When it comes to whistleblowing isn't the Employment Tribunal just an elaborate prank played on those standing up for truth and accountability?

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Locum Emergency Medicine Doctor
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On 27 February my NHS whistleblowing case is coming before the Employment Appeal Tribunal for a third time (the appeal is here). For 10 years, I have been knee-deep in a world where evidence doesn't seem to matter including even if it is deliberately destroyed. Judges instead of dealing with serious issues toss around phrases like "can of worms" as casually as when ordering a Latte in a coffee shop.

> *"Although there was a note from a private GP.. which references serous mental health issues and Mr Cocke saying he was stressed about this case and having to give evidence. This was the day after he destroyed the documents…It was Mr Cocke who opened this can of worms.".*

Not a quote from a crime novel but the words of Judge Ann Martin in paragraph 79 and 80 of her judgment throwing out my whistleblowing case despite as you can see quite a lot of evidence being destroyed by my opponents.

My case in a nutshell is that Lewisham and Greenwich NHS Trust and a group of powerful lawyers misled the press, numerous MPs/councillors about the serious patient safety issues at the centre of my case and how the bitter 4 year fight suddenly settled during a hearing in 2018 (leaving me with nothing for my career loss). The clear aim of the NHS statements to the press and MPs is to make me out to be a liar in order to discourage anyone looking into this situation. The sudden settlement came just before my team were about to cross-examine the NHS' 14 witnesses. This needed to be explained somehow.

In June 2022 , It was not as though I was standing alone in front of Judge Martin as many are in my position. I had the backup of the British Medical Association funding my legal team and supportive witnesses that in included 2 consultants anaesthetists, a former health minister and even my wife.

To get to their destination Judge Martin's tribunal ignored a staggering amount of evidence which I set out in my article the Employment Tribunal Will See You Now Doctor. The tribunal also has turned a blind eye to multiple acts of destruction and concealment of evidence including deleting 90,000 emails during a hearing!

The Judgment in this case is an insult to NHS staff and patients everywhere. It is also yet another indicator of the reality of the justice system in this country and who it really serves. I sense in the wake of the Post Office Scandal people's patience for this kind of thing is wearing a bit thin so those involved might be playing a dangerous game. In that sense, my appeal to the Employment Appeal Tribunal on 27 February could not come at a better time (Notice of appeal is here)

My whistleblowing case concerns serious and ongoing issues in a South London Intensive Care Unit serving 2 London Boroughs. My concerns were associated with 2 avoidable deaths. You would never know that reading Judge Martin's Judgment. In

an attempt to stop my case being heard my litigation also dragged the entire nation's junior doctors outside of legal whistleblowing protection for 4 years. The reality of how this was done is now only coming to light and was reported in the press but ignored by Judge Martin.

But back to that can of worms and the man that Judge Martin says opened it. The alleged opener of the can or worms – Mr Cocke is the former Director of Communications at Lewisham and Greenwich NHS Trust. It seems to me that Mr Cocke has found himself the fall guy for several senior NHS executives and their lawyers following those false briefings that were made about my whistleblowing case to local MPs/councillors, the press and the Trust Board. The briefings were clearly made to protect powerful reputations but the plan has backfired.

The briefings falsely claimed that my crowdfunded and widely reported whistleblowing case, that was known to be about ongoing issues in an intensive care unit linked to two avoidable deaths, was actually about just a minor issue one night about ward cover on the medial wards. The briefings also made false claims about investigations. Most notably the statements gave the false impression that the reason that I suddenly withdrew my whistleblowing case and settled mid hearing in October 2018 had nothing to do with cost threats. It was further stated that the NHS had made it clear before I settled that they would not pursue me for costs. The position evolved further over 3 public statements to an account of my lawyers approaching to settle my case because they believed it to be untruthful and them deciding to give this impression to the NHS lawyers whilst I was still under oath giving evidence – which is quite a claim to make. With friends like that who need enemies!

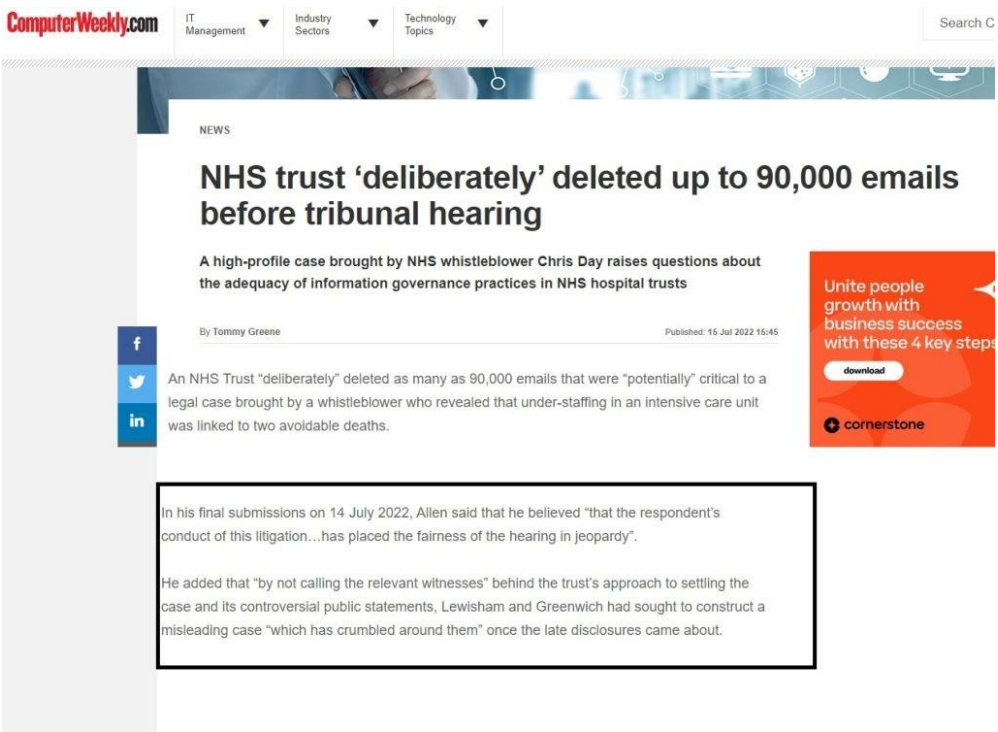
These objectively false briefings and public statements were challenged by the former health minister Sir Norman Lamb and the MP Justin Madders once they had seen the evidence of multiple cost threats against not only me but also wasted cost against my former lawyers. That same written evidence of cost threats was clearly put to Judge Martin and her Tribunal but was ignored without reason. They found no evidence of cost threats!

