Case Number: 2202688/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mrs HARMONY HAMBLY-SMITH	**v**	**(1) Mr SIMON DE PURY**
		(2) Dr MICHAELA DE PURY (former)

Heard at: London Central **On**: 7 June 2021

Before: Employment Judge P Klimov, in Chambers

JUDGMENT

1. The former Second Respondent's application for a costs order fails and is dismissed.

2. The Claimant's application for a costs order fails and is dismissed.

REASONS

Background

1. The relevant background to this matter and my findings and conclusions on the issue I determined at the open preliminary hearing on 30 April 2021 (the "OPH") are set out in the written reasons I prepared on 18 May 2021 (the "OPH Reasons"). In this judgment I will refer to relevant paragraphs in the OPH Reasons where necessary.

2. At the end of the OPH, after I gave my judgment on the preliminary issue, the counsel for the Second Respondent and the counsel for the Claimant said that they had been instructed to make costs applications against the First Respondent in connection with the preliminary issue and the OPH.

3. There was insufficient time to deal with the applications at the OPH and it was agreed that the applications would be submitted by 7 May 2021 and the First Respondent would make his submissions on the applications by 21 May 2021. The applications would then be decided on the papers.

4. The former Second Respondent ("MDP") seeks a costs order against the First Respondent ("SDP") on the grounds that SDP:

    (i) unreasonably applied to join MDP to the claim;
    (ii) unreasonably failed to draw the tribunal's attention to (i) the decision in ***Beresford*** and the limits of the tribunal's powers under Rule 34, and (ii) his correct factual case, when making the joinder application,
    (iii) unreasonably opposed MDP application to be dismissed from this claim.

5. MDP argues that SDP's application to join her was misconceived because on the ***Beresford*** and ***Brennan*** line of authorities the tribunal cannot make any judgment against her in favour of the Claimant ("HHS") when HHS makes no claim against her, and the tribunal cannot make any judgment against her for contribution. Furthermore, any tribunal award made against SDP in these proceedings cannot serve as a basis for any contribution claim by SDP against her in the civil courts. Therefore, there cannot be any issues between her and HHS and SDP following within the jurisdiction of the tribunal which it is in the interests of justice to have determined in the proceedings.

6. MDP submits that when making his application and at the telephone case management preliminary hearing on 15 September 2020 ("PHCM") SDP failed to give full and frank disclosure of material facts and law by not drawing the tribunal's attention the relevant authorities and by advancing his application on the factual basis he did not believe to be true.

7. Finally, MDP argues that it was unreasonable for SDP not to concede the preliminary issue identified by EJ Stout to be determined at the OPH in light of the facts he knew and the legal position with respect to the HHS' claims against him in these proceedings.

8. HHS seeks a costs order against SDP on the grounds that "*in causing [MDP] to be added to the proceedings as a party, and thus requiring the hearing of 30 April 2021 to be held, the [SDP] acted unreasonably and/or advanced a claim that had no reasonable prospect of success. In so doing, he caused [HHS] to incur unnecessary costs which could and should have been avoided. [SDP] should, therefore, be ordered to pay those costs*".

9. HHS largely relies on the argument that the factual basis used by SDP to join MDP was inconsistent with the facts known to him, his position in the matrimonial proceedings with MDP, and therefore he could not have reasonably believed that the advanced factual position was true and in fact did not believe that.

10. SDP opposes both applications. He says that based on his state of knowledge as at the time Employment Judge Wisby made her order to join MDP as a second respondent ("the EJ Wisby Order") and considering the stage that the litigation had reached, it was not unreasonable to apply to join MDP. Further, he argues that there are evidence suggesting that HHS

continued to work for MDP after she had resigned in March 2019 from her joint employment with them. There was nothing inherently unreasonable to apply to join MDP in the early stages of the proceedings and the OPH was needed to determine the factual issues.

