Case No: 2201371/2015

EMPLOYMENT TRIBUNALS

Claimant: **Mrs A A Balakumar**

Respondent: **Imperial College Healthcare NHS Trust**

Respondents to the wasted costs application: **(1) Ms Shivani Jegarajah**
(2) Mr Stephen Knight

Heard at: **London Central** **On:** **15 August 2019**

Before: **Employment Judge Goodman**
Ms C. McLennan
Mr J. Carroll

Representation
Claimant: (1) for the postponement application, Mr D. Matovu, counsel
(2) thereafter in person (assisted in the afternoon by Ms E Zarb of ELIPS)

Respondent Trust: Mr C. Edwards, counsel
For Ms Jegarajah and Mr Knight: Mr M. Harris, counsel

RESERVED COSTS JUDGMENT

1. The application to postpone the hearing is refused.

2. There was no concluded agreement that the respondent would withdraw the application if the claimant did not proceed with an appeal from the EAT.

3. The claimant conducted the claim unreasonably and is ordered under rule 76 to pay the respondent £7,500 as a contribution to costs.

4. The respondents to the wasted costs appeal are ordered to disclose to the respondent Trust, **no later than 11 October 2019**, and sooner if they come to hand before, copies of documents relevant to the terms on which they represented the claimant at the hearing in December 2015, to include documents prepared at any earlier date in the proceedings. If it is contended that some part of any document is privileged it may be suitably redacted. Any dispute on privilege should be referred to the tribunal and if

necessary another judge will decide that dispute.

5. The wasted costs application will be decided at a further hearing on **14 November 2019.**

REASONS

1. On 27 January 2016 a reserved judgment was sent to the parties dismissing all the claimant's claims against the respondent, her former employer. The panel had heard the claims from 30 November to 10 December 2015.

2. On 23 February 2016 the respondent applied (1) for an order under rule 76 for costs to be paid by the claimant for unreasonable conduct, and (2) an order under rule 80 for wasted costs against the two counsel who represented the claimant at the 2015 hearing.

3. The costs hearing was deferred until after the EAT had decided her appeal against the decision. Her appeal was dismissed on 25 September 2018, as was an application for review on 22 November 2018, and on 7 December 2018 the respondent asked for the applications to be relisted.

4. By that date Employment Judge Gay, who chaired the panel in 2015, had retired, and I was substituted for her. The lay members today are those who heard the case in 2015.

Postponement Application

5. Today the claimant made a further application for postponement, which the tribunal refused.

6. The listing history of the costs application is that on 4 January 2019 a direction was given to list the costs applications for hearing. It was listed on 4 June for hearing on 25 July. Both parties then sought a postponement, the respondent because counsel who had appeared throughout the 2015 hearing was not available. On 25 July it was relisted for hearing today, 15 August.

7. The claimant applied on 27 July for a postponement to December, and delivered a bundle of papers in support on 1 August. Written reasons were supplied for refusing this postponement request. Summarising those reasons: (1) the claimant had applied for a postponement on grounds she would be in Sri Lanka on 15 August, when on 30 July, after being notified of the hearing and after applying for postponement, she had booked and paid for flights out on 2 August and back on 12 August (2) in her cover letter she said she might not be able to return on 12 August as there was a religious festival on 15 August, but as she had just booked a return flight for 12 August, this was probably not an important commitment (3) her 8 year old son was due for an orthopaedic operation on 6 September to remove metalwork from an earlier leg fracture and would need care; however, he was fit enough for the long flight to Sri Lanka and back in August so seemed well enough to leave

for a day (4) she had recently sought assistance from FRU through ELIPS, but while it was desirable she should have advice, she had known for much longer of the application and that it was being relisted and this was very last minute (5) the application was very old (6) the next date when all panel members could assemble was 14 November 2019 (7) the respondents to the wasted costs application should not have this hanging over them much longer (8) the claimant asserted the respondent was barred by an agreement from pursuing the costs claim against her, which depended on some oral evidence and so needed to be resolved sooner rather than later.

