Case Number: 2300819/2019

IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL

B E T W E E N:

DR. CHRISTOPHER DAY

Claimant

-and-

(1) LEWISHAM AND GREENWICH NHS TRUST
~~(2) HEALTH EDUCATION ENGLAND~~ **Respondents~~**

Written Submissions on behalf of the Claimant

14 July 2022

Introduction

1. C's claim is one of post employment detriment on grounds of whistleblowing.

2. In essence, it is straightforward:

    a. C made a number of protected disclosures (PDs), most of which have been admitted by R. The tribunal will need to make findings on the outstanding matters;
    b. R subjected C to a number of detriments;
    c. The core question is whether R's actions or failures to act were done on the ground that C has made a protected disclosure or disclosures. That is a question on which R carried the burden of proof.

Bundles

3. The tribunal have:
    a. The Trial Bundle
    b. The Claimant's Supplementary Bundle [SB]
    c. The Late Disclosure Bundle (updated to include late disclosure up to the evening of 13 July 2022)
    d. The Transcript Bundle [TB] – referred to below both in reference to the [Day/Internal Page for that day/Line] e.g. [4/87/1] and the overall consolidated PDF number e.g. [TB/345].

The approach that the tribunal should take to the evidence

4. This matter has been heard by CVP over 16 days: 20 to 23 June; 27 June to 1 July; 4 to 8 July; and 12 and 14 July 2022. With reference back to the submissions made at the outset, this is a case which should have been heard in person and the quality of the hearing has been affected by being heard remotely. There have

been technical problems and inappropriate interruptions. A number of issues have turned on the veracity of witness evidence – which cannot be probed remotely as adequately as they can be probed in person. This is particularly important given the emergent unreliability of the documentary evidence.

5. C believes that R's conduct of this litigation – in particular the failure to preserve evidence; the inadequacy of the initial discovery exercise; the destruction of JL's emails; the destruction of emails by DC; and the other various ways in which evidence has been placed beyond reach as listed in AR's w/s – has placed the fairness of the hearing in jeopardy. C believes that R's response should have been struck out. R's behaviour since the outset of this litigation, as highlighted through the revelations during this hearing has been contemptuous towards C and towards the tribunal. R's attitude towards tribunal rules and tribunal orders appears to have been to use them to seek advantage.

6. The Court of Appeal in *Keefe v Isle of Man Steam Packet Co* [2010] EWCA Civ 683 articulated the principle that "a defendant who has, in breach of duty, made it difficult or impossible for a claimant to adduce relevant evidence must run the risk of adverse factual findings." In these circumstances, "the court should judge a claimant's evidence benevolently and the defendant's evidence critically." (ibid). Para 19 of Keefe states:

> If it is a defendant's duty to measure noise levels in places where his employees work and he does not do so, it hardly lies in his mouth to assert that the noise levels were not, in fact, excessive. In such circumstances the court should judge a claimant's evidence benevolently and the defendant's evidence critically. If a defendant fails to call witnesses at his disposal who could have evidence relevant to an issue in the case, that defendant runs the risk of relevant adverse findings see *British Railways Board v Herrington* [1972] AC 877, 930G. Similarly a defendant who has, in breach of duty, made it difficult or impossible for a claimant to adduce relevant evidence must run the risk of adverse factual findings. To my mind this is just such a case.

7. This is the approach that the tribunal is urged to take towards the evidence in this case.

8. One thing that R has been incapable of hiding is its attitude towards C throughout these proceedings, which has been frequently exposed in the high handed comments made about him, his case and his evidence (which is a criticism of R – not Mr Tatton Brown, who was no doubt acting on instructions):

    a. Implying that C had not mentioned covert audio in his Letter Before Action to his former counsel, only for it to be pointed out that C had in fact mentioned it no less than four times [4/87/1] – [4/87/17] [TB/375];

    b. Repeatedly implying that C had shown a lack of integrity because when raising money towards his legal fees, he had not put R's case before them. Not only was that incorrect - C in fact often posted articles which included explicit reference to R's position as well as links to R's statements (see, for example, [SB/247] and also the answers from C provided to para 6 of the Order made on 4 July 2022 (sent to the tribunal on 5 July 2022)); but the cross-examination also seemed to be hinting at there being some form of

implications for C in him not putting R's case in his own fundraising campaign [4/31/22 – 4/32/5] [TB/319] – [TB/320];

c. Putting to C that he hoped "*to be made a multimillionaire*", as though the serious safety matters he raised were as whimsical as buying a lottery ticket [4/59/7] – [4/61/3] [TB/347]-[TB/349]. As the ET will be aware, career-loss cases for young potential high earners such as C with security of employment and public sector pension loss, can easily run into seven figures;

d. Attempting to portray C's beliefs as unreasonable, referring sarcastically to his "*exhaustive analysis of the evidence*" [4/115/17] [TB/403] and going on to reference the denials of BT and DC that they had done anything to "penalise" C for whistleblowing: "*So their denials actually increased your strength of conviction*?" in response to C pointing out that R had not brought the right witnesses to the ET to defend the claim [4/118/15] – [4/119/3][TB/406] – [TB/407];

e. When C said he was upset that Simler LJ had granted him leave to appeal on all three grounds and then rescinded the permission on the basis that it had been a clerical error, a frankly bizarre set of circumstances even for a lawyer, he was asked: "*Is this part of the great medical legal coverup that you believe in?*" [5/81/8] [TB/540];

f. Telling C "*I know you like your conspiracy theories*" when C said that the wasted costs threat to him may have been misrepresented [5/135/23][TB/594];

g. Jibing back at C's answer that he thought the fact that the Trust did not omit certain matters helped his position: *You think a lot of stuff helps your position*" [5/160/21] [TB/619];

h. Describing C as being of a "*suspicious disposition*" in circumstances where R's own witness had destroyed an entire email archive [9/32/10] [TB/1119];

i. Making frequent reference to the length of C's w/s – which was unsurprising given the need to explain the context relating to the previous case and also the need to explain matters where disclosure had not been adequately given by R.

9. Despite that institutional hauteur towards C (who has been at times in person, at times funding his case with small donations from crowdfunders, and having to change solicitors mid case when BMA funding was obtained) it is R at the end of the case (having already been criticised by EJ Kelly for failing to comply with its disclosure obligations [585]) which has:

    a. Been revealed as having failed to carry out an adequate initial discovery exercise, including that:

i. No retention instruction was given;
ii. The correct people's electronic communications were not searched (only BT and DC were asked to search their own email inboxes) and even the exercise that was carried out has been revealed as inadequate given the number of recently disclosed documents which were emails to either BT or DC (a point made even stronger by the further late disclosure last night on 13 July 2022);
iii. Relevant documents were not disclosed;
iv. Documents have been deleted – in particular those of Janet Lynch;

b. Been revealed as having made assertions in the course of this litigation that were untrue. In relation to a record of Board meeting R said "There is therefore nothing to disclose" [SB 238]; also referred to by EJ Kelly at [535]. However on Thursday 7 July 2022 a note was revealed which provides a record of Board meeting [Late Disclosure Bundle 49-52]. This note was part of a chain that would have been picked up on any reasonable search of BT and DC's email inboxes;

c. Been revealed as recently as last night to have sent further letters to at least 6 further stakeholders in 2019 in documents that could not have been missed if a reasonable discovery exercise had been carried out in 2020. This is aggravated by the fact that criticism of R had already come from EJ Kelly on 2 September 2021 that R had "failed to comply with its discovery obligations" in relation to the 18 other stakeholder letters [585].

d. Presented two institutional witnesses (BT and DC) whose witness statement evidence is so undermined by the fact of and the content of R's late disclosure (not to mention BT's own oral evidence) that they can no longer be regarded as reliable witnesses of truth. These witnesses were the people in charge of carrying out a discovery exercise involving searching their own in boxes for relevant material – which they clearly failed to do adequately given that plainly relevant material had been squeezed out of R over last two weeks - produced in a piecemeal fashion only because of questions upon questions from C pointing out the inadequacy of the exercise being conducted;

e. In the early hours of Monday 4 July (by DC) in full knowledge of the importance of adequate disclosure in the course of the hearing, consciously and deliberately deleting a large quality of potentially relevant documents;

f. Withdrawn one if its witnesses (DC)[1] leaving little or no evidence as to why his statements were drafted in the terms that they were.

[1] Shortly before the finalisation of these submissions, additional medical evidence was produced to support that withdrawal – albeit that there is still no medical evidence directly addressing the question of whether DC can give evidence (indeed there is a GP certificate which appears to say the opposite) and there are a number of (sometimes contradictory) assertions by various solicitors and DC.

10. For avoidance of doubt, given the history of this litigation and in particular the disclosure history, C does not accept that documents said to have been deleted were actually deleted and that deleted documents truly are irrecoverable. C further highlights R's failure to provide any independent evidence to this effect (i.e. more than R's own devalued assertion). Last night R provided further disclosure from the files that DC had said could not be receovered in para 21 of his 2nd w/s. This only happened because C pushed and pushed in additional questions over the last two weeks – insisting that R follow its own policy [Late disclosure bundle 123-126]. Disclosure of relevant information should not have to be mined from an opponent in this manner. C has no faith in any assurance by R that there is no other relevant disclosure (if R is adopting that position).

11. C holds in general that R's assurances can no longer be relied upon. It is such assurances that provide the bedrock on which a fair hearing in adversarial civil litigation is based. This litigation is built not on such rock but on sand.

12. C wanted to cross examine DC. Amongst the points that would have been put to him are:

Disclosure

a. Describe the disclosure exercise that took place in 2020. Was it merely a search of your email inbox? According to Capsticks [Late disclosure bundle 116] there was no instruction to anyone to preserve documents – is that correct?

b. Describe the nature of any search for documents that took place since 2020.

c. Did any search for documents take place after the request of 27 May 2022 for the names of and relevant documentation from "the senior doctors who had been involved in the case" referred to in your w/s para 15? When Capsticks stated on 6 June 2022 that "we understand that individuals did not literally sign-off the statement (i.e. indicate in writing that they were happy with it or not) and that no further documents have come to light following a reasonable search that fall within the ambit of standard disclosure relating to "sign off" of the statements" – did that understanding come from you? [If so] it isn't true is it? You knew it not to be true didn't you? The individuals did indicate in writing whether they were happy or not didn't they as we can see from [Late disclosure bundle 7-15]?

d. Did you participate in the further search for documents over the weekend of 2/3 July 2022 described in para 11 of your 2nd w/s?

e. When on Monday 4 July 2022 you saw the email chain that Dr Harding had disclosed in your deleted items box (as you describe at para 14 of your 2nd w/s) did you tell anyone about this?

f. Why had you deleted the email chain that Dr Harding disclosed on Friday 1 July 2022? Do you agree that it is clearly relevant? Do you agree that it is evidence of your part in the formulation of the content of the 24 October 2018 public statement? How do you say that you must have thought it irrelevant at the time? If you deleted this email chain, it suggests that you may have deleted other relevant documents doesn't it?

g. Why did you delete documents on the morning on Monday 4 July? Was it because you feared that more relevant documents would come to light and that it would also come to light that you should have disclosed them back in 2020? How many documents do you say were deleted (both 100 and 90,000 are referred to in your 2nd w/s)?

h. When did you inform anyone else about your actions? Who did you inform? What steps did you take to see whether the emails that you had deleted could be recovered?[2]

Instructing client

i. Who replaced Janet Lynch as primary instructing client / primary liaison with Capsticks after her departure (no longer working after February 2021 – departed on 30 April 2019)? Was it you? Was it Kate Anderson?

j. Who is the primary instruction client for the purposes of this case? Is it you? Is it Kate Anderson?

