IN THE EMPLOYMENT APPEAL TRIBUNAL

Case Numbers: EA-2022-001347-NLD and EA – 2023-000545-NLD

ON APPEAL FROM THE LONDON SOUTH EMPLOYMENT TRIBUNAL

Case Number: 2300819/19

B E T W E E N:

DR. CHRISTOPHER DAY

Appellant

-and-

LEWISHAM AND GREENWICH NHS TRUST

Respondent

Application Under EAT Rule 33 (1) (c) for Review

Bundle of documents in Support

Chris Day <chrismarkday@gmail.com>
to EATAssociates, Yatish

Tue, Mar 12, 3:48 PM (18 hours ago)

Dear Sir/Madam

I am the appellant in the above appeal

Please could this email and attachments be but before Deputy High Court Judge Andrew Burns

Attached to this email

1. Cover letter to Judge Burns
2. Application under EAT Rule 33 (1) (c)
3. Signed form for an EAT Direction or Order
4. Judgment of EJ Self dated 19 January 2024
5. WS Dr Chris Day
6. Second WS of Dr Chris Day in response to evidence from Ben Cooper KC
7. Sealed Order of Judge Burns dated 1 March 2024

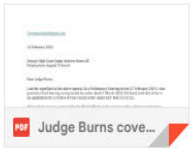
Please confirm receipt.

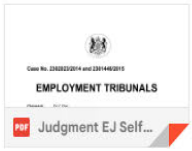
Yours,

Dr Chris Day

7 Attachments • Scanned by Gmail

Application for di...


Judge Burns cove...



Judgment EJ Self...


Dr Chris Day Mai...


Second WS Dr Ch...


Sealed Order 1 M...


Application of

HM Courts & Tribunals Service

Employment Appeal Tribunal

For Tribunal use only

Tribunal Ref. No.

Date filed

T461

Application for direction or order

Name

Dr Christopher Mark Day

I am

- ✔ an appellant
- ☐ a respondent
- ☐ other, please specify

Appeal number

EA-2022-001347-NLD

Other parties to the appeal

Lewisham and Greenwich NHS Trust

1. This is an application

- ☐ for a general case management order or direction pursuant to Section 7, including any application for an extension of time
- ☐ to appeal against an order made by the Registrar (see Section 7.14)
- ☐ to amend (see Section 8.2)
- ☐ for an urgent hearing or consideration of an application (see Section 8.3)
- ☐ for an adjustment or adjustments because of a medical condition or disability (see Section 8.4)
- ☐ to postpone a hearing (see Section 8.5)
- ☑ to review a previous decision of the EAT (see Section 8.6)
- ☐ for restriction(s) to the open justice principle (see Section 8.7)
- ☐ to view or obtain copies of documents (see Section 8.8)
- ☐ to add or remove a party (see Section 8.9)
- ☐ to rely on material before the Employment Tribunal (see Section 8.10)
- ☐ to ask the Employment Tribunal questions (see Section 8.11)
- ☐ to rely on evidence that was not before the Employment Tribunal (see Section 8.12)
- ☐ to rely on an argument that was not raised before an Employment Tribunal (see Section 8.13)
- ☐ by a party for a remote hearing (see Section 8.14)
- ☐ to observe a hearing remotely (see Section 8.15)
- ☐ to dispose of an appeal or cross-appeal by consent (see Section 8.16)
- ☐ some other type of application. Please state the application you wish to make.

2. I will copy this application to the other party or parties to the appeal

☐ Yes

✔ No – if no, state your reason

This is an application to review a decision made after an Appellant only hearing

3. Have you made a similar application before?

✔ No

☐ Yes – if yes, state what change in circumstances is relied on for making the application again

In making this application you must set out all the grounds on which you rely

The determination of your application will generally be final and you will not be able to make a similar application again unless there has been a material change in circumstances. (Note that any challenge to the determination of an appeal against an order made by the Registrar would have to be by appeal to the Court of Appeal (Court of Session in Scotland) - see section 7.14.10.)

Applications that rely on medical evidence
(For example, for adjustments or postponement)

4. I have attached all relevant medical evidence

☐ Yes

☐ No – if no state your reason

N/A

Applications that rely on other evidence

5. I have attached all relevant evidence

✔ Yes

☐ No – if no state your reason

All applications

6. The grounds for my application are:

You must set out the grounds using numbered paragraphs.

The grounds of my application are set out in the attached document.

Please note that there are two linked appeals :-
1. EA-2022-001347-NLD
2. EA-2023-000545-NLD
This application is for reeview of the decision made by Deputy Judge Burns in relation to EA-2022-001347-NLD, made on 27 Febeirary 2024 and issued by an order sealed on 1 March 2024.

Signed

Dated

Day		Month		Year			
1	2	0	3	2	0	2	4

EMPLOYMENT APPEAL TRIBUNAL

Appeal No EA-2022-001347-NLD
EA-2023-000545-NLD

B E F O R E

Andrew Burns, Deputy Judge of the High Court
SITTING ALONE

IN THE MATTER of an Appeal under Section 21(1) of the Employment Tribunals Act 1996 from the decision of an Employment Tribunal sitting at London (South) and sent to the parties on 16 November 2022

B E T W E E N :

Day Mark Christopher — Appellant

- and -

Lewisham and Greenwich NHS Trust — Respondent

UPON HEARING Mr Andrew Allen KC of Counsel on behalf of the Appellant

AND UPON the Liability Appeal (EA-2022-001347-NLD) and the Costs Appeal (EA-2023-000545-NLD) having been set down for a Preliminary Hearing pursuant to Section 4.3 of the Employment Appeal Tribunal Practice Direction 2023

IT IS ORDERED THAT:

1. Grounds 2,3, 5 and 7 of the Liability Appeal and the Costs Appeal be set down for a full hearing to the extent and for the Reasons attached to this Order. The time estimate for the full hearing of both appeals (including time for judgment to be delivered – see Section 11.2 Employment Appeal Practice Direction 2023) is 1 Day *the parties are to notify the Tribunal in writing if they disagree with this time estimate*. The appeals are Category A.

2. All other grounds are dismissed.

3. Permission is granted to amend the Notice of Appeal in the Liability Appeal in accordance with the Grounds permitted by this Order subject to a draft Amended Grounds of Appeal being submitted to the

Employment Appeal Tribunal for approval by the Judge within 7 days of the sealed date of this Order. The Respondent has liberty to apply on paper within 14 days of the sealed date of this Order on notice to the other party to vary or discharge the Order in this paragraph and/or for consequential directions as to the hearing or disposal of the appeal.

