have been fraudulent in my crowdfunding activities by misrepresenting the substance of my disclosures; and the response to them; and have done this publicly.

175. Issues raised in my protected disclosures are plainly about the Respondent's ICU and not limited to a one-off situation of medical ward cover as claimed by the Respondent. The protected disclosures have been supported by senior people and various external reports but in particular a Critical Care Peer Review in 2017 and to deny this is clearly detrimental.

SECTION 4 – COST THREAT DETRIMENTS

Concessions Made by the Respondents in this Case

176. The most objective way to demonstrate the impact the cost threats had on the likely progress of my case is to set out the Respondents various concessions that have occurred. I do so in order to demonstrate as dispassionately as I can manage, that I had at the very least an arguable case back in October 2018 when the costs threats were made. That is to say nothing of the possibility of my side of the story being accepted by the Tribunal in addition to the significant number of concessions from the Respondents which I will now set out.

First Respondent's Concessions

177. In addition to waiting 4 years for the Respondent to accept (at the October 2018 hearing) many of my protected disclosures as reasonable beliefs, the Respondent has made other concessions. By explicitly accepting the finding of their external investigation by Roddis Associates, the Respondent must now accept the criticisms set out above in the investigation report and at **(paragraph [116] of this statement or paragraph 36 of my Grounds of Claim)**. By this, the Respondent is effectively accepting multiple detriments that I have been subject to, the subject of my first whistleblowing claim. I believe that the link to the now accepted protected disclosures to these detriments is clear and in particular the January 2014 protected disclosures. There is certainly an arguable case to that effect. The detrimental activity set out by Roddis Associates all comes as a result the processing of my January 2014 protected disclosure.

Second Respondent's Concessions

178. Notwithstanding the Second Respondent's exit from this case. I would ask the Tribunal to note that prior to their exit from this litigation, the Second Respondent has made the following concessions in this litigation which I suggest points to the allegations in my first claim also clearly amounting to whistleblowing detriments by the Second Respondent:

    a) **Conceding protected disclosures including reasonable belief in issues of patient safety and deliberate concealment**; After 6 years of denial of my

protected disclosures (see para 25 of the Second Respondent's original ET3 Grounds of Resistance **[Page 100]** and attempts to discredit me, HEE accepted the content of my protected disclosures as reasonable beliefs in the public interest of both the patient safety class of disclosure and also the class that indicates that such issues have been or were likely to have been deliberately concealed. The concession is set out in the Second Respondent's amended Grounds of Resistance for the present claim at paragraph 15 **[Page 525].** That dramatic concession came after me sending this letter dated 11 November 2020 **[SB p230-232]** enclosing Further Better Particulars on my protected disclosures **[Page 481-488].** It is clearly detrimental to portray, for 6 years, a doctor's 13 important protected disclosures as unreasonable and vexatious when it is known all along that they are reasonable and important.

b) **Concession that formal investigation was terrible and misleading**; 2 senior HEE doctors involved in my case have been forced to concede that HEE's formal investigation into my whistleblowing case was "terrible" (Dr Frankel) **[SB p223-224]** and "*gives an exaggerated or distorted impression*" **(see Dr Chakravarti Tribunal statement paragraph 21 [SB p302]).**

c) **Conceding a false account of my protected disclosure in a formal report;** A senior doctor of the Second Respondent, Dr Chakravarti has conceded that damaging statements were falsely attributed to her in a formal Plummer report about my 3 June 2014 protected disclosure at the ARCP meeting. In her statement at paragraph 20 **[SB p301]** She states in relation to an email that she sent Mr Plummer on 5 January 2015, "*I felt baffled at the quotes attributed to me*". She further states at paragraph 21 **[SB p302]** "*I was very surprised to find various phrases in inverted commas seemingly quoting me, when I could not recall saying those phrases.*" Dr Chakravarti in paragraph 21 of her statement accuses the Second Respondent's investigating director Mr Plummer of giving an "*exaggerated or distorted impression*"_in his formal investigation into the protected disclosure at my ARCP. The covert audio secured the above concession which is referenced in Dr Chakravarti's 2018 Tribunal statement. Further context on this is set out at **(see paragraph 25-35 of the Further and Better Particulars (page 485-7))**.

d) **Conceding that my formal ARCP/Appraisal document was inappropriate**; The Second Respondent's former Post Graduate Dean Dr Frankel conceded in writing to Norman Lamb in January 2019 that the formal ARCP document completed for my 2014 appraisal "*was inappropriate*" **[Page 1305]** and seems to criticise another senior doctor Dr Lacy when he states, *"It is clear that Dr Lacy had not appreciated that the fact that U boxes had been ticked was inappropriate*" Dr Frankel further concedes that in my objection to the ARCP document, "*he was quite correct that these boxes needed to be removed".* The ticking of the 'U-Boxes' on my ARCP record indicated firstly that I had professional/ personal issues and secondly that I did not engage with supervision. It was further stated that an unsatisfactory ARCP outcome had occurred as a direct result of these reasons **(see paragraph 84 [SB p267]).**

e) **Conceding that a briefing document sent by former Post Graduate Dean was misleading;** The Second Respondent have accepted that their former Post Graduate Dean, Dr Frankel, sent a document about me and my case to the Chair of the Conference of UK Post Graduate Deans and former Health Minister Norman Lamb. HEE accept they did nothing to correct the document despite HEE knowing that one of their own senior doctors (Dr Lacy) had described the document as "misleading" in an email to the Second Respondent's management dated 16 January 2019 **[SB p224b];**

f) **Conceding "wholly inappropriate" use/sharing of my personal data;** HEE accepted that their former Post Graduate Dean obtained confidential material about me and my case by falsely stating that they had authorisation from the HEE Medical Director to obtain such information from my file in order to produce a briefing document (conceded as misleading by HEE). Judge Andrews described this as *"wholly inappropriate"* in her Judgment dated 12 February 2022. **[Page 607-624] at [Page 622];**

g) **Concession of "perhaps being deceitful".** The relevant former HEE Post Graduate Dean has conceded in open Tribunal that his actions were "perhaps being deceitful" (recorded in the recent Judgment dated 16 February 2022). **[Page 607-624] at [page 615].**

179. Given the above concessions from the Respondents, including the now accepted protected disclosures, any suggestion that I did not have at least a clearly arguable case of whistleblowing detriment back in 2018 is not credible. All of the above detriments from the Second Respondent are actions related to my ARCP/appraisal meeting on 3 June 2014, where I made one of the most serious of my protected disclosures.

180. Some if not all of these concessions from the respondents could have been obtained/used if the respondents witnesses had been cross examined in October 2018. They are clearly an indicator of how potentially fruitful a cross examination process could have been against the respondents had it occurred.

181. This raises the question of why I would abandon my claim just before cross examining the Respondents' witnesses. I clearly knew the above or similar concessions were possible and even had some of them at the time of settlement.

182. I will now turn to my reasons for agreeing to settling my previous claim. My decision, supported by my wife, to enter into the settlement agreement for my previous consolidated claim was a result of what I was told about alleged cost threats from the respondents by my former legal team.

183. In respect of the above, I emphasise that my case is that the cost threats occurred; the Respondent's categorical denials that they did occur are false and detrimental statements; and those denials were made on the grounds that I had made various

protected disclosures. The conduct of my former legal team is subject to proposed professional negligence proceedings which I will briefly turn to.

Conduct of my Former Legal Team

184. As stated, at the October 2018 hearing, I was represented by Tim Johnson Law and the barrister Chris Milsom.

185. As a result of Mr Milsom failing to provide answers to questions from both me and my solicitor following the settlement of my case and also as a result of Mr Milsom's breaching of General Data Protection Regulation legislation, I submitted a formal complaint against Mr Milsom to his chambers "Cloisters" on 5 May 2020 **[Page 1458-1466].**

186. Mr Donovan QC of Cloisters in his response to my complaint dated 13 May 2020 **[Page 1467-1477]** states, "*the Settlement Allegations raised issues of professional conduct and/or professional negligence which were too wide-ranging and too serious to be suitable for determination under the Procedure*" **[Page 1471]**. Mr Donovan further states more generally about my complaint, "*Plainly, Dr Day's complaint involves very serious allegations of professional misconduct and/or negligence*" **[Page 1474].** Mr Donovan summarises his understanding of the issues raised in my complaint at **[Page 1475].**

187. Mr Donovan further states effectively that he wishes to remain neutral on the matters forming *"no view on the merits or the demerits of the complaint"* ***[Page 1476]***. Lastly, Mr Donovan signposts me towards seeking advice in respect of professional negligence by stating that I was "*entitled to seek independent legal advice on the prospects of a claim against Mr Milsom for professional negligence*" ***[Page 1477]***.

