CASE NUMBER: 2300819/2019

IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL
BETWEEN

DR CHRIS DAY

CLAIMANT

-and-

LEWISHAM AND GREENWICH NHS TRUST

FIRST RESPONDENT

HEALTH EDUCATION ENGLAND

SECOND RESPONDENT

Application For Witness Orders for Relevant Lawyers

Introduction

1. The Claimant applies to the Regional Employment Judge for Witness Orders for the relevant legal professionals that were instructed at the final hearing of the Claimant's whistleblowing case in October 2018 (see Grounds of Claim). The Claimant accepts that the application is unique and may even be unprecedented but that does not make it unnecessary. The relevant lawyers are as follows;

    a) Mr Tim Johnson (Claimant's former solicitor)
    b) Mr Christopher Milsom (Claimant's former Counsel)
    c) Ms Rachel Spink (Hill Dickinson Solicitor with conduct of the case for Second Respondent in 2018 no longer working at the firm)
    d) Mr Philip Farrar (Hill Dickinson Head of NHS Employment instructed on this case and wasted cost application from 2019-2020 now no longer instructed or working at the firm)
    e) Mr Angus Moon QC (Second Respondent's former Counsel now Hill Dickinson's Counsel for Wasted Costs application)
    f) Ms Rachel Luddem (Capsticks Solicitor with conduct of the case for First Respondent)
    g) Mr Martin Hamilton (Capsticks Managing Partner and key Capsticks contact for First Respondent's Board)
    h) Mr Ben Cooper QC (First Respondent's former Counsel)
    i) Ms Nadia Montraghi (First Respondent's former Counsel also used by British Medical Association to discipline a Professor on BMA Counsel raising concerns about the Claimant's case months before October 2018 hearing (see wasted cost application and bundle)

2. The application is required due to irreconcilable accounts from the various registered legal professionals of Without Prejudice Discussion that led to the settlement of the Claimant's whistleblowing case. These accounts have been given to the Claimant and the Respondents' respective Boards of Directors (before and after the settlement was approved). This detailed application attempts to brief the Regional Employment Tribunal, so a fully informed decision can be made as to which of the above proposed orders (if any) are required to enable the Tribunal to deal properly and justly with this case.

3. The Claimant still works as an A&E Locum Doctor and this lengthy application has been drafted by the Claimant around challenging shift work for the purpose of assisting the Tribunal in dealing with a unique and perhaps unprecedented situation. The Claimant respectfully asserts this approach is likely to save the Tribunal's time and resources at the final hearing and ensure it has everything it needs to decide the case.

4. Without Prejudice Privilege has clearly been waived by the Respondents in various press articles, public statements and by the Respondents' counsel when they provided the Claimant with notes and emails of some of the Without Prejudice Discussions. As this Claim is about what each side's lawyers have said to each other and what the Respondents' have stated publicly and to MPs about the case, the Claimant maintains that neither the Claimant or Respondents has to waive Legal Advice Privilege and both sides have redacted disclosure accordingly.

Summary of Evidence

5. The written evidence from both the Claimant's lawyers and Respondents' lawyers shows that clearly stated costs consequences for the Claimant were initially communicated on Friday 5 October 2018 to the Claimant's legal team. This was by the First Respondent's Counsel Mr Cooper to the Claimant's Counsel, Mr Milsom, as part of a drop hands offer. Also communicated to Mr Milsom from both the Respondents' Counsel was permission to share this with the Claimant whilst he was in Purdah. Mr Milsom was expressly prohibited by the Respondents' counsel from discussing any details of the Claimant's case or his evidence when passing on the drop hands offer to the Claimant. The drop hands offer was passed on to the Claimant by Mr Milsom in a telephone conference on Sunday 7 October 2018.

6. Mr Cooper provides clear evidence that this initial drop hands offer was on the basis of the assertion Mr Cooper made (and not the Claimant's legal representatives as claimed in publicity) that he believed the Claimant's evidence was untruthful. However, this condition of the drop hands offer was never communicated to the

Claimant by his legal team either at the time or subsequently and has since been denied by the Claimant's former legal team in writing.

