IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL

CASE NOS: 2303023/2014 and 2301446/2015

BETWEEN:

DR C M DAY

Claimant

-and-

LEWISHAM & GREENWICH NHS TRUST

First Respondent

HEALTH EDUCATION ENGLAND

Second Respondent

Supplemental Skeleton Argument on Behalf of the Claimant on application for a wasted costs order listed for 5 and 6 December 2022

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1. This hearing has been listed to determine whether the Claimant's application, dated 12 June 2019, for wasted costs against Hill Dickinson solicitors for the 2nd Respondent has sufficient prospects of success to proceed in light of the relevant compromise agreements. The notice of hearing was given by letter dated 3 October 2022 [917-918] which states:

   The application shall also first be considered at a preliminary hearing to determine whether it has sufficient prospects of success to proceed to a substantive hearing having regard to the nature and content of the relevant compromise agreements entered into between the Claimant and the Second Respondent and/or the consent order entered into by the parties at the Court of Appeal dated 27 October 2016.
   . . .
   In particular they should address relevant authorities on the setting aside of compromise agreements and/or the consent order, particularly on the basis of fraud/misrepresentation/mistake (see for example Hayward -v- Zurich Insurance Co Plc [2015 EWCA Civ. 327)[1] and whether or not there are any clauses in the relevant compromise agreements similar to that identified in the case of Ackerman -v- Thornhill [2017] EWHC 99 (Ch) (26 January 2017), that precludes a party from pursuing any future proceedings. The parties should also address whether or not, despite any agreements that may preclude the Claimant himself pursuing a wasted costs order, the tribunal should nevertheless make an order on its own initiative".

2. Although not stated explicitly in the order, it is presumed that the hearing is a strike out hearing and that consideration is being given pursuant to

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[1] The Court of Appeal Judgment was overturned by the Supreme Court at [2016] UKSC 48

Rule 37(1)(a) albeit that what is being considered for strike out is an application rather than a claim.

Background

3. The Claimant presented whistleblowing detriment claims against the Respondents on 27 October 2014 [19-31] and 10 April 2015 [68-85].

4. The 2nd Respondent applied to strike out the Claimant's claim against it on the basis that he did not have worker status in relation to the 2nd Respondent under the extended definition in s43K Employment Rights Act 1996 – specifically s43K(1)(a) which states:

   > (1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who—
   > (a) works or worked for a person in circumstances in which—
   > (i) he is or was introduced or supplied to do that work by a third person, and
   > (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,
   > . . .
   > (d) is or was provided with work experience provided pursuant to a training course or programme or with training for employment (or with both) otherwise than—
   > (i) under a contract of employment, or
   > (ii) by an educational establishment on a course run by that establishment;
   >
   > and any reference to a worker's contract, to employment or to a worker being "employed" shall be construed accordingly.

5. The strike out hearing before the Employment Tribunal was on 25 February 2015 and the tribunal struck out the claim against the 2nd Respondent in a judgment sent to the parties on 16 April 2015 [86-96]. The argument run by counsel for the 2nd Respondent at the ET hearing in 2015 was that it was "fanciful to suggest that the party which substantially determined the terms and conditions of the Claimant's engagement was or could have been the Respondent" (ET Reasons para 42) [94]. At paragraph 46 of the 2015 ET Reasons [95], "The Tribunal accepted the Respondent's submission that the document which set out the detail of the relationship between the Claimant and the Respondents overwhelmingly pointed to the First Respondent as the body which was substantially responsible for determining the Claimant's terms and conditions of work." In conclusion at paragraph 52 of the 2015 ET Reasons [96] it states: "In conclusion, I accepted the primary submissions on behalf of the Second and Third Respondents that in construing s.43K(2) the focus is in relation to the work and as to who has substantially determined the terms on which the employee or the worker does that work. I agreed that it was relevant that the Third Respondent's role was to arrange the training of Dr Day over an extended period but that it was not the Third Respondent who substantially determined the terms on which he did the work for the Trusts. Here there was a training relationship which subsisted alongside the employment relationships with the various Trusts who were the Claimant's employers and

determined the terms on which he performed his work either on their own, or with others, not including the Respondents. The claim against the Third Respondent therefore had no reasonable prospects of success".