188. The chief source of evidence for the complaint has been Ben Cooper QC and Angus Moon QC, the Counsel acting for the NHS in my case. Mr Cooper and Mr Moon had responded to a Data Subject Access Request from me.

189. A serious situation has clearly developed between the former barristers in this case. It is wrong for me to be disadvantaged by it any further.

190. On 27 August 2020, I instructed a Letter Before Action to be sent to Mr Milsom which Mr Milsom had 3 months to respond to as per the pre-action protocol on professional negligence **[Page 1485-1501].**

191. It took Mr Milsom until the 27 July 2021 (11 months) to finally respond to my Letter Before Action dated 27 August 2020 about questions put to him about his conduct that remained unanswered. In his formal response to my LBA, Mr Milsom sets out for the first time his explanation of his actions on my case in October 2018 **[Page 1560-1582].** This has been redacted accordingly to preserve legal advice privilege.

192. It is obvious that the matters put by me to Mr Milsom in 2020 on the basis of information I had acquired since October 2018 and the response from him in 2021 played no part

in my decision to settle in 2018 as it was not known about at that time. The reason for the settlement was the various cost threats from the respondents.

193. Whether there may have been negligence and/or professional misconduct in the manner in which I was represented at the 2018 hearing is not a question for this tribunal (and would require a very detailed explanation).

194. I do not agree with what Mr Milsom says in his response to the letter before action much of which can be shown to be demonstrably inaccurate with reference to the 2018 hearing bundle.

What is Understood by the Term 'Cost Threat'?

195. I want to be clear what I mean when I use the term 'cost threat' when applied to employment tribunal litigation. This may not be necessarily as it is a widely understood term by employment law practitioners. I accept that it has its appropriate limited place in adversarial litigation as set out in the employment tribunal rules. The rights and wrongs of that is not what this case is about and it is certainly not my complaint.

196. In the present claim, the respondents are seeking to muddy the waters and manufacture confusion on what is meant by a cost threat in the employment tribunal because they are on the wrong side of the simple arguments in this case.

197. My complaint in this claim is not about multiple cost threats being *made* by the respondents. Rather the allegation is that multiple cost threats were made and then *denied* to MPs and to the press. There is also a very clearly obvious issue with what the Board of the First Respondent and I were told by our respective legal teams about respective without prejudice positions before and after agreeing to the settlement as they cannot both be true **[see Page 1123 and Page 1283-1285].**

198. My position in this litigation cannot be interpreted as some vague objection to the fact cost threats were used . My position is simply that multiple cost threats were used to induce settlement and to force the agreed statement and that it is false and to my detriment to deny that they were.

199. Since the settlement of my first whistleblowing claim, I have been open to hearing both sides of the story from both my former legal team and the legal teams of the NHS Respondents on the various cost and regulator threats. This is evidenced by my Data Subject Access Requests to opposing counsel. My application to set aside the settlement is yet further indication that I was open to and considered the possibility of what I had been told about the cost threats actually being a mistake or misrepresentation of the Respondents' actual position and to their publicly stated position being the accurate one.

200. I am surprised that after the respondents, responding to my application to set aside the settlement, denied what I have been told about the cost threats by Mr Milsom [**Page 1123]** was a mistake or misrepresentation, they now seem to claim that it is a mistake

or misrepresentation in their defence of the present claim. Either what is set out on **[Page 1123]** by Mr Milsom is a mistake or misrepresentation and the settlement agreement should be set aside or it is the true position of the respondents and the present claim cannot be resisted. It appears the respondents have sought to advance one position to resist my application to set aside the settlement and another position in the present claim.

What do Employment Lawyers Mean by the term Cost Threat?

201. I accept that this Employment Tribunal will have a view of what amounts to a cost threat in adversarial litigation, which I accept is important. However, it is also important to consider what many others consider by the term cost threat in order to consider whether or not the respondents have detrimentally misled the press, public and MPs.

202. Mr Shah Qureshi, the Head of Employment at the large national law firm, Irwin Mitchel, helpfully describes in the below quote from a Financial Times piece what most lawyers understand by the term cost threat in whistleblowing cases. The FT piece covered the use of cost threats in my whistleblowing case and other whistleblowing cases. Mr Qureshi states **[SB p242-247].**

> *"Employers and their lawyers routinely threaten costs against whistleblowers to frighten them into dropping their claims or watering them down"* **[SB p245].**

203. What I am claiming and what the respondent is counter-claiming is actually quite simple. I am saying that the same sort of cost threats that experienced employment lawyers are saying are routinely used against whistleblowers to frighten them into dropping their claims or watering them down were used against me by the Respondents and their lawyers. The Respondent has stated that they made no such cost threats and further stated that any suggestion that they did is simply untrue. The relevant detriments in the present claim are as follows **[Page 174]**

> "[Dr Day] *claims that the Trust threatened him with the prospect of paying our legal costs. All of this is simply untrue"*
>
> *"We did not threaten Dr Day with legal costs to pressure him to drop his claim"*

204. The First Respondent has also given the impression in their public statements and in communications to MPs that that they made it clear to me prior to my agreement to settle that they would not seek costs against me before I made the decision to withdraw my case, "*On the issue of costs, we had decided not to pursue Dr Day for legal fees before he withdrew his claim*" **[Page 174].**

205. In a Times Law piece in March 2022 that also mentioned my case, Shazia Khan the senior partner on the law firm Cole and Khan Solicitors states of NHS panel law firms in whistleblowing cases;

> "*Those seeking to vindicate their rights before an employment tribunal, Khan adds, will often be "priced out of justice" by well-resourced NHS trust lawyers*

who at public expense "deploy a menu of tactics" to defend cases. This includes triggering satellite litigation to strike out claims as a means to drain resources and threatening six-figure costs applications" (emphasis added)

What MPs Understand by the term 'Cost Threats'

206. I have been quite open with my evidence from my former Barrister Chris Milsom on the various cost threats made, including with the two MPs, Norman Lamb and Justin Madders. Both are former employment lawyers. In a letter dated 17 December 2018 to the Secretary of State for Health they summarise their understanding of what the evidence shows **[Page 260-261];**

> *"We are very concerned that the allegation that cost threats were made has been denied by both Health Education England and the Trust. Dr Day's barrister in the hearing has confirmed that threats were made. This is very troubling.*

Cost Threat on the Employer/Worker Point in 2016

207. Both Respondents have now accepted that the litigation position that I advanced in respect of Health Education England's (Second Respondent's) employer status in respect of junior doctor whistleblowing protection was not only correct but a 'public service' **[Page 996]**. Yet the day before the Employment Appeal Tribunal hearing on that point in 2016, my position was described as unreasonable by Health Education England, and they proceeded to make a written cost threat of £24,084.50 which included a schedule for costs **[SB p184-186].**

208. This cost threat was made when both respondents in the litigation knew my position was reasonable and a public service and both respondents had failed to disclose an LDA contract signed by both respondents that would help establish that Health Education England were my employer for the purpose of ERA s43K **[SB p204-208].**

209. In response to this cost threat, my solicitor, Tim Johnson, sent a letter dated 9 February 2016 that stated **[SB p183];**

> *"We are extremely surprised that your client intends to apply for costs in relation to this appeal as the appeal obviously raises issue of great public interest. In the aftermath of the Francis Report it is very important that the law is clear on exactly what whistleblowing protection junior doctors have.*
>
> *In your skeleton argument your client argues that there is a lacuna in the law. Yet you client intends to seek costs against a doctor who seeks to establish" the law in this area. This is a shameful abrogation of responsibility on the part of a public authority which is responsible for the training of junior doctors."*

210. This example illustrates perfectly how costs threats have been used in my case namely to intimidate me away from pursuing credible litigation in the public interest.