Your role in drafting the October statement

k. Why does your w/s para 13 seek to give the false impression that your role in the production of the 24 October 2018 statement was merely to put the statement into plain English when the late disclosure shows that (a) you were involved in multiple iterations prior to 22 October 2018 [Late disclosure bundle 7-9, 178-182]; and (b) you were making suggestions as to changes to content (which were themselves inaccuracies) in your email of 23 October 2018 [Late disclosure bundle 7]? Where are those iterations? Why did you not disclose them in 2020 – they would have been in your email inbox wouldn't they? R has not disclosed any email from JL to you or you to JL asking you to do tidy up her English has it? Is that another document or class of documents that R has chosen not to disclose – or are there no documents because it did not ever happen? Because you were intimately involved in drafting the content of the public statements weren't you?

l. What was BT's input during the earlier iterations? What was JL's input? What was the input of Drs Harding, Brooke, Patel and Luce other than in the documents that have recently been disclosued to us?

[2] From the disclosure sent last night (13 July 2022) we know that some at least of the deleted emails are recoverable [Late disclosure bundle 164]

Letters to stakeholders

m. JL's email of 22 October 2018 [Late disclosure bundle 9] also states that the statement was for the website and 'to share with stakeholders'. So was it the intention from the outset to share this statement with stakeholders Therefore when BT at his para 34 said that the Trust's position is accurately reflected in the January 2022 Judgment and Reasons of the ET which he quotes - suggesting that the letter to stakeholders was sent as a reaction to a Sunday Telegraph article [1141-1142] dated 2/12/18, in fact what he says is wrong isn't it – there was always an intention to send out the statement of 24/10/18 to stakeholders wasn't there?

n. We know from the disclosure (also initially withheld) at [1179-1182] that a communication was sent on 4/12/18 to 18 stakeholders including MPs. Was the 24 October 2018 public statement or any other statement sent to any stakeholders in October or November 2018 or at any other time than 4/12/18? Was it sent to people other than those on the list at [1182]? Did JL send it to any stakeholders at that time? Have further letters to stakeholders been withheld from disclosure like the previous ones?[3]

o. You say in para 37 that you were involved when the stakeholder letters were sent out in December 2018 and that you prepared the letter at [1179]? Why is there no email or other document with your name to it in relation to the 3 December 2018 communications? Has that documentation also been with-held from the Claimant and the tribunal?

p. The letter at 1179 says that the coverage has not reflected the full story – and that the attached statements will 'fully brief' the recipients – they do nothing of the sort do they? They are a partisan, one sided, inaccurate and selective account aren't they? The reason for sending out those statements was to attempt to stem the growing support for C amongst prominent individuals – he had already had NL and Justin Madders MPs intervene to try to assist him – isn't that right? The reason that you were trying to stem support for C was because of the content of the PDs that he had made – and because they had recently been brought to prominence in a public hearing in October 2018 which had gained a certain amount of publicity

q. Does R have a communications policy? Does it have a policy that covers communications with stakeholders? Does the NHS have such policies? Did you follow them in this case? If not why not? Is there any guidance suggesting that you should not send such communications without at

[3] We now know from the disclosure last night (13 July 2022) that further letters were sent to at least 6 further stakeholders including the CEOs of 4 other London NHS Trusts – which would have had a potential impact on C's ability to get work locally [Late disclosure bundle 208]

least seeking the input of the person that is the subject of the communications?

The content of the 24 October 2018 public statement

r. Going back to the Friday 1 July 2022 disclosure, your email of 23 October 2018 starts with an assertion that 'the legal case related purely to the night shift in January 2014'. That is a false assertion isn't it? In your w/s at para 14 (bottom of p5) you say that senior clinicians and Ms Lynch told you that – but in the email it looks as if you are telling them – doesn't it; and that they (or at least Drs Harding and Brooke) were telling you that the case was wider than that – and it went back to 2013? Please look at page 1 of the bundle – this is the claim form presented on 27/10/14 - the grounds of claim for that 1st claim start at page 14 and the heading prior to para 4 is August 2013 and subsequently – it then sets out PDs made to Dr Roberts in August 2013 at paras 7 and 8 That email is in this bundle at [1396-1397]. It was also in the October 2018 hearing bundle. It is about staffing levels in the ICU at night. It is plainly not about January 2014 as it pre-dates January 2014. It was given to BT and you at your meeting with NL and C on 14.1.19 wasn't it? So if you say that didn't know about this earlier (despite having been told about it on 22 October 2018) you knew about this when R failed to respond to the detail in NL's letter of 28 January 2019 didn't you?

s. C says he sent the same email to Dr Brooke and to Dr Harding on 2 and 3 September 2013 respectively. The Harding email (which merely incorporates the Brooke email) is in this bundle at [626-627]. At 628 is another email to Dr Brooke 30/8/13. These were also in the October 2018 bundle. They are also about resourcing in the ICU and plainly not about January 2014 – do you agree? Your email of 23 October 2018 [Late disclosure bundle 7] then goes on in the 2nd para to say that 'the legal action related to the second w/blowing case'. By 'case' do you mean legal case or incident of w/b. Do you mean that the legal action did not relate to the earlier August 2013 w/b – but only to the later January 2014 w/b? [IF YES] – but the earlier August 2013 were admitted as PDs in the hearing – on 3 October 2018 weren't they; and the January 2014 w/b was also about the patient safety at the ICU – see 63.1.3 and 63.1.5 wasn't it? Then there were additional disclosures in June and August 2014 at 63.1.6, 63.1.7 and 63.1.8 which included ICU patient safety issues – and issues about the manner in which C was treated which again are not restricted to the night of 10/1/14. You and R were aware of this in 2018 and 2019 – and R's selection of a more minor aspect of C's complaints to highlight on its public statement was not 'reasonably comprehensive' as JL sought to describe it [Late disclosure bundle 9] and was not capable in any way of leaving someone 'fully briefed' [1179] was it?

t. Going back to your email of 23/10/18 [Late disclosure bundle 7], having now seen what the claim was about, do you agree that the statements in your email are not accurate. You say you didn't have in depth knowledge of the case back in October 2018 and so someone told you what the case was about? Who told you? Was it Drs Harding, Brooke, Patel and Luce? Was it Janet Lynch? Those people – who in the person of Harding, Brooke, Patel and Luce had attended the hearing most if not all days; and who in the person of JL was the principal instructing client reporting back to BT on a daily basis – isn't that right? They would have known what the case was about wouldn't they? They would have known that it wasn't just about the 10/1/14 wouldn't they? But when you set out your comment in this email, they didn't stop you did they (indeed you suggest that they told you that in the first place (in your original w/s para 14). Despite this being flagged up by JL as 'a reasonably comprehensive statement' in her email [Late disclosure bundle 9]; and later sent out to 18 stakeholders to leave them 'fully briefed'. It was nothing of the sort was it? Do you hold JL and Drs Harding, Brooke, Patel and Luce responsible for that? Dr Brooke's email of 22 October 2018 [Late disclosure bundle 8] says that the statement is accurate – you now know that it isn't – he would have known that at the time wouldn't he?

u. The iteration of the public statement circulated by JL on 22/10/18 is at [Late disclosure bundle 9-10]. In your email responding to comments about that on 23/10/18 [Late disclosure bundle 7], you suggested that the words 'related to Dr Day's w/b concerns around the night shift in January 2014' be added after the sentence that began 'In October 2014, Dr Day submitted an Employment Tribunal claim . . .'. We can see from the final version at [170] that your suggestion was not taken up. We can however also see that there *is* a difference between the JL 22/10/18 version and the published version – it relates to a different section at top of [172] which starts 'Some of this publicity. . .' – we can see that section in JL's 22/10/18 version at [x] – 1st and 2nd sentences of that section are the same but at the end of the 3rd sentence, after the word 'raised' the final version adds the words '*in January 2014, which related to junior doctor cover on the medical wards*'. Who suggested the insertion of those words at that point? Was it Dr Harding, Dr Brooke, Dr Luce, or Dr Patel (all of whose emails are variously unavailable in whole or part for the reasons set out by AR in his w/s)? Was it JL whose emails have been deleted completely? Was it BT whose own searches of his inbox in 2020 and more recently for relevant material failed to produce any iterations or the input from him that JL refers to at [Late disclosure bundle 9]?[4] Was it Dr Aitken? Was it you?

[4] Last night's disclosure (13 July 2022) has finally produced some evidence of approval of content of some documents from BT – but not the iterations of the 24 October 2018 public statement

v. It was clearly inserted between 22 and publication on 24 October. Let's see how it changed the provision relating to the Peer Review. Going back to the attachment to JL's email of 22/10/18 in the para beginning 'Some of this publicity . . .' [Late disclosure bundle 10]. In the form circulated by JL it was already inaccurate wasn't it – because it states that the findings of the Peer Review 'included a range of concerns – including [not 'restricted to' but 'including'] the number of consultants employed in critical care'; and then it goes on to say 'these were not the same issues Dr Day had raised' doesn't it? But they were, weren't they. Let's look at the Peer Review – starts at 770. Executive summary is at [774]. The point made by C about doctor patient ratios – is certainly similar to the consultant patient ratio referred to in the Peer Review report. And when C was on nights – there was no ICU consultant present covering the either the ICU or critically ill patients on wards or A&E – merely a consultant on call. Even on that point, the Peer Review is not restricted to consultant patient ratios is it? Point 6 – junior doctor handover – was raised by C in his August 2013 PDs wasn't it; 'gaining and retaining adequate level of understanding'; and adequate handover [1396-1397]; Point 13 [775] – poor incident reporting culture - that was at the heart of C's complaint wasn't it - see C's w/s paras 148 to 156. He was complaining about his treatment after submitting a Datix report in January 2014; and the Roddis report made specific findings about that [C's w/s para 150]. So the version circulated by JL was already wrong – and someone made an addition which made it more wrong – isn't that right?