7. In any event the 5 October drop hands offer did not induce settlement. On 7 October 2018, the Claimant, in no uncertain terms, instructed his lawyers to reject the drop hands offer and to proceed as planned with the case. When this attempt at inducing settlement failed, further drop hands offers with cost threats were subsequently made, this time by both Respondents' Counsel and with new and different conditions. The Claimant's former Counsel , Mr Milsom, has provided a written account of further modified cost threats from each Respondents' Counsel which Mr Milsom described as "sophisticated and had a two tier approach" and were "in no way invited by [him]";

    a) *"Rejecting a drop hands offer and losing at trial without any credibility findings would lead to an application in respect of ongoing costs of trial"*
    b) "The above but with adverse credibility findings; the Respondents expressly stated that costs for the entire litigation maybe at large."
    c) "Dr Day would have to return the £55,000 paid at the remitted PH."

8. These and details of wasted cost consequences (described later) were put to the Claimant on Thursday 11 October 2018 which successfully induced the Claimant and his wife to withdraw the whistleblowing case under a settlement agreement.

9. Evidence from the Claimant, his wife and Mr Milsom indicate that on Friday 12 October 2018 the cost consequences described above were then used for an entire working day to attempt to force the Claimant to publicly state that the NHS Respondents had acted in good faith in this case by way of an agreed public statement. It is this that resulted in the wording included in the agreed statement seen in the settlement agreement. This has been published in the national press and permanently on Wikipedia.

10. There is also written evidence from Mr Milsom that the prospect of a legal regulator referral and wasted costs consequences were used against the Claimant's former legal team in respect of the use and alleged late disclosure of covert audio. The nature and effect of the wasted cost threat was not explained to the Claimant and he was led to believe that this was a potential liability for him when agreeing to the settlement. These actions by both Respondents' Counsel in respect of wasted costs and legal regulator referral introduced a clear conflict of interest within the Claimant's legal team which the Claimant was unaware of at the time of settlement. It resulted in a

stated intention and attempt by both Respondents' former Counsel in open Tribunal to seek to cross examine the Claimant's solicitor during the hearing before the Respondents' witnesses would have been called (had the case proceeded). The Claimant only realised after the settlement that this was related to a wasted cost threat against his solicitor payable by them and not him. There is also a documented reference, by Mr Milsom, from the Respondents' Counsel of a referral of the Claimant's lawyers to their legal regulator and the Claimant to the medical regulator.

11. Both NHS Respondents have categorically denied publicly and to the Courts that cost threats were used to induce settlement of the Claimant's whistleblowing case, the wording of an agreed public statement or that they were made at all. The First Respondent and the Managing Partner of Capsticks, Martin Hamilton, has formally denied that ordinary costs, reference to wasted costs, legal regulator referral were used against the Claimant and his former legal team. For some reason, this denial was repeated in a letter exchange with the First Respondent's Board days before Christmas in 2018. It should be noted that Mr Hamilton was copied into an email dated 5 October 2018 from Ben Cooper QC confirming to Mr Hamilton the initial drop hands offer Mr Cooper had proposed to the Claimant's counsel Mr Milsom on 5 October 2018 (rejected by the Claimant).

> "*I indicated.. There is now clearly a real risk that he (Dr Day) will not only lose his claim but may have findings that he has been untruthful in his evidence; If he were to withdraw at this stage we would not pursue him for costs but that if he ploughed on and that was the outcome, we would make a cost application"*

12. The First Respondent has stated the following publicly and to the press on the issues of costs;

> "On the issue of costs, we had decided not to pursue Dr Day for legal fees before he withdrew his case"
>
> "he claims that the Trust threatened him with the prospect of paying our legal costs. All of this is simply untrue.."

13. It seems clear to the Claimant, that Capsticks Solicitors and the senior NHS managers instructing the firm misled the Lewisham and Greenwich (First Respondent) Board at the time the Board approved the settlement agreement (referred to in open tribunal on the 12 and 15 October 2018). The Board's briefing document dated 30 October

2018 (not disclosed in December application to set aside the settlement) repeats the below position in the First Respondent's public statements;

> "On the issue of costs, we had decided not to pursue Dr Day for legal fees before he withdrew his case"

14. It is also probable from the evidence that by late December 2018 the Board of Lewisham and Greenwich started to doubt the truth of what they had been told which is the most likely reason for the Managing Partner of Capsticks, Martin Hamilton, 3 days before Christmas in 2018, sending 2 letters to the First Respondent's Board denying that cost threats were used in the case and then a subsequent letter denying that wasted costs, legal regulator referral and medical regulator referral were used against the Claimant and his lawyers.