Summary of Cost Threats at the October 2018 Hearing

211. My former barrister, Mr Chris Milsom's failure to give me access to relevant communications with opposing counsel resulted in me having to lodge a Data Subject Access Request against the Respondents' former Counsel in order to establish the position about various 'without prejudice communication'.

212. I will now set out what the evidence shows in respect of ordinary costs threats, wasted cost threats and various references to referring me and my former solicitor to our respective regulators. As far as I know, these threats first started during the period I was giving evidence in purdah at the October 2018 hearing.

213. I would encourage the Tribunal to think of the cost threats in 3 waves;

a) **First Wave** – Friday 5 October 2018 – Ordinary Cost Threat from only the First Respondent Lewisham and Greenwich (which DID NOT induce settlement);

b) **Second Wave** – From 8 -11 October 2018 – Multiple ordinary cost threats from both the First and Second Respondent, and a wasted cost threat (the second wave of threats DID induce settlement) – there were also references to a medical regulator referral and legal regulator referral;

c) **Third Wave** - Friday 12 October 2018 – Using cost threats to force the wording of the agreed statement

Cost Threat Friday 5 October 2018

214. The first of several ordinary cost threats occurred on Friday 5 October 2018. By this time, I had completed only two half days of a 6-day cross examination. On Friday 5 October, the Tribunal did not sit due to the personal circumstances of one of the Counsel.

215. The evidence shows that at on 5 October 2018 at 12:59, my Counsel, Mr Milsom sent an email to the First Respondent's Counsel Mr Ben Cooper QC with the words, "*You around for a chat this afternoon*" with no further text in the body of the email **[Page 942]**. Mr Cooper replied giving his mobile number at 13:06. **[Page 945]**.

216. In a document sent to my then solicitor, Jahad Rahman, on 30 October 2019 **[Page 1550 at 1552],** my former Counsel, Mr Milsom, described how a drop hands offer and corollary cost threat came about during his phone call with Mr Cooper (my emphasis below by underlining):

> *"I needed to speak to Mr Cooper on a few housekeeping matters in any event on that day. During the course of a telephone discussion, I asked whether there was – hypothetically - scope for resolution of matters. I made it emphatically clear that I had no instructions to do this: nor could I since Dr Day was in purdah.*

It seemed to me unlikely that there would be any prospect of financial resolution since this would be subject to Treasury approval I made it perfectly clear that I was not making an offer of settlement and had no authority to do so but was interested to consider the thoughts of the Trust to resolution in principle. Mr Cooper QC confirmed that he would explore that and reverted by way of his text message."

217. As part of the DSAR Mr Cooper has provided a file note of his telephone conversation with Mr Milsom that occurred at 1:13pm on 5 October 2019. It can be found at **[Page 948]**. The note describes a discussion of a drop hands offer and a reference to Mr Cooper anticipating making a cost threat at the end of my evidence. There is no mention in that file note of any link to any potential credibility findings against me. There is also no record of any discussion whatsoever about the truthfulness of my evidence;

> *" . . . I was anticipating approach[ing] CM at end of C's evidence to say drop hands then & we won't go for costs but otherwise we will – but won't want to waste hrg time for him to have the conversations*
>
> *- CM indicates it would be helpful for me to approach him on that basis in any event"*

218. After the telephone contact between Mr Milsom and Mr Cooper, Mr Cooper sent an email to the managing Partner of Capsticks Solicitors, Martin Hamilton at 13:38 **[Page 949]** (my emphasis below by underlining):

> "*I indicated* [to Mr Milsom] *that I was in any event anticipating approaching him around the end of his client's evidence in order to say that there is now clearly a real risk that he will not only lose his claims but may have findings made that he has been untruthful in his evidence; that if he were to withdraw at that stage we would not pursue him for costs; but that if he ploughed on and that were the outcome, we would make a cost application"*

219. Mr Cooper's emailed account **[Page 949]** of his phone call with Mr Milsom in respect of his 'anticipated' drop hands offer and cost threat is not the same as his account in his file note at the time of the phone call **[Page 948].** Included in the email but not in the file note is Mr Cooper recording that he indicated to Mr Milsom that there was "*now clearly a real risk that there may findings that . . . [I had] been untruthful in [my] evidence*". Mr Milsom in an email to me on 13 January 2019 denies that in that Friday phone call with Mr Cooper there was any link made to the truthfulness of my evidence **[Page 1338]**. As I have stated, Mr Cooper's file note appears to support Mr Milsom's account whereas Mr Cooper's email to the Capsticks managing partner does not. Both accounts however provide proof that a cost threat had already effectively been made (despite being couched at that point in the day in language relating to an anticipation).

220. The cost threat and drop hands offer communicated by Mr Cooper to Mr Milsom was passed on to my solicitor Tim Johnson by an email at 13:42. Mr Milsom does not state that the cost threat is linked to any suggestion by Mr Cooper that my evidence could be found to be untruthful **[Page 938]:**

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

221. Mr Milsom sent a text message to Mr Cooper at 13:48 **[Page 952]** that reads;

> *"Hi Ben, Chris here. It would be handy for him to have the weekend as thinking time would you object to me speaking to my client along the lines we discussed? I would understand if you did but it would be handy to make use of the hiatus."*

222. Mr Cooper has provided to me a copy of the text message that he sent Mr Milsom on Friday 5 October at 16:14. I did not know this existed until Mr Milsom later informed one of my legal team over 6 weeks after the settlement. Mr Milsom did not disclose this text message to the instructing solicitor, Tim Johnson, at the time. Mr Milsom subsequently claimed to have permanently lost it and I would not have obtained it at all had it not been for my DSAR to Mr Cooper and his assistance [**Page 952-953]**:

> *"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 . . .".*

223. A further text is sent by Mr Cooper to Mr Milsom the same afternoon stating a clear intention to rely on the earlier communication in any future proposed application for costs. It is explicitly stated by Ben Cooper that the communication is without prejudice save as to costs. That reinforces that by this point in the day there was unequivocally a costs threat being made **[Page 954]:**

> *"For the avoidance of doubt this is all wp save as to costs. B"*

224. I accept from the evidence that Mr Cooper has provided that he has shown that somewhere between 13:42 and 16:14, he was instructed to make a drop hands offer with a cost threat limited only to applying to a finding that I not been truthful in my evidence. It is also clear that the Manging Partner of Capsticks Solicitors was aware by that stage so there is no suggestion that Mr Cooper was acting without instructions by 16:14. Mr Cooper's file note **[Page 948]** and Mr Milsom's email to Tim Johnson shortly after the phone call with Ben Cooper at **[Page 938]** may suggest that the initial drop hands offer and corollary cost threat communicated to Mr Milsom verbally on the phone at 1:13pm did *not* link the threat to any Tribunal finding of untruthfulness of my evidence and that this clarification came later by text at 16:14 **[Page 953]**. There is no evidence in Mr Cooper's file note of his telephone call with Mr Milsom of any reference

to my evidence being untruthful either by Mr Cooper or Mr Milsom. Mr Milsom in an email to me on 13 January 2019 has also denied that any such discussion about the truthfulness of my evidence took place on the phone with Mr Cooper on 5 October 2018 **[Page 1338]**:

> *"I did seek clarity on costs should matters proceed in the course of my discussions with Ben on the Friday because he indicated the only offer that the Trust might make would be a drop hands offer: It was not as specific as the public statement suggests and did not link matters to the truthfulness of your evidence. I certainly made no comments as to your evidence being untruthful. (emphasis added)"*

225. I have learnt from a Data Subject Access Request that on the same day, Mr Milsom had a similar telephone conversation with the Second Respondent's Counsel Mr Angus Moon QC. During this conversation the Second Respondent did not formally adopt the drop hands offer offered by Ben Cooper QC on behalf of the First Respondent. However, Mr Moon did informally state a desire to recover the £55k awarded to me in May 2018 in respect of the worker/employer point (now subject to legal regulator investigation and the wasted cost application). This is recorded in Mr Moon's file note that was helpfully disclosed by Mr Moon in response to my DSAR **[SB p209b].**

226. At this time there is a clear difference between the two respondents in their position. The Second Respondent's position was their counsel giving an uninstructed warning about costs. In contrast, the First Respondent's counsel states that he has been instructed to offer a drop hands offer with a corollary of what is clearly in employment tribunal terms, a cost threat explicitly linked to an implication that the tribunal may find that my evidence may not be truthful. Mr Cooper then explicitly applies a 'Without Prejudice Save As For Costs' status to his communication with Mr Milsom.

