CASE NUMBER: 2300819/2019

IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL
BETWEEN

DR CHRIS DAY

CLAIMANT

-and-

LEWISHAM AND GREENWICH NHS TRUST

FIRST RESPONDENT

HEALTH EDUCATION ENGLAND

SECOND RESPONDENT

Skeleton Argument in Support of the Claimant's Application for Wasted Costs

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Introduction

1. This skeleton argument is provided by the Claimant as a Litigant in Person.

2. The Claimant lodged a supplementary bundle ("CSB") with the Tribunal in respect of his application for wasted costs on 9 November 2020. Hill Dickinson lodged a bundle with the Tribunal on 5 November 2020 before the Claimant had seen it.

3. Absent from the Second Respondent's bundle was;

    a) The 2014 LDA between the First and Second Respondent that was not disclosed in the litigation but obtained in July 2019 by the Journalist Tommy Greene.

    b) A Consent Order from the Court of Appeal dated 27 October 2016 stating *"Whatever the outcome of the Appellant's appeal, each of the Appellant and Second Respondent shall bear its own costs."*

4. The Claimant is grateful to Hill Dickinson for providing a copy of the October 2016 Consent Order on request. On being asked to include the 2014 LDA. Hill Dickinson maintain the 2014 LDA is not relevant to the present hearing and that it would not be proportionate to print it. In any event, whatever the rights and wrongs of that statement the Claimant has copies of the 2014 LDA and the Claimant extends an invitation to the Tribunal to inspect them during the hearing. The Claimant will refer to his bundle as ("CSB") and the main bundle as ("MB").

5. The Claimant confirms that he has read the Skeleton Argument provided by Mr Angus Moon QC dated 5 November 2020 and the attached Court of Appeal authority consisting of Gray v Going Places. The Claimant thanks Mr Moon for them.

Court of Appeal Authority – Grays V Going Places

6. Having had two interactions with the Court of Appeal already in this case, the Claimant is not looking for a hattrick and so is keen that any decision in this case does not depart from Court of Appeal authority. The Claimant will trust the Tribunal with that.

7. When considering which Judge should deal with a wasted costs application, it does seem to the Claimant that the Court of Appeal is specifying the grade of Judge and that is must be a Judge that has had conduct and made an order in the original case.

8. As a litigant in person, the Claimant accepts that his opinion on this point can be worth only so much so the Claimant intends to stay neutral on whether an employment tribunal in a complex case like this is bound by the authority referred to in Grays v Going Places.

9. The Claimant would advance the position that if the Employment Tribunal does decide it is bound by the authority then the Claimant's preference would be for the Judge that heard the original strike out application in 2015 to hear the wasted costs application.

10. The Claimant submits that it would be this Judge that is in the best position to understand how badly misled the tribunal was in 2015 on the reality of the Second Respondent's commissioning of doctors' employment and training around the country in 2014.

11. This Judge would appreciate the significance of Hill Dickinson drafting the commissioning contracts (LDAs) that governed the way 1-2 billion pounds was transferred to NHS Trust around the country in return for compliance to the Second Respondents terms in respect of the engagement of doctors (CSB Page 60-67).

12. The Claimant imagines that it would be this Judge that would be most impacted by the sight of the 2014 LDA between the First and Second Respondent.

Proposal of a Preliminary Point

13. The Claimant wrote to the Employment Tribunal and Employment Appeal Tribunal on of 8 July 2020 (CSB page 13-17) on request from the EAT registrar to set out his position on his wasted costs application in light of the Court of Appeal order in this case dated 18 June 2020 form Lady Justice Simler. The Claimant respectfully asks for this letter to be read by the Tribunal.

14. In the letter the Claimant's seeks the Tribunal and Hill Dickinson's agreement for a preliminary issue to be handled at the London South Employment Tribunal that if decided in Hill Dickinson's favor the Claimant accepts would be fatal to the Claimant's wasted costs application whatever the merits of the application or however serious the conduct set out in the application. This point is important as it demonstrates the Claimant's desire to act reasonably whilst robustly advancing his position.

15. The Second Respondent's proposal was for the Claimant to withdraw the wasted costs application following the Court of Appeal order dated 18 June 2020. The Claimant respectfully asks the Tribunal to make a finding on this and [12] above given what Hill Dickinson has expressed about the Claimant's reasonableness in the letter exchange dated 29 September 2020 (CSB 45-48).

16. The Claimant's preference is that this preliminary point be handled on the 13 November but the Claimant might have to accept that this is not possible given time pressure and given the Tribunal's decision on the Court of Appeal authority in Grays v Going Places.

Substance of the Preliminary Point

17. It is common ground that if the various compromise agreements identified by Hill Dickinson were properly made and any legal advice given to the Claimant before he entered into them was based on true and complete facts that the Claimant's wasted

costs application is doomed to failure and should be dismissed. The Claimant submits this is clearly not what has happened in this case.

