EMPLOYMENT TRIBUNALS

Claimants: **Dr Uwhubetine**
Dr Njoku

Respondent 1: **NHS Commissioning Board England**
Respondent 2: **Clinical Commissioning Group**
Respondent 3: **Dr David Black**
Respondent 4: **Dr David Brown**

HELD AT: **Sheffield** **ON: 28 August 2019**

BEFORE: Employment Judge Brain

REPRESENTATION:

Claimants: **Mr K Ali, Counsel**
Mr C Echendu in person
Respondent 2: **Mr J Boyd, Counsel**
Respondents 1,3,4: **No attendance**

JUDGMENT having been sent to the parties on 8 October 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. These reasons are provided at the request of the claimants' solicitors.

2. On 12 June 2018, I determined that the claimants had failed to comply with paragraph 3 of the 'unless order' made by Employment Judge Little on 21 March 2018 in material respects. Accordingly, I held that the claimants' claims were struck out upon 29 March 2018 pursuant to that order without any need for further order. Reasons for that ruling were promulgated on 2 August 2018.

Those reasons set out the procedural history leading up to the determination of 12 June 2018 and my reasons for finding that there had been material non-compliance with the unless order of 21 March 2018. I shall not repeat those reasons here.

3. On 9 July 2018 the solicitors acting for the second respondent applied for a costs order. The application was made pursuant to Rules 76(1)(a) and/or (b) and/or 76(2) of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. I shall not set out in full these Rules in particular and the provisions of Rules 74 to 84 inclusive of the Rules of Procedure. They are familiar to the parties.

4. On 25 July 2018 the solicitors acting for the first, third and fourth respondents also made a costs application. The grounds for the application were set out in a letter dated 31 July 2018. The first, third and fourth respondents relied upon Rule 76(1)(a) and Rule 76(1)(b). I shall not say anything further about the costs application made by the first, third and fourth respondents. (That costs application is stayed (pursuant to an order that I made on 27 August 2019) pending the outcome of the claimants' application to the Court of Appeal for leave to appeal against the Judgment of the Employment Appeal Tribunal which dismissed the claimants' appeals against my Judgment of 12 June 2018).

5. Before turning to the second respondent's costs application, I remind myself of the relevant principles in relation to costs applications in the Employment Tribunal. These are helpfully and succinctly set out in the claimants' counsel's skeleton reply to the costs application. The first of these is that in Employment Tribunal proceedings costs are still very much the exception and not the norm. As set out in *Harvey on Industrial Relations and Employment Law* (at paragraph 10.44 in part P1), "*the fundamental principle remains that costs are the exception rather than the rule, and that costs do not follow the event in Employment Tribunals*".

6. Tribunals should not be unduly critical of parties bringing claims which are not then pursued or which are struck out. Further, any unreasonable conduct must not automatically result in a costs order. Even where unreasonable conduct has been found, the Tribunal has discretion as to whether costs should be awarded and if so in what amount and must consider all relevant circumstances in exercising that discretion. In ***Oni v Unison*** [2015] ICR D17 (EAT) it was held (in paragraph 14) that, "*it is clear that Rule 76 imposes a two-stage exercise. At the first stage the Tribunal must determine whether the paying party has acted unreasonably or in any other way such as to invoke the jurisdiction to make an order for costs. If satisfied that there has been unreasonable or other relevant conduct at that stage, the second stage is engaged. At the second stage the Tribunal is required to consider making a costs order but has a discretion whether or not to do so".*

7. The first question I must ask myself therefore is whether the claimants' conduct falls within that in Rules 76(1)(a) and/or 76(1)(b) and/or 76(2). If it does not, then the costs application will fail. If it does then the question that arises is whether it is appropriate for the Tribunal to exercise discretion in favour of an award of costs. It is an error to go straight to the making of an award of costs if the proscribed conduct within the relevant parts of the rules is established. If there is a proscribed conduct then it is necessary to step back and look at the

facts and circumstances in order to consider whether a costs award is appropriate.

8. By application of these principles, the costs claim made under Rule 76(1)(b) can be quickly disposed of. This arises where a claim is found to have had no reasonable prospect of success. It cannot be said that the claimants' claims have no reasonable prospect of success in circumstances where Employment Judge Little determined (on 14 February 2018) that the claims had little reasonable prospect of success. A finding that a claim has little reasonable prospect of success is plainly distinct from a finding that a complaint has no reasonable prospect of success. Therefore, in so far as the costs application is made pursuant to Rule 76(1)(b) the claim falls at the first hurdle and it is unnecessary for me to go on to consider the exercise of discretion.

9. The costs claim brought under Rule 76(1)(a) is brought solely upon the basis that the way in which the claimants conducted the proceedings was unreasonable (in failing to comply with the Tribunals' Orders). The second respondent does not contend that the claimants were acting vexatiously, abusively or disruptively (which conduct also falls within the ambit of the Rule) in their conduct of matters. It follows therefore that the costs claims brought under Rule 76(1)(a) and (2) cover very much the same ground: that the claimants conducted the proceedings unreasonably by failing to comply with the Tribunal's orders to furnish proper particulars of their claims. It was the material failure so to do which led me to conclude that there had been a failure to comply with Employment Judge Little's order of 21 March 2018 and which resulted in the claims standing dismissed pursuant to the unless order. It is that failure which is said to constitute the unreasonable conduct pursuant to Rule 76(1)(a). It follows therefore that the two remaining grounds of claim stand or fall together.