w. With reference to your original w/s para 4 – line 9 - who are the members of the 'senior team' that agree and sign off statements on behalf of the Trust? Do they include the medical director Dr Aitken? In your para 4 – top of page 3 - in relation to the Evening Standard Article in 2016 – who are the clinical leads referred to? Are they Drs Harding, Brooke, Patel and Luce? Had they seen the Roddis report? We know that you in 2016 had not read the Roddis report – because you tell the tribunal at para 18 of your w/s that you had not read it when putting together the 24/10/18 public statement. Did you ever read it? When? That statement from the Trust to the Evening Standard in 2016 [763] said: "We investigated Dr Day's concerns in detail. We have robust procedures to support staff who raise concerns and we encourage our staff to speak out when concerns arise. We identified the need to increase medical staffing numbers for the intensive care unit at Queen Elizabeth hospital. The unit is now fully compliant with quality standards." Your w/s suggests that that comment was based on information that you had obtained from the clinical leads – you wouldn't have been able to come to that conclusion on your own would you? The highly critical Peer Review a year later did not find that the ICU was 'fully compliant with quality standards' did it? It said [774] – point 1 "It was apparent that this was a consistent issue with no clear recognition of the need for extra consultant input, nor any plans to

address this" didn't it? What do you say had actually been done between C raising his PDs about the ICU and your statement for the Evening Standard? The answer is nothing isn't it? That was an earlier example of you putting out an untrue public statement on behalf of the trust wasn't it? Going back to [763] you do there appear to link C's concerns and the medical staffing for the ICU don't you? Bu that was not something that you did in putting together the 2018 public statement – indeed what you did was precisely the opposite wasn't it? Why was that?

x. You go on in para 14 to say that the specific concerns raised by C in 2013 had been addressed by the Trust, with improvement noted by the Peer Review undertaken in 2017. Is that also something that you were told by the senior clinicians and JL? The Peer Review report does not say that C's concerns had been addressed does it? You go on to say at the end of para 14 that the media coverage was inaccurate in that it gave the impression that the Trust had chosen to ignore specific safety concerns raised since 2013. Is that what you had been told? In what way was that an inaccurate impression for the period between 2013 and 2017? You also mention Elizabeth Aitken in your para 14. She was the medical director – then and now. You say that she gave you the understanding that the issue of consultant staffing was addressed as a priority – was this understanding conveyed to you in 2018? There is no written communication from her to you at that time – although she is copied into the emails between Janet Lynch and you and Drs Harding, Brooke, Patel and Luce – isn't that right? Is that something else that you deleted either at the time or on Monday 4 July 2022?

y. In your paras 19 to 20 you address C's complaint that the Roddis report was being inaccurately referred to. Did you hear the oral evidence of BT? Do you accept as a broad principle that the 24/10/18 public statement inadequately reflected the breadth of C's PDs; and that it inadequately reflected the level of criticism of R in the Roddis reports?

z. The December 2018 report into bullying at the trust commissioned by BT found that there was a leadership style that at best was described as 'menacing, threatening and heavyhanded' [1250, HSJ report]. The culture described in that report was one that had been presided over by JL as Head of Workforce isn't that right? Is that why she left the Trust shortly afterwards? C's case was also one that brought to light a failure of the culture over which she presided as Head of Workforce wasn't it? The PDs that C made about failing to get adequate management responses are similar to the sorts of things dealt with in the bullying report aren't they? There was every reason for JL to have an animus against C for making the disclosures that he had and for bringing them to public prominence in an ET hearing in October 2018 – wouldn't you agree? Every reason for her to

have a reason to draft statements in a way which undermined C's credibility wasn't there?

aa. You say at para 6 of your original w/s that junior doctors were expressing dissatisfaction with R as a result of the CD case; and that was one of the reasons why the public statement on 24/10/18 was necessary - because of the publicity around the protected disclosures made by C, observed by several medical professionals including junior doctors at the October 2018 hearing and the treatment that he alleged he had suffered as a result – isn't that right?

Content of the December and January Public Statements

bb. Before we get to the December and January statements, I want to take you to [1088-1089]. You stated to Mr Greene – a journalist – that "it's important to note that the employment tribunal related to concerns that Dr Day had raised in 2014 about whether there were enough junior doctors covering the medical wards on the night shift" – that omits a large part of C's PDs doesn't it. You were not presenting a full account to Mr Greene were you? Is that again what you were told? Who by? Was it Drs Harding, Brooke, Patel and Luce and JL? In the previous para – when you state what it was that the Peer Review found – that is just one of the things isn't it? Again – as in 2016 – you have made a misleading statement to the press haven't you?

cc. The first reference by either party to costs was by R in the 24/10/18 public statement at [171] '*At the point that Dr Day withdrew his claim, we decided that we should not pursue Dr Day for costs'.* On 12/11/18 at [1090], in response to Mr Greene, R's response waived w/p privilege and got into the weeds of the negotiations didn't it? In the answer to Q2 it says that R did not ask its representatives to make a 'significant' costs threat. Analysing that – was there a suspicion at that time that the representatives may have gone beyond their instructions? What does 'significant' costs threat mean? What sort of costs threat would R say would not be significant Would it be insignificant to say 'if you lose and there are adverse findings as to truthfulness or credibility, costs would be at issue'? When you were assisting R to put together the responses to journalists and the public statements, had you seen the text at [953] that refers to a potential issue as to costs? Did you think that R had not mentioned costs one way or another? Did you know anything about wasted costs having been mentioned – did anyone tell you about that at the time? Did you know about the possibility of a GMC referral or an SRA referral in relation to the solicitors?

dd. The journalists that you had been briefing then went back to C with the information that you had given them – C then told him his side of the

story – and they went back to you e.g. Martyn Halle [1094-1095] – you fell into the trap set by the journalists (which isn't a criticism of them – it is their job to seek the truth – and they clearly suspected that you weren't giving it to them). You were furious with C by this point weren't you? [23/11/18 email – Late disclosure bundle 39][5]. On 4/12/18 you emailed BT and others about social media posts by the QE Patient Forum [1168]. You refer to a number of comments made including some relating to the CD case and the Telegraph story. The comments follow [1170-]. Most of them have nothing to do with CD do they? Serious concerns are raised about: privatisation of patient pharmacy [1172]; failure to diagnose blood cancer [1173]; [1173] brushing things under the carpet – and indeed R being good at losing documentation; and [1176] a failure to conduct an SI into the death of a patient. There were no public website statements about these other important things were there? Your para 30 makes reference to a 6 figure costs consequence. Do you now accept that in discussions at the tribunal the potential for costs of the entire litigation to be the subject of a costs application was discussed between counsel for Rs and counsel for C – that was BC's evidence wasn't it?

ee. Then we have the Sunday Telegraph article on 2/12/18 by Mr Greene [1141-1142]. Within that it records that NL had asked for a public enquiry – which 'appalled' you as you stated in an email to colleagues at [1138]. BT subsequently apologised to NL for that. NL was at the time an MP and former health minister who had a known interest in w/b in the NHS. Why did you find his comment about a public enquiry appalling? Isn't it better to shine a light on these sorts of issues than to cover them up? Your line about 'significant costs' was the subject of some debate at HEE [1145] Middle of the page – question 2 – what is your answer to that question? Middle of the page question 3 – HEE thought that you might be hinting that the lawyers went beyond their instructions didn't they. [1146] Alex Wallace at HEE felt that you were using 'weasel words' – do you agree?

ff. Was JL still drafting these statements? – you suggest so at your para 2 don't you? Did you have the same sort of input into the December and January statements that you had to the 24/10/18 statement? On 4/12/18 the letter was sent to stakeholders [1179] and also a public statement was made [173-175]. There were 3 statements about costs 4.1(a)(i)(ii)(iii). At your para 40 you say that you don't comment on whether they were accurate statements or not. Who told you what R should say in these statements? – was it JL? Did Drs Harding, Brooke, Patel or Luce have any input into this statement? You say at end para 40 that you weren't seeking to subject C to a detriment because he had made PDs years earlier – but in fact it was less than a month earlier that he had been speaking publicly in

[5] Further evidence of DC's fury is contained in last night's (13 July 2022) disclosure at [Late disclosure bundle 178]

a tribunal hearing about the PDs that he had made, the treatment that he had allegedly suffered at the hands of R including Drs Harding, Brooke, Patel and Luce and alleging that it had been whistleblowing detriment. That was very much in your mind wasn't it? And it would have been something that JL would have been very aware of as the primary instructing client – wouldn't it? You published a statement on the intranet on 24/12/18 [1286-1287]. You did not let C know that this had happened did you? On 3/1/19 you sent a draft statement to C – never published [1296-1297]. It contained a section on speculation that R failed to investigate two patient deaths – it had never been C's position that R failed to investigate 2 patient deaths had it? He had alleged that the investigation into *his* complaint had excluded reference to the 2 patients deaths – do you accept that those are different things – another inaccuracy? Had someone told you that C had alleged that R had failed to investigate 2 patient deaths? – Who? C pointed out that it was incorrect in a private message response to BT via the Twitter platform [2208] didn't he? That meant that C's actions had prevented R from making a mistake. None of the public statements actually published had been sent first to C. If they had, perhaps you could have taken into account any points that he had made – it might have avoided you being cross examined here today. On the other hand, it might not – because C's other points in this message at [2208] were largely ignored weren't they? He did ask that you went back to the barristers – did that happen? And the statement was not published at that time was it?

gg. In all of this correspondence so far, no one had suggested that when C's barrister approached your barrister, he had said that he wanted to know what R's position would be if there was a finding by the tribunal that he had been untruthful had they? R has not disclosed any document (yet) that helps us find out where that information came from. You say at your para 36 that Trust needed to react to what were believed to be misleading statements. Who believed them to be misleading? Who supplied the information which went to form that belief? Was it JL and Drs Harding, Brooke, Patel and Luce? However on 10/1/14 a new statement was issued [178-181] and in comparison with the old statement: it doesn't say anything about the patient death point – so you accepted C's point on that; but it does say [179] "*When they made their approach about settlement discussions, Dr Day's legal representatives indicated that it would be helpful to them for the Trust: To state what our position would be on costs if the tribunal were to dismiss Dr Day's claims and make findings that he had not been truthful in his evidence"* Who drafted that part of the statement – was it JL? Was it BT? Was it you? Had you seen [948, 951, 953] at that point? None of those documents suggest that C's representative raised an issue about truthfulness – they all suggest that BC did so – and BC agreed that he was the one who raised it when he gave evidence on Friday last week. Do you agree that this is not the impression given by that public

statement? The impression the was sought to be given by that statement was that C's representatives had concerns about the possibility of a finding about the truthfulness of his evidence. CM gave evidence that this was not the case – unchallenged evidence. Your para 51 (half way) says that you believed the statement to be accurate – who gave you the information that enabled you to form that belief? You say that your focus wasn't on the 2013 / 2014 PDs but on more recent events – one more recent event was the public airing of his PDs at the ET hearing in October 2018 wasn't it – and that was the cause of that section of the public statement wasn't it?

Concealment

hh. In what way is it asserted by R that PDs (iv, v, vi, vii and x) do not tend to show concealment?

Norman Lamb

ii. Why does your w/s para 55 state that you did not retain your notes of the NL meeting on 14 January 2018 when they have been produced in late disclosure?