Although, technically Mr Cocke wrote the briefings/public statement they were edited and approved by senior doctors/managers at the Trust and Capsticks Solicitors. The opening of the can of worms, as Judge Martin likes to put it, was Mr Cocke's attempts to save himself by exposing the dishonesty and concealment of evidence that had occurred in my case.

Perhaps on reflection mid-way through a court hearing was not the best time for Mr Cocke to attempt these revelations – I remember receiving the material disclosed by Cocke on a Friday night at 930pm and nearly choking on my Chinese takeaway. However, Cocke's push for transparency did not survive a Sunday evening meeting

that weekend at Capsticks Solicitors. After this meeting Mr Cocke's plan clearly changed from exposing everything to getting up at 5am the next day and traveling to the hospital to destroy an archive of 90,000 emails. Capsticks were on hand to deliver to the Tribunal an unsigned witness statement supposedly showing Mr Cocke admitting to his actions but Mr Cocke was never produced as a witness due to ill health. The legal papers setting out the sequence of Mr Cocke's actions can [read here.]

As you might expect all this did not go unnoticed by the public gallery and was reported by Tommy Greene in Computer Weekly and David Hencke in Westminster Confidential [(media coverage of June 2022 hearing is here).]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NEWS

NHS trust 'deliberately' deleted up to 90,000 emails before tribunal hearing

A high-profile case brought by NHS whistleblower Chris Day raises questions about the adequacy of information governance practices in NHS hospital trusts

By Tommy Greene — Published: 15 Jul 2022 15:45

An NHS Trust "deliberately" deleted as many as 90,000 emails that were "potentially" critical to a legal case brought by a whistleblower who revealed that under-staffing in an intensive care unit was linked to two avoidable deaths.

In his final submissions on 14 July 2022, Allen said that he believed "that the respondent's conduct of this litigation…has placed the fairness of the hearing in jeopardy".

He added that "by not calling the relevant witnesses" behind the trust's approach to settling the case and its controversial public statements, Lewisham and Greenwich had sought to construct a misleading case "which has crumbled around them" once the late disclosures came about.

So the thing that obviously needs to be investigated is why Mr. Cocke's plan changed from brave exposure on a Friday night to on Monday at 5am destroying an archive of 90,000 emails.

As there has been no interest from the courts or regulators at investigating any of this, I thought I would give ChatGPT a chance who concluded;

> *"It seems Mr. Cocke initially tried to spill the beans on the NHS's secrets, only to find himself switching gears faster than a race car driver at a hairpin turn. Destruction of evidence? Check. Concealment of key documents? Double-check. A weekend that went from exposing dishonesty on a Friday to a Monday morning mission to erase 90,000 emails? Now, that's a rollercoaster even the*

most seasoned theme park enthusiast might hesitate to ride - I wonder what changed"

I think it is fair to say as soon as Mr Cocke opened the can of worms, Judge Martin did her best to try and shut it again but didn't quite manage it or as Chat GPT puts it;

> "*Enter Judge Ann Martin, who, like a referee desperately trying to regain control of a chaotic wrestling match, attempted to shut the can of worms but ended up with a handful of wriggling critters.*"

Shutting the can of worms was always going to be a tricky endeavour as the hearing was observed by nearly 100 people online including the local South London GP, Dr Bob Gill. After watching the antics unfold in court and Judge Martin's weak response, Dr Gill decided to pay a visit to a Board meeting at Lewisham and Greenwich NHS Trust and took someone to film him. In this quite incredible video an independent review was promised but a not so independent review is what we got from KPMG and it didn't come cheap (more on that here).

Dr Bob's video is here https://youtu.be/G3Qt3DcvuPk

Oddly and probably in an attempt to avoid being appealed, Judge Martin did at least list out in her Judgement some of the examples of the concealment and destruction of evidence that were uncovered during my hearing. You can compare Judge Martin's list below (see paragraph 83 of Judgment) to Dr Bob Gill's list in his video;

> *"We had in our minds the criticism of Judge Kelly as set out above, the admission by the Respondent that there was no instruction to preserve relevant documents, that all emails of Ms Lynch (who was the instructing client in the 2014 litigation) were apparently deleted when she left the organisation, that despite it being categorically stated both in the preliminary hearing and in Mr Travis's evidence that there were no note of the board meeting that took place to discuss possible settlement of the 2014 claims, a note has now been belatedly produced. Also, the late destruction of documents that may have been relevant, by Mr Cocke."*

If the examples of destruction and concealment of evidence set out above actually did make it into the minds of the Tribunal, as Judge Martin claims, they could not have stayed in their minds for very long as absolutely no action was taken by the Tribunal to investigate or refer the matter on. There wasn't even so much as a negative inferences.

