Case No. 2302023/2014 and 2301446/2015

EMPLOYMENT TRIBUNALS

Claimant: Dr C Day

Respondent: Lewisham and Greenwich NHS Trust (1)

Health Education England (2)

Heard at: London South (By CVP) **On:** 5 and 6 December 2022

Before: Employment Judge Self

Appearances

For the Claimant: Mr A Allen KC - Counsel

For Respondent: Mr A Moon KC - Counsel

RESERVED JUDGMENT

Upon the Tribunal determining that the test for striking out the Claimant's Application for a wasted costs order against the Second Respondent's solicitors (Hill Dickinson), pursuant to Rule 37 (1) (a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 (The Tribunal Rules), is not met, the application will be listed for a Case Management Hearing to enable directions to be made for a determination of the Application.

WRITTEN REASONS

1. This hearing was listed, of the Tribunal's own initiative, to consider whether the Claimant's application seeking wasted costs against Hill Dickinson LLP, dated 12 June 2019, pursuant to Rule 80 of the Tribunal Rules, should be

struck out pursuant to Rule 37 (1) (a) of the same Rules, as having no reasonable prospect of success. There was a preliminary point raised about the scope of this hearing at the outset and the above summarises my ruling thereon. Both parties have indicated to me that they do not need anything other than my oral ruling on that matter.

2. Within the course of the hearing and prior to the parties commencing their submissions an issue was raised whether such an application for wasted costs came within the definition of "Claim" pursuant to the Employment Tribunal Rules and both parties were, eventually, in agreement that it could and both wished the hearing to proceed.

3. These claims have been running since 2014 and it is not possible to deal with the application without being clear about the chronology and what has taken place to date. Indeed, both advocates rightly spent some time working through the chronology as they saw it and I will do the same drawing from both of their submissions

4. The Claimant brought claims of whistleblowing detriment against a number of Respondents on 27 October 2014 and then brought a further Claim on 10 April 2015. One of those Respondents was Health Education England (HEE) who were represented at all material times by Hill Dickinson LLP. The Claimant asserted that he was a worker under the extended definition of worker in section 43K Employment Rights Act 1996 (ERA) between 5 August 2013 and 10 September 2014, which was the material period for the Claim, and that he had been subjected to a series of detriments on account of protected disclosures he had made.

5. HEE defended the allegations against it and the Response was received in late November 2014. Within that document HEE took the point that the Claimant did not fall within the extended definition of worker set out at section 43K of the Employment Rights Act 1996. It averred, at paragraph 8 of its Response (55), that it did not determine the terms upon which the Claimant was engaged and that that was the responsibility of the Trust who were employing the Claimant at the material time. It was pleaded that the Claimant had no reasonable prospect of success of coming within the section 43K definition of worker and that the Claim should be struck out on that basis (para 11 page 55).

6. This position was reiterated in a letter of 25 November 2014 and the Regional Judge in situ at that time listed a hearing so as to consider that point (among others) at an Open Preliminary Hearing (OPH). HEE points out that there was no order for disclosure prior to that hearing but the Claimant counters with the observation that there was a bundle prepared for the hearing into which documents the parties considered relevant were placed and then

considered by the Judge and referred to by her in the course of her Judgment.

7. That hearing was listed before EJ Hyde on 25 February 2015 and she struck out the claims against HEE after hearing representations from the parties. The basis for striking out the Claims was that they had no reasonable prospect of success.

8. At para. 42 of the Judgment it was recorded that counsel for HEE stated that it was fanciful to suggest that the party who substantially determined the Claimant's terms and conditions was HEE. At para. 43 the Judge reflected that she had before her terms and conditions of employment with the various Trusts with whom the Claimant was placed and that was a good start point.

9. At para. 45 EJ Hyde set out relevant sections of what was known as the "Gold Guide" and at para. 46 utilising that document accepted that that document ***"overwhelmingly pointed to the First Respondent (Lewisham) as being the body which was substantially responsible for determining the Claimant's terms and conditions of work"***

10. At paragraphs 48, 49 and 50 the Tribunal cites certain documents in the bundle in support of the HEE position and that it accepted certain evidence from a witness (Mr McKay).

11. At paragraph 52 of that Judgmen,t which was sent to the parties on 14 April 2015, EJ Hyde said:

    "In conclusion, I accepted the primary submissions on behalf of the Second and Third Respondents that in construing section 43K the focus is in relation to the work and as to who has substantially determined the terms on which the employee or the worker does that work. I agreed that it was relevant that (HEE's) role was to arrange the training of Dr Day over an extended period but that it was not (HEE) who substantially determined the terms on which he did the work for the trust. Here there was a training relationship which subsisted alongside the employment relationships with the various trusts who were the Claimant's employers and determined the terms upon which he performed his work either on their own or with others not including the Respondents. The claim against (HEE) therefore has no reasonable prospects of success".

