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**~~

SUPPLEMENTARY WITNESS STATEMENT OF THE CLAIMANT
In RESPONSE TO THE WITNESS STATEMENT OF BEN COOPER QC

I, **Dr Christopher Day** of [redacted], make this supplementary statement in response to the witness statement of Ben Cooper QC (Mr Cooper) and say as follows: -.

Introduction

1. Mr Cooper has attempted to use his witness statement to effectively make a submission about my evidence at the October 2018 Tribunal.

2. In paragraph 12 of his statement, Mr Cooper makes a very strong statement about his view of me being dishonest and underhand.

3. This statement will deal with Mr Cooper's examples that he sets out in his witness statement where he attempts to substantiate the view that he has given about my evidence. Mr Cooper states at paragraph 16 of his statement that he is 'obviously not suggesting that findings should be made' now about my evidence at the hearing in October 2018. Mr Cooper is a QC with a standing in the world of employment law. He sets out in seven paragraphs (10 to 16) over three pages in his witness statement an account of my evidence which I contest. A tribunal will inevitably be influenced by his view unless I have the opportunity to respond to it. I do not think that the tribunal can come to any conclusion as to the evidence I gave at the hearing in October 2018 and it should put the matters set out in Mr Cooper's paragraphs 10 to 16 entirely to one side.

4. It should be noted that Mr Cooper, when making his allegations of dishonesty against me, provides no actual examples or quotes from my 44 pages of tribunal statement, Instead, he relies on his own account of my verbal evidence; an account which I consider disingenuous.

5. Mr Cooper's various examples centre on my 10 January 2014 protected disclosure. My evidence on this disclosure is found at [61-78] of my first and main statement in this matter.

At paragraph 10 Mr Cooper states,

"one feature which quickly became clear was his apparent inability to answer questions directly or succinctly. This meant that his cross-examination took much longer than it ought to have done – a total of more than 5 days overall"

6. On numerous occasions during my cross examination, Mr Cooper would start a line of questioning with a misrepresentation of my own stated position or a misrepresentation of a certain document. Mr Cooper would then offer significant resistance to me accessing the bundle to prove my position and a dispute would then follow about my right to access the bundle during my evidence. I would then be accused of being evasive (because I wanted to refer to the document to answer the question). This sequence was repeated on numerous occasions.

7. A simple example of this relates to the exchange in open Tribunal that Mr Cooper and I had about something as seemingly straight forward as the time at which I made my protected disclosure by phone to the Duty Senior Manager on Call, Joanne Jarrett on 10 January 2014.

8. My 2018 Tribunal statement at paragraph 40 confirmed the precise time of my telephone protected disclosure on 10 January 2014 as 23:10 **[SB p258, para 40]**:

> *"I decided to phone the Senior Manager on Call, Joanne Jarrett, to tell her this. I did so at 23:10 with Jane Dann sitting beside me" (emphasis added)"*

9. This is consistent with the First Respondent manager's call log as confirmed by the relevant senior manager, Joanne Jarrett to the Roddis Associates external formal investigation in 2014 **[SB p132]**:

> "*JJ referred to her notes where it is recorded that the first call she had from QEH was at 2310 from Dr Day (CD). No other calls what so ever were noted previously."(*emphasis added)

10. Despite this clear evidence Mr Cooper accused me in open tribunal of getting the time of my phone call wrong in my evidence.

11. Mr Cooper opened his cross examination on this issue by asking me why I had persisted in referring to my telephone call (the 10 January protected disclosure) as

taking place "in the middle of the night". He further stated that I had exaggerated the time and that I knew that I made the call in the early evening. It was then asserted that this was an example of me getting things wrong.

12. As would be expected, I reiterated that my statement gave a precise time for my call as 23:10 **[SB p132, para 40]** and that this time was backed up the Trust's management log **[SB p132].** That should have been the end of it, but it was not. Mr Cooper persisted and said that I used the term "in the middle of the night" for dramatic effect and this was an example of me being hyperbolic and unreliable.