Broadly the Judge Martin Judgment attempts to get all the senior NHS people and lawyers off the hook for misleading the press, MPs and even the Board of an NHS Trust. The Judgment then tries to frame me the whistleblowing junior doctor as the dishonest charlatan.

Clearly such a plan would have worked better if Mr Cocke had decided not to go rogue exposing the NHS Trust's secrets and if I hadn't shown up with 2 consultant anaesthetists, my wife, a former health minister explaining clearly how the NHS and their lawyers had misled the press and MPs. However, Judge Martin was undeterred and didn't let a little thing like evidence from 3 doctors and a former health minister or the deliberate destruction and concealment of key documents get in the way of letting an NHS Trust and a bunch of powerful lawyers of the hook.

But if you read Judge Martin's Judgement, I am not sure it actually does get the NHS and it's lawyers off the hook. Embedded in it are judicial findings of fact that drop my opponents and their lawyers right in it for what they have told the press and MPs about my case. Take paragraph 155;

> *"The Tribunal finds that the wording of issue 4.1.(a) (iii) is interesting.* ***The wording is that the Respondent decided not to pursue the Claimant for its legal fees before he withdrew his case.*** *It does not say that legal fees were not discussed in the without prejudice discussions leading to the settlement. However, even taking this into account,* ***the Tribunal finds that it was on settlement that the Respondent decided definitively not to purse costs.*** *The Tribunal considered whether this was something that was substantial or trivial rendering this de minimus and of course, whether this was said because the Claimant made a protected disclosure.* ***The Tribunal finds that in the eyes of the Claimant's Crowdfunders this would be significant. They inevitably had concerns and questions about why the Claimant settled and did not go on to conclude the case that they had funded. The impression given here is that the Claimant knew that the Respondent was not going to pursue costs when the Claimant was saying that it was the costs matters that meant he settled. The Tribunal finds that this is a detriment."***

This factual finding of the Tribunal cannot mean anything other the NHS and its lawyers lying to the press, MPs and the hospital board and in doing so trying to make me out to be a liar with my reason for settling the case.

But that is not all. Paragraph 123 of the Tribunal Judgment judicially finds that a reference to a proposed wasted cost application against my former solicitor was made. This was another thing that was explicitly denied to the press, MPs and to the NHS Trust Board by NHS managers and the lawyers involved in the case;

> *"There was a possibility of wasted costs in relation to the late disclosure of covert recordings the Claimant had made which came out during his evidence. Mr Cooper says it was HEE that raised this and not the Respondent. Given that this would be an order against the Claimant's then solicitors, Mr Cooper says it made no sense to raise it as part of without prejudice negotiations."*

These findings get even trickier for the NHS and their lawyers when the evidence is examined relating to the wasted cost threat that was clearly put to Judge Martin . Although Judge Martin records in her Judgment at paragraph 123 ;

> *"Mr Cooper (the Lewisham and Greenwich Barrister) says it was HEE that raised this and not the Respondent. Given that this would be an order against the Claimant's then solicitors, Mr Cooper says it made no sense to raise it as part of without prejudice negotiations."*

Mr former barrister Chris Milsom in his evidence quite clearly contradicted Ben Cooper KC's account on wasted costs. Mr Milsom stated quite clearly in email evidence in 2018 that he also placed into his Tribunal statement for June 2022 that it was both Ben Cooper KC for Lewisham and Greenwich NHS Trust and Angus Moon KC for Health Education England that made reference to pursuing wasted costs against my former solicitor Tim Johnson Law. Ben Cooper's attempt to distance himself from wasted costs is not credible;

> *"It is perhaps worth adding that there was an unrelated discussion as to wasted costs which was raised as an issue by* ***both Respondents.*** *It was alleged that my instructing solicitors had failed to disclose various covert recordings of discussions between Dr Day and personnel from the Respondents which were seen to be pertinent to the claim."*

In addition, my June 2022 tribunal statement clearly described (as would have anyone present in the public gallery in October 2018) that it was both the barrister acting for HEE (Angus Moon KC) and Lewisham and Greenwich (Ben Cooper KC) that were openly and vigorously seeking wasted costs against Tim Johnson Law.

> *"The wasted cost threat was obviously a live issue at the October 2018 Tribunal, as on Thursday 11 October 2018,* ***both Mr Cooper and Mr Moon*** *sought in open Tribunal for a Tim Johnson Law solicitor to be cross examined on the covert audio matter prior to the respondents' witnesses."*

The London South Regional Judge Freer would also be able to confirm this from his notes of the 2018 hearing which I have been so far refused.