12. It is clear that EJ Hyde carefully considered the evidence provided to her including the documentary evidence that was placed in the bundle and made her decision on the information before her.

13. The Claimant appealed that Judgment and the matter came before Mr Justice Langstaff at the Employment Appeal Tribunal on 10 February 2016

with Judgment being handed down on 9 March 2016. The appeal was refused. It does not seem to me that the reasoning is relevant to the issues of this case and so I need not go into the Judgment in any great detail. Mr Moon referred to a passage in the Judgment at page 139 of the bundle where the issue was referred to as ***"one of hard-edged law".*** The issue in dispute still required a factual assessment and evidence of what the Claimant's situation was and, in particular, identification by that evidence of who determined his terms and conditions and whether it brought him within the extended definition of worker set out in the Employment Rights Act 1996.

14. The matter was then further appealed to the Court of Appeal and the hearing took place on 21 March 2017 with Judgment being handed down on 5 May 2017. At this point both parties not only engaged established senior Employment law Juniors on their case bus also had instructed QCs in order to argue the point. In addition, Public Concern at Work were permitted to intervene and were also represented by Queen's Counsel. The parties to this litigation agreed on 27 October 2016 that they would not pursue costs against each other whatever the outcome of the appeal and an Order reflecting that was made by the Court of Appeal to the effect that whatever the outcome each would bear their own costs. This effectively prevented the need for an application to be made by the Claimant to limit recoverable costs pursuant to Rule 52.19 of the CPR.

15. The lead judgment at the Court of Appeal was given by Lord Justice Elias who noted at paragraph 6 that whilst he accepted that the issue was suitable to have been dealt with as a Preliminary Hearing it would have been ***"desirable"*** for the issue to be determined as a Preliminary Issue following findings of fact as opposed to being dealt with via a strike-out.

16. Since the EAT hearing there had been another case (**McTigue**) which the Court of Appeal was able to draw from and at para. 23 of the Court of Appeal judgment they observed that **"in principle HEE could fall within the scope of section 43K (2) (a) ERA notwithstanding that the Claimant had a contract with the Hospital Trust."**

17. The Court of Appeal then went onto consider whether the EAT had applied the correct test in that it did not properly consider that both the employing Trust and HEE could both substantially determine the terms of agreement. It was found (para. 27) that the Tribunal had not engaged directly with the question whether HEE itself substantially determined the terms on which the Claimant was engaged and therefore the Tribunal and the EAT had fallen into error. It was not accepted that the answer to the correct question to be asked was clear and obvious and so the Claim was remitted to the Tribunal for that to be considered by way of a Preliminary Issue i.e., whether HEE substantially determined the Claimant's terms of engagement.

18. The matter made its way back to the Employment Tribunal and REJ Hildebrand presided over a directions hearing on 10 July 2017 and sent out an Order with directions for a four-day hearing on the Preliminary Issue identified as ***"Whether the (Claimant) was a worker of HEE pursuant to section 43K Employment Rights Act 1996"*** and that was to be considered ***"on the facts and in light of the guidance provided by the Court of Appeal Judgment"*** .

19. Standard disclosure by List and then inspection of any documents ***relevant to the issue*** identified in the case as set out in the preceding paragraph was made (my emphasis). Further standard directions preparing his matter for a hearing were also made.

20. Although the Order gave dates in August 2017 for the disclosure and inspection it was not until 14 February 2018 that a Senior Associate at Hill Dickinson sent a list and copies to the Claimant's then solicitors and in a covering email she stated that she looked forward to receiving disclosure from other parties in due course. Neither party asserted that there was any dilatory conduct in relation to the timing of disclosure and so I proceed on the basis that an extension was agreed by the parties.

21. One of the documents disclosed was listed as being **"Learning and Development Agreement between London Strategic Health Authority (LSHA) and South London Healthcare NHS Trust"** (2012 LDA Agreement). Although the background is slightly more complicated than I am about to set out, LHSA was a predecessor of HEE and the Lewisham Trust fell under South London etc at the time of this agreement which is dated 1 April 2012.

22. At this point in time I have been given no information as to how this document came to light or how it came to be in the List of Documents and, no doubt, if this application proceeds to a final hearing those matters are likely to be the subject of evidence. All I can take from it at the moment, however, is that a decision was taken by Hill Dickinson that this document was one that met the criteria of being a document relevant to the issue to be determined as of February 2018. It is also apparent that it was not a document placed within the bundle when the issue was first at the Employment Tribunal some years earlier and I have received no explanation for that omission in the course of this hearing.