13. I then referenced an internal email within the Respondent dated 29 April 2014 **[P2] [2018 bundle, page 720]** that shows it was managers of the First Respondent and not me that referred to my phone call being made "in the middle of the night". It took time for me to find the email and no assistance was offered:

> "*Dr Roberts tells me that he first informed of the original issue by one of the service managers who told him that the on-call manager had to be called in the middle of the night"(*emphasis added)

14. I also reference evidence showing me in 2014 criticising the First Respondent's managers for exaggerating the time of my phone call by describing it as being in the middle of the night. I did so in my meeting with Roddis Associates on 18 September 2014. My note of this meeting records this and I took Mr Cooper and the Tribunal to this text against significant resistance from Mr Cooper **[P4]** ***[2018 Bundle, Page 992]****:*

> *"MR asks whether I had ever phone duty manager previously at the hospital. I confirm I have never phoned a duty manager before or since. I also made the point that the trust has twisted the actual description from a rational polite call an hour into my shift to an irrational call "in the middle of the night."* (Emphasis added)

15. This simple example on nothing more complicated than the time at which I made my phone call perfectly illustrates how Mr Cooper went about his cross examination of me. The simple matter of the time of my phone call was clearly proved as 23:10 on mine and the Trust's evidence but Mr Cooper chose to pick a fight with me based on series of false assertions followed by an attempt to portray me as unreliable. That style of cross examination was in my view responsible for the lengthy nature of my cross examination.

Mr Cooper states at paragraph 13 of his statement,

"Dr Day alleged (in his pleadings and in his witness statement) that he had been approached by the Duty Site Manager and told that two doctors who would normally look after the wards had not turned up, that he telephoned the Senior Manager On Call to raise concerns about this this, that he was given false information about the

staffing levels that night, . . . However, the contemporaneous documents showed that Dr Day had not been given false information about staffing levels that night and could not have been told by the Site Manager that two doctors had not turned up because, at the time of his conversation with her, only one doctor had not turned up. When taken to the documents which showed this in cross-examination, he was forced to accept these points."

16. It is simply not the case that contemporaneous documents showed that I had not been told that two doctors had not turned up as only one had not turned up, When putting that assertion to me during my cross examination in October 2018, Mr Cooper relied on a manuscript document that he stated showed that I was factually wrong in my 10 January 2014 protected disclosures, and I was also wrong to say that I had been given the wrong information about medical staffing. This occurred after Mr Cooper had asked me a series of closed factual questions about what was written on the manuscript document which had the appearance of being a handwritten management note of some kind. I clearly had to accept that what was stated in the manuscript document was stated in the document, as I was asked a series of closed questions.

17. However, I further stated that I had no idea of the true providence of the document Mr Cooper had taken me to. I stated that the dated and timed emails between the Respondent's management in January 2014 was much more powerful evidence. I made clear that the relevant emails clearly show a medical staffing deficit of two doctors for the night of 10 January 2014. I also stated that no manuscript document can change that. I did not depart from this position but had no choice but accept that the manuscript document said what it said. The relevant emails from the Respondent's management are as follows:

    a) An email dated 15 January 2014 from Dr Ward, the clinical lead for medicine to the First Respondent's Medical Director and Assistant Medical Director stating, "*I am aware of the problem that occurred. Our usual medical cover at night it staggered to match demand but after midnight we have 2 SHOs and a reg. FY1s do not work nights. It seems that somehow, two SHOs were booked but they did not turn up for their shift*. (Emphasis added) **[SB p89]**;

    b) An email from Dr Ward dated 16 January, "On the evening in question, we had two locum SHOs booked to cover during the night. *Unfortunately, one SHO pulled out at the last minute and the other was given incorrect information by the agency"* **[Trial 2018 bundle Page 686] [p5].**