4. Within 28 days of the seal date of this Order, the Respondent must lodge with the Employment Appeal Tribunal and serve on the Appellant an Answer to both appeals, and if such Answer include a cross-appeal shall forthwith apply to the Employment Appeal Tribunal on paper on notice to the Appellant for directions as to the hearing or disposal of such cross-appeal.

5. The parties will be notified of the hearing date in due course. The hearing will be conducted in person. If any party has a concern about attending a hearing in person they should raise it in writing to the Employment Appeal Tribunal using the application form at Annex 2 of the Employment Appeal Tribunal Practice Direction 2023 (with a copy to the other party or parties) within 14 days of the seal date of this Order or, if the concern arises later because of a change in circumstances, as soon as practicable after the concern arises. The other party or parties may then write to the Employment Appeal Tribunal (copy to the party that has raised the concern) with any comments, within 7 days of receipt. A Judge or the Registrar will thereafter decide whether the hearing should proceed in-person or remotely or some other order should be made, and the parties will be notified of their decision. The Employment Appeal Tribunal may, itself, notify the parties that the hearing will be converted to a remote hearing, should it be decided that it is appropriate or necessary to do so.

6. The parties shall co-operate in compiling and agreeing and shall, by no later than 28 days prior to the date fixed for the hearing of the full appeal, lodge with the Employment Appeal Tribunal 2 hard copies and an electronic copy of an agreed, indexed and paginated bundle of material documents for the hearing of the appeal prepared in accordance with Sections 11.3 and 11.4 of the Employment Appeal Tribunal Practice Direction 2023. In addition to those set out at 11.3, other relevant documents which are necessary fairly to consider the appeal and that you are likely to refer to at the full hearing may be added as a Supplementary bundle. If any Supplementary Bundle is more than 50 pages long, you must seek permission from the Employment Appeal Tribunal to rely on it.

7. The Appellant shall lodge with the Employment Appeal Tribunal and serve on the Respondent a chronology and the parties shall exchange and lodge with the Employment Appeal Tribunal 2 hard copies and an electronic copy of skeleton arguments in the form required by Section 11.6 of the Employment Appeal Tribunal Practice Direction 2023, not

less than 14 days before the date fixed for the hearing of the full appeal.

8. The parties shall co-operate in agreeing a list of authorities and shall jointly or severally lodge a hard copies and an electronic copy of a bundle of authorities in the form required by Section 11.7 of the Employment Appeal Tribunal Practice Direction 2023 not less than 7 days prior to the date fixed for the full hearing.

9. The parties are permitted to apply for this Order, or part of it (save for paragraph 1), to be varied, supplemented or revoked. Any such application should be copied to the other party or parties. The Employment Appeal Tribunal may, on its own initiative, vary, supplement or revoke this Order, or part of it. If this order, or any part of it is varied, supplemented or revoked, the parties will be notified.

D A T E D 27 February 2024

TO: Slater and Gordon for the Appellant

Capsticks for the Respondent

The Secretary, Central Office of Employment Tribunals, England & Wales

(Case No. 2300819/19)

Preliminary Hearing

Reason/s Allowed to Proceed

Appellant	Day Mark Christopher
Respondent	Lewisham and Greenwich NHS Trust
EAT number	EA-2022-001347-NLD EA-2023-000545-NLD
Date of Hearing	27 February 2024
Judge	Andrew Burns, Deputy Judge of the High Court
Topic(s) (2 max.)	32A
Allowed to Proceed to Full Hearing	

Note on requested correction to Judgment

Following the hearing the Appellant emailed the EAT with his application for reconsideration and his witness statement dated 11 December 2018.

The Appellant writes that I "wrongly stated in his oral Judgment at my PH on 27 February 2024, that my application to set aside the 2018 settlement agreement was made on the basis of duress and that it was not surprising it was refused on that basis implying that it was futile. This is damaging to me as a crowdfunder. The application was NOT based on duress but on mistake/misrepresentation". He says that 'duress' was the label used by the ET. He invites me to correct that reference in my judgment.

I note that the application for reconsideration was referred to by the ET as being on the grounds of 'duress' which I then repeated in my oral judgment. It appears that is a reference to paragraph 27 of Dr Day's witness statement supporting the reconsideration application in which he says that "The financial duress of the costs threat was the reason for my agreement to such wording".

However the end of the same statement states that the basis for his reconsideration application that he was operating under a "mistake or pursuant to a misrepresentation" that costs threats were made by the Respondents. I am content to correct any transcript of my judgment to refer to the basis of the reconsideration as being 'mistake or misrepresentation' rather than 'duress' as that appears to be a better description of the Appellant's grounds for the reconsideration.

Reasons:

Ground 1: Failure to make reasoned findings on the issues. The ET did not need to make findings on whether the protected disclosures tended to show deliberate concealment or endangering health and safety as it was admitted that they were protected disclosures, there was no argument before that the difference was probative on the issue of causation and the precise type of protected disclosure would be unlikely to affect the findings of fact on causation. It is not arguable that the ET failed to properly adjudicate and engage with the Claimant's claims.

Ground 2: The stark language of para 154 that "If something put in one of the published statements is true, then it is not a detriment." is an arguable error of law. It is arguable that the detriment issue was wider than whether the Respondent made 'false and defamatory statements'. It is arguable that the ET's findings about the content and tone of the statements and the CQC concerns were relevant factors to whether they amounted to a detriment and should have been taken into account. It is arguable that it was a detriment to send them to a number of MPs and local public officials. It is not arguable that the ET did not have regard to the timing of the Respondent's decision not to pursue costs against the Claimant as it used this distinction to find in paragraph 155 that this was not accurate and was a detriment. It is not arguable that it did not take into account the evidence of both Mr Milsom and Mr Cooper or the agreed statement as that evidence was specifically addressed and considered. There is nothing perverse in the finding that Mr Milson initiated the conversation and that would have involved asking about the Respondent's position.

Ground 3: It is not arguable that the ET drew adverse inferences from the Claimant's legal privilege. However it is arguable that the ET perversely omitted to draw adverse inferences from the Respondent's disclosure failures, Mr Travis' inaccurate evidence at para 83 and 84 and the deletion of documents at para 85 or Mr Cocke evidence about notes of his meeting with Sir Norman Lamb. It arguably gave the ET at least some reason to doubt the rationale for publishing the statements when they found in para 168 that they had no reason at all to doubt the evidence on causation.

It is arguable that the ET should have taken those elements into account in para 213 when it decided whether it was a detriment to write to MPs and public officials and whether that was done because the Claimant had made protected disclosures. It is also arguably relevant to causation.

