IN THE SOUTH LONDON EMPLOYMENT TRIBUNAL **ClaimNo. 2300819/2019**

BETWEEN

DR CHRISTOPHER DAY

Claimant

and

LEWISHAM AND GREENWICH NHS TRUST

Respondent

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RESPONDENT'S CLOSING SUBMISSIONS

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Introduction

1. These closing submissions cover the following ground:
   (a) Detriments;
   (b) Detriments in employment;
   (c) Causation
   (d) Conclusions and case overview

2. Separately, the R has made some submissions regarding the credibility of the C's evidence and the R's witnesses; and submissions about both parties' disclosure.

3. In considering these detailed submissions the ET is invited not to overlook the fact that resolution of this case is in essence relatively simple. Even if the C can establish that some of his alleged detriments were detriments, none of them fall within the ambit of Part V of the ERA 1996; and none was done on the grounds of the C's protected disclosures made years earlier. The evidence for both those propositions is in truth overwhelming. The C's claim under s.48 of the ERA 1996 should therefore be dismissed.

What is a detriment for the purposes of s.47B of the ERA 1996?

4. A detriment exists "if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment". An "unjustified sense of grievance cannot amount to a detriment": see **Jesudason** [27]. As it was put in **R (Interim Executive Board of Al-Hijrah School) v HM Chief Inspector of Education [2018] 1 WLR 1471 (CA)** at [48], the touchstone of a detriment is 'reasonableness of perception of adverse detriment'.

5. The test is therefore objective. It is not sufficient for the C to say that he felt aggrieved at the statements. The issue is whether a reasonable worker would take that view in all the circumstances.

6. Relevant to the consideration of what a reasonable worker would consider is the issue of what, in the adversarial context of litigation, would constitute a reasonable response by an opponent in litigation – even if the response will be, from the perspective of the other litigant, detrimental. In **Pothecary Witham Weld v Bullimore [2010] ICR 1008** (EAT), Underhill J considered authorities concerned with "cases of a very particular type, namely cases where the employer has taken action in order to protect his position in current litigation". Underhill J said (at [19(3)]) in respect of such cases that

   "In considering whether the act complained of constituted a detriment the starting-point is how it would have been perceived by a reasonable litigant; but such a litigant could not properly regard as a detriment conduct by the employer which constituted no more than reasonable conduct in defence of his position in the litigation."

7. Here the issue was a respondent to high profile adversarial litigation taking action to protect its reputation in the context of adverse publicity following the conclusion of that litigation. The R could not reasonably regard as a detriment conduct which constituted no more than a reasonable response to the adverse publicity associated with the C's case, having regard to the content accuracy and tenor of that prior adverse publicity. In **Jesudasen**, Sir Patrick Elias stated [62] that "The claimant could have no legitimate grievance at the trust responding, even in a robust way, to his damaging and, in part,

false communications". Submissions about the content and accuracy of the C's crowdfunding postings are set out in the separate submission regarding the C's credibility.

8. Furthermore, if an alleged detriment is trivial it will not amount to a detriment for the purposes of s.47(B)(1) of the ERA 1996 on the basis that it will be *de minimis:* see **Moyhing v Barts and London NHS Trust [2006] IRLR 860** (EAT) Elias LJ at paras 20, 23. The EAT noted there that the *de minimis* exception was recognized in **Ministry of Defence v Jeremiah [1980] QB 87 (CA)**, approving, on this ground only, the earlier decision of the Court of Appeal in **Peake v Automotive Products Ltd [1977] ICR 968.**

9. The *de minimis* point arises because the allegedly detrimental statements need to be considered in the context of the press statements of which they form a part. The press statements make comments about the C or his case that are unchallenged even though they are damaging to his reputation as a crowdfunder. Even if the impugned statements might reasonably be perceived to be adverse detriments if viewed in isolation, it is submitted that they will not amount to detriments for the purpose of s.47(1)(b) if they are trivial in the context of the press release as a whole. The point can be illustrated by an example. Suppose that the statement "X got 5 GCSEs at school" is false – X in fact got 7 GCSEs at school. X might say that the statement about his GCSE attainment is to his detriment. He might legitimately feel aggrieved. But if the statement was "X, who got 5 GCSEs at school, was convicted of theft last week", it is submitted that his complaint about the misrepresentation of his GCSE achievement is no longer a detriment. In the context of that statement as a whole the error is obviously trivial.

10. Finally, it is necessary that the C can show that he was "subjected to" the detriment by the R by the act complained of. This is relevant because some of the detriments complained of are statements that are not about the C at all: e.g. statements about the findings of an external investigation or whether the concerns identified by a review were the same issues as the C had raised in January 2014. Even if the statements are untrue the C needs to establish that the making of the statement subjected *him* to a detriment.

11. In addition to the above, the C needs to establish that his complaints fall within the jurisdiction of the ET in the first place: this is the "in employment" point discussed

below. Although that is in some ways a logically prior issue, these submissions first consider whether the impugned acts or statements are detriments at all (without prejudice to the R's contention that none of them fall within the ET's jurisdiction in any event).

The October 2018 statement: the relevant circumstances

12. What are the circumstances of the October 2018 statement? They include the following.

13. **First**, the statement is a **press release**. The late-disclosed email of 22/10/18 from Janet Lynch [disclosure bundle, p. 7-11] indicates that the "aim is to focus on the facts of the case from our point of view". A statement from a particular point of view is partisan. Moreover, because it is a relatively short press release it is necessarily selective. Could a reasonable worker object to the R posting a necessarily selective statement articulating the R's point of view?

14. The answer is clearly "no". That is because (as is explicitly recorded in the October statement itself [172]) "much of the publicity and social media activity around [the C's] case has created a negative impression of the Trust…". Moreover, much of that publicity was unfair or misleading. That being the case, a reasonable worker in the C's position would not object to the R putting its side of the story. The C and/or his supporters had posted partisan and selective comments about the R and his litigation: he could not reasonably complain if the R sought to right the balance.

15. The C (somewhat grudgingly) accepted that he had made criticisms of the R in his capacity as a crowdfunder (4/315/28/29[1]). He had (for instance) asserted when launching what the text states is his 4th crowdfunding campaign to fund the October 2018 hearing[2] that he had lost his career on the grounds that he had raised patient safety issues[3] - a damaging assertion about the R that he knew (but did not emphasise) was hotly contested. He also made allegations that his safety concerns were not acted upon[4].

[1] i.e. day 4/p.315 of the 1291 page pdf/internal page numbering 28 and 29.
[2] So the campaign to fund the current litigation must have been the 5th round of crowdfunding.
[3] See para 29 of his Third Statement.
[4] Ditto.

16. Immediately after the case settled there was social media comment that was hostile to the R from the C's supporters that was perceived to be (and was) inaccurate and damaging. Thus on 17/10/18 Dr Harding emailed DC saying "I'm not sure if the Trust has made a statement yet but surely that must address the concerns in the piece below. People still do not know the full facts of the case and until they do, the reputation of the Trust (and HEE, and the clinicians managers and investigators involved) will be at risk…The article below is infuriating" [p.4 of supplemental disclosure bundle]. Immediately prior to the October 2018 statement there was an adverse and erroneous comment to the effect that the C had been gagged (1017[5]) and questions from journalists as to whether the Rs had made threats of "crippling" legal costs (18/10/18 p.1030).

17. **Secondly**, part of the circumstances of the October 2018 press release was the inescapable fact that the C – a high profile crowdfunder who had persuaded supporters to part with hundreds of thousands of pounds[6] – had withdrawn his case before the conclusion of evidence and without receiving a penny. The natural (and accurate) inference from that fact was that his case had gone badly. The simple fact of the sudden withdrawal immediately triggered "insults and questions" [1013]. The fact that the C decided, following expert legal advice, to the withdrawal from proceedings will inevitably have damaged the C's reputation as a crowdfunder irrespective of anything the R might say.

18. **Thirdly**, the reasonable worker would recognise that any impugned statement has to be considered in the context of the press release as a whole, including the fact and associated inference referred to in the preceding paragraph. The key "take aways" from the October 2018 statement, so far as the C is concerned[7] are as follows:
    (a) He agreed to withdraw the case after 6 days of evidence;
    (b) He did not receive any money and is not subject to a gagging clause;
    (c) He raised safety concerns and did so in good faith;
    (d) His case was likely to lose.

[5] For which the C cannot be held responsible: this was an (erroneous) assumption made by Dr Phil Hammond.
[6] On 3/3/20 [2207] he says (in the context of his threatened judicial review of the BSB when it rejected all his complaints against the 4 barristers he had referred to it) that he had raised over £600k crowdfunding.
[7] Recognising that the focus of the press statement is very much on the R rather than the C: see e.g. the final two paragraphs.

(e) The Rs were likely to have been found to have acted in good faith.

(f) He performed a public service in establishing whistleblowing protection for junior doctors.