13. An exploration of these issues with DC in cross examination would have assisted C to demonstrate his case to the tribunal and get across his narrative about what happened to him – and in particular it would have assisted the tribunal in relation to causation.

14. Last night's further late disclosure (13 July 2022) makes clear that letters were sent to other stakeholders in addition to the 18 we know of:

    a. 4 CEOs of neighbouring Trusts: Amanda Pritchard, CEO, Guy's and St Thomas', Peter Herring, Interim CEO, Kings, Matthew Trainer, CEO, Oxleas, Dr Matthew Patrick, CEO, South London and Maudsley [Late disclosure bundle 204, 205, 208-211]; and
    b. Steve Russell at NHSI. and Jane Cummings at NHSE [183].

15. Under cross examination BT was asked whether he'd sent letters to anyone else. He paused for a long time before answering that he had not.

> Q. Apart from the ones that we know about. So apart from these 18 letters, apart from the meetings that you had with Norman Lamb and the correspondence to and from Norman Lamb, have you had any other communications, verbally or in writing, with any MPs or councillors or social services senior professionals about the claimant's case?
> A. I don't think so, no. [7/158/7] [TB/881]

16. That was not true and any reasonable search in 2020 would have produced the documents that were disclosed last night in that regard.

17. The late disclosure last night (13 July 2022) also at [Late disclosure bundle 181] suggests that there is an attachment which is missing (see footer at [Late disclosure bundle 182]). The disclosure is obviously still incomplete. We also don't know what BT told Chris Hopson or whether BT let DC know how it went. At [Late disclosure bundle 183] – again there is a missing attachment – see footer at [Late disclosure bundle 185]. [Late disclosure bundle 186] shows Dr. Patel approving the statement. At [Late disclosure bundle 204] the attachments are missing, as are the covering emails (see bottom of [Late disclosure bundle 204]. At [Late disclosure bundle 209], the chain is cut off so there are missing emails.

18. It is also worrying that R is continuing to insist that the documents that it is now producing would not have been relevant documents which should have been produced under a proper disclosure exercise in 2020. This indicates that there is still a lack of understanding as to what should or should not be disclosed.

19. As well as Drs Harding, Brooke, Patel and Luce, the other ghosts at the banquet are Janet Lynch and Kate Anderson. Ms Lynch is happily alive and well and working as Interim Director of People and Organisational Development at Hertfordshire Partnership University NHS Foundation Trust.[6] Ms Anderson (a key witness in relation to detriment 4.2 concerning the lack of adequate response to NL's request of 28 January 2019) is not only happily alive and well and working at R, but she watched some of the hearing. No reason has been offered by R for failing to call these people as witnesses. The tribunal is asked to infer that this is because presenting people to give evidence whose knowledge of the issues could not be disputed would have detracted from R's aim which was to present DC and BT as the innocent people responsible for the public statements made by R and who were largely ignorant of any inadequacies in the content. That strategy has imploded under the weight of the content of the late disclosure that we have seen and the revelations about the inadequacy of the disclosure exercise that we have begun to learn about.

20. BT in oral evidence accepted that 'we could have been clearer' [7/152/17] [TB 875]. This is an inadequate description of the failings of R's public statements – which had been pointed out to BT – face to face by C at the NL meeting and set out in detail in C's letter of 23 January 2019.

21. Some parts of the cross examination of C have not aged well in light of the subsequent late disclosure and other revelations. The following points were put to C:

    a. [4/113/10] [TB/401] et seq – discussion about whether C had seen any evidence that caused him to doubt his initial belief about the statements being a deliberate attempt to smear him, and saying that the fact R hadn't disclosed the names of the doctors had reinforced that belief. It turns out C had very good reason to be suspicious.

[6] https://www.hpft.nhs.uk/about-us/our-board-of-directors/janet-lynch/

b. [4/163/3] [TB/451] – discussion about the sincerity of DC. This has aged very badly indeed.

c. [5/26/7] [TB/485]– a question put to C: "*Do you have any reason to doubt the sincerity of what Mr. Cocke is there saying*?". That is not a question that would have been put after the revelations of the past fortnight.

d. [5/32/6] [TB/491]: question from R: "*Is there a single document of which you are aware that indicates a similar level of irritation on behalf of anyone at the respondent Trust with you?*". We now know that: R's disclosure is not complete; and there is an email from DC expressing his "fury" at C which seems to be trying to imply that he had crowdfunded a holiday [Late disclosure bundle 39].

e. [5/36/4] [TB/495]– C talks about the doctors having input into the board decision, and that there was hostility towards him. R asks again whether any document indicates hostility, C explains that doctors will have been involved, and R retorted: "*there is an astonishing lack of evidence of any sort of personal hostility felt towards you by the respondent's witnesses, and that significantly undermines your case*". It turns out that C was right. The doctors did dislike him; and they did have input into the statements. They didn't want to be cross-examined. We know all of that now, but we didn't know it at the time of C's cross examination. This is a real prejudice to C, who has had to give his evidence without the benefit of proper disclosure. There was no equality of arms and no equal footing.

f. [5/41] – [5/42] [TB/500] – [TB/501]In answer to a question about whether he believed that Mr Cocke had personal hostility to him, C says DC may have lied in his statement. That turns out to be an accurate appraisal of Mr Cocke's evidence to the tribunal based on a comparison of the late disclosure and the content of Mr Cocke's w/s.

The Issues

22. The issues were set out in the agreed List of Issues document ('LoI') submitted by the parties in advance of the start of the hearing. This document was very largely based on the list of issues which has been in existence since October 2019 [referred to at para 8, 445]. The only major change was the addition of detriment 4.4 relating to the letters to stakeholders on 4 December 2018 which C was unaware of at the time and which R had improperly failed to disclose [585].

23. In relation to detriment 4.3, during his oral evidence, C accepted that there was no evidence of a direct communication from Sir Robert Francis to R and therefore this detriment relies on the communication to R from the CQC.

24. Contrary to R's assertion that C's case has been articulated differently at tribunal, C has always asserted that his detriments arose on grounds of the 2013 and 2014 PDs. Those PDs were made to Dr Harding and Dr Brooke amongst others

and were the subject of claims of detriment in the case heard in October 2018 which involved the actions (or inaction) of Dr Harding, Dr Brooke, Dr Luce and Dr Patel. The suggestion that R has in some way been taken by surprise by the focus during this case on the input of those senior clinicians is rejected. R refers to the 'senior team' / 'clinical leads' / 'senior clinicians' / 'senior doctors who had been involved in the Tribunal case' / 'senior clinical team' in DC w/s paras 4, 14, 15 and 45 and there are 29 references to JL in R's w/s. Those are the people that DC variously states would be involved generically in sign off of public statements (para 4); were the source of his (mis)understanding about the case (para 14); and / or who internally signed off on the public statement of 24 October 2018 (para 15); and / or who were later pressing for a statement on costs to be issued by R (para 45).

25. R refused to name those people despite a request dated 27 May 2022, which included a request for relevant documents and an application to the tribunal dated 14 June 2022. C has been denied the opportunity to cross examine DC about (a) his knowledge of those people; (b) the reason for R refusing to release their names prior to his cross examination; (c) their input into the drafting of R's public statements. The Tribunal is asked to draw the inference that R's refusal to name those individuals is because R sought to hide their identity from the tribunal to avoid being required to either produce relevant documentation showing their involvement in the formation of the public statements or alternatively to avoid having to admit that R's failures to preserve evidence and to have given proper disclosure had put such documentation (allegedly) beyond use.

Privilege

26. The parties agreed that:

    a. Neither party waives legal advice privilege.

    b. Legal advice privilege covers the content of legal advice but not the fact of giving, seeking or taking legal advice. Therefore a witness can be asked 'was legal advice given, sought or taken?' but not 'what was the advice?'

    c. Neither party is asserting without prejudice privilege in relation to the without prejudice communications between C and R.

    d. Neither party is seeking to exclude reference to the fact or content of without prejudice communications between HEE and C on the basis either that without prejudice privilege has been waived or that these communications fall within one of the exceptions to that rule.

    e. Communications between BC and HEE's counsel are not covered by without prejudice privilege, but it is asserted by R that litigation privilege applies to those that involved BC obtaining information that was used to advise his clients.

27. As set out in **Phipson on Evidence (20th Edition)** at 23-16: "*No adverse inference can be drawn from a claim for privilege. It would be inconsistent with privilege existing as a fundamental right on which the administration of justice is based for a court to draw any adverse inference from the making of a valid claim to privilege*" (see also *Wentworth v Lloyd* [1864] 10 H.L.C. 589*; Sayers v Clarke Walker* [2002] EWCA Civ 910).

The Legislative Framework

28. The relevant parts of the Employment Rights Act 1996 ("ERA 1996") state:

> ***43A Meaning of "protected disclosure"***
> *In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.*
>
> ***43B Disclosures qualifying for protection***
> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
> *. . .*
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
> *. . .*
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.*
> *. . .*
>
> ***47B Protected disclosures***
> *(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*
> *(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—*
> *(a) by another worker of W's employer in the course of that other worker's employment, or*
> *(b) by an agent of W's employer with the employer's authority,*
> *on the ground that W has made a protected disclosure.*
> *(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.*
> *(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.*
> *(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the*

employer to show that the employer took all reasonable steps to prevent the other worker—
(a) from doing that thing, or
(b) from doing anything of that description.
. . .
(2) … this section does not apply where—
(a) the worker is an employee, and
(b) the detriment in question amounts to dismissal (within the meaning of Part X).
. . .

48 Complaints to employment tribunals

. . .
(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.
. . .
(2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
. . .
(3) An employment tribunal shall not consider a complaint under this section unless it is presented—
(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
(4) For the purposes of subsection (3)—
(a) where an act extends over a period, the "date of the act" means the last day of that period, and
(b) a deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected do the failed act if it was to be done.
(4A) Section 207A(3) (extension because of mediation in certain European cross-border disputes) and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (3)(a).
(5) In this section and section 49 any reference to the employer includes—
. . .
(b) in the case of proceedings against a worker or agent under section 47B(1A), the worker or agent.

Protected disclosures

29. The tribunal will need to make findings on the PDs for two reasons:

a. Not all of the PDs are accepted by R – and some are accepted only as being made under s43B(1)(d) and not s43B(1)(f). It may be tempting to put this issue to one side, given that R accepts most of the alleged PDs and that C reasonably believed that they tended to show health and safety endangerment (rather than concealment). However given the history of this litigation, it is imperative that the tribunal make findings as to whether C reasonably believed that PDs (iv, v, vi, vii and x) tended to show concealment given the consistency between those allegations and R's attitude towards disclosure;

b. Part of the detriment claim is that R's public statements and communications with stakeholders sought to portray C's PDs in an inaccurate manner which '*glossed over the patient safety critical issues'*[7] and '*provided a purported summary in which the less serious points have been selected for public - to be shared with the public, and the more serious ones haven't'*.[8]

30. The PDs relied upon are the same as those relied upon for the October 2018 hearing. It has never been denied that C communicated in the manner and on the dates cited in the LoI para 2. It was initially only admitted by R that PD(iii) amounted to a PD and the others were '*not admitted*' [33-40].