8. On 14 August (the day before the hearing) the claimant made a further application to postpone. In a covering letter she said: "I am out of the country since 2 May (sic) 2019", and attached her air ticket. She was going to a pilgrimage on 15 August with her son. She added a doctor's note of 4 August recommending a week's bedrest for back pain, and said she was too worried about her son to proceed. Attached was a letter dated 14 August from a travel agent (Kulin Desai of Civic Travel in Harrow) referring to the return flight on 12 August, and saying "we came to know due to their health issues being not well they could not make it to the airport and missed the flight on 12 August from Colombo to LHR".

9. E J Glennie ruled this application would be considered on 15 August, as there was no evidence from the claimant about not being in the country.

10. This morning the claimant sent a message that she was delayed in traffic and she arrived at the tribunal after 11. The hearing was delayed to 11.30 so she could speak to counsel. The application was then renewed. On her behalf it was advanced:

(1) the claimant had gynaecological symptoms and was having an operation in November (when produced by the claimant on her phone, the letter says she has an out patients appointment in November when it will be considered whether she needs an operation on the bladder, and a pre-operation assessment may be done)
(2) she required a Tamil interpreter
(3) she had returned to England on 13 August
(4) she needed time to prepare and get legal advice
(5) her son has Downs syndrome and is having an operation in September.

11. The respondent objected to postponement: she was well enough to attend today; the application had been outstanding for 3 and a half years; she might need more time to get advice, but everyone was now in the room and ready to proceed.

12. The tribunal refused the postponement application. The claimant had not needed an interpreter in the 2015 multi-day final hearing, nor requested one for this hearing until a separate letter sent by post at the end of July 2019. One was requested by Ms Jegarajah for her in a letter of September 2015, on the basis that: "her family members need to understand the proceedings and though the claimant is competent in the English language it is her second language and she may not understand

some sentences and legal argument without an interpreter". That suggests she asked for an interpreter for her family, not for herself. On past evidence and on her interventions this morning, she both understood and spoke English fluently. The sudden request for an interpreter looked like an attempt to get the hearing postponed. Her son's health was a reason not to have the hearing postponed if he was shortly to have an operation that may incapacitate him for a while. Her own health had on her case been an ongoing problem from 2011 (later in the day she more than once asserted that she was dismissed by the respondent Trust because they anticipated she would bring a clinical negligence claim against them relating to her son's birth in 2011). If postponed until after she had an operation in mid-November (if she did have one) and she then convalesced, the hearing would not take place until 2020. She had known since December 2018 that the respondents were pursuing the costs application and could have taken steps earlier to get advice, and if she believed it was abandoned, she had known from 4 June, 10 weeks, that it was live – her behaviour was that of an ostrich. The matter was now very old, and it was not fair to the respondent or the counsel who faced wasted costs applications to delay it again. Everyone was ready today. It was in the interests of justice to proceed.

13. The tribunal noted with concern that the claimant seemed in her 14 August application to have tried to mislead the tribunal about her whereabouts. She sent a letter from the travel agent dated 14 Auhgust eporting that she had missed the plane back on 12 August, and her own letter saying she had been away since 2 May (we accept this may be a genuine error and that she meant 2 August), but omitted to say, by letter or email, that she had in fact returned to London on 13 August.

Has R agreed to abandon costs applications?

14. In her 14 June application to postpone the 25 July hearing the claimant said:

> "I am shocked by what is the purpose of this hearing because… in December 2018 I received an offer letter from Rachel Tyler" (of Capsticks, solicitor with conduct for the respondent Trust) "if you drop off your court of appeal application then they would waive off the cost order. I agreed to this, and replied in email and in writing and she said the case was finished."

In a further letter dated 20 June she told the tribunal :

> "Capsticks ..said they would drop hands if I drop the entire case. I agreed over the telephone where two people were present. The tow people Raja Lingam, a community leader and my husband, Bala Kumar. Capsticks informed us that the case will be closed and I am shocked at this wasted costs order now. Had Capsticks not lied to me i would have pursued to the Court of Appeal. I request that this wasted costs order is dismissed".