227. It is unclear from the evidence whether Mr Moon and Mr Cooper had communicated between themselves prior to or after the call.

228. This drop hands offer, and corollary cost threat was passed on to me on Sunday 7 October during a telephone conference.

Conference on Sunday 7 October 2018

229. On the morning of Sunday 7 October at approximately 10 am, I was phoned by my Solicitor, Tim Johnson, who informed me that my counsel, Chris Milsom had requested a telephone conference. I agreed and shortly after we proceeded to have a telephone conference. I was informed that counsel for the respondents, Ben Cooper QC and Angus Moon QC had authorized the conference but had also stated that my evidence could not be discussed during the conference. I set out an account of this conference in my statement for my application to set aside the settlement agreement dated 11 December 2018 **[Page 137].**

230. 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 the First Respondent Lewisham and Greenwich NHS Trust. The stated offer was that if I withdrew all my claims the Trust would not pursue me for costs. I was then informed that it was the Trust's position that if I failed to accept the offer, proceeded to cross examine any of the Trust witnesses and ended up losing the case that the Trust would seek to recover its costs for the hearing. My Counsel reported being told that that figure would be in excess of £100k. This figure was later clarified by more detailed financial information from Mr Cooper.

231. 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.

232. With a family to support and as a homeowner the potential cost consequences now being applied to the case made me seriously question whether I could continue with the case. Despite the important issues at stake in the case, it was made clear to me that proceeding would place my family's home and security at risk. I decided to complete my 6 days of cross examination. I decided at that stage to proceed with the case.

233. I clearly rejected the drop hands offer as Mr Milsom confirmed in the document he sent to my former solicitor, Jahad Rahman in early 2021, *"Dr Day rejected the offer as he was entitled to do so"* **[Page 1550 at 1553]**

234. The unexpected costs threat, combined with not being able to discuss it properly with my lawyers for 6 days, had a negative effect on my physical health. I developed a severe back pain that occurred within minutes of the 7 October telephone conference and required a combination of pain killers in order for me to get up off the floor. This pain continued to varying degrees throughout the rest of my evidence. I am normally fit and well, working as an A&E Locum Doctor and I regularly play football. I cannot remember another time in my life where I have required regular pain killers on consecutive days. This was exacerbated during my evidence by the low table on which the 6 volumes of the trial bundle were situated, perpendicular to the witness table. This was kindly rectified by the tribunal staff.

235. I would like to make clear that at no point in the conference on Sunday 7 October 2018 was it stated to me that the drop hands offer and cost threat was limited only to circumstances where there was a finding by the Tribunal that my evidence had been untruthful. When this was first suggested by the Respondent in their public statement dated 10 January 2019 **[Page 178-179]** which in fact went further and suggested that my "legal representatives" [plural] had sought a statement from the Trust as to what its position would be if the tribunal made findings that I had not been truthful in my evidence, I immediately sought clarification from my legal team as I was outraged that the Respondent could assert such a thing publicly. I emailed Tim Johnson, my former solicitor on 13 January 2019 and he promptly replied to my email on the same day **[Page 1332-1333]**;

"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."

236. My email to Mr Milsom on 13 January 2019 at 19:34 begins with the words, "I assume this is a formality" **[Page 1338]**. Mr Milsom replied on the same day (13 January 2019) at 7:51pm and could not have been clearer about the terms of the drop hands offer and corollary cost threat made on 5 October by Ben Cooper QC **[Page 1338]**:

> *"I did seek clarity on costs should matters proceed in the course of my discussions with Ben on the Friday because he indicated the only offer that the Trust might make would be a drop hands offer. It was not as specific as the public statement suggests and did not link matters to the truthfulness of your evidence. I certainly made no comments as to your evidence being untruthful."*

237. Whilst I accept Mr Cooper has shown what Mr Milsom has stated about the 5 October 2018 drop hands offer is not correct in respect of the offer not being linked to findings that my evidence was untruthful **[Page 953],** that does not mean that I have been in anyway inaccurate about what I have reported being told by Chris Milsom about the drop hands offer and cost threat as this email from Mr Milsom makes clear **[Page 1338]** nor does the contemporaneous evidence suggest that my legal team were the ones to broach the possibility of my evidence being found to be untruthful.

238. Clearly if there had been a discussion in October 2018 between me and my legal team about any of the Respondents' cost threats at any point in this litigation being linked to a finding or implication that my evidence was untruthful, the 13 January 2019 email exchange set out above between Tim Johnson, Chris Milsom and myself would not have been worded in the way that it was.

239. What is also clear from the evidence is that, whatever transpired in the telephone conversation between Mr Cooper and Mr Milsom on 5 October 2018, it was done without the knowledge or instruction of either me or the instructing solicitors from Tim Johnson Law. Therefore, it cannot be represented as me initiating settlement (I was still giving evidence after all) especially as I rejected the drop hands offer within minutes of finding out about it, 2 days after it was made.

240. I would also like to make clear that during my 6 days of cross examination both respondents made clear challenges to my credibility in open Tribunal. The credibility challenges focused mainly on my use of covert audio and my concession in open tribunal that use of covert audio could be underhand, although I made clear I felt justified in its use in this case. Another issue was the date in which I disclosed it to my legal team which I confirmed was in 2014.

241. I only resorted to covert audio after I had reason to suspect instances of deliberate attempts from the respondents to fabricate the tone and content of my dialogue in certain important situations. The first example was the protected disclosure I made by phone call on 10 January 2014 and second was the protected disclosure on 3 June 2014 to the ARCP panel. I believe that I have clearly demonstrated attempts by the respondents to misrepresent my dialogue on these dates both in formal documents

and even in Tribunal pleadings **[see FBP (Page 484-487].** The existence of the covert audio forced false accounts about me in certain meetings to be disowned by certain senior doctors. The first of these accounts was by Dr Chakravarti about the ARCP protected disclosure on 3 June 2014 and then subsequently by Roddis Associates in respect of the meeting on 18 September 2014 **[see para 121-123 of this statement].** The primary purpose was to record what I said so that I could demonstrate both what I said and the way I said it and counter any further false accounts of my dialogue. I proved this action had reasonable justification by the concessions I was able to secure from Roddis Associates and Dr Chakravarti on false reporting of my dialogue.

242. It should also be noted that the covert audio was taken by me of formal meetings after my employment at the Respondent had ended and whistleblowing claims were registered with ACAS. At the point of me taking covert audio, I had commenced the process of adversarial litigation and my trade union had made legal threats of whistleblowing claims. That is very different from an employee recording an informal interaction with no justification which is very much how the Respondents wished to paint the covert audio.

243. There were also alleged credibility issues relating to when the audio was disclosed both to my legal team and to the other side. The credibility issues surrounding the covert audio and my genuine worries about them cannot now be re-invented into issues to do with the truthfulness of my evidence under oath.

Further Cost Threats from 8-11 October 2018

244. An email dated 30 November 2018 **[Page 1123]** sent to me from Mr Milsom sets out how the Respondents' position on costs had moved on by the 11 October 2018 from what is described in the Data Subject Access Request material from Mr Cooper and Mr Moon in respect of Friday 5 October.