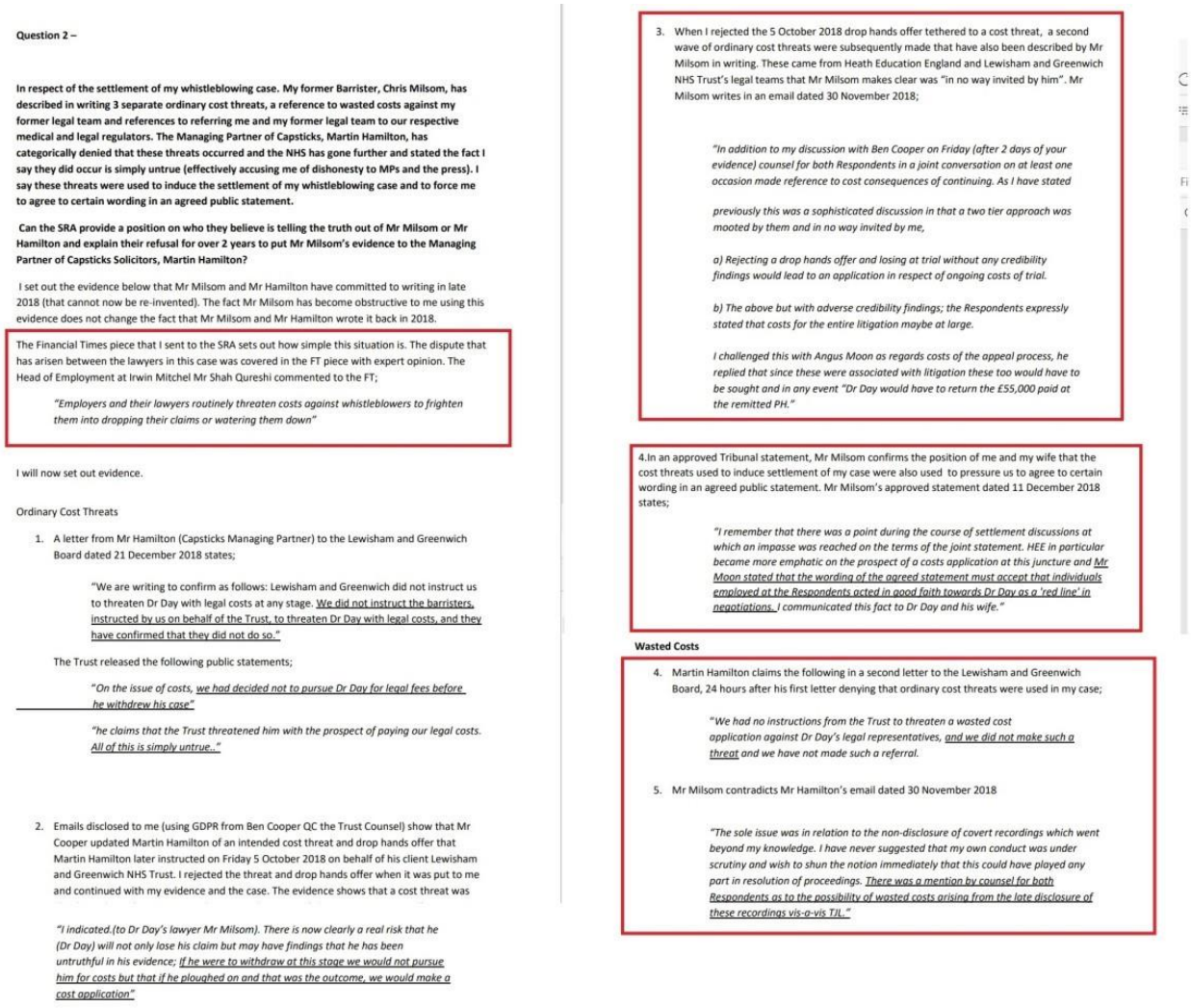
Both HEE and Lewisham and Greenwich NHS Trust have denied that a wasted costs threat were made but it is clear their barristers made such threats and also acted on them in open Tribunal by way of seeking to cross examine Tim Johnson Law.

Judge Martin has just ignored this evidence to the clear benefit of Ben Cooper KC and the managing partner of Capsticks. For some reason Judge Martin did not want to help Angus Moon KC, Hill Dickinson or HEE quite so much and this finding is a problem for them given their denial of the use cost threats in my case.

As recorded by Judge Martin, Mr Cooper attempted under oath to blame HEE's barrister Mr Moon and distance himself from the wasted cost threat in order to protect himself and the managing Partner of Capsticks who by that time had told the Board of Lewisham and Greenwich the following;

> *"1. We had no instructions from the Trust to threaten a wasted cost application against Dr Day's legal representatives, and we did not make such a threat on the Trust's behalf."*

Judge Martin choses to ignore this clear conflict of evidence on wasted costs and what it means for the Managing Partner of Capsticks. However, wasted costs is just one example. I sent a letter to the legal regulator (SRA) setting our written evidence of the multiple cost threats that I was subject to and comparing them to the Managing Partner's response to the Lewisham and Greenwich Board which informed a Times Article. Both can be read here. Below is screenshot of my SRA letter where all the evidence of cost threats ignored by Judge Martin (and the SRA) is highlighted in red.



Question 2 –

In respect of the settlement of my whistleblowing case. My former Barrister, Chris Milsom, has described in writing 3 separate ordinary cost threats, a reference to wasted costs against my former legal team and references to referring me and my former legal team to our respective medical and legal regulators. The Managing Partner of Capsticks, Martin Hamilton, has categorically denied that these threats occurred and the NHS has gone further and stated the fact I say they did occur is simply untrue (effectively accusing me of dishonesty to MPs and the press). I say these threats were used to induce the settlement of my whistleblowing case and to force me to agree to certain wording in an agreed public statement.

Can the SRA provide a position on who they believe is telling the truth out of Mr Milsom or Mr Hamilton and explain their refusal for over 2 years to put Mr Milsom's evidence to the Managing Partner of Capsticks Solicitors, Martin Hamilton?