18. In addition to the emails that support my protected disclosures being correct and something that it was reasonable for me to believe, I made the following three additional points to defend the validity of my protected disclosure:

    a) Firstly, I made clear in my follow up email to Joanne Jarrett that I was relying on the Clinical Site Manager (Karen O'Connell) as the source of the information

(and not information found for myself) for the aspect of my protected disclosure that related to medical ward cover staffing **[SB p87].** I made the point that given that at the time I was dealing with a medical emergency on CCU, it was reasonable to take what I was told at face value.

b) Secondly, I made the point that the second most senior nurse in the hospital Jane Dann endorsed the information in my protected disclosure and had witnessed my phone call to Duty Senior Manager Joanne Jarrett. I was prevented by Mr Cooper to taking the Tribunal to Jane Dann's statement **[see paragraph 3-6 on SB p297]**.

c) Thirdly, I stated that the recipient of my protected disclosure, Joanne Jarrett, conceded the validity of my protected disclosure. She conceded to Roddis Associates that my concerns had "*come to pass"* **[SB p135]**.

19. I do not deny that I had to be robust and insistent during my cross examination in order to get my point across. However, the factual position I asserted underpinning the validity of all my protected disclosure was correct. That must be why my disclosure has been conceded as a reasonable belief. Given the above written evidence, I clearly would have no need to concede that I was in any way wrong with the factual basis of my protected disclosure and I did not make such a concession.

20. Mr Cooper states in his paragraph 13, "*the contemporaneous documents showed that Dr Day had not been given false information about staffing levels that night and could not have been told by the Site Manager that two doctors had not turned up because, at the time of his conversation with her, only one doctor had not turned up"*. As I made clear at the Tribunal, what Mr Cooper is asserting here was <u>not my basis</u> for saying I had been given the wrong information about medical staffing. My actual basis for stating that I was given wrong information about medical staffing by the Site Manager is set out my email dated 14 January 2014 **[p6-7] [2018 Bundle Page 681c]**:

> *"After my phone call with you, I was given the wrong information by the site manager that there was a registrar and two experienced SHOs in A&E that would try and cover the wards. This wrong information was endorsed by your email. I have since found out that the medical team of that night consisted of a registrar and a foundation doctor no other doctors…I note the night became so challenging that the medical consultant was called in to the hospital by the registrar."*

21. When it was put to me at the Tribunal that I had not been given wrong information about medical staffing Mr Cooper attempted exactly the same tactic as he has attempted in his Tribunal statement. My answer is the same now as it was then, unless the Respondent can prove that they had a Registrar and 2 experienced SHOs for the night of the 10 January 2014 then I was given the wrong information. I pointed out to Mr Cooper that even his manuscript document does not help him with that.

22. I could not have been clearer about this at the Tribunal. The email evidence in this case shows firstly 2 doctors did not attend the hospital for the night shift on the medical wards. The evidence also shows that what I was told in response to my phone call was that the medical team that night consisted of a registrar and 2 experienced SHOs. This turned out not to be the case. I therefore was and am also now correct to say that I was given the wrong information on the night of 10 January 2014 about the reality of the medical ward cover for that night.

At paragraph 14a of this statement Mr Cooper states;

"that he knew *full well* that the site management team had '*probably decided to skimp on locums*', which he accepted in cross-examination was simply his own invention and that he had no basis for saying it"

23. During my cross examination, Mr Cooper attempted to challenge me on a claim that I apparently accused the Trust (the First Respondent in the 2018 hearing) of secretly routinely planning inadequate medical cover as a cost cutting measure which he termed "scheming on locums".

24. I stated that this was not my position and that I am confident that I have made no such allegation in my witness statement, in my formal letters of complaint or in any emails. I was very clear on this at the Tribunal.

25. I also stated with reference to the bundle that this was demonstrably not my position on why the situation on 10 January 2014 happened. I quoted the section of my 10 January 2014 email to Joanne Jarrett **[SB p87]**. It referred to the medical staffing deficit described to me by Karen O'Connell and repeated the position that I expressed on the phone, "*I am sure some effort was made to avoid this situation.*" (Emphasis added).