6. The Claimant appealed to the EAT where after a hearing on 10 February 2016, the 2nd Respondent was again successful [127-150]. During the EAT proceedings, the 2nd Respondent threatened costs against the Claimant. The EAT determined the matter against the Claimant on a related basis with a different emphasis – which was principally that the fact that the wording of s43K could only be interpreted to mean that because the 1st Respondent was a section 230(3) employer, the 2nd Respondent could not also have the status of employer the status conferred by s43K.

7. The Court of Appeal overturned the strike out in a judgment handed down on 5 May 2017 *Day v Lewisham & Greenwich NHS Trust & HEE* [2017] EWCA Civ 329, [2017] ICR 917 [161-171], remitting the matter to the tribunal for re-determination on the basis that the tribunal had not engaged directly with whether the 2nd Respondent training body as well as the 1st Respondent trust substantially determined the terms on which the claimant was engaged.

8. The matter was remitted for a hearing before the Employment Tribunal, which was scheduled to take place between 14 and 17 May 2018.

9. The 2nd Respondent disclosed a document on 14 February 2018 [175-313] – which although not the actual relevant Learning and Development Agreement (LDA) between the 1st and 2nd Respondents was sufficient to indicate that the relationship between the Respondents was one which in fact did establish worker status for junior doctors such as the Claimant against HEE. Contrary to the suggestion by Hill Dickinson in their letter to the EAT on 1 August 2019 [ ] the LDA produced was not "The specific Lewisham LDA". Suspiciously, it was disclosed without fanfare – despite being clearly an important document. The Claimant does not understand that document disclosed in February 2018 to have been the one drafted by Hill Dickinson. The need for a document of that nature, regulating the relationship between the 1st and 2nd Respondent should have been apparent to the 2nd Respondent and its solicitors from the outset of the proceedings. The LDA disclosed nearly three years after the 2015 strike out hearing, showed that the 2nd Respondent *was* responsible for substantial terms under which the Claimant worked. The entire basis for the strike out application had been false. The argument run by the 2nd Respondent that it was 'fanciful' to suggest that the party which substantially determined the terms and conditions of the Claimant's engagement was or could have been the Respondent was completely wrong.

10. All of the LDAs were in the possession of the 2nd Respondent at all relevant times. The 2014 LDAs including the one between the

Respondents were also in the possession of Hill Dickinson because they drafted it – but the Claimant did not know that at the time of any of the compromise agreements / agreed orders.

11. The content of the LDA had featured heavily in the Skeleton Argument dated 10 May 2018 prepared by Tom Linden KC on behalf of the Claimant ahead of the remitted preliminary hearing scheduled to start on 14 May 2018 [314-330]. It would inevitably have been a primary focus of attention at the original employment tribunal preliminary hearing in 2015 if it had been disclosed properly at that time.

12. On or about Friday 11 May 2018, very shortly before the remitted hearing was due to start on Monday 14 May 2018, the 2nd Respondent withdrew its application for strike out [331-333 and the 2nd Respondent entered into a consent order with the Claimant conceding the worker status point and agreeing to pay £55,000 towards the Claimant's costs in an agreed order sent to the parties on 17 May 2018 [334-445].

13. The first two claims were settled on 15 October 2018 [336-342]. The order dismissing the claims upon the parties having reached terms of settlement was sent to the parties on 28 November 2018 [343].

14. Further claims against the Respondents were presented on 6 March 2019 [534-571]. Neither Respondent sought to assert that either the settlement agreement of 15 October 2018 or the subsequent order of 28 November 2018 precluded the Claimant from bringing those claims which related to matters which post dated the settlement agreement.

