IN THE FIRST TIER TRIBINAL

HEALTH EDUCATION AND SOCIAL CARE

PRIMARY HEALTH LISTS

DR IAN BRUNT

-V-

DURHAM PRIMARY CARE TRUST

COSTS APPEAL

John Burrow –Judge

Dr Iftikhar Lone – Professional member

Ms Sheila Brougham – Lay member.

1. The hearing in this matter took place on 1 August 2012 at Mowden Hall, Staindrop Road, Darlington. Dr Brunt was represented by Simon Cridland of counsel and Heather Caddy of Hill Dickinson solicitors. The PCT were represented by Katie Scott of Counsel and Phillipa Doyle of Hempsons solicitors.
2. On 11 February 2011 the PCT removed Dr Brunt from their performers' list. He appealed against the decision on 10 March 2011, that appeal being compromised by an undertaking by Dr Brunt to comply with voluntary conditions. The opposition to

the appeal was then withdrawn by the PCT. Dr Brunt subsequently applied for costs under rule 10(1)(b) of the 2008 Rules and on 30 January 2012 Judge Crisp awarded him his full costs against the PCT.

3. On 24 February 2012 the PCT appealed the decision of Judge Crisp, and Judge Hillier set that decision aside on 30 April 2012. The issue of costs was reheard on 1 August 2012 to determine Dr Brunt's original application for costs, which was for the full period March to end September 2011. As a result of that hearing a decision was issued on 17.8.12 in which Dr Brunt was awarded a proportion of his costs for the period 3 – 28 September 2011 which was a part only of the costs claimed.

Submissions

4. We have considered rule 23 and note both parties have agreed to have this matter decided on the papers and both parties have made paper submissions. We have concluded on the information which is available to us from these submissions we are able to decide the matter without a hearing.
5. Counsel for Dr Brunt made submissions dated 19 September 2012. In those submissions he stated that because he had recovered some of his costs as a result of the hearing of 1st August 2012 he should be entitled to some of his costs of that hearing. He refers to a letter to the Respondent about compromise of costs dated 21 October 2011 in which a figure of £35,000 was proposed, in full and final settlement of the matter. The offer was not accepted by the Respondents. He now accepts the costs of the 3 – 28 September are unlikely to exceed or to approach that figure. Nevertheless he submits that the offer shows Dr Brunt was acting reasonably and that the Respondents "failed to countenance compromise of the application for costs". It is submitted that the failure to countenance compromise in circumstances where an award was likely to be made constitutes unreasonable conduct within the meaning of rule 10(1) (b) of the 2008 Rules. In the letter of the 21 October 2011 the solicitors for Dr Brunt point out that the offer of £35,000 was made pursuant to part 47.19 of the Civil Procedure Rules and would remain open for 21 days.
6. Counsel for the PCT made submissions dated 20.9. 12, by a letter dated 21.9.12 saying that the tribunal can only make an order for costs if it considers the party or representative has acted unreasonably in bringing, defending or conducting the proceedings. They refer to the *Ridehalgh* case which determined that "unreasonable" means vexatious or designed to harass the other side rather than advance the resolution of the case. Further they quote the case as deciding that conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result. Thus they say there is no presumption that costs follow the event or that a party should be awarded costs because a hearing has been required to vindicate an entitlement to costs.
7. They submit that the proposition that the respondent's failure to countenance a compromise is unreasonable is flawed because
   a. The Appellants claim was for all costs for March 2011 to the end of September 2011 and they were successful only for a proportion of these costs.
   b. The compromise settlement figure of £35000 far exceeds the sum they will be awarded as a result of the tribunal decision dated 17 August 2012.
   c. It was therefore reasonable for the Appellant to reject the offer of settlement and resist the application for costs at the hearing of 1 August 2012. Had the Respondent not rejected this offer they would be facing a far higher costs bill than it currently is.

8. Subsequent correspondence indicates the parties have not yet determined the precise settlement figure. The Appellant in their submissions dated 19 September 2012 accepts the costs of the 3rd to the 28th September 2012 "are unlikely to exceed the £35,000 offered or indeed to approach that figure". The Respondent in their submissions dated 20.9.12 state £35000 "far exceeds" the sum which the Appellant will obtain as a result of the decision of the Tribunal dated 17 August 2012.

Determination

9. Rule 10(1)(b) of the 2008 Tribunal Procedure (FTT) (HESC) Rules provides the Tribunal may make a costs order only … (b)"*if the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting proceedings"*.
10. "Unreasonable" was defined by the Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 2005 as follows:

"Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgement, but it is not unreasonable."

11. We considered whether it was reasonable for the Appellant to challenge Dr Brunt's application for costs for the full period March to September 2011. In our view it was because as a result of the challenge and the correct application of the relevant legal principles the Appellant now has to pay a lesser proportion of those costs. It permits of a reasonable explanation namely had they not challenged the application for costs for the whole period they would now be liable, wrongly, to pay a greater sum.
12. We considered whether it was reasonable to reject the compromise offer of £35,000. Although the parties have not as yet finally determined the precise amount to be paid as a result of the order dated 17 August 2012 both agree the figure will be significantly less than the £35000 offered as a settlement figure by the Appellants. For this reason in our view it was reasonable for them to reject the settlement figure and proceed to a hearing where the correct amount could be determined. It was not vexatious or designed to harass but permits of a reasonable explanation namely that the respondents sought to pay only the correct amount of costs which was significantly less that £35,000.
13. The Appellants assert that the Respondents "failed to countenance costs compromise." If by this remark the Appellants are asserting the Respondents should have sought to negotiate some lower figure, and a failure to do so was unreasonable we take into account that the Appellants did not suggest then and do not suggest now that they would have accepted at that time any lower figure, much less one that did not even approach £35,000 or one which was such that £35,000 far exceeded it. The offer was made pursuant to rule 47.19 and was available for 21 days only. In the circumstances of a quite complex claim we do not think it unreasonable that the

Respondents sought a ruling by the tribunal to determine their true costs liability. Their refusal to seek some alternative compromise at that stage was not vexatious or designed to harass but did permit of a reasonable explanation, namely that they wished the appropriate figure to be determined by the tribunal.

14. Accordingly no order for costs is made.

Judge John Burrow

8.10.12