15. In contrast to the First Respondent, the Board of the Second Respondent seem to have had more insight into the situation and appear to mock the First Respondent's approach. This occurred in an internal email copied to the Second Respondent's CEO and their law firm, Hill Dickinson's Head of NHS Employment, Philip Farrar;

> "*HEE keeping to the consistent and clear line that we did not threaten costs is aided by the Trust's current, slightly weasel-worded line, and any subsequent changes they make. The more they twist, the clearer and more trustworthy our position is."*

16. The discrepancy between what the various registered legal professionals have claimed in written documents about the settlement of this important NHS whistleblowing case is unacceptable. This discrepancy is obvious and has been reported in the national press and discussed in the House of Commons yet the employment tribunal has not engaged in a proper fact finding exercise to get to the bottom of it. This is despite an application to set aside the settlement agreement.

17. This has sent a damaging message to other NHS staff of their chances of justice in an employment tribunal when against powerful and well connected NHS panel law firms and QCs. This is reflected by the fact post settlement, over 3,000 people have donated over £100k to the Claimant's crowdfund to the have these issues dealt with properly. This has nearly all been consumed in the appeal courts with no proper first instance fact finding to base any decisions on. The Claimant continues to work as a Locum A&E Doctor (with no security or career path) and his wife as a staff nurse, now with all the challenges of a global pandemic. Both feel utterly let down by the way this case has been handled and feel the interests of powerful and influential lawyers have been preferred over justice.

18. The Claimant respectfully submits that the only way for the Tribunal to determine the Claimant's claim in respect of whether the Respondents have knowingly misled the public, the press and MPs on the Claimant's case and settlement (see Ground of Claim) is to follow this process;

a) to make findings as to what was actually said during the Without Prejudice Discussions between counsel about costs in respect of proceeding with the case and the wording of the agreed statement (including ordinary costs, wasted costs against the Claimant's legal team, legal regulator referral, medical regulator referral);

b) to make findings on what Counsel told their instructing solicitor about the above;

c) to make findings on what the Claimant and key people in the Respondents were told about the above from their lawyers (excluding legal advice);

d) to make findings on what certain members of the First Respondent's Board were factually told on Sunday 14 October 2018 when it approved the settlement (excluding legal advice).

19. It is a matter for the Tribunal how many of the requested Orders (if any) that it requires to deal justly with this situation but the Claimant firmly believes that all the requested Orders are required on the basis of what is set out in this application.

20. The Claimant's former Counsel Mr Milsom initially offered to be a witness to confirm what he had been told by the Respondents' Counsel. This then changed to him requiring an Order, to him becoming obstructive, then to him losing and then misrepresenting key without prejudice save for costs material (if Ben Cooper QC's evidence is accepted). Mr Milsom then breached General Data Protection Regulation (see letter to Cloisters Chambers from Rahman Lowe Solicitors also sent to the EAT).

21. Without Prejudice Privilege has clearly been waived. The Claimant requests that any orders make clear that the Claimant's right to legal advice privilege is to be preserved so any claim of negligence the Claimant may have against Mr Milsom is not intentionally infected or prejudiced by the witnesses in this litigation.

22. The Claimant submitted an application for a witness Order for Mr Milsom in December 2018 which was not responded to by the Tribunal. The EAT criticised the

application for being too brief and seemed to assert that as justification for the employment tribunal not responding to it. This application is therefore very detailed so the Tribunal can understand the significance of the evidence sought and be sure of the exact sources.

23. This will now now be set out in considerable detail which will assist the Regional Employment Judge in only making the Orders that are required in his judgment.

Friday 5 October 2018 – Drop Hands Offer with Cost Consequences/Threat

24. By Friday 5 October 2018, the Claimant had completed only two half days of a 6 day cross examination. On Friday 5 October, the Tribunal did not sit due to personal circumstances of one of the Counsel.

