Neutral Citation Number: [2024] EWHC 870 (KB)

Case No: QB-2020-000427

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 April 2024

Before:
DEXTER DIAS KC
(**sitting as a Deputy High Court Judge**)
- -
Between:

ALEXANDER KUZNETSOV **Claimant**

- and –

(1) **EDWARDS DUTHIE SHAMASH (a firm);**
(2) **EDWARDS DUTHIE SOLICITORS (a firm);**
(3) **OLA McGHEE;** **Defendants**
(4) **OLABUNMI ADESOLA McGHEE**

- -
- -

The claimant in person
Stephen Innes (instructed by **Browne Jacobson LLP**) for the **Defendants**

Hearing dates: 18, 20 March 2024
- -

Approved Judgment

.....

DEXTER DIAS KC

This judgment was handed down remotely at 10.30am on 19 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Dexter Dias KC:

(Sitting as a Deputy High Court Judge)

1. This is the judgment of the court.

2. It follows the listing of this case for trial on 18 March 2024 and then 20 March 2024. The trial did not proceed on either of those dates for reasons that will become clear. The parties have made several applications and the judgment provides the court's ruling on each of them.

3. This is a professional negligence claim. The claimant is Alexander Kuznetsov, who is a litigant in person. There are four named defendants. They are (1) Edwards Duthie Shamash (a firm); (2) Edwards Duthie Solicitors (a firm); (3) Ola McGhee; (4) Olabunmi Adesola McGhee. There is dispute about which or who are the correct defendants. This need not be resolved here, save to say that the first defendant was incorporated after merger in 2019 and defendants three and four are the same person. Ms McGhee's name, however, is Olubunmi and has been misspelled by the claimant. The defendants are represented by Mr Innes of counsel.

4. The applications before the court for determination are:

    1. The claimant's application to adjourn the trial;

    2. The defendants' application to strike out the claim;

    3. The defendants' various costs applications.

5. The judgment is subdivided into three sections accordingly. Given the nature of the applications, it is unnecessary to set out the factual background extensively as the detail of the rival cases about the underlying dispute does not, save in one critical respect, affect the decisions the court must now make.

6. In its barest essentials, Alexander Kuznetsov was employed by the Royal Bank of Scotland ("RBS") in October 2010 and made redundant in October 2011, with a termination date of 31 December 2011. He made various claims against RBS and in March 2012, albeit briefly, instructed the first defendant. The third defendant was a fee earner at the firm. The first defendant therefore provided some initial advice and prepared a draft of the ET1 Claim Form to pursue a claim in the Employment Tribunal. The claimant revised and lodged at the Employment Tribunal himself on 29 March 2012. The ET1 made a claim for unfair dismissal, with ancillary claims for holiday pay, notice pay and a protective award based on a failure of redundancy consultation. The claims were ultimately compromised on terms involving a substantial payment to Mr Kuznetsov, although the details of that settlement agreement remain confidential.

7. There was no claim for automatic unfair dismissal based on what is known as "whistleblowing". The claimant alleged that he was dismissed as a result of protected disclosures he made to RBS about (1) not being paid his bonus and (2) being asked to relocate to its office in Russia. His attempts to pursue this whistleblowing claim were variously dismissed by the courts: by Employment Judge Glennie on 13 February 2015;

on appeal at the Employment Appeal Tribunal on 29 July 2015 by HHJ Eady QC (as she then was); on 31 January 2017 by the Court of Appeal.

8. The claimant alleges that the defendants should have advised him to include the whistleblowing claim in his ET1 claim form against RBS. It is put in his Particulars of claim in this way:

> "34.1 [The Defendants] failed to plead the claim for automatic unfair dismissal in accordance with the Employment Tribunal's rules and practice and/or advice that this has to be pleaded separately from the unfair dismissal "tick box" on the form and/or failed to advise that the claim for unfair dismissal had to be pleaded differently."

9. The legal significance of this additional claim is that a protected disclosure is treated as an automatically unfair dismissal for the purposes of the Employment Rights Act 1996, and the "cap" on compensation otherwise applicable to unfair dismissal claims in the Employment Tribunal does not apply to whistleblowing.