18. Hill Dickinson identified the compromise agreements and orders on 14 May 2018 and 15 October 2018 as relevant and included them at (MB 2-9).

19. There is a settlement agreement that was not included in the main bundle or referenced in the Hill Dickinson skeleton argument. This is the consent Order from the Court of Appeal dated 27 October 2016 that had a material impact on the £55,0000 that was awarded at the May 2018 Preliminary Hearing.

20. The broad thrust of the Claimant's case is that had the reality of the Second Respondent's ultimate role in commissioning doctors' training and employment been known by the Tribunal in February 2015 the litigation would have taken a vastly different course.

21. The Second Respondent in their relevant commissioning contract or LDA even imposed terms on the First Respondent on how to deal with doctors that raised whistleblowing concerns and has details in it about dispute resolution and various other issues relevant to this case.

22. The comments of Mr Justice Langstaff in his EAT Judgment speak volumes on how misled the Employment Tribunal and Employment Appeal Tribunal were on the reality of the Second Respondent's commissioning functions being facilitated by Hill Dickinson.

> "*HEE was little different from any third party who might have acted detrimentally towards him as a whistleblower"*

23. Had it been known at the time of any of the compromise agreements that there was a failure to disclose a March 2014 LDA contract between the Second Respondent and the First Respondent (and the various other NHS Trusts the Claimant was due to rotate to) and;

    a) That these contracts were drafted by Hill Dickinson months before the strike out application in February 2015. (Please can the Tribunal read the letter exchange from Sir Norman Lamb and Tommy Greene to the CEO of the Solicitor Regulation authority (CSB 18-22).

    b) Signed by Mr Plummer the investigating Director of the Claimant case (please can the Tribunal read the letter from Sir Norman Lamb to the Second Respondent enclosing a letter from the Claimant dated 5 April 2015 to Hill Dickinson (CSB 25-29)

24. The Claimant's actions would have been very different.

25. The conduct of Mr Plummer is described by the Second Respondent's own witness in their 2018 Tribunal statement;

    > *"the notes made by Mr Plummer contain short phrases without giving their context and by stringing the phrases together I feel it gives an exaggerated distorted impression. Upon reading the report, I was very surprised to find various phrases in inverted commas seemingly" quoting me, when I could not recall saying those phrases. I did not feel that the report portrayed the situation as accurately from my perspective as I would have wanted."*

26. Sir Norman Lamb and the Claimant have written to both Hill Dickinson and the Second Respondent to challenge the conduct in respect of false pleadings designed to smear the Claimant after the relevant witnesses disowned them. No Response was received (Page 25-29).

27. The reality of the misleading pleadings and the absence of undisclosed evidence obviously weakened the position of the Claimant at the time of each of the compromise agreements.

28. The Claimant submits that had the Claimant known what is set out in paragraph 21-25 above he would not have entered into the various settlement agreements which will be briefly dealt with separately.

Court of Appeal Consent Order 27 October 2016

29. On the 27 October 2016 the Claimant and the Second Respondent agreed to an undertaking that resulted in a Consent Order from the Court of Appeal;

> *"Whatever the outcome of the Appellant's appeal, each of the Appellant and Second Respondent shall bear its own costs."*

30. The Claimant's simple argument is that had he known about the Second Respondent's failure in disclosure in the ET and EAT in October 2016, he would have done then what he has done now. He would have reported the firms to the Solicitor Regulation Authority, complained to MPs and applied for wasted costs in the EAT and ET. 3 separate Solicitor Regulation Authority investigations are still ongoing into this case (CSB Page 23-24).

31. If the Claimant had been in possession of all the facts he certainly would not have agreed to the consent order on 27 October 2016 that made the hearing cost neutral. The Claimant submits his reasoning should be immediately obvious but he will expand on his reasoning below.

32. Paragraph 18-20 above outlines how misled the ET and EAT was on the reality of the Second Respondent's ultimate influence over employment and training of doctors.

33. This enabled Hill Dickinson to represent the Claimant's appeal to the Court of Appeal publicly and privately as futile. The letter from Hill Dickinson dated 10 October 2016 (CSB 1-2) in particular shows how the Claimant was misled into believing the Second

Respondent's position was far stronger than it actually was and would have been if the reality of HEE's functions exposed from any of the LDA's including the 2012 LDA had been disclosed.

34. It is not enough for the Claimant to know he is right he has to be satisfied he can prove it. This was certainly the case as cost threats and a schedule of costs had been sent to the Claimant in the EAT.