19. In light of those facts – which are a mixture of "good" and "bad" from the C's perspective – the criticisms now raised by the C and identified as detriments are objectively trivial. A reasonable worker would not therefore object to them. The point can be illustrated by considering the sort of amended wording that the C implicitly suggests ought to have been included in the impugned statements[8]. Had the statements included the sort of modifications suggested in the footnote, the "key take aways" referred to above would not have altered one jot. The C's reputation is entirely unaffected by the points complained of[9].

20. This perhaps explains why:

(a) There is no evidence at all from social media postings or commentary that anyone thought less of the C because of the October 2018 statement on the grounds that he "made a fuss about nothing" or anything of that sort – or indeed that anyone inferred from the October 2018 statement that the C was vexatious or dishonest or unreasonable – which is what the C (and his wife) alleges was the intended implication of the statements. Identifying such evidence would be

[8] For instance:

(a) "Dr Day raised a number of concerns about patient safety including staffing ratios on the ICU and one relating to a night shift in January 2014. The concerns he raised on the night shift related in part to whether there were enough junior doctors working on the night shift.."

(b) "The external investigation found… the Trust had responded in the right way by calling in the on-call consultant to provide additional support, whilst making a number of other criticisms of the Trust".

(c) "Some of the issues identified by the Critical Care Review in February 2017 related to some of the concerns raised by Dr Day, but they were not relevant to the issue of junior doctor cover on the medical wards that had concerned him in January 2014".

[9] To put it another way: however exhaustively the R might have described the C's complaints or the adverse conclusions of whatever review or reports, that would not alter the established facts that (a) the C acted in good faith in raising safety concerns; but (b) his case was likely to fail and the ET was likely to conclude that the Rs acted in good faith.

the easiest way for the C to show that his reputation in fact suffered in the way he has alleged.

(b) The C did not respond to the statement himself on twitter nor on his crowdfunding pages explaining that actually his concerns were more serious or more extensive than the statement suggested, or that they were supported in his view by the 2017 Critical Care Review. That (strongly) suggests that the C himself recognised that these issues are irrelevant or trivial in the context of the press release as a whole. A key part of the context to the press statements is the fact that the C could at any time identify and correct any alleged inaccuracies. He was not prevented from doing so and – obviously – had already demonstrated a willingness to "post" extensively about his case. His ability and willingness to do so is relevant to the issue of what he might legitimately feel aggrieved about. If you are able to respond trenchantly to any inaccuracy the scope to legitimately feel aggrieved about it diminishes.

(c) Crucially, the C in his statement to the journalist Tommy Greene [1084[10]] on 14/11/18 makes no attempt at all to correct what he *now* claims are the allegedly damaging or misleading impression(s) created by the 2018 statement. This is the clearest evidence that what he claims now about the statements and their damaging impact is not a reasonable interpretation of them nor an accurate assessment of their impact.

21. **Finally**, the press release as a whole is *positive* about the C[11]. The October 2018 statement contains a number of neutral factual statements about the C and three unequivocally positive statements about him: that an external investigation found that it had been appropriate for him to have raised his concerns[12]; that an agreed statement recorded that he had blown the whistle and raised patient safety concerns in good faith[13]; and that he had "performed a public service" in establishing whistleblowing protection for junior doctors[14]. The only potentially negative comment about him is that the ET

[10] Quoted in the Amended GoC at [24] [463].
[11] This point is also relevant to causation. The C maintains that the R was (a) intent on smearing him and portraying him as vexatious, dishonest and unreasonable; and (b) that it did so on the grounds of his protected disclosures. The first limb of this contention is wholly unrealistic when the statement as a whole is positive.
[12] Implausibly the C maintained that this was a neutral comment rather than a positive comment: [4/34/134].
[13] Similarly he said this was a neutral statement: [4/35/138]
[14] Bizarrely the C said that this was a detrimental statement about him [4/35/139]

was not likely to conclude that he had been treated detrimentally on the grounds of whistleblowing. If, as is the case, the statement as a whole (despite being selective and "putting the Trust's side of the story") overall says positive things about the C, he cannot reasonably complain about the absence of additional detail that would have had a non-existent or trivial impact on his reputation.

The specific alleged detriments in the October 2018 statement

(a) ***The external investigation found it had been appropriate for Dr Day to raise his concerns and the Trust had responded in the right way.***

22. The C's objection to this statement is that it is untrue. He seeks to establish that by highlighting a number of criticisms that the investigators, Roddis, made of the R "about its response to the C's protected disclosures": see e.g. para. 36 (a) of the AGOC [466].

23. In fact, the statement is true. It obviously has to be read in its entirety[15] and the claim being made is that the investigators found that the R responded "…in the right way by calling in the on-call consultant to provide additional support". That is a statement about the Roddis findings about the R's response on the night shift in January 2014 when two doctors who were scheduled to work on the medical wards had failed to come in. The C accepted that himself [5/532/72-73]].

24. The Roddis findings about the R's response on the night in question are at 675 and 685-6. There are not criticisms[16] of the R in those findings and the fact that the consultant was called in is recorded. The C acknowledged that he had no objection to the R saying things that are true on their website ("... they are more than welcome to put something true on their website…" [4/322/34). He can therefore have no legitimate sense of grievance about the sentence because it is true.

[15] As accepted by the C at 5/18/72

[16] It is important to note that the C did not submit his Datix report that night [686] so the R's response to that report is not relevant to the issue of the adequacy of its response to the unexpected staff shortage on the night itself. .

25. The C's real complaint appears to be that the R did not refer to the fact that the Roddis report did make criticisms of the R, albeit not about its response on the night of 10/1/14 itself. That is a complaint about an alleged deliberate failure to do something – i.e. highlight other concerns. That is not the detriment complained of in this case, however.

26. In any event, the C could not reasonably feel aggrieved about that failure because:

    (a) It is for the R to select (within reason) what it chooses to focus on as part of its press release in the context of the barrage of unfair criticism made of it and its legitimate interest in protecting its own reputation;
    (b) It is not a statement about the C at all.
    (c) Whether or not the R highlighted criticisms made of it in the Roddis report, the overall impression of the C would not have altered at all: the R had already acknowledged that his concerns had been raised in good faith; and however critical Roddis might have been of the R it would not alter the facts acknowledged in the press release that the ET was likely to find that the R had acted in good faith and that the C was likely to lose his case (a fact most people would anyway have inferred from his decision to withdraw the claim in the circumstances in which he did).

(b) ***"Some of the publicity around this case has incorrectly made a link to the findings of a peer review of the critical care unit at QEH undertaken by the South London Critical Care Network in February 2017… It is important to be clear that these were not the same issues that Dr Day had raised in January 2014 which related to junior doctor cover on the medical wards".***

27. It is accepted that the "range of concerns" found by the 2017 Review overlapped to some degree with the issues raised by the C in January 2014 which did indeed "relate to" junior doctor cover on the medical wards but were not limited to that issue. The statement is not therefore strictly accurate – which is why BT acknowledged that it could have been worded differently.

28. However, it does not follow that that inaccuracy means that the statement as a whole is a detriment to which the C was subjected by the R. It is submitted that it is not. The key points are as follows:

(a) The focus of the paragraph is on incorrect publicity. The C is not said to be the source of that incorrect publicity, nor can that be implied. So it is not a statement about the C at all.

(b) The other subject matter of the paragraph – the findings of the 2017 Critical Care Review – is also not about the C.

(c) It might therefore be an inaccurate statement, but it is not defamatory – which is the essence of the C's complaint. The suggestion that the statement implies that the C's claims were unreasonable or vexatious or dishonest is absurd.

(d) The fundamental point being made – that the 2017 Review is not relevant to the C's patient safety concerns raised in 2014 – is a valid one. The way the 2017 Review was carried out is described on [774], first paragraph. There is no evidence or suggestion that the 2017 Review was assessing evidence about the state of clinical performance or service standards in 2014. The focus (unsurprisingly) was on the "state of play" in February 2017. That being the case, the inference from the statement that the 2017 Review is not relevant to the C's concerns in 2014 is true. Had the 2017 Review given the R an entirely clean bill of health the C would legitimately observe that that cannot possibly prove anything about the merits of his concerns three years earlier. The obverse is also true: if some of the concerns identified in 2017 overlap with concerns that the C raised 3 years earlier that does not show that the latter were well founded. The R's service standards in critical care may have deteriorated in the meantime.

(e) An accurate statement about the degree of overlap between the 2017 Review and the C's concerns would not have altered the C's reputation in the slightest. It was clear from the press release that his concerns had been raised in good faith yet his case was likely to lose. Whether his concerns were well founded or not was not an issue in the case and would anyway not have been established by noting a similarity in the 2017 Review's conclusions and his concerns.

(f) Any sense of grievance on the C's part would therefore be unjustified. The statement, particularly in the context of the press release as a whole, is irrelevant to the C's reputation as a crowdfunder. Had the C thought otherwise he would no doubt have posted a correction on his crowdfunding pages. There is no evidence that he did.

