IN THE MANCHESTER COUNTY COURT Claim No. 0MA12678

Manchester Civil Justice Centre
1 Bridge Street West
Manchester

Monday, 7th November 2011

Before:

HIS HONOUR JUDGE STEWART QC

Between:

ANIS VIKA

Claimant/Respondent

-v-

HM REVENUE & CUSTOMS

Defendant/Appellant

Counsel for the Claimant/Respondent: MR. MOORE

Counsel for the Defendant/Appellant: MISS BEATRICE COLLIER

JUDGMENT APPROVED BY THE COURT

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Number of Folios: 59
Number of Words: 4,243

APPROVED JUDGMENT

THE JUDGE:

Introduction

1. This is an appeal by the defendant against the decision of Deputy District Judge Harris who on 28th July 2011 made an order in these terms, "Reserved judgment as attached". I granted permission to appeal on 1st August 2011.

2. The issue in this appeal is whether the claimant should receive a 100 per cent success fee under Civil Procedure Rule 45.24(2)(b) (as Deputy District Judge Harris determined) or whether the claimant should receive a 62.5 per cent success fee under Rule 45.24(2)(c)(ii) as the defendant contends.

Background Facts

3. I shall take these from paragraphs 2 and 3 of the deputy district judge's judgment:

> "2. In 1999 the claimant was employed by the defendant as an administrative assistant and in November 2007 he was requested to clear a backlog of case files. The case files were stored in large boxes and kept in various places around the office and each box contained between 200 to 250 files. It was his responsibility (along with others) to carry the boxes by hand to his work area and, depending on where the boxes were, this could be a distance of up to 30 feet. He then had the responsibility of sorting the files and, due to lack of space, this would sometimes require him to kneel on the floor. Once the files were placed in correct piles they would be bundled up, placed back in a box and the box brought closer to his desk and then worked on, following which the files would be placed in cabinets.
>
> 3. The claimant did not have too many difficulties reaching the top drawer of the filing cabinets, but for the lower ones he had to bend to look into and for the bottom ones he had to kneel on the floor to access them. The claimant was expected to sort and file large volumes of files (he was doing two to three boxes a day) which meant that he was lifting and bending for long periods. The claimant felt he was under pressure to carry out this work as there was a deadline and, shortly after commencing the work, he started to experience back pain, which included acute lower back pain with sciatica which culminated in a discectomy operation. The claimant contended his condition was caused by the negligence of the defendants and/or their servants and/or their agents. It was concluded that the claimant had a pre-existing back condition and that his back was vulnerable and susceptible prior to his carrying out the activities described, that he would be likely to aggravate his back condition and that his symptoms should settle within six months. Following a Part 36 offer the appellant accepted the sum of £4,000 in April 2010."

Relevant Rules

4. "V Fixed Recoverable Success Fees in Employer's Liability Disease Claims

Scope and Interpretation

45.23

(1) Subject to paragraph (2) this section applies where –

(a) the dispute is between an employee… and his employer…; and

(b) the dispute relates to a disease with which the employee is diagnosed that is alleged to have been contracted as a consequence of the employer's alleged breach of statutory or common law duties of care in the course of the employee's employment; and

(c) the claimant has entered into a funding arrangement of a type specified in rule 43.2(1)(k)(i).

…

(3) For the purposes of this section –

…

(c) 'Type A claim' means a claim relating to a disease or physical injury alleged to have been caused by exposure to asbestos;

(d) 'Type B claim' means a claim relating to –

(i) a psychiatric injury alleged to have been caused by work-related psychological stress;

(ii) a work-related upper limb disorder which is alleged to have been caused by physical stress or strain, excluding hand/arm vibration injuries; and

(e) 'Type C claim' means a claim relating to a disease not falling within either type A or type B.

(The Table annexed to the Costs Practice Direction contains a non-exclusive list of diseases within Type A and Type B).