15. The claimant did not copy either letter to the respondent but they learned of it from the tribunal's letter of 12 August refusing the 27 July application to postpone.

16. The claimant has not produced the email she mentioned in her 14 June letter, nor a copy of the letter she says was sent. She said the community leader, now in Canada, sent the letter and she does not have a copy. She does not have the email because her son deleted it when playing with her phone.

17. The Capsticks letter in question is dated 13 November 2018. The respondent's solicitor wrote:

> "We understand from correspondence from your representative, Daniel Matovu, following the appeal hearing that you are considering an application to apply for permission to appeal to the Court of Appeal. Our client will incur further costs for this process and its priority is to draw a conclusion to these proceedings. In these circumstances, our client puts forward a "drop hands" offer which is that the trust is willing to agree to withdraw its application against you on the basis that you confirm that no application for permission to appeal to the Court of Appeal will be pursued and therefore original claim to the employment tribunal is withdrawn. The settlement would therefore be a conclusion to the entire proceedings. This offer is subject to terms, which are to be agreed before any agreement become binding. Note that if you reject this offer, we consider it fair to put you on notice now that the trust will pursue its application for costs against you and may do so even if you apply for permission to appeal in the Court of Appeal. We recommend that you obtain independent legal advice in relation to this letter…"(links were supplied, and a suggestion that she consult Mr Matovu).
>
> "This offer will remain open until 4 PM on 23 November 2018, following which it will be automatically withdrawn. If terms are not agreed and we will write to the employment tribunal to ask for a hearing to determine the costs application".

18. The evidence of the Respondent is that the claimant had not replied by 23 November. On Friday 7 December, Capsticks wrote to the tribunal asking for the costs application to be listed for hearing now the appeals were dismissed. The claimant did then telephone Capsticks on an unspecified date in the week beginning 3 December (it may have been Friday 7th) to ask if the deadline could be extended, saying that she wished to accept the offer. In an email to ACAS on 10 December 2018, copied to the claimant, these details of the telephone call "last week" were mentioned, and Capsticks said to ACAS :

> "The Trust has agreed to this on the basis that discussions begin no later than 17 December 2018 (we understand that her son has a planned hospital operation this week) and should be completed prior to Christmas. We should be grateful if you would discuss this with the claimant… If she confirms her agreement to you, we will prepare draft COT3 terms".

19. On 17 December 2018 Capsticks emailed ACAS again, again copied to the claimant, pointing out they had received no reply, and asking for contact to be made the claimant that day.

20. On 21 December 2018 the claimant forwarded to Capsticks a letter drafted for her on 19 December by the PSU (personal support unit), who were helping her prepare appeal bundles, setting out "Settlement Conditions". The conditions were that the Trust would (1) remove from the record allegations made against her, (2) provide a reference in

agreed terms, and (3) reinstate her to her previous employment, adding that the allegations against her were all to do with her personal life, not work.

21. The respondent did not reply to this email. They say they have not received any handwritten letter from the claimant.

22. The claimant did not, so far as we know, seek permission from the Court of Appeal to appeal the decision of the Employment Appeal Tribunal. Nor, so far as we know, did she contact ACAS.

23. Is the respondent barred by an agreement not to pursue the costs application because, acting on their promise, the claimant refrained from pursuing the appeal further? On the bare facts, they made an offer, and she did not pursue an appeal. Their offer was however time limited; they agreed an extension to 17 December, but heard no more from the claimant by then; then after that deadline had expired, far from accepting the drop hands offer, the claimant sought a great deal more than a simple dropping of the costs application against her, as she sought remedies the tribunal could have awarded if she had won, presumably as a condition of not proceeding. The 21 December email is not explained by the claimant.

24. The time limit for an appeal to the Court of Appeal is 21 days from the seal date of the order appealed. The review order is sealed 28 November, so 19 December was the very last date to appeal. (The substantive order was sealed 29 October). The respondent cannot have known from the claimant's email of 20 December that she had decided not to pursue the appeal; it did not make sense to make conditions if she had, as she would have nothing to negotiate with.

25. We conclude that the claimant did not accept the respondent's drop hands offer, although as a matter of fact she did not pursue a further appeal.

