Case Number: 1806183/2017
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EMPLOYMENT TRIBUNALS

Claimants		Respondent
Dr S Uwhubetine	v	**1. NHS Commissioning Board England**
Dr E Njoku		**2. Clinical Commissioning Group**
		3. Dr David Black
		4. Dr David Brown

Interested party **Mr C Echendu**

Heard at: **Sheffield** **On:** **12 February 2020**

Before: **Employment Judge Brain**

Appearance:

For the Claimants: **No attendance or representation**

For Respondents 1, 3 & 4: **No attendance or representation**

Respondent 2: **Written representations**

Mr C Echendu **Written representations**

COSTS JUDGMENT

The Judgment of the Employment Tribunal is that Mr Echendu's application for an Order, pursuant to Rule 80 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, that the second respondent's solicitors pay his costs of and occasioned by the application heard on 28 August 2019 is refused.

REASONS

1. This matter has a somewhat long and complex procedural history. This culminated in a costs hearing which took place on 28 August 2019. This concerned only the claimants, their former representative Mr Echendu and the second respondent.

2. The first, third and fourth respondents had no interest in the costs hearing of 28 August 2019. They also had no interest in Mr Echendu's application which is the subject of this costs judgment.

3. I determined at the costs hearing of 28 August 2019 that:

   3.1. The second respondent's application that the claimants should pay some or all of the costs of and occasioned by the proceedings shall be refused and stands dismissed.

   3.2. The second respondent's application for an Order that Mr Echendu should pay the costs of and occasioned by the adjournment of the hearing held on 20 November 2018 also shall be refused and stands dismissed.

4. Following the promulgation of my judgment of 28 August 2019, the claimants' solicitor made an application for me to provide reasons. These were sent to the parties on 12 November 2019. The procedural history is summarised in paragraph 2 of those reasons (in particular by way of cross reference to the judgment which I gave on 12 June 2018). Reasons for my ruling of 12 June 2018 were promulgated on 2 August 2018 and sets out the procedural history leading up to my determination of 12 June 2018. Thus, the reasons for the judgments of 12 June 2019 and 28 August 2018 when read together set out the procedural history of the matter as a whole. It is familiar to the parties. I shall not set it out in full here.

5. On 28 August 2019, I held that the claimants' conduct of the case brought against the second respondent was not so egregious as to warrant the making of a costs order against them in the second respondent's favour.

6. The second respondent also made an application for an order for costs against Mr Echendu. He was on the record as the claimants' representative until he applied to come off the record on 23 May 2019. The application made by the second respondent against Mr Echendu was one made under Rule 80 of Schedule 1 to the 2013 Rules. This is commonly referred as a '*wasted costs order.'*

7. The application for an order against Mr Echendu was made by the second respondent's solicitor on 21 May 2019. The basis of the application was that it was Mr Echendu's failure to attend the hearing held on 20 November 2018 (at which the second respondent's application for a costs order against the claimants was to be considered) which necessitated its postponement. The second respondent's solicitor said that Mr Echendu "*failed at the time to notify either the Tribunal or the parties of his inability to attend and he has subsequently failed to provide an adequate explanation for his failure despite having been ordered to do so."*

8. Rule 80 provides that,

   "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."

9. In **Ridehalgh v Horsefield 3 All ER 848, CA**, the terms *"improper, unreasonable or negligent"* were defined as follows:

    - Improper conduct. This includes but is not limited to, behaviour that would result in disbarment, striking off, suspension from practice or other serious professional penalty.
    - Unreasonable conduct. This is used to describe conduct that is designed to harass the other side (in a vexatious manner), rather than progress the case.
    - Negligent conduct. This should be considered in an untechnical way, as a failure to act with the competence reasonably expected of ordinary members of the legal professional.