26. I also pointed Mr Cooper QC to **[p8] [2018 bundle page 688]** which was an email dated 17 January 2014 from me to a Dr Ward stating what I accepted about the ward cover issue on 10 January 2014, "*the situation you describe with locum cover is entirely understandable and I accept that it sounds unavoidable"*. (Emphasis added) Mr Cooper prevented me from accessing at least one of these references from the bundle.

27. Mr Cooper did not accept that I had not made the allegation and stated that I made the allegation in my meeting with Roddis Associates on 18 September and took me to **[p9] [2018 bundle Page 987 (az)].** Mr Cooper then selectively quoted dialogue from me in the Roddis Associates meeting on 18 September 2014. The dialogue originated from Dr Roddis asking me why I did not make my protected disclosure to either the medical consultant on-call or the Intensive Care Unit consultant on-call.

28. This followed me setting out to Dr Roddis that I spoke to the ICU consultant to seek authorisation to transfer the CCU medical emergency to ICU but did not mention the medical ward cover issue (which further indicates that I was calm, in control and had the ability to filter what I told my consultant whilst dealing with an ongoing medical emergency). Mr Cooper has chosen to leave this important context out of his statement as he did when questioning me at the Tribunal whilst selectively quoting the dialogue.

29. After the discussion about the ICU consultant, the transcript records Dr Roddis asking why I had not involved the duty medical consultant and chose instead to phone the duty manager, I responded **[p9] [2018 Bundle Page 987(az)]:**

> *"I didn't want to phone some consultant and say*, *"You haven't hired any doctors," knowing full well that the clinical site management team, mainly the duty manager probably decided to skimp on the locums."*

30. It is clearly misleading to characterise me describing a thought process on why I did not want to make a complaint or allegation on a given issue as me actually making the allegation or complaint. From the transcript, it is clear that I am describing my reluctance to make such an inflammatory allegation. I made this abundantly clear at the Tribunal when challenged with this quote. It should also be noted that neither the formal Roddis Associates record of the meeting nor my note of the meeting makes any mention of this dialogue as it is so insignificant.

31. Mr Cooper put to me that I had invented my basis for using the words the "*duty manager probably deciding to skimp on the locums".* I did not accept this. I took Mr Cooper to an earlier part of the Roddis Transcript **[P10] [2018 bundle Page 987(aw)]** that showed me reporting to Roddis Associates the Clinical Site Manager, Karen O'Connell voicing to me two of her observations on why the medical staffing deficit occurred on 10 January 2014. They included an apparent decision not to attempt to hire locum doctors and also a decision not to swap or ask any of the day staff rostered on for the weekend day shifts to instead cover the night of Friday 10 January.

> "*I encountered the site manager. She was stressed.*
>
> *Claire: That's Karren.*
>
> *Chris: She said, "I can't believe what they've done. They don't have any doctors on the medical wards. They've screwed up. <u>They haven't even gone for locums."</u> Something along the lines of, "We didn't want to call anyone in for the night because we didn't want to affect weekend staffing. It was Friday night. We didn't want to call any of the day people on the Saturday in because we wanted them on Saturday."*

32. It is unreasonable to conclude from the evidence that the reference to “skimping on locums “is me inventing an allegation with no basis when I clearly showed at the Tribunal that it was based on what was first raised with me by the Clinical Site Manager (Karren O’Connell). It is clear from the evidence that I am reporting an allegation that had been made by the Clinical Site Manager (not an allegation that I had instigated) and describing a thought process on why I would not want to make the allegation myself. It is therefore frankly ridiculous to assert that I conceded at the Tribunal, firstly, that I had made the allegation myself and then, secondly, that there was no source or basis for the allegation. Even If I had made the allegation formally (which I did not) it would clearly have had a basis and that was what someone else had said (Karren O’Connell the most senior nurse in the hospital that night).

