IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL

CASE NOS: 2303023/2014 and 2301446/2015

IN THE MATTER OF A WASTED COSTS APPLICATION AGAINST THE SECOND RESPONDENT'S REPRESENTATIVES, HILL DICKINSON LLP

BETWEEN:

DR C M DAY

Claimant

-and-

LEWISHAM & GREENWICH NHS TRUST

First Respondent

HEALTH EDUCATION ENGLAND

Second Respondent

CLAIMANT'S OPENING NOTE
For wasted costs application to be heard on 23rd – 25th October 2024

Numbers in [ ] refer to page numbers in the bundle

INTRODUCTION AND ISSUES

1. This is the Claimant's Opening Note, setting out the Claimant's position in outline ahead of the hearing of his wasted costs application.
2. Hereafter, the Claimant is referred to as "C", Hill Dickinson are referred to as "HD", and the Respondents are referred to as "R1" or "R2", or "the Trust" and "HEE" as applicable.

3. The headline issues for the Tribunal to determine are set out in the CMO of EJ Taylor, made following a preliminary hearing on 21 March 2024 [1039]:

    a. Does the settlement agreement dated 15 October 2018 preclude the making of a wasted costs order or may it be set aside for negligent or fraudulent misrepresentations?

    b. If the 15 October 2018 settlement agreement does not preclude the making of a wasted costs order, does the 2016 Court of Appeal no costs Consent Order preclude the making of a wasted costs order?

    c. Does the May 2018 agreement preclude the making of a wasted costs order?

    d. Can and should the ET consider making a wasted costs order of its own initiative?

    e. If it is open to it so to do, should the ET make a wasted costs order and in what amount?

    f. Has there been any improper, unreasonable or negligent act or omission on the part of HD?

    g. If so, then what extra costs was C caused to incur?

PROPOSED PRE-READING

4. In the 'likely timetable' proposed by EJ Taylor [1035], the Tribunal has 2 hours scheduled for pre-reading. That may not be enough.

5. EJ Taylor suggests in her CMO that the agreed reading list for the PH would be a good starting point in respect of the Tribunal's reading for this hearing [1035] – [1036]. With that in mind, C proposes the following pre-reading for the Tribunal in addition to this Opening Note:

    a. C's wasted costs application dated 12 June 2019 [677-682]

    b. HD's response to the EAT wasted costs application [886-888]

c. R2's skeleton argument presented in February 2015 at the strike out application [1569-1583] and in particular paras 26 to 34 [1579-1582];

d. The 16 April 2015 ET decision on s43K [86] – [96];

e. The 9 March 2016 EAT decision on s43K [127] – [150];

f. The 5 May 2017 CoA decision on s43K [161] – [171];

g. The skeleton argument on behalf of the Claimant from Tom Linden 10 May 2018 [314-330] and in particular paragraphs 32 to 35 [325-329] which concern the LDA;

h. The tribunal should familiarise itself with:

   i. the 2012 LDA [178-313] which was disclosed on 14 February 2018 [175-177]; and

   ii. the 2014 LDA, which HD drafted [718-870] and which was never disclosed in litigation, but discovered as a result of responses to FoI requests in 2019. The ET is invited in particular to review the clauses of the 2014 LDA referred to below at para 34;

i. The ET's decision of 19 January 2023 on strike out of the wasted costs application [966 - 987];

j. MW's witness statement dated 12 September 2024;

k. C's witness statement dated 16 September 2024;

l. C's supplementary witness statement dated 11 October 2024;

m. The explanation of the costs incurred by C as a result of the failure to disclose [1378] – [1380].

BACKGROUND TO THE APPLICATION

6. The Claimant's whistleblowing detriment claims relevant to this application were presented on 27 October 2014 [7-31]; and 10 April 2015 [68-79]. He also brought a claim on 6 March 2019 [534-571]. In part the claims were based on a disclosure that relevant information had been deliberately concealed. Despite the wording of

the October 2018 Agreement, R2 did not admit that the Claimant had made protected disclosures until a PH on 13 November 2020.

7. At times during the long history of the litigation, the Claimant has represented himself; at times he has had solicitors and counsel; at times he has had the support of the BMA; at times he had to resort to crowd-funding his case.

8. HD have represented R2 in a number of tribunal cases brought against R2 by doctors. HD also drafted a large number of LDAs for R2 in the relevant period – some examples are at [1474-1505]. These are multi million pound contracts.