Time limits

29. The claims based on the October 2018 statement are in any event out of time: see AGOR, para. 37 [502]. ACAS received the EC notification on 31/1/19 – so any alleged detriment before 1/11/18 is out of time. The C can seek to rely on s. 48(3)(a) as being "part of a series of similar acts" the last of which is in time, but in order to do so he has to establish that the other acts complained of are in fact detriments to which he was subjected contrary to s.48. Since it is denied that he can do so it is denied that he can rely on this provision.

30. The C admitted that he became aware of the alleged detriment on 28/10/18. He has adduced no evidence to support a finding that it was not reasonably practicable for him to present his claim within 3 months of the act complained of, so he cannot rely on the "escape clause" in s.48 (3)(b).

The 4 December 2018 press release

31. Many of the points referred to above apply equally to this statement: it is a press release so necessarily selective and sets out the R's side of the story; the C could always correct or highlight any errors; it was a statement that was responsive to specific misleading and damaging publicity; the impugned statements need to be considered in the context of the press statement as a whole and the undeniable fact that the C had decided to withdraw his case following legal advice which provided an overwhelming inference that his case had gone very badly.

32. It is particularly relevant to consider the 2/12/18 Daily Telegraph article which provides the immediate catalyst for the press statement. That statement contained almost provocatively inaccurate assertions such as:

(a) He was threatened with "life changing" costs if he lost the case.

(b) He was forced out of his job.

(c) He was "forced" to accept a settlement.

(d) He was told after two and a half days of cross examination that the Rs [plural] had told him of their intention to seek costs for the entire four week hearing if he lost.

(e) According to Norman Lamb there had been an outrageous use of taxpayer money to crush [a junior doctor] and prevent the full facts being aired.

33. The fact that the immediate publicity, to which the C had himself contributed, was so misleadingly biased is relevant to the extent to which the C could feel legitimately aggrieved by what the R said in response.

4 December 2018 – the specific alleged detriments

(a) "… Dr Day has claimed … that he was forced to withdraw his case as he 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 case".

34. This statement is true – so the C can have no legitimate sense of grievance about it. He was not forced to withdraw his case; he was not "threatened" with the prospect of paying the R's legal costs; he was not threatened with legal costs to pressure him to drop the case.

35. Two red herrings can be set to one side at the outset. First, the statement is about alleged cost threats to *him.* It is common ground that any wasted costs application would have been against his solicitors so whatever was said about wasted costs cannot have amounted to a threat against the C. The C accepted that at [5/589/130]. The C claims that he had not appreciated that fact at the time. That is inherently improbable and is forcefully denied by CM (w/s [17] – "I am quite satisfied that Dr Day understood this").

But even if the C did believe that, the true position is not in doubt. So what was said about wasted costs is irrelevant[17].

36. The second red herring is what was said about costs (if anything) by HEE. The impugned statements are about the R's alleged costs threats, not HEEs. What (for instance) Mr Moon (who was plainly not authorised to act on behalf of the R nor did he) said about costs to persuade the C to agree to the "good faith" wording of the agreed statement is irrelevant.

37. The C was not "forced" into settlement. He decided to settle in light of the legal advice he had received and the risks of (among other matters[18]) an adverse costs order being made in the circumstances of the case. The position is as described by Simler LJ in her judgment dismissing the C's application for leave to appeal : see [362, para. 5]. It does not require the authority of the Court of Appeal to explain that point but is helpful that it has. It did the C little credit that he refused to accept the accuracy of that analysis, citing misconceived procedural concerns, which, if even if they had existed (which they did not) would not have invalidated what Simler LJ said. Moreover, the C himself recognised that "forced" was inaccurate, which is why he changed that word in a draft statement to "decided": see [1101].

38. Nor was the C "threatened" with costs. In analysing this issue, it is necessary to consider what in fact happened and the context[19] of whatever was said by the R about costs; and also to consider the C's semantic arguments about the word "threat".

39. It was submitted on behalf of the C that a "threat" is "a suggestion that something unpleasant or violent will happen, especially if a particular action or order is not followed". The relevant definition that appears if you google "threat meaning" is "a statement of an intention to inflict pain, injury damage or other hostile action on someone in retribution for something done or not done". The difference between the two definitions is the emphasis in the latter on intention and retribution.

[17] In terms of what was said, see BC's account at w/s paras 65 and 66, and 8/31/121-125. BC was a particularly compelling, careful and credible witness. There is no reason not to accept his evidence (on this point or more generally).
[18] i.e. the reputational and regulatory issues identified by CM.
[19] The word used by BT and BC.

40. The C's definition does not sufficiently distinguish between a threat and a warning. The sentence "If you don't take the train but drive on the motorway you might sustain a catastrophic injury in a car crash" is a warning not a threat – yet on the C's definition that is a threat: the suggestion is made that something unpleasant will happen if a particular action (not taking the train but driving on the motorway) is not followed. It is not therefore an accurate definition. It misses the sense of intentionality and retribution. It is pertinent in this context that BC said he thought in terms of costs warnings not threats. It is also highly relevant that neither of the two barristers in fact engaged in the negotiations (BC and CM) agreed with the characterisation or suggestion that the R had made costs threats.

41. BC said that "threat" implied some sort of impropriety. Whether that is always true, it is submitted that that it is indeed a clear connotation of the use of the word in the current context. The assertion that the R threatened the C with costs connotes an *intention* to apply for costs in as a consequence of – and in retribution for - the C not doing what the R wanted.

42. Thus understood, what BC said about costs and the context in which he did so cannot possibly be accurately characterised as a threat.

The w/p negotiations

43. The evidence about what was said by the R on the question of costs and the context in which it was said is straightforward. In summary:
    (a) The ET rules include rules about costs. There is a risk of an adverse costs order being made against a litigant inherent in those rules.
    (b) The likelihood of a costs order in fact being made depends on the circumstances of a particular case.
    (c) After two days of evidence Chris Milsom (CM) thought that the C was at risk of an adverse costs order being made against him. CM is an experienced employment barrister and obviously knew what the ET costs rules are, what the case was about and how it was going.

(d) He thought the reputational and financial (i.e. costs) risk against his client were such that it was in his client's interest to approach BC. He did so seeking a drop hands settlement. He thought the C was at risk of facing a "pretty hefty fall" [3/208/33].

(e) When he approached BC, his principal concern was not about "findings of active dishonesty" [3/190/15] or that the potential costs risk arose because of a finding of "wilful dishonesty" [3/207/32]. In other words, CM thought the risk of an adverse costs order arose <u>even in the absence of findings of dishonesty</u>.

(f) CM initiated the call with BC. He opened the call by saying that he wanted to speak without prejudice and was doing so without instructions. He discussed the R's position on settlement, referring to the need for Treasury approval for any financial payment (implicitly recognising that the R would not contemplate a settlement that involved paying the C anything).

(g) In response, BC explained what he envisaged saying at the conclusion of the C's evidence. That explanation included an articulation (without instructions) of an anticipated position on costs – i.e. if the C lost and was found to have been untruthful in his evidence, a costs application would be made. CM says he does not remember this but made clear is does not say that BC's account is wrong. Moreover, CM accepted that the email on [951] is an accurate summary of the conversation [3/214/39]. The evidence therefore indicates that that is what BC said.

(h) At or towards the conclusion of the conversation CM invited the R to make its position clear – i.e. to make its drop hands offer. However, he knew that that would include it articulating its position on costs if the case did not settle. Since CM had been told what the R's anticipated position on costs was (even if he cannot now remember that) the request that the R make its offer was a request that it set out its position knowing that that position was likely to be that the R would agree to a drop hands settlement if the C did not start xx of the C; and that it would apply for costs if he then lost with adverse credibility findings.

(i) As a result of the conversation with BC and following CM's request that the R state its position, CM anticipated an offer (which would include an articulation of the R's position on costs) coming – which is why he sought permission to

speak to his client (before his xx had finished) shortly after the end of the conversation: see [3/230/54-55].

(j) In direct response to CM's request for permission to speak to his client whilst still in "purdah", BC granted that permission and confirmed the R's position on settlement, as requested, so that CM had something to put to his client: see the text on 953. BC quite plainly would not have done so but for the conversation initiated by the C, what the C had said during that conversation, and CM's subsequent approach requesting permission to speak to his client.

(k) The R's position on costs did not thereafter change – see BC's clear and unqualified evidence[20]. CM confirmed that BC said on the morning of Monday 8 October that the Trust's offer would remain open until the first R witness was called [3/226/50-51]. There is no contemporaneous documentation indicating that the R subsequently made some sort of different offer or "two tier offer". In particular, whilst admitting that that phrase was not used at the 11/10/18 conference, the C's evidence that the attendance note on 976 was in effect a reference to a two tier costs threat is wrong. That note refers to CM distinguishing between (a) wasted costs and (b) costs between then and the end of the proceedings. That is not the same as the alleged two tier costs threat referred to in CM's email on [1123] of 30/11/18[21].

