant's evidence was that he wasn't in a state to look for work and that he didn't look for work in those 23 weeks. The Claimant was asked when he started work, the Claimant said that he started work in April 2023 he could not remember the exact date. There was no evidence of the Claimant's new role in the bundle.

11. On 7 March 2024 it became clear that all the evidence could not all be heard within the allocated time. The Employment Tribunal listed the matter for another 3 days from 22-24 April 2024 inclusive.

12. At the hearing on 8 March 2024, the Claimant was asked why the Claimant had not provided any evidence regarding the Claimant's income in the 23 weeks he was are claiming for. The Claimant did not have answer as to why the documents had not been provided.

13. The Employment Tribunal ordered that the Claimant provide his bank/ building society statements from all his bank accounts from 1 November 2022- 30 April 2023. The Claimant was told that he may redact any outgoing payments, but the Employment Tribunal would need to see all incoming payments. The Claimant was asked when he would be able to provide those statements. The Claimant said that he could provide the statements in two weeks.

14. The Employment Tribunal then proceeded to ask the Claimant questions about his case which included asking question about his communications with Fen-Bay. The Claimant was adamant in his evidence that he had not had any contact with Fen-Bay since refusing the role in October 2022.

15. The Employment Tribunal ran out of time and was unable to hear one more witness for the Respondent within the allocated time. At the end of the hearing the Respondent agreed to produce a bundle for the reconvened hearing with the additional documents to be disclosed to the Employment Tribunal and the Respondent. The page numbers of that bundle were to run on from the 206 page bundle. The Respondent did produce such a bundle and the additional pages ran from page 207-page 219.

16. The Employment Tribunal case management order was sent to the parties on 12 March 2024 giving the parties notice of the hearing to be reconvened for Monday 22 April, Tuesday 23 April and Wednesday 24 April 2024. The Claimant was ordered to provide his bank statements to the Respondent and the Employment Tribunal from 4 November 2022- 30 April 2023 not later than 22 March 2024 [paragraphs 6-8 of the 12 March 2024 Order].

17. On 22 March 2022 the Claimant provided his bank statements redacted with the names of outgoing organisations and amounts that he made payment to the Employment Tribunal and the Respondent. The Claimant did not provide an unredacted copy of the bank statements for the Employment Tribunal. The bank statement disclosed that the Claimant had received a sum of £2,218.59 from Fen-Bay on 30 November 2022 [#14]. With the bank statements the Claimant provided a letter from Fen-Bay confirming the Claimant's dates of employment as 7 November 2022 as the date the Claimant started working for Fen-Bay and 22 November 2022 as the last day the Claimant was employed by Fen-Bay Services Ltd [#15]. The Claimant also provided a supplemental witness statement. In that statement the Claimant apologised *"for not being completely honest*" about his employment with Fen-Bay. The Claimant sought to correct some of his earlier statements contained in his original witness statement. The Claimant repeated in his supplemental witness statement that paragraph 19 of his original witness statement was "true". The Claimant's case in his supplemental witness statement was that he called Fen-Bay on the afternoon of 4 November 2022 and asked if he could attend their offices on 7 November 2022, the Claimant said that the reason he had not been completely honest with the Employment Tribunal and his wife who he had not told was because he suffered from separation anxiety and he was scared that his wife was going to leave him and then as his wife tried to get his job back with the Respondent it spiralled out of control and he panicked. The Claimant stated that *"this supplemental statement is a true account of what happened and gives full account with regards to Fen Bay and my employment and termination with them."*

18. By the date of the reconvened hearing on the 22 April 2024, the Employment Tribunal had received from the Respondent an application dated 17 April 2024 at 08:58 for a strike out of the Claimant's claim and at 10:42 an application for costs under a time preparation order. The application contained a number of documents amounting to 22 pages. Reference to # followed by a number are a reference to those pages.

19. The Respondent had written to the Claimant on 12 April 2024 asking the Claimant if the sums of money received reflected in the Claimant's bank statement from Fen-Bay had been taken into account in the Claimant's schedule of loss. The Respondent did not received a response to this query.