33. After making these points, Mr Cooper asserted that I was not being honest about what Karen O’Connell had stated to me on 10 January, which I did not accept. I also stated in response to Mr Cooper that the Respondent had chosen not to bring Karren O’Connell as a witness. This resulted in an argument as Mr Cooper reacted angrily.

34. I also stated to Mr Cooper that he had chosen to withdraw my Intensive Care Unit clinical supervisor Dr Roberts from giving evidence at the last minute and that decision, when combined with failing to produce Karen O’Connell, meant accusing me of lying about any of this is a bit rich.

35. Dr Roberts was listed as a witness for the First Respondent at the October 2018 Tribunal but was withdrawn at short notice. Dr Roberts sent a text message to me dated 24 June 2018 at 21:57 which stated, “*I think you should call me for evidence before the Trust solicitors try to gag me”.* I responded stating, “*Did the Trust call you as a witness?”*. Dr Robert’s replied, “*They have.not sure whether it will stay that way though as I don’t think I am saying what they want.”* ***[p11-12]****.*

Mr Cooper states at paragraph 14 (b) and (c)

> **“b. that he *had* had a further conversation with the Site Manager, which was not an allegation that appeared in any other document or account by him and was contrary to both his witness statement for the Tribunal and his acceptance in cross-examination that he had not had a further conversation with the Site Manager – and when taken to that passage of his grievance interview later during cross-examination he sought to explain the discrepancy by claiming an incomplete recollection (a caveat that had not featured in his, generally emphatic, evidence up to that point); and**
> **c. that in that further conversation, the Site Manager had sought to discourage him from calling the On Call manager about the staffing issue out of concern about ‘*where it would end*’, a detail which was plainly intended to imply concern about some form of retribution and to bolster Dr Day’s whistleblowing case”**

36. At the hearing in October 2018, I made it clear from early on in my oral evidence that I was primarily relying on contemporaneous documentation and not recollection of events let alone any 'emphatic' recollection of events. My witness statement largely referred to evidence which was supported by contemporaneous documentation. By the time of my cross examination over 4 years had elapsed since the relevant events (as a direct result of the Second Respondent's stance on the worker status point).

37. I had given an account of the 10 January 2014 disclosure in my account to Roddis Associates on 18 September 2014, which was just months after the events.

38. I made clear at the Tribunal that there were facts that I described to Roddis Associates about which I had a confident recollection in 2014, but that following the passage of 4 years, I could not hope to have the same confident recollection for the October 2018 hearing. So, I based my witness statement on contemporaneous documents.

39. The documentary evidence before the 2018 hearing included my notes and the transcript of the Roddis Associates meeting, so was therefore before the tribunal. At the Tribunal, it was Mr Cooper that made continual reference to the account that I gave to Roddis Associates, <u>not me.</u>

40. I did my best to answer Mr Cooper's questions on the account I gave to Roddis Associates in 2014. I will now turn to Mr Cooper's stated example.

41. During my interview with Roddis Associates on 18 September 2014, I stated that I had mentioned to the Clinical Site Manager (Karen O'Connell) in CCU about the possibility of phoning the on-call duty manger. This was after hearing what Ms O'Connell had described to me about the facts and her opinion on the medical staffing that night.

42. I reported to Roddis Associates that the Clinical Site Manager, Karen O'Connell, when I mentioned the possibility of me phoning the duty manager, stated, "*If you make a fuss you don't know where it will end*" **[p13] [2018 Bundle Page 1005(h)].** Karen O'Connell did deny saying these words in her own interview with Roddis Associates, but was not a witness at the 2018 Tribunal hearing.

43. I made clear to Mr Cooper (and the Tribunal) that I had not included this dialogue between me and Ms O'Connell in my witness statement because I had not referenced it in any contemporaneous note and because after over 4 years, I did not feel that I had a confident enough recollection of the encounter for it to be included in my Tribunal statement as I could not expand past what I had reported about the conversation to Roddis Associates in 2014.

