



EMPLOYMENT TRIBUNALS

Claimant: Mr Tim Savory and 58 Others
(See attached schedule)

First Respondent: Southwest Ambulance Service NHS Foundation Trust

Second Respondent: Vocare Limited

Heard at: Exeter **On:** 10 May 2018

Before: Employment Judge Fowell

Representation:

First Respondent: Mr J Arnold, instructed by DAC Beachcroft LLP

Second Respondent: Mr J Van Zyl of Square One Law LLP

JUDGMENT

1. There be no order for costs.

REASONS

Background

1. This application follows a preliminary hearing held from 20 to 24 November 2017 on the question of whether there had been a service provision change under the TUPE Regulations 2006 following the acquisition by the second respondent (Vocare) of the contract to provide the NHS telephone 111 service for clinical commissioning groups in the county of Devon. That issue was resolved in favour of Vocare, and in my decision of 1 December 2017 I concluded that there had been no such transfer.
2. Summarising the issues, it was common ground that the First Respondent (the Trust) had been operating a combined service for the counties of Devon and Cornwall until shortly before the date of the putative transfer and were in the process of separating out the two teams. The separation was important because they wanted to ensure by the date of the change of contract that there was an organised grouping of employees providing just the Devon service. They would then transfer to Vocare. While they remained providing the service to both counties however, TUPE would not apply.

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3. Previously, the staff operating this combined service were all based in the Trust's "West Hub" in Exeter. The Trust also operated a Dorset service from their East Hub. To achieve the desired separation, the Trust were recruiting new staff into the East hub, alongside the Dorset team, who would be providing the Cornwall service in future. The key issue at the previous hearing therefore was whether they had been successful in this race to separate the team by the required date, 30 September 2016. I concluded that they had not.
4. That is by way of summary however. I will not however re-state all of the evidence and considerations that led to that conclusion, and this decision on costs will need to be read in the light of those earlier findings.
5. Subsequently, by letter dated 8 January 2018 Vocare applied for an award of costs in relation to that hearing. They asserted that the First Respondent (the Trust) had acted unreasonably in defending the proceedings in two main respects:
 - a. by relying on correspondence from 18 July 2016 on 12 August 2016 to the effect that a separation of the service between Devon and Cornwall had already been achieved; and
 - b. by relying on data regarding the proportion of time taken by call advisers in the West hub on calls from Cornwall which I found was apt to mislead.
6. This correspondence and data has already been the subject of much scrutiny and I will not repeat what was previously said about it. The Trust responded by relying on the terms of rule 76(1) of the Employment Tribunals rules of procedure which provide that a tribunal may make a costs order and shall consider whether to do so where it considers that:
 - a. a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either bringing the proceedings... or the way that the proceedings... have been conducted; or
 - b. any claim or response had no reasonable prospect of success.
7. They pointed out that this language did not include acting unreasonably in defending the proceedings and there was no suggestion that their response had no reasonable prospects of success.
8. In response, Vocare's solicitors wrote to the tribunal on 16 January raising as an alternative the fact that the response advanced by the Trust had no reasonable prospects of success.
9. The Trust now argues that that second letter was a separate application and was made out of time. I do not accept that. The subject matter of both letters complained of the Trust's reliance on controversial data and on the two items of correspondence referred to above. The second letter was therefore an elaboration of the first.

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10. However, the position remains as stated by the Trust, that it has to be shown that they either
 - a. acted unreasonably etc in way that the proceedings were conducted or
 - b. that their response had no reasonable prospect of success.

No reasonable prospects

11. I will deal with the second of these first. For convenience I will refer to the Trust's case as the response and Vocare's response as the "claim", although in reality both of them were responses. It is not at all clear to me that the language of Rule 76 is apt to cover a situation in which one respondent brings a costs application against another respondent, but this was not a point raised by the Trust and in view of my conclusion it is not necessary to consider it further.
12. As noted above, the essential question was whether by 30 September 2016 the Trust had achieved a separation between the Devon and Cornwall teams. This depended largely on the analysis of the data. The earlier correspondence by the Trust had little or no bearing on this question. My findings were that by the time of that correspondence no effective steps had been taken to transfer the Cornwall service from the West hub to the East.
13. It has to be recognised that it would have been perfectly possible for the Trust to have succeeded in its response, no matter how misleading its earlier correspondence, if the end result had been achieved. It is certainly true, as appears from the witness evidence given by Ms Emma Wood on behalf of the Trust, that the Trust defended its own statistics and was disparaging about those presented on behalf of Vocare. A careful examination was required of the competing merits of these sets of data. Ultimately, Vocare's view prevailed. Mr Reade QC, in the course of his cross-examination of Ms Wood, pointed out the potentially misleading nature of the statistics presented, with the focus on the proportion of time spent "logged on" rather than the proportion of time spent engaged in handling calls. He was able to do so because the basis of the figures was clear. There was no suggestion that the figures were wrong, and both sets of figures (those showing the proportion of time logged on and the proportion of time handling calls) had been disclosed in the course of preparation for the hearing.
14. Other factors played a part in the question of whether or not there was an organised grouping of employees, including the organisation of the telephone lines, but it cannot be said that the Trust's case had no reasonable prospects of success. Their figures were simply exposed as less reliable than Vocare's figures. But it follows from my findings that they were perhaps a few weeks away from achieving the desired separation. I would add that the decision was one which called for careful consideration and was not at all clear cut, even after five days of evidence and argument. Hence, I do not conclude therefore that the response had no reasonable prospect of success.

Did they act unreasonably in the way that the proceedings were conducted?