23. Matters proceeded and the hearing was listed for 14-17 May 2018. Mr Linden QC (as he then was) was instructed by the Claimant for the hearing and I have seen his skeleton argument for that hearing (314 - 330). At paragraph 6 he states that the Claimant's position is that HEE and the Trust both substantially determined the terms upon which the Claimant was engaged but that HEE had a far more important role than the Trust.

24. At paragraph 10 Mr Linden identified documents that, in his view, the Tribunal ***"may wish to consider more carefully"*** and the first of these was the 2012 LDA Agreement ***"which sets out the obligations of the Trust and HEE in relation to the specialist training programme which the Claimant was undertaking".***

25. At paragraph 13 Mr Linden identified the importance of the case as it affected approximately 54,000 junior doctors and specialist registrars in the NHS and also had wider ramifications where working arrangements were determined by more than one organisation. At para 14 he explained that in his view the possibility that HEE would be able to retaliate against a whistle blower without any recourse by the whistle blower, taking into account the role it played in relation to doctors in training, was surprising to say the least.

26. At paragraph 32 Mr Linden referred to the 2012 LDA Agreement and stated that:

"The important point for present purposes is that it includes a number of terms that governs the relationship between the Trust and the Trainee. HEE therefore also "determines" the terms on which the trainee is to be engaged at work, through the LDA".

He then provided a substantial number of examples from the Agreement to demonstrate this point and then referred to part of a witness statement from one of the HEE witnesses which he described as effectively an admission that through the LDA, HEE substantially determined the terms upon which Junior Doctors are engaged.

27. Mr Moon KC's skeleton argument is dated 11 May 2018. I do not know whether he had had sight of Mr Linden's skeleton before he drafted his own. At paragraph 3 of that document Mr Moon wrote:

"After very careful consideration, including consideration of the evidence, HEE has decided to concede the preliminary issue on the basis that postgraduate trainees are workers within the meaning of section 43K (ERA)."

Mr Moon invited the Tribunal to make an Order which reflected the concession on the Claimant's status and to make a formal finding that:

"The Claimant was a "worker" within the meaning of section 43K(1) ERA and that HEE was his "employer" within the meaning of 43K(1) ERA throughout the period from 5 August 2013 to 10 September 2014 when the Claimant was a Postgraduate Trainee and that the Claimant is accordingly entitled to bring these proceedings under the ERA against HEE".

28. On 14 May a document was signed by EJ Freer in which the concession drafted by Mr Moon was recorded and the Tribunal made the finding requested above. In addition, it was recorded:

"By consent the Employment Tribunal orders that in full and settlement) of all the Claimant's claims for costs in respect of the "worker" issue HEE will pay the Claimant's costs to the Claimant's solicitors in the sum of £55,000 inclusive of VAT within 28 days of today."

29. The Claimant indicated at this hearing that the £55,000 was only part of the costs which he had expended on the preliminary point. No doubt if this application proceeds that will be evidenced.

30. The substantive claims were listed for a final hearing commencing on 1 October 2018. The Claimant was cross examined and it is common ground that before the end of that cross examination a settlement agreement was entered into on 15 October 2018. The Claimant was represented by counsel at that hearing and the settlement agreement entered into is in relatively standard form. It records in a preamble that in the course of the hearing ***"the parties have reached agreement for the withdrawal and settlement of those claims"*** brought before the Employment tribunal at that time. Further in the preamble it was said that the Agreement was ***"in full and final settlement of those claims and all or any claims the claimant has or may have against…. HEE, their directors, officers, agents and / or employees arising out of or in connection with the Claimant's employment and / or training and / or their termination."***

31. At paragraph 2.2 of the Agreement (338) the Agreement states:

"This Agreement is also in full and final settlement of all or any claim or application for costs / expenses that any of the parties may have against any other party or parties representative , whether in relation to the claims or their conduct or otherwise".

32. On 28 November 2018 a Judgment was sent to the parties which simply stated that **"Upon Agreement having been reached between the parties, the Claimant's claims are dismissed upon withdrawal."** And so it was that the first set of proceedings were compromised and ended.

33. On 11 December 2018 the Claimant sought to set aside the Settlement Agreement and to have the Judgment referred to in the previous paragraph reconsidered and then revoked. (344 et seq). The Claimant asserted that he had entered into the Agreement "operating under a mistake or pursuant to a misrepresentation given that he entered into the Agreement on the basis that he believed that the Respondent had said that it would pursue the Claimant

for costs if he proceeded with the trial and ultimately lost whereas he was now told that that was not the case (345). The Claimant attached a witness statement to his application in support (347-353).

34. In that document the Claimant described his account of what had happened during the hearing and, in particular, how it had come to be that he had come to withdraw his claim and how ***"as a direct result of the costs threats we decided to withdraw the case."*** The Claimant then described how he was contacted by a journalist (Mr Greene) and how other information had come to light to the effect that the Respondent denied making any form of costs threat. If that was true, said the Claimant, then the basis upon which he entered into the Agreement was a false one as there had either been a misrepresentation or a mistake.