31. At the October 2018 hearing, R accepted on 3 October 2018 - the first day of the live hearing (following 2 reading days) – that (i) to (v) and (vii to ix) were PDs but not (vi) and (x). During this litigation, C has additionally accepted PD(vi).

32. C's evidence in relation to the contested PD (x) is at C's w/s paras 79 to 81. R has offered no evidence in response and did not challenge C's evidence on this point during cross examination. The tribunal is asked to find that C's communication to the ARCP Panel on 3 June 2014 amounted to a protected disclosure under both s43B(1)(d) and (f).

33. R's acceptance of the PDs goes only as far as s43B(1)(d) (*tends to show that the health or safety of any individual has been, is being or is likely to be endangered)* but does not extend to 43B(1)(f) (*tends to show that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed*).

34. The issue on this point is articulated in the LoI at para 2.1(b) as whether it was reasonable for C to believe that disclosures (iv, v, vi, vii and x) tended to show that information tended to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

35. C's evidence as to the nature and content of his PDs is at C's w/s paras 48 to 90. R has offered no evidence in response and did not challenge C's evidence on this

[7] Dr Megan Smith [3/104/17] – [3/104/21]
[8] Dr Megan Smith [3/102/10] – [3/102/15]

point during cross examination. It follows that R has not put to C that it was not reasonable for him to believe that disclosures (iv, v, vi, vii and x) tended to show concealment.

36. The tribunal is therefore asked to find that all of C's communications to R listed at para 2(i) to (x) of the LoI amounted to a PDs under s43B(1)(d) and that PDs (iv, v, vi, vii and x) amounted to PDs under s43B(1)(f) on the basis that C reasonably believed in deliberate concealment.

37. At an earlier point in the litigation, HEE conceded that the PDs made to it (which included PD(x)) were PDs under both s43B(1)(d) and s43B(1)(f), albeit that HEE refused to identify which fell within which category [para 2(a), 551-552].

38. The aspect of the tribunal's findings on the PDs which relates to the detriments is dealt with below. It is worth recalling the evidence of Drs Hormaeche and Smith as to the seriousness of the PDs that R sought to underplay or ignore in its public statements:

    a. Dr Hormaeche at paras 44-45 of his statement stated:

> 44. For the reasons set out above, it is clear ICU Core Standards support the validity and importance [of] Dr Day's protected disclosures in respect of consultant-to-patient ratios, junior doctor-to-patient ratios and airway support. I cannot understand why Roddis Associates would conclude otherwise.
>
> 45. The Core Standards state that exceeding these ratios is deleterious to patient care and Consultant well-being, and that this is also determined by factors including trainee numbers and levels of experience. My view is that repeated failure to comply with the Standards exposes patients to increased levels of risk, which given the already high risk nature of the patient cohort, should not happen.

    b. Dr Smith at para 2.13 of her statement stated:

> For the avoidance of doubt, in my view, based on my own practical experience, the ratio of 1:18 in the Respondent's ICU was, prima facie, unsafe and (if more than a one-off incident) was something that was required to be rectified by the recruitment of more (and in some cases more experienced) junior doctors.

Dr Smith put it more directly in her oral evidence on 23 June 2014 [8/36/1] [TB 949].

> There was a clear and present danger to patient safety: absolutely no question about that.

39. This is the impact of the matters that C was bringing out in public in the October 2018 hearing.

Detriments

40. A detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment' *Shamoon v*

Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL, paras 33 to 35.

41. We have altered the order of the detriments below to reflect chronological order – rather than the order that they are set out in the LoI.

Detriment 4.1(c) *In respect of the Claimant's whistleblowing case: 'The external investigation found it had been appropriate for Dr Day to raise his concerns and that the Trust had responded in the right way'* [170]

42. It is common ground that the 'external investigation' was the Roddis report(s) [651-654, 655-714, 715-758]. C has many issues with the Roddis reports [C's w/s paras 123-129, 140-164] but he points out at paras 116 the 14 findings of the reports that point away from the Trust having 'responded in the right way'. That an external investigation has said that 'the Trust had responded in the right way' is not an accurate reflection of the contents of those reports. It seeks to isolate one aspect of the Roddis findings, in relation to one aspect of C's concerns which was far from the most serious.

43. What's more, R did not respond in the right way – it was exactly in relation to matters highlighted by C that the 2017 Peer Review report found that '*this is a consistent issue with no clear recognition of the need for extra consultant input, nor any plans to address this*'.

44. There is a clear parallel here to be drawn with the case of *Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] ICR 1227 where an untrue public statement by the employer that that claimant's allegations had been independently investigated and '*found to be completely without foundation*' was considered by the Court of Appeal to have been capable of amounting to a detriment (see paras 54; and 61-62).

45. C has set out in unchallenged evidence at w/s 168-175 how his credibility was undermined by R's public statement which amounts to a detriment. It can be inferred from R's statement that C had made specious, unjustified and unsubstantiated complaints. It is reasonable to treat such comments as damaging to reputation and integrity and something which could bring C into disrepute with his peers, fellow NHS staff and current or future patients. That is to say nothing of the effect of the statements on journalists and MPs and stakeholders – many of whom could hold the keys to future employment.

Detriment 4.1(d) *In respect of the Claimant's whistleblowing case: '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'* [172]

46. C says this is not just inaccurate but seeks to undermine him.

47. This is addressed in C's w/s paras 130-167.

48. It is inaccurate in the following respects:

    a. It *is* correct that there is a link between the Peer Review and C's case;
    b. C *did* raise issues which were also raised by the Peer Review;
    c. C did not only raise issues in January 2014
        i. Even the issues raised in January 2014 covered matters also addressed by the Peer Review;
    d. C did not only raise issues related to junior doctor cover on the medical wards.

49. The late disclosure from Friday 1 July 2022 [Late disclosure bundle 7 -11] suggests that between the draft circulated by JL on 22 October 2018 [Late disclosure bundle 9- 10] and the final wording published on 24 October 2018, the words 'in January 2014, which related to junior doctor cover on the medical wards' were added. R has not explained who added those inaccurate words or why.

50. C has set out in unchallenged evidence at w/s 168-175 how his credibility was undermined by R's public statement which amounts to a detriment.

Detriment 4.1(a)(i) *In respect of the without prejudice discussions 'he claims that the Trust threatened him with the prospect of paying our legal costs . . . All of this is simply untrue'* [174]

51. The fact the statement was made is not disputed and it is there to see in the 4 December 2019 public statement at [174] which is still online today.

52. R says that the statement needs to be read in context – which C agrees with – but the context is not just the other words in that public statement (and the previous public statement) but what actually happened at the public hearing in October 2018 and the media and other public comments that had been made since.

53. R also in cross examination of NL and MS sought to suggest that this was merely a PR statement. However these were statements used to 'fully brief' MPs and other stakeholders not mere PR. In addition, we should be realistic about who reads public statements about ET cases – even ones such as this which have had had a certain amount of publicity. Even R's own evidence suggests that their public statements were aimed at medical professionals (potential recruits) (BT w/s para 8]; and we also now know from late disclosure that a key aim was to circulate internally to all staff asap – which they did (see Late Disclosure Bundle at 12, 17 and 51) and indeed there is a reference to pizza' with Mehool [Patel] and Liz [Aitken] in which they are encouraged to use the statement when talking to junior doctors [Late disclosure bundle 186].

<u>What is and is not a costs 'threat'?</u>

54. The Cambridge dictionary definition of a threat (put to BT and BC) is *"a suggestion that something unpleasant or violent will happen, especially if a particular action or order is not followed*".

55. The 'action' was withdrawal of the case. The '*something unpleasant*' was a potential costs application in the event that the tribunal made findings about C's untruthfulness / credibility.

56. The fact that a costs threat was made (or in R's preferred language that '*there would be an issue as to costs'*) [953] is not the alleged detriment. The ET rules provide for costs to be awarded in certain limited circumstances. The rules do not prevent employers from making costs threats. The *detriment* is that R subsequently sought to resile from the fact that it has used a costs threat as a tool in this litigation. That happened *after* C had said that he was subjected to costs pressure, which itself occurred after R first referred to costs in the 24 October 2018 statement [170].

57. R disputes the word 'threaten' and will no doubt point to the evidence of CM in that regard. The tribunal is asked to draw on its own experience. Costs are not raised as a matter of course in ET proceedings. However, these were not standard ET proceedings. Costs had already been threatened in the history of this litigation (by HEE at the EAT [SB 186-187]). A £55,000 contribution had been paid towards the Claimant's costs by HEE following both Respondents' failures to disclose the LDA document relevant to the worker status issue which had been so hotly contested by HEE and which had caused years of delay to the case.

58. When costs are raised as an issue in the ET by employers, a sensible lawyer will be circumspect in the wording of its approach to an employee – particularly so in cases such as whistleblowing and discrimination where, if costs are raised in a heavy-handed manner by an employer, that can itself form the basis of accusations of detriment (or even aggravated damages).

59. Whatever the type of claim, when costs are raised in the ET by employers, it would be exceptional for what is colloquially referred to as a 'costs threat' to be worded using language such as 'threat'. Stating 'there would be an issue as to costs' is about as threatening as it usually gets in ET litigation.

60. At a very basic level, the marking of correspondence accompanying a negotiating position as 'without prejudice *save as to costs*' as R did at [954] means 'if you don't accept our position, we may make a costs application and if so, we may refer to this correspondence'.

61. It is in this context that in particular the words 'all of this is simply untrue' in the public statement [174] are important. R didn't say (in this communication) 'it wasn't a threat – we did say that 'there would be an issue as to costs' in certain circumstances but we don't regard that as a '*threat*'. It gave the impression that to suggest that costs had played a part in the settlement was 'simply untrue'.

62. It is not necessary to stand over a claimant like a Victorian villain yelling 'I am threatening you' for a costs threat to have been made.

63. It has been suggested that all that R was doing in the texted offer at [953] was to merely make a 'drop hands' offer. That is not correct. A 'drop hands' offer is an offer of an agreement that withdrawal from the case will not result in a costs application. The thing that might have opened the door to the costs application is the withdrawal during the course of litigation. R's offer at [953] goes beyond that and makes a specific threat of a costs application which is not linked to the fact of the withdrawal but rather linked to a specific potential finding of the tribunal.

64. The Claimant deals with this point in his w/s at paras 195 to 288. There was no specific challenge during cross examination to any particular aspect of that evidence. In fact, C was not challenged to any great extent on whether or not a costs threat was made. Instead, much of the questioning in relation to costs threats was around the content of C's letter before action. R put the questions in the following context: "*I'm going to use that word 'threat' neutrally; I'm not going to have an argument about whether it is accurate. The thrust of the Trust's costs threat was linked to there being adverse findings as to your truthfulness, but you weren't told that by CM, and, had you known that the only threat was linked to your truthfulness, you would never have settled. That's right isn't it?*" [5/79/7] [TB/367].

