



9th January 2023

Your ref: **2300819/2019**  
Our ref: **AXR/137052**

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Dear London South Employment Tribunal

**Dr Christopher Day v Lewisham and Greenwich NHS Trust**  
**Case number: 2300819/2019**

1. We write on behalf of the Trust in response to the Claimant's application for costs in his solicitor's letter of 13 December 2022. We agree with the Claimant that the application should be determined on the papers to avoid additional expense.

### **Summary of the Trust's position**

2. The Trust opposes the Claimant's application. For the reasons explained below it would be manifestly unfair and unjust (and hence contrary to the overriding objective set out in Rule 2 of the 2013 Rules of Procedure) for any costs order to be made in the Claimant's favour. The Trust's alleged unreasonable conduct has been exaggerated by the Claimant and any additional costs incurred as a consequence have been dwarfed by the costs occasioned by the Claimant's own unreasonable conduct. The ET is therefore invited to dismiss the application.

### **The law**

3. As the ET will know, and as the Claimant points out, the ET will have jurisdiction to make a costs order only if one or more of the gateway conditions set out in Rule 76 is met. If that is the case the ET then has a discretion whether or not to make a costs order (and if so in what amount). When exercising that discretion, it has to take into account all relevant circumstances. Those include the conduct of the party applying for costs – in this case the Claimant.
4. This was made clear by Mummery LJ in **Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420** at [41] where he said that:

*"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case..."*

and went on to hold [50] that the ET on the facts of that case had erred because it:

*“...failed to factor into the exercise of its discretion the significant criticisms voiced by it of the council’s litigation conduct and the effect of that conduct on the costs incurred by the council and claimed by it from the Claimant.”*

5. As Slade J made clear in **Raggett v John Lewis Plc [2012] IRLR 906** at [43](2):

*“The conduct of the litigation by the applicant for a costs order can be taken into account in determining the amount of costs ordered to be paid.”*

### **The Claimant’s conduct of the litigation/prospects of success**

6. The Claimant acted unreasonably in bringing (and subsequently persisting with) the proceedings for the purposes of Rule 76(1) and/or his claim had no reasonable prospect of success (for the purposes of Rule 76(1)(b) of the 2013 Rules). In principle, therefore, a costs order (of far greater magnitude than the order sought against the Trust) could be made against him. That is a highly material factor when considering whether any costs order (and if so what) should be made against the Trust.

#### **(a) No reasonable prospects of success**

7. The Claimant’s claim had no reasonable prospects of success. Moreover, in view of the fact that he was expertly advised throughout by experienced specialist Leading Counsel it also follows that it was unreasonable for him to have brought the proceedings and/or unreasonable for him to have persisted with them.

8. The ET comprehensively rejected the Claimant’s claims. He himself has said (in a Linked In article) that *“The judgment said that we lost and also that we lost badly ...”* . (The reference to “we” is the Claimant referring to himself).

9. Since the Trust admitted that the Claimant made protected disclosures (“PDs”) in 2013 and 2014, the Claimant needed to establish that (a) the Trust subjected him to detriments after the conclusion of the 2018 litigation; (b) that those detriments were done on the grounds of the PDs and (c) that the claim fell within the jurisdiction of the employment tribunal.

10. He failed at every count, other than establishing a solitary detriment. That amounts to a comprehensive defeat. The scale of his defeat suggests that this was always a hopeless claim.

11. His biggest challenge – and one that will have been immediately apparent on any reasonable assessment of his case – was that there was no reason to think (and no evidence to suggest he would ever prove) that the alleged detriments were done on the grounds of the historic PDs. His case to the contrary was mere implausible assertion. Indeed, it is doubtful that the Claimant himself even believed it<sup>1</sup>.

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<sup>1</sup> The ET will recall the way in which the Claimant, whilst complaining to Sir Norman Lamb about his alleged detriments, did not assert that they were done on the grounds of his historic PDs. He himself