35. On 18 February 2019 EJ Martin considered the application and concluded that there was no reasonable prospect of a reconsideration being successful and the application was refused (394-395). On 26 February 2019 the Claimant asked for a reconsideration of that decision and set out his reasons for that. He also intimated that he was also taking steps to appeal EJ Martin's order and that appeal was received by the Employment Appeal Tribunal on 26 or 28 March 2019 (the date stamp is not clear on the document I have). That appeal was rejected on the sift by HHJ Eady (as she was then) who indicated that in her view it had no reasonable prospect of success.

36. On 24 July 2019 the Claimant requested an oral 3 (10) hearing to plead his case in person but permission to appeal was dismissed by Heather Williams QC sitting as a Deputy Judge of the High Court. On 30 December 2019 the Claimant appealed to the Court of Appeal and on 7 April 2020 Lady Justice Simler refused permission to appeal on all grounds. And so it was that the Claimant's first attempt to set aside the Settlement Agreement concluded in failure.

37. A further Employment Tribunal claim was commenced in early March 2019 against HEE (inter alia) but the case against HEE was struck out in mid-February 2022 for reasons that are not relevant to the issues I have to determine. Similarly, the fate of the Claimant's claims against the NHS Trust also has no bearing on the issues in this Claim.

38. On 12 June 2019 the Claimant's then solicitors made an application for wasted costs under Rule 80 of the Tribunal Rules **"for the legal costs incurred in defending a preliminary strikeout issue raised by the Second Respondent (HEE)…"** It was confirmed that HEE were represented by Hill Dickinson LLP who were the subject of the wasted costs application.

39. The application gave a brief account of the background set out above and then stated as follows:

"The Second Respondent (HEE) had not disclosed a vital document in the case, the Learning Development Agreement (LDA) between the First and Second Respondents until the 14th of February 2018.

In May 2019 in response to a Freedom of Information (FOI) request made by a journalist Mr Tommy Greene the Claimant discovered that Hill Dickinson were also the solicitors who drafted the LDA. The Claimant understands that Hill Dickinson drafted this document in generic form, in the specific form used between the First and Second Respondents and for other NHS Trusts and the Second Respondent (HEE). It was a significant piece of work for that firm, for which they were well remunerated.

We attach a copy of HEE's response for the tribunal's consideration"

40. The Claimant contended that he had to incur significant costs as a result of the improper, unreasonable and/or negligent acts of Hill Dickinson. It was asserted that "***Hill Dickinson must have known of the LDA which it drafted and ought to have brought the significance of the LDA to its Client's attention in the early stages of these proceedings as this would have disposed of the need to make an application for strike out of the Claimants claim and the Claimant incurring substantial costs in responding to and preparing for a hearing associated with the application.***

The Claimant has decided to pursue this application now on the basis of the information obtained through the FOI by Mr. Greene where the claimant has discovered that Hill Dickinson were also the solicitors who drafted the LDA and were paid for doing so, thereby making it apparent to the Claimant that Hill Dickinson were aware or should have been aware of his existence at a much earlier stage and advised their clients accordingly".

Further on in the application:

"We submit that this application is consistent with the overriding objective of the Tribunal and the rules of natural justice because the Claimant would suffer a substantial injustice if the application is not heard and granted. Recognising the potential relevance of the Settlement Agreement of the 15th of October 2018 and in order to avoid expenditure of any further unnecessary legal costs the Claimant proposes that this application is immediately stayed pending the resolution of his appeal to the Employment Appeal Tribunal in relation

to the October 2018 settlement agreement and the Employment Tribunal order of the 28th of November 2018".

41. I read that paragraph as an acknowledgement that the issue of setting aside the settlement agreement would have to be resolved before the application for wasted costs could be considered and that if it was set aside on the basis of the existing application then there would be no need to go into the matters raised in this application thereby saving costs. I am satisfied that there have been two entirely separate and distinct arguments being advanced as to why the Settlement Agreement needs to be set aside. The first being in relation to Costs being sought in the event the Claimant lost and the second on the basis of material non-disclosure / misrepresentation/ fraud.

42. As at the date of the application the change in circumstance relied upon was that the Claimant became aware that the LDA document which had been key to the concession made by HEE on the preliminary point at a late stage had been drafted by Hill Dickinson and it called for an explanation as to why Hill Dickinson did not alert HEE to that earlier. In July 2019 the relevant LDA between HEE and Lewisham was disclosed to Mr Greene, the journalist.

