EMPLOYMENT TRIBUNALS

Claimant: **Mr F Walton**

Respondent: **DHL Parcel UK Limited**

INTERIM JUDGMENT ON COSTS

1. The claimant is liable to pay costs to the respondent in respect of his unreasonable conduct in his response to the respondent's request for specific disclosure under Rule 76(1) (a), and because his claim had no reasonable prospect of success under Rule 76(1)(b). The amount of costs payable is to be determined at a further hearing after regard to the claimant's ability to pay under Rule 84 as appropriate.

2. The respondent's application for costs against the claimant's representative under Rule 80 is not upheld.

REASONS

Introduction

1. The respondent indicated an intention to make application for costs at the start of the second day of a two-day preliminary hearing to determine whether the claimant was in employment for the purposes of s. 83(2)(a) of the Equality Act 2010. The claimant had withdrawn his claims that morning, part way through his evidence, and before any respondent evidence was heard.

2. A formal application for costs, supplemented by supporting documents, was sent to the Tribunal on 7 February 2022 and responded to by the claimant on 17 February 2022 with supporting documents. The respondent also submitted written submissions on 15 June 2022. The parties had requested that I deal with the application on the basis of written submissions only and I have been assisted by their detailed submissions. Unfortunately, due to pressure of judicial workloads in the Manchester Employment Tribunal it was

not possible to list this before me to consider until 23 June 2022.

3. I had suggested to the parties that I make an initial assessment to determine if the respondent had shown that costs should be awarded but not at this stage assess quantum, and, because of the amount of costs claimed was in excess of £40,000, asked whether the respondent sought a detailed assessment under Rule 78(1)(b).

4. The parties consented to that approach and in its letter of 1 April 2022 the respondent accepted a cap of £20,000 on the amount sought so that the amount claimed would be considered under Rule 78(1)(a).

5. The application was set out in a letter dated 7 February 2022 from the respondent's solicitors and supplemented by the written submissions made on 15 June 2022. The application was made against the claimant under Rule 76(1)(a) of the Employment Tribunal Rules 2013 (vexatious and/or unreasonable conduct) and Rule 76(1)(b) (no reasonable prospects of success) and also against the claimant's representatives under Rule 80(1). The application was made on the following basis:

    a. Under Rule 76(1)(a) that the claimant acted unreasonably in the way that the proceedings had been conducted by way of his obstructive response to the respondent's request for specific disclosure and in his failure to comply with the tribunal's order dated 18 January 2022, in particular by failing to provide any documents or an explanation until shortly before lunch on day one of the preliminary hearing: by not providing any evidence of payments made to other drivers and providing insurance documents for the wrong dates. The respondent submitted that it thereby incurred costs unnecessarily in making repeated requests for disclosure; having to make an application for specific disclosure; and through unnecessary and unreasonable delays at the hearing on 24th January, including the claimant's delay in not withdrawing his claim until the morning of 25 January 2022 by which time further costs have been incurred in connection with the hearing;

    b. Under rule 76(1)(b) the respondent relied on two cost warning letters which have been sent to the claimant on the basis that the claimant had no reasonable prospect of success from the outset of showing that he was worker because he was clearly in business in his own right, it being said that had been clear from point when the ET3 was lodged and that the claimant had acknowledged that his claim no reasonable prospect of success by withdrawing it before the respondent's evidence was given at the preliminary hearing. The respondent relied in particular on an EAT decision which had considered the terms of the respondent's subcontractor agreement which applied to the claimant (*UK Mail Ltd v Creasey* UKEAT/0195/12/ZT) which the respondent argued is a decision which is not impacted by recent higher court decisions in the *Pimlico Plumbers* and *Uber* cases.

c. Under Rule 80 wasted costs were claimed against the claimant's representative, Silverdale Solicitors, on the basis it is submitted by the respondent that they had acted unreasonably or negligently in the conduct of the proceedings, including by failing to provide documents to their counsel, and they had negligently failed to provide the claimant with documents to enable him to participate properly in the hearing which led to unnecessary and unreasonable delays on day 1 of the hearing. The respondent submitted that had the hearing on day one started promptly the parties would have reached the point of the claimant withdrawing his claim much earlier, avoiding unnecessary costs on day 2 and if documents have been provided in good time the costs of the hearing might been avoided altogether.