44. In light of those facts, what the R said about costs cannot accurately be described as a "threat":

(a) In view of CM's assessment of the case (i.e. that the C faced the financial risk of an actual adverse costs order irrespective of any findings of dishonesty) the R's stated position on costs constituted a significant <u>concession</u>. It alleviated the pressure on the C that was inherent in the circumstances of the case, in view of how badly it had been going. The implication of the offer was that (a) no costs application would be made if the C lost but without adverse findings on

[20] And CM's evidence saying he did not believe it did [alter thereafter]: 3/224/49]

[21] This email needs to be treated with considerable caution as an accurate account of the w/p discussions. There is evidence (i.e. from Mrs Day and the C) that CM did not accurately describe the R's position on costs (as per the text message on 5/10/18) to the C on Sunday 7/10/18 nor indeed at the later conference. CM had forgotten the fact that that R's position was linked to credibility findings. Other aspects of the email are clearly inaccurate: CM is wrong in asserting in this email that he sought permission to speak to the C *after* he had received the first formal offer of settlement from BC (and also wrong in asserting that that was sent in the evening – it was sent at 16.14 in the afternoon).

credibility – i.e. it removed the costs risk that had been sufficiently real in CM's assessment to have meant it was in his client's interests to initiate settlement discussions in the first place; and (b) even if the C lost with adverse credibility findings an application was in effect stated to be a possibility not a certainty (an "issue").

(b) To set out a position on costs that is more advantageous than CM himself had assessed at the time, in response to CM's request to do so, cannot possibly be construed as a threat. CM assessed that there was an actual risk of a costs order being made against his client – that was the financial risk that informed his view that early settlement was in the C's interests. That is to be contrasted with the triple contingency referred to by BC: *if* the C lost; and *if* there were adverse findings as to credibility; and *if* the R decided to make an application, then it would do so.

(c) There was no impropriety in the R's conduct of the negotiations. That was accepted by CM and the C's allegations of impropriety were (correctly) disowned by AA: see [8/1012/99] and [8/1018/105]. If "threat" in this context connotes impropriety, there plainly was no threat.

(d) The R did not communicate an *intention* to make a costs application. It was indicating a possibility that it would do so if the C lost and if there were adverse credibility findings.

(e) The communication was not intended to pressurise the C. It was a response to CM's request that the R state its position in respect of a drop hands offer.

(f) Since the R's position was more generous to the C than the inherent risks as perceived by CM, it cannot even be described as a costs warning. As BC said it was "at [CM's] invitation, confirming an offer, having gotten instructions from the Trust.." [8/1017/104]. It was "pinpointing a specific potential issue as to costs" [8/1009/96]. It was conveying information to CM so he could advise his client [8/1015/102]. It was doing no more than spelling out the obvious [[8/1016/103] – albeit it in terms more generous than might have been anticipated by CM.

45. It follows that the statement is true. It cannot be a detriment – the C himself accepts the R is entitled to put true statements on its website. Even if (which is denied) the ET

concludes that the statement is in some respect misleading or inaccurate it does not in context amount to a detriment. It was a legitimate and reasonable response to the significantly misleading comments made about the case referred to above.

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

46. This is an obviously true statement. It is not therefore a detriment. The fact that it was true is clear from the reasoning of Heather Williams Q.C. (as she then was) in her EAT judgment at the Rule 3(10) hearing: see para. 54 [310]. The fact that the C once again refuses to accept the clear reasoning of a judge, citing spurious procedural allegations[22], and (having been asked the question 5 or 6 times [5/533/74-75]) asserted that it is untrue is regrettable: but that reflects more on the C's credibility than any flaw in the EAT's reasoning.

47. The statement might indeed be "carefully worded" (as characterised by Heather Williams Q.C.) but that does not mean that the C can reasonably object to it. The press release – particularly in the context of the seriously inaccurate assertions that had been made about the case – was necessarily selective in its focus.

The third statement : 10 January 2019

"Dr Day's legal representatives indicated that it would be helpful to them for the Trust to state what our position would be 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 as to costs. This reflects the fact that we are an NHS body responsible for public funds"

48. The statement is true (or substantially true) in view of the sequence of events referred to above. In particular:

[22] i.e. that the judge had failed to take into account the evidence of CM and "made up a load of facts" [5/535/77].

(a) CM clearly wanted the R to make an offer. He did so because it would be helpful to him to sell the idea of a drop hands settlement (which he believed was in his client's interests) to his client.

(b) The offer he requested the R to make had already been indicated to him: i.e. a drop hands offer, with an explanation that if the C proceeded with the case, lost and had adverse findings on his credibility a costs application would ensue.

(c) The request that BC make an offer was therefore a request to indicate its position if he lost and there were adverse findings as to his truthfulness.

(d) That is in substance what the statement says.

49. It is understood that the C takes a number of issues with the statement:

(a) He complains at the reference to representatives (plural). It is not accepted that the statement necessarily implies all of the C's representatives made the approach. It means, at least on one possible reading, "one of the representatives". More pertinently, the quibble is entirely beside the point. Whether it was his barrister or his barrister and solicitor who made the request is irrelevant. The C is seizing on what is at most a trifling error – a reasonable worker would not take umbrage at it.

(b) The C says that the statement implies that his representatives were concerned about the truthfulness of his evidence. It is not accepted that that is a natural inference from the statement but even if it were, it is not inaccurate. It is a fair inference that the heavily redacted passage on [1562-1563] contains factual assertions about significant problems with the C's evidence. The largely unredacted passage at 1566 contains specific allegations about the C's evidence between 8th and 11th October 2018. Those concerns include his saying that the decision to record the meeting was "impulsive" having earlier said that he had purchased a recording device some days earlier. The same issue was identified by BC and the ET will recall his evidence that the strong impression he (and Mr Moon) gained that the C was being untruthful. BC (who it is submitted was a particularly impressive witness) said that his recollection that this passage in the C's evidence "landed really badly for him as an example of him being untruthful

and that it didn't come across as him making a mistake with the use of the word "impulsive", but that it was him wriggling under a difficult bit of cross-examination from Mr Moon…by giving evidence that was manifestly untrue" [8/1057/146]. It is highly likely that CM formed the same impression as the other two experienced barristers, in which case it must have been true that he was concerned (at least by that stage) about the truthfulness of the C's evidence.

50. There is an air of unreality and opportunism about the C's complaint regarding the 3rd statement. The impugned sentence forms part of a press release which provides an accurate but devastating summary of the outcome of the C's case, with an inevitable (but fair) consequential impact on his reputation among his crowdfunders. In particular:
    (a) The R denied the allegations that 4 specific threats were made against the C as a result of which he dropped his case.
    (b) The C was represented throughout by a solicitor and barrister. He claimed £5.5m loss of earnings.
    (c) His legal team approached the R during the course of him giving evidence to ask about settling the case on the basis of his withdrawing the case and the Rs not applying for costs.
    (d) That approach (in the belief of the R) was because it was clear to the C's legal team that the case was not going well and was going to fail.
    (e) No pressure whatsoever to start settlement discussions had been placed on the C or his legal representatives.

51. Any inaccuracy in the impugned statement is trifling in the context of this summary of the case. It does not amount to a detriment for the purposes of s. s.47(1)(b) of the ERA 1996.

The remaining detriments: failing to respond to NL's request to justify or remove the public statements; failing to remove and/or update public statements once contacted by the CQC; and sending the first two press statements to stakeholders

52. It is submitted that:

(a) If none of the impugned statements constitute a detriment it necessarily follows that none of these actions can possibly constitute a detriment;

(b) Even if one or more of the statements viewed in isolation constitutes a detriment it does not follow that sending a press release that contains that statement is itself a detriment. If the press release as a whole is not something a reasonable worker can reasonably complain of it is submitted that the C cannot reasonably complain of the impugned actions even if the statement contains some aspect about which he can reasonably complain.

Are any of the detriments "in employment"?

53. The C's claim is brought under s.47B of the ERA 1996. That falls within Part V of the ERA which deals with "Protection from suffering detriment in employment" (emphasis added). The question arises whether the alleged detriments relied upon by the C fall "in employment".

54. This issue was considered by the CA in **Tiplady v City of Bradford [2020] ICR 965** at paras.43-45[23]. The headnote of that case reads (in part) as follows:

> … the structure and language of the discrimination legislation prior to the Equality Act 2010 , which proscribed discrimination in the "employment field", enforceable in the employment tribunal, and in "other fields", enforceable in the County Court, meant that "detriment", in relation to a claim by an employee against their employer, was understood as referring to a detriment to which the employee had been subjected in the employment field; that the position was the same under the 2010 Act, where, although the headings to the relevant Parts no longer used the language of "fields", the division of protection between different kinds of relationship, enforceable in different tribunals, was retained; that, despite differences in their particular structure and language, the whistleblower legislation and the discrimination legislation were fundamentally of the same character, and it made sense to interpret identical language in the two statutes, where it occurred, in the same way; and that, adopting that approach, Parliament should be taken, when using the terminology of detriment in Part V of the Employment Rights

[23] The discussion is technically obiter, but it is manifestly highly authoritative.

Act 1996 , which was concerned with detriment "in employment", to have intended that the detriment had to be suffered by a claimant in their capacity as a worker.