Ground 4: There was no arguable error of law in assessing the alleged failure to respond to Sir Norman Lamb or removing public statements after CQC contact. The ET was entitled to conclude that the Respondent did respond.

The ET concluded that there was no detriment of a "deliberate failure to remove or update statements" in circumstance where the ET found there

was no request that it do so from the CQC but found that the CQC did raise concerns about the public statements The ET has arguably reached a perverse conclusion here by taking into account an irrelevant factor namely whether the CQC asked for the statements to removed rather than the relevant factor which is what to do in response to the CQC's concerns about the content and tone of the statements (para 210). It was arguably a detriment to retain the statements with their content and tone after a regulator such as the CQC had communicated its concerns about them. This should be brought under an Amended Ground 2 as it was arguably perverse to find no detriment in para 211.

Ground 5: It is arguable that the ET applied the wrong legal test in respect of causation. Although the ET found that the protected disclosures "had no material influence on the way the statements were drafted", the ET found that the 'four doctors' who had been involved in receiving some of the original protected disclosures were also involved in approving the public statements about the settlement. That was only revealed by late disclosure. The ET noted that further disclosure about their involvement was needed to determine the issue of causation and that the four doctors had made comments about the content of the public statements and gave their approval. The ET arguably erred in considering whether they were motivated by malice whereas the proper legal test is whether they influenced the alleged detriments to any material extent.

Ground 6: The ET directed itself to the law on the burden of proof and looked to the Respondent for a reason. There is no arguable error of law.

Ground 7: It is arguable that the ET Majority erred in its reading of T*iplady v City of Bradford MDC* [2020] ICR 965 by finding that the Claimant was subjected to a detriment as a "crowd-funded litigant" when the detriments were connected with his former employment and the claim which arose out of his former employment. It is arguable that a former employee is protected from detriment even if he brings a claim and where the detriment arises as a consequence of that claim.

Ground 8: It is not arguable that the ET was procedurally unfair by restricting cross-examination of Mr. Cooper KC to relevant issues. It is not arguable that the ET took into account against Dr Day something that it had not permitted him to cross examine upon. The question that the ET had to decide was largely agreed evidence between Mr Cooper and Mr Milsom. It is not arguable that procedural unfairness affected the ET's conclusion on the issues.

Costs Appeal: The ET arguably took into account irrelevant factors namely the Claimant's subsequent conduct and arguably did not take the seriousness of the Respondent's disclosure failures and deletion of evidence into account in its costs' discretion. It is not arguable that the ET could only consider matters contained or considered in the Liability Judgment. The Costs Appeal is arguable as a perverse exercise of discretion.

CASE NUMBER: 2300819/2019

IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL
BETWEEN

DR CHRIS DAY

CLAIMANT

-and-

LEWISHAM AND GREENWICH NHS TRUST

FIRST RESPONDENT

~~**HEALTH EDUCATION ENGLAND**~~

~~**SECOND RESPONDENT**~~

SUPPLEMENTARY WITNESS STATEMENT OF THE CLAIMANT
In RESPONSE TO THE WITNESS STATEMENT OF BEN COOPER QC

I, **Dr Christopher Day** of [redacted], make this supplementary statement in response to the witness statement of Ben Cooper QC (Mr Cooper) and say as follows: -.

Introduction

1. Mr Cooper has attempted to use his witness statement to effectively make a submission about my evidence at the October 2018 Tribunal.

2. In paragraph 12 of his statement, Mr Cooper makes a very strong statement about his view of me being dishonest and underhand.

3. This statement will deal with Mr Cooper's examples that he sets out in his witness statement where he attempts to substantiate the view that he has given about my evidence. Mr Cooper states at paragraph 16 of his statement that he is 'obviously not suggesting that findings should be made' now about my evidence at the hearing in October 2018. Mr Cooper is a QC with a standing in the world of employment law. He sets out in seven paragraphs (10 to 16) over three pages in his witness statement an account of my evidence which I contest. A tribunal will inevitably be influenced by his view unless I have the opportunity to respond to it. I do not think that the tribunal can come to any conclusion as to the evidence I gave at the hearing in October 2018 and it should put the matters set out in Mr Cooper's paragraphs 10 to 16 entirely to one side.

4. It should be noted that 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.

5. Mr Cooper's various examples centre on my 10 January 2014 protected disclosure. My evidence on this disclosure is found at [61-78] of my first and main statement in this matter.

At paragraph 10 Mr Cooper states,

"one feature which quickly became clear was his apparent inability to answer questions directly or succinctly. This meant that his cross-examination took much longer than it ought to have done – a total of more than 5 days overall"

6. On numerous occasions during my cross examination, Mr Cooper would start a line of questioning with a misrepresentation of my own stated position or a misrepresentation of a certain document. Mr Cooper would then offer significant resistance to me accessing the bundle to prove my position and a dispute would then follow about my right to access the bundle during my evidence. I would then be accused of being evasive (because I wanted to refer to the document to answer the question). This sequence was repeated on numerous occasions.

7. A simple example of this relates to the exchange in open Tribunal that Mr Cooper and I had about something as seemingly straight forward as the time at which I made my protected disclosure by phone to the Duty Senior Manager on Call, Joanne Jarrett on 10 January 2014.

8. My 2018 Tribunal statement at paragraph 40 confirmed the precise time of my telephone protected disclosure on 10 January 2014 as 23:10 **[SB p258, para 40]**:

> *"I decided to phone the Senior Manager on Call, Joanne Jarrett, to tell her this. I did so at 23:10 with Jane Dann sitting beside me" (emphasis added)"*

9. This is consistent with the First Respondent manager's call log as confirmed by the relevant senior manager, Joanne Jarrett to the Roddis Associates external formal investigation in 2014 **[SB p132]**:

> "*JJ referred to her notes where it is recorded that the first call she had from QEH was at 2310 from Dr Day (CD). No other calls what so ever were noted previously."(*emphasis added)

10. Despite this clear evidence Mr Cooper accused me in open tribunal of getting the time of my phone call wrong in my evidence.

11. Mr Cooper opened his cross examination on this issue by asking me why I had persisted in referring to my telephone call (the 10 January protected disclosure) as

taking place "in the middle of the night". He further stated that I had exaggerated the time and that I knew that I made the call in the early evening. It was then asserted that this was an example of me getting things wrong.

12. As would be expected, I reiterated that my statement gave a precise time for my call as 23:10 **[SB p132, para 40]** and that this time was backed up the Trust's management log **[SB p132].** That should have been the end of it, but it was not. Mr Cooper persisted and said that I used the term "in the middle of the night" for dramatic effect and this was an example of me being hyperbolic and unreliable.