I set out the evidence below that Mr Milsom and Mr Hamilton have committed to writing in late 2018 (that cannot now be re-invented). The fact Mr Milsom has become obstructive to me using this evidence does not change the fact that Mr Milsom and Mr Hamilton wrote it back in 2018.

The Financial Times piece that I sent to the SRA sets out how simple this situation is. The dispute that has arisen between the lawyers in this case was covered in the FT piece with expert opinion. The Head of Employment at Irwin Mitchel Mr Shah Qureshi commented to the FT;

"Employers and their lawyers routinely threaten costs against whistleblowers to frighten them into dropping their claims or watering them down"

I will now set out evidence.

Ordinary Cost Threats

1. A letter from Mr Hamilton (Capsticks Managing Partner) to the Lewisham and Greenwich Board dated 21 December 2018 states;

   "We are writing to confirm as follows: Lewisham and Greenwich did not instruct us to threaten Dr Day with legal costs at any stage. We did not instruct the barristers, instructed by us on behalf of the Trust, to threaten Dr Day with legal costs, and they have confirmed that they did not do so."

   The Trust released the following public statements;

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

   "he claims that the Trust threatened him with the prospect of paying our legal costs. All of this is simply untrue.."

2. Emails disclosed to me (using GDPR from Ben Cooper QC the Trust Counsel) show that Mr Cooper updated Martin Hamilton of an intended cost threat and drop hands offer that Martin Hamilton later instructed on Friday 5 October 2018 on behalf of his client Lewisham and Greenwich NHS Trust. I rejected the threat and drop hands offer when it was put to me and continued with my evidence and the case. The evidence shows that a cost threat was

   "I indicated.(to Dr Day's lawyer Mr Milsom). There is now clearly a real risk that he (Dr Day) will not only lose his claim but may have findings that he has been untruthful in his evidence; If he were to withdraw at this stage we would not pursue him for costs but that if he ploughed on and that was the outcome, we would make a cost application"

3. When I rejected the 5 October 2018 drop hands offer tethered to a cost threat, a second wave of ordinary cost threats were subsequently made that have also been described by Mr Milsom in writing. These came from Heath Education England and Lewisham and Greenwich NHS Trust's legal teams that Mr Milsom makes clear was "in no way invited by him". Mr Milsom writes in an email dated 30 November 2018;

   "In addition to my discussion with Ben Cooper on Friday (after 2 days of your evidence) counsel for both Respondents in a joint conversation on at least one occasion made reference to cost consequences of continuing. As I have stated

   previously this was a sophisticated discussion in that a two tier approach was mooted by them and in no way invited by me,

   a) Rejecting a drop hands offer and losing at trial without any credibility findings would lead to an application in respect of ongoing costs of trial.

   b) The above but with adverse credibility findings; the Respondents expressly stated that costs for the entire litigation maybe at large.

   I challenged this with Angus Moon as regards costs of the appeal process, he replied that since these were associated with litigation these too would have to be sought and in any event "Dr Day would have to return the £55,000 paid at the remitted PH."

4. In an approved Tribunal statement, Mr Milsom confirms the position of me and my wife that the cost threats used to induce settlement of my case were also used to pressure us to agree to certain wording in an agreed public statement. Mr Milsom's approved statement dated 11 December 2018 states;

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

Wasted Costs

4. Martin Hamilton claims the following in a second letter to the Lewisham and Greenwich Board, 24 hours after his first letter denying that ordinary cost threats were used in my case;

   "We had no instructions from the Trust to threaten a wasted cost application against Dr Day's legal representatives, and we did not make such a threat and we have not made such a referral.

5. Mr Milsom contradicts Mr Hamilton's email dated 30 November 2018

   "The sole issue was in relation to the non-disclosure of covert recordings which went beyond my knowledge. I have never suggested that my own conduct was under scrutiny and wish to shun the notion immediately that this could have played any part in resolution of proceedings. There was a mention by counsel for both Respondents as to the possibility of wasted costs arising from the late disclosure of these recordings vis-a-vis TJL."

That all said, Judge Martin's flawed findings indicate that a proposed wasted cost application or wasted cost threat occurred and show as false any denial that cost threats in general or wasted costs threats in particular were used to induce the settlement of my case in 2018.

Judge Martin has also turned a blind eye to a fundamental conflict of interest created by a wasted cost threat being made against my own former legal team whilst I was under oath. It is this conflict of interest that led my former lawyers to insert a clause into the settlement that only lawyers could benefit from;

> *" This Agreement is also in full and final settlement of all or any claim or application for costs or expenses that any of the Parties may have against any other Party* ***or Party's representative,*** *whether in relation to the Claims or their conduct or otherwise (my emphasis)."*

You just need to look at Paragraph 315 of my June 2022 Tribunal statement to see the mess the lawyers on both sides got themselves in at the October 2018 hearing of my case.

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

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

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

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

c) According to Hill Dickinson **[Page 147-148],** Mr Milsom proceeded contrary to my explicit instruction on Monday 8 October 2018 to continue to negotiate settlement proposing broad terms which developed into a proposed confidentiality clause and a clause to protect all lawyers in the litigation from wasted costs. It was impossible

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

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

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

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

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

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

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

317. Given what Mr Milsom describes in his email dated 30 November 2018 **[Page 1123],** It should be noted and explored why Mr Cooper and Mr Moon's DSAR Response does not also include similar file notes and emails to their solicitors referring to the discussions between Counsel and solicitors that occurred after 5 October 2018 up until to settlement on 15 October 2018. Mr Milsom clearly describes these subsequent 'Without Prejudice Discussions'. The detailed account of the events of Friday 5 October found in multiple emails and file notes from the Respondent's counsel, is in stark contrast to the complete absence of material for the subsequent discussions between counsel once I had rejected the drop hands offer.