35. The 10 October 2016 letter also raises questions about Hill Dickinson's role and fees in respect of mitigating the damage done to whistleblowing law by this case. This letter represents one of the first times it was acknowledged that there was a "gap in the law" for junior doctor whistleblowing protection caused by this case. This was explicitly denied publicly and in the EAT by Hill Dickinson/HEE which Mr Justice Langstaff accepted;

> *"Forensically attractive though it may ne to describe an absence of protection in particular circumstances as a lacuna it is better viewed in this case as it was in Fecitt as Parliament carefully delineating the extent to which protection against detriment for whistleblowing should be afforded. It determined that protection should not extend so far as to cover the relationship of the Claimant with a body such as HEE."*

36. Given Mr Justice Langstaff's words, the Claimant would like to inform the Tribunal exactly what Parliament has stated about what the ET and EAT believed to be true about the submissions in this case in 2015/16 (49-52). The quotes are from a House of Commons debate on whistleblowing that occurred on 3 July 2019. Sir Norman Lamb and Justin Madders are MPs that are both former employment lawyers. Sir Norman Lamb is a former health minister. It is difficult to imagine two MPs better qualified to comment on this case.

37. Justin Madders stated;

"Health Education England effectively sought to remove around 54,000 doctors from whistleblowing protection by claiming that it was not their employer."

38. Sir Norman Lamb stated;

    ""Is the hon. Gentleman aware that the contract between Health Education England and the trusts, which demonstrates the degree of control that Health Education England has over the employment of junior doctors, was not disclosed for some three years in that litigation? It was drafted by the very law firm that was making loads of money out of defending the case against Chris Day. I have raised this with Health Education England, but it will not give me a proper response because it says that the case is at an end. Does the hon. Gentleman agree that this is totally unacceptable and that it smacks of unethical behavior for that law firm to make money out of not disclosing a contract that it itself drafted?"

14 May 2018 – Settlement

39. As part of the 14 May 2018 settlement agreement a payment of £55,000 was made from the Second Respondent in respect of the "worker" point (MB page3).

40. The Claimant submits there is a massive public interest point here. Had the fact been known by either the Tribunal or the Claimant that;

    a) Hill Dickinson were being paid public money to draft LDAs around the country in 2014;

    b) They withheld this fact and the relevant 2014 LDA contract for the First Respondent from disclosure

    Then it must be the case that at least some of that £55k payment to the Claimant on 14 May 2018 should have come from Hill Dickinson and not public money.

41. The Journalist Tommy Greene has set out from a legal opinion he instructed how fraud by failure in disclosure could apply to this situation (CSB page 21-22) which was also referenced by Sir Norman Lamb (Page 18-20).

42. The Claimant was denied full payment of his costs on the worker point as a result of the consent order dated 27 October 2016. The same issues set out above [26-35] that apply to the 27 October 2016 settlement also apply to the 14 May 2018 settlement.

The 2016 order influenced, as you would expect, the Claimant settling for far less than his crowdfund had expended on the worker point.

43. This meant the Claimant could not afford to retain his counsel James Laddie QC for the 4 week final hearing in October 2018 and could not pay his junior counsel Chris Milsom even a fraction of what the two legal teams representing the NHS were paid for this case which has been established as £700k.

44. Lastly the Claimant repeats the point made at [18-28]. If he had known those facts he would have referred Hill Dickinson to the SRA in May 2018 and applied for wasted costs in the EAT, ET and may even have challenged the 26 October 2016 consent order in the Court of Appeal. If any of those actions had been fruitful the dynamic and Claimant's resourcing for the October 2018 hearing would have been vastly different.

October 2018 Settlement

45. Hill Dickinson rely on clause 2.2 of the relevant settlement agreement;

> "This agreement is also in full and final settlement of all or any claim or application for costs or expenses that any of the parties may have against any Party's or Party's representatives, whether in relation to the Claims of their conduct or otherwise"

46. The Claimant has set out his position on this in detail in his letter to the ET and EAT dated 8 July 2020 (CSB Page 13-17). If the Claimant had known the reality of the facts set out above [18-28] he would never have agreed to protect the lawyers representing the Respondents from wasted costs.

47. Since the settlement it has transpired that reference to a wasted costs claim against the Claimant's former lawyers at the 2018 Tribunal was made by the Respondents. The significance of this is being tested in other litigation.

Wasted Costs Orders of the Tribunals Own Initiative

48. If the Tribunal finds on the 13 November 2020 that the any of the compromise agreements is a bar to the Claimant pursuing a wasted costs application. The Claimant submits that Rule 82 of the Employment Tribunal Rules gives the Tribunal the power to make such an order of their own initiative;

> *"A wasted costs order may be made by the Tribunal on its own initiative or on the application of any party"*

Conclusion

49. I would like to thank the Tribunal for reading my skeleton argument and referenced documents in the bundle.

Dr Chris Day

12 November 2020