20. By letter dated 18 April 2024, the Claimant wrote to the Employment Tribunal objecting to the strike out application emailed to the Employment Tribunal and the Respondent on 18 April 2024, 16:11. In that letter the Claimant stated that he was objecting to the strike out application on the grounds " *The claimant has submitted a subsequent statements along with supporting evidence explaining his reasons for his actions*
    - *The claimant did in fact follow all the court orders and case management orders, the same can not be said for the other side.*
    - *Yes the claimant was not forthcoming with the information regarding Fen Bay but has since corrected this with his subsequent statement the only mistake he did was regarding his employment with Fen Bay that has been full explained in the statement provided.*
    - *Mr Abrahams behave has not been scandalous in anyway and again his reasons are explained in his statement provided .*

    Mr Abrahams has corrected his mistake and again has explain his reasons and is fully understanding this will be discussed during the hearing on the 22nd April 2024".

21. The Employment Tribunal received further correspondence from the Respondent on 22 April 2024 attaching the Claimant's response to the Respondent's application to strike out and the email dated 12 April 2024.

22. Employment Tribunal decided that it could not decide the Respondent's strike out and costs applications without hearing evidence from the Claimant and the Claimant's wife. The Respondent was given an opportunity to ask questions but preferred that the Employment Tribunal ask questions of the Claimant and his wife. The Claimant had no objection to this. The Employment Tribunal heard further evidence from the Claimant and his wife. In oral evidence on 22 April 2024, the Claimant said that he contacted Fen-Bay on the afternoon of 4 November 2022 as a last resort but it was Fen-Bay who asked if he was available to attend the office on Monday 7 November 2022 and that there would be a trial period for 4-6 weeks. The Claimant said that the reason why he did not tell the Employment Tribunal the truth about his employment with Fen-Bay was he was just embarrassed of whole situation. Prior to the hearing, his wife had tried to take her own life. The Claimant believed that she would leave him. He thought the worst, and now he knows it was stupid not to tell the truth, but he didn't know what he had to do to not worry her. He didn't want to feel a failure and didn't want his wife to see him as a failure. He had a chat with her and told her he was going to stay at Sara. His wife only became aware of the lie when he showed her his bank statements. The Claimant was asked what was different now to when the hearing started on 6 March 2024. The Claimant said there is a difference between getting help and support. He actually has a diagnosis. He is trying to move forward and be positive. He wishes he had more courage and was honest.

23. The Employment Tribunal heard submissions of the Respondent's strike out application and the submissions of the Claimant's oral response. It was only after the Employment Tribunal gave judgment and oral reasons in respect of the strike out application, the Employment Tribunal heard the Respondent's

costs application. After the Claimant responded to that application, the Employment Tribunal gave judgment and oral reasons for its decision in respect of the Respondent's costs.

Relevant Law

24. Rule 37 of the schedule 1, Employment Tribunal Rules of Procedure ('ETR') states:

> *"(1)* At any stage of the proceedings, either on its own initiative or on the application of a party, *the Tribunal may strike out all or part of a claim or response on any of the following grounds-*
>
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success;*
>
> *(b) that the manner in which the proceedings have been conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
>
> *(c) for non-compliance with any of these Rules or with an order of the Tribunal;*
>
> *(d) that it has not been actively pursued;*
>
> *(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*
>
> *(2)* A claim or response may not be struck out unless the party in question *has been given a reasonable opportunity to make representations, either in writing or, if requested by the Respondent, at a hearing".*

Rule 37(1)(b) ETR

25. In order for an Employment Tribunal to strike out for unreasonable conduct under rule 37(1)(b), the Employment Tribunal must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or that it has made a fair trial impossible; in either case, striking out must be a proportionate response (see Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA)

26. In Bolch v Chipman 2004 IRLR 140, the EAT set out the steps that an Employment Tribunal must follow when determining whether to make a strike-out order in respect of rule 37(1) (b). The EAT lists firstly that an Employment Tribunal must find that a party or his or her representative has behaved scandalously, unreasonably or vexatiously when conducting the proceedings; secondly, once such a finding has been made, the Employment Tribunal must consider, in accordance with De Keyser Ltd v Wilson 2001] IRLR 324 whether a fair trial is still possible, as, save in exceptional circumstances, a striking-out order is not regarded simply as a punishment. If a fair trial is still possible, the case should be permitted to proceed; - even if a fair trial is unachievable, the tribunal will need to consider the appropriate remedy in the circumstances. It may be appropriate to impose a lesser

penalty, for example, by making a costs or preparation order against the party concerned rather than striking out his or her claim or response.