43. Whilst it is clear to me that nothing happened on the Wasted Costs Application I have not been able to find any evidence of a formal stay being ordered. The issue was considered by REJ Freer in his letter of 3 October 2022. He concluded that the wasted costs application should first be considered at a Preliminary Hearing to determine whether it had sufficient prospects of success to proceed to a substantive hearing having regard to the nature and content of the relevant Settlement Agreements entered into between the Claimant and HEE and the consent order entered into by the parties at the Court of Appeal dated the 27th October 2016.

44. On the final page of the letter REJ Freer confirmed that the issue to be determined was

"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 the content and nature of relevant compromise agreements reached between the Claimant and the Second Respondent (HEE) and / or the consent order dated the 27th October 2016".

45. In particular the parties were asked to address relevant authorities on the setting aside of compromise agreements and / or the consent order particularly on the basis of fraud / misrepresentation / mistake. The parties were also asked to 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 of its own initiative.

The Statutory Basis for the Application

Wasted Costs Orders

46. Under the Tribunal Rules, Rule 80 - 82 deals with wasted costs applications as follows (so far as is relevant):

80.— (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.

81. A wasted costs order may order the representative to pay the whole or part of any wasted costs of the receiving party or disallow any wasted costs otherwise payable to the representative, including an order that the representative repay to its client any costs which have already been paid. The amount to be paid, disallowed or repaid must in each case be specified in the order.

82. A wasted costs order may be made by the Tribunal on its own initiative or on the application of any party. A party may apply for a wasted costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings as against that party was sent to the parties. No such order shall be made unless the representative has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application or proposal. The Tribunal shall inform the representative's client in writing of any proceedings under this rule and of any order made against the representative.

47. In order to be successful on an application for wasted costs the Claimant must demonstrate, on the balance of probabilities that he has incurred costs as a result of an improper, unreasonable or negligent act or omission on the part of Hill Dickinson.

48. Rule 80 is based on the wasted costs provisions that apply in the Civil Courts, with the definition of 'wasted costs' being identical to that contained in S.51(7) of the Senior Courts Act 1981. Accordingly, the authorities applicable to wasted costs in the civil law generally are equally applicable in the Employment Tribunal. The two leading authorities analysing the scope of S.51 and the circumstances in which such orders can be made are **Ridehalgh v Horsefield (1994) 3 All ER 848, CA**, and **Medcalf v Mardell (2002) 3 All ER 721, HL**.

49. In **Ridehalgh** the Court of Appeal had advocated a three-stage to adopt in respect of wasted costs orders:

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?

50. The Court of Appeal in **Ridehalgh** emphasised that even where the Court / Tribunal is satisfied that the first two stages of the test are satisfied (i.e., conduct and causation) it must nevertheless consider again whether to exercise the discretion to make the order and to what extent and that it still has a discretion at that stage to dismiss an application for wasted costs where it considers it appropriate to do so.

51. In **Ridehalgh** the Court of Appeal examined the meaning of 'improper', 'unreasonable' and 'negligent and this was subsequently approved by the House of Lords in **Medcalf**— 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.

52. Mr Justice Elias (as he then was) confirmed these principles **in Ratcliffe Duce and Gammer v Binns (2008) EAT**, where he observed that where a wasted costs order is concerned, the question is not whether the party has acted unreasonably. The test is a more rigorous one, as the leading authorities make plain. The distinction therefore is between conduct that is an abuse of process and conduct falling short of that. A wasted costs order requires a high standard of misconduct on a representative's part. An abuse of the court includes such matters as issuing or pursuing proceedings for reasons unconnected with success in the litigation; pursuing a case known to be dishonest; and knowingly making incomplete disclosure of documents.

Strike Out Order

53. An employment judge or tribunal has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on any of the following five grounds pursuant to Rule 37 (1) of the Tribunal Rules. There are a number of grounds upon which a claim can be struck out but in this case we are looking at subsection (a) i.e., that the Application "***has no reasonable prospect of success"***.

54. The power to strike out all or part of a claim or response is discretionary. Even if one of the five grounds in r 37(1) is made out, the tribunal must consider whether to exercise their discretion or make an alternative order. The first stage involves a finding that one of the specified grounds for striking out has been established and, if it has, the second stage requires the Tribunal to decide as a matter of discretion whether to strike out the claim or response (or part thereof).

55. Lady Smith in ***Balls v Downham Market High School and College*** **UKEAT/0343/10** said at paragraph 6 of that Judgment:

"Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their

written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects."

56. Once a claim / application has properly been identified, the power to strike it out under the Tribunal Rules on the ground that it has no reasonable prospect of success will only be exercised in comparatively rare circumstances (**Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755, at [30])**. In particular, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute as often a hearing is required where evidence is challenged and evaluated. (**Tayside**). As such, a Claimant's case must ordinarily be taken at its highest – with the assumption being that the Claimant will establish that the facts which they have asserted in their claim are true, however vehemently the other side takes issue with them. Taking the claim at its highest means taking it at its highest not just in the pleadings but in any relevant supporting documentation available to the tribunal.