6. The claimant resisted the application. His solicitor produced a number of documents and, made submissions on each of the grounds above:

    a. The application under Rule 76(1)(a):
        i. The claimant disputed that he had acted unreasonably in the way that he had responded to the request for specific disclosure in the tribunal order dated 18 January 2022. In their submissions the claimant's solicitors referred to delays by the respondent's solicitors in compliance with orders made at a case management preliminary hearing in March 2021 and the amount of time which it had taken for the respondent's representatives to request disclosure of documents from the claimant. It was disputed whether it was necessary to disclose some documents relating to how the claimant employed other drivers to carry out work on the basis that the claimant could be cross-examined about that at the hearing.

        ii. The claimant's solicitors also pointed to the fact that some of the documents which have been the subject of the specific disclosure order (the insurance documents) had not been requested by the respondent until December 2021. They argued that following the order made on 18 January 2022 the relevant documents were sent to the respondent's representative and some of the disputed documents were already included in the bundle of documents. They also argued that although there had been a delay at the start of the preliminary hearing for documents to be sent, in fact the respondent already had at least some of them and the delay had been caused by them.

        iii. The claimant said that his decision to withdraw had not been unreasonably delayed and denied that his decision was based on the fact his claim lacked merit. He pointed in particular to the stress of the hearing, feeling intimidated by the respondent and his wife's concerns for his well-being. It is

argued that I could not make a finding of no reasonable prospects of success when all of the evidence has not been heard.

b. The application under rule 76(1)(b): The claimant placed reliance on advice obtained from counsel and in support that disclosed a note from conference which suggested that the claimant had been told that he would have a good prospect of persuading the tribunal that he was a worker and that his prospects of success put at 51% (in fact counsel's note appears to say 55-60%). The claimant argued that there are a number of authorities (including the decisions in the Pimlico Plumbers and Uber cases) which require that tribunal look at both the contract and the true nature of the relationship between parties to determine the reality of that relationship and that in circumstances where the tribunal never had the opportunity to hear evidence from both sides, it cannot be said that the claimant had no reasonable prospect of success.

c. The application under Rule 80: The claimant's solicitors acknowledged that there have been some confusion about whether the claimant had received all the necessary documents readiness for the hearing and apologised to the tribunal for the delays which resulted, but disputed that their counsel had not received all the relevant documents and pointed to delays by the respondent in complying with the case management orders made on 19 March 2021 and the fact that witness statements where not exchanged until 12 January 2022, and to the fact that they had received a further amended bundle from the respondent's representative on 17 January 2022 and further disclosures on 21 January.

d. In terms of the amount claimed by the respondent, the claimant pointed to the fact that £25,250 is claimed for the respondent's counsel attending a 1½ day hearing for which claimant's counsel charged £1,620 and a costs warning letter sent by the respondent dated 11 November 2021 which stated that counsel's fees for attendance at the preliminary hearing were estimated to be £1, 250 plus VAT. I am not however dealing with any issues of quantum in this judgment.

Relevant law

7. The relevant Tribunal Rules are Rules 74-84 of the Tribunal Rules 2013. The pertinent provisions are as follows:

> Rule 76 When a costs order or a preparation time order may or shall be made
> (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.
[..]

Rule 77 Procedure
A party may apply for a costs order or a preparation time order at any stage 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. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

Rule 78 The amount of a costs order
(1) A costs order may—
(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;
[….]

Rule 80 When a wasted costs order may be made
(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs—
(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or
(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.

Costs so incurred are described as "wasted costs".

(2) "Representative" means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.

(3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.

8. There is a two-stage test to the application of the test in Rule 76 – first to consider whether the relevant ground under Rule 76 is made out, and if it is, to consider whether the Tribunal should exercise its discretion to award costs. In other words simply because a party establishes that a ground on

which costs *could* be made has been shown, it does not follow that a costs order *must* be made.