15. The Claim against the 2nd Respondent was struck out by Judgment sent to the parties on 16 February 2022 on the basis that the Claim was out of time given that the alleged perpetrator of the more recent detriments, Dr Frankel, the former Postgraduate Dean of the 2nd Respondent until 30 April 2018, was not acting as an agent of the 2nd Respondent in relation to alleged detriments which were in time [592-609].

16. There has never been a determination by the tribunal in relation to any of the alleged detriments to which the Claimant was subjected by the 2nd Respondent.

17. The Claim against the 1st Respondent was determined against the Claimant by Judgment sent to the parties on 16 November 2022 [610-676].

18. In May 2019, via the answer to a Freedom of Information Request made by a journalist, Tommy Greene, it was revealed that Hill Dickinson solicitors had drafted the undisclosed LDA between the First and Second Respondent in this claim [681-682]. In July 2019, the actual relevant LDA [719-873] was produced by the Respondent to Tommy Green albeit never

disclosed in the litigation brought by the Claimant. His discovery that Hill Dickinson were also the solicitors who drafted the LDA led the Claimant to his contention that they were aware or should have been aware of its existence and disclosed it in the litigation. Even the outdated earlier LDA was produced far too late in February 2018. It appears that Hill Dickinson acted in relation to the 2nd Respondent's agreements with a large number of Trusts and were paid well to do so. The Claimant estimates that the 2nd Respondent had in the region of 200 separate commissioning relationships (each worth considerable amounts – up to the tens of millions each) [e.g. 685-716]. It is therefore difficult to understand how Hill Dickinson could not have been alert to the existence of that document as the Claimant has established that Hill Dickinson drafted the model version of the LDA adapted for NHS Trusts around England. Of course, disclosure is not an obligation on firms of solicitors but rather on parties to litigation. However, if solicitors were aware of a relevant document, which was in the control of a client, it would have been professionally incumbent on those solicitors to alert the client to its obligation to disclose. That would not appear to have been done in this case.

19. The consequences of the failure to disclosure the LDA in 2015 and of the pursuit of the strike out application at that time went beyond the substantial impact on the Claimant. In 2016 the GMC reported that "We recognise that a level of concern now exists among doctors in training in England about whether they are adequately protected in their relationship with Health Education England (HEE), and that, as a result, some may feel less secure about raising concerns for fear of suffering detriment to their career."

Disclosure in the ET

20. Disclosure in the ET is not as formal a process as it is in the Civil Courts under the Civil Procedure Rules (CPRs), although Rule 31 does give the ET the same powers to order inspection and disclosure of documents as the County Court (and the General Case Management Power in Rule 29 applies specifically to parties). CPR 31 sets out the power of the County Court. The Practice Directions to CPR 31 do not apply in the ET. There is for example no requirement on the parties in the ET to sign a disclosure statement.

21. However, the basic principles remain the same. Standard disclosure in the County Court is governed by rule 31.6 CPR and requires a party to disclose: (a) the documents on which he or she relies, and (b) the documents that adversely affect his or her own case, adversely affect another party's case or support another party's case. When a court orders standard disclosure, it will require the parties to make a reasonable search for documents falling within (b) above — rule 31.7(1) CPR. In order to determine whether such a search is reasonable, factors such as the number of documents involved, the nature and complexity of the proceedings, the expense involved in retrieving the documents and the

significance of any document which is likely to be located will be taken into account — rule 31.7(2) CPR.

22. The LDA was a document adversely affecting the 2nd Respondent's case and it is difficult to understand how it would not have come to light in any reasonable search that should have taken place prior to the 2015 hearing.

23. The Overriding Objective states (my emphasis):

> **2 Overriding objective**
> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
> (a) ensuring that the parties are on an equal footing;
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
> (e) saving expense.
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties **and their representatives** shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Wasted Costs in the ET

24. The relevant rules on wasted costs are as follows:

> **80 When a wasted costs order may be made**
> (1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs—
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or
> (b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay. Costs so incurred are described as "wasted costs".
> (2) "Representative" means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.
> (3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.
>
> **81 Effect of a wasted costs order**
> A wasted costs order may order the representative to pay the whole or part of any wasted costs of the receiving party, or disallow any wasted costs otherwise payable to the representative, including an order that the representative repay to its client any costs which have already been paid. The amount to be paid, disallowed or repaid must in each case be specified in the order.