44. At the Tribunal, when directly questioned by Mr Cooper, I could not remember for sure whether the voicing of my intention to phone the duty manager and the Karen O'Connell response "*If you make a fuss you don't know where it will end"* occurred

when Karen told me of the medical staffing issue or during a separate conversation after I had dealt with the medical emergency on CCU. I initially thought it was a separate conversation after I had stabilised the patient. Mr Cooper could see I was unsure and accused me of making the whole thing up. I made clear that I was certain Karen O'Connell said these words that night before I made my call to the Joanne Jarrett even though she later denied she had said them to Roddis Associates. All I said at the Tribunal was that I could be sure whether it was in the same conversation where I was informed of the staffing deficit or during a subsequent conversation.

45. My oral witness evidence about this statement was not as Mr Cooper asserted me 'making it up' and a 'complete fiction'. I did not accept this at the Tribunal and made the point that the First Respondent had not produced Karen O'Connell as a witness in any event.

46. Moreover, I also do not accept, that my account can be characterised by Mr Cooper as me adding 'detail' to the context in an attempt to bolster my case.

47. It was Mr Cooper not me who brought it up, meaning I was having to respond to questions from Mr Cooper about an account that I had given 4 years previously - to Roddis Associates. I was being open with quite predictable problems with recollection that anyone would have when trying to remember a conversation that happened over 4 years ago.

Covert Audio

48. Mr Cooper makes a number of points about me being 'deliberately deceitful and untruthful' in respect the covert audio used in this case. The audio was taken by me in 2014 but only disclosed to the parties in 2018 by my former legal team. The time of disclosure was a result of a 4-year delay to my case coming to final hearing. My statement for the present hearing deals with these matters at **[paragraph 253-255 and [SB 180-181]).**

49. As my main statement makes clear, I was open with my intention to use covert audio in this case and reason for doing so as far back as August 2015 **[SB 176-182].** Mr Cooper chooses to omit this important fact from his misleading narrative. I will now deal with other points Mr Cooper asserts on the covert audio that are not dealt with in my main statement for this hearing.

50. At paragraph 15 of Mr Cooper's statement, he states:

***"*He accepted that he had behaved in an 'underhand' way in the manner he had gone about making these recordings"**

. . .

"Dr Day suggested to Mr Moon that his decision to record one of the meetings had been impulsive, but then in response to further questions said that he had

borrowed the device he used to record the meeting a few days before for that purpose."

51. Mr Cooper's account of this can be shown to be objectively wrong. Mr Cooper (as you might expect) early on in my cross examination (as virtually all counsel have done that I faced in this case) wanted to put to me how underhand my use of covert audio was.

52. Mr Cooper's cross examination of me occurred before Mr Moon's cross examination. This sequence is important given what Mr Cooper is now claiming. In response to both Mr Cooper and Mr Moon's challenge of me on the covert audio, I repeated the position expressed in my 2018 statement at paragraph 177 **[SB p288]**.

> *"I understand that taking an audio recording of this meeting could appear underhand. I want to confirm that I only resorted to this after several examples of what I had said, and the way I said, being falsely reported."*

53. My 2018 statement makes clear at paragraphs 174-178, one of several examples of why I felt I was justified in my decision to use covert audio in this case. It is important to note this was done only once I had left the employment of the respondents and registered a whistleblowing dispute with ACAS. This is another key fact Mr Cooper chooses to omit from his narrative.

54. Both my correspondence from 2015 and evidence at the 2018 Tribunal (both written and verbal) made clear that my actions on the cover audio were deliberate, a result of careful consideration and were actions that I stood by with clear reasons. This is in contrast to perhaps a narrative of the covert audio being a more sudden and unplanned act in the heat of the moment that that I expressed regret for. The latter was clearly not my position at the 2018 hearing.

55. Furthermore, my planned use of cover audio was further explored by Mr Moon during his cross examination of me. Mr Moon asked me questions about how I went about recording the various meetings. I was entirely open with the fact that I did not just record the meeting on my phone and made clear that I purchased a recording device for the sole purpose of recording formal meetings at the respondents. When further questioned I was open with the fact that I went to Currys at Stratford Westfield to buy an Olympus Dictaphone for that purpose (a detail that I could have easily avoided divulging had I wished to).