The Respondent's Application for Costs under rule 76

26. Unlike in the courts, in the tribunals costs do not follow the event. Costs orders may however be made in some circumstances.

> **Rule 76**
>
> —(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

27. The tribunal must decide whether there has been unreasonable (etc) conduct. It must then decide whether to make an order, having regard to the overriding objective. In addition, by rule 84:

> In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a

wasted costs order is made, the representative's) ability to pay.

28. The application had asked for all the respondent's costs, estimated at £63,000 excluding the costs application itself, to be the subject of detailed assessment, but today the respondent limited its claim to £20,000, the cap on the employment tribunal's summary assessment power.

29. The claimant was given adjournments during the hearing to discuss the respondent's submissions with ELIPS.

Conduct

30. The respondent's application is mainly based on findings of the tribunal in the January 2016 judgment and findings. They also rely on pre hearing conduct, and her evidence to the hearing. Their arguments were set out in a written skeleton.

31. In paragraphs 48.2, 48.28, 48.29, 48.30,48.31,48.76 and 48.95 the tribunal had recorded that they did not believe the claimant. In 48.31 it had found that her lack of honesty went "far beyond mere inaccuracy, containing evidence that was obviously not truthful". Other passages record her contradictions, and her assertions that inconvenient documents were all false. The lay members concurred in those findings and remember the proceedings. The judge today records that the claimant sought to say that 49.76 (the claimant saying social services were closing the child protection plan was untrue) was wrong, but she has produced a family court order of November 2018 recording an agreement between parents and local authority by which undertakings were given and a supervision order not proceeded with, so evidently the child protection matters were not concluded in December 2015. The matters on which the claimant was found untruthful were widespread.

32. This tribunal notes that the claimant's conduct in the postponement applications, and not giving the whole story on the drop hands offer, are on a par with the behavior recorded by the 2015 tribunal.

33. The respondent argues that no evidence was given relating to her claims of less favourable treatment because of race compared to Nigerian and Filipino staff, or perception of disability, so it was unreasonable to pursue these claims.

34. The respondent complains the claimant insisted on very substantial numbers of irrelevant documents having to be included in the bindles, with an index that did not correlate to the material, that she disclosed duplicated material and late, and importantly, that she did not disclose tapes of meetings she had secretly recorded, or transcripts if their content, until after the hearing had begun.

35. The claimant did not really deal with these matters in detail, but she spoke at length about how she had not lied and how she was misrepresented.

36. The respondent then relied on correspondence attempting to settle the

claim as evidence supporting a finding of unreasonable conduct in the context of the lack of truthfulness and making assertions without evidence. In December 2015, after the hearing had started, they mad wan offer of £2,500 to settle, to which the claimant's counsel had countered with £70,000. (today the claimant said she was not aware of the counter offer, and rejected the offer itself because she had spent so much more on legal costs herself by then).

37. Once the claimant appealed, the respondent made an offer in September 2016 to withdraw the application for costs against her if she would withdraw the appeal and waive privilege against her counsel. In September 2017 shortly before the EAT hearing they offered to drop the costs application in return for abandoning the appeal.

38. Case law on the application of rule 76 shows that where a party has lied deliberately it may be perverse not to make an order for costs – **Daleside Nursing Home Ltd v Mathew UKEAT/0519/08** – but on its own it does not establish that costs should be paid, and a tribunal must consider the nature, gravity and effect – **Arrowsmith v Nottingham Trent University (2012) ICR 159**. Had the paying party "made a case that was materially dependent on the advancing of her assertions that were untruthful".