65. R also said to C: "*Well, my submission at the conclusion of this case will be that the whole issue of wasted costs is irrelevant because the truth or otherwise of these statements concerns whether or not threats were made against you to pay costs, not against your solicitors*" [5/133/9] et seq [TB/592]. C did not agree. R went on to say that he wasn't going to have a "semantic debate" about what a threat was, but: "*just so that I have put the trust's case, the reality, Dr Day, is that Mr Cooper, articulating the Trust's position on costs in the way that he did and in the circumstances that he did, did not remotely amount to making a costs threat. Do you agree with that?*". C did not agree [5/162/12] [TB/621].

Detriment 4.1(a)(ii) '*we did not threaten Dr Day with legal costs to pressure him to drop his claim*' [174]

66. R's argument about 'threaten' is dealt with above.

67. In relation to R's desire to pressure C, why else would R have stated that 'there would be an issue as to costs' in certain circumstances? For the avoidance of doubt, it is not suggested that the tribunal make a finding that R's cannot do this in ETs – or that an employer's action in threatening costs / putting costs at issue was necessarily inherently wrong – the detriment before this tribunal is making a false website statement about it afterwards which made C look like a liar.

68. Whatever R's perception of the strength of its case, there are no certainties in litigation. The evidence is that R's witnesses who were due to give evidence did not want to do so (see BT's evidence at [7/20/7] [TB/743]; see also Late

disclosure bundle 50]). There was also the question of ongoing legal costs. In addition, R seems to have perceived that it was suffering in terms of PR from the fact of the case being aired – whatever its view of the merits.

69. Whoever approached who first on 5/10/18 (with emphasis):

    a. BC made it clear to CM (as recorded in BC's own notes at [947/948] that he "was anticipating approaching CM at the end of C's evidence to say drop hands then & we won't go for costs <u>but otherwise we will</u>"; and

    b. in BC's email to his instructing solicitor that day at [949] he stated that "*I indicated that I was in any event anticipating approaching him around the end of his client's evidence in order to say that there is now clearly a real risk that he will not only lose his claims but may have findings made that he has been untruthful in his evidence; that if he were to withdraw at that stage we would not pursue him for costs; but that if he ploughed on and that were the outcome, <u>we would make a costs application</u>*";

    c. as is also set out BC w/s para 27 "*I indicated that I had in any event anticipated approaching Mr Milsom at the end of Dr Day's evidence in order to say that there was clearly a real risk that he would not only lose his claims but may have findings made that he had been untruthful in his evidence; that if he were to withdraw at that stage the Trust would not pursue him for costs; but that if he ploughed on and that were the outcome (i.e. if he were to lose with findings that he had been untruthful) then the Trust <u>would make a costs application</u>*."

70. The conversations between BC and CM reflected in these formulations would have formed the context for CM's understanding of the texted offer at [953] – all make it clear that in the circumstances described, a costs application <u>will</u> be made. That is a costs threat.

71. C rejected the 5/10/18 drop hands proposal on 7/10/18, which was communicated to both respondents.

72. The costs threats continued during the following week. In his witness statement at para 5, CM set out that he discussed costs with BC, including BC's brief fee, which "*was a direct response to Mr Cooper informing me that costs may be at large should a negotiated settlement not prove possible*". He goes on at para 6 to explain the further correspondence from BC by text message, noting "*It was clear in my mind that costs were at large should settlement not be procured. At no stage was I informed otherwise: indeed to the best of my recollection references to costs continued and were echoed by HEE*". CM was not challenged on this in cross-examination. In re-examination, CM suggested there were further costs threats after 5/10/18.

    "I communicated a rejection to Mr Cooper and Mr Moon, although Mr Moon had not put forward an offer -- there had been clear indications that HEE would align themselves with the Trust's position" [3/67/25] [TB/243] et seq

CM went on to say, following questions as to timing of various manoeuvres by the Respondents [3/78/18] – [3/79/5] [TB/253] – [TB/254]:

"*I think the point to make is that, by the second week, and, in fact, before that, frankly, there was a gathering momentum, as trials are sometimes apt to have, and counsel for both parties -- and I don't make criticism of this; if I were in their shoes, I'd probably do the same thing -- there was a clear pincer movement, and I think that's a natural consequence, frankly, of claims pursued against multiple respondents*"

73. There is very little documentary evidence from that period to assist the tribunal. Unfortunately we now know that this is not indicative of there never being any documentary evidence. It is particularly unlikely that JL in particular would not have sent any communications in writing during the week in which further costs discussions were taking place.

Detriment 4.1(a)(iii) '*[o]n the issue of costs, we had decided not to pursue Dr Day for legal fees before he withdrew his case'* [174]

74. It in the 24 October 2018 public statement, R had said something slightly different: "At the point that Dr Day withdrew his claim, we decided that we should not pursue Dr Day for costs" [171].

75. Because of the need to get Board approval, R's formal agreement to the settlement terms came on Sunday 14/10/18 [Late disclosure bundle 50-52] some 2 days after the wording had been agreed by C. The natural meaning of the phrase used in the public statement [174] is not that R, at the point of approving the settlement agreement and as part of the agreement, agreed not to pursue C for costs, but that at some point prior to that, it had made that decision. It was this phrasing, in particular, that caused C to seek to set aside the settlement agreement – because if it was true that R had decided not to seek costs before he withdrew, the dominant factor in his decision to withdraw was one which he, his lawyers and it would appear the opposing lawyers were mistaken about – because they all understood that the agreement not to pursue him for costs was part and parcel of the same agreement that he withdraw his claim.

76. Any informed person reading this would consider this statement to be another refutation of any suggestion that costs played any part in the settlement decision. It suggests that C's reason for withdrawing must be solely his assessment of the merits of the case without any external pressure.

77. In relation to 4.1(a)(i), (ii) and (iii), R's comments are clearly detriments as they unfairly and inaccurately suggest that C's account (which was that he was placed under costs pressure and that he would not have settled were it not for a costs threat) is false.

Detriment 4.1(b) In respect of the without prejudice discussions: '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 that we are an NHS body responsible for public funds' [179]

78. The clear meaning here is that C's lawyers asked something like 'what would your position be if the tribunal were to dismiss Dr Day's claims and make findings that he had not been truthful in his evidence' – and that C's lawyers were the ones who were concerned that there could be a finding that C had been untruthful in his evidence

79. What it suggests is that even C's own lawyers were worried about the tribunal making a finding that C had been untruthful in his evidence.

80. 'Legal representatives' plural is clearly wrong – the approach was by CM – expressly without instructions (as is clear from the subsequent communications to TJL [1322 and 1327] and the exchange after the event at [1338, 1201 – 1204, 1013 – 1016, 1081 - 1083]. The importance of this is that R's public statement makes CM's approach to BC sound considerably more formal and considered than it would appear to have been.

81. The order in which the events are set out in the public statement (our comments in square brackets) is:

    a. C's legal representatives approached R's legal representatives [which sounds formal];

    b. C's 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*" [this is not accurate];

    c. "*in response to this request*" 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. [in fact it was R's barrister who initially made that comment].

82. That is not what happened.

83. Both barristers were without instructions at the point of their 5/10/18 conversation also acting without instructions. However BC did have instructions when he made R's offer to CM by text messages at [953] and [954]. That was the first formal communication by either party.

84. CM denied that he had a concern about the truthfulness of C's evidence [3/43/2]:

> CM: Forgive me. I suppose the point that I really do reject is that I did anything or conveyed anything which signified an agreement that Dr Day was to be regarded as untruthful.

> Untruthfulness was not my principal concern. My principal concern was the reputational risk of going this far and having an adverse judgment.
>
> R: I don't think Mr Cooper is suggested that you ever agreed or that your client was untruthful –
>
> CM: I think that's the point that I wish to be quite emphatic on, frankly.

85. CM denied that he communicated such a concern to R. BC's handwritten note [947/948] doesn't suggest that anyone raised the issue of truthfulness in this conversation. BC's email to his instructing solicitors suggests that he (BC) raised it. BC's w/s states the same thing "*I did link* . . ." [BC w/s, para 28, line 6] and BC agreed in oral evidence that he raised it [8/93/15].

86. Taking a step back to examine BC's basis for saying that in the first place. BC's evidence as to C's oral evidence in 2018 is challenged in C's supplementary w/s. Following the supplementary statement, Mr Cooper altered his written statement on material matters. The tribunal have indicated that they will not be making findings on the nature of C's evidence in October 2018. However, even taken at its height, the matters referred to by BC are not at all likely to have formed the basis for a finding of untruthfulness that could lead to a costs order.

87. Indeed in all of R's evidence, there is no indication of anything that could possibly form the basis of a finding of untruthfulness that might lead to a costs order.

88. C sets out in his w/s at 307 to 314 why it is that this statement amounted to a detriment.

Detriment 4.2 *Deliberately fail to respond to the Right Hon. Norman Lamb's request on 28 January 2019 to either justify or remove the public statements published on the Trust's website*

89. The issue here is not whether R was silent but whether it responded to NL's request to justify or remove. NL's evidence – after making reference to the chain of correspondence [1404, 1413, 1416, SB/339] was that it did not.

90. BT accepted in oral evidence that the investigation into this by Kate Anderson was imperfect; and that in any event the matters set out in the draft letter of 6 March 2019 [1416-1419] were not all put to NL at the subsequent meeting [Discussion is at TB/939-953] – see in particular [8/33/10-12] [TB/946] and [8/34/3-7] [TB/947].

91. C had been supported by NL and it was clearly to his detriment for R to attempt to persuade NL that C's assertions were incorrect on the basis of an inadequate review carried out by Kate Anderson.

Detriment 4.3 *Deliberately fail to remove and / or update their public statements once contacted with concerns about the statements from the Care Quality Commission and or Sir Robert Francis QC.*

92. R's pleaded response to this part of the claim is [596] "*it is denied that the Trust was contacted by Sir Robert Francis or the CQC*"; and it goes on to say that the Trust contacted the CQC - and the Trust confirmed in response. R hasn't produced any evidence that it contacted the CQC.

93. C relies on [1425-6] a letter from Ellen Armistead at CQC to Sir Robert Francis, which is redacted in relation to some completely separate matter and which at 1426 says *'We share your concerns about the content and tone of the publicly available statements on the Trust's website and having taken up the concerns with the Trust, they have advised that they have sought the advice of their lawyers and they intend to keep the statements on the Trust website as the case regarding Dr Chris Day has had a negative impact on those considering applying for jobs. The CEO is confident the statements reflect the version of events as they happened*.'

94. The CQC have also confirmed to C [1532] that C's concerns were discussed at an FPPR meeting on 25/3/19. FPPR is a Fit and Proper Persons Review.