13. I then referenced an internal email within the Respondent dated 29 April 2014 **[P2] [2018 bundle, page 720]** that shows it was managers of the First Respondent and not me that referred to my phone call being made "in the middle of the night". It took time for me to find the email and no assistance was offered:

> "*Dr Roberts tells me that he first informed of the original issue by one of the service managers who told him that the on-call manager had to be called in the middle of the night"(*emphasis added)

14. I also reference evidence showing me in 2014 criticising the First Respondent's managers for exaggerating the time of my phone call by describing it as being in the middle of the night. I did so in my meeting with Roddis Associates on 18 September 2014. My note of this meeting records this and I took Mr Cooper and the Tribunal to this text against significant resistance from Mr Cooper **[P4]** ***[2018 Bundle, Page 992]****:*

> *"MR asks whether I had ever phone duty manager previously at the hospital. I confirm I have never phoned a duty manager before or since. I also made the point that the trust has twisted the actual description from a rational polite call an hour into my shift to an irrational call "in the middle of the night."* (Emphasis added)

15. This simple example on nothing more complicated than the time at which I made my phone call perfectly illustrates how Mr Cooper went about his cross examination of me. The simple matter of the time of my phone call was clearly proved as 23:10 on mine and the Trust's evidence but Mr Cooper chose to pick a fight with me based on series of false assertions followed by an attempt to portray me as unreliable. That style of cross examination was in my view responsible for the lengthy nature of my cross examination.

Mr Cooper states at paragraph 13 of his statement,

"Dr Day alleged (in his pleadings and in his witness statement) that he had been approached by the Duty Site Manager and told that two doctors who would normally look after the wards had not turned up, that he telephoned the Senior Manager On Call to raise concerns about this this, that he was given false information about the

staffing levels that night, . . . However, the contemporaneous documents showed that Dr Day had not been given false information about staffing levels that night and could not have been told by the Site Manager that two doctors had not turned up because, at the time of his conversation with her, only one doctor had not turned up. When taken to the documents which showed this in cross-examination, he was forced to accept these points."

16. It is simply not the case that contemporaneous documents showed that I had not been told that two doctors had not turned up as only one had not turned up, When putting that assertion to me during my cross examination in October 2018, Mr Cooper relied on a manuscript document that he stated showed that I was factually wrong in my 10 January 2014 protected disclosures, and I was also wrong to say that I had been given the wrong information about medical staffing. This occurred after Mr Cooper had asked me a series of closed factual questions about what was written on the manuscript document which had the appearance of being a handwritten management note of some kind. I clearly had to accept that what was stated in the manuscript document was stated in the document, as I was asked a series of closed questions.

17. However, I further stated that I had no idea of the true providence of the document Mr Cooper had taken me to. I stated that the dated and timed emails between the Respondent's management in January 2014 was much more powerful evidence. I made clear that the relevant emails clearly show a medical staffing deficit of two doctors for the night of 10 January 2014. I also stated that no manuscript document can change that. I did not depart from this position but had no choice but accept that the manuscript document said what it said. The relevant emails from the Respondent's management are as follows:

    a) An email dated 15 January 2014 from Dr Ward, the clinical lead for medicine to the First Respondent's Medical Director and Assistant Medical Director stating, "*I am aware of the problem that occurred. Our usual medical cover at night it staggered to match demand but after midnight we have 2 SHOs and a reg. FY1s do not work nights. It seems that somehow, two SHOs were booked but they did not turn up for their shift.* (Emphasis added) **[SB p89]**;

    b) An email from Dr Ward dated 16 January, "On the evening in question, we had two locum SHOs booked to cover during the night. *Unfortunately, one SHO pulled out at the last minute and the other was given incorrect information by the agency"* **[Trial 2018 bundle Page 686] [p5].**

18. In addition to the emails that support my protected disclosures being correct and something that it was reasonable for me to believe, I made the following three additional points to defend the validity of my protected disclosure:

    a) Firstly, I made clear in my follow up email to Joanne Jarrett that I was relying on the Clinical Site Manager (Karen O'Connell) as the source of the information

(and not information found for myself) for the aspect of my protected disclosure that related to medical ward cover staffing **[SB p87].** I made the point that given that at the time I was dealing with a medical emergency on CCU, it was reasonable to take what I was told at face value.

b) Secondly, I made the point that the second most senior nurse in the hospital Jane Dann endorsed the information in my protected disclosure and had witnessed my phone call to Duty Senior Manager Joanne Jarrett. I was prevented by Mr Cooper to taking the Tribunal to Jane Dann's statement **[see paragraph 3-6 on SB p297]**.

c) Thirdly, I stated that the recipient of my protected disclosure, Joanne Jarrett, conceded the validity of my protected disclosure. She conceded to Roddis Associates that my concerns had "*come to pass"* **[SB p135]**.

19. I do not deny that I had to be robust and insistent during my cross examination in order to get my point across. However, the factual position I asserted underpinning the validity of all my protected disclosure was correct. That must be why my disclosure has been conceded as a reasonable belief. Given the above written evidence, I clearly would have no need to concede that I was in any way wrong with the factual basis of my protected disclosure and I did not make such a concession.

20. Mr Cooper states in his paragraph 13, "*the contemporaneous documents showed that Dr Day had not been given false information about staffing levels that night and could not have been told by the Site Manager that two doctors had not turned up because, at the time of his conversation with her, only one doctor had not turned up"*. As I made clear at the Tribunal, what Mr Cooper is asserting here was <u>not my basis</u> for saying I had been given the wrong information about medical staffing. My actual basis for stating that I was given wrong information about medical staffing by the Site Manager is set out my email dated 14 January 2014 **[p6-7] [2018 Bundle Page 681c]**:

> *"After my phone call with you, I was given the wrong information by the site manager that there was a registrar and two experienced SHOs in A&E that would try and cover the wards. This wrong information was endorsed by your email. I have since found out that the medical team of that night consisted of a registrar and a foundation doctor no other doctors…I note the night became so challenging that the medical consultant was called in to the hospital by the registrar."*

21. When it was put to me at the Tribunal that I had not been given wrong information about medical staffing Mr Cooper attempted exactly the same tactic as he has attempted in his Tribunal statement. My answer is the same now as it was then, unless the Respondent can prove that they had a Registrar and 2 experienced SHOs for the night of the 10 January 2014 then I was given the wrong information. I pointed out to Mr Cooper that even his manuscript document does not help him with that.