39. In our finding the findings of untruthfulness in the judgment mean that we should consider an order for costs. They are many and spread over several issues. Some falsely grounded her case – for example that she should have had anaesthetics training when she was employed a scrub nurse - others were wild and contradictory. The tribunal does not hold that she did not have a real sense of grievance, or that the whole case was manufactured, but she had little, at times, no regard for the need in administering justice to base a decision on facts derived from truthful evidence. The claimant's behaviour since the application was made tends to reinforce the impression she will say anything to achieve her end, whether or not it is true, and whether or not it is relevant (as for example the assertion the tribunal should read her medical records to understand that the dismissal was set up to frustrate a claim against the trust for medical treatment, something which never featured in the original hearing). Even taking into account that facing a costs application may have made her desperate, there is enough material in the judgment to reach the conclusion that the claims she made were often unsupported by the claimant's own evidence. It is one thing to bring a claim and offer no evidence (which may not found a costs order unless most if it is unsupported); it is another to alter evidence at will to suit the argument, as seems to have happened in the hearing.

40. The behaviour in relation to documents was no doubt exasperating, time consuming, and so expensive for the respondent, but is not of the same seriousness. Failing to disclose the tapes, especially when the claimant had solicitors who could have told her they were disclosable, is serious of the claimant was seeking to produce them from a hat (although in the event it is not clear that they did show the respondent's version of what occurred at meetings was wrong - only the parts said to be inaudible did the claimant seek to rely on.

41. None of this however is as serious as lying, but it serves to reinforce our view that some order should be made.

42. Before doing so we consider ability to pay.

Ability to Pay

43. The claimant worked for the respondent as a senior staff nurse, as scrub nurse in theatre. After she was dismissed, the NMC (Nursing and Midwifery Council) ruled that she had no case to answer in respect of the matters at her son's hospital in respect of which she had been dismissed. The claimant says that she cannot access online employment opportunities, but we did not understand why this was. It is possible she is barred from the respondent's jobs website. She is not working. She lives on benefit, and said she was on income support. She denied getting job seekers allowance since dismissal. The letters and documents she had brought with her did not include any letters from DWP about benefits, but we were able to view a photograph of half the first sheet of two letters on her phone, though neither stated any breakdown of figures allowed or paid. She said she got personal independence payments for disability, a lumbar disc prolapse, and had a care plan with carers twice daily. Her husband looked after their son and he did not work because he had a hand fracture, also claiming income support. The couple live in a house which she said belonged to her husband's family. She though the independence payments were £57.30 per month and the carer's allowance £57.50. The income was said to be £134 per week, but it was not clear whether this included or was in addition to other benefits. She stated the benefits payments they receive cover the mortgage payments (which she then said was rent charged by his brother, who lives there too). She said these had been £575 per month but had just been increased to £700.

44. She said she owes £16,422.17 (revised down from £19,000, the figure she gave at first) to Lloyds bank for a personal loan to cover expenses when her father killed. She owes £1,000 and £2,000 on two credit cards. She denied any county court judgments registered against her. Finally, she added that she had borrowed nearly £60,000 from community members for the costs of employment tribunal representation, which she said amounted to £48,000. This is difficult to reconcile with Ms Jegarajah saying in September 2015 she had spent £6,000 and exhausted her funds, but it appears she has been involved in family court proceedings, and possibly some of the money was spent there. Then she said there was a judgment of £10,000 in Willesden County Court which her husband had borrowed money to pay. They paid creditors by small deductions from their benefits. She said bailiffs were "attacking the house", though it was not clear who these were, or when this happened.

45. From this the tribunal concluded she has some earning capacity, despite any current health problem (while stating she was unable to get work as a nurse, she spoke of wanting to work in human resources), and if in fact she is able to work as a qualified nurse, and there seems no reason why not, much work is available at her grade. The health problems were said to have started in 2011, which means she was able

to work for the respondent despite them. The information on home ownership is difficult. We do not know whether she and her husband do or do not own any of the property, and knowing how the claimant has been misleading in other respects, and that until dismissal she was earning, we are sceptical of her information; it is possible that she does. If she does, a brief search against the address shows it is a semi-detached house last sold in April 2005 for £245,000. In the absence of documents little more can be said. We do know she has access to resources. Her recent visit to Sri Lanka was funded by others, she said.

46. We decided to order the claimant to pay £7,500 as a contribution to the respondent's costs. This is little more than a tenth of their costs, excluding this hearing, and does not reflect the magnitude of the claimant's conduct, only a measure of realism as to what may be recovered now or in future having regard to what is known of her means.