Ordinary Cost Threats

245. 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 were 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 me in May 2018. Mr Milsom also makes clear that it was *"in no way invited by him"*, **[Page 1123]** (emphasis added):-

> *"In addition to my discussion with Ben Collins [Cooper] on the Friday (after two 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 adverse credibility findings would lead to an application in respect of ongoing costs of trial.*

b) *as above but with adverse credibility findings; the Respondents expressly stated that costs of the entire litigation may be at large.*

I challenged this with Angus Moon QC as regards costs of the appeal process: he replied that since these were associated with litigation these too would have been 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

246. In his email dated 30 November 2018, Mr Milsom confirms reference to wasted costs against my former legal team in respect of the alleged late disclosure of covert audio recordings. However prior to my agreement to the settlement, Mr Milsom listed the potential liabilities associated with the respondents' wasted cost threat in respect of the covert recordings with the other ordinary cost threats from the respondents that I was liable for **[Page 976].**

247. As stated, the existence of covert audio evidence of formal meetings was instrumental in getting a senior doctor of the Second Respondent, Dr Chaktravarti, to disown damaging statements about me which had apparently falsely been attributed to her in a formal report by the Second Respondent's investigating director Mr Plummer (see Dr Chakravarti's Tribunal statement at paragraph 20-21 **[SB p301-302]**). Mr Plummer was also the likely signature of the undisclosed LDA contract on the HEE employer point **[SB p207-208].** The statements that were falsely attributed to Dr Chaktravari give a dramatic and damaging account of my 3 June 2014 protected disclosure to the HEE ARCP/appraisal panel **[SB p178-179].** In her 2018 Tribunal evidence, Dr Chaktravarti went on to disown the statements falsely attributed to her in a formal report and to describe the relevant Director of the Second Respondent, Mr Plummer, as giving an "exaggerated or distorted impression" in his investigation of my case **(see paragraph 21 [SB p302]).**

248. I now set out a good example of why I believe it was reasonable for me to resort to covert audio once my employment had ended and the whistleblowing dispute had begun. As stated Mr Plummer's actions involved falsely attributing statements to Dr Chaktravarti that she did not say. The following statement falsely attributed to Dr Chakravarti by Mr Plummer records in his formal report the allegation that I would go on to make in September 2014 about Roddis Associates as something that I apparently said at my 3 June 2014 ARCP meeting (according to Dr Chakrvarti); **[SB p165];**

> *"On a personal level she felt bad for him as he clearly felt `let down` and `frustrated' however she also said that Dr Day had alleged the Trust's internal investigations had falsified documents which was a very serious allegation.*

249. As stated, Mr Plummer is referring to an allegation that I would go on to make about the Trust's external investigation by Roddis Associates, about their false record of our 18 September 2014 meeting. Proving this allegation like securing Dr Chakravarti's

concessions on statements falsely attributed to her was only possible because of my covert audio evidence **[see paragraph 121-123 of this statement]** and **[Page 922-931].** Clearly, I could not have made such an allegation about the Trust's investigation by Roddis associates on 3 June 2014 about a record of a meeting that would happen 3 months after the ARCP. At the time of the ARCP, I had not made a formal complaint against the Trust nor had there been any kind of investigation. The ARCP was the trigger for my complaint. Mr Plummer includes my allegation against the Trust investigation in his account of my ARCP to give a certain impression but did not think enough about the chronology of events.

250. Mr Milsom stated the following about the threat of wasted costs and regulator referral against my former legal team in his email to me dated 30 November 2018 **[Page 1123]**:

> *"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."*

251. The wasted cost threat was obviously a live issue at the October 2018 Tribunal, as on Thursday 11 October 2018, both Mr Cooper and Mr Moon sought in open Tribunal for a Tim Johnson Law solicitor to be cross examined on the covert audio matter prior to the respondents' witnesses. Moreover, the following unusual clause was inserted into the settlement agreement at clause 2.2 **[Page 992]**:

> *"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* (my emphasis).

252. There is evidence of Mr Moon QC making reference to matters relating to covert audio in an email dated 21 September 2018 **[SB p209]** to my former lawyers a week before the final hearing of the case.

253. At the Tribunal in October 2018, the lawyers on all sides appeared to be unaware of a letter dated 17 August 2015 from Hill Dickinson to Tim Johnson Law Solicitors that would have been fatal to any wasted cost application against my former lawyers in respect of disclosure of covert audio **[SB p176]**. The letter enclosed an email chain from me challenging a false and damaging account of my dialogue in the formal ARCP meeting on 3 June 2014 when I made a key protected disclosure **[SB p177 – 182])**. In

my email dated 7 August 2015, enclosed with the HD letter, I confirm the following **[SB p180-181];**

> *"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".*

254. Dr Chakravarti at paragraph 26-27 of her Tribunal statement 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 **[SB p302-303]**.

255. The accusations of dishonesty against me and my 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 that the respondents could have asked for the audio at any time 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 had been greatly delayed for 4 years as a result of the Second Respondent's actions. The wasted cost threat was vexatious and wholly inappropriate.

Threat of Referral of the Claimant to the General Medical Council

256. Mr Milsom' s email dated 30 November 2018 stated the following **[Page 1123]**

> *"the prospect of a GMC referral/conduct which may warrant GMC interest (principally as regards covert recording) was raised not only by Ms. Motraghi 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."*

257. An email dated 3 January 2019 containing an embargoed public statement **[Page 176-177]** that the First Respondent's CEO instructed be sent to me in advance refers to the Respondent's position on any threat to refer me to the General Medical Council (Medical Regulator)

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

258. The Capsticks managing partner, Martin Hamilton in a letter dated 22 December 2018 to the Board and CEO of the First Respondent stated **[Page 1284-5];**

> *"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."

259. For some reason the embargoed statement was never published following me asserting in an email dated 3 January 2019 that the Trust check with their counsel before publishing any further public statements.

260. The threat to refer me to the GMC had no impact on my decision to settle as I did not know about it until a month after the settlement.

Conference on Thursday 11 October 2018

261. Following the conclusion of my evidence on Thursday 11 October, it was suggested by all sides' Counsel that the tribunal finish for the day without beginning to cross-examine any of the Respondents' witnesses.

262. I travelled back to Cloisters barristers' chambers for a conference. My wife and I attended the meeting with my barrister, Chris Milsom and Solicitors Tim Johnson and Ellie Wilson. An account of the conference and subsequent events has been provided in witness statements to set aside the settlement in December 2018 by me **[Page 136 -142]** and my wife Mrs Melissa Day **[149-151]**

263. At the conference, I was informed by Chris Milsom that both respondents had adopted the 'drop hands offer' described to me on 7 October 2018. It was clearly expressed to both me and my wife that in the event that I did not take up the offer and proceeded to cross examine witnesses that the offer would be withdrawn. I was told that if I were to proceed to judgment then the respondents would proceed to attempt to recover their costs for the whole of the proceedings if I lost. 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.

264. Mr Milsom described details of the financial information given to him from the respondents' side. I was told Ben Cooper QC's brief fee was around £70,000 and the total cost liability that I could be exposed to would be estimated at £500k.

265. In consultation with my wife, I decided very quickly in the conference that on the basis of the costs threats that we were not prepared to accept the risk to our family home and security that proceeding with the case would involve. In these circumstances and as a direct result of the cost threats I decided to withdraw the case.

266. I remember stating to my wife that we should go out to dinner and discuss the cost threats properly. This was met with a firmness from my wife that continuing with the case was simply not in her view an option in light of the various cost threats and that there would be nothing to discuss. This was a position that took me only a few minutes to accept as proceeding with case without my wife's blessing was not an option for me. I therefore instructed my lawyers to settle. I will now set out my reasoning.

267. I understood the £500k figure to be a worst-case scenario but took it extremely seriously for the reasons that I will now set out.

268. By the end of the conference on 11 October 2018, I understood from Mr Milsom there to be the following cost threats from the respondents that amounted to that very significant £500k figure:

a) The £55k Worker/Employer cost threat (Second Respondent)

b) The cost threat associated with just losing the case (both respondents)

c) An additional cost threats relating to covert audio and credibility findings (both respondents).