9. The Tribunal may (but is not required to) take into account the paying party's ability to pay in deciding whether to make a costs order, and if so in what amount (Rule 84).

10. In determining whether unreasonable conduct under rule 76(1)(a) is made out, 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). However, it is not necessary to analyse each of these aspects separately, and the tribunal should not lose sight of the totality of the circumstances (*Yerrakalva v Barnsley Metropolitan Borough Council* 2012 ICR 420, CA). At paragraph 41 of *Yerrakalva*, Mummery LJ emphasised that: *"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it has."*

11. When assessing whether the 'no reasonable prospect of success' ground in rule 76(1)(b) is made out, the test is not whether a party had a genuine belief in the prospects of success. The tribunal is required to assess objectively whether at the time it was brought, the claim had no reasonable prospect of success, judged on the basis of the information known or reasonably available to the claimant, and what view the claimant could reasonably have taken of the prospects of the claim in light of those facts (*Radia v Jefferies International Ltd* EAT 0007/18).

12. There is a three-stage test to consider in making a wasted costs order under Rule 80 (adopting the approach of the Court of Appeal in *Ridehalgh v Horsefield* 1994 3 All ER 848, CA):
    a. has the legal representative acted improperly, unreasonably, or negligently?
    b. if so, did such conduct cause the applicant to incur unnecessary costs?
    c. if so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

13. In *Ridehalgh v Horsefield* the Court of Appeal examined the meaning of 'improper', 'unreasonable' and 'negligent' — subsequently approved by the House of Lords in *Medcalf v Mardell and ors* 2002 3 All ER 721, HL — as follows:
    a. 'improper' covers, but is not confined to, conduct that would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty
    b. 'unreasonable' describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case
    c. 'negligent' should be understood in a non-technical way to denote

failure to act with the competence reasonably to be expected of ordinary members of the profession.

14. A legal representative should not be held to have acted improperly, unreasonably or negligently simply because he or she acts on behalf of a party whose claim or defence is doomed to fail.

15. I have also taken into account the Presidential Guidance on costs (Presidential Guidance; General Case Management – Guidance Note 7 Costs).

16. It is also relevant to note that the legal provision which was being considered in the preliminary hearing was whether the claimant was an "employee" for the purposes of the Equality Act 2010. The legislation that I had to consider however was s83 (2) (a) of the Equality Act 2010

"S83 (1) This section applies for the purposes of this Part.
(2) "Employment" means—
(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;
[..]".

17. I note here that the term "worker" is commonly and conveniently used to distinguish those who fall within the scope of the provision of employment under a contract personally to do work, from those whose employment is under a contract of employment although the term "worker" is not used in the Equality Act. That is how the legal issues involving the claimant have been referred to by both parties in this case and I have adopted their terminology.

18. It is also relevant to the submissions of the respondent to note the case of *UK Mail Ltd v Creasey* UKEAT/0195/12/ZT. The is an appeal brought to the respondent in this case (the company have since changed names) against a finding that Mr Creasey (who I shall refer to as Mr C to avoid confusion with the claimant in this case) was a worker for the purposes of s230 of the Employment Rights Act 1996. Briefly the facts in that case are these – Mr C was a van driver and classified by the respondent as a subcontractor along with some of his colleagues. A preliminary issue arose concerning the legal nature of his relationship with the respondent under the terms the subcontractor's agreement, which included a policy of engaging a substitute for the subcontractor. In that case Mr C was unaware of the clause that if he could not or did not want to carry out the work, he was entitled to send others to do it provided they met the respondent's conditions as to suitability. The employment tribunal found that the relationship between the claimant and the respondent was not by virtue of the contract that of a client or business undertaking carried on by him and that he was a "worker" not an employee for the purposes of claims under the Employment Rights Act 1996 and the Working Times Regulations. The EAT allowed the appeal against that decision. It found that as a matter of construction of the contract, the claimant was not required to perform work personally since he had an unfettered right to send others, subject to them meeting the suitability provisions in the

contract.