27. In Bennett v Southwark LBC [2002] ICR 881, the Court of Appeal defines "Scandalous" as irrelevant or abusive of the other side or the Tribunal's process:

28. In Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327, the EAT confirmed that whether a fair trial is possible does not require an Employment Tribunal to determine the question in absolute terms. In that case, the EAT approved the ET's approach that the question of a fair trial was in respect of that trial window allocated.

Rule 37|(1)(c) ETR

29. In deciding whether to strike out a party's case for non-compliance with an order under r37(1) (c), a tribunal must have regard to the overriding objective set out in rule 2 ETR of seeking to deal with cases fairly and justly. The EAT's decision of Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371 explains that this requires a tribunal to consider all relevant factors, including: a. the magnitude of the non-compliance; b. whether the default was the responsibility of the party or his or her representative; c. what disruption, unfairness or prejudice has been caused; d. whether a fair hearing would still be possible; and e. whether striking out or some lesser remedy would be an appropriate response to the disobedience.

30. Lindsay P, in De Keyser Ltd v Wilson [2001] IRLR 324 does make the point that that there can be circumstances in which a finding can lead straight to a debarring order. Such an example, we note paragraph 25 of Lindsay P's judgment, is "wilful, deliberate or contumelious disobedience" of the Order of a court.

Costs – Preparation Time Order

31. The relevant parts of Rule 76 ETR state:

"(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
> *(b) any claim or response had no reasonable prospect of success*;
> *…..*

(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 hearing has been postponed or adjourned on the application of a party."

32. Rule 79 states :

" 79 The amount of a preparation time order

(1) The Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of—

(a) information provided by the receiving party on time spent falling within rule 75(2) above; and
(b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.

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

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

In deciding whether to make an order under the ground of unreasonable conduct, the Court of Appeal decision of McPherson v BNP Paribas (London Branch) [2004] ICR 1398 concluded that a tribunal should take into account the ‘nature, gravity and effect’ of a party’s unreasonable conduct.

In Yerrakalva v Barnsley Metropolitan Borough Council and anor [2012] ICR 420 the Court of Appeal, clarified the principle that that in the Employment Tribunal costs are the exception not the rule.

Strike Out Application

33. On 17 April 2024 the Employment Tribunal received a written application from the Respondent asking for a application for a strike out of the Claimant’s claim to be heard on the first day of the reconvened hearing on 22 April 2024 [#1-4].

34. The written application in summary was made on the basis that the Claimant had failed to comply with EJ Tuck KC’s case management order sent to the parties on 5 October 2023, under paragraphs 7 & 8 [64] under rule 37(1)(b). The Respondent said in that application that the Claimant was in breach of the order because on 22 March 2024, following the Employment Tribunal’s case management order sent to the parties on 12 March 2024, the Claimant disclosed a letter from Fen-Bay Services Ltd dated 22 November 2022 confirming the Claimant’s dates of employment.

35. The Respondent’s application was that the Claimant failed to comply with EJ Tuck KC’s case management orders by deliberately withholding the letter dated 22 November 2022 from Fen-Bay to the Claimant which was not provided to the Respondent until 22 March 2024 after the Claimant had given evidence. The Respondent’s written application also referred to the Claimant’s conduct as scandalous and unreasonable or vexatious under rule 37(1)(c), relying on the Claimant’s contradictory evidence i.e. paragraph 19 of his witness statement, that he failed to disclose in his witness statement that he had commenced employment with Fen-Bay Services Ltd on 7th November 2023, during cross examination of the Claimant, replied that he had not commenced employment with Fen-Bay Services Ltd, the Claimant denied that

he told Ms Thorpe on Friday 4th November 2022 that he was going to work for Fen-Bay Services Ltd.

36. The Respondent's oral submissions in summary were that Mr Plume was genuinely sorry to hear about the Claimant's wife's personal circumstances. Mr Plume said that bringing a claim is a serious undertaking and the Employment Tribunal must have regard to the overriding objective. The Parties must help the Employment Tribunal to further the overriding objective. The emails from the Respondent requesting evidence of his employment with Fen-Bay went to the Claimant personal email address. He should have know to act truthfully and honestly.