25. The Claimant's former Counsel, Mr Milsom has stated that he telephoned the First Respondent's former Counsel Mr Cooper to discuss employment tribunal timetabling and reported to his instructing solicitor by email dated 5 October 2018 that during the conversation,

> *"acting without formal instructions Ben Cooper has broached the prospect of a drop hands offer with corollary that if we proceed to a negative judgment they will seek to recover costs".*

26. On the same day, Mr Milsom had a similar telephone conversation with the Second Respondent's Counsel Angus Moon QC. During this conversation HEE's did not formally adopt the drops hands offer offered by Ben Cooper QC on behalf of the First Respondent but did mentioned a desire to recover the £55k awarded to the Claimant in May 2018 in respect of the worker/employer point (now subject to legal regulator investigation and wasted cost application). It is unclear from the evidence whether Mr Moon and Mr Cooper had communicated between themselves prior to or after the call.

27. Mr Milsom communicated to the Claimant the formal drop hands offer from the First Respondent following permission being granted for this from both Respondents' Counsel. This occurred during a conference on Sunday 7 October 2018, whilst the Claimant was in Purdah. The Claimant described this in his December 2018 witness statement for the application to set aside the settlement agreement;

""The stated purpose of the contact was to inform me of a drop hands offer that had been made by Mr Cooper on behalf of Lewisham and Greenwich NHS Trust. The offer was that if I withdrew all my claims the Trust would not pursue me for costs, I was then informed that it was Trust's position that if I failed to accept the offer, proceeded to cross examine any of the Trust's witnesses and ended up losing the case that the Trust would seek to recover its costs for the hearing…
I was also told that there was no formal offer from HEE at that point but that they were talking about seeking to recover the £55k in costs awarded to me at the May hearing."

28. The Claimant rejected the drop hands offer from the First Respondent in no uncertain terms and instructed his lawyers to proceed with the case as planned. The Claimant continued his 3 further days of evidence.

29. The First Respondent has described this telephone interaction between Mr Milsom and Mr Cooper in multiple press/public statement as an approach by the Claimant to initiate settlement discussions through his legal representatives (both barrister and solicitor). The Respondents have done this knowing that firstly, neither the Claimant or the instructing solicitor had any knowledge of the interaction between Mr Cooper and Mr Milsom until after it had happened and secondly knowing that the Claimant explicitly rejected the First Respondent's drops hands offer when it was communicated to him on Sunday 7 October 2018.

30. Whatever the substance of the conversation between Mr Cooper and Mr Milsom, which is disputed between Mr Milsom and Mr Cooper, it is wholly untrue to characterise in public statements as firstly an approach from the Claimant to settle and secondly an approach by both the Claimant's legal representatives (solicitor and barrister) when the solicitor and Claimant didn't known about it at the time and did not instruct it.

31. A letter dated 14 January 2019 from the Claimant's former firm of solicitors to the First Respondent's solicitors states, "As your firm is aware Tim Johnson/Law made no approach to your firm, your client or counsel to ask for settlement discussions in Dr Day's case.

32. The initial narrative of the Respondents' public statements in 2018 also included categorial denials that any cost threats/consequences were used in the case;

a) “On the issue of costs, we had decided not to pursue Dr Day for legal fees before he withdrew his case”

b) “he claims that the Trust threatened him with the prospect of paying our legal costs. All of this is simply untrue..”

33. In a public statement released on 10 January 2019, the First Respondent materially changed their narrative about the case and settlement set out in their 2018 press public statements (as pleaded as detriments in the Claimant’s Grounds of Claim). The First Respondent attempts to disguise the fact they are changing their position on costs with a further distortion of the Friday 5 October 2018 phone call between Mr Milsom and Mr Cooper;

> ““Dr Day’s legal representatives indicated that it would be helpful to them for the Trust: To state what our position would be on costs if the tribunal were to dismiss Dr Day’s claims and make findings that he had not been truthful in his evidence...The Trust's legal representatives confirmed that if the tribunal were to dismiss Dr Day's claims and make findings that his evidence was untruthful, then there would be an issue to costs. This reflects that we are an NHS body responsible for public funds'"

34. The Claimant’s counsel, Chris Milsom, has confirmed in writing that the costs consequences communicated by Ben Cooper QC for the Trust “did not link matters to the truthfulness of [the Claimant’s] evidence” and also that he “certainly made no comments as to [the Claimant’s] evidence being untruthful.” This position has been further endorsed by the Claimant’s Solicitor Tim Johnson in an email dated 13 January 2019, “I don't think for a moment that Chris Milsom said anything to Ben Cooper or anyone else, to suggest that your evidence was untruthful. I have no evidence to suggest Chris did that and I don't believe he would.”