The Worker/Employer Cost threat

269. I understood from Mr Milsom in the conference of a stated intention from the Second Respondent to recover at the very least the £55K awarded to me on the employer/worker point in the event that I lost the case. The conference note states, *"CM said that AM told him that if we go ahead then they would ask for their £55,000 back."* **[page 976].** Mr Milsom' s email dated 30 November 2018 **[page 1123],** further confirms this cost threat, *"I challenged this with Angus Moon QC 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."* (my emphasis by underlining).

270. This cost threat clearly centres on recovery of the funds paid over to me by the Second Respondent in respect of costs incurred in litigating the employer / junior doctor whistleblowing protection point earlier in this case's history. Mr Moon used the term in any event to describe the cost threat; which is certainly how I understood it at the conference. Any suggestion that this cost threat was related to my credibility, or the truthfulness of my evidence is clearly not what is said in either the conference note or Mr Milsom's subsequent email **[Page 1123].**

The cost threat associated with just losing the case

271. I understood in the conference, from what Mr Milsom said, that both Respondents had made clear to Mr Milsom that proceeding with the case and losing could lead to them seeking to recover substantial costs. This cost threat is described in the conference note as *"the costs between now and the end of the hearing (£120,00[0] or more)"* **[Page 976].** It is further set out in Mr Milsom' s email dated 30 November 2018, *"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* ***[Page 1123]***.

272. This threat was clearly not related to any adverse finding on my credibility and just associated with losing the case.

Cost threat relating to covert audio/credibility

273. It was made clear to me by Mr Milsom that the Respondents would seek additional costs against me to what I have described above if there were credibility findings made by the Tribunal. Mr Milsom describes this cost threat in his email dated 30 November 2018 **[Page 1123],** "*as above but with adverse credibility findings; the Respondents expressly stated that costs for the entire litigation may be at large.*

274. As stated, my credibility was brought into question on several occasions in respect of my use and allegedly late disclosure of covert audio. Another issue was the fact that, in open tribunal, I had accepted the use of covert audio could be underhand. A further issue was an assertion in open Tribunal by Angus Moon QC that I should be referred to the medical regulator because of the covert audio. As stated, I made clear that I believed that covert audio was justified in my case but had to consider the possibility of a Judge not agreeing with that. Any cost threats related to the covert audio had to be seriously considered, particularly given the fact I have a house and a family to look after. I understand that lawyers and judges may have strong views on covert audio, but I believe I have clearly shown why it was needed in this case and also how misled the Tribunal would have been without it. I wasn't prepared to bet my house on a Judge seeing things my way on covert audio.

275. At the time of the 12 October conference, I took the additional threat related to my use of covert audio to be the wasted cost threat. At the time I understood wasted costs to be a penalty for Claimants behaving badly in litigation, and in my case over the covert audio. When I asked what the costs were likely to be, Mr Milsom responded by explicitly including wasted costs with reference to covert audio when he listed the respondents cost threats and the stated potential liabilities **[Page 976]** (my emphasis added);

> "*CD asked what the costs are likely to be. CM said that there are two types of costs: wasted costs (in relation to the covert recordings) and the costs between now and the end of the hearing (£120,00[0] or more). CM said that BC's brief fee is around £70,000 and the total cost is of an estimate of half a million. CM said that AM told him that if we go ahead then they would ask for their £55,000 back.*"

276. At no point in the conference was I told that a wasted cost threat was being made by the respondents against my solicitor rather than me. At the time, I had no idea of the possibility of my legal team being separated off to be pressured with their own legal threat that they themselves would be liable for.

277. I gained some awareness, from what my wife, who overheard Mr Johnson and Mr Milsom speaking about details in Cloisters Chambers of a potential separate process with the legal regulator and Tim Johnson Law. A potential fine was mentioned. At the time I believed that was entirely separate from the employment tribunal cost threats. This was not discussed in the conference. It had no impact on my decision to settle.

My experience/knowledge on costs in the employment tribunal at the time

278. At the time of the October 2018 hearing, I had very little knowledge of the basis in the employment tribunal rules for the legitimate use of cost threats in employment tribunal litigation. I accept cost threats have a legitimate place in deterring vexatious claims. For the issues raised in this case to be put in that category is extremely unfair.

279. I was aware in October 2018 that costs have been a live issue in the history of this case. As stated in 2016 we were threatened in the EAT for costs by the Second Respondent for pursuing the employer/worker point. In May 2018, we actually benefitted from an award on £55k of costs. This experience informed my consideration of the cost threats that were made in October 2018.

Cost threat related to agreed statement – Friday 12 October

280. We attended the Tribunal on the following day to negotiate a settlement agreement.

281. I attended the London South Employment Tribunal at 10am and I understand that counsel informed the Tribunal that settlement negotiations had commenced.

282. 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 examining 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'.

283. During a conversation my wife and I had with Mr Milsom, in a Costa Coffee local to the employment tribunal, I was told that the wording of the 'respondents had acted in good faith' was referred to by the HEE Barrister, Mr Moon, as a 'red line'. Negotiations about the agreed statement went on for most of the day (Friday 12 December). Often, they took the form of a phone call between Mr Milsom and the respondents' counsel. On this occasion it was definitely Mr Moon that Mr Milsom was speaking to.

284. Mr Milsom has confirmed this account in his approved statement dated 11 December 2018 states;

> *"I remember that there was a point during the course of settlement discussions at which an impasse was reached on the terms of the joint statement. HEE in particular became more emphatic on the prospect of a costs application at this juncture and Mr Moon stated that the wording of the agreed statement must accept that individuals employed at the Respondents acted in good faith towards Dr Day as a 'red line' in negotiations. I communicated this fact to Dr Day and his wife."* (my emphasis by underlining)

285. I can clearly recollect several key objections that I had to the wording that the respondents had acted in good faith. Mr Milsom passed these objections on whilst we were in Costa Coffee. Mr Milsom appeared to be speaking to Mr Moon QC who appeared to be in a room with Mr Cooper QC or at least someone representing the

First Respondent. Managers from the First Respondent or their legal team were clearly providing the position of the First Respondent to Mr Moon on what I was saying as my objections to the agreed statement. My objections were based on what the respondents' own witnesses had conceded and the findings of the Trust's external investigation. There were several examples but these I were raised with Mr Milsom:

a) Dr Chakravarti conceding the Second Respondent's director Mr Plummer gave an "exaggerated or distorted impression" in his investigation of my case and falsely attributed damaging statements about me to Dr Chakravarti in his report. **[see above paragraph 178]**

b) The First Respondent's external investigation criticisms of the Trust on bullying;

c) Roddis Associate's false account of the 18 September 2014 meeting and their apologies and adoption of my note of the meeting to substitute their initial false account **[see paragraph [121-123 of this statement]**;

d) The fact the First Respondent had used public money to deny the status and reasonableness of my protected disclosures for 4 years before conceding them on the first day of the hearing on 3 October 2018;

e) The Second Respondent's conduct on the ERA s43K point including the failure to disclose a key contract. It should be noted that this conduct has been described by an MP with the words "smacks of unethical behaviour". The agreement to pay costs of £55k of must have indicated a concession by the Second Respondent that they had not acted in good faith or reasonably.**[See above paragraph [35-36]**

286. I remember Mr Milsom passing on an argument from the Second Respondent that amounted to the point that because Mr Plummer (the Second Respondent's investigating director) was no longer employed for the Second Respondent that the agreed public statement could seem true on the points that I raised as he was no longer an employee of the Second Respondent. The First Respondent advanced a similar argument about Roddis Associates being contractors and that their conduct didn't need to be taken into account in any comment about employees of the respondents acting in good faith. I am certain this position came after the lawyers took instruction from the Respondent. The First Respondent was clearly aware of how the cost threats were being used to force the wording of the agreed statement **[Page 996].** I remember the employment status of Dr Roddis had to be looked into and this took time.

287. Eventually, I had no choice but to accept the following wording as we were approaching the end of the afternoon. The financial duress of the costs threat was the reason for my agreement to such wording. Mr Milsom secured the words the "the tribunal was likely to find" so the agreed statement was not expressed as my view on the facts.