22. I could not have been clearer about this at the Tribunal. The email evidence in this case shows firstly 2 doctors did not attend the hospital for the night shift on the medical wards. The evidence also shows that what I was told in response to my phone call was that the medical team that night consisted of a registrar and 2 experienced SHOs. This turned out not to be the case. I therefore was and am also now correct to say that I was given the wrong information on the night of 10 January 2014 about the reality of the medical ward cover for that night.

At paragraph 14a of this statement Mr Cooper states;

"that he knew *full well* that the site management team had '*probably decided to skimp on locums*', which he accepted in cross-examination was simply his own invention and that he had no basis for saying it"

23. During my cross examination, Mr Cooper attempted to challenge me on a claim that I apparently accused the Trust (the First Respondent in the 2018 hearing) of secretly routinely planning inadequate medical cover as a cost cutting measure which he termed "scheming on locums".

24. I stated that this was not my position and that I am confident that I have made no such allegation in my witness statement, in my formal letters of complaint or in any emails. I was very clear on this at the Tribunal.

25. I also stated with reference to the bundle that this was demonstrably not my position on why the situation on 10 January 2014 happened. I quoted the section of my 10 January 2014 email to Joanne Jarrett **[SB p87]**. It referred to the medical staffing deficit described to me by Karen O'Connell and repeated the position that I expressed on the phone, "*I am sure some effort was made to avoid this situation.*" (Emphasis added).

26. I also pointed Mr Cooper QC to **[p8] [2018 bundle page 688]** which was an email dated 17 January 2014 from me to a Dr Ward stating what I accepted about the ward cover issue on 10 January 2014, "*the situation you describe with locum cover is entirely understandable and I accept that it sounds unavoidable"*. (Emphasis added) Mr Cooper prevented me from accessing at least one of these references from the bundle.

27. Mr Cooper did not accept that I had not made the allegation and stated that I made the allegation in my meeting with Roddis Associates on 18 September and took me to **[p9] [2018 bundle Page 987 (az)].** Mr Cooper then selectively quoted dialogue from me in the Roddis Associates meeting on 18 September 2014. The dialogue originated from Dr Roddis asking me why I did not make my protected disclosure to either the medical consultant on-call or the Intensive Care Unit consultant on-call.

28. This followed me setting out to Dr Roddis that I spoke to the ICU consultant to seek authorisation to transfer the CCU medical emergency to ICU but did not mention the medical ward cover issue (which further indicates that I was calm, in control and had the ability to filter what I told my consultant whilst dealing with an ongoing medical emergency). Mr Cooper has chosen to leave this important context out of his statement as he did when questioning me at the Tribunal whilst selectively quoting the dialogue.

29. After the discussion about the ICU consultant, the transcript records Dr Roddis asking why I had not involved the duty medical consultant and chose instead to phone the duty manager, I responded **[p9] [2018 Bundle Page 987(az)]:**

> *"I didn't want to phone some consultant and say*, *"You haven't hired any doctors," knowing full well that the clinical site management team, mainly the duty manager probably decided to skimp on the locums."*

30. It is clearly misleading to characterise me describing a thought process on why I did not want to make a complaint or allegation on a given issue as me actually making the allegation or complaint. From the transcript, it is clear that I am describing my reluctance to make such an inflammatory allegation. I made this abundantly clear at the Tribunal when challenged with this quote. It should also be noted that neither the formal Roddis Associates record of the meeting nor my note of the meeting makes any mention of this dialogue as it is so insignificant.

31. Mr Cooper put to me that I had invented my basis for using the words the "*duty manager probably deciding to skimp on the locums".* I did not accept this. I took Mr Cooper to an earlier part of the Roddis Transcript **[P10] [2018 bundle Page 987(aw)]** that showed me reporting to Roddis Associates the Clinical Site Manager, Karen O'Connell voicing to me two of her observations on why the medical staffing deficit occurred on 10 January 2014. They included an apparent decision not to attempt to hire locum doctors and also a decision not to swap or ask any of the day staff rostered on for the weekend day shifts to instead cover the night of Friday 10 January.

> "*I encountered the site manager. She was stressed.*
>
> *Claire: That's Karren.*
>
> *Chris: She said, "I can't believe what they've done. They don't have any doctors on the medical wards. They've screwed up. <u>They haven't even gone for locums."</u> Something along the lines of, "We didn't want to call anyone in for the night because we didn't want to affect weekend staffing. It was Friday night. We didn't want to call any of the day people on the Saturday in because we wanted them on Saturday."*

32. It is unreasonable to conclude from the evidence that the reference to “skimping on locums “is me inventing an allegation with no basis when I clearly showed at the Tribunal that it was based on what was first raised with me by the Clinical Site Manager (Karren O’Connell). It is clear from the evidence that I am reporting an allegation that had been made by the Clinical Site Manager (not an allegation that I had instigated) and describing a thought process on why I would not want to make the allegation myself. It is therefore frankly ridiculous to assert that I conceded at the Tribunal, firstly, that I had made the allegation myself and then, secondly, that there was no source or basis for the allegation. Even If I had made the allegation formally (which I did not) it would clearly have had a basis and that was what someone else had said (Karren O’Connell the most senior nurse in the hospital that night).

33. After making these points, Mr Cooper asserted that I was not being honest about what Karen O’Connell had stated to me on 10 January, which I did not accept. I also stated in response to Mr Cooper that the Respondent had chosen not to bring Karren O’Connell as a witness. This resulted in an argument as Mr Cooper reacted angrily.

34. I also stated to Mr Cooper that he had chosen to withdraw my Intensive Care Unit clinical supervisor Dr Roberts from giving evidence at the last minute and that decision, when combined with failing to produce Karen O’Connell, meant accusing me of lying about any of this is a bit rich.

35. Dr Roberts was listed as a witness for the First Respondent at the October 2018 Tribunal but was withdrawn at short notice. Dr Roberts sent a text message to me dated 24 June 2018 at 21:57 which stated, “*I think you should call me for evidence before the Trust solicitors try to gag me”.* I responded stating, “*Did the Trust call you as a witness?”*. Dr Robert’s replied, “*They have.not sure whether it will stay that way though as I don’t think I am saying what they want.”* ***[p11-12]****.*

Mr Cooper states at paragraph 14 (b) and (c)

> **“b. that he *had* had a further conversation with the Site Manager, which was not an allegation that appeared in any other document or account by him and was contrary to both his witness statement for the Tribunal and his acceptance in cross-examination that he had not had a further conversation with the Site Manager – and when taken to that passage of his grievance interview later during cross-examination he sought to explain the discrepancy by claiming an incomplete recollection (a caveat that had not featured in his, generally emphatic, evidence up to that point); and**
> **c. that in that further conversation, the Site Manager had sought to discourage him from calling the On Call manager about the staffing issue out of concern about ‘*where it would end*’, a detail which was plainly intended to imply concern about some form of retribution and to bolster Dr Day’s whistleblowing case”**

36. At the hearing in October 2018, I made it clear from early on in my oral evidence that I was primarily relying on contemporaneous documentation and not recollection of events let alone any 'emphatic' recollection of events. My witness statement largely referred to evidence which was supported by contemporaneous documentation. By the time of my cross examination over 4 years had elapsed since the relevant events (as a direct result of the Second Respondent's stance on the worker status point).