Judge Martin deals with this chasm in the accounts between the lawyers that agreed the settlement of my case at paragraph 130 of her Judgment which is frankly laughable;

> "*Mr Milsom candidly said that some of the emails he sent at the time of the settlement process were not entirely accurate*"

Judge Martin was also the Judge that refused me a hearing to challenge my settlement in 2018. But in 2022 she has effectively found that both me and the Board of Lewisham and Greenwich did not have accurate information from our lawyers when agreeing to the settlement - and I think that is putting it mildly.

So what is Judge Martin supposed to do?

By the end of my June 2022 hearing, Judge Martin and her tribunal had heard and seen evidence from 6 individuals that showed clearly that MPs, the press and an entire NHS Board had been misled about my case by senior NHS managers and lawyers. Even Judge Martin's own flawed Judgment comes through for me on this.

Judge Martin has also made factual findings of indicating a previously denied wasted cost threat was made against my former lawyers. This is associated with the following actions from my former barrister Chris Milsom;

- agreeing to remove reference to the 2 avoidable deaths from the trial chronology before the 2018 hearing (without my instructions),
- "not being entirely accurate with me in emails (as Judge Martin puts it in paragraph 130 of her Judgment)",
- seeking settlement of my case off instruction,
- seeking a gagging clause on my behalf
- proposing then inserting a clause in a settlement to protect all lawyers from wasted costs.

I think the above makes me the first NHS whistleblower in NHS history to attempt to gag myself and the NHS Trust that I whistleblew at!

At the end of the June 2022 hearing Judge Martin and the Tribunal had a choice to make which was to sort this situation out or continue the cover up. It is actually the same choice that the NHS managers had all the way back in 2014. All Judge Martin has done is what everyone else has done and that is to ignore all the evidence and instead decided to attack and smear me. I now turn to Judge Martin's attempts at this.

Dr Chris Day is the problem in this case

Judge Martin and her tribunal attempt to explain the serious issues in this case with the narrative of me being a dishonest person with a vexatious whistleblowing case. The settlement agreement is sold as an act of mercy to stop people finding out the truth about me and my vexatious whistleblowing case in a public London South Employment Tribunal Judgment. This is despite me being cross examined on it now twice for several days in front of a public gallery. Was I really the person that was going to be damaged by the facts of my case coming out in public?

Was I exposed in the October 2018 hearing as a vexatious whistleblower?

My 6 days of cross examination by Ben Cooper KC and Angus Moon KC in October 2018 was not done in secret and was witnessed by a packed public gallery including several journalists. The journalists have become even more supportive as I set out in the Employment Tribunal will see you now doctor. My evidence at the October 2018 Tribunal was reported in Private Eye which can be read here. Private Eye are not mugs, if I had gone to pieces in the witness box this article would not have been written;

> *".In August 2013, Dr Day was training in Emergency Medicine and was placed by HEE in the intensive care unit (ICU) of Queen Elizabeth Hospital Woolwich. With no prior experience in anaesthetics and intensive care, Day was alarmed to find a single junior doctor was responsible at night for up to 18 ICU patients, plus any ICU 'outliers', and was expected to admit new patients. Dr Day raised the concern that this was unsafe. In response he was told that 'the system has worked well for years.' Day discovered four other ICU juniors with no prior experience of intensive care or anaesthetics. In November 2013, core standards*

were published for ICUs which stated that there should be no more that 8 patients per doctor, and immediate access to an anaesthetist skilled with advanced airway techniques. In Woolwich, the on-call anaesthetist was also covering operating theatres and was not always immediately available. In November and December 2013, two patients deaths happened at night under the care of the ICU, with non-anaesthetic trained junior doctors. They were declared as Serious Untoward Incidents (SUIs) and went to Coroner's inquest. In one, a chest drain punctured the liver and the patient died from haemorrhage. Another patient died because of a failure to investigate the cause of low blood pressure and to admit in a timely manner to ICU. Both SUIs were somehow excluded from the safety investigation into Dr Day's concerns, which concluded the night time ICU staffing was 'acceptable'."

Following the October 2018 hearing, I have gained the support of the BMA and was able to produce 2 consultant anaesthetists and a former health minister as supportive tribunal witnesses. This is all very surprising if I was exposed for all to see in October 2018 as a dishonest and vexatious whistleblower.

Is my whistleblowing case factually weak and vexatious?

Since de-instructing my former barrister Chris Milsom, I have forced multiple concessions from my opponents that simply would not have been possible if my whistleblowing case was vexatious . Some have been won in hearings when I have been acting without lawyers and would not have been possible without strong facts because frankly I am not a magician. These concessions and how they were won were emphasised to Judge Martin and set out in my main June 2022 statement at paragraph 177 for Lewisham and Greenwich and for HEE at paragraph 178;

- [178]a Conceding protected disclosures including reasonable belief in issues of patient safety and deliberate concealment; (After 6 years of denial, I achieved this at a hearing without lawyers on 13 November 2020 with this document.)

- [178]b Concession that formal investigation was terrible and misleading

- [178]c Conceding a false account of my protected disclosure in a formal report;

- [178]d Conceding that my formal ARCP/Appraisal document was inappropriate

- [178]e Conceding that a briefing document sent by former Post Graduate Dean was misleading

- [178]f Conceding use/sharing of my personal data described by Judge Andrews in a Judgment dated 16 February 2022 as ""wholly inappropriate" (but no action taken)

- [178]g Concession on "perhaps being deceitful" from Dr Frankel (recorded in a Judgment by Judge Andrews dated 16 February 2022 but no action taken)

The above concessions alone indicate a credible whistleblowing case and a collection of serious whistleblowing detriments. How does Judge Martin explain ignoring such serious issues?