56. After this enquiry, Mr Moon stated in no uncertain terms that he believed that I should be referred to the GMC (medical regulator) for my underhand tactics with covert audio. My former Counsel, Mr Milsom makes reference to this **[Page 1123]**. The prospect of being referred to the GMC put me under a huge amount of pressure as I would not be able to work as a locum in the interim as GMC investigations can take years. Mr Moon pressed me again on why I would resort to such underhand tactics with covert audio and whether it was consistent with the GMC duties of a doctor. At that point I stated the covert audio was 'impulsive'. The ordinary definition of the word

‘impulsive’ is clearly not an accurate word for my stated position on the covert audio that I had already committed to in written and verbal evidence in 2018 and also as far back as 2015 in email correspondence.

57. I was immediately ridiculed for using the word ‘impulsive’ as I had shortly before set out an account of traveling to a shopping centre to buy a recording device to record a series of formal meetings about my whistleblowing case after careful consideration. I remember these words being quoted back at me to ridicule me. The word ‘impulsive’ was clearly not what I meant and the immediate words of ridicule that followed prevented me clarifying my position. What I meant to indicate was my strong instinct to protect myself and my career from the respondents which meant the word I meant to say was ‘instinctive’.

58. My use of the word ‘impulsive’ instead of the word ‘instinctive’ despite being an embarrassing mistake under pressure and perhaps understandable due to the length and style of my cross examination did not mislead anyone as Mr Cooper is attempting to imply.

59. The sequence of events asserted by Mr Cooper is incorrect. Mr Cooper is attempting to make it seem that I misled the Tribunal into believing my covert audio was an impulsive act and I was subsequently caught out later in my cross examination when it was established, after further questioning, that I borrowed the device a few days before using it. Mr Cooper’s account is misleading in the sequence that he is suggesting:

> “*Dr Day suggested to Mr Moon that his decision to record one of the meetings had been impulsive, but then in response to further questions said that he had borrowed the device he used to record the meeting a few days before for that purpose.”* (my emphasis by underlining)

60. It should be noted that Mr Cooper does not even get the detail right that the recording device was purchased at a shopping centre and claims instead that my evidence was that I borrowed it.

61. I accept that ridiculing me now for saying the word ‘impulsive’ under pressure from Mr Moon is open to Mr Cooper but what is not open to Mr Cooper is to claim wrongly that I used the word ‘impulsive’ before I made it clear in open Tribunal how I purchased a recorder and planned to record formal meetings related to this dispute and the reasons that I felt such action was needed and justified.

62. Mr Cooper’s account is therefore misleading in asserting that I tried to hide my true intentions with the covert audio when I was entirely open with them at the hearing in October 2018 and from as far back as August 2015 **[SB 302-303]**.

63. I have consistently stated in this case my use of covert audio was to expose and counter attempts by both respondents at fabricating my dialogue in certain important situations to do with my protected disclosures. The covert audio succeeded in this aim **[see my main statement [120-124] and [247-249].**

Covert Audio and the Second Respondent's Employer/Worker Point

Indeed, Mr Moon took Dr Day through material which showed that the contents of one of the meetings he had covertly recorded had been in dispute in relation to the preliminary employment status issue, yet Dr Day had failed to mention the recordings in the witness statements he had prepared in relation to that issue. Although he did not adequately explain his own failure to refer to the recordings in that context – a point which also undermined the explanation he had given to me that the preliminary issue had been a distraction from the issues to which the recordings related – Dr Day did at this point say that he had given them to his solicitors at the start of 2015

64. As stated, my reasons for resorting to covert audio were made clear to Second Respondent and their solicitors, Hill Dickinson, in August 2015 **[SB 176-182].** The existence of the covert audio is even acknowledged by Michael Wright, the Partner in Hill Dickinson with conduct of the case by letter dated 17 August 2015 **[SB p176]:**

> *"You will note your client's reference to covert audio recordings and to a witness order"*

65. Mr Wright was the solicitor with the conduct of the May 2018 preliminary hearing for the Second Respondent on the employer point. If Mr Wright felt the covert audio was relevant he could have asked for disclosure of it. Mr Wright made no such request because he knew such evidence was only relevant to the substantive hearing in June 2018.