55. Underhill LJ said this in terms of the relevant test (at para. 45).

> There remains the question of how exactly a detriment is to be recognised as arising, or not arising, "in the employment field": what are the boundaries of the field? Lord Hope did not have to consider this in *Shamoon*, and *Martin* was a plain case because it concerned the exercise of public powers which clearly fell in a different "field" under the 1976 Act. Broadly, the test suggested by Mr Lewis to the ET, and which it accepted, of asking in what "capacity" the detriment was suffered – or, to put the same thing another way, whether it was suffered by the claimant "as an employee" – seems to me likely to produce the right answer in the generality of cases.

56. The courts' approach to post termination whistleblowing detriments claims has been heavily influenced by the approach taken in discrimination claims: see **Woodward v Abbey National plc (No. 1) [2006] ICR 1436** where the CA considered the discrimination/victimisation case of **Rhys-Harper v Relaxation Group Place [2003] ICR 867** in concluding that "in employment" meant "in the employment relationship".

57. Since that decision, the discrimination legislation was amended to cover former relationships where the discrimination or victimisation "arises out of and is closely connected to that relationship": see now, s.108 Equality At 2010 ("EqA 2010").

58. An example of a victimisation claim brought under the EqA 2010 failing because it did not fall within the employment field is provided in **Aston v The Martlet Group Ltd [2019] ICR 1417.** The C complained that the modification of an earlier ex gratia offer to pay an ex-employee £4,000, to an offer to do so on condition that he withdraw a tribunal claim brought under the Equality Act 2010, was an act of victimisation. The EAT held that (quoting from the headnote) "protection from discrimination after an employment relationship had ended depended on satisfying section 108 of the Act, which required that the discrimination "arises out of and is closely connected to" the relationship and, on the facts, the withdrawal of the goodwill offer could not be said to have been "closely connected to" the claimant's former employment; and that,

accordingly, there was no jurisdiction to entertain the post-termination victimisation claim."

59. The EAT emphasised that "closely connected to" must add something to the earlier condition of "arises out of" [100]. On the facts of the case the requisite test was not met, even though it was accepted that the offer had been made in the capacity of ex-employer. The EAT held that the fact that the statement was made in the capacity of ex-employer was a necessary but not sufficient condition to satisfy the case [101]. A but-for test is equally necessary but not sufficient. Even if both tests were satisfied something more was necessary to satisfy the "closely connected" test.

60. Here, the statements would not have been made but for the fact that the R had been the C's former employer. But they were not made in the capacity of his former employer. They were statements made by an opponent in litigation about litigation. That clearly demonstrates that they are not in employment. The position is even more clear-cut than in **Aston.** .

61. Turning to the test referred to Underhill LJ: are the statements complained of by the C which he alleged are detriments in the employment field suffered by him "as an employee" (or even as an ex-employee)? The answer is clearly "no". The C's employment with the R was relatively short-lived (a year) and had ended in August 2014 – more than 4 years earlier. Critically, his role as employee or ex-employee had been superseded by his role as a litigant who had brought a (high profile) claim against the R and his associated role as a high-profile crowdfunder.

62. His complaints in the claim he compromised in October 2018 were about alleged detriments he suffered *qua* employee or worker back in 2014. His essential complaint in the current claim is about how he has been treated by the Respondents *qua* litigant or crowdfunder. He complains of the impropriety of the Respondents making costs threats that forced him to abandon his claim. He then complains about how the R had subsequently misreported those facts and his litigation as a whole. The alleged

detriments did not affect him *qua* employee at all[24]: they (allegedly) affected his reputation as a crowdfunded litigator taking on the NHS establishment[25]. It follows that the C's complaints, even if in principle well founded (which they are not) are complaints in respect of which the ET does not have jurisdiction.

63. The C himself (perhaps unwittingly) gives evidence that supports this analysis. In his witness statement he refers to the fact that he made covert audio recordings of conversations. In seeking to minimise the stigma that might attach to his having done so he makes the point [242] that he did not do so *qua* employee, but *qua* litigant (actual or prospective): "At the point of 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…".

64. The fact that the current dispute is not about alleged detriments "in employment" is also clear from:

    (a) The fact that the C himself states (w/s [8]) that "the focus of the present claim is on what the R has chosen to say publicly and to MPs about the substance of my first whistleblowing case and about how it settled". That is a fair summary. If what was said to be a detriment is damaging to his reputation (which is the C's contention) it was damaging to his reputation *qua* crowdfunder and in the eyes of his crowdfunder supporters. It has nothing to do with his reputation as a doctor – i.e. his ability to treat patients with skill care and compassion – still less his reputation as a doctor when working all those years ago for the R.
    (b) The communications with SNL are all to do with the R's alleged treatment of the C, not during his employment, but in its handling of his litigation. The £700k used to "crush" the C's case and the allegedly illegitimate costs threats are all to do with alleged impropriety during or mishandling of that litigation. SNL was not focussing on the historic alleged detriments in 2014 (which he recognised

[24] In his 91 page statement the C does not give evidence about who he is currently working for or suggest that his work has been affected by the detriments he alleges.
[25] A role which, in his own estimation, had brought himself a certain amount of "glory" [836] and which resulted in his

was a matter for the 2018 ET to determine) – he was concerned about the Rs' alleged treatment of the C in the claims he brought.

(c) The C, when he first started complaining about the alleged detriments, did not seek to invoke the R's bullying and harassment policy or to raise a formal grievance (as he would no doubt have done had he been in employment). The relevant policies, which formed part of the 2018 bundle, have not been asked by the C to be included in the current bundle.

(d) The way that the C factually is trying to link the alleged detriments to his historic PDs is via the 2018 hearing. He said for instance that "all the accepted disclosures explored in open tribunal is what I say has caused this causation" [5/582/123]. So his claim on his case arises out the R's alleged reaction to what he said in the October 2018 hearing (more than 4 years after his employment ended). It is "closely connected" to that hearing, not his historic employment.

65. The detriments arising out of the comments about how the 2018 case settled (e.g. the C being threatened with costs etc) are manifestly comments not about or arising from the C's employment. They are about the circumstances in which the 2018 case settled. The comments about the external investigation findings and the 2017 Care Review have some link to the C's employment but they are comments about the C's 2018 case (so do not arise out of nor are closely connected with his employment): see for instance the LoI which record at para. 4.1(c) and (d) "In respect of the C's whistleblowing case". The subject heading of the October 2018 press release is "statement from [the R] – Dr Chris Day whistleblowing case". The 4 December 2018 statement is headed "Additional statement on Chris Day case". They all arose as part of a PR battle that was triggered by the ending of the 2018 case and the interest in the case generated by the C's crowdfunding campaigns. The C's whole complaint is that these comments allegedly portrayed him as someone who had brought a vexatious claim[26]. Whether or not that is true is not sufficiently closely related to his employment to fall within the ET's jurisdiction.

[26] In the Jesudason case the EAT made clear that it would have allowed a cross appeal by the employer against the rejection of an argument that the ET had failed to give reasons for its rejection of the Trust's argument that Mr Jesudason was making decisions not as an ex-employee whistleblower but as a "campaigner": see **Jesudason v Alder Hey Children's NHS Foundation Trust UKEAT/0248/16/LA** [124].

66. It is also to be noted that in the Settlement Agreement [992] that the C agreed to when withdrawing the 2018 claim, the C provided a warranty at clause 3.1(a) that he was aware of no additional claim (other than those referred to in clause 2.1 which he expressly settled) at the time of the Agreement or in the future "arising out of or in connection with" his employment. He further warranted (clause 3.1(b)) that he would not bring any claim "arising out of or in connection with" his employment, including a claim for detriment on the grounds of his having made public interest disclosures. He compromised in clause 2.1 "all or any claims or rights of action … that the C has or may have against the Employer … arising out of or in connection with the C's employment … including but not limited to (a) claims for unlawful detriment on grounds of public interest disclosures under Parts IVA and V of the ERA 1996, whether the subject of the Claims or otherwise."

67. On the facts, the current claim is not one that arises out of or in connection with his employment: it arises out of and is connected with the termination of the 2018 litigation. That is why it does not fall "in employment". But if the R is wrong about that the C has compromised the claim and his pursuing it is an abuse of the ET's process. It ought (in this scenario) to be struck out on that ground.

Causation

68. In order to establish that the C suffered any detriment "on the ground that" he made protected disclosures the ET needs to conclude that the protected disclosures materially influenced (in the sense of having a more than trivial influence) on the employer's treatment of the whistleblower: see **Jesudason** [29-31].

69. The acts in question are the statements "released publicly by the Trust" (AGOC, [33] [465]) regarding the without prejudice discussions in the public statements; and about the C's case (AGOC [36] 466). In paragraph 69 AGOC it is said that the detriment complained of against the R is "the publication, failure to remove from their website and circulation to a Member of Parliament" of false and defamatory statements [69] on p.[478]. This wording is mirrored in the LoI: see [4.1]. So the relevant motivation is that of the person responsible for those acts or deliberate failures to act. That person is BT. He approved the content of the statements for publication (w/s 19, 30, 32).