Even my own lawyers thought I was dishonest

One of the most damaging detriments the NHS attempted against me is to claim to the press, MPs and on their website that both my solicitor and barrister not only thought my evidence was untruthful but decided to approach the NHS lawyers and give them this impression whilst I was still under oath giving evidence;

> *"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"*

Contrary to evidence from all the people involved confirming this didn't happen. Judge Martin and her tribunal finds that it did happen. Paragraph 156 of the Judgment refers to what is quoted above in the Trust's public statements as " *correct and not a detriment*". To make this finding the Tribunal has ignored and re-invented what the transcript clearly says and this is not just from my former barrister Chris Milsom but also the NHS position. We are taking this shambolic point on appeal. The transcript records Chris Milsom responding to the above detriment;

> *"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.".*

The NHS barrister cross examining Chris Milsom then clarifies Ben Cooper's position on the detriment on behalf of Lewisham and Greenwich NHS Trust;

> *"I don't think Mr Cooper is suggesting that you ever agreed or that your client was untruthful"*

***We applied and funded an official transcript from an approved provider from the MOJ so this text cannot be disputed by anyone including the Judge**

If ignoring the above was not enough. The Tribunal also ignored or re-invented written evidence on this point that it was taken to. Firstly an email to me from Chris Milsom stating that he;

> "certainly made no comments as to your evidence being untruthful."

Another email that is ignored by Judge Martin this time from my former solicitor Tim Johnson states,

> "*I don't think for a moment that Chris Milsom said anything to Ben Cooper or anyone else, to suggest that your evidence was untruthful. I have no evidence to suggest Chris did that and I don't believe he would."*

The Tribunal has quite literally ignored or re-invented 4 sources of evidence in order to make me seem dishonest in its Judgment that it has published online. Now why would it want to do that?

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Dishonest, underhand and **obsessive belief in his victimhood**

Building on attempts to make me look dishonest by fabricating the position of no less than 3 lawyers. The Tribunal has chosen to cut and paste Ben Cooper KC, the Trust's former barrister accusing me in his witness statement of being dishonest and a few other things;

> *"Mr Cooper sets out why he was considering making such an approach to the Claimant after his evidence had completed. His witness statement sets out his impression of the Claimant's evidence. His impression was that the Claimant had an* ***"obsessive belief in his victimhood"*** *resulting in him making a*

> *"**progressively more elaborate re-writing of history** by him to fit his narrative". He considered that the Claimant's evidence was "**dishonest and underhand** in pursuit of what he saw as the virtue of his case".*

The function of doing this seems to be to make it appear legitimate for me as a doctor giving evidence in an important whistleblowing case to have been interrupted with a cost threat or proposed cost application. The reasoning in the Tribunal's Judgment appears to go something like this; because it is apparently likely I would be found to be untruthful (with no basis), the cost threat Mr Cooper makes and the NHS denies him making isn't really a cost threat (because as I say it is apparently likely that I will be found to be untruthful). Then that apparently means that no one is actually lying when this cost threat is denied (effectively because I apparently deserved it). This is staggering logic.

You might think if Ben Cooper King's Counsel in a sworn witness statement was going to accuse a doctor of being dishonest or progressively and more elaborately *re-writing history or of a "dishonest and underhand pursuit*" he might have at least one or two examples of what he means from the doctor's witness statement. Mr Cooper didn't – not even one.

In contrast, I had no problems producing examples of things Ben Cooper KC had written down in his witness statement that fitted comfortably into what Mr Cooper was accusing me of. I produced a second Tribunal statement dedicated to this purpose which Judge Martin allowed after some resistance from the NHS.

My tribunal statement initially made the point that was then put to Ben Cooper in cross examination by Andrew Allen KC

> "*Mr Cooper, when making his allegations of dishonesty against me, provides no actual examples or quotes from my 44 pages of tribunal statement, Instead, he relies on his own account of my verbal evidence; an account which I consider disingenuous."*

My statement started having its effect on Mr Cooper even before my barrister Andrew Allen KC had started his cross examination of him. Mr Cooper had to ask permission to alter his tribunal statement in material ways even before swearing in to give his oral evidence. He did this in front of Judge Martin (another fact she ignored in her Judgment). Changing a witness statement is not a good look for a KC. Perhaps it could be said it is a bit rich of Ben Cooper to accuse me of re-inventing history if he has to alter his own witness statement during a court hearing about my case.

Mr Ben Cooper KC

You can read my 15 pages of Ben Cooper statement here. After reading it you may wonder what on earth Ben Cooper said in response. The answer to that question was not something we were allowed to find out. Judge Martin decided to rescue him by stopping Andrew Allen KC's cross examining of him. The procedural unfairness of our halted cross examination of Ben Cooper is a point we are taking on appeal. Judge Martin still inserted Mr Cooper's insulting words to describe me into her Judgment but prevented my barrister testing them. Our Notice of Appeal states;

> *"Contrary to the principle of procedural fairness, the Tribunal, having stopped the cross-examination, relied on untested content of Mr Cooper's witness statement"*

It is also interesting how keen Judge Martin was to put the untested venom (that she prevented us testing) of Ben Cooper KC into her public judgment whilst leaving out of her Judgment the actual words of my day to day consultant supervisor at Lewisham and Greenwich NHS Trust. Judge Martin was taken to evidence of this and

the strongly positive view of over 30 members of staff that worked with me at the Queen Elizabeth Hospital but just turned a blind eye. I suppose that didn't fit her narrative.