10. The conduct of a party's representative is effectively that of the party. A persistent failure to provide information can be unreasonable conduct. The word "*unreasonable"* has its ordinary English meaning. The Tribunal must look at the nature, gravity and effect of a party's conduct in determining reasonableness. Should the second respondent establish that the claimants conducted the proceedings unreasonably and acted in breach of the Tribunal's orders then a broad-brush approach to causation is required, the Tribunal being enjoined to identify the unreasonable conduct complained of and its effect.

11. The chronology of events is well known to the parties. The claimants today rightly do not seek to go behind any of the orders made in the case. The recitation of the procedural history is set out in my Judgment which is at pages 167 and onwards in the hearing bundle.

12. The kernel of the second respondent's contention that the claimants' conducted the proceedings unreasonably and were in breach of the Tribunal's orders (which conduct overall gives rise to a costs liability) is the failure upon the part of the claimants to properly particularise and provide further information about their case and the basis of it. I drew the parties' attention during the course of this morning's hearing to the case of ***Kaur v John L Brierley Limited*** EAT 783/00 as authority for the proposition that a persistent failure to provide information can be unreasonable conduct. In that case, the claimant and her advisors persistently failed to identify the unlawful deduction that they were alleging had been made from her wages. This was despite repeated and

reasonable requests from the employer's solicitors. Although the claimant in the case was not able to provide any explanation for the failure she pursued the proceedings causing the employer to incur additional and wholly unnecessary costs. When the final hearing was imminent, the claimant withdrew. The Employment Tribunal's decision to make a costs order against the claimants was upheld by the Employment Appeal Tribunal.

13. By reference to the procedural history which I set out in the reasons for the Judgment of 12 June 2018 it can be seen that on 5 March 2018 the claimants presented a document entitled *"claimants' details of claim"*. This was effectively further particulars of the grounds of claim set out in the claim form presented on 3 November 2017. Employment Judge Little was concerned that the further and better particulars told the respondents little more than was in the grounds of claim. I refer to paragraph 13 of my reasons that were sent to the parties on 22 August 2018. This led to the order of 21 March 2018 ordering the claimants to "*re-file the details of claim document (that they have filed on 5 March 2018) clearly indicating where and how that has been amended so as to provide the information required by paragraph 1 of the order made on 14 February 2018*". (The latter is a reference to Employment Judge Little's order of that date ordering the provision of the further and better particulars and which in the event materialised on 5 March 2018).

14. On 28 March 2018 the claimants' counsel presented to the Employment Tribunal a third pleading which was entitled *"claimants' details of claim".* This was therefore the third iteration of the claimants' claims. (In the event of course I held this document to be materially non-compliant with Employment Judge Little's order of 21 March 2018).

15. The recitation of the procedural history shows that in my judgment the claimants' conduct was not as egregious as that of the claimant in the ***Kaur*** case. In the latter case, the claimant persistently failed to identify the unlawful deduction which she contended the respondent had made from her wages. This was held to be an inexplicable failure in what appears to be a relatively straightforward matter. In the instant case, the claimants at least sought to comply with the Tribunal's orders.

16. I also take into account that the claimants themselves were very much in the hands of their representative (Mr Echendu) in formulating the case in such a way as to comply with the Tribunal's orders. As I have said, a party's representative's conduct is effectively that of the party. In my judgment the conduct of the claimants themselves is not so egregious as to warrant a description of their conduct as unreasonable. True it is that there was failure to comply with the Tribunal's orders but there is no suggestion that such conduct was wilful, in deliberate defiance or disobedience or disrespectful of the Tribunal's orders. Two attempts were made by the claimants to comply. They instructed Mr Echendu to formulate their claims. The attempts were unsuccessful but there were at least an attempts (in contrast to the ***Kaur*** case).

17. I now turn to the application of the two-stage test described at paragraphs 6 and 7 above. By reference to the second respondent's application under Rule 76(1)(a) I find that the initial threshold is passed as there was material non-compliance with the Tribunal's orders for the provision of further and better particulars of the claim. However, at the second stage of the test, I find that the claimants have not acted unreasonably for the reasons that I have given in

paragraphs 12 to 16 above. It follows therefore that the second stage of the test is not engaged.

18. Upon the second respondent's costs application made under Rule 76(2) I find that the claimants did fail to comply with the Employment Tribunal's orders made on 14 February 2018 and 21 March 2018. That is an inevitable finding given the conclusions that I reached on 12 June 2018. Therefore, the second stage of the test is engaged. I exercise my discretion in favour of the claimants. The factors which tell in favour of the exercise of discretion in the claimants' favour are that: the claimants were reliant on their legal representative to comply with the orders; and the claimants purported to comply albeit that they failed to do so. There was therefore no wilful disregard of Tribunal orders. Further, the claimants have suffered the strike out of their claims.

19. For these reasons, the second respondent's costs application is refused.

Employment Judge Brain

Date 11 November 2019