11. SPD contends that the failure to draw to EJ Wisby's attention at the PHCM the decision in ***Beresford*** cannot amount to unreasonable conduct because:

    (i) it was appropriate and reasonable for SDP to wish to have MDP joined based on the potential outcomes and scenarios that might be established at trial which had not been ruled out at that stage,
    (ii) the application was not advanced on the basis of a contribution claim, but under Rule 34 of the Employment Tribunals' Rules of Procedure 2013 ("ET Rules") on the basis that there appeared to be issues between HHS and MDP falling with the jurisdiction of the tribunal,
    (iii) MDP did not raise the ***Beresford*** argument in her solicitor's letter of 11 August 2020, which was considered at the PHCM, and
    (iv) ***Beresford*** was a decision under the old version of the employment tribunals' rules of procedure, and Rule 34 of the ET Rules is arguably wider than the corresponding provision in the old rules.

12. SDP also argues that it cannot be said that he did not present his correct factual case. It was set out in his grounds of resistance and there was no finding by the tribunal at the OPH that SDP had not been truthful at either PHCM or in his evidence at the OPH.

13. SDP points out that MDP did not appeal the EJ Wisby Order. Instead, at the OPH, she sought to invoke Rule 34 to have herself removed as a second respondent. That resulted in some considerable time being spent at the OPH dealing with her application, which ultimately resulted in the Tribunal ruling that it was not an avenue open to MDP. On the other hand, SDP rightly and properly conceded that the determination of the preliminary issue in MDP's favour would constitute a material change of circumstances for the purposes of the test in ***Serco v. Wells***.

14. With respect to the HHS's costs application, SDP repeats the above submissions and further submits that contrary to the stance adopted by HHS at the OPH, at the PHCM her counsel did not object to MDP being joined as a second respondent and stated that it was a matter between the respondent and the Tribunal and acknowledged that HHS would not be prejudiced by MDP being added as a second respondent.

The Law

15. Rule 76 provides:

    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

(b) any claim or response had no reasonable prospect of success.

16. The following key propositions relevant to costs orders may be derived from the case law:

17. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order. Only if the tribunal decides to exercise its discretion to make an award of costs the question of the amount to be awarded comes to be considered (Haydar v Pennine Acute NHS Trust UKEAT/0141/17).

18. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (AQ Ltd v Holden [2012] IRLR 648).

19. For term "vexation" shall have the meaning given by by Lord Bingham LCJ in AG v Barker [2000] 1 FLR 759:

> "*[T]he hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be , its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.*" (Scott v Russell 2013 EWCA Civ 1432, CA)

20. 'Unreasonable' has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' (Dyer v Secretary of State for Employment EAT 183/83).

21. In determining whether to make a costs order for unreasonable conduct, a tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct — (McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA)

22. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. However, the tribunal must look at the entire matter in all its circumstances. Yerrakalva v Barnley MBC [2012] ICR 420 Mummery LJ gave the following guidance on the correct approach:

> "*41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances*".

Conclusions

23. First, I shall briefly deal with the HHS' application under Rule 76(1)(b), namely that SDP "*advanced a claim that had no reasonable prospect of success*".

24. SDP did not advance any claim against MDP. He applied to join her as a second respondent in relation to the HHS' claims. In his application he did not make any separate claims against MDP or claimed contribution in relation to the HHS' claims. He stated that as joint personal employers they "*in principle have joint and several liability in respect of any claim established*". It was an application for a case management order and not a claim. In my judgment, Rule 76(1)(b) does not apply to applications for a case management order. In her application HHS did not refer me to any authority to the contrary.

25. If, however, I am wrong, and "any claim" in Rule 76(1)(b) should be interpreted as to include an application for a case management order, of the kind made by SDP under Rule 34, his application did succeed at the PHCM and therefore cannot be said to have had no reasonable prospect of success.

26. Turning to the ground of unreasonable conduct of the proceedings.

27. MDP says that the SDP's application was misconceived, the joinder was wrong in law and served no legitimate purpose and therefore it was demonstrably unreasonable for SDP to apply to join MDP.

28. I do not accept that the SDP's application was misconceived or wrong in law. It was made on the basis that there was a factual dispute as to whether MDP remained the HHS's employer until her dismissal. Until that dispute was determined at the OPH, in my judgment, there appeared to be issues between MDP and the existing parties falling within the jurisdiction of the tribunal, and that was the basis for the EJ Wisby Order.