10. The defendants dispute that the claimant gave Ms McGhee instructions about the protected disclosures or instructed them to make such a claim. If Mr Kuznetsov did provide such instructions and the claim was not advanced by the defendants, he alleges that this would be a breach of duty, a vital element in a professional negligence claim.

11. With that outline of the factual background, I turn to the applications before the court.

§I. ADJOURNMENT

12. On 29 February 2024, the King's Bench Listing Office received the following email sent on behalf of the claimant:

> "Dear High Court,
>
> I am a relative of Mr. Alexander Kuznetsov who is a party (claimant) in the proceedings referred above. I was told that a trial is scheduled for the week commencing on 18 March 2024. Due to the medical and health problems sustained by Mr. Kuznetsov, he asked me to contact the Court and inform the Court of the adverse health conditions and seek an adjournment/postponement.
>
> Regretfully, Mr. Kuznetsov sustained a deterioration in the health condition in February, including acute heart pain, due to the triple vessel heart desease. [sic]
>
> This is confirmed by the enclosed medical report/fit note. As stated in the report, the doctor/practice can be contacted at 02074856104 if necessary.

> According to the medical records, examination by Professor Uppal showed triple-vessel disease and is scheduled for a coronary artery bypass graft operation into three or four vessels. Risk factors for ischaemic heart disease include hyperchdlesterolaemia, hypertension and positive family history.
>
> In light of the circumstances, I would like to seek a reasonable adjournment/postponement of the hearing due to the adverse health conditions of Mr. Kuznetsov.
>
> Please find an official medical report attached. Please do not hesitate to contact me if any further information is required.
>
> Sincerely,
>
> Valery Kuznetsov"

13. The authority for Valery Kuznetsov to write on behalf of the claimant is unclear beyond what has been stated in the email. Equally, as noted by the defendants, this was not a formal application to adjourn made by the claimant. Nevertheless, in fairness to Mr Kuznetsov, the court approached the communication as an adjournment application by the claimant or at least on his behalf and was prepared to proceed on the basis that his "relative" was duly authorised.

14. The attached "official medical report" was a one-page proforma doctor's note from Dr Sabri Trepca dated 26 February 2024. The doctor appears to practice from a health clinic in northwest London. The document states that the claimant was examined by the doctor on the same date, but contains no record of how long the examination took, what Mr Kuznetsov was complained of or what was medically found save for an entry that due to the claimant's "triple vessel disease", Mr Kuznetsov was "advised" that he was "not fit for work" from 21 February to 23 March 2024. There were no further relevant details provided. The report does not say, as the email claims, that there was a "deterioration" in the claimant's condition, nor that he is unfit to attend court. Nonetheless, this document is the basis of the claimant's adjournment application.

15. On 14 March 2024, the court received a letter from the defendants' solicitors opposing the adjournment application and another on 15 March 2024. The defendants submitted that the medical evidence filed by the claimant was insufficient. It was not in accordance with the requirements set out in the case *of Levy v Ellis-Carr* [2012] EWHC 63 (Ch) by Norris J. The approach of the courts to what constitutes adequate medical evidence to justify non-attendance was recently considered in *Bruce v Wychavon District Council* [2023] EWCA Civ 1389 ("Bruce"), where Coulson LJ said at [36]:

> "There is a good deal of authority concerned with what may constitute adequate medical evidence, in circumstances where that is proffered as the good reason for the non-attendance. The most useful guidance is set out by Norris J in *Levy v Ellis-Carr* [2012] EWHC 63 (Ch) at [36], where he said:
>
> > "…Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing

> all recent consultations), should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after a proper examination. It is being tendered as expert evidence. The court can then consider what weight to attach to that opinion, and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case)." (My emphasis)
>
> That approach was expressly endorsed at [26] of the judgment of Lewison LJ in the subsequent case of *Forresters Ketley v Brent* [2012] EWCA Civ 324."

16. The Court of Appeal also considered this issue in similar terms in *GMC v Hayat* [2018] EWCA (Civ) 2796 at [48] ("GMC"). It should also be noted that the courts have said that where a party is unrepresented, the court should be "slow" to refuse an adjournment application based on medical grounds.