82 Procedure

A wasted costs order may be made by the Tribunal on its own initiative or on the application of any party. A party may apply for a wasted costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings as against that party was sent to the parties. No such order shall be made unless the representative has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application or proposal. The Tribunal shall inform the representative's client in writing of any proceedings under this rule and of any order made against the representative.

25. The 28 day time limit in Rule 82 is subject to the general power contained in Rule 5 enabling the ET to extend time.

26. Rule 80 is based on the wasted costs provisions that apply in the civil courts, with the definition of 'wasted costs' being identical to that contained in S.51(7) of the Senior Courts Act 1981. Accordingly, the authorities applicable to wasted costs in the civil law generally are equally applicable in the employment tribunals — *Ratcliffe Duce and Gammer v Binns (t/a Parc Ferme)* EAT 0100/08 [tab 5, para 12] and *Mitchells Solicitors v Funkwerk Information Technologies York Ltd* EAT 0541/07 [tab 4, paras 21, 27]. It should however be noted (as it was by REJ Freer in his letter of 3 October 2022 [914-916]) that ET Rules 2 and 41 allow for the employment tribunal to regulate its own procedure with regard to the principles in the overriding objective.

27. The two leading authorities analysing the scope of S.51 and the circumstances in which such orders can be made are *Ridehalgh v Horsefield and other cases* [1994] 3 All ER 848, CA [tab 1, pages 226 B-C, 231 E, 238 E]], and *Medcalf v Mardell and ors* [2002] 3 All ER 721, HL [tab 3, page 136 H]. In the *Mitchells Solicitors* case, the EAT confirmed that these cases are 'sources of essential assistance' for employment tribunals in the matter of wasted costs.

28. The question is not whether the party has acted unreasonably. The test is a more rigorous one. To lay the ground for a wasted costs order, it is vital to establish that a representative assisted proceedings amounting to an abuse of the courts process (thus breaching his or her duty to the court) and that his or her conduct actually caused costs to be wasted. Knowingly making incomplete disclosure of documents could amount to such an abuse of process. However in *KL Law Ltd v Wincanton Group Ltd and anor* EAT 0043/18 [tab 14, paras 27, 33], Simler J (then President of the EAT) observed that, where there has been a failure in respect of disclosure, a tribunal cannot simply assume that there was either negligence on the part of the legal representative concerned or that it is a failure by the legal representative regarding his or her duty to the court. Simler J emphasised that 'a wasted costs order is an order that should be made only after careful consideration and any decision to proceed to determine whether costs should be awarded on this basis should be dealt with very carefully.

A wasted costs order is a serious sanction for a legal professional. Findings of negligent conduct are serious findings to make. Furthermore, even a modest costs order can represent a significant financial obligation for a small firm. Tribunals should proceed with care in this area.'

Strike Out

29. Rule 37(1)(a) states:

> **37 Striking out**
> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;

30. Strike out is a draconian step. It would not be in accordance with the overriding objective to strike out this application. It would not be a proportionate response to the potential complexity of legal argument.

31. Prior to disclosure, the Claimant may not be able to show for certain that the actions of Hill Dickinson were sufficiently serious that he should be permitted to go behind the wording of the settlement agreement(s). However what is required at this stage of the process is for the Claimant to show that he has a prospect of establishing a path to success on his application which is 'more than fanciful'.

32. In *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126 [tab 6, paras 29, 30, 32], the Court of Appeal held that a cautious approach should generally inform protected disclosure ('whistleblowing') cases, which have much in common with discrimination cases, in that they involve an investigation into why an employer took a particular step. The Court stressed that it will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when the central facts are in dispute.