29. If MDP considered the EJ Wisby Order was wrong in law, she should have appealed it. She chose not to do that. Instead, she applied to set it aside. Her application to set it aside was refused by EJ Stout on 11 November 2020, when she ordered the OPH to resolve the factual dispute. In doing so, she confirmed that "*in the light of the information now provided by the Second Respondent it is apparent that, to use the terms of Rule 32, "there are issues between [the Second Respondent] and … the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice have determined in the proceedings".*

30. MDP did not appeal the EJ Stout order either. Furthermore, MDP herself, by her solicitors' letter of 29 September 2020, sought, in the alternative, an order to hold a preliminary hearing to determine the issue who the HHS's employer was at the time of her dismissal, and that application was granted.

31. With respect to the argument that the SDP's application was made on a false factual premise, namely that MDP continued to be the HHS' employer up to the date of her dismissal. I find that, whilst based on the evidence I heard and the documents I was referred to at the OPH the position SDP adopted for the purposes of his joinder application in these proceedings appears to be inconsistent with his position in the matrimonial proceedings with MDP, his evidence at the OPH, which I accept, were that he thought that he was the sole employer of HHS until he had received details of her commission claim, which on the face of it suggest that HHS continued to work for MDP after her resignation in March 2019.

32. Therefore, in my judgment, while at the OPH I found that MDP was not the HHS' employer at any relevant time, until that finding of fact was made, it was not unreasonable for SDP to rely on the evidence he had to argue that MDP remained the HHS' joint employer.

33. I do not accept HHS' contention that SDP could not have reasonably believed and did not in fact believe in the factual assertion he was advancing. Whilst his case on the facts was not the strongest, in my judgment, it was not unreasonable for him to seek to establish the disputed facts.

34. He discovered that some of the HHS' commission claim related to transactions initiated by MDP which postdate HHS' resignation in March 2019. He also discovered that his written contract of employment with HHS had never been properly finalised and executed. The previous employment arrangement between HHS and SDP and MDP as joint employers were not clear, with their jointly controlled entities appear to have been interposed as the employer party.

35. Further, at the time of the SDP's application to join MDP on 7 August 2020, it appears the existing parties were still in correspondence seeking to understand how HHS was putting her commission claim. For example, on 24 August 2020, SDP's solicitors made a request for additional information with respect to the HHS's commission claim. HHS fully clarified her position on the commission claim only on 26 March 2021, and that was in the context

of her resisting a threaten application to strike out her commission claim for it being time barred.

36. Therefore, in those circumstances, I find that it was not unreasonable for SDP to advance his application on the factual basis as he did. In my judgment, it cannot be said that he could not have reasonably believed and in fact did not believe that the factual basis was properly arguable.

37. In my view, SDP's failure to draw to EJ Wisby's attention the decision in ***Beresford*** does not amount to unreasonable conduct. The SDP's joinder application was not advanced on the basis of contribution, and unlike in ***Beresford*** there was a dispute as to the correct identity of the HHS' employer.

38. It appears from the record of the PHCM that neither HHS' counsel, who attended the PHCM, nor MDP's solicitors in their written submission on the SDP's application, relied on ***Beresford*** or otherwise made any submission on that issue.

39. Further, in their application to set aside the EJ Wisby Order of 29 September 2020, MDP's solicitors did not mention ***Beresford*** as the reason why the EJ Wisby Order should be set aside. Instead, they argued that the application had been made on the factually incorrect basis, which matter was ultimately decided at the OPH.

40. Therefore, in those circumstances, I find that not drawing to EJ Wisby's attention ***Beresford*** and other authorities, upon which MDP relied at the OPH (***Brennan and Welsh***), cannot be said to be unreasonable conduct.

41. For the sake of completeness, I shall observe that while the decision in ***Brennan*** does appear to establish that the Civil Liability (Contribution) Act 1978 is concerned only with liabilities falling for determination in the civil courts and creates no right to contribution in relation to claims within jurisdiction of an employment tribunal, the EAT held that *per curiam* and indeed stated that they "*do not regard this conclusion with any satisfaction*".

