EMPLOYMENT TRIBUNALS

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Date 3 October 2022

Case Number: 2302023/2014

Claimant		**Respondent**
Mr C M Day	**V**	**1. Lewisham And Greenwich NHS Trust**
		2. Health Education England

Dear Sir / Madam,

Employment Tribunals Rules of Procedure 2013

By an instruction made on 29 September 2022, Regional Employment Judge Freer writes to the parties as follows:

Having considered relevant materials on the Claimant's claims, Regional Employment Judge Freer has decided that the Claimant's wasted costs application against the Second Respondent shall be considered by any available experienced employment judge.

The application shall also first be considered at a preliminary hearing to determine whether it has sufficient prospects of success to proceed to a substantive hearing having regard to the nature and content of the relevant compromise agreements entered into between the Claimant and the Second Respondent and/or the consent order entered into by the parties at the Court of Appeal dated 27 October 2016.

The Claimant has made an application for wasted costs under rule 80 of the Employment

Tribunal's (Constitution and Rules of Procedure) Regulations 2013 in respect of legal costs incurred in defending a strike out application made by the Second Respondent, which led to a hearing before the Employment Tribunal on 25 February 2015, the Employment Appeal Tribunal in February 2016 and the Court of Appeal on 21 March 2017.

The application was passed to the Regional Employment Judge to consider on the papers which judge should consider the matter. Very regrettably that process became subject to a lengthy delay linked to the Claimant's claim in case number 2300819/2019 being considered.

With regard to the appropriate judge to consider the Claimant's wasted costs application, the Claimant argued that it should be heard by Judge Hyde, who made the decision on the initial strike out application, because it is argued that she was misled at the relevant hearing. The Second Respondent argues that it should be heard by Regional Employment Judge Freer because he was the judge of the panel that determined the issue that disposed of the case. The Second Respondent relies upon the authority of *Gray -v- Going Places Leisure Travel Ltd* (2005) EWCA Civ189 in support of its argument.

However, in the interim Judge Hyde had been unable to attend at the tribunal for a period of time and has subsequently retired from her judicial post. Regional Employment Judge Freer has moved from the London South Region to take up the same position for the London Central Region.

The decision in *Gray* does not lay down a principle that must be followed in employment tribunal proceedings. It is a decision under the provisions of the Civil Procedure Rules. Rules relating to costs in the Employment Tribunal are contained in the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 at rules 74 – 84 and rules 2 and 41 allow for the Tribunal to regulate its own procedure. In addition, the decision in *Gray* states: "in the absence of at least a good reason to the contrary, the costs of proceedings (in so far as they have not already been disposed of at an interlocutory stage) should be dealt with by the tribunal which determines the issue which disposes of the case immediately after the judgment in disposing of the case". Those are different circumstances to the cases under review in the Claimant's application, which were withdrawn upon dismissal on terms agreed by the parties part way through the hearing and without the disputed issues being judicially determined. Further there are clearly good reasons why both the judges requested by the parties are unavailable.

In any event, the reality is that given the appeal of the particular issue to the Court of Appeal, the nature of the application relating to an allegation of non-disclosure only discovered by the Claimant in 2019 after the initial appeal point was determined by the Court of Appeal, and the relevant compromise agreements having been entered into, there is no obvious knowledge or information that any employment judge can bring to the wasted costs application such that it would have any impact on the outcome.

Therefore, the application can be heard by any judge. However, given the complexity of the proceedings and the potential arguments that may be made relating to the application, it should be considered by an experienced judge, either salaried or fee-paid. The benefit of this matter being considered by any employment judge is that the application can now be heard without further delay, which is in accordance with the overriding objective.

Given the nature of the application and the Claimant's arguments that the compromise agreements and/or consent order should be disapplied, a preliminary hearing on prospects of success should be considered having regard to those matters. That hearing should take place after the decision has been made in the Claimant's case numbered 2300819/2019, which also may address arguments relating to the same or similar compromise agreements.

Therefore, a preliminary hearing will be listed with a time estimate of two days to consider whether or not the Claimant's application for wasted costs should be struck out on the basis that it has no reasonable prospect of success having regard to the content and nature of relevant compromise agreements reached between the Claimant and the Second Respondent and/or the consent order date 27 October 2016.

The tribunal has already received a skeleton argument and bundle of documents supplied by the Claimant and a brief skeleton argument and bundle submitted by the Second Respondent.

In order to assist further with the determination of the preliminary hearing issue, the parties are ordered to submit no later than 21 days before the hearing date, both to the tribunal and to the other party, any new or supplemental written skeleton arguments upon which it intends to rely. In particular they should address relevant authorities on the setting aside of compromise agreements and/or the consent order, particularly on the basis of fraud/misrepresentation/mistake (see for example *Hayward -v- Zurich Insurance Co Plc* [2015 EWCA Civ. 327) and whether or not there are any clauses in the relevant compromise agreements similar to that identified in the case of *Ackerman -v- Thornhill* [2017] EWHC 99 (Ch) (26 January 2017), that precludes a party from pursuing any future proceedings. The parties should also address whether or not, despite any agreements that may preclude the Claimant himself pursuing a wasted costs order, the tribunal should nevertheless make an order on its own initiative".

Yours faithfully,

LHead

Lynn Head
For the Tribunal Office

cc ACAS