> *"Dr Day blew the whistle by raising patient safety concerns in good faith. Dr Day has performed a public service in establishing additional whistleblowing protection for junior doctors. The Tribunal is likely to find that both the Trust and HEE acted in good faith towards Dr Day following his whistleblowing and that*

Dr Day has not been treated detrimentally on the grounds of whistleblowing. Dr Day's claims are dismissed upon withdrawal" ***[Page 996].***

288. At around 17:00, the parties went before the Tribunal and stated that agreement on a settlement had been reached. Ben Cooper QC informed the Tribunal that the Trust CEO had approved the settlement but that there would need to be a board meeting that would take place on Sunday 14 October as the nature of the settlement was one that would need board approval. This led several people in the Public Gallery to the wrong conclusion that I had received a substantial pay off. This erroneous conclusion then started to circulate.

Sunday 14 October – Respondent Board Meeting

289. It was referred to in open Tribunal on Friday 12 October, that the First Respondent's Chief Executive did not have the authority alone to approve the proposed settlement agreement and that Board approval would be needed. Several journalists suspected that I had been paid off and gagged as a result of this dialogue in open Tribunal. This is not the case.

290. I am aware this Board meeting occurred on the evening of Sunday 14 October. The First Respondent has not disclosed any record of this meeting or initially even any reference to its existence in emails or other documents.

291. On 15 July 2020, I was copied into the following email that was sent to the Solicitor Regulation Authority from the Journalist Tommy Greene **[Page 1479-1483];**

> *"Attached to the forwarded email is a response to a Freedom of Information request by Lewisham and Greenwich Trust. It is a fairly straightforward request, asking for the details of a trust board meeting that took place in October 2018. It has been stated in open tribunal that at this board meeting the controversial settlement agreement in Dr Day's whistleblowing case was approved by the trust's board. I believe the SRA and Dr Day should both seek the records of this conference, as my FOI request and all questions I have put to the trust board secretary on this matter have been met with the same response - they have declined to answer any questions on the meeting (which have been put to them several times) and now claim no records of the meeting can be provided as they say it took the form of a 'confidential teleconference'. Trusts can be referred to the Secretary of State for failing to keep records of their meetings - particularly ones that deal with matters of such public interest as this one - and for failing to disclose them.*

292. On the 21 July 2020, I sent the First Respondent's solicitor an email attaching Mr Greene's email sent to the SRA [**SB p233-236];**

> *"Please can I request an explanation as to why the written record of the Trust board meeting/teleconference that occurred on Sunday 14 October 2018 that approved the settlement of my case, was not disclosed in the recent application*

proceedings and or appeal. It is likely that such a record will make clear what the Trust Board knew at the time of settling in respect of the following;

1. The Trust's stated position/instruction on wasted costs during settlement talks;

2. The Trust's stated position/instruction on ordinary costs during settlement talks;

3. The use of any reference to costs to secure the wording of the agreed statement and to discourage the cross examining of witnesses.

4. The Board's knowledge/consent to the above tactics while I was giving evidence in purdah

5. The Board's understanding of the patient safety issues in my case and whether they have been accurately reported in the various Trust public statements.

It is likely to also make clear what the Trust Board knew about my reasons for settling and agreeing to the wording of the agreed statement. "

293. The Respondent's solicitor replied on 4 August 2020 referring to the anticipated standard disclosure order, "*the Employment Tribunal will no doubt in due course make an order for disclosure of relevant documents. If any documents exist relating to the meeting you refer that are relevant to the issues in that claim, they will be disclosed in accordance with that direction".*

294. On 21 December 2020, I applied for an order for the formal record of this Board meeting and other relevant documentation/communication relating to it, as none of this material was listed in standard disclosure **[SB p237]** The Respondent's solicitor responded by email dated 23 December 2020 and stated, "*there is no documentation that falls within the class of documentation"* **[SB p238].** When I pressed for an order on 19 March 2021 **[Page 535],** documents were finally disclosed **[Page 985-989]**. These documents fall short of an actual record of the meeting but are clearly relevant but were not included in standard disclosure or provided after I made a specific request for them in an application dated 21 December 2020 when the existence of such documents was denied to the Tribunal.

Monday 15 October – Settlement Finalised

295. At 10am on 15 October, Counsel for the parties signed the settlement on behalf of their clients. At the time I was in transit to the Tribunal, and I authorised this by text message to Chris Milsom for the reasons outlined above.

296. The parties' representatives went before the Tribunal and the agreed statement was read out by Counsel for one of the Respondents.

297. As the case had been crowdfunded, on 15 October I sent the agreed statement to our 4,000 backers on Crowd Justice only adding the following words **[Page 997];**

> *"We would like to thank you for your encouragement and generosity. We are very proud of what we have been able to achieve together with our supporters on Crowd Justice."*

298. The Second Respondent released a statement [**Page 182-184]** on their website which they report in emails that they circulated to the press. It contained the agreed statement and the following additional text before the agreed statement;

> *"The claim brought against HEE and the Trust was settled on the basis of Dr Day withdrawing his case, the published position statement and the parties agreeing not to seek any award for legal cost. No financial payment will be made by HEE as part of the settlement and the settlement is not subject to confidentiality.*
>
> *We have always been clear we did not act against Dr Day because of his protected disclosures or cause him any detriment. We are delighted that it is now accepted that the Tribunal was likely to find that too if the claims against HEE had not been withdrawn and dismissed.*
>
> *This process has caused tremendous stress for staff involved, especially those accused of causing detriment and we thank them for their forbearance, diligence and commitment and we are delighted that the allegations against them have been withdrawn.*
>
> *HEE has always supported healthcare staff blowing the whistle, it is part of the education and training we oversee for new clinicians. This process led us to voluntarily agree a new legal route to hold HEE to account should whistle blowing doctors in training feel it necessary and it saw the law change to give access to redress through Tribunal as well.*
>
> *We hope that all doctors and other staff know they will be supported by HEE should they blow the whistle and that HEE has not and will not cause detriment to those that do." (emphasis added)*

299. As part of the Data Subject Access Request, Mr Cooper QC disclosed the following email dated 15 October 2018 from Mr Milsom that he sent them on the day of settlement **[Page 1021]**

> *"Both,*
>
> *After two pretty gruelling weeks I just want to say chapeau. It would be condescending of me to say any more about the immense quality of cross-examination: QC status rarely arrives by luck alone. But the decency and spirit in which this was conducted was greatly appreciated. There was no crowing or bravado: quite the contrary. I for one appreciated it enormously.*
>
> *All the best and see you soon no doubt*

Best wishes, Chris"

300. Mr Cooper provided a reply to Mr Milsom in an email dated 16 October 2018 **[Page 1020]** (my emphasis in underlining);

> *"Likewise, to thought the collegiate spirit all round on the Day trial made it a much more pleasant experience than it might otherwise have been -Angus and I both understood the position you found yourself in and I for one was immensely impressed that your persuasive powers has an effect where little else previously had (I appreciate you can't comment on that!) Hope to catch up soon."*

301. I imagine these are the sorts of emails that will mean different things to different people perhaps particularly given their context both in 2018 and now in 2022. Mr Milsom did not disclose them to me. They came to me from Mr Cooper.