Findings relevant to the costs application

19. The claimant obtained an ACAS certificate issued on 22 September 2020 against the respondent. The claim of race discrimination (specifically victimisation) was issued on 21 October 2020. The claim, at para 2 of the grounds of complaint, sets out a number of reasons why the claimant said he should be regarded as a worker (although as noted above strictly the legal issue was whether he should be regarded as working in employment because he worked under a contract "personally to do work".)

20. The response was submitted on 17 December 2020. This sets out detailed grounds of resistance, including specific pleadings on the question of "worker" status explaining why it is said that the claimant is not a worker and referring to the fact that the claimant had been engaged by the respondent as a subcontractor via a limited company of which he was the sole director. The response refers to the decision of the EAT in *UK Mail Ltd v Creasey* case referred to above. The respondent pleaded in its response that the claimant had no reasonable prospect of success

21. There was a preliminary hearing before Employment Judge McDonald on 19 March 2021. A preliminary hearing was listed to determine whether the claimant was in the "employment" of the respondent under section 83 (2) (a) of the Equality Act 2010, and a number of case management orders were made for that preliminary hearing, including provision for the production of a bundle of documents to be agreed by 30 July 2021 with provision for exchange of witness statement by 27 August 2021. Employment Judge McDonald's case management orders did not allow the parties to vary employment tribunal orders by consent.

22. In terms of the preliminary hearing itself we had a difficult first day. The respondent's submissions reflect the delays as follows:

> "8. On 24 January 2022, the Open Preliminary Hearing ("PH") commences (Day 1) @ 10.00a.m. During Day 1:
>
> a. The PH start time is delayed to 10:30 due to Claimant's connectivity issues;
>
> b. The PH adjourned to 14:00. for Claimant's counsel to take instructions and read documents previously sent to the Claimant's solicitor 15:17 on 21 January 2022;
>
> c. The Claimant's representative provides 'additional' disclosure by purported response to the Order for Specific Disclosure by email at 12:40 – albeit including documents disclosed previously and already contained in part at pages 92 and 94 of the PH Bundle;

d. The PH reconvenes at 14:00 but has to be adjourned as the Claimant states he does not have a copy of the bundle nor the Respondent's witness statement;

e. The adjournment to 14:45 is subsequently required to be extended to 15:30 as the Claimant requires more time with his representative. The PH substantively commences at around 15:30.

f. The Respondent lodged the Respondent's Authorities at 08:54 on 25 January 2022 in readiness for Day 2 of the PH."

I agree that this is fair summary of what happened.

23. As the summary above indicates, I heard some cross-examination of the claimant at the end of the first day of the preliminary hearing, but that was limited, and heard no cross-examination of the respondent's witness at all because at the outset of the second day the claimant withdrew his claim.

24. I have been provided with some copy correspondence from the parties from which I am able to make some limited findings about the conduct of litigation, but I am not in a position to make detailed findings of fact. The parties in this case were both keen that the issue of costs the considered on the basis of written representations only, which is understandable in light of the costs of a further hearing, but it means that I have had to determine the question of liability for costs without having heard further evidence.

25. It is relevant that in support of his submissions, the claimant has produced documentary evidence that he sought advice from counsel, Mr Bronze then of Kenworthy Chambers, on 6 August 2020 and a note from conference has been disclosed by the claimant in response to this cost application. The notes of the conference record that counsel had sight of the claimant's subcontractor agreement with the respondent and was aware that he had his own company and that the claimant employed his own drivers and counsel recorded that "the respondent had a right of veto over who is engaged". The conference note recorded a number of other matters in relation to which the respondent exercised control over how the claimant operated his business. The claimant's counsel identified a number of reasons why he says in his view the claimant has good prospects of persuading a tribunal that the claimant is a worker that entitled to bring a claim for victimisation and he referred to the similarities with other cases which have been decided against different companies in this regard. Counsel identified the fact that the claimant trade is a limited company is a factor which suggest that he was in business on his own account but advised that that is not determinative and refers to EAT authorities in that regard. Counsel then discussed various matters which are relevant to the substance of the discrimination complaints.