95. When the statements were raised with R by the CQC, going back to [1426] it states that "The CEO is confident the statements reflect the version of events as they happened". BT agreed in oral evidence that this confidence was misplaced [8/58/3] [TB/971].

96. By the point at which the CQC had contacted R, any previous level of ignorance as to the detrimental effect of the public statements on C must have been dispelled. R had C's account in detail, supported by NL in strong terms. Multiple opportunities for R to have reflected on whether these statements (now three of them) accurately reflected what had happened in October 2018 had been missed. The reason for continuing with that stance was that R and / or individuals at R were reacting against the PDs that C had made and which had been recently aired in a public tribunal hearing.

97. It is noteworthy that the BMA also wrote to R about this [1547-1549] and received no substantive response.

98. AA TO INSERT MORE ON THIS

Detriment 4.4 *On 4 December 2018, the First Respondent's Chief Executive, Mr Travis wrote 18 letters to local MPs and local public officials enclosing the 23 October 2018 and 4 December 2018 public statements about the Claimant's case. This material, that was purportedly to fully brief those MPs and public officials, contained untrue and detrimental material (as particularised in paras. 33 and 36 of the AGOC).*

99. The detrimental material is the same as the content of the two public statements.

100. BT accepted in oral evidence that despite the wording of the covering letter [[7/151/5] – [7/152/22] [TB/874] – [TB/875]] the public statements attached to the letter did not provide the recipients with a full story and would not leave them 'fully briefed'.

101. This detriment to C is based upon the inaccuracies in the public statements as outlined above, but it is sharper – as noted by EJ Kelly [585] because these are specific communications to a known readership.

'subjected to'

102. The correct meaning of 'subjected to' in this context was considered by the EAT in *Abertawe Bro Morgannwg University Health Board v Ferguson* [2013] ICR 1108, EAT (see ¶¶18 – 19). The term 'subjected to' was a suitable linguistic alternative for conveying a sense of causation capable of operating in respect of both a positive act and a failure to act. It did not have any connotation of 'wilfulness', not least because s47B(1) in any event provides that any act or failure to act has to be done (or not done) deliberately because the worker made a protected disclosure.

Causation

Burden of Proof

103. As set out in s48(2) ERA 1996, if the worker raises a ground for the detriment that is more than trivial, it is for the employer to show the ground upon which any act was done or deliberately not done.

104. Once all the other necessary elements of a claim have been proved on the balance of probabilities by C — i.e. that there was a protected disclosure, there was a detriment, and R subjected C to that detriment — the burden will shift to R to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure.

Knowledge of the disclosure

105. Clearly, given the recent airing of the PDs and alleged detriments during C's evidence in the October 2018 hearing, R (and all relevant individuals, BT, DC, JL, Drs Aitken, Harding, Brooke, Patel and Luce) knew about the protected disclosures.

Whose mind?

106. The Supreme Court in *Royal Mail v Jhuti* [2019] ICR 731 examined s103A ERA 1996 (automatic unfair dismissal by reason or principal reason that the employee made a protected disclosure). Lord Wilson's leading judgment set out the issue in that case as follows:

> Question
> 1. Section 103A of the Employment Rights Act 1996 ("the Act") provides:
>
> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

In this appeal the dispute surrounds the reason for the dismissal of Ms Jhuti, the appellant, from her employment by Royal Mail Group Ltd ("the company"). As I will explain, the facts found by the employment tribunal ("the tribunal") show that

(a) Ms Jhuti made protected disclosures within the meaning of section 43A of the Act, colloquially described as whistleblowing, to her line manager;

(b) the line manager's response to her disclosures was to seek to pretend over the course of several months that Ms Jhuti's performance of her duties under her contract of employment with the company was in various respects inadequate;

(c) in due course the company appointed another officer to decide whether Ms Jhuti should be dismissed; and

(d) having no reason to doubt the truthfulness of the material indicative of Ms Jhuti's inadequate performance, the other officer decided that she should be dismissed for that reason.

So what was the reason for Ms Jhuti's dismissal? Was it that her performance was inadequate? Or was it that she had made protected disclosures? These specific questions generate the following question of law of general importance which brings the appeal to this court:
In a claim for unfair dismissal can the reason for the dismissal be other than that given to the employee by the decision-maker?

107. At para 42 Lord Wilson states:

42. The need to discern a state of mind, such as here the reason for taking action, on the part of an inanimate person, namely a company, presents difficulties in many areas of law. They are difficulties of attribution: which human being is to be taken to have the state of mind which falls to be attributed to the company?

108. And at para 60 (emphasis added):

60. In searching for the reason for a dismissal for the purposes of section 103A of the Act, and indeed of other sections in Part X, courts need generally look no further than at the reasons given by the appointed decision-maker. Unlike Ms Jhuti, most employees will contribute to the decision-maker's inquiry. The employer will advance a reason for the potential dismissal. The employee may well dispute it and may also suggest another reason for the employer's stance. The decision-maker will generally address all rival versions of what has prompted the employer to seek to dismiss the employee and, if reaching a decision to do so, will identify the reason for it. In the present case, however, the reason for the dismissal given in good faith by Ms Vickers turns out to have been bogus. <u>If a person in the hierarchy of responsibility above the employee (here Mr Widmer as Ms Jhuti's line manager) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker.</u>

109. And at para 62:

62. The answer to the question of law identified in para 1 above is therefore as follows:

Yes, if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the

decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.

110. In *Western Union Payment Services UK Ltd v Anastasiou* EAT 0135/13, Her Honour Judge Eady QC accepted that 'there may be cases where there is an organisational culture or chain of command such that the final actor might not have personal knowledge of the protected disclosure but where it nevertheless still materially influenced [his or] her treatment of the complainant'.

111. In *Malik v Cenkos Securities plc* EAT 0100/17 (a decision that was handed down in the gap between the Court of Appeal and Supreme Court decisions in Jhuti), Mr Justice Choudhury considered that it was impermissible to import the knowledge and motivation of another party to the decision-maker for the purpose of establishing liability under S.47B. He referred to the Court of Appeal's decision in *Reynolds v CLFIS (UK) Ltd and ors* [2015] ICR 1010, CA, an age discrimination case, in which the Court rejected what it called the 'composite' approach to liability and concluded that the acts of those who had provided 'tainted' information to the decision-maker for unlawful reasons had to be considered separately from the actions of the innocent decision-maker. Choudhury J disagreed with the comments in *Western Union Payment Services UK Ltd v Anastasiou* (above), noting that they were obiter.

112. However *Malik* was decided prior to the Supreme Court's decision in *Jhuti* and as noted at para 56 of *Jhuti* in that case the tribunal had attributed the actions of individuals at the employer to the employer when dealing with the s47B whistleblowing detriment claim.

113. In any event, the operation of s47B(1A) and (1B) means that the employer is liable for the detrimental acts of individual employees (whether the employer knows or approves of those detriments). In this case C had no knowledge of who had inputted into the public statements (and his knowledge and that of the tribunal is still incomplete). However C has been able to show that those statements are inaccurate and incomplete and it is clear that a number of individuals at R collaborated on those statements and also it is clear that even after the inaccuracies in the statements were pointed out in detail by C, R persisted in maintaining its detrimental stance.

'on the ground of'

114. The test as to whether a worker was subjected to detriment "*on the ground of*" a protected disclosure was set out by Elias LJ in *Fecitt and ors v NHS Manchester* [2012] ICR 372 at ¶45:

> *In my judgment, the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower*

115. The meaning of 'on the ground of' is not the same as 'related to' or 'arose out of'

116. The test is not the same as that for unfair dismissal where a tribunal is looking for the 'reason or principal reason'.

117. The motive behind the act or omission is irrelevant; it does not matter why the employer wanted to treat the employee as they did. Further, whether or not the employer intended to subject the worker to the detriment is not relevant.

118. It is worthy of note that R did not make public statements about any of the other very serious matters that were the subject of public criticism and which were completely unrelated to C. For example the scathing public feedback about the Queen Elizabeth Hospital on the HealthWatch Greenwich website [1170] - [1171]; criticism of Mr. Travis for privatising an out-patient pharmacy [1172]; an allegation of clinical negligence about a 55 year old man with terminal blood cancer and the Trust being "*very good at losing documentation*" [1173]; an allegation of clinical negligence in relation to the death of a patient who developed a stage 4 necrotic ulcer which led to sepsis [1176] (though 54k doctors is tagged in the latter tweet).

119. In order to determine whether a particular act or deliberate omission was done on the ground of the protected disclosure, the ET must enquire into the conscious and unconscious mental processes of the employer. The Respondent must be prepared to show why the detrimental treatment was done. If it does not do so, inferences may be drawn against it: see *London Borough of Harrow v. Knight* at ¶20.

120. If the employer fails to prove that detriment was not on the grounds of the protected disclosure, then the issue must be determined in favour of the employee (see *Fecitt*; see also *Edinburgh Mela Ltd v Purnell* [2021] IRLR 874 at ¶67 and *Harvey* at D1:36).

121. *Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] ICR 1227 is authority for the proposition that where an employer responds to a communication made by a worker in response to a protected disclosure then it is a matter of fact for the Tribunal as to whether the employer's detrimental response was on the grounds of the protected disclosure. The Court of Appeal accepted in *Jesudason*:

> *the issue is not the reason why the letters rebutting the appellant's allegations were written but why the offending passages which caused the detriment were included in those letters (*see Sir Patrick Elias at ¶64)

122. In this regard, the tribunal is requested to draw inferences from two things that R did not do:

a. Firstly R did not supply disclosure adequately – and did not preserve evidence when it should have done. The late disclosure that we have had has undermined the case that R sought to present to the tribunal of the 'innocents' DC and BT being responsible for the statements – whether they were strictly speaking accurate or detrimental or not;

b. Secondly the very matters omitted from the public statements are telling. As Dr Smith put it, R '*glossed over the patient safety critical issues*'[9] and '*provided a purported summary in which the less serious points have been selected for public - to be shared with the public, and the more serious ones haven't*'.[10] The relevant link to C's PDs can be found in the fact that R sought to minimise the more serious issues that C had attempted to bring to light.

"*In employment*"

123. R seeks to argue that the alleged detriments relied upon by C are not 'in employment'. R's argument primarily relies on the Court of Appeal authority of *Tiplady v City of Bradford MDC* [2019] EWCA Civ 2180; [2020] ICR 965, a case in which Underhill LJ commented on 'in the employment field' and the requirement for any detriment to have been suffered by a Claimant in their capacity as a worker.