10. At the hearing of 28 August 2019 the wasted costs application against Mr Echendu was added to the issues to be considered by the Tribunal (in addition to the costs application made by the second respondent against the claimants). Mr Echendu gave an explanation for his non-attendance on 20 November 2018. In the light of Mr Echendu's explanation, which concerned being immobilised on the motorway due to a vehicle breakdown, the wasted costs application was not pursued by the second respondent with great vigour. While doubtless the circumstances were unfortunate, I held that it was difficult to see how Mr Echendu's conduct that day was improper, unreasonable or negligent within the meaning of those terms as elucidated by the Court of Appeal in **Ridehalgh.**

11. On 22 August 2019, six days before the costs hearing, Mr Echendu wrote to the second respondent's solicitor. He put the second respondent's solicitor on notice that should the wasted costs application against him be pursued on 28 August 2019 then he would in turn seek a wasted costs order against the second respondent's solicitor. The wasted costs application against Mr Echendu was not withdrawn. Mr Echendu therefore attended the hearing on 28 August 2019: (by this time he was not on the record as acting for the claimants). Upon the dismissal of the wasted costs application against him he made his application against the second respondent's solicitor.

12. The second respondent's counsel was unable to deal with the wasted costs application against his instructing solicitor. I therefore gave directions for the second respondent's solicitor to make written representations no later than 18 September 2019.

13. The second respondent's solicitor made written representations on 8 October 2019. Unfortunately, these representations were not drawn to my attention. Due to an administrative error, they appear not to have been linked to the file. Understandably, on 2 January 2020 Mr Echendu wrote to ask about the status of his wasted costs application against the second respondent's solicitor. This prompted me to invite written representations from the second respondent's solicitor (by way of a letter I caused to be sent on 15 January 2020 in ignorance of their letter of 8 October 2019). It was this that prompted the second respondent's solicitor to resubmit the representations made on 8 October 2019. Those representations were supplemented by additional representations dated 30 January 2020 made in reply to the letter of 15 January 2020. I shall come to these representations in due course.

14. As a general proposition, there are some potential practical difficulties arising out of the application of the wasted costs rules. Most obviously, this may create a conflict of interests between a representative and his or her client. Therefore, a legal representative should not be held to have acted improperly, unreasonably or negligently (which are the thresholds which must be met in order for a wasted costs order to be made) simply because the legal representative acts on behalf of a client whose case, defence or application fails. It is the duty of the representative to present the case whatever the representatives' views of the strength or weakness of it. Professional advocates should not be deterred from taking on cases for fear of being exposed to a wasted costs application upon the failure of their client's case.

15. A further difficulty relates to the principle of legal professional privilege. The privilege belongs to the client. If the client does not waive the privilege then the legal representative may be prejudiced in his or her ability to advance an explanation rebutting an allegation that the conduct in question was negligent (as defined in **Ridehalgh**). The Court of Appeal recognised in the **Ridehalgh** case the difficulties that privilege might cause lawyers and said that Courts and Tribunals should make a full allowance for the fact that legal representatives may be prevented from telling the full story. Where there is room for doubt then the lawyer is entitled to the benefit of that doubt.

16. In **Medcalf v Mardell & Others [2002] 3 All ER 721**, **HL**, Lord Bingham said that,

    "Where a wasted costs order is sought against a practitioner precluded by legal professional privilege from giving his full answer to the application, the court should not make an order unless, proceeding with extreme care, it is satisfied

    (a) that there is nothing the practitioner could say, if unconstrained, to resist the order and

    (b) that it is in all the circumstances fair to make the order."

14. In **Ratcliffe, Duce and Gammer v Binns (t/a Parc Ferne) & Anor EAT 0100/08**, Mr Justice Elias (as he then was) said that where the privilege of the client is not waived, it will be a very exceptional case indeed where a court will be entitled to infer that a party is abusing the process of the court by pursuing a hopeless case.