26. However, in his note counsel also said this "to the best of my knowledge there is no binding decision by an employment tribunal on whether owner

drivers at UK Mail are workers or not". It is therefore clear that counsel was unaware of the EAT decision referred to by the respondent in its response to the tribunal claim. The advice was given before the claim was lodged. If further advice was sought after the respondent drew the claimant's attention to the Creasey decision in its response, privilege in that advice has not been waived.

27. The claimant's solicitors also provided me with copies of various correspondence between the representatives which refer to the parties agreeing between themselves to vary Employment Judge McDonald's case management orders and that the subsequent correspondence appears to confirm what I have been told about delays in the production of the bundle. The bundle of documents for the preliminary hearing was not agreed until early January and witness statements were not exchanged until 12 January 2022.

28. The respondent sent a letter to the claimant marked "*without prejudice save as to costs*" on 11 November 2021. That letter refers to the possibility of the respondent making an application to the tribunal for the claimant to play some or all of its legal fees incurred in defend defending the claim. The letter asserts that the claimant was a self-employed independent contractor business on his own account and explains the basis for the respondent's belief in that regard, including pointing to the fact that he had engaged at least 6 additional drivers during 2020 to undertake the services provided to the respondent. There is reference to the fact that the claimant has engaged with the respondent by his own limited company and draws the claimant's attention to the EAT decision in *Creasey* previously referred to. The letter goes on to refer explicitly to the question of costs and states that the costs incurred to that date in the proceedings amount to £5,586 plus VAT, that further costs will be incurred in preparation for the preliminary hearing and counsel's fees of attendance are anticipated to be £1,250 plus VAT.

29. A further letter marked without prejudice save as to costs was sent to the claimant on 17 February 2021. In brief terms that letter repeats the assertion that the claimant did not have worker status and repeats the cost warning, although there is no more specific comment in relation to costs. No warning was given to the claimant that the respondent had instructed Queens Counsel to attend a preliminary hearing letter and as a result the costs in relation to counsel's attendance had increased very significantly.

30. The respondent made an application for specific disclosure on 15 December 2021**.** In the explanatory background to that application, it was explained that the claimant had been asked to disclose all of the documents pertaining to contractual arrangements in place between the claimant and his own drivers on 10 September 2021 and he had subsequently been chased on a number of occasions. Eventually the claimant's solicitors responded to say that the claimant had instructed them that he only had verbal agreements with his drivers. This in turn led the respondent to request copies of invoices, payslips and payment documentation in relation to payments to drivers during 2019

to 2021 on the basis that that documentation was relevant and necessary for the proper disposal of the issues given the contention that the claimant was operating a business on his own regard. The claimant's representatives responded to acknowledge that the claimant operated by a limited company and said that the arrangements with drivers would be dealt with in his witness evidence. On 11 November 2021 the respondent reiterated that it considered the documents relating to arrangements with the claimant's drivers were relevant to the question of work status because it would demonstrate that he profited from the services undertaken by those drivers. On 6 December claimant representative informed the respondent that the claimant was not willing to provide the documentation requested. No explanation was offered for that refusal.

31. The respondent's application for specific disclosure was considered by Employment Judge Allen and an order was made on 18 January 2022 for specific disclosure on the ground that the documents requested were relevant and necessary for the determination of the issues to be decided.

32. I have also been provided with an email from the respondent to the claimant's representative referring to the order for specific disclosure dated 21 January 2022 which refers to the respondent having become aware of a written agreement between the claimant's company and a driver which appeared to contradict the reasons given by the claimant for not disclosing any agreements with the drivers and stating an intention to raise that at the start of the preliminary hearing, which is what happened although I did not make any findings about that given what happened. During an adjournment of the hearing on 24 January the claimant's solicitor wrote to the employment tribunal to confirm the claimant's explanation about why documents had not been disclosed and in particular to allege that the document produced had been fraudulently prepared by the individual in question. The case did not progress to a stage where I was able to make any findings on that matter.