Percentage increase of solicitors' fees

45.25

(1) In the cases to which this section applies, subject to rule 45.26, the percentage increase which is to be allowed in relation to solicitors' fees is –

…

(b) where –

(i) the claim concludes before a trial has commenced; or

…

(2) Where rule 45.24(1)(b) applies, the percentage increase which is to be allowed in relation to solicitors' fees is –

…

(b) in type B claims, 100%; and

(c) in type C claims –

(i) 70% if a membership organisation has undertaken to meet the claimant's liabilities for legal costs in accordance with section 30 of the Access to Justice Act 1999; and

(ii) 62.5% in any other case.

Practice Direction 45PD 10 provides:

SECTION 25B FIXED RECOVERABLE SUCCESS FEES IN EMPLOYER'S LIABILITY DISEASE CLAIMS

25B.1

The following table is a non-exclusive list of the conditions that will fall within type A and type B claims for the purposes of Rule 45.23;

Claim Type	Description
A	Absestosis Mesothelioma Bilateral Pleural Thickening Pleural Plaques
B	Repetitive Strain Injury/WRULD Carpal Tunnel Syndrome caused by repetitive strain injury Occupational Stress."

The Decision of Deputy District Judge Harris

5. The key paragraphs of Deputy District Judge Harris' judgment are these:

"16. …they show very clearly that the injury in this case was an injury to the lower back and to the claimant's leg. The injury is the most unpleasant injury of a sciatic condition. Mr Corness is correct in his submission that it is appropriate for me to give words their proper dictionary interpretation. I do not find it is in any way possible to conclude that such an injury could be described as an 'upper limb disorder'. Some guidance is also given by the Judicial Studies Board booklet where there is a complete section under 'Orthopaedic Injuries (section K)' relating to work-related upper limb disorders. Such injuries include tenosynovitis, carpal tunnel syndrome and eipicondylitis, i.e. golfer's elbow or tennis elbow. Such injuries are in a completely different area of the body to those relating to the lower back.

17. However, that is not the end of the argument. I have given careful consideration to the issues raised in the judgment of District Judge Bedford which, whilst I acknowledge is not binding, is the only authority relating to issues of this nature that I have been referred to and of which I am aware. It is important to analyse the logic of that judgment for much of it is of relevance

herein, and it is interesting indeed to note that the claimant's solicitors are in that case the same as in this case, as is the instructed consultant orthopaedic surgeon.

18. The approach adopted by District Judge Bedford commends itself to me. In *Law –v- Beatty* the injury was to the claimant's spine. In this case it is to his lower back. In neither case, using a straightforward dictionary definition, could it be considered that the site of injury is one that could be described as an upper limb disorder. Neither a spine nor the lower back is an upper limb. I accept that the condition concerned is work-related.

19. It is appropriate to ensure that the substantive wording of the CPR is looked at in conjunction with the Practice Direction. The Practice Direction makes it clear, firstly, that the list of conditions is non-exclusive, and, secondly, that repetitive strain injury/work-related upper limb disorder constitutes a condition which will fall within type A or, as in this case, type B claim for the purpose of rule 45.23. In order to succeed the claimant must consequently show that this is not a one-off injury, it is the result of an ongoing course of conduct on the part of the paying party. In this case I am satisfied that the claimant was exposed to a work regime which he implemented day in and day out and that this caused a worsening of his condition which ultimately led to his being compensated. In such circumstances it is not a one-off specific injury but is the result of an ongoing system of work, lifting and carrying carried out by the claimant. Using the dictionary definition I am satisfied that the claimant suffers from a strain injury and this is repetitive, and that consequently such injury brings itself under the list of conditions that fall within type B as set out in CPR PD 25B.1. In such circumstances (and for very similar reasons, therefore, to those reached by District Judge Bedford in *Law –v- Beatty*) I am satisfied that the claimant's injury falls to be dealt with as a type B claim as described in CPR 45.23 and consequently the correct level of success fee is 100 per cent.

20. It is appropriate to point out that there is a very considerable lack of clarity to be found within the CPR on this point and it is very much left to judicial discretion. This seems to be an area where an amendment to the Rules would be appropriate so as to provide some certainty, and certainly I acknowledge that the booklet as provided by the claimant's solicitors could be construed as not reflecting the decision in this judgment."