9. R2 sought strike out of the Claimant's claim against it on the basis that it had impunity under the law for subjecting whistleblowing junior doctors to detriments. On 25 February 2015 R2's strike out application came before EJ Hyde. R2 argued that:

    a. "*it is fanciful to state that the party which substantially determines the terms and conditions of the Claimant's engagement is, or could be [R2]*" [1579-1560, ¶26];
    b. "*on the wording of the Gold Guide it is submitted to be unarguable that the body which is responsible substantially for determining the Claimant's terms and conditions as regards work is other than R1*." [1581, ¶30];
    c. "*it is submitted that the effect of all of the above is to render fanciful any suggestion (which for the avoidance of doubt the Claimant has not made) that the Respondents are the entity which "substantially determines or determined the terms on which he is or was engaged ...Any other case is simply irreconcilable with the undisputed contemporaneous documentation*" [1582, ¶34].

10. These assertions were made although no LDA had been disclosed, despite the 2014 LDA having been drafted by HD, R2's solicitors. These were assertions about the facts and they were made on the basis of partial disclosure. Having accepted those assertions, the ET struck out the Claimant's claim against R2 [86-96 in particular para 52 [96]].

11. On 9 March 2016 the Claimant's appeal was rejected by the EAT [127-160] primarily on the basis that where an individual was a section 230(3) worker none of the separate situations in which the meaning of 'worker' might be extended by section 43K could apply [146-147, para 37], This was an argument, which although pleaded, had not been advanced by R2 at the ET [1569-1583] and was not referred to in the ET decision as noted by the EAT at para 26 [139].

12. The Claimant appealed to the Court of Appeal. In October 2016, ahead of his Court of Appeal hearing, C agreed to a consent order ("**the Consent Order**") which provided that each party would bear their own costs of the appeal [156] – [160].

13. Before the Court of Appeal, R2 made the submission that "*the Respondent submits that it need not engage in a debate about contractual terms as simply there is no factual finding of the Employment Tribunal that a such a contract was in existence*" [1602].

14. On 5 May 2017, the Court of Appeal upheld the appeal on the basis that the EAT was wrong in its conclusion in EAT para 37 on the interpretation of s43K (CA paras 16 - 23 [166- 169]); and that the ET was wrong in failing to recognise that both R1 and R2 could have substantially determined the Claimant's terms (CA paras 24 to 27 [169-170]) and the Court of Appeal remitted the matter to a fresh tribunal to have the question of whether R2 substantially determined the Claimant's terms decided as a preliminary issue (not a strike out) (CA para 30 [171]).

15. Disclosure in relation to the preliminary issue was given by R2 on 14 February 2018 [175 - 177]. The only new document disclosed which had any particular significance to the issue was the 2012 LDA.

16. On 11 May 2018, after several years of litigation, R2 conceded the worker point. The only explanation as to how this arose was "*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 s43K*." [331 @ 332, para 3].

17. As a result of the concession, on 14 May 2018 C agreed to an order incorporating a £55,000 contribution to his costs ("**the May 2018 Agreement**") [334 - 335]. The relevant wording in respect of the May 2018 Agreement was as follows:

> "*BY CONSENT THE EMPLOYMENT TRIBUNAL ORDERS that in full and [sic] 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*"

18. On 15 October 2018, C entered into a settlement agreement against R1 and R2, withdrawing his claims in exchange for not being pursued for costs by R1 and R2 ("**the October 2018 Agreement"; together, "the Agreements**") [336 - 342]. The circumstances of the October 2018 Agreement are highly contentious.

19. Clause 2.2 of the October 2018 Agreement provides [338]:

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

20. On 12 June 2019, C made an application for wasted costs [677-682] following the discovery by C that HD had been responsible for drafting the LDAs on which the preliminary point had turned [681]. C discovered this not through any disclosure from R2 or via HD, but from responses to FOI requests made by a journalist, Tommy Greene [681-682].

21. The relevant LDA itself was produced in July 2019, again in response to Tommy Greene's FOI request, which also revealed that HD had been responsible for drafting the specific LDA for the period 1 April 2014 to 31 March 2015 which covered the period in which C was subjected to detriments [719 @ 723].