57. It is also important that the reference to 'disputed facts' is not limited to disputes about factual events (what happened) but also covers disputes over the reasons why those events happened, where that is relevant to the legal claim that has been brought. There will therefore be a crucial core of disputed fact in a case which turns on why a decision maker acted as they did, and the parties have competing assertions on those reasons, even where there is no dispute as to how that decision maker acted and what they in fact did. Where a claim will turn on the question of how a decision maker evaluated disputes of fact, and precisely what conclusions they reached, these are matters that can only be resolved at a full hearing.

58. It is not impossible for a claim which involves disputed facts to legitimately be struck out as having no reasonable prospect of success, but it will be an exceptional case where this is justified (see **Ezsias v North Glamorgan NHS Trust [2007] IRLR 603**), An example, however, where a strike out may be appropriate notwithstanding a dispute of fact is where 'it is instantly demonstrable that the central facts in the claim are untrue' (see **Tayside)**. The qualification that it must be 'instantly demonstrable' that the pleaded facts are untrue is significant – it must be possible to quickly and decisively show that the central foundations of the claimant's case are untrue for a strike out to

be warranted. It is not enough that with further time and examination (whether of witnesses or documents) it is likely that the claimant's assertions will be shown to be untrue. Thus, where the assertions made in the claim are contradicted by plainly inconsistent documents, that will provide a basis for a Tribunal to strike out a claim as having no reasonable prospect of success; or, as it was put in **Ezsias**, where the facts sought to be established by the Claimant were ***'totally and inexplicably inconsistent with the undisputed contemporaneous documentation'*** (at [29], per Maurice Kay LJ).

59. All Claims and parts of Claims are subject to the same principles regarding strike out and, of course, the same wording of **Rule 37 (1) (a)**. There has been a line of cases, however, that makes it clear that as discrimination and whistleblowing cases in particular, commonly turn on matters such as the mental processes of decision makers and inferences to be drawn from behaviour, as well as credibility of witnesses, and may involve a reversal of the burden of proof, they are particularly unsuitable for resolution at a preliminary stage on a strike out application.

60. This is an application for a wasted costs order and not a claim for discrimination or whistleblowing. Having said that the same test is in situ for all claims and in my view there is no special power invested in a discrimination case to withstand strike-out in appropriate circumstances, but care needs to be taken where there are core issues of fact turning on oral evidence whatever the subject matter of the case. As discrimination cases are often of that nature it is that which means that great care has to be taken.

61. The listing of this application for a hearing to determine whether or not the merits of the application were such that the application should be struck out was made of the Tribunal's own motion as opposed to an application by either of the parties. It was determined however that the Respondent would provide their submissions, in favour of the strike-out first.

The Respondent's representations

62. I will attempt to summarise the Respondent's submissions and I emphasise that I have carefully read and re-read both parties' skeleton arguments and also my notes of the extensive oral submissions made by Mr Moon KC and Mr Allen KC and have taken all they have said and written into account.

63. At para 7 of the Respondent's submissions stated:

"In short the application for wasted costs has no prospect of succeeding because such an application is not open to the Claimant in light of the terms of the settlement agreement entered into by the Claimant in October 2018. The Claimant says that this settlement agreement should be set aside and his application for wasted costs should be heard on its merits."

That would seem to place the Respondent's primary focus as being what they consider to be the insuperable difficulty that the Claimant will have in setting aside the October 2018 Settlement Agreement and in particular paragraph 2.2 thereof which is clear as a compromise of either party's ability to pursue costs including wasted costs in relation to those claims.

64. At para. 22 of the Respondent's submissions that primary focus is confirmed and the observations of Simler LJ, when she refused the Claimant's appeal on the sift in relation to his first attempt to set aside the settlement agreement, to the effect that the agreement met the terms of s.203 Employment Rights Act 1996 and that the Claimant had been advised by both counsel and solicitors when entering into the contract are used as support for the Respondent's position.

65. At para 23. The submissions concede that:

"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 ….. misrepresentation".

Counsel then cites a definition of misrepresentation from Foskett on Compromise (para 4-37 9th Edition):

"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".

66. The Respondent goes on to accept that a failure to disclose a *material* document in litigation might involve a misrepresentation and cites Para 4-40 of Foskett:

"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".

