CASE NO. 2302023/2014B

IN THE EMPLOYMENT TRIBUNAL

LONDON SOUTH

B E T W E E N:

DR CHRISTOPHER DAY

Claimant

-and-

LEWISHAM AND GREENWICH NHS TRUST

First Respondent

-and-

HEALTH EDUCATION ENGLAND

Second Respondent

SKELETON ARGUMENT ON BEHALF OF HILL DICKINSON, THE SECOND RESPONDENT'S SOLICITORS

(For Preliminary Hearing listed on 5th and 6th December 2022)

1. This Skeleton Argument is provided on behalf of the Second Respondent's solicitors, Hill Dickinson LLP, in response to the Claimant's application against Hill Dickinson LLP for wasted costs. The parties will be liaising to provide paginated bundles of documents and authorities but these are not yet available.

2. The Claimant is referred to as C in this Skeleton Argument, the First Respondent is referred to as R1, the Second Respondent is referred to as HEE and Hill Dickinson LLP is referred to as HD.

Introduction

3. This Skeleton Argument addresses the application for wasted costs under the following main headings:-

    - **The application.**
    - **The issue.**
    - **The facts and procedural history in outline.**
    - **The law.**
    - **HD's submissions.**

The application

4. The application for wasted costs was made by letter from the C's former solicitors dated 12th June 2019. It is alleged that as a result of an improper, unreasonable or negligent act or omission on the part of HD, HEE failed to disclose "a highly relevant document" and that this improper, unreasonable or negligent omission justifies a wasted costs order against HD. HD denies any such improper, unreasonable or negligent act or omission.

The issue

5. On 14th May 2018 and again on 15th October 2018 C entered into settlement agreements which were embodied in orders made by the tribunal. On 19th October 2018 Employment Judge Freer made an order that, upon agreement having been reached between the parties, C's claims were dismissed upon withdrawal. Paragraph 2.2 of the October 2018 settlement agreement states:-

> "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 other Party or Party's representative, whether in relation to the Claims or their conduct or otherwise."

6. On 3rd October 2022 Employment Judge Freer made an order that the application for wasted costs should be considered in a preliminary hearing to determine whether the application 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 C and HEE and/or the consent order entered into by the parties in the Court of Appeal dated 27th October 2017.

7. HD's submission in short is that the application for wasted costs has no prospect of succeeding because such an application is not open to C in light of the terms of the settlement agreement entered into by C in October 2018. C says that that settlement agreement should be set aside and his application for wasted costs should be heard on its merits.

The facts and procedural history in outline

8. C was a doctor in training at R1's hospital between about 7th August 2013 and 5th August 2014. HEE are a body responsible for ensuring that there is an effective system for the planning and delivery of education and training to trainee doctors.

9. In late 2014 C brought proceedings in Case 2302023/2014B against various bodies including R1 and HEE alleging "whistleblowing" detriment. HEE contended in Grounds of Resistance that the Employment Tribunal lacked jurisdiction to consider the claims against it because C was neither an employee of HEE nor a

worker under the Employment Rights Act 1996 (ERA) in relation to HEE and therefore he was not entitled to claim "whistleblower" protection.

10. An order was made by Employment Judge Hildebrand on 20th January 2015 directing the trial of various preliminary issues including HEE's contention that C was neither an employee of HEE nor a worker. The question was treated as a pure point of law. No order was made for disclosure of documents in relation to those preliminary issues.

11. HEE was successful before both Employment Judge Hyde in a judgment dated 14th April 2015. Langstaff J in the Employment Appeal Tribunal dismissed C's appeal in a judgment handed down on 9th March 2016. However, C appealed to the Court of Appeal and by a judgment dated 5th May 2017 C's appeal was allowed and the case was remitted to a fresh Employment Tribunal to decide as a preliminary issue whether HEE "substantially determined the terms of engagement" of C. Prior to the hearing in the Court of Appeal the parties had entered into a consent order dated 27th October 2016 whereby they agreed to bear their own costs whatever the outcome of the appeal.

12. An order for disclosure of documents was made by Employment Judge Hildebrand on 10th July 2017 for the first time after the hearing in the Court of Appeal. On 14th February 2018 HEE gave disclosure. That disclosure included a document entitled "the Learning and Development Agreement between London Strategic Health Authority and South London Healthcare NHS Trust" and was dated 1st April 2012. The document is referred to below as the 2012 LDE.