37. I had given an account of the 10 January 2014 disclosure in my account to Roddis Associates on 18 September 2014, which was just months after the events.

38. I made clear at the Tribunal that there were facts that I described to Roddis Associates about which I had a confident recollection in 2014, but that following the passage of 4 years, I could not hope to have the same confident recollection for the October 2018 hearing. So, I based my witness statement on contemporaneous documents.

39. The documentary evidence before the 2018 hearing included my notes and the transcript of the Roddis Associates meeting, so was therefore before the tribunal. At the Tribunal, it was Mr Cooper that made continual reference to the account that I gave to Roddis Associates, <u>not me.</u>

40. I did my best to answer Mr Cooper's questions on the account I gave to Roddis Associates in 2014. I will now turn to Mr Cooper's stated example.

41. During my interview with Roddis Associates on 18 September 2014, I stated that I had mentioned to the Clinical Site Manager (Karen O'Connell) in CCU about the possibility of phoning the on-call duty manger. This was after hearing what Ms O'Connell had described to me about the facts and her opinion on the medical staffing that night.

42. I reported to Roddis Associates that the Clinical Site Manager, Karen O'Connell, when I mentioned the possibility of me phoning the duty manager, stated, "*If you make a fuss you don't know where it will end*" **[p13] [2018 Bundle Page 1005(h)].** Karen O'Connell did deny saying these words in her own interview with Roddis Associates, but was not a witness at the 2018 Tribunal hearing.

43. I made clear to Mr Cooper (and the Tribunal) that I had not included this dialogue between me and Ms O'Connell in my witness statement because I had not referenced it in any contemporaneous note and because after over 4 years, I did not feel that I had a confident enough recollection of the encounter for it to be included in my Tribunal statement as I could not expand past what I had reported about the conversation to Roddis Associates in 2014.

44. At the Tribunal, when directly questioned by Mr Cooper, I could not remember for sure whether the voicing of my intention to phone the duty manager and the Karen O'Connell response "*If you make a fuss you don't know where it will end"* occurred

when Karen told me of the medical staffing issue or during a separate conversation after I had dealt with the medical emergency on CCU. I initially thought it was a separate conversation after I had stabilised the patient. Mr Cooper could see I was unsure and accused me of making the whole thing up. I made clear that I was certain Karen O'Connell said these words that night before I made my call to the Joanne Jarrett even though she later denied she had said them to Roddis Associates. All I said at the Tribunal was that I could be sure whether it was in the same conversation where I was informed of the staffing deficit or during a subsequent conversation.

45. My oral witness evidence about this statement was not as Mr Cooper asserted me 'making it up' and a 'complete fiction'. I did not accept this at the Tribunal and made the point that the First Respondent had not produced Karen O'Connell as a witness in any event.

46. Moreover, I also do not accept, that my account can be characterised by Mr Cooper as me adding 'detail' to the context in an attempt to bolster my case.

47. It was Mr Cooper not me who brought it up, meaning I was having to respond to questions from Mr Cooper about an account that I had given 4 years previously - to Roddis Associates. I was being open with quite predictable problems with recollection that anyone would have when trying to remember a conversation that happened over 4 years ago.

Covert Audio

48. Mr Cooper makes a number of points about me being 'deliberately deceitful and untruthful' in respect the covert audio used in this case. The audio was taken by me in 2014 but only disclosed to the parties in 2018 by my former legal team. The time of disclosure was a result of a 4-year delay to my case coming to final hearing. My statement for the present hearing deals with these matters at **[paragraph 253-255 and [SB 180-181]).**

49. As my main statement makes clear, I was open with my intention to use covert audio in this case and reason for doing so as far back as August 2015 **[SB 176-182].** Mr Cooper chooses to omit this important fact from his misleading narrative. I will now deal with other points Mr Cooper asserts on the covert audio that are not dealt with in my main statement for this hearing.

50. At paragraph 15 of Mr Cooper's statement, he states:

***"*He accepted that he had behaved in an 'underhand' way in the manner he had gone about making these recordings"**

. . .

"Dr Day suggested to Mr Moon that his decision to record one of the meetings had been impulsive, but then in response to further questions said that he had

borrowed the device he used to record the meeting a few days before for that purpose."

51. Mr Cooper's account of this can be shown to be objectively wrong. Mr Cooper (as you might expect) early on in my cross examination (as virtually all counsel have done that I faced in this case) wanted to put to me how underhand my use of covert audio was.

52. Mr Cooper's cross examination of me occurred before Mr Moon's cross examination. This sequence is important given what Mr Cooper is now claiming. In response to both Mr Cooper and Mr Moon's challenge of me on the covert audio, I repeated the position expressed in my 2018 statement at paragraph 177 **[SB p288]**.

> *"I understand that taking an audio recording of this meeting could appear underhand. I want to confirm that I only resorted to this after several examples of what I had said, and the way I said, being falsely reported."*

53. My 2018 statement makes clear at paragraphs 174-178, one of several examples of why I felt I was justified in my decision to use covert audio in this case. It is important to note this was done only once I had left the employment of the respondents and registered a whistleblowing dispute with ACAS. This is another key fact Mr Cooper chooses to omit from his narrative.

54. Both my correspondence from 2015 and evidence at the 2018 Tribunal (both written and verbal) made clear that my actions on the cover audio were deliberate, a result of careful consideration and were actions that I stood by with clear reasons. This is in contrast to perhaps a narrative of the covert audio being a more sudden and unplanned act in the heat of the moment that that I expressed regret for. The latter was clearly not my position at the 2018 hearing.

55. Furthermore, my planned use of cover audio was further explored by Mr Moon during his cross examination of me. Mr Moon asked me questions about how I went about recording the various meetings. I was entirely open with the fact that I did not just record the meeting on my phone and made clear that I purchased a recording device for the sole purpose of recording formal meetings at the respondents. When further questioned I was open with the fact that I went to Currys at Stratford Westfield to buy an Olympus Dictaphone for that purpose (a detail that I could have easily avoided divulging had I wished to).