12. The ET observed [181<sup>2</sup>] that this was not a case where a particular disclosure was ascribed to a particular detriment. That was because there was no evidence that *any* PD was causally linked to any of the alleged detriments – i.e. there was no evidence to support a necessary component of his claim, which was anyway obviously (very) improbable. The ET formally found [179] that the statements about which the Claimant complained (only one of which in any event amounted to a detriment) were “*made in response to the media interest in the case and a desire to put the Trust’s side of the story. The Tribunal agrees with the Respondent’s submission that this was essentially a PR battle*”.
13. This was in truth an obvious and foreseeable conclusion. The Claimant never had a reasonable prospect of establishing the contrary. His case was hopeless and should never have been pursued. Even if that was not obvious from the outset it should have been obvious at the latest by the time witness statements were exchanged.
14. This is **not** a submission made with the benefit of hindsight. The Trust took advice as to the strength of its position, including from a KC, at an early stage. The Trust did not consider that the case had any reasonable prospect of succeeding. However, for the reasons set out below the Trust did not attempt to strike out the claim or issue any kind of costs warning, despite its view as to the very poor prospects of the Claimant’s complaints succeeding. The Tribunal will also recall that the Respondent agreed not to take the jurisdictional issue as a preliminary point at the full merits hearing. This is because of the history of the 2018 claim.
15. It was foreseeable that any attempt by the Trust to strike out the current claim or to seek a deposit order against the Claimant (or issue a costs warning) would have been met by: (a) an appeal or attempted appeal; and/or (b) further litigation; and/or (c) a highly partisan and misleading narrative on social media about the Trust seeking to silence legitimate whistleblowing. After all, that was the consequence of the settlement of the 2018 claim – a settlement initiated by the Claimant’s own barrister. It was inconceivable that highlighting his claim’s obvious weaknesses would in fact have resulted the Claimant withdrawing the claim. The Trust considered there was no realistic option but to defeat the claim at a substantive hearing on its (lack of) merits.
16. The ET observed [10] that it did not know why the Claimant put forward a statement from Jeremy Hunt MP because of its obvious irrelevance. The likely explanation is provided by the Claimant’s commentary on the ET’s judgment. He has tweeted the following: “*As a junior doctor if you rock up to an Employment Tribunal with 2 consultants and a health minister backing you up and if your claim is that MPs and the press have been misled on life and death issues in an NHS whistleblowing case, you might be expected to be listened to...*”. He has also written that “*It is not every day a junior doctor turns up to an employment tribunal with a witness statement in support of their case from a previous Secretary of*

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admitted in cross examination that he “does not think for one second that Ben Travis has anything personal against me”.

<sup>2</sup> i.e. paragraph 181 of the ET’s judgment.

*State for Health and the current Chancellor of the Exchequer. Jeremy Hunt clearly wanted the Tribunal to know that my protected disclosures were about serious and valid issues to do with an Intensive Care Unit...*

17. The reason the Claimant adduced an irrelevant statement from Jeremy Hunt appears therefore to have been so that he could state that he was “supported” in his claim by him. It is an attempt to bolster or salvage his reputation. This (it is suggested) provides an explanation for why the Claimant might initiate and press on with hopeless litigation. Commencing and persisting with the claim enabled him to continue to present himself to his supporters as valiantly continuing a multi-year battle for justice, knowing that if he lost he would “spin” the defeat as a miscarriage of justice. In other words, the litigation itself has been a continuation of a PR battle. That is not the purpose of ET proceedings.
18. This is evidenced by the fact that, following the ET’s judgment, the Claimant has on Twitter accused the Judge of “*turning a blind eye*” to an opponent who “*gets so worried that they destroy evidence mid hearing*”; he has asked “*If you live in South London how do you feel about an employment tribunal ignoring such clear evidence that could effect [sic] whether you live or die?*”. He has said of the tribunal’s judgment that the “*The tribunal has no excuse for getting this so wrong*” and “*has clearly let the public interest down*”. He has claimed that the “*Judge ignored a lot of evidence, multiple instances of destruction/concealment of evidence and the NHS’ main witness suddenly not showing up*”; and commented that “*it is so depressing that the system appears either so weak or so corrupt that it cannot deal with the fairly simple and objective issues in this case*”. He has stated that “*Judge Martin & team have done their best to get the various senior people off the hook*”.
19. These are absurd and offensive comments – but they are no more unreasonable than those made in the Claimant’s underlying claim. Moreover, the Claimant has “form” when it comes to initiating and persisting with hopeless litigation: the ET will recall he sought to challenge the refusal to reconsider the dismissal of the 2018 claim all the way up to the Court of Appeal, despite its obvious total lack of merit. The inevitable dismissal of his appeal, by a series of eminent judges, generated similar comments from the Claimant about corruption (see [107]).
20. It follows that the Trust has been put to the very significant expense of responding to the Claimant’s unreasonable claim – expense that obviously exceeds the sums said to have been incurred as a result of the Trust’s allegedly unreasonable conduct. Although the Trust does not seek a costs order against the Claimant it invites the ET to take this fact into account as a compelling reason not to make a costs order against it.

**(b) Unreasonable conduct of the proceedings**

21. Even if (contrary to the above) the ET is not satisfied that the Claimant’s claim had no reasonable prospect of success and/or that it was unreasonable for him to have initiated and persisted with the claim as a whole, the Claimant’s conduct of the proceedings was nonetheless unreasonable in discrete ways that occasioned

at least as much additional cost as that caused by the Trust's issues with disclosure. For this additional reason it is submitted no order for costs ought to be made against the Trust.