124. The leading case on post-employment detriments is *Woodward v Abbey National Plc* (No1) [2006] EWCA 822; [2006] ICR 1436. In that case, Ward LJ in the Court of Appeal explained the rationale behind whistleblowing detriment extending beyond the contract of employment:

> 28. He [Lord Nicholls in Rhys Harper[11]] dealt with the construction of the statute in these paragraphs:
>
> "37. To my mind the natural and proper interpretation of section 6(2) of the Sex Discrimination Act 1975 and the corresponding provisions in the other two Acts in this context is that once two persons enter into the relationship of employer and employee, the employee is intended to be protected against discrimination by the employer in respect of all the benefits arising from that relationship. The statutory provisions are concerned with the manner in which the employer conducts himself, vis-à-vis the employee, with regard to all the benefits arising from his employment, whether as a matter of strict legal entitlement or not. This being the purpose, it would make no sense to draw an arbitrary line at the precise moment when the contract of employment ends, protecting the employee against discrimination in respect of all benefits up to that point but in respect of none thereafter."
>
> . . .
>
> 66 That leads one to ask the Rhys-Harper question: can Parliament seriously have intended to afford the whistle-blower protection only in respect of acts done in retaliation while the contract subsists and not to protect him from detriment suffered after his employment has terminated? Is such a distinction not palpably absurd and self-evidently capricious?
>
> . . .
>
> 68 . . . The public interest, which led to the demand for this Act to protect individuals who make certain disclosures of information in the public interest and to give them an action in respective of that victimisation, would surely be sold short by allowing the former employer to victimise his former employee with

[9] Dr Megan Smith [3/104/17] – [3/104/21]
[10] Dr Megan Smith [3/102/10] – [3/102/15]
[11] *Rhys-Harper v Relaxion* [2003] ICR 867in which the House of Lords held that the discrimination legislation extended to detriments suffered by former employees

> impunity. It simply makes no sense at all to protect the current employee but not the former employee, especially since the frequent response of the embittered exposed employer may well be dismissal and a determination to make life impossible for the nasty little sneak for as long thereafter as he can. If it is in the public interest to blow the whistle, and the Act shows that it is, then he who blows the whistle should be protected when he becomes victimised for doing so, whenever the retribution is exacted.

125. *Woodward* was applied by the EAT in *Onyango v Berkley* (2013) UKEAT/0407/12/ZT in the contest of post-employment protected disclosures.

126. In *Tiplady,* Underhill LJ considered the position of a council employee who alleged that she had made protected disclosures when she had raised concerns to the council in a private capacity about a property owned by her; and that she been subjected to unlawful detriments as a result of raising those concerns. In describing the episodes relied upon by the claimant in *Tiplady*, in para 1(2) of the judgment, Underhill LJ stated: *"It will be apparent that neither episode had, as such, anything to do with the employment relationship between Mrs Tiplady and the Council: they concerned the exercise of the Council's powers as a local authority."*

127. The claimant in *Tiplady* was both an employee of the Council and a resident within the same district. The question was whether the alleged detriments had been suffered by Mrs. Tiplady as an employee, or in in her capacity as a householder. In fact the appeal was dismissed on the basis that even if the tribunal had been wrong on the 'in employment' point, there were other bases on which they had dismissed her claim (see paras 16 and 17).

128. Underhill LJ discussed *Woodward*, and expressly cites *Woodward* with approval (at ¶¶29 – 31).

129. At para 45 Underhill LJ stated:

> 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. This is not strictly the same as the "two hats" analysis which Mrs Tiplady challenges, because the focus is not on the hat being worn by the employer but on that being worn by the employee; but in practice these may, if I may mix my metaphors, be two sides of the same coin. But I do not think the boundaries of the employment field should be drawn narrowly. Mrs Tiplady suggested, in order to illustrate how arbitrary the concept was, that it would mean that detriments would only be within the scope of section 47B if they occurred in the workplace or during working hours: I do not accept that that is the result. It may be a useful thought-experiment to ask whether, if the claim had been based on a protected characteristic under the 2010 Act rather than on the making of a protected disclosure, it would fall under a Part of that Act other than Part 5 : if, say, the detriment was suffered by the claimant as a consumer of services or as a student or as an occupier of premises and thus would fall under Parts 3, 4 or 6 , it could not be suffered as a worker. But I am chary about suggesting that that is a touchstone which will provide the answer in every case. There are bound on any view to be borderline cases, and I do not think that it would be right for us in this case to attempt any kind of definitive guidance. I would only add that

> I think it was sensible of the ET in this case to give Mrs Tiplady the benefit of the doubt as regards detriments (11) and (12).

130. Dr Day relies on PDs made whilst he was an employee. His case heard in October 2018 was about detriments suffered whilst he was an employee. His present case relies on those same PDs and in part upon the allegedly false characterisation of those PDs and detriments by R.

131. In addition, C is a doctor. As a professional, his reputation is important to him (as tacitly is acknowledged by R, given their references to GMC referral – e.g. in the late disclosed note of the Board meeting [Late Disclosure bundle 50 – 53]). To attack his reputation and his credibility is to attack him 'in the employment field'.

132. When it was put to C that he made critical comments about R in his capacity as a "crowdfunder", C responded clearly and emphatically: "*No I do so in my capacity as a doctor*" [4/30/23]. In any event he didn't stop being a doctor when he (by necessity caused by R's actions) become a crowdfunder.

133. In the language of Underhill LJ (para 45 of *Tiplady*), the capacity in which Dr Day suffered the detriments was as a former employee. If Dr Day's claim had been based on a protected characteristic under the Equality Act 2010, he would clearly not be barred from bringing such a claim and it would not fall under any other part of the Equality Act 2010. If the tribunal considers this to be a borderline case, it is encouraged to follow Underhill LJ's suggestion that it was sensible of the tribunal in the *Tiplady* case to give her the benefit of the doubt.

134. To suggest that this places C's current case outside 'the employment field' is to attempt to roll back the reasoning in *Woodward*. To accede to any argument that C was subjected to detriments not in the employment field but '*as a campaigner*' or '*as a crowdfunder*' is to enter into dangerous territory in which a former employer is permitted to '*make life impossible for the nasty little sneak*' with impunity. R makes a particularly dangerous suggestion in para 13 of its Opening Submission in which it invites the tribunal class C as a 'litigant' rather than an ex-employee. This seeks to remove post-employment whistleblowing detriment protection from those who bring claims. That cannot have been what Parliament intended.

135. What the authorities establish is that protection from whistleblowing detriment plainly endures past the end of the employment relationship. In *Woodward*, it is worth noting that the period between the protected disclosures and the detriment were around a decade.[12]

[12] In **Woodward**, C's employment ended by redundancy in 1994; she signed a settlement agreement as to discrimination arising from the redundancy in 1996, and in 2003 she brought a claim for post-employment whistleblowing detriment. The Claimant's appeal as to post-employment detriment was allowed by the Court of Appeal.

136. If the tribunal considers that it is bound by *Tiplady* to conclude that C's claim is outside the field of employment, C reserves the right to argue (at a higher level) that *Tiplady* was wrongly decided including on the basis that unlike the Equality Act, Part IV of the ERA 1996 does not provide for protection in the context of other kinds of relationship beyond that of employer and worker.

Fettering future claims

137. The settlement of claims in the employment context is subject to well-known statutory guidelines. As set out in s203(3) ERA 1996, for a settlement agreement to be valid (emphasis added):

> *(a) the agreement must be in writing;*
> *(b) the agreement must relate to the particular complaint;*
> *(c) the employee must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and in particular its effect on his ability to pursue his rights before an employment tribunal;*
> *(d) there must be in force, when the adviser gives the advice, a policy of insurance* or an indemnity provided for members of a profession or professional body *covering the risk of a claim by the employee in respect of loss arising in consequence of the advice;*
> *(e) the agreement must identify the adviser; and*
> *(f) the agreement must state that the conditions regulating settlement agreements under the Act are satisfied.*

138. As set out in *Foskett on Compromise (9th Ed)* at 28-37:

> *The intention behind this restriction is to ensure that settlement agreements cannot be used effectively to constitute a blanket 'full and final settlement' of all claims that an employee 'has or might have' against an employer. The involvement of an independent adviser can only render effective settlement agreements which seek to settle the specific dispute or disputes raised between employee and employer. However, if a number of disputes exist between an employee and an employer, each can be settled in the single settlement agreement provided the proper formulation is used in connection with each claim. There is no need for separate agreements in relation to each.41 The confinement of a "settlement agreement" to the particular complaint or proceedings involved means that such an agreement is more limited in its scope than an agreement effected through an ACAS conciliation officer. It should be emphasised that the specific claims settled must be identified in the agreement.*

139. The House of Lords in *BCCI v Ali* [2001] UKHL 8; 1 All ER 961 made clear that any sort of general release requires specific wording. As Lord Bingham explained in that case:

> *[10] … a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware.*
> *[…]*

> *[17] I think these authorities justify the proposition advanced in paragraph 10 above and provide not a rule of law but a cautionary principle which should inform the approach of the court to the construction of an instrument such as this. … the judges I have quoted expressed themselves in terms more general than was necessary for decision of the instant case, and I share their reluctance to infer that a party intended to give up something which neither he, nor the other party, knew or could know that he had*."

140. In *BCCI,* neither party knew or could have known about a claim for stigma damages, and therefore they could not possibly have intended to settle those claims.

141. It was further accepted in *BCCI* that where a general release would result in unfairness to a party, it would be unconscionable to allow the other party to rely upon it. An example of this might be settling a breach of contract claim with a general release as to any further claims arising from breach of the same contract in circumstances where one contracting party goes on to breach the contract (or indeed the spirit of the settlement itself) with impunity.

142. Again turning to the analogous position under the Equality Act 2010. If C signed a settlement agreement in relation to e.g. a race discrimination claim, with a similar clause, no tribunal would prevent him from bringing a claim on the basis that he had been subjected to new acts of race discrimination after the settlement agreement.

143. For R to suggest in para 16 of its Opening Submissions that for C to agree to clause 3.1(a) excludes him for arguing that things that hadn't yet happened amounted to detriments in the field of employment is to propose a discriminator's charter. The words 'or in the future' in clause 3.1(a) are clearly for the purpose of preventing the Claimant from bringing a claim in the future about something that had already happened at the date of the settlement agreement but was not already the subject of litigation.

Jurisdiction – time limits

144. C's claim form was presented on 6 March 2019 [365]. Early conciliation all took place on 31 January 2019. The three month period prior to which any individual claim is out of time started on 6 December 2018.

145. Some detriments pre-date 6 December 2018 and some post-date it.

146. Clearly all of the detriments constitute a series of similar acts or failures for the purposes of ERA, s48(3)(a) and/or an act extending over a period for the purposes of ERA, s48(4)(a) which ended within the primary time limit.

147. Those which post date 6 December 2018 are:

a. the third statement on 10 January 2019 (detriment 4.1(b));

b. the failure to adequately respond to NL's letter of 28 January 2019 to justify or remove the public statements (detriment 4.2);
c. the failure to remove or update the public statements after concerns from the CQC (detriment 4.3).

148. In addition, although the stakeholder letters were sent on 4 December 2018, C did not know about them until January 2021 (detriment 4.4). Therefore it was not reasonably practicable for C to have brought that part of the claim at an earlier time.

Andrew Allen QC
Elizabeth Grace
Outer Temple Chambers
14 July 2022