42. Therefore, it appears that even on the basis of ***Beresford***, it is arguable that Rule 34 gives the tribunal the power to join a party to the proceedings to determine issues for the purposes of "*res judicata*" in any parallel or pending civil proceedings. I also agree with SDP that the language in Rule 34 appears to be wider than in the old rule 10(2) considered in ***Beresford*** and ***Brennan***.

43. To be clear, I do not find that the Tribunal has such power. In my judgment on the preliminary issue (see paragraph 69 – 72 in the OPH Reasons) I decided that it did not. However, I find that the law on this issue is not as clear as to allow me to conclude that if SDP had indeed put his application on the basis of seeking a contribution from MDP it would have been unreasonable for him to do so. In any event, as I said earlier, the legal basis for his application was different.

44. Concerning the issue of full and frank disclosure, I do not accept that the same standard of disclosure as required in *ex parte* applications in the civil courts equally applies to applications for a case management order to an employment tribunal, including under Rule 34. The ET Rules govern employment tribunals' procedure. They do not contain the disclosure requirements of the equivalent standard, as set out in the White Book or in the case law upon which MDP relies (Ghafoor v Cliff [2006] 1 WLR 3020). These authorities concern civil courts procedure. In her application MDP does not refer me to any authority to demonstrate that the same duty applies when making an application to an employment tribunal to join a party under Rule 34. In my view, it would be wrong to apply the same duty in the context of employment tribunal proceedings, which are meant to be less formal and more tailored to accommodate litigants in person and lay representatives.

45. In any event, MDP was put on notice about the SDP application, and her solicitors submitted written representations to the tribunal. She was not invited to attend the PHCM as at that time she was not a party to the proceedings. However, her solicitors in their letter opposing the application did not make any such request, which would have been open to them to do under Rule 29 of the ET Rules.

46. For the same reasons as explained above, I find that it was not unreasonable for SDP to oppose the MDP's application to be removed as a second respondent until the factual dispute was resolved at the OPH. SDP properly conceded that if I found against him on the preliminary issue this would be a material change in the circumstances, and that would allow me to make a new order under Rule 34 to remove MDP as a respondent, and that is how the matter was eventually decided.

47. Furthermore, for the reasons I explained in my judgment on the preliminary issue (see paragraphs 11 – 22 in the OPH Reasons) it would have been wrong in law for me not to deal with the preliminary issue. Accordingly, I cannot see how SDP opposing the MDP's application could be said to be unreasonable conduct until the preliminary issue was determined.

48. I have already dealt with the issue as to whether SDP has acted unreasonably in presenting his factual case as the basis for his application (see paragraph 31- 36 above). While things moved on from when the SDP application had been made in August 2020, and in the correspondence between the parties MDP has clarified how she was advancing her commission claim, in my judgment, it was still not unreasonable for SDP not to concede that MDP was not the HHS' employer at any relevant time and to seek to have that question determined by the tribunal at the OPH.

49. There was still a factual dispute as to the nature of the ongoing relationship between MDP and HHS after March 2019 and how some of the HHS' commission claim related to that. At the OPH, having heard oral evidence from SDP, MDP and HHS and having considered relevant documents in the hearing bundle, I concluded that MDP was not the HHS' employer at any relevant time for the purposes of these proceedings. However, in my

judgment, SDP's case on the facts was not so hopeless as to consider that it was unreasonable for him to run it at the OPH.

50. For these reasons, I find that by joining MDP to the proceedings on the factual basis advanced in his application, and/or by not drawing to EJ Wisby attention ***Beresford*** and ***Brennan*** line of authority, and/or by opposing MDP's application to be removed as a second respondent to these proceedings, SDP did not act unreasonably.

51. It follows, that MDP's and HHS' applications for a costs order against SDP fail and are dismissed.

Employment Judge P Klimov
London Central Region

Dated: 7 June 2021

Sent to the parties on:

07/06/2021.

For the Tribunals Office

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