13. The preliminary issue was listed for hearing in May 2018. At that hearing HEE conceded that C was a worker for the purpose of the "whistleblowing" legislation. On 14th May 2018 C entered into a settlement agreement which was embodied by an order of the tribunal. C criticised HEE for a "failure to disclose a key contract" prior to the hearing. Under the terms of the May 2018 settlement agreement C recovered £55,000 in costs in full and final settlement of all C's claims for costs in respect of the "worker" issue.

14. The substantive claims, which were expanded to include further detriments (Case 2301446/2015B), came on for hearing in October 2018. After being cross-examined, C entered into a settlement agreement on 15th October 2018. As noted above, on 19th October 2018 Employment Judge Freer made an order that, upon agreement having been reached between the parties, C's claims were dismissed upon withdrawal. Paragraph 2.2 of the October settlement agreement is set out above.

15. Soon after he had entered the October settlement agreement C sought to have it set aside:-

    (i) On 11th December 2018 C applied to set aside the October settlement agreement. That application was refused by Employment Judge Martin on 18th February 2019.

    (ii) On 26th February 2019 C applied for reconsideration of his application. C included a complaint about disclosure of the LDA (see below) as part of that application.

(iii) C also appealed the refusal by Employment Judge Martin on 18th February 2019 to the Employment Appeal Tribunal on 28th March 2019. On 15th July 2019 Her Honour Judge Eady found that the appeal disclosed no reasonable grounds for bringing the appeal and that no further action was to be taken on it.

(iv) On 24th July 2019 C's then solicitors wrote applying for an oral hearing before a judge of the Employment Appeal Tribunal. That hearing took place on about 14th November 2019 before Heather Williams QC sitting as a Deputy Judge of the High Court and she too found that no further action was be taken on the appeal. C was represented by counsel at that hearing.

(v) On 30th December 2019 C appealed to the Court of Appeal against the decision of Heather Williams QC sitting as a Deputy Judge of the High Court in the Employment Appeal Tribunal. That appeal was ultimately dismissed by Simler LJ on 7th April 2020.

16. On about 6th March 2019 C issued further proceedings in the ET against R1 and HEE (Case No 2300819/2019). These proceedings alleged new detriments arising from C's earlier public interest disclosures. The claims against HEE in these further proceedings were dismissed on 16th February 2022 following a preliminary hearing before Employment Judge Andrews on 17th -19th January 2022. The claims against R1 in these proceedings have also recently been dismissed in a judgment dated 15th November 2022 and sent to the parties on 16th November 2022.

17. For the sake of completeness C also applied on 12th June 2019 to the Employment Appeal Tribunal for wasted costs against HD in an application which mirrors that before the Employment Tribunal. It is understood that that application was stayed, although the up to date position is not clear.

18. In essence in the letter of 12th June 2019 from C's former solicitors complained that "a vital document", namely the LDA, was not disclosed by HEE until 14th February 2018. It is alleged that "the LDA, a highly relevant document, was not included in the February 2018 disclosure list but merely buried in the documentation disclosed."

19. In fact the 2012 LDA was included in the list of documents sent by HD on 14th February 2018 and a copy of that document was sent with the e-mail.

20. C also says that he obtained another LDA dated 1st April 2014 and yet further LDAs in July 2019 with the help of a journalist, Mr Tommy Greene.

The law

21. C appears to accept that he must set aside the October 2018 settlement agreement in order to be able to succeed on his application, although he contends that even if he cannot maintain his application the Employment Tribunal may make an order for wasted costs on its own initiative.

22. HD submits that it is right that C must have the October 2018 settlement agreement set aside in order to pursue his application for wasted costs against HD. The terms of paragraph 2.2 of the October settlement agreement plainly prevent a claim for wasted costs against HD. Further, as Simler LJ observed in the Court of Appeal

"[the] agreement met the terms of s203 Employment Rights Act 1996, the claimant received independent legal advice from Christopher Milsom, experienced employment law counsel, who represented him, together with solicitors, throughout the final hearing of the claims. The agreement having been reached between the parties, the claimant's claims were dismissed upon withdrawal by a judgment of EJ Freer sent to the parties on 28 November 2018." No issue under s 203 ERA arises.

23. Nonetheless, it is accepted that a settlement agreement made in accordance with section 203 ERA may be set aside on certain common law grounds including duress and misrepresentation: *Industrious Ltd v Horizon Recruitment* [2010] ICR 491. C does not allege duress. As to misrepresentation:-

> "A false representation of a material fact, made prior to a compromise and which induces it, may, at the instance of the party misled, operate to vitiate the compromise." (*Foskett on Compromise*, 9th Edition (2020) at paragraph 4-37).