35. As a result of a Data Subject Access Request from the Claimant to the Respondent’s Counsel dated 19 November 2019, Ben Cooper QC has provided an email he sent to Capsticks Solicitors including to their managing partner Martin Hamilton describing the position <u>initially</u> articulated to Mr Milsom on costs in his telephone conversation on 5 October 2018;

> “*I indicated.. There is now clearly a real risk that he (Dr Day) will not only lose his claim but may have findings that he has been untruthful in his evidence; If he were to withdraw at this stage we would not pursue him for costs but that if*

he ploughed on and that was the outcome, we would make a cost application"

36. This can only be said to be Mr Cooper's view and cannot be represented in a public statement as the view of the Claimant's legal representatives (solicitor and barrister) especially as Mr Milsom has explicitly denied stating this as his view and the solicitor was not even present on the call.

37. Mr Cooper also provided to the Claimant a text message that he sent Mr Milsom on Friday 5 October that the Claimant did not know existed and Mr Milsom claims he had lost;

> *"I can confirm that I now have instructions to offer a drops hands if your client agrees to it before we start our evidence but if he continues and loses with adverse findings as to his truthfulness there would be an issue as to costs. We are also content for you to speak to your client about this so he can reflect over the weekend but on the basis that you don't any specific aspect of the case or his evidence".*

38. It is impossible to reconcile Mr Milsom and Mr Cooper's account of Friday 5 October 2018. However it is clear that the First Respondent's position on costs passed on to the Claimant by Mr Milsom (whether accurately or not) was <u>not</u> the Respondents final position on costs. It also did not induce the Claimant to stop his evidence and settle the case. The Claimant was quite clear in his rejection of the drop hands offer on Sunday 7 October.

39. Mr Cooper QC and Mr Moon QC provided file notes and various emails to their instructing solicitor to the Claimant as part of DSAR. If Ben Cooper QC, Angus Moon QC and their instructing solicitor's evidence is to be accepted by the Tribunal it would have to find that the Claimant's former barrister Mr Milsom acted without instruction from either the Claimant or instructing solicitor to initiate settlement discussions on Friday 5 October 2018, misrepresented the cost position of the First Respondent and proceeded contrary to explicit instruction on <u>Monday 8 October 2018</u> to continue to negotiate settlement proposing broad terms which developed into a proposed confidentiality clause and a clause to protect all lawyers in the litigation from wasted costs. It would also need to be found that Mr Milsom had made up his references to sophisticated two tier ordinary cost threats/consequences, references to the Claimant returning the £55k awarded in to him in May 2018, wasted costs, legal regulator referral and medical regulator referral. This is obviously a serious allegation.

Respondents Position on Costs Thursday 11 October 2018

40. An email dated 30 November 2018 from Mr Milsom to the Claimant sets out how the Respondents' position on costs had moved on from what is described in the Data Subject Access Request material from Mr Cooper and Mr Moon in respect of Friday 5 October.

41. It is curious that Mr Cooper and Mr Moon's DSAR does not also include similar file notes and emails to their solicitors referring to the discussions between Counsel and Solicitors that occurred after 5 October 2018 up until to settlement on 15 October 2018. This also makes the failure in disclosure of the Sunday 14 October 2018 Board teleconference that approved the settlement look even more suspicious. Mr Milsom does describe these subsequent Without Prejudice discussions which will now be set out.