67. At paragraph 26 the Respondent makes it clear that if the matter were to proceed to a full hearing then HD would "strenuously maintain" that they have not acted in a manner that would justify a wasted costs order. At paragraph 27 the Respondent sets out its reasons why the application is "bound to fail" and therefore should be struck out as having no reasonable prospects of success. In summary they are as follows:
    a) The 2012 LDA was disclosed on 14 February 2018 and was in the list of documents;
    b) There can be no legitimate criticism of HD prior to the decision of the Court of Appeal on the worker issue as there was no order for disclosure;
    c) The documents not disclosed by HD prior to the October 2018 settlement agreement were not material. There is no difference in real terms between the 2012 LDA agreement known prior to the settlement and the 2014 LDA after the settlement
    d) The Claimant has already received his costs for the late disclosure of the 2012 LDA already and received £55,000 for it.
    e) The Claimant had complained about the disclosure point in his previous applications to set aside and so should not be permitted a second chance.

68. At para 29 HD make representations as to why it is that the Tribunal should not make an order for wasted costs of its own initiative which relate to the importance of finality in litigation and the weight to be attributed in the event that the October 2018 agreement not being set aside. All of the points above were amplified by Mr Moon KC in his eloquent submissions to me over several hours.

The Claimant's Representations

69. Mr Allen KC drafted submissions on behalf of the Respondent. At para.39 he contends that the Court of Appeal costs agreement is no bar to the application as it plainly only relates to the costs of the Appeal and was a means by which applications did not need to be made to the Court of Appeal for such an order.

70. At paragraph 40 he refers to the 17 May 2018 agreement for HEE to pay £55,000 costs to the Claimant and points out that this deals with inter partes costs only, that it was a contribution to costs only and that it could not have been in the contemplation of the Claimant that there was any potential for a wasted costs order against HD as they did not know the full picture of HD's involvement in the LDAs at that time. It is asserted that had the Claimant known what he now knows ***"he would have sought an Order for all of his costs against HD or HEE."***

71. At paragraph 45 Mr Allen KC accepts that the wording of the settlement agreement does cover wasted costs applications. In the next paragraph (46) he accepts it in order to progress his wasted costs application against HD he must argue either that either the costs are not covered by this agreement or that the agreement should not prevent him from seeking a wasted costs given that he was unaware at the time of entering into the settlement agreement that the grounds for such an application existed.

72. Paragraph 47 contains the nub of the Claimant's contentions in which he acknowledges that the finality of litigation principle but asserts that ***"As at October 2018 the Claimant did not know that HD had drafted the LDA (and indeed drafted many documents in relation to HEE's relationship with various Trusts). Had the claimant known then what he knows now he would not have entered into an agreement which could stop him applying for costs against HD. It is in the interests of justice to permit the Claimant to progress this application".***

73. At para 49 it is asserted that a settlement agreement can be set aside on the basis of misrepresentation, mistake or duress and it is confirmed that duress is not being relied upon by the Claimant. The case of **Hayward v Zurich Insurance Company** is relied upon to show that fraud, misrepresentation or mistake need not be the sole cause but only needs to be the material cause which induced a party to enter into a settlement agreement. Mr Allen KC states at paragraph 52 that:

"Whether or not the actions of HD full within the categories identified in Hayward V Zurich can only be determined following disclosure and witness evidence."

Conclusions

74. During the course of the hearing, I asked the advocates to draw up what they considered to be the List of legal and factual Issues they considered a Tribunal would have to consider in the event that this matter proceeded past today. I asked for it to be agreed if possible but also indicated that if there were differences then they could be marked upon the document so that I could see where there was dispute. Despite asking for progress over the hearing and being assured that one was being curated one was never provided. That is highly unfortunate. It is unclear to me as to why that has not been undertaken but I will proceed without such a document..

75. Of necessity, in my view, there has been a lengthy preamble in this judgment leading to these conclusions which will, in comparison, be (perhaps mercifully) brief.

76. The application which the Claimant wishes to pursue is one of wasted costs against HD in relation to their involvement in a series of hearings in the early parts of this litigation. The Claimant has made his allegations and HD has denied those allegations although the factual position of HD's conduct has not been given in any detail at all. A full hearing will enable both parties to produce documents and evidence in relation to that

77. The following seems to be common ground:

a) The Claimant will need to set aside the October settlement agreement as a pre-requisite to being able to have his wasted costs application heard.
b) There is a route by which a Claimant could have the settlement agreement set aside if he can show a misrepresentation / fraud / mistake.

78. It is an agreed fact that HEE raised the issue of whether the Claimant came within the extended definition of worker in their Response and that there was then an extended period of litigation during which substantial costs were incurred culminating in HEE's concession prior to the matter being litigated. HD were HEE's retained legal representatives through that whole period

79. It is an agreed fact that no LDA was disclosed prior to a generic document being disclosed in the document list following REJ Hildebrand's order. Although there was no order for disclosure at the original Employment Tribunal hearing before EJ Hyde HEE and their solicitors had supplied a bundle of documents which they must have considered relevant to the issue to be determined and that bundle did not include any LDA. There would appear to be a need to enquire into how the original bundle did not contain that document and an assessment of the materiality or otherwise. At first blush it seems an important document which was highlighted in Mr Linden's skeleton argument as being key and there was a concession shortly thereafter. Findings will need to be found about the materiality of that document in HEE's consideration, subject of course to any privilege issues.