22. It was not until the 2019 responses to the FOI requests revealed the 2014 LDA, which sets out the lengthy and detailed contractual relationship between R1 and R2 as at the material time, that it became clear that HD had been responsible for drafting and advising on the LDAs.

23. At the time that C entered into the settlement agreements, he did not know of HD's involvement in drafting the 2014 LDA which HD never disclosed and which further evidenced that their client, R2, substantially determined C's terms and conditions at the relevant period of time.

THE HISTORY OF AD HOMINEM ATTACKS AGAINST C

24. Throughout the history of this litigation, C has been subject to any number of unreasonable and inaccurate attacks by the Rs and their representatives, who have sought to portray C as something other than who he is: a junior doctor who blew the whistle on serious safety concerns, and who has fought tirelessly to secure whistleblowing protection for other doctors in order that patient safety concerns could be raised without fear of repercussions.

25. Part of the reason the ET is hearing a wasted costs application is because at the original ET hearing which underlies this application, the ET was told that C's argument that R2 was also his employer by s43K ERA 1996 was "*fanciful*". It was not. We now know that C's argument failed because of submissions made on the facts by R2, to the effect that it was fanciful to suggest that the party which substantially determined the terms and conditions of the Claimant's engagement was or could have been the Respondents [94, para 42][1].

26. At a recent hearing, C took it upon himself to correct many of the inaccurate statements made against him, providing documentary evidence to correct the various attempts that had been made by other parties to smear his good character [1389] – [1396].

27. Despite anticipating another ad hominem attack that he is seeking to relitigate closed matters, C raises this issue now in the hope that the ET will take a circumspect approach to a tendency in this litigation for the Rs and their representatives to mischaracterise C and his intentions. Further and in any event,

[1] Based on the argument in R2's skeleton at [1579-1580, para 26].

such an approach is plainly not relevant to the issues which the ET has to decide on this application.

28. The ET will also note that HD on behalf of R2 have a tendency to tell C that his claims have no reasonable prospects of success, in circumstances where the reverse proves true:

    a. Making what might at best be described as a misguided strike out application in respect of the s43K worker point, which took years to put right [86 - 96] and which was not based on all of the available relevant information;

    b. On 9 February 2016 making a costs threat at the EAT [1455, 1383-1384];

    c. Telling C on 10 October 2016 that his appeal on the s43K worker point had no merit and that HD would not withdraw its invitation that the Court of Appeal refuse his application to appeal [1318 - 1319];

    d. Making an implied costs threat in correspondence to the EAT regarding the wasted costs order on 29 September 2020 on the basis that that the application was 'unreasonable' [934] – [935];

    e. Making a failed strike out application in respect of the wasted costs application heard in January 2023 [966] – [987].

HD'S POSITION

29. HD say that C is not entitled to bring a wasted costs application. They also originally attempted to strike out the wasted costs application on the basis that it had no reasonable prospect of success; however, the strike out application failed before EJ Self in January 2023 [966-987].

30. HD's position is as follows:

    a. That C is bound by the Agreements and cannot bring a wasted costs application;

    b. That C is bound by the Consent Order;

c. That there was no order for disclosure prior to the February 2015 hearing;

d. That in any event HD did not know that HD had advised on and drafted the 2014 LDA - which was *never* disclosed;

e. That the failure to disclose is immaterial because, despite being a contract which governed the parties' employment relationship, the LDA had no relevance to the question of whether R2 was an employer for the purposes of s43K ERA 1996;

f. That the failure to disclose is immaterial because the Gold Guide was sufficiently clear in setting out the relevant terms and conditions, despite the clear argument made at the time by R2 that the Gold Guide did not indicate that R2 substantially determined C's terms and conditions [1580-1581, paras 29-30];

g. That there was no duty to disclose because HD had misunderstood the law but even if HD had understood the law correctly, the LDA would not have been disclosed (WS/MW at ¶19);

h. The LDA is a "*generic*" document which did not "determine contractual terms" (see WS/MW at ¶20), which does rather raise the question of why R2 then conceded the issue after the disclosure of the 2012 LDA.

31. C submits that HD's position by and large seeks to side-step the failure to disclose an obviously relevant document that governed the parties' relationships and which led to the concession by R2 in May 2018. C further contends that the failure to disclose was in breach of HD's disclosure duties, regardless of whether there was an order for disclosure.