56. After this enquiry, Mr Moon stated in no uncertain terms that he believed that I should be referred to the GMC (medical regulator) for my underhand tactics with covert audio. My former Counsel, Mr Milsom makes reference to this **[Page 1123]**. The prospect of being referred to the GMC put me under a huge amount of pressure as I would not be able to work as a locum in the interim as GMC investigations can take years. Mr Moon pressed me again on why I would resort to such underhand tactics with covert audio and whether it was consistent with the GMC duties of a doctor. At that point I stated the covert audio was 'impulsive'. The ordinary definition of the word

‘impulsive’ is clearly not an accurate word for my stated position on the covert audio that I had already committed to in written and verbal evidence in 2018 and also as far back as 2015 in email correspondence.

57. I was immediately ridiculed for using the word ‘impulsive’ as I had shortly before set out an account of traveling to a shopping centre to buy a recording device to record a series of formal meetings about my whistleblowing case after careful consideration. I remember these words being quoted back at me to ridicule me. The word ‘impulsive’ was clearly not what I meant and the immediate words of ridicule that followed prevented me clarifying my position. What I meant to indicate was my strong instinct to protect myself and my career from the respondents which meant the word I meant to say was ‘instinctive’.

58. My use of the word ‘impulsive’ instead of the word ‘instinctive’ despite being an embarrassing mistake under pressure and perhaps understandable due to the length and style of my cross examination did not mislead anyone as Mr Cooper is attempting to imply.

59. The sequence of events asserted by Mr Cooper is incorrect. Mr Cooper is attempting to make it seem that I misled the Tribunal into believing my covert audio was an impulsive act and I was subsequently caught out later in my cross examination when it was established, after further questioning, that I borrowed the device a few days before using it. Mr Cooper’s account is misleading in the sequence that he is suggesting:

> “*Dr Day suggested to Mr Moon that his decision to record one of the meetings had been impulsive, but then in response to further questions said that he had borrowed the device he used to record the meeting a few days before for that purpose.”* (my emphasis by underlining)

60. It should be noted that Mr Cooper does not even get the detail right that the recording device was purchased at a shopping centre and claims instead that my evidence was that I borrowed it.

61. I accept that ridiculing me now for saying the word ‘impulsive’ under pressure from Mr Moon is open to Mr Cooper but what is not open to Mr Cooper is to claim wrongly that I used the word ‘impulsive’ before I made it clear in open Tribunal how I purchased a recorder and planned to record formal meetings related to this dispute and the reasons that I felt such action was needed and justified.

62. Mr Cooper’s account is therefore misleading in asserting that I tried to hide my true intentions with the covert audio when I was entirely open with them at the hearing in October 2018 and from as far back as August 2015 **[SB 302-303]**.

63. I have consistently stated in this case my use of covert audio was to expose and counter attempts by both respondents at fabricating my dialogue in certain important situations to do with my protected disclosures. The covert audio succeeded in this aim **[see my main statement [120-124] and [247-249].**

Covert Audio and the Second Respondent's Employer/Worker Point

> **Indeed, Mr Moon took Dr Day through material which showed that the contents of one of the meetings he had covertly recorded had been in dispute in relation to the preliminary employment status issue, yet Dr Day had failed to mention the recordings in the witness statements he had prepared in relation to that issue. Although he did not adequately explain his own failure to refer to the recordings in that context – a point which also undermined the explanation he had given to me that the preliminary issue had been a distraction from the issues to which the recordings related – Dr Day did at this point say that he had given them to his solicitors at the start of 2015**

64. As stated, my reasons for resorting to covert audio were made clear to Second Respondent and their solicitors, Hill Dickinson, in August 2015 **[SB 176-182].** The existence of the covert audio is even acknowledged by Michael Wright, the Partner in Hill Dickinson with conduct of the case by letter dated 17 August 2015 **[SB p176]:**

> *"You will note your client's reference to covert audio recordings and to a witness order"*

65. Mr Wright was the solicitor with the conduct of the May 2018 preliminary hearing for the Second Respondent on the employer point. If Mr Wright felt the covert audio was relevant he could have asked for disclosure of it. Mr Wright made no such request because he knew such evidence was only relevant to the substantive hearing in June 2018.

66. My former solicitors Tim Johnson Law had possession of the covert audio from 2015. They too would have disclosed it for the May 2018 preliminary hearing had they thought it was relevant to the issues to be decided on the Health Education England employer point.

67. In his Tribunal statement for this hearing, Mr Cooper has chosen to omit from his narrative the fact that the firms of solicitors on both sides of the litigation on the employer/worker preliminary hearing in May 2018 were aware of the existence of my covert audio. Mr Cooper would have known that the reason for the covert audio not being disclosed or referred to at the May preliminary was not a result of my dishonesty or deception (as Mr Cooper is attempting to portray with his misleading narrative) but a result of the view that both Hill Dickinson and Tim Johnson Law took about what was relevant. Both sets of solicitors appear to have taken the view that the covert audio was not relevant to the issues to be decided at the May 2018 Preliminary Hearing on the employer point and chose not to complicate matters with it.

68. At the time of drafting his Tribunal statement for these proceedings, Mr Cooper would have been well aware that both Hill Dickinson and Tim Johnson Law knew about the covert audio and that Tim Johnson Law has possession of it since 2015. The relevant letter exchanges on this point were not only contained in the bundle for the June

2018 hearing but the Second Respondent's senior doctor, Dr Chakravarti at paragraph 26-27 of her Tribunal statement for the 2018 hearing explicitly states that I informed her on 7 August 2015 of my intention to use covert audio in my case to challenge false accounts of my dialogue in formal meetings. Dr Chakravarti also confirms she passed this information to HEE and their lawyers Hill Dickinson in August 2015 **[SB p302-303]**

69. Mr Cooper asserts that the covert audio was in some way relevant to the preliminary issue on the employer point of the Second Respondent. Nothing in the covert audio assisted the Tribunal on the employer point. There is no evidence recorded by the covert audio that either strengthened or weakened either mine or the Second Respondent's position on the employer point. The employer status related to the influence the Second Respondent exerted over the First Respondent (and all other NHS Trusts in England) in return for large sums of public funding. The public controversy on this point centres on an attempt by both Respondents to hide the reality of this in order undermine whistleblowing protection for the nation's doctors **[see main statement [35]-[36]].**

70. I am surprised that Mr Cooper would wish to draw further attention to both respondents' actions on this point. The failure of both Respondents to disclose the LDA contact, which clearly would have collapsed the Second Respondent's position on this in 2015 as it eventually did in 2018 (even with an outdated version of the LDA), wasted huge amounts of public money and undermined whistleblowing law for the nation's doctors for 4 years. If Mr Cooper is suggesting that the covert audio would have changed any of that then he is misguided.