Wasted Costs

47. Rules 80 to 82 apply:

When a wasted costs order may be made

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.

Effect of a wasted costs order

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.

Procedure

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.

48. The authorities on wasted costs are **Ridehalgh v Horsfield and anor (1994) ChD 2015** and **Metcalfe and Mardell (2003) 1AC 120**. The latter case emphasises the care required, given the penal effect of such an order, when the respondent to the application is inhibited by privilege from defending himself. (We were told that any wasted costs order has career implications, as it will damage an application for silk or a judicial appointment, though Ms Jagarajah has one such already, Mr Knight does not). There is emphasis on the use of discretion in how to proceed with such an application. There should be a prima facie case to answer, otherwise it should be dismissed. Whether there should be an oral hearing will be proportionate to the amount at stake. There might have to be an adjournment if the respondent is not present when the application is made. The conduct must be serious: improper meaning serious enough suspension from practice, conduct designed to harass the other side rather than advance conclusion of the case, and negligence which wasted costs.

Representation and Expectation

49. The respondents to the wasted costs order are the barristers who represented the claimant during the hearing. The lay members' recollection is that Ms Jegarajah was there to cross examine on the facts, and as she did not know employment law or procedure, Mr Knight was to advise on employment law.

50. The application concerns conduct on the second and third day of the hearing, in particular applications made that the judge should recuse herself, another that the tribunal should admit three transcriptions of recordings, one of a conversation in café, and two others of internal hearings, an application to reconsider a decision, and an adjournment to seek instructions on an appeal against the decision. It is said that these matters were futile and wasted a day and a half of the hearing; they occupy paragraphs 22 -45 of the reasons. The respondent relies on paragraph 34 of the decision which recites what Ms Jegarajan said: that she had been told early on there were some tapes, and repeatedly pressed to listen to them, but she had made a professional decision not to listen to them, until pressed again on the weekend before the hearing when she had, and concluded they showed a different picture of the hearings; she then had them professionally transcribed. Nevertheless the passages on which the claimant wanted to rely were noted to be inaudible by the transcriber. Mr Knight had heard those passages and made notes on some post it notes for the respondent's counsel, but he had not had time to read them. No transcript of these passages was made for the tribunal even though the matter went overnight.

51. A point was made by his counsel that Mr Knight had not been ordered to transcribe the passages he had identified; on this I comment that if

counsel said he would do something I would not myself then order him to do what he said he would do unless there was real reason to doubt his good faith, or suspect that his client might be less cooperative.

52. Additionally the trust says the representatives did not ask questions on parts of the claimant's case and did not advance evidence on some of it.

53. Ms Jegarajah was present today, and although represented, made interventions during today's hearing, to the tribunal, to respondent's counsel, and to the claimant, though not in a way audible to the tribunal. Mr Knight was not; it was said he was listed on the Administrative court. No application to postpone was made. Instead Mr Morris argued that as their solicitors had sought in a letter to the tribunal in April 2016, this should be a direction hearing only, and that in any event the tribunal should dismiss the application. It is noted that the solicitors made no application for a directions hearing when the costs application was revived in December 2018, or listed in June 2019.

54. There are practical difficulties proceeding. The claimant is said not to waived privilege, and although she had said in March 2016 that she would, it was said not to be clear that she understood the implications, nor that she had obtained independent advice on this, so the barristers consider they are still bound.

55. The respondent barristers also say they cannot disclose the terms on which they were instructed to appear at the hearing (client care letter) because that is privileged, or if the terms themselves are in standard form, and an order for production is made, they may contain privileged material.

56. Mr Knight had represented the claimant at the pre-hearing review at a time when the claimant says she was paying for legal representation; she said she paid £5,000 ahead of the case management hearing. Ms Jagarajah wrote to the tribunal at length on 20 September 2015 (so several weeks before the hearing began) saying the claimant could no longer pay solicitors, having until now spent £6,000, and wished to resist an application to strike out. Ms Jegarajah said she was acting "on a direct access basis".