37. Mr Plume said we now know that it is not true that the Claimant did not work for Fen-Bay. In case management order sent 5 October 2023, EJ Tuck specifically said, parties must send all relevant documents. Documentation was withheld and that failure to provide that information has frustrated justice. The information would not have been voluntarily provided without an ET order. The failure has had a significant impact on this case. It is unreasonable to lie to the Tribunal. Mr Plume doesn't believe that the Claimant's supplemental statement is credible. The Claimant has been vague, he is not a credible witness, with lying to his wife and the Employment Tribunal, and that it is unreasonable behaviour. There has been a breach of the case management order. Mr Plume said that he pressed the Claimant representative and was stonewalled. He understands that strike out is draconian. If the Claimant was being honest then would we will be hear for another 3 days. The Respondent was denied further cross examination due to the lack of truthfulness.

38. The Claimant's oral submissions in response to the strike out application is that the Claimant is aware he lied. The email address is not the Claimant's personal email address- but was set up for the tribunal case it is one the Claimant and Mrs Abrahams have access to. The Claimant's autism means he forgets dates. The Claimant was trying to get a job with Horman that and was not a lie. Mrs Abraham said that we did follow the order.

39. It was pointed out to Mrs Abrahams that the Employment Tribunal does not recall seeing the letter that HR terminated the Claimant. Mrs Abrahams said she did not recall seeing the letter. EJ Young asked Mrs Abrahams you must have received a P45? Mrs Abrahams said she did not think about the P45 so she was complying with order to the best of their knowledge.

40. Mrs Abrahams said that the Claimant is standing by that position that they did comply with the order, because the Claimant didn't think about the p45. The same can be said about the other side, there are emails not in the bundle that they spoke to owners, some of those emails are not there. Mr Plume cherry picked parts of conversations. There was extended questioning, and that is why we have extra 3 days. We spent a day trying to change the issues. Mrs Abrahams told the Employment Tribunal that she had sought legal advice (and throughout the case had free legal advice). She had also paid a solicitor after seeing the bank statements and asked for legal advice. It was a week after, Friday before or Monday 18 March 2024. Regardless of the Fen Bay business, the Claimant had been put through endless promises, the reason why he resigned still stands. The Respondent's documentation is inconsistent.

Analysis/conclusions

41. The Employment Tribunal considered both the written and oral submissions of the parties in respect of the strike out application and the documentation before it as referred to in these reasons. The Respondent advanced their application on 2 grounds of r 37((1) (b) & 37(1) (c) unreasonable conduct and failure to comply with ET order.

42. The Claimant by his own admission lied when giving evidence on previous occasions about not being employed with Fen-Bay. We accept that the Claimant did not tell the truth because he wanted to hide it from his wife. We considered the Claimant's mental health issues and their impact, but we also find that he did not tell the truth in order to gain advantage in undermining the Respondent's case and to mislead the Employment Tribunal.

43. The unfairness and prejudice caused to the Respondent is significant. Whilst at an early stage the Claimant alleged the Respondent had not disclosed documents and seemed to be pursuing that argument in the Claimant's submissions. We were not told the relevance of the documents were allegedly missing and the application was not pursued by the Claimant in front of this Employment Tribunal prior to raising it in defence to the strike out application. The Claimant's argument appeared to be the Respondent delayed providing documents and that was the same as the Claimant's delay. However, there was nothing put before us that relevant disclosure had not taken place by the Respondent. Whilst the evidence the Claimant did not disclose could be determinative of the Claimant's claim for constructive unfair dismissal, the tribunal spent time considering an application for an amendment in respect of the Respondent's argument regarding whether the Claimant worked for Fen-Bay. The Claimant had a lot to gain by not telling the truth.

44. Mr Plume was consistently looking for the information regarding the Claimant's employment at Fen-Bay. The Claimant blocked it from day one, from September 2023 when Mr Plume requested the documentation [#16]. If the Respondent had been given permission to get information from Fen-Bay then we would have had the information sooner [#17-18]. It was a fundamental piece of evidence that the Claimant worked for Fen bay and his reason for leaving his employment with the Respondent. It was wilful blocking.

45. The Claimant's reason for misleading and lying to the Employment Tribunal was to hide the information from his wife because he was embarrassed. But there was no difference in the Claimant's circumstances from when he gave evidence on 6-8 March 2024, the Claimant's position was there was a difference as he had a diagnosis of autism and ADHD and help and support. But on the last occasion the Claimant said that he had is autism diagnosis and now had help and support. There was no difference at all. We consider that the Claimant's conduct was unreasonable conduct.