33. In *Balls v Downham Market High School and College* [2011] IRLR 217, EAT [tab 8, para 6], Lady Smith stated that where strike-out is sought or contemplated on the ground that the claim has no reasonable prospect of success, the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success. The test is not whether the claim is likely to fail; nor is it a question of asking whether it is possible that the claim will fail. It is a high test.

Hill Dickinson's Position for this Preliminary Hearing

34. The Claimant's understanding is that for the purposes of this hearing, Hill Dickinson seek to place up to three obstacles in the path of the Claimant's application for wasted costs:

    a. The 2016 Court of Appeal Consent Order (it is not clear whether Hill Dickinson seek to rely upon this order);

b. The May 2018 settlement of £55k;
c. The October 2018 settlement.

35. Those contentions are addressed below.

36. It is also understood that Hill Dickinson also argue that the individual solicitors responsible for representation of the 2nd Respondent were unaware of the work done for the 2nd Respondent by other solicitors in the same firm in drafting the LDA. That is a question of fact which could only be determined after disclosure and is not suitable for this preliminary hearing (nor listed to be heard at this hearing).

37. It may also be argued (it is certainly asserted in correspondence) that the LDA was not disclosed earlier because it was not relevant. It is not anticipated that this argument will be pursued but if it is pursued, it is also not suitable for determination at this preliminary hearing (nor listed to be heard at this hearing).

38. The ultimate questions as to whether Hill Dickinson have acted improperly, unreasonably, or negligently; and if so, whether such conduct caused the applicant to incur unnecessary costs; and if so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs[2] are also not suitable for determination at this preliminary hearing (nor listed to be heard at this hearing).

Relevant Tribunal Orders

Court of Appeal 2016

39. The Court of Appeal 27 October 2016 consent order made prior to the following year's hearing in the Court of Appeal states:

> *UPON reading the letters from the Appellant's and Second Respondent's solicitors*
> *1. AND UPON the Appellant and Second Respondent having each agreed not to pursue costs against the other, whatever the outcome of the appeal*
> *2. BY CONSENT IT IS ORDERED THAT:*
> *(1) Whatever the outcome of the Appellant's appeal, each of the Appellant and Second Respondent shall bear its own costs.*
> *. . .*

40. That is plainly an order (not unusual in these circumstances) relating only to the inter partes costs incurred in the Court of Appeal. It has no relevance to this application in the Employment Tribunal save that had the Claimant known then what he knows now, he would have sought costs against the 2nd Respondent (and / or Hill Dickinson).

Tribunal May 2018 Order

41. The agreed order of the Employment Tribunal sent to the parties on 17 May 2018 states:

[2] The *Ridehalgh v Horsefield* three stage test

BY CONSENT THE EMPLOYMENT TRIBUNAL ORDERS that in full and settlement of all the Claimant's claims for costs in respect of the "worker" issue HEE will pay the Claimant's costs to the Claimant's solicitors in the sum of £55,000 inclusive of VAT within 28 days of today.

42. That is plainly an order which relates to inter partes costs. It was a contribution towards costs rather than full payment of assessed costs. It cannot have been in the Claimant's contemplation at the time that there could have been any potential for a wasted costs application, given that he was unaware until mid-2019 that not only the 2nd Respondent but also their solicitors were aware of and in possession of the LDAs. Had the Claimant known then what he knows now, he would have sought an order for all of his costs against Hill Dickinson and / or the 2nd Respondent.

Tribunal October 2018 settlement agreement

43. The settlement agreement of 15 October 2018 records as follows (my emphasis in bold):

WHEREAS
(A) The Claimant brought claims against the Employer and HEE in the South London Employment Tribunal for unlawful detriment on grounds of having made protected disclosures in connection with his participation in and departure from a specialist training programme provided by HEE and in connection with his employment with the Employer between August 2013 and August 2014.
(B) The final hearing of those claims commenced on 1 October 2018 and in the course of that hearing the parties have reached agreement for the withdrawal and settlement of those claims on the terms set out herein.
(C) This Agreement is in full and final settlement of those claims and all or any claims the Claimant has and/or may have against the Employer and/or HEE, their directors, officers, agents and/or employees arising out of or in connection with his employment and/or training and/or their termination.
(D) The parties intend this Agreement to be an effective waiver of any such claims and agree that it constitutes a valid settlement agreement under section 203 of the Employment Rights Act 1996.
. . .