17. The defendants attached two judgments handed down by Fordham J in which Mr Kuznetsov was the claimant. The judgments are dated 14 and 16 February 2024 ([2024] EWHC 311 (KB); [2024] EWHC 328 (KB)). Mr Kuznetsov appeared before the court in person and conducted the advocacy on both occasions. He had filed a without notice application about disputed property transactions. He first appeared in person in Court 37 on 14 February, when Fordham J was not prepared to hear the case without notice and adjourned until 16 February. When the case returned before him, the judge found that the claimant's presentation of the case had "a number of troubling implications" [9]. In dismissing the claimant's application, the judge said:

> "It transpires that the Claimant had provided the Court only with some of the email traffic, and only with emails which he had sent. [6]
>
> There has been a plain and obvious material non-disclosure [by the claimant] in making a "without notice" application. [15]
>
> I do not need to repeat the observations which I have made about the misleading nature of the materials and the story, presented from the Claimant's perspective, that I was describing in the First Judgment. [17]
>
> The Claimant made a conscious decision, when coming to the Court, about what emails to put before the Court and what emails not to include for the Court. [20]
>
> In my judgment, the withholding of documents and information was serious and significant." [ibid.]

18. Therefore, on 14 and 16 February 2024, Mr Kuznetsov attended the High Court and represented himself and his conduct has been criticised by the court for presenting a "consciously" misleading picture, and on a without notice application where the duty of candour is especially important. The significance of the claimant's advocacy in the middle of February must be connected to an earlier application he made in these proceedings to adjourn a hearing in December 2023. Then he relied on the same kind of sparse medical note as he relies upon for this adjournment application. Notwithstanding the claim at the end of 2023 that he was suffering from heart problems, he was able to attend court twice in the middle of February 2024.

19. It may be suggested that Mr Kuznetsov deteriorated *after* these mid-February hearings. However, the defendants brought to the court's attention that following the medical certificate of 26 February 2024, the claimant had issued yet more, and unconnected, proceedings (BL-2024-000350). The court was able to confirm that Mr Kuznetsov issued proceedings against another legal professional for professional negligence on 7 March 2024. His claim is supported by very detailed particulars of claim extending to 16 pages and 39 paragraphs that appear to have been drafted and signed by Mr Kuznetsov, once more acting in person. The claim form is issued by him and not a legal representative. While the particulars are dated 12 February 2024, they were issued on 7 March. It may be said that the issuing of a claim is not the same appearing in court, but what is clear is that notwithstanding his medical condition, Mr Kuznetsov has been conducting litigation himself 11 days before the trial was due to start and a week after the relied-upon medical certificate.

20. I judge that these matters are relevant to the decision whether to grant the adjournment the claimant seeks here. The appropriateness of undertaking such wider survey was enunciated by the Court of Appeal in GMC, as cited in *Financial Conduct Authority v Avacade Ltd (In Liquidation) (t/a Avacade Investment Options)* [2020] EWHC 26 (Ch) at [62]:

> "GMC v Hayat mentioned above also provides support for the proposition that, in considering the weight to be attached to a particular medical report, the court is entitled, indeed obliged, to look at it in light of the history and the other materials available to it. In that case, Lang J had allowed an appeal from a decision of the Medical Practitioners Tribunal on the basis that the tribunal had failed to adjourn proceedings against the appellant in light of a sick note he produced which advised that he was not fit for work."

21. Therefore, I assess the adjournment application in a wider context, evaluating the "other materials" available to the court. There are several further pertinent factors:

    a. The claimant did not comply with court orders from 2022, while filing a detailed application in support of his appeal against the order of Master McCloud from December 2022;

    b. He did not comply with the court orders in 2023, by failing to file witness evidence, despite his confirmation that he would, and failed to file a schedule of loss and failed to prepare a trial bundle;

c. He failed to respond to the defendants' draft bundle index;

d. He was given the opportunity to provide further medical evidence and did not;

e. He was given the opportunity to respond to the defendants' pre-trial skeleton and did not;