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15. Firstly, the fact that the Trust were aware of the potential TUPE risk if they lost this race against time, and deliberately attempted to organise their workforce to bring themselves within the scope of the Regulations, does not mean that they acted in a way which was deliberately misleading. Organisations often do the opposite, and there is no moral judgment to be made either way.
16. I did find it a serious concern, and it remains a serious concern, that the Trust, a public body, would put forward in correspondence in July and August 2016 the contention that a separation had already been achieved. The only factual basis for this was a transfer of telephone lines, although again I found that this was not ultimately actioned until September when staff had been recruited and trained to take the calls. This correspondence did indeed go further than it ought, just as I found that the data relied on was apt to mislead. The words were chosen carefully. In the event however, Mr Pitt-Payne QC did not place particular emphasis on that correspondence. I was referred again to the skeleton argument he presented at the start of the Preliminary Hearing which concludes:

“This hearing turns on a narrow factual issue: whether, immediately before 30 September 2016, there was an organised grouping within the Trust whose principal purpose was to perform the Devon contract.”
17. The focus was therefore on the final few weeks of September 2016. On this, the Trust had an arguable case. It would in my view be placing too high a duty on a party, faced with a claim of this sort, to re-examine its previous correspondence in detail in order to correct any misleading impression. At the risk of labouring the point, that correspondence did go further than it ought, but in the normal process of testing the evidence, that fact became apparent.
18. In any event, the correspondence pre-dated the proceedings. I cannot conclude that merely by relying on this correspondence, the Trust was acting unreasonably “in the way in which it conducted proceedings.”
19. I was referred by Mr Van Zyl to the unreported case of **Sunuva Ltd v Martin**, a decision of Mr Justice Kerr on 14 December 2017. The issue in the claim related to whether costs incurred in relation to work done before receipt of an ET3 could be reclaimed. It considered the earlier case of **Health Development Agency v Parish [2004] IRLR 550**, in which Lord Justice Mummery concluded that the tribunal’s discretion to award costs is not limited to those which were caused or attributable to the unreasonable conduct of the applicant, and so pre-action costs could be recovered.
20. It does not follow however that relying on pre-action conduct or correspondence is unreasonable conduct of proceedings. The two questions are completely separate.
21. To repeat, there is no power to award costs on the basis that a party has acted unreasonably in *defending* the claim, only where the way in which the defence has been conducted was unreasonable. There may be cases where the conduct of a party before the issue of the claim is so unreasonable that continuing to rely on it is itself unreasonable, but here, without actively

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disassociating itself from its earlier correspondence, the Trust advanced its case on the main basis that it won the race against time, which was not in my view unreasonable.

22. Overall therefore I conclude that the test in rule 76 is not met, and so it is not necessary to go on to consider the exercise of discretion.

Employment Judge Fowell

Date 24 May 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

25 May 2018

FOR THE TRIBUNAL OFFICE

	Case no.	Claimant
1.	1400119/2017	Mr T Savory
2.	1400120/2017	Mr J Baker
3.	1400121/2017	Mrs C Bale
4.	1400122/2017	Mrs K Ballard
5.	1400123/2017	Mr O Barnard

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6.	1400124/2017	Mrs S Barry
7.	1400125/2017	Ms W Bartlett
8.	1400126/2017	Mr M Beavis
9.	1400127/2017	Mrs R Bennett
10.	1400128/2017	Mrs S Boardman
11.	1400129/2017	Mrs J Boland
12.	1400130/2017	Mr M Brimacombe
13.	1400131/2017	Mrs K Buss
14.	1400132/2017	Mrs J Cable
15.	1400133/2017	Mr N Chapman
16.	1400134/2017	Miss A Correia
17.	1400135/2017	Mrs H Douglas
18.	1400136/2017	Mrs K Doyle
19.	1400137/2017	Ms G Durham
20.	1400138/2017	Mrs J Gowing
21.	1400139/2017	Mr S Gubb
22.	1400140/2017	Mrs M Guest
23.	1400141/2017	Miss A Hookings
24.	1400142/2017	Mr A Hillman
25.	1400143/2017	Miss R Hunt
26.	1400144/2017	Mr A Johnson
27.	1400145/2017	Mrs D Kahana
28.	1400146/2017	Mr D Kirby
29.	1400147/2017	Mrs C Kyle
30.	1400148/2017	Ms A Lesniewska
31.	1400149/2017	Ms J Lowenthal
32.	1400150/2017	Mr B Matthews
33.	1400151/2017	Mrs J McCann
34.	1400152/2017	Mr D Moffatt
35.	1400153/2017	Mr R Mortimer
36.	1400154/2017	Mr P O'Shea
37.	1400155/2017	Miss A Page
38.	1400156/2017	Mrs C Perkins
39.	1400157/2017	Mrs A Piercy
40.	1400158/2017	Mrs C Pilkington
41.	1400159/2017	Mr R Prior
42.	1400160/2017	Miss J Pritchard
43.	1400161/2017	Mr G Reed
44.	1400162/2017	Ms P Rosewell
45.	1400163/2017	Mr D Savicevic
46.	1400165/2017	Mrs A Simmonds
47.	1400166/2017	Mrs T Stanton
48.	1400167/2017	Mr M Sullivan
49.	1400168/2017	Miss A Taplin
50.	1400169/2017	Ms C Taylor
51.	1400170/2017	Mrs C Townsend
52.	1400171/2017	Mrs S Warner
53.	1400172/2017	Mrs K Weir
54.	1400173/2017	Mrs L Weir
55.	1400174/2017	Mr M White
56.	1400175/2017	Mrs E Wilding-Webb
57.	1400176/2017	Miss H Williams
58.	1400177/2017	Miss K Wills
59.	1400178/2017	Mrs D Woodes

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