Ordinary Costs

42. By 11 October 2018 the situation of the Respondents on costs was very different from the position on 5 October. The Second Respondent by that time had also adopted a drop hands offer of their own. Mr Milsom sets this out in his 30 November 2018 email and in particular the nature of the updated cost threat/consequences. Unlike the 5 October drop hands offer which was only from the First Respondent, the drop hands offers on 11 October was from both Respondents and stated by Mr Milsom to be "sophisticated" with a "two tier approach" and also involved seeking the recovery of the £55k awarded to the Claimant in May 2018;

> *"In addition to my discussion with Ben Cooper on Friday (after 2 days of your evidence) counsel for both Respondents in a joint conversation on at least one occasion made reference to cost consequences of continuing. As I have stated previously this was a sophisticated discussion in that a two tier approach was mooted by them and in no way invited by me,*
>
> *a) Rejecting a drop hands offer and losing at trial without any credibility findings would lead to an application in respect of ongoing costs of trial.*
>
> *b) The above but with adverse credibility findings; the Respondents expressly stated that costs for the entire litigation maybe at large.*
>
> *I challenged this with Angus Moon as regards costs of the appeal process, he replied that since these were associated with litigation these too would have to be sought and in any event "Dr Day would have to return the £55,000 paid at the remitted PH."*

Wasted Costs and Legal Regulator Referral Against the Claimant's Legal Team

43. In his email dated 30 November 2018, Mr Milsom confirms reference to wasted costs against the Claimant's former legal team in respect of the alleged late disclosure of covert audio recordings. This evidence was instrumental in getting a senior doctor of the Second Respondent to challenge damaging statements about the Claimant that had been falsely attributed to her in a formal report about the Claimant making a key protected disclosure. In witness evidence, the relevant senior doctor went on to disown the statements falsely attributed to her in a formal report and to accuse a Director of the Second Respondent of giving an "exaggerated or distorted impression" in his investigation of the Claimant's case. Mr Milsom states;

> "*The sole issue was in relation to the non-disclosure of covert recordings which was beyond my knowledge. I have never suggested that my own conduct was under scrutiny and wish to shun the notion immediately that this could have played any part in resolution of proceedings.*
> *- there was a mention by counsel for both Respondents as to the possibility of wasted costs arising from the late disclosure of these recordings vis-a-vis TJL. My advice to you and conduct of litigation was entirely unaffected by this: you were my client and wasted costs considerations, however unattractive, had no impact on you personally. I would remind you that I was prepared to divulge in open tribunal that responsibility for late disclosure rested with TJL until you gave me instructions that you no longer wished to do this once the implications on TJL were explained."*

44. At the time of settlement it was <u>not</u> made clear to either the Claimant or his wife that the wasted cost threat in respect of the covert audio was a potential liability for his lawyers rather than the Claimant. Both the Claimant and his wife made this point in their statements to set aside the settlement agreement (which was ignored by the Tribunal in 2018 without reasons given).

> *"The Respondents' Counsel had told my barrister what the costs were likely to be and Mr Milsom passed this information on to my wife and me. <u>He described the existence of two types of cost threat; wasted costs in relation to covert audio and the ordinary costs between now and the end of the hearing.</u> At the time I did not understand how wasted costs differed from ordinary costs."*

45. The wasted cost threat was obviously a live issue as on Thursday 11 October 2018, both Mr Cooper and Mr Moon sought in open Tribunal the Claimant's solicitor to be cross examined on the covert audio matter before the Respondents witnesses.

Moreover, the following very unique clause was also inserted into the settlement agreement.

> *"This Agreement is also in full and final settlement of all or any claim or application for*
> *costs or expenses that any of the Parties may have against any other Party or Party's representative, whether in relation to the Claims or their conduct or otherwise.*

46. There is evidence of Angus Moon QC making reference to matters relating to covert audio in an dated 21 September 2018 to the Claimant's lawyers a week before the final hearing of the case. It is entirely possible and quite frankly probable that the wasted cost threat referred to by Mr Milsom (on 30 November 2018) against the Claimant's lawyers could have started to be exerted in the days leading up to the final hearing of the case on 1 October 2018. This surely needs to be explored in evidence in order to decide the Claimant's claim.