24. Though it is possible to contend that a failure to disclose a *material* document in litigation might involve a misrepresentation, the hurdle for demonstrating such a misrepresentation is high:-

> "A suppression of a fact or document which, if its existence were revealed would destroy totally (rather than, perhaps, merely undermine to some extent) a claim being advanced by a claimant would involve the claimant in pursuing a claim which he knew to be unfounded. A compromise of such a claim could be invalidated." (*Foskett on Compromise* at paragraph 4-40).

25. HD also relies upon the cases referred to by Employment Judge Freer on 3rd October 2022 which stress the importance of finality in litigation: *Hayward v Zurich* [2015] EWCA Civ 327; [2017] AC 142 and *Ackerman v Thornhill* [2017] EWHC 99.

HD's submissions

26. If the matter goes beyond this preliminary issue HD will strenuously maintain that C has not identified any improper, unreasonable or negligent act or omission on the part of HD such as to justify a wasted costs order against HD. It is doubtful, for example, that the 2014 LDE or the LDAs other than the 2012 LDA were disclosable at all.

27. However, this preliminary issue is concerned with the prospects of success of this application in light of, in particular, the terms of the October settlement agreement. HD submits that the application for wasted costs is bound to fail for the following main reasons:-

    (i) The allegation that HD did not disclose the 2012 LDA on 14th February 2018 is factually wrong. The LDA was both referred to in the list of documents and sent to C's then solicitors. The suggestion that the 2012 LDA was "merely buried in the documentation disclosed" is bound to fail. A like argument was given short shrift by Snowden J in *Ackerman v Thornhill* at paragraphs 95 and 96 of the judgment.

    (ii) There can be no legitimate criticism of HD in relation to events prior to the decision of the Court of Appeal on 5th May 2017 on the "worker" issue because there was no order for disclosure. In any event, such criticism as might have been levelled was settled by the October 2018 settlement agreement.

(iii) Similarly, there can be no legitimate criticism of HD in relation to the consent order as to costs of 27th October 2016 because there was no order for disclosure prior to then. In any event, such criticism as might have been levelled in relation to that consent order was also settled by the October 2018 settlement agreement.

(iv) The documents which C says were not disclosed by HD prior to the October 2018 settlement agreement, namely the other versions of the LDA were simply not material. C's counsel (now Linden J) in his Skeleton Argument for the hearing in October 2018 made a number of points on the 2012 LDA. There is no material difference on these points between the 2012 LDA and the 2014 LDA. The other LDAs add nothing to the argument. These points will be developed in oral submissions.

(v) C was aware of and complained about what he said was the late disclosure of the 2012 LDA and on his own case he received £55,000 in costs in relation to that as a result of the May 2018 settlement agreement.

(vi) C could have (and perhaps did) complain of the "undisclosed" 2014 LDA and the other LDAs in his numerous applications after the 2018 settlement agreement to set that agreement aside. His applications, pursued to the Court of Appeal, were unsuccessful. To permit C to set aside the 2018 settlement agreement in these costs proceedings would undermine the decisions of the tribunals which considered his earlier applications, including the Employment Appeal Tribunal and the Court of Appeal. HD relies upon the

Henderson v Henderson doctrine referred to in *Ackerman v Thornhill* [2017] EWHC 99.

28. C's contentions come nowhere satisfying the heavy burden required to be discharged in order to justify setting aside the 2018 settlement agreement.

29. As to C's contention that that the Employment Tribunal should make an order for wasted costs on its own initiative, HD submits that the Employment Tribunal should not do so for the following main reasons:-

(i) If the October 2018 settlement agreement is not to be set aside, this is a factor which weighs heavily in the balance against the Employment Tribunal making an order for wasted costs on its own initiative.

(ii) There is a public interest in finality in litigation, which is a particularly acute consideration given the history in this case. Further, it is not in the public interest to permit settlement agreements to be undermined or outflanked: *Ackerman v Thornhill.*

(iii) The setting aside of the October 2018 settlement agreement would have an impact on third parties to the application for wasted costs, namely R1 and R2.

(iv) The application for wasted costs was made on 12th June 2019. It is out of time. Even if it were in time, it would not be in the public interest for the application to be heard as a result of a decision on the Employment Tribunal's own initiative at a hearing which will probably take place 5 years

after the October 2018 settlement agreement was entered into.

Serjeants' Inn Chambers,
LONDON
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ANGUS MOON KC

22nd November 2020