2. FULL AND FINAL SETTLEMENT
2.1 This Agreement is in full and final settlement of all or any claims or other rights of action (whether under the laws of England and Wales, European Union or any other law) that the Claimant has or may have against the Employer and/or HEE, their directors, officers, agents or employees arising out of or in connection with the Claimant's employment and/or training and/or their termination whether under common law, contract, statute, or otherwise including but not limited to:
a. claims for unlawful detriment on grounds of public interest disclosures under Parts IVA and V of the Employment Rights Act 1996, whether the subject of the Claims or otherwise;
b. constructive and/or unfair dismissal under the Employment Rights Act 1996;
c. breach of contract, including without limitation wrongful dismissal;
d. any other claim under the Employment Rights Act 1996;
e. any claim, including a claim for damages for harassment under the Protection from Harassment Act 1997;
f. any personal injury claim associated with any of the aforementioned claims; and
g. any other personal injury claim save where the Claimant is reasonably not aware of the facts and matters giving rise to such claim.
2.2 This Agreement is also in full and final settlement of all or any claim or application for costs or expenses that any of the Parties may have against any

other Party or Party's representative, whether in relation to the Claims or their conduct or otherwise.
2.3 This clause is without prejudice to any rights that the Claimant has in relation to his accrued pension rights if any.

CLAIMANT WARRANTIES
3.1 The Claimant acknowledges and accepts that the Employer and HEE in entering this Agreement act in reliance on the Claimant warranties contained in this Agreement. The Claimant represents and warrants that:
a. the claims and prospective claims referred to at clause 2 amount to the entirety of the claims which he believes he has or may have against the Employer and/or HEE or their directors, officers, agents or employees, whether at the time of entering into this Agreement or in the future arising out of or in connection with his employment and/or its termination;
b. he has not commenced any claim other than the Claims to be withdrawn under clause 4 and shall not commence any claim or proceedings in relation to those claims or prospective claims referred to at clause 2 whether in the Employment Tribunal, the High Court, the County Court or otherwise;
c. he has not commenced and shall not commence any other claim not referred to at clause 2 whenever arising in the Employment Tribunal, the High Court, the County Court or otherwise against the Employer and/or HEE, their directors, officers, agents or employees;
d. he has taken independent legal advice from the Adviser and has raised all issues relevant to his employment and/or its termination, which may give rise to a claim against the Employer and/or HEE, their directors, officer, agents or employees and has asked the Adviser to advise on whether he has or may have any claims under clause 2;
e. he has received advice from the Adviser about the terms and effect of this Agreement on his ability to pursue any complaint before an Employment Tribunal or court;
f. the Adviser is a qualified lawyer or a relevant independent adviser within the meaning of Section 203 (3A) of the Employment Rights Act 1996;
g. the Adviser has confirmed that there is in force, and was at the time the advice was received, a policy of insurance or indemnity covering the risk of a claim by the Claimant in respect of a loss arising as a consequence of the advice provided by the Adviser;
h. the Adviser has signed the certificate at Schedule 1;
i. as at the date of this Agreement, there are no circumstances of which the Claimant is aware or ought reasonably to be aware which may give rise to a personal injury claim by the Claimant against the Employer and/or HEE, their directors, officers, agents or employees.

4. TRIBUNAL PROCEEDINGS
4.1 On execution of this Agreement, the Claimant warrants that he will through his counsel inform the Tribunal that the Claims are withdrawn and will consent to their dismissal upon withdrawal.

5. AGREED POSITION STATEMENT
5.1 The parties jointly subscribe to and agree the Joint Position Statement set out in Schedule 2 to this Agreement.