70. It is important to note that the act (or deliberate failure to act) in question is the publication and subsequent failure to remove from the website (and the decision to send to SNL or stakeholders) press releases which are alleged to contain detrimental statements. It is *not* the act of including the specific wording of the statements that are said to be detrimental in the press releases in the first place. If X introduces malign wording about the C in a press statement and Y publishes the statement or subsequently deliberately fails to modify the malign wording in the press statement, the relevant motivation for the publication of the malign statement and that subsequent deliberate failure to modify it is Y's. X's motivation for a different act – drafting the malign wording in the first place – is irrelevant. That is why the detailed analysis of how the press statements came to be worded as they are is irrelevant (save to the extent that it casts light on the motivation of Y's decisions which are under scrutiny). It is also why the criticisms of the R's failures to investigate the emails of Drs Harding/Luce/Patel/Brooke is misplaced. There is no suggestion that they were responsible for publishing the press statements or deciding to send them to stakeholders; there has been merely a belated suggestion that they might have been authors of the impugned wording that was included in the statements.

71. The distinction described above is an important one. Deciding to include in a press statement certain wording is a different act from publishing a press statement that includes that wording. It is the latter that is in issue in this case. Much of the xx of BT focussed on whether (a) certain statements in the press releases were accurate; and (b) whether (if they were inaccurate) he knew or ought to have known that at the time. Whether he ought to have known that they were inaccurate (assuming that they were and assuming that in fact he did not know that they were) is irrelevant. If he believed them to be accurate, even if the belief was unreasonable, it becomes very difficult to establish that he caused them to be published on the grounds of the PDs years earlier.

72. In any event, the C faces formidable difficulties in establishing the requisite motivation. The C (appropriately) admitted that "he does not think for one second that BT has anything personal against me" [5/498/39]. It is anyway inherently implausible that BT would seek to penalise the C for making PDs 4 or 5 years earlier, when BT had no responsibility at all for the R's response to those PDs (as he only came into post in April

2018)[27]. He has given unchallenged evidence about the impact the adverse publicity about the case had had on recruitment, particularly of junior doctors (w/s para. 18). Having publicised problems with bullying he would have had no difficulty publicising historic adverse treatment of a whistleblower, had that been the case. There is evidence of BT expressing a desire to assist the C and to facilitate a return to a training programme. These are actions of someone wanting to support the C rather than demonise him.

73. Nevertheless, the C has belatedly sought to argue that the impugned decisions were "on the ground" of his PDs because BT was fed tainted information by others. In other words, it is said that others (the prime suspects being the four doctors) influenced the detrimental wording because of their hostility towards the C because he below the whistle, even if BT was unaware of that fact.

74. That argument fails as a matter of law and as a matter of fact. As a matter of law, the motivation of the decision maker is to be imputed to the employer, otherwise there would be the rank injustice of that decision maker being held personally liable: see **Malik v Cenkos Securites Plc UKEAT/0100/17** (17 January 2018) (paras. 85-93). This decision clearly establishes that (a) even if the impugned wording was influenced by a desire on the part of the author of the wording to subject the C to a detriment for blowing the whistle; (b) that malign motivation cannot be ascribed to the person responsible for publishing it.

75. As a matter of fact, the assertion that BT has been fooled by others into including detrimental statements in the press statements because of others' hostility towards the C because of his protected disclosures is not supported by any evidence. In a typical "Iago" case the Iago figure is identified, and his/her malign motivation is established on the evidence. Here, the C is speculatively casting around for Iago figures without any

[27] A point that precisely mirrors the CA's observation in **Jesudason** at [72] that it was *"intrinsically unlikely that the authors of these letters would have been reacting to the protected disclosures. All but the copy letter to the CQC were made years earlier; those complaints had been dealt with and the claimant was no longer employed in the trust"*.

evidence that any of them had the requisite hostility (still less because of his protected disclosures).

76. Very late in proceedings (i.e. in giving oral evidence) he cited 4 doctors who were witnesses at the 2018 hearing (Drs Harding; Luce; Brooke and Patel). In the absence of any evidence of hostility in the 22/10/18 email string, the C then sought to extend his speculation to 3 more doctors – a move correctly characterised by the ET as a fishing expedition. He has referred to Janet Lynch – but there is no evidence of hostility on her part towards him nor allegation to that effect in his 91 page witness statement[28]. Her email of 22/10/18 indicates that her motives were entirely benign: a desire to produce a reasonably comprehensive statement that focusses on the facts of the case from our point of view. That is inconsistent with a desire to penalise the C for making PDs.

77. There is no evidence that DC had any animus towards the C[29], still less that he had such because of PDs made 2 years before he even became aware of the C's case (w/s 2).

78. The contemporaneous documentation indicates beyond any reasonable doubt that BT and DC were motivated by a desire to set the record straight and protect the R's reputation. That is quite different from a desire to victimise him for making PDs. See in particular :

    (a) [1168]– "in response to all this [adverse social media coverage] we've prepared a statement on the Chris Day case rebutting the inaccuracies of the Telegraph story"
    (b) [1179 – letter to stakeholders];
    (c) [1193 – "main consideration was reputation of the Trust"];
    (d) [1206 – DC summarising recent social media quotes and discussing a response];
    (e) [1209- BT tweeting that he wanted to "share our version of events"];

[28] Indeed, Ms Lynch does not appear even to be mentioned in the statement.
[29] The only evidence the C could come up with was DC's email in which he said he was "appalled" at SNL's request for a public enquiry. The full sentence is "It is worth noting that we have written to Norman Lamb asking for a meeting to brief him on this, but he's not responded, so I'm appalled to see that he is calling for a public enquiry". DC says that his email was "more emotive than my normal style" [32]. His reaction might be thought to be unsurprising but it certainly does not demonstrate hostility towards the C: his assertion that it does is simply evidence of his ability to (mis)interpret evidence in a way that supports is entrenched views about the case.

(f) [1318 – DC emailing BT discussing how to respond to a journalist's queries].

79. Indeed, the C himself seems (when not giving evidence on oath) to recognise the implausibility of his case on causation. When writing to Sir Robert Francis [1430] he does not complain that the detriments he complained of were done because he had blown the whistle – even though there was every reason to do so in view of Sir Francis' interest in whistleblowing protection. Similarly in the C's lengthy letter to SNL of 23/1/19 [1386-1397] he does not refer at all to his current case on causation. The only reference to the reason for his alleged detriments is at the end of the letter [1395] where he says "the Rs' desire to divert attention from their mishandling of my protected disclosures on serious safety issues is the very obvious explanation for this". That however is a *different* explanation to penalising or victimising him for making protected disclosures[30].

80. There is no evidence that BT or DC had any clear understanding of the various PDs that the C made. The C does not attempt to distinguish between any of his multiple PDs as being causative of any particular detriment. That is because there is no link between any of them and any of the PDs: the whole case on causation is (misplaced) speculation. Indeed, the theory has been advanced on a bizarrely improbable basis – e.g. that the R's intention in making or not removing the press releases was to prevent "further airing" of the PDs, whether by the C or by other following the C, or whether by social media or in the newspapers or Parliament" [8/15/60] – when the press releases obviously did not prevent the C saying whatever he wanted about his case.

81. Moreover, the speculation is based on the theory that his PDs were somehow brought back into focus at the 2018 hearing so that they had a causative effect on BT in late 2018 or early 2019. Aside from the fact that there is no evidence that that is the case[31] – it is mere (belated) assertion – the theory fails. The C does not allege that whatever he said in the 2018 hearing was itself a PD – yet that is what he is suggesting had the material influence on the alleged detriments. Moreover, the fact that it was what was said in the

[30] A point the C implicitly recognised with his stubborn refusal to answer the question [5/506/46-48] as to whether engaging in diversionary tactics is different from penalising a whistleblower.

[31] There is no evidence of specific hostility on social media towards the 4 doctors or the R or to anyone as a result of the C's oral evidence in the 2018 case; nor of any hostility towards the C from anyone because he gave that evidence.

2018 hearing that (allegedly) caused the detriments highlights that the case does not fall with the jurisdiction of the ERA in any event: it is not "in employment".

82. The caselaw emphasises the need for the ET to focus on the reason for the treatment: establishing that a PD is the context in which a detriment occurred is not sufficient. Here, the C's PDs do not even form part of the immediate context.

83. BT's oral evidence on the issue of causation was compelling and consistent:

Detriments 4.1.c and 4.1.d

84. When asked whether a reason for allegedly "glossing over the patient safety issues" was that the doctors wanted to "protect themselves from criticism"[32], BT said he did not accept that, saying that he did not think the doctors were particularly fearful of the cross examination or of matters coming to light" [7/810/87][33]. When asked if it was because both the R and the doctors were reacting to the claimant because he had brought these concerns to light [7/811/88/] BT responded: *Absolutely do not accept that. The reasons, as I have said, were, those are the main issues that had been raised in that letter to the chief executive at the time, and those were the matters where there was the most commentary at the time. So that's why the statement focused on that. Could it have been broader? If it was going to be a comprehensive summary of everything that happened in the case, yes, it could have been. But I absolutely don't -- I really would strongly object to the point around intentionally trying to gloss over any matters at all, because I don't see why -- I don't see why we would*.