f. He was given the opportunity to respond to the defendants' letters opposing his adjournment application and did not;

g. He failed to appear on the first day of the trial;

h. He failed to appear for the adjourned trial, listed two days later to give him a further opportunity to engage;

i. He sought to rely on a similarly sparse medical note in December 2023, which did not explain why the claimant could not attend the hearing or attend remotely (as recited in the order of Master Gidden);

j. Despite his claim to medical incapacitation in December 2023, on 12 January 2024 he filed a very detailed application to set aside and/or vary the order of Master Giddens (extending to 21 paragraphs over 3 pages), supported by a witness statement dated 28 December 2023, running to 24 paragraphs and 5 pages;

k. In the application notice dated 12 January 2024, he sought to have his application "dealt with … at a hearing" (this being the standard application notice terminology for the box he ticked);

l. His instant claim as it stands is inherently weak and contradicted by contemporaneous evidence, with no evidence to support his claim before the trial court;

m. His disclosed medical note is in many respects not in accordance with the guidance in *Levy v Ellis-Carr*:

   i. It is not a medical report but a GP's unfitness for work certificate;

   ii. It documents very little detail about the claimant's condition, nor explains on what basis the limited details were arrived at beyond the claimant's self-reporting;

   iii. It lacks a reasoned prognosis;

   iv. It does not explain whether, how or why the claimant is unable to attend or conduct his trial, either in court or remotely.

22. While the court recognises the precept that the court should be slow to refuse an adjournment application on medical grounds from a litigant in person, it must view the application in light of all the available material. Having done so, the court has no hesitation in refusing the application for the trial to be taken out of the list. It must retain its listing.

23. The adjournment application is refused.

§II. STRIKE OUT

24. As noted, on the first day listed for trial, Monday 18 March 2024, neither the claimant nor any instructed legal representative attended. The attendance of a legal representative, even in the claimant's absence, may amount to his having "attended" his trial (*Rouse v Freeman, The Times,* 8 January 2002, per Gross J*).* Since neither of those two events occurred, for the purposes of the relevant CPR rules, I find that the claimant failed to attend the trial on 18 March 2024.

25. Despite the court granting him a further opportunity to attend when the case was adjourned to Wednesday 20 March 2024, he failed to attend. He was notified of the opportunity to provide any further medical evidence and to respond to the defendant's skeleton argument by a court order to that effect sealed on Monday 18 March 2024 and sent to him at his correspondence email on 18 March. He did not respond. On 20 March, he did not instruct a legal representative to attend. Therefore, I find that on 20 March 2024, he again failed to attend the trial.

26. On that date, the defendants made an application to strike out the claim under CPR 39.3. This provides:

> "Failure to attend the trial
>
> 39.3
>
> (1) The court may proceed with a trial in the absence of a party but –
>
> (a) if no party attends the trial, it may strike out(GL) the whole of the proceedings;
>
> (b) if the claimant does not attend, it may strike out his claim and any defence to counterclaim; and
>
> (c) if a defendant does not attend, it may strike out his defence or counterclaim (or both).
>
> (2) Where the court strikes out proceedings, or any part of them, under this rule, it may subsequently restore the proceedings, or that part.
>
> (3) Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.
>
> (4) An application under paragraph (2) or paragraph (3) must be supported by evidence.

> (5) Where an application is made under paragraph (2) or (3) by a party who failed to attend the trial, the court may grant the application only if the applicant –
>
> (a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him;
>
> (b) had a good reason for not attending the trial; and
>
> (c) has a reasonable prospect of success at the trial."

27. Since the claimant did not attend the trial, the application was made under CPR 39.3(1)(b).

28. The court had first to consider whether to try the case on the materials before it in the claimant's absence. The defendant submitted that this would a "pointless" and empty exercise. This was principally because the claimant's case suffered from a central defect: despite court orders, he had not filed any witness evidence. It is important to set out the procedural context that led to this situation.

29. On 21 December 2022, Master McCloud ordered as follows:

> "4 Evidence of fact will be dealt with as follows:
>
> 4.1 by 4pm on 3 July 2023 all parties must serve on each other copies of the signed statements of themselves and of all witnesses on whom they intend to rely and all notices relating to evidence;
>
> 4.2 oral evidence will not be permitted at trial from a witness whose statement has not been served in accordance with this order or has been served late, except with permission from the Court."