The Respondent's Evolving Public Position on Costs

302. The First Respondent claimed the following position on costs in December 2018 - which are claimed as objectively false statements and detrimental statements in the present claim **[Page 1166].** The context of these statements will be set out later in this statement;

> *"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."* **[Page 174]**

303. It appears that the Second Respondent (Vicky Diaz) had intended to mirror the position of the First Respondent of a categorical denial of cost threats with a further reference for it to be untrue to suggest otherwise. On 12 November 2018 after proposing such wording, she was advised to remove the sentence containing the word 'untrue' by the Second Respondent's Director Mr Lee Whitehead, *"Do we need the last sentence?"* **[Page 1076].** We now know from the hearing in January 2022 that Mr Whitehead was the person giving instructions to the Second Respondents lawyers **[page 1075-1077].** Mr Whitehead responds to Vicky Diaz;

> *"It's tempting but I don't think we should go there. I would say that's starting to get into territory where Day may feel he has to come back to us (and/or the Trust) to say that we have broken the spirit or letter of our agreement.*
>
> *There is no evidence so far that Day himself is talking and I think we have enough ammunition without taking the risk."*

304. The First Respondent's position on the cost threats then evolved in various subsequent press statements and Tweets leading to Health Education England, the former Second Respondent in these proceedings to mock their various changes in position [**Page 1146];**

> *"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."* (my emphasis by underlining)

305. In a public statement released on 10 January 2019, the First Respondent attempts to disguise the fact that they are publicly changing their position from their categorical denial of making costs threats in my case. They have attempted this by giving a series of false impressions to smear and discredit me further in respect of how my case settled **[Page 1314 -1316]**:

> *"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'"*

306. The above dialogue can only be referring to the telephone contact that Mr Cooper and Mr Milsom had on Friday 5 October which resulted in the First Respondent instructing a drop hands offer of settlement and a corollary cost threat. This evidence from Mr Cooper and Mr Milsom in relation to this phone call and subsequent drop hands offer is set out at **[paragraph 214- 243 above].**

307. Firstly, it is misleading for the Respondent to refer publicly to the Friday 5 October drop hands offer and imply that my side initiated it when the Respondent knew that I rejected the offer as soon as I found out about it on Sunday 7 October (a fact they exclude from their public statement). This also gives the false impression that it was the terms of this offer linked to an implication about the truthfulness of my evidence that induced the settlement of my case. The Respondent knew this to be untrue as they knew I had rejected the offer. Clearly the aim of this content is to give the public impression that my side was concerned that a dishonesty finding was a real possibility in my case and that I settled the case on that basis.

308. Secondly, the Respondent seeks to also give the false public impression that my legal representatives (which can only mean in my case my solicitor and barrister) approached the Trust's legal team and indicated that they were concerned that my evidence may be found to be untruthful. I can only assume that the Respondent is relying on Mr Cooper's account of his phone call with Mr Milsom on 5 October. Nowhere in Mr Cooper's file note of his conversation with Mr Milsom **[Page 948]** is there a mention of Mr Milsom making any reference to the possibility of a finding that my evidence was untruthful or indeed any reference to Mr Cooper making such a reference. Mr Cooper records other significant things Mr Milsom says in the phone call

in his note. Mr Milsom has categorically denied he said anything of the sort:-, *"I certainly made no comments as to your evidence being untruthful"* **[Page 1338].** Even if Mr Cooper seeks to rely on his subsequent email to the managing partner of Capsticks **[Page 949],** this note at **[Page 948]** is not consistent with his contemporaneous file note when it describes the drop hands offer, this email also does not provide support for the Respondent's allegation that *my* legal representatives were concerned that my evidence may be found to be untruthful. Even in that email to his instructing solicitors, Mr Cooper clearly states that it was *him* that indicated to Mr Milsom the risk that my evidence may be found untruthful and not the other way around - but as I say, this does not feature at all in Mr Cooper's contemporaneous note of his phone call.

309. Thirdly, the Respondent by using the term 'legal representatives' in the context of my case and this situation are giving the impression of a well thought out and planned formal approach involving my solicitor and barrister, where both legal professionals apparently initiate settlement discussions and express concerns about the possibility of a finding about the truthfulness of my evidence. The reality was an informal and disputed account of a discussion between two barristers during a telephone conversation about employment tribunal housekeeping matters. It is objectively wrong to imply that Tim Johnson Law had any involvement in this interaction between Mr Milsom and Mr Cooper on 5 October, as the firm only found out about it after it had happened. This was confirmed by letter dated 14 January 2019 from my former firm of solicitors, Tim Johnson Law to Martin Hamilton, the Managing Partner of the First Respondent's solicitors, Capsticks, which states **[Page 1356]**:

> *"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".*

310. As stated Mr Chris Milsom wrote to me and Tim Johnson Law on 13 January 2019 to confirm in writing that he "certainly made no comments as to [my] evidence being untruthful" **[Page 1338].** This position was further endorsed by my former Solicitor Tim Johnson in an email also 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"* **[Page 1333]**.

311. I wish to highlight the following text from paragraph 34 of my Grounds of Claim: (my emphasis):

> *"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."*

312. From the evidence it seems likely that the underlined portion of paragraph 34 of my Grounds of Claim that reports something that Chris Milsom has written may not be a true reflection of the situation, despite it being a true reflection of what Chris Milsom wrote to me, at least in relation to the 5 October 2018 drop hands offer. It seems to me Mr Cooper has shown that offer at least (on Friday 5 October) was linked to findings that my evidence was untruthful as clearly stated in Mr Cooper's Friday 5 October text. However, the text does not prove what was said on the phone to Mr Milsom and certainly does not assist Mr Cooper with the subsequent cost threats he made after I had rejected the initial drop hands offer.

313. However, the rest of paragraph 34 in my Grounds of Claim is supported by the evidence, in particular Ben Cooper's email to Martin Hamilton **[Page 949].** The key to the pleaded detriment is the First Respondent falsely implying that *both* my solicitor and barrister gave the impression that my evidence may be found to be untrue to Mr Cooper; or that it was the terms of the drop hands offer linked to the truthfulness of my evidence that induced the settlement of my case. The Respondent knew that I rejected the drop hands offer made on Friday 5 October 2018 as soon as I found out about it.

314. The Respondent's false and detrimental statements continue to damage me and have been categorically denied by both Mr Milsom and Tim Johnson Law and are not supported by Mr Cooper's contemporaneous note of his phone call with Chris Milsom on Friday 5 October. Two good examples of the large amount abuse that I have suffered on social media as a result the Respondent's 10 January 2019 public statements are these tweets from two senior doctors. I have never met these people before **[Page 1535-1536]**. Norman Lamb warns one of the doctors of the defamatory consequences of his actions with his own tweet.

Gaps in Data Subject Access Request Disclosure from the Respondents' Counsel

315. Mr Cooper QC and Mr Moon QC provided file notes and various emails to their instructing solicitor to me as part of their Data Subject Access Request Response. If Ben Cooper QC, Angus Moon QC and their instructing solicitor's evidence is to be accepted by the Tribunal, the Tribunal would have to find that my former Counsel Mr Milsom;

a) Acted without instruction from either me or instructing solicitor to initiate settlement discussions on Friday 5 October 2018 **[Page 949]**:

b) Misrepresented the cost position of both Respondents that he set out in his email dated 30 November 2018 **[Page 1123]** and at the conference on 12 October 2018 (This has to be the Respondent's position if they are claiming the cost threats set out by Mr Milsom on **[Page 1123]** were never made of communicated to him by the respondents' legal teams)

c) According to Hill Dickinson **[Page 147-148],** Mr Milsom proceeded contrary to my explicit instruction on Monday 8 October 2018 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 was impossible

for me to have had any input or knowledge of this. Milsom has denied this occurred.

d) Subsequently fabricated references to further drop hands offers from both Respondents with "sophisticated two tier" ordinary cost threats/consequences [**Page 1123**]:

e) Fabricated references to me facing the risk of having to return the £55k awarded in May 2018 **[Page 1123]**:

f) Fabricated reference to wasted costs [**Page 1123**];

g) Fabricated reference to a legal regulator referral **[Page 1123]**:

h) Fabricated reference to a medical regulator referral for me **[Page 1123]**:

316. These are very serious allegations to make against my former Counsel, Mr Milsom.

317. Given what Mr Milsom describes in his email dated 30 November 2018 **[Page 1123],** It should be noted and explored why Mr Cooper and Mr Moon's DSAR Response 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. Mr Milsom clearly describes these subsequent 'Without Prejudice Discussions'. The detailed account of the events of Friday 5 October found in multiple emails and file notes from the Respondent's counsel, is in stark contrast to the complete absence of material for the subsequent discussions between counsel once I had rejected the drop hands offer.