80. Clearly the generic LDA disclosed and the specific LDA between Lewisham and HEE were in existence at all material times and there will need to be a fact-finding process as to why it was that those documents were disclosed in the way and at the time they were. A determination will have to be made about the factual circumstances that gave rise to the disclosure of the LDA document within the disclosure list, why it was not disclosed before and the subsequent disclosure of the actual LDA agreement and the information that HD had drafted all of those documents. The Claimant will have to persuade the Tribunal that the information that was received after the settlement had

been entered into was sufficient to enable the settelement agreement to be swept aside. That is a matter of evidence and assessment of that evidence.

81. It may well be, of course, that privilege is not waived and the Tribunal has to consider the situation with that handicap. I have had no definitive information from the parties at this stage (nor would I expect any) as to what is to happen to privilege.

82. The mechanism by which the setting aside of the agreement would be argued is going to be by a consideration of oral evidence and then applying that oral evidence to the law. At this stage I have no clear idea about precisely what either party will say. The Claimant will say in broad terms that he was misled / the victim of fraud by HD's conduct and that would be sufficient to have caused him to act in a different way and accordingly the Settlement Agreement needs and can be, according to case law, set aside. There will be an assessment of HD's conduct (if they choose to provide an explanation) which will feed into the assessment process.

83. As stated there will be an issue as to the importance of the LDA in the Respondent's abandonment of their primary contention on the status point. The Claimant will point to the payment of £55,000 in costs as supporting their contention that the document was a material one that should have been disclosed earlier. The Respondent may argue otherwise.

84. It is beyond doubt that the Claimant was fully aware of the LDA at the time the status point was conceded and accepted £55,000 from the Trust in recompense for that. He has indicated that his position would be that he would never have entered into that agreement had he known that potentially there was an improper, unreasonable or negligent act or omission on the part of HD and instead he would have sought a higher payment of costs and/or made an application against HD for their part in the situation. That is an evidential matter which can only be considered in light of all the circumstances and upon the Claimant being cross-examined.

85. I return to the legal position relating to strike-outs and in particular the fact that I am obliged to take the Claimant's case at its highest and the dicta of Lady Smith in the **Balls** litigation, which I repeat again here for ease of reference:

"Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a

careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects."

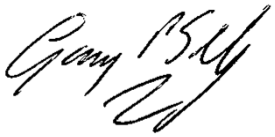
86. I am satisfied on the information and representations laid before me that the Respondent has failed to persuade me that there are no reasonable prospects of success. As stated previously it is acknowledged that there is a route through which the Claimant could travel to set aside the Settlement Agreement and then persuade the Tribunal that HD have acted in such a manner that a wasted costs order is appropriate. Whilst I acknowledge that the Claimant's path appears to be one with a number of hurdles I am not persuaded that any of those hurdles is insuperable either individually or taken together and taking the Claimant's case at its highest I am satisfied that the strike-out test is not met. I am satisfied that the application can only properly be considered taking into account the evidence of the parties and factual findings found.

87. Using the dicta in Tayside I am not satisfied that the Respondent has demonstrated that this is one of those cases where **"it is instantly demonstrable that central facts in the claim are untrue."** It is arguable that documents that should have been before EJ Hyde were not before EJ Hyde. It is arguable that the fault lay with HEE or it is arguable that some culpability lay with HD. It is arguable that had the full picture been known at the time the Settlement Agreement was entered into that the Claimant would have declined to enter into it and sought other terms / outcomes. It is arguable that depending on the evidence which is presented about the circumstances that HD's conduct could be impugned to such an extent that there was a misrepresentation / fraud which would allow the Settlement Agreement to fall away. If the Settlement Agreement falls away then it is possible that HD could be found to meet the test whereby a wasted costs order could be made depending on the findings of fact on their conduct once their position has been put

I am quite satisfied that all those matters need to be scrutinised following appropriate disclosure and evidence.

88. I have considered the specific points raised by the Respondent and which I have set out at paragraph 67 above and do not consider that any of the points raised either individually or in any combination leads me to a conclusion that there is no reasonable prospect of success.

89. Following disclosure of relevant documents and the evidence of the parties it is my view, at least possible that the Settlement Agreement could be set aside and if that is the case at least possible that a Wasted Costs order could then be made. The Respondent has not persuaded me that there is no chance of that taking place and accordingly I decline to strike this Application out. The matter will be listed for a Case Management Hearing in order to give directions for a full hearing of the Claimant's wasted costs application.



Employment Judge Self
Date: 18 January 2023

Sent to the parties on:
19 January 2023

Mr A Byndloss-De'Allie
For the Tribunal Office