22. The Claimant's unreasonable conduct of the proceedings include the following:

*No attempt was made to limit the ambit of his claim*

23. The ET will be aware of the expectation that litigants conduct proceedings reasonably and proportionately – as will the Claimant's expert advisors. For instance, Mummery LJ said in a celebrated passage in **Hendricks v Commissioner of Police of the Metropolis [2003] ICR 530** at [54] that:

*“Attempts must be made by all concerned to keep the discrimination proceedings<sup>3</sup> within reasonable bounds by concentrating on the most serious and the more recent allegations.”*

The Claimant singularly failed to do so. He never once withdrew an allegation or made a concession. He did not limit himself to a few plausible alleged “detriments”. Instead, he adopted a “kitchen sink” approach of articulating every conceivable complaint, however hopeless – inevitably adding to the length of the proceedings. (In this regard the ET should be aware that the Claimant has issued a *fourth* claim, complaining about the sending of letters to additional stakeholders in December 2018. This claim is identical to the claim discussed by the ET at [212-213] – it just involves different stakeholders. Despite the rejection of the “stakeholder” complaints in the existing claim the Claimant has not withdrawn this (further) claim.)

*No attempt was made to limit the Claimant's witness evidence to material relevant to the issues in the case.*

24. In addition to adducing Jeremy Hunt's pointless statement the Claimant submitted:

- (a) A 91 page “main” witness statement. (He also submitted a further 3 statements, one of which was itself 15 pages). In circumstances where the PDs that were made to the Respondent were admitted<sup>4</sup>, the Claimant's statement was manifestly unreasonably long, riddled with irrelevance and submission. It was approximately twice the length of the statement he submitted for the 2018 hearing. It inevitably added to the length of the hearing and the Respondent's costs by burdening the tribunal with reams of irrelevant material and submission – much of it characterised by an attempt to re-argue the 2018 litigation.
- (b) Two statements from Drs Hormaeche and Smith. These were (as the ET found) largely irrelevant [33] and were in effect expert evidence [31] for which no permission had been sought or granted. The ET pragmatically [34] allowed the statements to be adduced – but they inevitably lengthened the proceedings. As with Jeremy Hunt's statement, the Claimant's post judgment comments suggest

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<sup>3</sup> **Hendricks** was of course a discrimination case – but the same principles apply to a whistleblowing case.

<sup>4</sup> See para 3.1 (a) – (c) of the Agreed List of Issues filed on 16.6.22 (16:23)

the real reason they were adduced was so the Claimant could claim he was supported by two consultants. That is unreasonable conduct of the proceedings.

*The Claimant acted unreasonably when giving his evidence*

25. The ET's findings about the Claimant as a witness are at [197]. Those findings unequivocally amount to unreasonable conduct of the proceedings – and it is conduct that inevitably lengthened the proceedings. Indeed, the finding that the Claimant “*appeared to be wanting to rerun the 2014 case*” might equally be made of his unnecessarily lengthy main witness statement, and his desire to adduce the evidence of Drs Hormaeche and Smith. The stubbornness inherent in the Claimant's repeated refusal to answer straightforward questions is all the more culpable in view of the fact that he knew that that was a criticism made of him by Mr Cooper KC about his evidence in 2018 – a criticism he roundly rejected.

*The Claimant himself breached disclosure obligations*

26. The Claimant himself breached tribunal orders regarding disclosure. He disclosed the crucial letter before action (“LBA”) to Mr Milsom late – a document that was significantly damaging to the Claimant's case (see paragraphs 48-49 of the Respondent's Closing Submissions on Credibility and Inferences). That conduct added to the Trust's costs.

**The Trust's disclosure**

27. For the reasons summarised above it is submitted that it would be wholly inappropriate to make a costs order against the Trust. It has chosen not to seek its costs against the Claimant but relies on his unreasonable conduct of the proceedings (and the significant costs it has occasioned) as a reason not to make a costs order in his favour.

28. In any event, the criticisms the Claimant makes of the Trust's disclosure are overstated. In particular:

(a) The Claimant has persistently misrepresented or misunderstood the nature of the disclosure obligations in the employment tribunal. These were summarised by the EAT in **Frewer v Google UK Ltd and others [2022] IRLR 472** at [19-20] (and quoted at length in the Trust's Submissions in response to the Claimant's strike out application). There is no general obligation to search for and disclose “relevant” documents. The obligation is to disclose documents on which a party relies, or which adversely affect his own case or support another's case.