47. At the Tribunal in October 2018, the Claimant and the lawyers on all sides seem to forget about a letter dated 17 August 2015 from Hill Dickinson to the Claimant's Solicitors that would have been fatal to any wasted cost application against the Claimant's lawyers in respect of covert audio. It enclosed an email from the Claimant challenging a wildly false and damaging account of his dialogue in a formal meeting when he made a key protected disclosure. In the email dated 7 August 2015 (enclosed with the HD letter) the Claimant stated *"I have covert audio recordings that I intend to use at the Tribunal… I felt I had no choice but to take covert digital recordings in order to demonstrate my ability to describe the Woolwich ICU situation both calmly, objectively and politely".*

48. The accusations of dishonesty against the Claimant and his former instructing solicitor for allegedly keeping the covert audio hidden until 2018 should have been robustly challenged on the basis of this 17 August 2015 letter. In any event the truth of the matter is the Respondents could have asked for the audio at anytime after August 2015. Clearly it was thought by all sides that the covert audio was only relevant to the final hearing of the case which was greatly delayed for 5 years as a result of the Second Respondent's actions (see wasted Costs Application)

Threat of Referral of the Claimant to the General Medical Council

49. An email dated 3 January 2019 containing an embargoed public statement that the First Respondent's CEO instructed be sent to the Claimant in advance refers to the Respondent's position on any threat to refer the Claimant to the General Medical Council (Medical Regulator)

> "We did not consider referring Dr Day to the GMC and have no intention of doing so."

50. The Capsticks managing partner, Martin Hamilton in a letter dated 22 December 2018 to the Board and CEO of the First Respondent stated;

> *"We had no instructions from the Trust to threaten to refer Dr Day to the GMC, and we did not make such a threat on the Trust's behalf. You have confirmed that the Trust has never considered referring Dr Day to the GMC and has no intention of doing so."*

51. For some reason the embargoed statement was never published following the Claimant asserting in an email dated 3 January 2019 that the Trust check with their counsel (rather than just the instructing solicitor) before publishing any further public statements.

52. Mr Milsom's email dated 30 November 2018 is incompatible with what is stated by the CEO of the First Respondent and Martin Hamilton the managing partner of Capsticks.

> *"the prospect of a GMC referral/conduct which may warrant GMC interest (principally as regards covert recording) was raised not only by Ms Montraghi for the Trust (junior to Ben Cooper) but also explicitly in open tribunal through cross examination by Angus Moon QC. I mentioned it to you at the time as a potential issue in that context."*

Friday 12 October 2018

Costs to Secure Wording of Agreed Statement

53. The Claimant and his wife Mrs Day made clear in their witness statements for the application to set aside the settlement that the cost consequences described above were used to force the wording of the agreed public statement. The Claimant cannot understand why this evidence from his statement and the statement of Mrs Day was ignored by the Tribunal in the application to set aside the settlement without any reasons given.

54. Mrs Day stated in her Tribunal statement dated 11 December 2018

> "*During a discussion in Costa Coffee in Croydon, I became aware through Mr Milsom that the Respondents through the communications from their counsel, were starting to apply the cost threat originally associated with continuing proceedings to getting my husband to consent to certain wording in the agreed statement. The wording stated that all individuals employed by the Respondents had acted in good faith. We were told that this was a 'red line' for the Respondents.*
> *Negotiations about the agreed statement went on for most of the day (Friday 12 December). Eventually we accepted that we had no choice but to accept the final wording of the agreed statement. The cost threats were the only reason that we agreed to this wording."*

55. Dr Day in his statement dated 11 December 2018

> "On 12 October 2018 during the negotiations, the Respondents through the communications from their counsel to my counsel started to apply the cost threat originally associated with my proceeding to cross examine the Respondents' witnesses to getting me to consent to an agreed statement that stated that all individuals employed by the Respondents had acted in good faith. I was told that this was referred to by the HEE Barrister as a 'red line'.

56. Mr Milsom will confirm what is described by the Claimant and his wife Mrs Day and made reference to it in his email dated 30 November 2018;

> *"there was a point during the course of settlement discussions on the following Friday (ie the day after the Thursday conference) at which an impasse was reached on the terms of the joint statement. HEE in particular became more emphatic on costs at this juncture: we were ultimately able to secure mutually*

agreeable wording."

Martin Hamilton Managing Partner Capsticks Solicitors

57. It is clear from Mr Cooper's Data Subject Access request that Mr Hamilton was copied into key communication about this case. However, there is a gap in DSAR disclosure of material between 5-15 October including records of further Without Prejudice Discussions referred to by Mr Milsom in his 30 November 2018 email and any reference whatsoever to the Board teleconference on 14 October 2018.