Discussion and conclusions

Rule 80

33. Turning first to the question of the application under Rule 80, I am not satisfied that the threshold for a finding that the claimant's solicitors had acted improperly, unreasonably or negligently has been met. There were difficulties with the claimant accessing documents at the start of the hearing but I have noted that the very late submission of a further copy of the bundle by the respondent and the generally somewhat relaxed approach by both representatives to Employment Judge McDonald's orders with no apparent regard to Rule 29. Although I can see the issues about specific disclosure played their part, that is not a complete explanation for the late bundle, nor does it explain the late exchange of witness statements. The parties should not have departed from Employment Judge McDonald orders without approaching the tribunal to seek a variation of those orders. Orders are made by employment judges for the timely management of disclosure,

preparation of bundles and exchange of witness statements to avoid the sort of situation which arose in this case. If disclosure had been dealt with in accordance with the original timetable, the issues relating to specific disclosure would have come to light much sooner and if indeed that was the reason for the late bundle and witness statements, those delays could well have been avoided. There was fault by both parties' representatives in this regard.

34. The claimant's solicitor offered reassurance in their submissions that all relevant documents were sent to their counsel but in any event the respondent was sending new documents to the claimant's solicitors during the afternoon of the working day before the hearing. It would hardly be surprising if it then proved difficult for the claimant's solicitors to ensure the counsel and their client had had a full opportunity to read and consider those documents before the start of the hearing. Disruption to the start of a hearing is unfortunately all too uncommon where, as here, there is late disclosure and preparation of tribunal doucments. I am satisfied that at least some blame lies with both representatives. In those circumstances I cannot find that the claimant's representatives acted improperly, unreasonably or negligently so the ground under which wasted costs under Rule 80 could be awarded as not been established.

Rule 76(1)(a)

35. In terms of the claimant's approach to the question of specific disclosure I do find that that the claimant acted unreasonably. Documents relevant to the arrangements with his drivers are clearly relevant to the question of whether the claimant was employed under a contract personally to do work and he was exercising rights under a substitution clause to provide their services. Even if the claimant did not have written agreements with those drivers there must have been some documentation which would be relevant to their engagement, including in relation to how they were paid. Those documents should have disclosed in response to Employment Judge McDonald's order that documents reasonably relevant to the issues were to be disclosed by list by 4 June 2021 with copies to be provided by 25 June 2021. Even if the claimant had not recognised the relevance of those documents at first, it should have been obvious when they were specifically requested by the respondent and should have been disclosed at that stage. It was the claimant who had a legal obligation of disclosure not the respondent who had an obligation to make a timely request for sight of documents.

36. It is unreasonable for any party to respond to a request for disclosure to say "I will give oral evidence about that". The disclosure of relevant documents in the possession of parties is fundamental to the fair and just determination of factual disputes. It must be obvious why this is the case – documents may show that the oral evidence of an individual is mistaken or even misleading. Documents are often crucial to the assessment of the credibility of oral evidence and, of course, that is why the principles of disclosure has been developed. Disclosure is a fundamental part of our litigation process and the

obligation to disclose relevant documents cannot be supplanted by oral evidence.

37. On 6 December 2021 the claimant's solicitor said "please be advised that my client has responded stating that he is not willing to provide documentation requested regarding payments to his drivers. I leave you to take whatever action you deem necessary". That was unreasonable, obstructive and provocative. It was a breach of the Employment Judge Macdonald's orders not to disclose documents and a breach of the mutual obligation on parties to cooperate in the tribunal process found in Rule 2. The respondent should not have been forced to seek an order for specific disclosure as it was. It must have been obvious to the claimant that his actions would force the respondent to make a disclosure application and therefore incur unnecessary costs. That was unreasonable conduct and in those circumstances I find that it is appropriate to exercise my discretion to award make a costs order under rule 76(1)(a) against the claimant for his conduct in this regard. I will invite further submissions from the parties about how I should assess those costs and in what amount.