15. The second respondent's solicitor maintains that although the wasted costs application against Mr Echendu was ultimately unsuccessful, it was a reasonable one to pursue. In the representations dated 8 October 2019 the second respondent's solicitor observed that Mr *Echendu "previously objected to* [my order made on 20 November 2018] *which required him to provide a witness statement explaining his non-attendance that day upon the basis that it was vexatious and amounted to harassment. That submission was rightly rejected and the order remained in force. Our client's application was not designed to harass Mr Echendu. It was designed to seek to recover costs (paid out of the public purse) which had been incurred as a result of the aborted hearing on 20 November 2018."*

16. On 20 November 2018 I had ordered Mr Echendu to file with the Employment Tribunal and serve upon the respondents' solicitors a witness statement setting out the circumstances on his failure to attend the hearing that day. The second respondent's solicitors are right to point out that Mr Echendu sought the

revocation of that order. Nonetheless, he did eventually provide an explanation. The explanation was provided by him on 23 March 2019. In paragraph 2 of his letter of that day he says that he was on the way to the hearing on 20 November 2018 *"when one of my vehicle tyres deflated and swayed onto a hard side of the M1 motorway between Wakefield and Barnsley which would have caused a serious accident."* He went on to say that, *"I was terrible in shock that I had to call one of my assistants (Mr Scot Igie) who came to help me. I did not call either the Tribunal or the claimants because as at the time I had misfortune, I was caught in fear and anxiety."*

17. Insofar as the second respondent's solicitors seek to make such a case, I reject any contention that it is a basis for the pursuit of the wasted costs application that Mr Echendu sought the revocation of my order of 20 November 2018. He was not there when I made the order so did not have the opportunity of making representations about it. While the order was maintained in the face of his objections, I see nothing improper in Mr Echendu having sought the revocation of it.

18. Similarly, I see no basis for justifying the pursuit of a wasted costs order against Mr Echendu simply by reason of his delay in providing his explanation. True it is that this was forthcoming only around four months after the date of the hearing in November 2018. However, he provided an innocent explanation for his non-attendance. There was nothing from the second respondent to gainsay that and yet the second respondent nonetheless instructed its solicitors to pursue the wasted costs order against Mr Echendu.

19. The weakness of the wasted costs application against Mr Echendu was recognised very fairly by the second respondent's counsel at the hearing held on 28 August 2019. This brings me to the further representations made by the second respondent's solicitors dated 30 January 2020.

20. In the final paragraph this is said: -

    "On the issue of legal privilege, our client does not waive privilege in our advice. The Tribunal will however be aware that solicitors are creatures of instruction. This firm is not in the habit of acting against client's instructions and we invite the Tribunal to draw its own inferences from this".

21. This paragraph leads me full circle to the principles that I have set out above. The second respondent's solicitors can only have a liability if they were *negligent*, or guilty of *improper* or *unreasonable* conduct within the meaning of those terms *per* **Ridehalgh.** The question of whether the second respondent's solicitors were negligent (in the sense of failing to act with the competence reasonably expected or ordinary members of the legal profession) often turns on what instructions were provided by the client and what advice was given by the representative. I am satisfied, by application of the principles in the **Medcalf** case, that I cannot be satisfied that there is nothing that the second respondent's solicitors could say unconstrained by legal professional privilege in order to resist the order sought against them. I am bound to give the benefit of the doubt to the second respondent's solicitors in this matter and can only infer that in their favour that certain advice was given by them to their clients about the prospects of success of the pursuit of a wasted costs order against Mr Echendu and that, in the light of the advice given, the second respondent nonetheless wished to proceed with the application.

22. This is sufficient to dispose of the application made by Mr Echendu against the second respondent's solicitor. However, the second respondent's solicitors have raised a further issue in their letter of 30 January 2020. Essentially, it is contended that Mr Echendu has in any event got no standing to make a wasted costs application against them.

23. As I said earlier, Rule 80(1) provides that, *"Tribunal may make a wasted costs order against a representative in favour of <u>any party</u> in the circumstances set out in the Rule."* The term *"representative"* is defined in Rule 80(2). This term *means "a party's legal or other representative or any employee of such representative…"* [emphasis added].

24. The second respondent's solicitors rightly point out that the term *"party"* is not defined within the Rules. There is, in my judgment much force in their representation that a wasted costs order may only be made against a representative in favour of a party. There is no dispute in principle, of course, that the second respondent's solicitors are that party's representative and therefore potentially have a wasted costs liability. (On the facts, of course, I find that no liability for wasted costs has arisen but in principle one may have been made against the second respondent's solicitor).

