

IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL

CASE NOS: 2303023/2014 and 2301446/2015

BETWEEN:

DR C M DAY

Claimant

-and-

LEWISHAM & GREENWICH NHS TRUST

First Respondent

HEALTH EDUCATION ENGLAND

Second Respondent

DRAFT

List of Issues

In this list we refer to Hill Dickinson as "HD"

Settlement Agreement to be set aside?

1. Does the settlement agreement dated 15 October 2018 ("the settlement agreement") prevent the Claimant [C] from making this application for wasted costs (either because it should be set aside or because it should not apply to this wasted costs application) [C's position is this settlement agreement does not prevent the tribunal from determining the question of wasted costs]
2. In the alternative can the tribunal of its own initiative make a wasted costs order.
3. Was there fraud, misrepresentation or mistake by HD in failing to disclose in these proceedings at any point the LDA taking effect from 1 April 2014

between the First and Second Respondent [the 2014 LDA] or the fact that it had been drafted by HD and if so was this a material cause which induced C to enter into the settlement agreement, such that the settlement agreement

4. Further , was there fraud, misrepresentation or mistake by HD in failing to disclose in these proceedings at any point the 2014 LDA or the fact that it had been drafted by HD and if so was this a material cause which induced C to enter into :
 - a. The 2016 Consent Order in the Court of Appeal
 - b. The May 2018 agreement ;

such that both or either of these should be set aside

5. If so, if the Claimant had known of the improper, unreasonable or negligent act or omission on the part of HD ,would he have sought a higher payment of costs and/or made an application against HD for their part in the situation
6. The parties agree that a tribunal has the power under Rule 82 to consider wasted costs on its own initiative.
7. C's position is that, in the alternative , the tribunal can determine the question of wasted costs against HD on its own initiative.

Should a wasted costs order be made?

8. Did HD act improperly, unreasonably, or negligently in failing to disclose (i) the 2014 LDA and their involvement in the preparation of the 2014 LDA and (ii) the model LDA between the Second Respondent and NHS bodies from 2014 (the generic LDA) and their involvement in the preparation of the generic LDA, and (iii) the 2012 LDA :
 - a. before the hearing of the application by the Employment Tribunal of the application to strike out; and
(and in the case of the 2014 LDA and generic LDA only)
 - b. When disclosing the 2012 LDA in February 2018

- c. at any time before the settlement of the proceedings in October 2018.
9. If so, did such conduct cause the applicant to incur unnecessary costs?
10. If so, is it in the circumstances just to order HD to compensate the Claimant for the whole or any part of the relevant costs?

Factual issues

11. Was the 2014 LDA between the First and Second Respondent and/or the generic LDA relevant to the question as to whether the claimant was a worker for the purposes of section 43K(1) of the Employment Rights Act 1996 of the Second Respondent ?
12. When in and by whom were HD first instructed to advise and assist in the preparation of the generic LDA.
13. When in and by whom were HD first instructed to advise and assist in the preparation the of the 2014 LDA.
14. In respect of each of the following matters who in HD , at any time prior to 15 October 2018, during the conduct of each matter had conduct of the matter, worked on the matter and/or was aware about of the matter; the matters being:-
- a. The preparation of the generic LDA
 - b. The specific relevant 2014 LDA
15. Who in HD , at any time prior to 15 October 2018, had conduct of these proceedings , worked on these proceedings and/or was briefed on these proceedings?
16. Was the Second Respondent advised by HD prior to or after the application to strike out the claimants' claim that the 2014 LDA and/or the generic LDA (both of which they had drafted) were germane documents evidencing the

relationship between the first and second respondents at the material time? If not, why not?

17. Why did HD not include either the 2012 LDA, the 2014 generic LDA or the specific 2014 LDA between the First and Second Respondent in the bundle of documents for the hearing of the application to strike out the claimant's claim?
18. Why it was that the 2012 LDA was only disclosed on 14 February 2018 in response to orders made on 10 July 2017 following the Court of Appeal decision of 5 May 2017, and why did HD not then disclose the 2014 LDA?.
19. Why were neither the generic LDA nor the 2014 LDA between the First and Second Respondent disclosed by HD in these proceedings ?
20. Did the Claimant incur more than £55k in resisting the application to strike out the claim (including costs incurred in Employment Tribunal , the Employment appeal tribunal and the court of Appeal)?
21. When and how did the Claimant become aware of the existence of the specific 2014 LDA and the generic LDA and that HD had drafted each?
22. When HD's Head of NHS Employment negotiated the £55k payment of costs to the Claimant in May 2018, were they aware that the firm had failed to disclose the 2014 LDA and the generic LDA between the First and Second Respondent?
23. In May 2018, when HD's Head of NHS Employment stated that the failure to disclose the 2012 LDA earlier was because their client, the Second Respondent, had failed it to disclose them before, were they aware that HD had drafted the generic LDA and LDAs with numerous NHS Bodies including the 2014 LDA with the First Respondent