Argument and Analysis

6. In paragraph 16 the district judge said, and I agree with him:

> "I do not find it in any way possible to conclude that such an injury could be described as an 'upper limb disorder'."

7. In paragraph 20 the district judge said that there is a lack of clarity within the CPR on this point "…and it is left very much to judicial discretion". I disagree with the word "discretion" but if he in fact meant "interpretation" then I agree.

8. I also accept the submission that this was a repetitive strain injury in the normal sense of those words. However, on a proper construction of rule 45.23(3)(d)(ii) this is not a work-related upper limb disorder. Therefore, the Practice Direction which gives a "non-exclusive list of the conditions that will fall within type A and type B claims for the purposes of rule 45.23" can only, as it states, be listing conditions that do in fact fall within type A and type B for the purposes of the rule. The approach to the interpretation of the rules is clear. I can take it from the Court of Appeal case in *Kilby –v- Gawith [2008] EWCA Civ 812, [2009] 1 WLR 853* in which at paragraph 17 Mr Morgan QC, who was counsel for the appellants, accepted that:

> "The construction preferred in the courts below was permissible as a matter of language but he submitted that the defendant's construction is also permissible as a matter of language and is to be preferred if the rules are given a purposive construction, as principle requires should be done."

At the end of paragraph 17 the then Master of the Rolls said:

> "I entirely accept that it is appropriate to adopt that approach here and I will return to the purpose of section II of Part 45 in a moment."

Then in paragraph 18 of the judgment the learned Master of the Rolls said this:

> "The answer to the question in this appeal is essentially one of construction of CPR Part 45. Like any provision of the CPR, the relevant rules in Part 45 must be construed by reference to their ordinary meaning when viewed in their context."

Nevertheless one has to construe the rules and, in my judgment, the Practice Direction, however purposive an approach to construction one takes, cannot list conditions that do not fall within type A and type B claims for the purposes of rule 45.23. If this is correct, then, in my judgment, the appeal must also succeed. The words "repetitive strain injury" in the Practice Direction cannot extend the meaning of the rule.

9. What are the arguments against such a finding? They are based in part on authority and in part on arguments as to construction of the rule and what is the proper purposive construction in the context.

10. The first argument is this, and I take this from the claimant's skeleton at paragraph 23:

> "It is submitted that there is no good reason to have a distinction between injuries caused to the back or lower limbs by repetitive stress or strain as compared to upper limbs or neck in respect of the characterisation of the type of claim within section V of part 45. The purpose of the different types of case within section V is to differentiate the levels of success fees according to the likely risk. A strain injury caused by repetitive activity gives rise to the same risks of failure for the claimant's solicitors whether the strain injury is to an upper limb, lower limb, neck or back. Such claims are very often contested on liability and causation."

This may be correct. Whether this was considered by the rule committee at the time of the introduction of the rule and the Practice Direction I do not know. The rules were

apparently introduced in 2005 following a report of the Civil Justice Council. I do not have a copy of the report. Counsel have only been able to find a Press release dated 1st July 2005 from which I will make brief citations:

> "The Civil Justice Council has announced that agreement has been reached on fixed recoverable success fees for employer's liability (disease). The final mediation meeting on 25th April 2005 culminated in agreement principle after a year of work on this difficult issue. The detail of that agreement has since been refined and approved by the Civil Procedure Rule Committee and will be implemented in October 2005."

Then there are some notes for editors and I shall cite this:

> "The key provisions of the agreement on recoverable success fees in employer's liability disease claims are set out below;
>
> …
>
> 2. 62.5 per cent success fees in claims arising from deafness, VWF and other diseases except RSI and stress claims (70 per cent for section 30 claims).
>
> 3. 100 per cent success fee in claims arising from stress and RSI."

Clearly, on this document RSI and stress claims were all 100 per cent. This is in keeping with the claimant's submission. However, the rule introduces the concept of work-related upper limb disorder and I have to interpret the rule. If the rule were properly capable of applying to all RSI cases then this document and the Practice Direction would require that interpretation. However, in my judgment, it is not. The term "work-related upper limb disorder" is unambiguous.