46. The Employment Tribunal cannot trust that the Claimant is telling the truth now. We cannot trust his evidence. There are inconsistences in any event i.e. where the Claimant says that paragraph 19 of his statement in his original statement is true in his supplemental statement, where it clearly is not true, the fact there was no change to the Claimant's schedule of loss to take account of monies received from Fen-Bay, the Claimant's oral evidence to the

Employment Tribunal that it was Fen-Bay who asked him to attend their offices on Monday 7 November 2022 when in his supplemental witness statement he said it was he who suggested it.

47. The Claimant made a submission that he did comply with Employment Tribunal's 5 October order, even though he accepted that he had access to his P45, which was an example of evidence not provided in respect of his Fen-Bay employment. The Claimant said that he had not thought about his P45 when he received the order asking for relevant documentation. It is clear that the Claimant did not comply with the order and the submissions made only supported the Employment Tribunal's determination that the Claimant could not be trusted. We consider that there cannot be a fair trial, the Claimant's schedule of loss was also misleading and that had not been rectified. The Claimant is claiming losses from 4 November 2022, and even now he has not made any effort to rectify the information provided in his schedule of loss. He had made no account for the money earned whilst working for Fen-Bay. The Claimant explained that he received legal advice and we consider that the submission that the Claimant complied with the Employment Tribunal's order could not be consistent with any legal advice received.

48. We have considered the principles of Weir Valves. The non compliance of the order for disclosure was deliberate and so falls within the circumstances envisaged in *De Keyser Ltd v Wilson*. The default of compliance was the Claimant's and not his wife as his representative as she did not know about the Claimant's employment with Fen-Bay until the disclosure of the bank statements. The Claimant admitted lying to her as well. The Claimant said that he did not think about his P45 but the reality was that he was hiding his employment with Fen-Bay, it therefore had to be deliberate that he was hiding any documentation that would suggest that he went to work for Fen-Bay. In those circumstances we consider that there was significant non compliance but if it was just the non compliance we would have concluded that a fair trial was possible with further disclosure of documents. However, we exercise our discretion to strike out the claim because we no longer can trust the Claimant in respect of the case.

Costs Application

49. The Respondent's application was the preparation time order amounted to £1751 based upon the hourly rate being £44. The Claimant was told that there were sufficient grounds to have his claim struck out. It should not have progressed this far. The basis of the Respondent's application was both r76(1)(a) and r76(1)(b) ETR.

50. Mrs Abraham's response to the preparation time order application on behalf of the Claimant was that given the circumstances at the moment, the Claimant wouldn't be able to afford a preparation time order of £1,751. She was out of work for the foreseeable as she had been diagnosed with cancer last week. Mrs Abraham had no income coming in. The Claimant's income was £34,000 gross, after tax he was receiving £2,500 net. Mrs Abrahams was still receiving treatment and taking time off work. The Claimant had 3 dependent children.

Analysis and conclusions

51. We considered the Respondent's written application and the parties oral submissions as well as other relevant documentation referred to in these reasons. The Respondent's warned the Claimant in their correspondence on 10 April 2024 that they could avoid costs if they withdrew the claim [#21] and a strike out application. In the Respondent's costs warning letter dated 17 April 2024, the Claimant was told the cost to date were £2266. The Respondent was claiming 51.5 hours at a rate of £44. We accept this rate as being the correct rate.

52. We acknowledge that costs are the exception and not the rule. We considered the fact that the Claimant did take legal advice throughout the proceedings. But there appeared to be a lack of engagement with the Respondent regarding the costs warning. The Claimant's conduct did meet the threshold of unreasonable conduct in terms of the way the proceedings have been conduct in misleading the Employment Tribunal and the Respondent and deliberate non compliance of an order. We did not consider that the threshold was reached in respect of rule 76(1)(b). We exercise our discretion to award a preparation time order on the grounds of r76(1)(a) and r76(2) as we consider it proportionate in the circumstances. Even if we had not found that the Claimant was in breach of the order we would have considered that the cost threshold had been reached under r76(1)(a).

53. The Employment Tribunal's own assessment of what is a reasonable and proportionate amount of time for the party to have spent on preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and the documentation required amounts to 51.5 hours totalling £2,266.

54. We considered the Claimant's circumstances and the fact he is the sole breadwinner with 3 children. We make a preparation time order of £1,250.

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Employment Judge Young

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Dated 22 July 2024

REASONS SENT TO THE PARTIES ON
30 July 2024

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FOR THE TRIBUNAL OFFICE

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