32. It is clear that the LDAs supported C's case on the s43K(1)(a) worker issue, and that, by governing the relationship between R1 and R2, the LDAs indicated that R2 substantially determined the terms upon which C was employed.

33. Tom Linden QC (as he then was), set out the broad-ranging implications of the 2012 LDA for C's case in his skeleton dated 10 May 2018 [314-330] and in particular at paragraphs 32 to 35 [325-329].

34. The 2014 LDA, while structured differently, also sets out a number of similar terms, which would have been the material terms for C's employment (though C did not discover this LDA until the FOI request, when he also learned that the LDA was drafted by HD). Some examples from the 2014 LDA:

    a. At (C)(ii) on [725], one of the purposes of the 2014 LDA is to "*set out the obligations of the Placement provider and the Authority to provide support, education and training and workforce development*";

    b. By the 2014 LDA R1 was required to, and therefore R2 determined the terms of:

        i. Recruitment: by Clause 7, R1 was required to recruit, select and ensure learners (junior doctors) who met the terms set out in Clause 7 [737] – [739];

        ii. Non-discrimination: Under Clause 8, R1 had to ensure that it complies with the Equality Act 2010 and other relevant legislation relating to discrimination in employment or in the delivery of public services, and to ensure that all Learners enjoy equal opportunity to receive Services regardless of any protected characteristic [739] – [740];

        iii. The work environment: By Clause 10, R1 had to provide premises and facilities to support Learners, and, among other things, consult with the Authority on any significant changes to the use of Premises/facilities which would impact upon the educational environment, maintain all equipment in a safe condition, and ensure that any Health and Safety Legislation is complied with [740] – [741]; see also Schedule B at [773] – [744];

        iv. Working time: By Clause 35, R1 was required by HEE to ensure that the work hours of Learners met the requirements of the Working Time Regulations 1998 and to support flexible working [765];

        v. Education and learning requirements: As set out in Part D, there are lengthy and detailed explanations of how education and training

should be delivered to medical and dental students [811] – [822], and in Part G there is a specific requirement to provide library and knowledge services;

vi. Salary: see Annex II [840] – [862].

35. Both the 2012 LDA and the 2014 LDA were plainly relevant to the s43K worker issue, because they indicate, among other things, that HEE substantially controlled the relationship between the parties. The 2014 LDA, in addition, is the contract that covers the relevant period of time for C's claims.

36. C contends that HD's conduct by failing to disclose the LDAs was improper, unreasonable, and/or negligent, and it further constitutes an abuse of the court's process.

C'S POSITION

37. C maintains that had he known that HD had failed to disclose an LDA they themselves had drafted:

    a. He would not have entered into the Agreements;

    b. He would not have agreed to the Consent Order, but would have pursued his full costs at that stage (and he notes that the Court of Appeal may not have needed to remit the matter if it had had the LDAs);

    c. He would not have agreed to include wasted costs as a term of the October 2018 Agreement.

38. The fact that C did not know the true position at any of the material times changed the course of the litigation. The reason C did not know that the true position was because of disclosure failings that even the most junior lawyer would have avoided. That those disclosure failings included a document that HD had drafted – one of a series of similar documents that HD had drafted for HEE's relationship with Trusts across the country, places this within the territory of wasted costs.

39. C contends that neither of the Agreements nor the Consent Order precludes him from bringing this wasted costs application. There are two primary bases for this submission:

    a. The Agreements, properly construed, do not bind C from bringing a wasted costs application of this nature; and,

    b. C entered into the Agreements on the basis of misrepresentation and therefore the Agreements should be set aside, or set aside for the purposes of the wasted costs application.

40. C further contends that HD has plainly acted in breach of its disclosure duties, not least because partial disclosure of some material determining terms and conditions (for example, the Gold Guide), gave the ET (and in turn, the appeal courts) a misleading and unclear picture of how the terms of C's employment were determined. This was central to the trajectory of the s43K worker point.

41. In the alternative, if the ET finds that C cannot bring a wasted costs application because of the Agreements and/or the Consent Order, then in C's submission the ET can and should make a wasted costs order of its own volition.

CONCLUSION

42. C will elaborate upon these submissions during closing submissions; however, in summary, and as a result of the above, C will invite the ET to grant his wasted costs application.

Andrew Allen KC

Elizabeth Grace

Outer Temple Chambers

22 October 2024