30. While the defendants served the witness statement of Ms McGhee, the claimant failed to file any witness evidence. Therefore, to file witness evidence now and/or to give evidence himself, he would be required at this very late stage to seek relief from sanctions under CPR 3.9 (*Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ 506 at [25]; *Denton & Ors. v White & Ors.* [2014] EWCA Civ 906). For approximately seven months, from April to December 2023, the claimant had maintained what the defendants describe as a "radio silence". This was recorded as a recital to the court order of 19 December 2023 before Master Gidden:

> "AND UPON the Claimant appearing, since 17 April 2023, to have taken no step to comply with the directions contained in the order dated 21 December 2022 or to progress his claim or answer the Defendant's correspondence."

31. Master Gidden made case management directions, ordering:

> "2. The claimant to confirm in writing to the Defendants' representatives by 4pm on 2 January 2024 whether or not he intends to apply to the court for permission to adduce witness evidence."

32. The claimant did notify the defendants' solicitors of an intention to adduce witness evidence. His notification was on 29 December 2023, and the court has been provided with the defendants' record of receipt. However, the claimant then failed to file any witness evidence. This failure is all the more serious given that he drafted a detailed statement dated 28 December 2023 to set aside and/or vary the order of Master Gidden dated 19 December 2023 and filed it with his application notice on 12 January 2024.

33. Despite the failure to file witness evidence, he has not made any application for relief from sanctions. Therefore, there is no witness evidence at trial for him to rely on. This being the case, should the trial proceed in the claimant's absence, it would be in an evidential vacuum from his side of the court. Ms McGhee has filed a statement with an appropriate statement of truth and in conformity with the court's order. Her evidence materially and fundamentally contradicts Mr Kuznetsov's central claim set out in the particulars of claim that he instructed her about the "whistleblowing" claim. Should the court have gone through the process of conducting the trial in the claimant's absence, Ms McGhee, who attended each day of the trial, would have gone into the witness box, been sworn and adopted her witness statement as her evidence in chief. Her evidence contradicting the claimant's allegation is capable of belief on its face, being supported by contemporary attendance notes that she made that contain no mention whatsoever of the whistleblowing claim. Therefore, there would be nothing to contradict Ms McGhee's evidence. The burden of proof is on the claimant, in any event. In the absence of evidence, it is impossible for him to have proved his case to the civil standard. It is for these reasons that the court accepts the defendants' submission that to have conducted the trial in these circumstances would have been a futile exercise. The appropriate procedural step was to consider the merits of the defendants' strike out application.

34. In addition to the failure to file witness evidence in accordance with the 21 December 2022 and 19 December 2023 orders, the claimant failed to file a schedule of loss and although he insisted on preparing the trial bundles, then failed to do so. The bundles before the court were prepared by the defendants. The merits of the claimant's case are weak since there is an evidential void at the heart of it. The court notes that for CPR 3.4 strike out applications, one of the recognised principles is that the court should assume that the facts alleged in the statement of case are true (*Price Meats Limited v Barclays Bank Plc* [2002] 2 All ER (Comm) 346 at 347*; Bridgeman v McAlpine-Brown* (Unreported, 19 January 2000) at [21], an approach endorsed in *Re Regis UK Limited (In Administration)* [2019] EWHC 3073 (Ch) at [22] ("*Regis*") and *Various Claimants v Standard Chartered PLC* [2023] EWHC 2756 (Ch), per Michael Green J ("*Various Claimants*").

35. However, this is a strike out at trial application under CPR 39.3. The court has reached the point where the substance of the admissible evidence must be considered and not just pleadings. There is no evidence from the claimant before the court to either consider or contradict the defendants' ostensibly plausible evidence. The defendants are correct that the case turns on breach of duty, and whether the claimant instructed Ms McGhee to plead a case on automatically unfair dismissal (the whistleblowing claim). The claimant has no admissible evidence before the court either to establish that element of

his claim or to contradict the evidence of Ms McGhee that fundamentally undermines and contradicts his particulars of claim. In an action for professional negligence, breach of duty is an indispensable constituent element and a claim fails without it.