66. My former solicitors Tim Johnson Law had possession of the covert audio from 2015. They too would have disclosed it for the May 2018 preliminary hearing had they thought it was relevant to the issues to be decided on the Health Education England employer point.

67. In his Tribunal statement for this hearing, Mr Cooper has chosen to omit from his narrative the fact that the firms of solicitors on both sides of the litigation on the employer/worker preliminary hearing in May 2018 were aware of the existence of my covert audio. Mr Cooper would have known that the reason for the covert audio not being disclosed or referred to at the May preliminary was not a result of my dishonesty or deception (as Mr Cooper is attempting to portray with his misleading narrative) but a result of the view that both Hill Dickinson and Tim Johnson Law took about what was relevant. Both sets of solicitors appear to have taken the view that the covert audio was not relevant to the issues to be decided at the May 2018 Preliminary Hearing on the employer point and chose not to complicate matters with it.

68. At the time of drafting his Tribunal statement for these proceedings, Mr Cooper would have been well aware that both Hill Dickinson and Tim Johnson Law knew about the covert audio and that Tim Johnson Law has possession of it since 2015. The relevant letter exchanges on this point were not only contained in the bundle for the June

2018 hearing but the Second Respondent's senior doctor, Dr Chakravarti at paragraph 26-27 of her Tribunal statement for the 2018 hearing explicitly states that I informed her on 7 August 2015 of my intention to use covert audio in my case to challenge false accounts of my dialogue in formal meetings. Dr Chakravarti also confirms she passed this information to HEE and their lawyers Hill Dickinson in August 2015 **[SB p302-303]**

69. Mr Cooper asserts that the covert audio was in some way relevant to the preliminary issue on the employer point of the Second Respondent. Nothing in the covert audio assisted the Tribunal on the employer point. There is no evidence recorded by the covert audio that either strengthened or weakened either mine or the Second Respondent's position on the employer point. The employer status related to the influence the Second Respondent exerted over the First Respondent (and all other NHS Trusts in England) in return for large sums of public funding. The public controversy on this point centres on an attempt by both Respondents to hide the reality of this in order undermine whistleblowing protection for the nation's doctors **[see main statement [35]-[36]].**

70. I am surprised that Mr Cooper would wish to draw further attention to both respondents' actions on this point. The failure of both Respondents to disclose the LDA contact, which clearly would have collapsed the Second Respondent's position on this in 2015 as it eventually did in 2018 (even with an outdated version of the LDA), wasted huge amounts of public money and undermined whistleblowing law for the nation's doctors for 4 years. If Mr Cooper is suggesting that the covert audio would have changed any of that then he is misguided.

71. Mr Cooper purports to give his view on the relevance of the covert audio to the employer worker point. However, by omitting key facts, he gives the false impression that the lack of disclosure and reference to the covert audio at the May 2018 Preliminary hearing was a result of dishonesty and deception on my part when he knows, or should know, that Tim Johnson Law had the material and secondly Hill Dickinson and their client had not pressed for it, although its existence had been made clear to the Hill Dickinson partner, Michael Wright, in 2015 **[see para 25-26 SB p302-303] and [SB p176].**

Conclusion

72. To the extent that it is relevant for this Tribunal to assess whether it was reasonable for Mr Cooper to believe that a different Tribunal was likely to find my evidence untruthful, I believe this statement clearly shows that it was not.

This statement is true to the best of my knowledge and belief.

Signed: 

Dr Christopher Day

6 June 2022