[32] None of the doctors is mentioned in any of the press statements – it is unclear why any of them would generate criticism of them, particularly with the agreed statement recording that they had acted in good faith. In any event "wanting to protect yourself from criticism" is not the same motivation as targeting the C because he had blown the whistle. Even if acting on that hypothetical motivation might have had the effect of damaging the C's reputation, that does not mean that was the or a reason for the action. The C would not – in the language of Elias LJ in **Jesudason** [73] – be in the direct line of fire.

[33] Being anxious or hesitant about being cross examined is perfectly natural. That might explain a desire for a case to settle. It obviously does not follow (once the case had settled, without cross examination) that the doctors would wish to allegedly belittle the seriousness of the C's complaints. The agreed statement recorded that the R had acted in good faith: it did not matter how serious the C's complaints might have been. He was likely to have lost anyway.

85. When asked if the motivation was to diminish the seriousness of C's case and to undermine C's credibility with those that had supported him[34], including those medical professionals [7/812/89/] BT responded: *No, it really wasn't at all. The motivation, I think, as I have already said, was that we had a lot of -- there was a lot of adverse publicity around the Trust, particularly in the junior doctor community, and all we were wanting to do was to say -- just to give a different perspective on the case. It's -- you know, for example, I think as I put in my statement, when the CQC came to inspect in 2018, one of the inspectors, I was told, asked colleagues -- said, "What is it like to work in a (inaudible) with such a terrible reputation?" I have had -- you know, we have had struggles recruiting junior doctors. We had people being warned off working for the organisation because of some of the information that had been in the public domain. So we weren't seeking to say this is absolutely everything. We were giving our view on what we thought were the things that were the most important to Dr Day at the time*.

86. When it was suggested that the reason for not mentioning the ICU concerns was that shortly before this, C had been airing in public at the hearing the PD he has made and the Trust decided to take action against C [7/815/92] BT responded: *I don't agree with you. I don't see it that way, and certainly there was absolutely no intention of that at all, as far as I'm aware. Again, going back to that process around signing off the statements and -- I think it is -- and I think going back to the bit -- the issues that were raised, the key issues that were raised at the time of Dr Day's employment in that letter, that is what that statement is looking to address, amongst other things, and in the context of a lot of information being out there in the public domain. And it does reference other claims in that statement as well*.

Detriment 4.1.d

[34] These speculative suggestions do not make psychological sense. However serious or trivial the C's patient safety concerns might have been, they were raised in good faith; and however serious they were, the R is recorded as having acted in good faith, and his underlying claims are recorded as having been likely to fail. Moreover, it was an inescapable fact that the C had chosen to withdraw without a penny in compensation. Within those narrow parameters it would be bizarre for anyone at the R to have thought: Ha! We can nevertheless diminish his reputation by implying that his safety concerns were not very important. The artificiality of the C's case is evident from the fact that he himself in the chronology or "timeline" he posted on his crowdfunding pages refers only to one PD (the one in January); and two newspaper articles about which the C makes no material complaint are very similar in content in their summary of the C's position as the first press release: see [761] and [766].

87. In response to a question that the R was attempting to diminish the seriousness of the complaints that the C had made and the disclosure that C had raised [7/31/123/1-4] BT responded: *No. That's absolutely -- that absolutely wasn't the intention of the statement* [7/846/123846/].

88. In response to a question that the reason for doing this was the PDs which had recently been aired in a public hearing in Oct 2018 which attracted publicity [7/31/123/7-10] BT responded: *I don't accept that. I think I've talked already about the motivations, as I see them, behind these statements.* [7/846/123].

Detriments 4.1(a)(i)-(iii)

89. In response to a question that comments in 4 December portraying C as a conveyor as untruths was because of the issues raised that he had complained about at the October hearing [7/872/149] BT responded: *It could not be further from the truth, sir. I think, as I've explained, the reason we did this is we wanted to be clear that we had not threatened a whistleblower and we do not want to deter whistleblowers or people raising concerns from coming forward. And I can give you examples, many examples, where people coming forward and raising concerns has led to significant service improvement. So we would not want to deter people. So that absolutely is not -- I disagree very strongly with that assertion, sir*.

90. In response to a question that the motivation for publishing the third statement was because of the references within the comments on the HSJ's history to PDs that C had raised [7/894/171/] BT responded: *No. So I think what I was -- what we were thinking was, it had just become a very big issue, and, you know, reflected by the fact there were lots and lots and lots of comments in the HSJ. I recall us being pressed very, very hard by -- I can't remember who. I think it was some journalists, in particular, around four specific matters around costs. The conversation, really, at that time, as I recall it, was really all about costs and the fact that Dr Day -- well, the allegation that Dr Day had settled the case because he was being threatened with costs. That's what people were most concerned about, as I understood it; not the breadth of what we had said in that*

statement, did it include absolutely every part of Dr Day's disclosures. So, for us, it was much more about, okay, well, let's -- we have said quite a bit already, it's provoked quite a response, let's just answer these four questions and then draw -- you know, try and draw a line under the communications around this, and, indeed, we have not made any further public comments around this case until -- well, I guess until this -- you know, this particular part of the kind of evidence.

91. In response to a suggestion that the reason why R sought to give a false impression as to who mentioned the truthfulness of C evidence, was because of the PDs recently aired in open Tribunal in Oct 2018 [7/47/187/1-9] BT responded: *I don't accept that, sir, no* [7/187/1-9].

92. In response to a suggestion that by 10 January 2018, the R was seeking to deflect attention away from the C's PD [7/910/187] BT responded: *The biggest issue that we were dealing with, that I was aware of, was the issue -- well, certainly this is what it felt at the time, was, had we not -- had we not described all the characteristics of the case in the best possible way, it was, I thought, a different point, which was around costs, and I think the idea of us having threatened with costs is absolutely not what we did. That was not what we wanted to do. It is not what we did. We did not want people coming away with an impression that we had threatened a whistleblower. So that was the reason why we did that. And, indeed, as you will see, and I'm sure we will come on to tomorrow, I tried genuinely to think about, how can we support Dr Day, rather than try and do things which would actively discredit him. All we have been trying to do with these statements is to set out the fact that -- the way that we saw things.*

Detriment 4.2

93. In response to a suggestion that the reason for BT not to engage with points raised by the C and to diminish the seriousness of the concerns that C had raised[35] and to portray him as someone who brought a vexatious claim [8/964/51 & 8/965/52] BT responded: *That's not correct. I disagree with that*. [8/965/7].

[35] In fact that is not the alleged detriment complained of (which is that the R deliberately failed to respond to SNL's request on 28/1/19 to justify or remover the public statements on the website).

Detriment 4.3[36]

94. In response to a suggestion that continuing with this stance was because R was reacting against the PD that C had made and which had been recently aired in the public tribunal hearing [8/972/15/] BT responded: *No. I don't agree with that [8/972/24]*.

95. In re-examination in response to a question re clarification of his "absolutely not" answer [8/981/68] BT responded: *So I was responding "Absolutely not" that we didn't you know, it was absolutely not about wanting to mislead anyone around it. Certainly there was no intention there at all to mislead anyone. I think what we were concerned with was around the reputational issues, which were very real for us, and we still suffer from, and what we wanted to do was just give a different side to the case so people who were interested in the case could see some narrative from our perspective, recognising that there's also plenty of other information out in the public domain. So that was absolutely the intention. I think what has become clear from the very detailed examination over the past day and a half is that that first statement could have been worded differently.* [8/982/17].

96. The fact that the 2nd and 3rd press releases were a direct response to what the C was saying (directly or as reported in the press or was being stated on his behalf) about the circumstances in which the 2018 case settled is beyond dispute. It was not triggered by or materially influenced by the PDs of four or five years earlier. The position is less obvious in respect of the October 2018 statement. This has enabled the C to advance the case that because the 2018 statement was "proactive", and not responsive to something that the C had said, it must have been motivated by something else (i.e. the C's references to the PDs in his evidence in the 2018 hearing).

97. This speculation ignores the evidence. It is true that the evidence that the C was directly discussing the 2018 case prior to the October 2018 statement is thin. But it is nevertheless obvious that the October 2018 statement was responsive to social media commentary about the case (rather than the PDs that the C had made years earlier). This

[36] BT does not appear specifically to have been asked about his motivation in respect of detriment 4.4.

is most clearly the case from the email of Dr Harding, quoted above.[37] The significance of the fact that the social media commentary did not originate from the C directly is that there would have been no reason for the R to be motivated by hostility towards him (whether for allegedly reviving his PDs when giving his evidence, or otherwise). The motivation was to set the record straight and protect the R's reputation: a quite different motivation from that alleged by the C.

S.48(2) ERA 1996

98. Because the evidence supporting the C's theory of the case is thin to non-existent, it is anticipated that he will seek to place reliance on s.48(2) of the ERA which provides that once it is shown that the acts or failures to act complained of did in fact take place, it is for the employer to show the ground on which it was done.