57. The respondents to the wasted costs application argue the application should be dismissed because they were not representatives as defined in rule 82, as one "who is not acting in pursuit of profit with regard to the proceedings". It is not relevant, it is said, that they may have been remunerated at an earlier stage if they were not at the time of the hearing. Even if this is wrong (and the respondent Trust objects that in that case every representative could structure his fees such that he is not in pursuit of profit at the hearing itself), those who act pro bono in these circumstances should not be discouraged from doing so; it is not in the public interest that impecunious litigants have advocates who are inhibited from involvement by fear of costs orders. Next, it is argued it is disproportionate to have two hearings for the amount involved (£3,252). The satellite litigation has already involved costs greater than the amount sought. That may increase if any waiver by the claimant leads to a need for separate representation of each respondent. It was also

asserted the matter is now stale, and finally, the respondent Trust has not specified what each is said to have done. It was argued there should be proper particularisation, and then a stage one hearing.

58. The Trust responds that whether there was pursuit of profit is something the tribunal should explore by an order; documents on terms of business are generally in standard form and do not contain advice; if they do, suitable redactions can be made.

59. We concluded we would not decide the application today. The claimant's late arrival and subsequent adjournments for advice had eaten into the time and we finished late. It was not fair to Mr Knight, whatever his reasons for not attending today.

60. We considered whether there was a prima facie case. Against Ms Jegarajah there may be. Because she told the tribunal it was her decision not to listen to the tapes until just before the hearing, there is unusually no issue as to what instructions she was given which might be privileged and inhibit her defence. On the face of it, and subject to what may be said, she could and should have considered the tapes earlier, they were disclosable and should have been transcribed and disclosed much earlier, this is not procedure exclusive to an employment tribunal, but common to many courts and tribunals, and doing so late appears to have held up the tribunal and prolonged the hearing. Subject to the finding basis of her involvement, it is a point to be pursued. The tribunal may have to consider whether the delays imposed by the recusal and reconsideration applications are to be considered on their own merits or as consequences of the decision not to listen to the tapes until the last minute.

61. It is less clear what part Mr Knight played before the hearing began, when he agreed and began to prepare, and so on, and why he was not able to prepare a usable transcript of the "inaudible" passages he had detected for the tribunal. Again, this does not appear to be anything to do with instructions given by the claimant which may be privileged, and the same remarks can be made about disclosure of the funding basis for his involvement before and at the hearing. It can only be said that his role appears to have been a subsidiary one; it is possible that his role played little part in holding up the hearing for the best part of two days.

62. The tribunal found it unattractive that the respondents to the wasted costs applications should seek two hearings, and then argue that the costs of this made the application disproportionate, while at the same time frustrating the process by not attending the hearing, so engineering the dismissal they sought. It is not clear there should be two hearings. The respondent's case was plain from their application and was responded to in writing, it was not a case of a court or tribunal deciding wasted costs summarily and without proper time and thought to prepare a defence.

63. We decided there should be a further hearing to decide the pursuit of profit point, and the merits. In the meantime there is an order for disclosure of documents showing the basis on which each was instructed, at any stage in the proceedings, not just at the hearing, and

of fee notes for work billed too. This is to enable the tribunal to make an informed decision on the point, which must be in the context of arrangements prior to the start of the hearing. Any privileged material can be redacted. Any dispute about redaction must be the subject of a prompt application to the tribunal in case another judge should consider it.

64. Counsel for the respondent barristers points out that their chambers, Mansfield, has since disbanded, and tracing papers and emails may be difficult. However, we comment there must have been some arrangement for continuity of clerking, also that the application came only two months after the hearing, so some steps should have been taken to preserve the material, especially as at the time the claimant, they say, did agree to waive privilege; further, it is not suggested the respondents have tried and failed to trace the documents, and while it may not be straightforward, it is not shown it is impossible or futile to try to find them.

65. Once disclosed the respondent Trust can consider whether to pursue their application. For the time being it is relisted for a date when the panel can convene, and recently Mr Edwards could too.

Employment Judge - Goodman

Date 20th August 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

23/08/2019

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FOR THE TRIBUNAL OFFICE

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