36. I emphasise that this is a CPR 39.3 application. I am mindful of and have considered the authorities about CPR 3.4 strike out applications (*"Regis*"; "*Various Claimants*"). This is not a case engaging "uncertain and developing" areas of law (*Barrett v Enfield London Borough Council* [2001] 2 AC 550 at 557, per Lord Browne-Wilkinson). While it is generally not appropriate for the court to conduct a "mini-trial" to resolve conflicts of evidence (*Swain v Hillman* [2001] 2 All ER 91), here there is no evidence from the claimant. The claim is bound to fail (*Hughes v Colin Richards & Co* [2004] EWCA Civ 266 CA at [22], per Peter Gibson LJ).

37. Therefore, examining the case as a whole, the court rules that the claim must be struck out.

§III. COSTS

38. The defendants make six further applications, focused on costs issues.

39. **First**, that the claimant pay the costs of the action. The general rule is that costs follow the event. The claim has been struck out. Section 51 of the Senior Courts Act 1981 states that costs "shall be in the discretion of the court" and the court retains a wide discretion as to costs (CPR 44.2(1)). There is no reason why the claimant should not pay the defendants' costs. The court exercises it discretion accordingly.

40. **Second**, the defendants seek detailed assessment given the significant costs incurred which amount to around £100,000. It is unarguable but that there must be detailed assessment; it is not possible to assess costs in this substantial case summarily.

41. **Third**, the defendants seek costs on an indemnity basis. The short point is whether the conduct of the claimant is "out of the norm" such that costs should be awarded on the indemnity basis. In *Excelsior Commercial and Industrial Holdings Ltd* [2002] EWCA Civ 879, the Court of Appeal declined to give detailed guidance about the principles to be applied in ordering costs on the indemnity basis because the language of the rules should not be replaced with other phrases. Instead, the matter should be left so far as possible to the discretion of judges at first instance (per Waller LJ, [38]). In *Excelsior*, the Court held that the making of a costs order on the indemnity basis would be appropriate in circumstances where:

> "the conduct of the parties; or
>
> other particular circumstances of the case (or both) took the situation 'out of the norm' in a way which justifies an order for indemnity costs" ([31] per Lord Woolf LCJ and [39] per Waller LJ).

42. In this case, the claimant failed to attend his trial on two occasions, having failed to comply with court orders to file witness evidence and failed to file a schedule of loss

and trial bundles. I judge that this is conduct out of the norm and "something outside the ordinary and reasonable conduct of proceedings" (*Esure Services Ltd v Quarcoo* [2009] EWCA Civ 595). In the *Access to Justice Final Report* (July 1999), it was recommended that failure to comply with directions and orders "should produce orders for indemnity costs" (Ch.7 para.25) (cited in *White Book* 44.3.6). Having regard to all the circumstances of the case, the claimant's conduct justifies an order for costs to be assessed on an indemnity basis, if not agreed.

43. **Fourth**, the defendants applied for the claimant to pay two-thirds of the costs on account, subject to the set offs that follow. I judge that this is reasonable. It is likely that the defendants will comfortably recover this sum, particularly since costs are awarded on an indemnity basis.

44. **Fifth**, the defendants sought set off against the costs payable by the claimant of a sum of £1266 they were ordered to pay by Master McCloud on 21 December 2022. This makes evident sense and is granted.

45. **Sixth**, the defendant submitted that the adjusted sum be payable from 14 days of the date of the court's sealed order. This is also a standard term for time to pay. It is granted.

46. Since Mr Kuznetsov is unrepresented, it is right that the court should reiterate the terms of CPR 39.3: it is open to him to apply to set aside the judgment and ancillary orders. Such application must be made in accordance with CPR 39.3 A party seeking to set aside a regular judgment of the court must satisfy all three requirements of promptness, good reason, and a reasonable prospect of success *(Mabrouk v Murray* [2022] EWCA Civ 960, as endorsed by Coulson LJ in *Bruce* at [34]).