58. It is also clear, this time, from Tribunal disclosure that Mr Hamilton was the contact at Capsticks briefing the Lewisham and Greenwich NHS Trust Board about this case. For some reason, Mr Hamilton sent two successive letters dated 21 December 2018 and 22 December denying the Claimant's position on the settlement which is likely to a result of members of the Board challenging Capsticks but in any event something Mr Hamilton needs to account for.

59. The letter from Mr Hamilton to the Board dated 21 December states

> "*We are writing to confirm as follows:*
> *Lewisham and Greenwich did not instruct us to threaten Dr Day with legal costs at any stage. We did not instruct the barristers, instructed by us on behalf of the Trust, to threaten Dr Day with legal costs, and they have confirmed that they did not do so."*

60. Mr Hamilton's letter dated 22 December stated;

> "We write further to our letters of 21 December 2018 and can further confirm that, in the settlement negotiations with Dr Day's legal representatives:
>
> 1. We had no instructions from the Trust to threaten a wasted cost application against Dr Day's legal representatives, and we not make such a threat and we have not made such a referral.
>
> 2. We had no instructions from the Trust to threaten Dr Day's legal representative with a referral to their regulator. We did not make such a threat and we have not made such a referral.
>
> 3. We had no instruction from the Trust to threaten to refer Dr Day to the GMC, and we did not make such a threat on the Trust's behalf. You have

confirmed that the Trust has never considered referring Dr Day to the GMC and has no intention of doing so.

61. The only logical reason for Mr Hamilton to need to write 2 letters like this to the Board of Lewisham and Greenwich NHS Trust, so close to Christmas, is the Board beginning to doubt what it had been told by the managers and lawyers involved in the Claimant's case. This includes the briefing document given to the Board dated October 30 October 2018 which is basically the same as the 2018 public statements that mislead on the scope of the Claimant's 13 protected disclosures (now accepted) and results of the external investigation (see Grounds of Claim) and advances the following position;

> "On the issue of costs, we had decided not to pursue Dr Day for legal fees before he withdrew his case"

62. It appears likely that Mr Hamilton would have been involved in the 14 October 2018 teleconference that briefed certain members of the Board prior to their approval of the settlement.

Second Respondent's Management

55. The Second Respondent's stated position on the settlement is far more simple than the multiple positions expressed by the First Respondent.

> "Health Education did not threaten Dr Day in any way at any point during these proceedings"

56. The following emails (from disclosure) indicate what senior managers in the Second Respondent understood to be true about the above public statement and the reality of what induced the settlement;

57. An email dated 3 December 2018 from a senior NHS manager Mr Alex Wallace with the former HEE CEO and Head of NHS Employment at Hill Dickinson (Philip Farrar) copied in speaks volumes;

> "HEE keeping to the consistent and clear line that we did not threaten costs is aided by the Trust's current, slightly weasel-worded line, and any subsequent changes they make. The more they twist, the clearer and more trustworthy our position is."

57. An email dated form the Second Respondent 12 November 2018 copied to the Hill

Dickinson Head of NHS Employment (Philip Farrar) discusses the risk associated with the Claimant making public the truth about the circumstances of the settlement which strongly implies they knew about the circumstances.

> "*There is no evidence so far that Day himself is talking and I think we have enough ammunition without taking the risk"*

58. On the day of settlement (15 October 2018) an internal email within the Second Respondent indicates an awareness of a potential thorny issue about costs that might needed to be tackled in a public statement;

> " Fine. Not quite sure the legal costs line now scans but let's get it out."

Ben Cooper QC and Angus Moon QCs Awareness of the Respondents False Public Statements

59. An email dated 16 October 2018 from Mr Cooper to Mr Milsom makes light of the circumstances in which this case settled. "Your persuasive powers had an effect where little else previously had (I appreciate you can't comment on that)".

60. Mr Milsom sent an email dated 11 November to Ben Cooper QC and Angus Moon QC informing them of the quote given by the Respondents to the Telegraph that was forwarded to the Claimant ,"I understand a Telegraph Journalist is sniffing around investigating the conversations which led to Day settling".

63. The Claimant sent a letter dated 4 December 2018 to Mr Ben Cooper QC and Mr Angus Moon QC informing them of the relevant quotes that the Respondents were using to misrepresent 'Without Prejudice' discussions on the record with a national newspaper asking them to correct their misleading impression.

Dr Chris Day
14 January 2021