25. The difficulty for Mr Echendu is that he is not a party to the proceedings. He was in fact a representative of the claimants who were, of course, two of the parties to the proceedings. It was upon this basis that the second respondent pursued the application against them for their wasted costs. That step was taken in their capacities as parties to the action. Mr Echendu had a potential liability to the second respondent as a representative as defined by Rule 80(2). (Again, on the facts, this did not in fact arise for the reasons that I have explained in this judgment).

26. The 2013 Rules draw a distinction between a party on the one hand and other persons on the other. For example, Rule 34 provides that:

    "the tribunal may on its own initiative, or on the application of <u>a party or any other person</u> wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included" [emphasis added].

27. Rule 35 provides that:

    "The tribunal may permit any person to participate in proceedings, on such terms as may be specified, in respect of any matter in which that person has a legitimate interest."

28. In the context of Rules 34 and 35, therefore, the term *"party"* on the one hand and *"other person" and "person"* on the other plainly have a different meaning. A distinction is to be drawn between a party to the proceedings on one hand and other persons on the other.

29. Jowitt's *Dictionary of English Law* (5th Edition) provides, in its revision dated 1 August 2019, that *"a person who takes part in a legal transaction or proceedings is said to be a party to it."* It goes on to say that a party is a litigant and that, *"in a legal proceeding the parties are the persons whose names appear on the record."*

30. Upon this basis, I am satisfied that although not defined in the Rules, the term *"party"* for the purposes of the Rules is confined to the claimant, respondent or another added to the proceedings as a party pursuant to Rule 34. The term "*party"* does not extend to anyone else. Had it been the intention of the Rule-makers that a representative could make a costs application in his or her own right then that would have been provided for within the Rules. The Rules limit the right to make a wasted costs order only to parties.

31. There is a further difficulty for Mr Echendu. This is that Rule 80 provides that *"a wasted costs order may be made in favour of any party where that party has incurred costs*" [emphasis added] as a result of any improper unreasonable or negligent act or omission on the part of a representative or 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. Therefore, only the costs which a party has actually incurred are recoverable by way of wasted costs.

32. In this case, there is no suggestion that the claimants have incurred the costs which Mr Echendu seeks to recover from the second respondents' solicitor. Upon the basis of my ruling in paragraphs 23 to 30, only the claimants may pursue the wasted costs order being sought against the second respondent's solicitors. However, the costs in question are those incurred by Mr Echendu in preparing for and resisting the wasted costs application against him. These are not the claimants' costs. To the best of my knowledge, the claimants are not liable to pay these costs to Mr Echendu.

33. It seems to me therefore that to make an award of wasted costs in Mr Echendu's favour would be a breach of the indemnity principle. This is a principle of law which provides that cost ordered to be paid as between parties to litigation are given as an indemnity to the person entitled to them and the amount which the paying party has to pay cannot exceed the amount which the successful party has to pay to his own solicitor. The claimants have no obligation to pay Mr Echendu in respect of his costs of defending the wasted costs application against him (or at any rate, I was not told that they do have such a liability). There are therefore no costs incurred by the claimants in respect of which they are entitled to seek indemnity from the second respondent or the second respondents' solicitors.

34. In summary therefore, I hold that:

    33.1. The second respondents' solicitors conduct of the proceedings was not improper, unreasonable or negligent as defined in **Ridehalgh** and therefore no wasted costs arise upon which basis a wasted costs order can be made against them.

    33.2. In any event, Mr Echendu has no standing to bring his claim in respect of his costs as against the second respondents' solicitors as he was not a party to the proceedings.

33.3. The costs incurred by Mr Echendu are not those of the claimants. As the wasted costs order can only be made in favour of a party and are intended to indemnify a party against the wasted costs incurred by them as a consequence of improper, unreasonable or negligent conduct by the other party it would be a breach of the indemnity principle to make an award against the second respondents' solicitors in the circumstances.

Employment Judge Brain

Sent to the parties on 9 March 2020

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