6. SETTLEMENT AGREEMENT
The parties agree that the conditions regulating settlement agreements and compromise agreements contained in section 203(3) of the Employment Rights Act 1996 have been satisfied by the terms of this Agreement.
. . .

44. The Agreed Position Statement at Schedule 2 stated as follows:

Dr Day blew the whistle by raising patient safety concerns in good faith.

Dr Day has performed a public service in establishing additional whistleblowing protection for junior doctors.
The Tribunal is likely to find that both the Trust and HEE acted in good faith towards Dr Day following his whistleblowing and that Dr Day has not been treated detrimentally on the grounds of whistleblowing.
Dr Day's claims are dismissed upon withdrawal.

45. The Claimant accepts that the wording of this settlement agreement does cover wasted costs applications (at least against the legal representatives of another party).

46. The Claimant accepts that in order to progress his wasted costs application against Hill Dickinson, he must argue either that the costs sought are not covered by this agreement or that the agreement should not prevent him from seeking wasted costs given that he was unaware at the time of entering into the settlement agreement that the grounds for such an application existed.

47. The Claimant anticipates that the principle of finality in litigation is likely to be cited by Hill Dickinson – and that there will be reference to the Claimant's previous failed attempt to set aside the settlement agreement. However, the agreement is between the parties to the litigation and is not an agreement entered into with those parties' legal representatives and this application for wasted costs is not an attempt by the Claimant to re-open his litigation against the Respondents – but rather a separate but related application against the 2nd Respondent's solicitor. To be weighed against the finality in litigation principle is that the Claimant did not know as at October 2018 that Hill Dickinson had drafted the LDA (and indeed drafted many such documents in relation to HEE's relationship with various Trusts). Had the Claimant known then what he knows now, he would not have entered into an agreement which could stop him applying for costs against Hill Dickinson. It is in the interests of justice to permit the Claimant to progress this application.

48. A Tribunal's power to look behind a settlement agreement emanates from the power of the tribunal to consider the validity of the agreement under section 202 Employment Rights Act 1996 itself rather than the common law, see *Glasgow City Council v Dahhan* UKEATS/0024/15/JW [tab 9] at paragraph 21 and *Horizon Recruitment Ltd v Vincent* [2010] ICR 491 [tab 7] at para 27, albeit that the common law principles are then applied.

49. An agreement can be set aside on the basis of misrepresentation - *Greenfield v Robinson* EAT/811/95 [tab 2] at pp 2-3; *Horizon Recruitment Ltd v Vincent* [2010] ICR 491 [tab 7] at para 17; or mistake (*Horizon* para 18); or duress (*Horizon para 21*).

50. For the avoidance of doubt, these are merely examples of the power that a tribunal has - the Claimant does not argue duress in relation to any of the consent orders or the settlement agreement.

51. Setting aside of compromise agreements and/or consent orders, on the basis of fraud / misrepresentation / mistake was explored in *Hayward -v- Zurich Insurance Co Plc* [2016] UKSC 48 [tab 10]. The fraud / misrepresentation / mistake need not be the sole cause, it need only be a material cause which induced the decision to enter into the settlement agreement - *Hayward v Zurich Insurance Company plc* at para 33. There is a presumption in favour of a causative effect (*Hayward v Zurich* paras 34 and 35) and it is very difficult to rebut that presumption *Hayward v Zurich* para 36. Whether or not the actions of Hill Dickinson fall within the categories identified in *Hayward v Zurich* can only be determined following disclosure and witness evidence.

52. The Claimant entered into the settlement agreement ignorant of the fact that Hill Dickinson were aware of the LDA at the time when they represented the 2nd Respondent in 2014 to 2018. It would not be in the interests of justice to prevent him from even proceeding with an application for wasted costs which is based on information which he obtained after the date of the settlement agreement.