11. The next argument is that there is no reference in the definition of type C claims to physical injury or physical stress or strain. With reference to the rules and the Practice Direction it follows that diseases within type C include hand/arm vibration injuries, deafness claims and occupational asthma claims. This claim fits within the claims contemplated by type B rather than type C. It was a claim in respect of a work-related injury caused by repetitive physical stress or strain. In my judgment this argument is based on a mistaken premise. It is correct that type A claims (perhaps unhelpfully) mean a claim relating to a disease or physical injury alleged to have been caused by exposure to asbestos. However, to fall within section V at all the dispute has to relate to a "disease" (45.23(1)(b)). Therefore, the fact that a type C claim means "a claim relating to a disease not falling within either type A or type B" cannot assist in this construction issue and negates the claimant's argument on this point (that "disease" has a broad meaning in the context of this rule – see the decision of Master Howarth in *Norris* – see below).

12. Deputy District Judge Harris relied on the decision of District Judge Bedford in *Law –v- Balfour Beatty, Leeds County Court, 16th November 2009*. I shall cite certain brief passages from that judgment:

> "2. The receiving party's position is that the claimant worked carrying out various road repairs in and around North Yorkshire, that over a period of time

A

he used a whacker plate (a large awkwardly shaped plate 60 kilos in weight) and that he sustained injury resulting from the repetitive effect of this excessive heavy lifting work and that this aggravated difficulties within his spine which were degenerative which had already had an asymptomatic degenerative condition, but that the matter was worsened considerably and that it was as a result of that proceedings were ultimately issued and settled by the paying party.

B

…

4. I am satisfied that this was not a one-off incident and that the resulting condition falls within the definition of 'disease' as contemplated in the provisions of CPR 45.23.

C

…

6. I then turn to whether the condition suffered by this particular individual comes within the list which sets out the diseases included in type A and type B for the purposes of 45.23. I say, first of all, that this is a non-exclusive list. I see that in claim B there is "repetitive strain injury/WRULD". It is urged on behalf of the paying party that repetitive strain injury in this context means work-related upper limb disorder and that the two terms are interchangeable. The receiving party argues that they are not interchangeable and that if there has been repetitive strain injury that constitutes a disease within 25 and that, even if it does not, then I am reminded that the list is non-exclusive.

D

E

…

8. So when I consider the facts of this case I bear in mind that I have an employee who works over a considerable period and who has a medical condition which is significantly exacerbated by the actions of the employer. That is different to an employer(?) who suffers a one-off injury as a result of some problem in the workplace. I am satisfied in all of those circumstances that when I consider the facts of the case before me in the light of the overriding objective that the skeleton argument submitted on behalf of the receiving party is sound and should be followed."

F

I am afraid that in so far as District Judge Bedford found that this type of back injury was type B I disagree with the decision of District Judge Bedford for the reasons I have already given.

G

13. The claimant also relies on a decision of Master Howarth in *Norris –v- HM Revenue & Customs [2010] EWHC 90178 (Costs).* In *Norris* the claimant suffered an exacerbation of symptoms of rheumatoid arthritis and cervical spondylosis as a result of her work. The injuries in this case were to the neck, left wrist and right elbow (paragraph 14). This decision did not have to deal with symptoms which could not properly be described as work-related upper limb disorder symptoms.

H

14. However, in *Fountain –v- Volkerrail Limited, 11th April 2011 (Unreported)* Master Howarth held that lower back symptoms caused by repetitive lifting fell within a type B claim. He said in paragraph 9:

> "Here the position, it seems to me, is similar. In effect over a period of time, rather than an individual incident, there has been damage to Mr Fountain's back… I conclude from the particulars of claim and medical evidence that these injuries were not caused by a single event or two single events as such. The injuries to the claimant were sustained over a period of time as pleaded in the particulars of claim; firstly, a period of five days before the initial injury, and, secondly, a period of some four months in relation to the second index injury as such referred to by Mr Osborne. In other words they seem to fit, in my judgment, within the definition of 'disease' for the purpose of the protocol. Following my decision in the case of *Norris –v- HM Revenue & Customs* it follows that if, as I do find, that this is a work-related disorder then in those circumstances it is in effect a claim for repetitive strain injury. Consequently the success fee falls within the relevant provisions of rule 45.23(3)(d)(ii) and as such it is properly claimed at 100 per cent. So I am satisfied that on the facts of this case, which fall fairly and squarely within the disease category, that the 100 per cent success fee is the appropriate success fee."