36. Dr Sauer, the Claimant's day to day clinical supervisor at the First Respondent described the Claimant in a report that was sent the Second Respondent's formal investigation;

> *"a competent and confident trainee with a skill set which exceeds the expectations of someone of his level of training... He was very conscientious, absolutely reliable and always attended punctually. He took very little sick leave and was always willing to work flexibly to enable the department to cope with the clinical workload and was unfailingly cheerful and as a consequence a popular colleague."*

I will end where I begun. Judge Martin's Judgment is an insult to NHS staff and patients alike and is a further indication of the reality of the justice system in this country and who it really serves. I sense in the wake of the Post Office Scandal peoples' patience and tolerance for this kind of thing is wearing a bit thin. In that sense my appeal to the Employment Appeal Tribunal on 27 February could not come at a better time (more details on that here).

I will be sending this article to the President of the Employment Tribunal as I feel quite strongly Judge Martin and her wing members should not be allowed to hear other cases until all this is looked into unless President Clark does not see a problem with any of this.

If nothing is done this will happen again and again. Just this weekend I read about this happening to a nurse at the same Trust, against the same law firm involved with the same London South Employment Tribunal.

How the toxic management of a health trust and law firm Capsticks got rid of a senior nurse whistleblower | Westminster Confidential (davidhencke.com)

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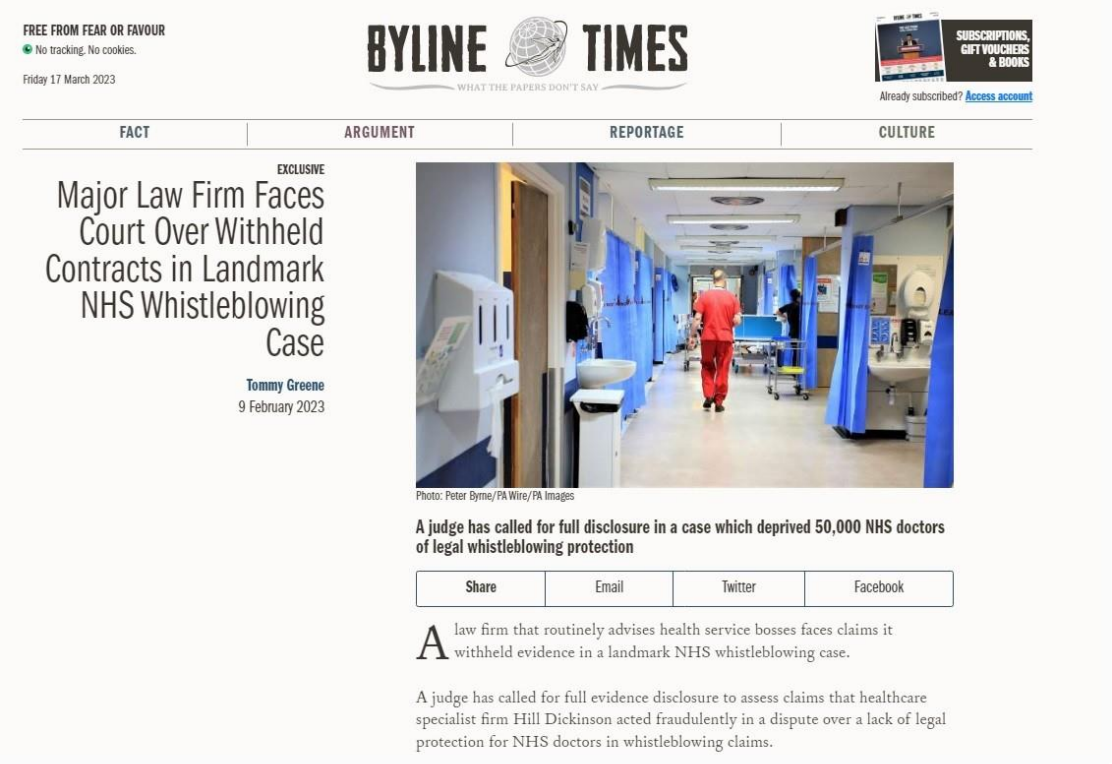
Thurdy Campbell A former senior nurse at Queen Elizabeth Hospital, Woolwich has come forward with a fresh tale of the toxic management at the Lewisham and Greenwich NHS Trust and their...

Westminster Confidential

****Arguing doctors out of whistleblowing protection in an attempt to prevent this case ever being heard.



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EXCLUSIVE

Major Law Firm Faces Court Over Withheld Contracts in Landmark NHS Whistleblowing Case

Tommy Greene
9 February 2023

Photo: Peter Byrne/PA Wire/PA Images

A judge has called for full disclosure in a case which deprived 50,000 NHS doctors of legal whistleblowing protection

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A law firm that routinely advises health service bosses faces claims it withheld evidence in a landmark NHS whistleblowing case.

A judge has called for full evidence disclosure to assess claims that healthcare specialist firm Hill Dickinson acted fraudulently in a dispute over a lack of legal protection for NHS doctors in whistleblowing claims.

If you have read this far you can probably see why certain people have fought hard to stop this case ever being hard. Their methods at doing this are now subject to a wasted cost application that is progressing in the ET and EAT. To find out more click here.