53. In *Ackerman -v- Thornhill* [2017] EWHC 99 (Ch) (26 January 2017) [tab 11], Snowden J left open the possibility that despite a previous judgment, proceedings could be reopened where evidence had come to light which was not available, and could not have been discovered with reasonable diligence, at the time the first judgment was given (para 79). It is submitted that in relation to this application for wasted costs, in the tribunal context, the test should be whether the evidence of the alleged improper, unreasonable or negligent act or omission on the part of the representative had come to light which was not available, and could not have been discovered with reasonable diligence, at the time the first judgment was given. Again, whether or not the actions of Hill Dickinson fall within the categories identified in *Ackerman -v- Thornhill* can only be determined following disclosure and witness evidence.

Tribunal making an order 'on its own initiative'

54. REJ Freer has directed that the PH on 5 and 6 December 2022 will also consider *"whether or not, despite any agreements that may preclude the Claimant himself pursuing a wasted costs order, the tribunal should nevertheless make an order on its own initiative"* [914-916].

55. Rule 82 states that *"A wasted costs order may be made by the Tribunal on its own initiative or on the application of any party. . . ."* The phrase 'on its own initiative' appears in a number of places in the ET Rules. It is in Rule 5 in relation to extending or shortening time limits. It is in Rule 29 in relation to the making of case management orders. It is in Rule 34 in relation to the addition, removal or substitution of parties. It is in Rule 50 on the making of privacy orders. It is in Rule 54 in relation to directing that there should be a preliminary hearing. It is in Rules 70 and 73 in relation to reconsideration of a tribunal judgment.

56. There is no time limit applicable to such a mechanism; and the agreed order(s) would not preclude such an approach.

57. The Court of Appeal in *Ridehalgh v Horsefield and other cases* [1994] 3 All ER 848 [tab 1], commented (in the context of the wasted costs provisions that apply in the civil courts) that save in the most obvious cases — such as failure to appear, lateness, negligence leading to an otherwise avoidable adjournment, gross repetition or extreme slowness — courts should be slow to initiate an inquiry into wasted costs, since in complex cases this could lead to 'difficult and embarrassing issues'.

58. This is such an obvious case (if the facts are established – which is a matter for a further hearing).

59. There is no case law authority directly concerning the meaning of "on its own initiative or on the application of any party" in the context of Rule 82. However, the very similar wording in Rule 70 states "*A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment . . .*" and there are cases concerning that wording. The Rules on reconsideration provide separate mechanisms for applications by parties (Rules 71 and 72) and reconsideration by the tribunal on its own initiative (Rule 73).

60. In *TCO In-Well Technologies UK Ltd v Stuart* [2017] ICR 1175 [tab 13], para 25, the EAT held that where a party makes a late application under rule 71 it is not open to the tribunal to raise the same issue 'on its own initiative' under rule 73, since rule 71 and rule 73 are alternative routes to reconsideration and there is no scope for a hybrid process whereby a matter is raised by a party and then taken on by the tribunal.

61. The EAT distinguished *Stuart* in *Banerjee v Royal Bank of Canada* [2021] ICR 359 [tab 15, paras 30-37], holding that a party's submission to an employment tribunal at a remedies hearing that it should reconsider an issue decided at the liability hearing did not amount to an application for reconsideration under rule 71 and so did not preclude the tribunal reconsidering the issue 'on its own initiative' under rules 70 and 73.

62. However if the Claimant is prevented from making an application (because of the agreed order(s)) then the tribunal are not going to determine his application at all – and he is merely inviting the tribunal to use its own initiative (akin to *Banerjee*).

Summary

63. The Claimant accepts that there may be a question as to whether the arguments made above will need to be reconsidered at a final hearing of this matter; and that some of his arguments are dependant on disclosure by Hill Dickinson, but he contends that his arguments have sufficient

prospects of success to proceed to a final hearing of his wasted costs application and that his application should not be struck out at this preliminary stage.

64. To strike out the application would be a draconian act. The Claimant's application is not bound to fail. The tribunal cannot properly conclude that the claim has no reasonable prospect of success.

Andrew Allen KC
Outer Temple Chambers
24 November 2022
Revised 2 December 2022