99. In **Chatterjee v Newcastle upon Tyne Hospitals NHS Trust (UKEAT/0047/19/BA, 23 September 2019**), after reviewing authorities in the context of protected disclosures and detriment for trade union activities, HHJ Auerbach identified two salient propositions (at paras 33, 34):

    (a) First, it does not *necessarily* follow from findings that there has been a protected disclosure and subjection to detriments that the burden shifts under section 48(2). The ET must be satisfied that there is a sufficient *prima facie* case such that the conduct calls for an explanation.
    (b) Second, if the burden *does* shift in this way it will fall to the employer to advance an explanation but, if the tribunal is not persuaded by a particular explanation, that does not mean that the respondent must necessarily or automatically lose. The ET may draw an inference that the conduct was on grounds of the protected disclosure. But the ET may still feel able to draw inferences from all of the facts found that there was another explanation for the conduct, albeit not the one

[37] The email of 17/10/18 in which Dr Harding wrote to DC saying "I'm not sure if the Trust has made a statement yet but surely that must address the concerns in the piece below. People still do not know the full facts of the case and until they do, the reputation of the Trust …. will be at risk…The article below is infuriating".

advanced by the employer, and that the protected disclosure was not a material influence.

100. Following that guidance it is submitted as follows:

(a) It is not accepted that the C has established a sufficient *prima facie* test of causation. Where is the evidence that the C's belated theory of the case might be correct? There is no direct evidence to support it at all. Furthermore:

i. There is no direct evidence of personal hostility towards the C on the part of any of the R's employees post the 2018 hearing in the voluminous documentation before the tribunal. This dearth of evidence, like the dog that did not bark, is very telling. It is also to be contrasted with the mass of evidence suggesting that the obvious explanation for the R's conduct – that it wanted to protect its reputation in the face of misleading and hostile publicity – is the right one.

ii. The C's case is psychologically implausible. That explains perhaps why he does not articulate it to SNL, Sir Robert Francis or in his own 91 page statement prepared for these proceedings.

iii. If there were specific hostility towards the C – and as noted, there is no evidence of that – it is far more likely to be because of recent statements about the case by him or his supporters, than the historic PDs years earlier.

(b) The suggestion that the R has not adduced evidence of its motivation is absurd: see above. That evidence is credible and has comfortably survived the C's attempts to undermine it.

Conclusions and case overview

101. Having made submissions on the constituent parts of the C's claims the R concludes with some observations about the case as a whole.

102. Because the current claim arises out of the termination of the 2018 claim, that claim is the appropriate starting point. The obvious inference from the fact that the C decided to withdraw his 2018 claim without payment mid-way through the evidence is that the case

had been going very badly for him and he thought he would lose[38]. That natural inference is supported by the clear evidence of CM. The pessimism CM had felt after 2 days of the C's evidence will only have deepened as the C's evidence progressed: it was only in the latter part of his evidence that he was grilled by Mr Moon QC about the covert recordings, which raised potential regulatory issues and direct issues as to his credibility (when he said that the recordings were "impulsive"). CM was clear that the C faced regulatory, reputational and financial risks in continuing with the claim. It is extremely unlikely that the C did not share that pessimism.

103. The C is not to be criticised for deciding to settle when he did. He will not be the first litigant who rapidly finds that his/her case is not going as well as hoped. Settling a claim – even at a very late stage – can be the "dawn of sanity".[39] He saved both sides the on-going costs of the hearing; he avoided the risks identified by CM; and in securing some positive comments about himself in the agreed statement it was – as CM says the C acknowledged explicitly at the time – a "win-win".

104. In normal circumstances, that would have been that. But the C was a prominent and successful crowdfunder. There is/was nothing wrong with that (although whether the C's claims about the integrity with which he discharged his role as a crowdfunder are accurate is considered elsewhere) – but it had two immediate consequences.

105. First, as noted above, there was inaccurate social media comment hostile to the R from the C's supporters. That comment was not necessarily generated by the C. For instance, on 17/10/18 Dr Harding emailed DC saying "I'm not sure if the Trust has made a statement yet but surely that must address the concerns in the piece below. People still do not know the full facts of the case and until they do, the reputation of the Trust …. will be at risk…The article below is infuriating".

[38] When asked about the origin of the reference to "Dr Day agreeing that the case was futile" in the LBA [1495] the C initially referred to it being a reference to "something that needed to be redacted for legal advice privilege". The suggestion seems to be that he (in a passage allegedly covered by legal advice privilege) is recorded as having agreed that the case was futile. He then said that it was a reference to "innuendo" "anyone looking at my case would see a claimant that suddenly pulls the plug on a whistleblowing case as the claimant going to pieces and throwing in the towel" [5/3/9-10].

[39] The phrase used by the CA in **McPherson v BNP Paribas (London Branch) [2004] ICR 1398** at [28].

106. Secondly, the C himself made a series of increasingly misleading claims that sought to deflect attention away from the fact that he had withdrawn from the proceedings because he recognised he was likely to lose. The update he posted on his crowdfunding page stated that "We are very proud of what we have been able to achieve together with our supports on Crowd Justice" [1027]. That statement was no doubt true in respect of the C's success in the CA against HEE. It is most unlikely to have been an accurate statement in respect of his feelings regarding the outcome of the 2018 hearing. Being ripped to shreds in cross examination and not receiving a penny in compensation would be a surprising source of pride.

107. Implausible claims about pride in respect of the "achievements" of the 2018 hearing did not imply any wrongdoing on the part of the R. By mid-November 2018 however, that had changed. In his statement to Tommy Greene of 14/11/18 [1084] the C was saying he was "disgusted" at the way he and his family had been treated. He claimed that the R had approached him whilst giving evidence "for no other reason than to threaten me for costs". He referred to the approach being "designed to affect my ability to give evidence and to intimidate me into withdrawing my whistleblowing claims". He had "no choice" but to drop the case. The threat he referred to was the Rs seeking the costs of the 4 week hearing if he lost the case and cross examined the Rs' witnesses. He also specifically complained about being pressurised into agreeing the "good faith" part of the statement.

108. The C's statement to Mr Greene implied impropriety on the part of the R and shifted the focus from the C's decision to abandon a case that was going very badly to the R's alleged wrongdoing. But on careful analysis the statement still suggested that the C's case was weak: if he thought he was likely to win, the threat of applying for costs if he lost would be unlikely to cause him to throw in the towel. Nor had he complained about being pressurised into agreeing that part of the agreed statement that stated that his case was likely to fail.

109. As more time passed the C's narrative developed. It was not just that the Rs deployed inappropriate threats; in doing so they had prevented a case he believed to be viable and likely to succeed from being determined on its merits. This is the case that he advances to the ET. He evidently caused SNL to believe that he (the C) had felt the case had gone

well – a belief that maintained SNL's support for him and resulted in SNL providing highly emotive criticisms of the R's alleged conduct. In order to try to answer the obvious question of why he would choose to settle a good case the C emphasised the perceived costs threat associated with the covert recording: see by way of example [6/653/25-29].

110. This is not something he identified in the statement to Mr Greene. For reasons explained elsewhere, it is not credible, and the tribunal is invited to reject it as an accurate account of what the C believed about costs.

111. The upshot of the above however is that the R was faced with an increasingly damaging and inaccurate narrative about how the 2018 case settled. It was entirely unsurprising[40] that it responded with press statements setting out its position.

112. Those statements were a reasonable and foreseeable response to the misleading publicity about the termination of the C's case. There is no evidence that they were motivated by personal hostility towards the C, still less because of the PDs he had made years earlier.

113. Instead of recognising that, the C has homed in on a number of discrete statements and claimed them to be detriments in order to advance this claim. He has ignored the content of the statements as a whole and the context in which the statements were issued. He has taken umbrage at errors or alleged errors that are trivial when seen in context – for instance, griping about the use of the word "representatives" rather than "representative". This is so, even though there is no evidence from social media postings or otherwise than anyone thought the less of the C because of any of the statements he now complains about.

114. He has also, in order to get the case before the tribunal, been compelled to say that the impugned statements were done on the grounds of his PDs years earlier, despite the implausibility of the stance, the lack of evidence that that was the case, and the evidence that the C does not believe it himself[41]. He has belatedly developed an elaborate new

[40] The assessment of the ET in the judgment of 16/2/22 [607-624] at para. 32 was that "unsurprisingly" the Sunday Telegraph article of 12.2.18 "provoked reaction" from both Rs.
[41] E.g. his not articulating this part of his case in his correspondence with SNL and Sir Robert Francis.

theory of the case based on the four doctors allegedly developing a desire to tarnish his reputation because of what he said in the 2018 tribunal. This too is unsupported by any evidence and is flawed in law.

115. In an attempt to keep his case alive, the C has stubbornly refused to accept clear contemporaneous evidence that the R simply wanted to put its side of the story and protect its reputation.

116. The ET is respectfully requested to dismiss the C's claim.

14 July 2022

DANIEL TATTON BROWN Q.C.

Littleton Chambers