(b) Applying that test, it is not accepted that the Trust's failure initially to disclose communications with stakeholders in December 2018 was a breach of its disclosure obligations. Those communications did not support the Claimant's case<sup>5</sup>. Similarly, the late disclosure of communications between the four doctors

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<sup>5</sup> It is accepted that EJ Kelly reached a different conclusion – see [78]. But she applied the erroneous test of “relevance”. Moreover, the fact that a party physically produces a document does not amount to a concession that it is strictly discloseable – documents are often produced out of an abundance of caution or

and Ms Lynch did not support the Claimant's case – indeed quite the reverse [176, 178]. This is the opposite of a litigant failing to disclose damaging documents (and provides a marked contrast with the Claimant's late disclosure of the LBA).

(c) The destruction of documents by Mr Cocke was obviously wrong. But it does not amount to unreasonable conduct of the proceedings by the Trust. Mr Cocke was (very) ill at the time. The ET has referred to his having a “... *progressing mental health issue and this taken with the irrational act of deleting emails points to Mr Cocke being quite unwell especially as it was he who first provided extra documents that had not been disclosed*” [94]. Mr Cocke in no sense was authorised or encouraged by the Trust to act (irrationally) as he did. His behaviour (to which he quickly “fessed up”) is not something for which the Trust should be held vicariously liable, at least for the purposes of Rule 76. The Respondent would also reiterate the point that, as set out in its closing submissions and in correspondence with the Claimant's solicitors, all the deleted emails were recovered by the Trust and, after searches were made of them, a small number of additional documents were disclosed to the Claimant<sup>6</sup>.

(d) It is accepted that the Trust should not have told the ET that no record of the Board meeting prior to the settlement of the 2018 Claim – that was inaccurate, and the Trust apologises for that inaccuracy. However, even though no formal minutes of the meeting were taken, an informal note of the meeting was ultimately disclosed; and, once again, in the context of the Claimant seeking very significant costs from the Trust, it is worth making the otherwise pedantic point that the document was not strictly discloseable. It does not support the Claimant's case or undermine the Trust's case.

29. The Trust does not pretend that the manner in which it discharged its disclosure obligations was perfect. It understands the ET's observation that it took a “*dim view*” [86] of the Trust's disclosure issues. But in making that observation it has to be borne in mind that the parties are not remotely on an equal footing. The problems with the Trust's disclosure came to light when it voluntarily produced further disclosure and subsequently provided a detailed account of how it had sought to discharge its disclosure obligations. Armed with that information it is easy to criticise and pick holes in the Trust's approach.

30. In contrast, the Claimant has persistently failed to confirm how he himself purported to discharge his own disclosure obligations (see paras. 46-47 of the Respondent's Closing Submissions on Credibility and Inferences).<sup>7</sup> It is to be inferred from his silence that neither his current nor his former solicitors assumed

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to obviate further argument. Similarly, the fact that Mr Travis wrote to additional stakeholders does not damage the Trust's case or support the Claimant's.

<sup>6</sup> Para 38 of Respondent's Closing Submissions on Credibility and Inferences.

<sup>7</sup> If, having taken an oath to tell the whole truth and nothing but the truth he persistently refused to answer straightforward questions, what confidence can the ET have that he would produce documents that undermined his case (e.g. that conflicted with his evidence that he thought the 2018 litigation had gone well)?.

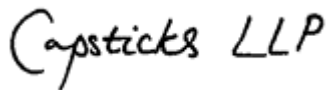
responsibility to conduct searches for discloseable documents themselves or even to oversee his disclosure searches, and that the Claimant was more or less left to decide what he would disclose. In view of his highly partisan approach to the litigation the ET can have little confidence that the Claimant would himself have disclosed documents that undermined his case. For this reason alone it would be seriously unjust to saddle the Trust with a substantial costs order based on its disclosure failures when the Claimant's approach to disclosure has been characterised by a deliberate lack of transparency.

## **Conclusion**

31. The Claimant was responsible for bringing the current claim. He did so regardless of its obvious lack of merit. He did so in a manner that unnecessarily lengthened the proceedings and added to the Respondent's costs. The Respondent had no option but to defend it – and inevitably incurred substantial costs in doing so. The fact that the Claimant ultimately lost does not preclude him from making the current costs application – but the fact that he pursued a case that had no realistic prospect of winning and that he did so in the unreasonable manner summarised above are highly relevant to the issue of whether, as a matter of discretion, a costs order ought to be made in his favour. It is submitted that it would be clearly unjust to do so. The ET is invited to dismiss the Claimant's application in full.

We can confirm that this letter has been copied to the Claimant's solicitor.

Yours faithfully

A handwritten signature in black ink that reads "Capsticks LLP". The word "Capsticks" is written in a cursive style, and "LLP" is written in a simpler, blocky font.

**Capsticks Solicitors LLP**

CC. Slater & Gordon (Claimant's solicitors) by email: [Edward.Cooper@slatergordon.co.uk](mailto:Edward.Cooper@slatergordon.co.uk)