Rule 76(1)(b)

38. The respondent has also sought costs under rule 76(1)(b) on the basis that the claim had no reasonable prospect of success. The claimant's answer to that is to point to counsel's opinion as reflected in the note from August 2020 although it is clear that the opinion offered in August 2020 did not take into account the *Creasey* decision.

39. It is suggested by the claimant that I cannot make a finding that there was no reasonable prospect of success because the claimant withdrew his claim for the evidence and submissions had been heard. I cannot accept that proposition. If it was true costs could never be awarded under rule 76(1)(b) unless they have been the final determination of a legal issue. There is no such limitation in the Rules. I do accept however, that there will only be exceptional cases where it can be said that a case has no reasonable prospects of success where a tribunal has not had the opportunity to consider all of the relevant evidence in claims where the determination of the legal issues requires consideration of both fact and law. I have therefore approached this with caution.

40. Whilst the issue of "worker" status is clearly a complex one, as confirmed by the number of decisions of the higher courts, nevertheless there are some cases where it is clear that an individual is not employed under a contract personally to do work or where there is no reasonable prospect of an individual establishing that they were so employed. Here the legal agreement in dispute for the contract between 2 companies, one owned and controlled by the claimant and where the material terms of that contract was subject to a decision of the EAT which is binding on this tribunal, namely *Creasey.* Although Creasey is not a case which considers the provisions in the Equality Act 2010, nevertheless I accept that if I had heard all of the evidence in this

case I would have been bound by that decision as it deals with the meaning of personal performance in the Working Time Regulations and the wording of the particular contract the claimant worked under.

41. In the *Creasey* case itself, Mr C had not exercised his rights under the same substitution clause that the claimant in this case had been subject to and indeed had been unaware of its existence. Nevertheless, in the absence of any suggestion that the arrangement was a sham, it had been found he was not a worker on the basis that the correct construction of these particular contractual arrangements was incompatible with worker status. The claimant here had, in contrast, had made use of the substitution clause and that was in dispute. As in the *Creasey* case, there was no suggestion in the pleadings in this case that the claimant sought to argue that the subcontractor agreement with the respondent was a sham. I have taken into account that, of course, the law in this area has continued to develop significantly since 2012 when the EAT heard arguments in *Creasey*, but nevertheless even taking the claimant's case at its highest, I consider that objectively at the time the claim it was lodged it had no reasonable prospect of success in light of the Creasey decision, although the claimant did not become aware of that until the response was lodged.

42. Accordingly this does give rise to circumstances where a costs order may be appropriate under the first limb of Rule 76(1)(b).

43. I then had to consider whether to exercise my discretion to make any award of costs. I was troubled by the claimant's failure to disclose relevant documents about his drivers. It seems likely to me that he realised those documents would be damaging to his case. I am also concerned by the fact that despite the respondent repeatedly highlighting the *Creasey* decision to the claimant I have seen no evidence of any attempt by him to explain to the respondent why he said his case could be distinguished from *Creasey* or why this tribunal would not be bound by that decision. It appears that the claimant chose to disregard attempts by the respondent to highlight why his case had no reasonable prospect of success and that was compounded by his failure to disclosure to disclose documents which would damage his case. In those circumstances I consider that the claimant is culpable and this is one of those unusual cases where an order should be made. However I am unable to make an assessment of the amount at this stage.

44. In terms of my discretion about the amounts of the costs order which should be made, under Rule 84 I may have regard to the paying party's ability to pay. In this case claimant has indicated that he does wish to make representations under rule 84 because he says that if he were ordered to pay the respondent's costs he would insolvency. In the circumstances I consider that it is appropriate that I hear further submissions from the parties before making an assessment of the amount of costs which be paid to the respondent in this case. I have made separate case management orders about that.

Employment Judge Cookson
Date 1 July 2022

JUDGMENT SENT TO THE PARTIES ON
5 July 2022

FOR THE TRIBUNAL OFFICE

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