It is not clear what the reasoning was or whether he was focusing on the problem with which I have to grapple. However, I have to say that I disagree with the conclusion.

15. Both parties rely on Court of Appeal authority in relation to the status of Practice Directions. It is sufficient if I cite from the decision in *Leigh –v- Michelin Tyre plc [2003] EWCA Civ 1766*. Lord Justice Dyson (as he then was) giving the judgment of the court said this:

> "19. The provisions about the purpose of costs estimates and their relevance in relation to the assessment of costs appear in Practice Directions, and not in the rules themselves. This seems to have influenced the judge in his interpretation of CPR 43 PD para 6.6. He referred to passages in the judgments of this court in *Re C (Legal Aid: Preparation of Bill of Costs) [2001] 1 FLR 602*, and *Godwin –**v**- Swindon Borough Council [2002 1 WLR 997*. In the former, Hale LJ said at para 21:
>
> > '(21). Unlike the Lord Chancellor's orders under his 'Henry VIII' powers, the Civil Procedure Rules 1998 themselves and the 1991 Remuneration Regulations, the Practice Directions are not made by Statutory Instrument. They are not laid before Parliament or subject to either the negative or positive resolution procedures in Parliament. They go through no democratic process at all, although, if approved by the Lord Chancellor, he will bear ministerial responsibility for them to Parliament, but there is a difference in principle between delegated legislation which may be scrutinised by Parliament and ministerial executive action. There is no ministerial responsibility for Practice Directions made for the Supreme Court by the Heads of Division. As Professor Jolowicz says, loc cit, page 61:
> >
> > > 'It is right that the court should retain its power to regulate its own procedure within the limits set by statutory rules, and to fill in gaps left by those rules; it is wrong that it should have power actually to legislate'.'

20. In the latter, May LJ said at para 11:

> 'Practice Directions are not the responsibility of the Civil Procedure Rule Committee, whose responsibility under section 2 of the Civil Procedure Act 1997 is limited to making Civil Procedure Rules. Practice Directions are subordinate to the rules: see paragraph 6 of Schedule 1 to the 1997 Act. They are, in my view, at best a weak aid to the interpretation of the rules themselves.'

21. It is true that the ground rules which set out the relevant criteria for the assessment of costs are contained in the rules, not the Practice Directions, but the rules are, to some extent, open-textured. In particular, CPR Rule 44.5(1) provides that the court is to have regard to 'all the circumstances' in deciding whether the costs were proportionately and reasonably incurred, or were proportionate and reasonable in amount. Without prejudice to that general injunction, the court must also have regard to the various factors mentioned in CPR Rule 44.5(3), of which the first is the conduct of the parties. In our judgment, the provisions in the Practice Direction as to the giving of estimates of costs at various stages of the litigation are made pursuant to the power in the court to regulate its own procedure within the limits set by the statutory rules and to fill in gaps left by those rules. CPR 43 PD para 6.6 does not purport to, nor does it, introduce criteria for the assessment of costs which are inconsistent with or additional to those contained in CPR Rule 44.5 itself…"

I do not accept that in the present context the rule in issue is open-textured such that the Practice Direction can, as the claimant would submit, "fill in any gaps" left by the rule. The words "repetitive strain injury" cannot extend the meaning of the rule. To use the language of Dyson LJ in paragraph 21 the Practice Direction has to be "within the limits set by the statutory rules". To construe the present claim as type B would be "inconsistent with or additional to those contained in" Rule 45.23. I rely on the words of Lord Justice May in *Godwin*:

> "Practice Directions are subordinate to the rules… They are… at best a weak aid to the interpretation of the rules themselves."

Summary

16. In conclusion I allow this appeal and find that this was a type C not a type B case.

(End of Judgment)

(Discussions/proceedings after judgment follow)