71. Mr Cooper purports to give his view on the relevance of the covert audio to the employer worker point. However, by omitting key facts, he gives the false impression that the lack of disclosure and reference to the covert audio at the May 2018 Preliminary hearing was a result of dishonesty and deception on my part when he knows, or should know, that Tim Johnson Law had the material and secondly Hill Dickinson and their client had not pressed for it, although its existence had been made clear to the Hill Dickinson partner, Michael Wright, in 2015 **[see para 25-26 SB p302-303] and [SB p176].**

Conclusion

72. To the extent that it is relevant for this Tribunal to assess whether it was reasonable for Mr Cooper to believe that a different Tribunal was likely to find my evidence untruthful, I believe this statement clearly shows that it was not.

This statement is true to the best of my knowledge and belief.

Signed: 

Dr Christopher Day

6 June 2022

CASE NUMBER: 2300819/2019

IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL
BETWEEN

DR CHRIS DAY

CLAIMANT

-and-

LEWISHAM AND GREENWICH NHS TRUST

FIRST RESPONDENT

~~**HEALTH EDUCATION ENGLAND**~~

~~**SECOND RESPONDENT**~~

WITNESS STATEMENT OF CLAIMANT

I, **Dr Christopher Day** of [redacted], will say as follows

1. I make this statement in relation to the Employment Tribunal hearing which will commence on 20 June 2022.

2. Save as otherwise appears, the matters contained in this statement are from my own personal knowledge or have otherwise come to me through the conduct of this case.

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Section 3 – Misrepresenting Formal Investigation Findings

Section 4- Cost Threat Detriments

Section 5 – Events Post Settlement

SECTION ONE – INTRODUCTION TO WHISTLEBLOWING CLAIM

A History of My Claim

3. This whistleblowing detriment claim is based on events that occurred during and in the year after the final hearing of my first whistleblowing claims (under consolidated case numbers 2302023/2014 and 2301466/2015) [my first whistleblowing case].

4. The previous consolidated claims were presented to the Tribunal on the 27 October 2014 and 10 April 2015. Both the present claim and previous consolidated claims have been against two respondents: the First Respondent being Lewisham and Greenwich NHS Trust (now the only respondent in this claim) and the Second Respondent was Health Education England. I refer to Lewisham and Greenwich NHS Trust as the Respondent or, when addressing my first whistleblowing case, as the First Respondent.

5. The Second Respondent, Heath Education England is the national body responsible for commissioning the postgraduate employment and training of doctors on their career path to hospital consultant or GP.

6. The respondents' actions over the last 8 years have destroyed my medical career. Throughout this litigation, I have worked ad hoc shifts as a locum junior doctor in Emergency Medicine. This often, if not always, involves a 10 hour shift starting early afternoon and ending at midnight. It is these times in which locum cover is needed. Had I progressed on my career path with the Second Respondent, I would have been a hospital consultant by 2019. My current arrangement offers me no career path, job security or employment rights. For example, when working during the pandemic in A&E, I caught Covid-19 and, as I fully accept, I had no right to sick pay from either my locum agency or the NHS for the time that I could not work.

7. It was not until October 2018 that the final hearing of my first whistleblowing claims occurred despite them being lodged in 2014.The reason for the delay was that the Second Respondent had denied that I was a "worker" of theirs under the extended meaning of worker under section 43K of the Employment Rights Act 1996, but the Court of Appeal determined on appeal that I was capable of being such a worker and remitted the matter to be heard by an employment tribunal. The Second Respondent waited until days before an employment tribunal Preliminary Hearing in May 2018 to concede the worker status point that they had spent 4 years denying. This had resulted in an almost 4-year delay in my proceedings and had implications for the whistleblowing protection of other doctors during this time.

8. The final hearing of the previous claim (2302023/2014 and 2301466/2015) occurred at the London South Employment Tribunal between 1-15 October 2018. The claim was dismissed following a settlement agreement. The focus of the present claim is on what the First Respondent has chosen to say publicly and to MPs about the substance of my first whistleblowing case and about how it settled. The First Respondent initially breached without prejudice privilege and there has now been so much discussion about that negotiation that no privilege can attach to it. I do not waive privilege over legal advice given to me during that litigation or at all. This is particularly important as

my legal representation at that time is subject to a Letter Before Action for proposed professional negligence proceedings **[Page 1485-1501].**

9. The claim against the Second Respondent, Health Education England, in this present claim was dismissed by an order dated 16 February 2022, where it was found that the alleged detriment against them which was in time could not be tested by the employment tribunal as the relevant former senior employee was not found to be acting as an agent of the Second Respondent at the relevant time **[Page 607-724].** This enabled a further time limit point to be successfully taken by Health Education England, so as to mean that the claims against Health Education England in respect of other alleged detriments cannot be pursued. There will therefore be no determination as to whether the detriments which I suffered at the hands of Health Education England were on grounds of my whistleblowing.

10. The 13 protected disclosures relied on in this claim have now been accepted by the Respondents and are the same protected disclosures relied on in my first whistleblowing claim. These were made when I was employed in 2013/14 by the First Respondent as an anaesthetic and intensive care doctor. The relevant Grounds of Claim **[Page 13-25 and 72-77]** are included in the bundle. My witness statement from my first whistleblowing claim is in the claimant's supplementary bundle at pages **[SB p250-295]**

11. The now accepted protected disclosures center on one of the Intensive Care Units at the First Respondent at the Queen Elizabeth Hospital, in Woolwich, South East London. The unit serves the 2 London boroughs of Bexley and Greenwich. The fact it took 6 years to arrive at a point where both respondents accepted my protected disclosures as reasonable beliefs is relevant to this claim and will be explored later in this statement.

12. The settlement agreement reached to settle my first whistleblowing case included the following agreed public statement **[Page 996]**:

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

13. By the time the settlement agreement had been entered into, I had been cross examined for 6 days and my own witnesses, Dr Sauer (my clinical supervisor at the Respondent) and Ms. Dann (senior nurse) had also given their evidence. The statements of Ms. Dann **[SB p296-298]** and Dr Sauer **[Page 1598-1561]** strongly supported my position in the case.

14. The basis on which I entered into the settlement agreement was that the respondents, through their counsel, during cross examination, after cross examination and during the negotiation of the settlement agreement made clear to my former counsel, Mr Chris Milsom that they would seek substantial costs against me if the case proceeded and I

was unsuccessful. The cost threats were also used to secure the wording of the agreed statement in particular the wording relating to the NHS acting in good faith that was termed a “red line” in negotiations. Mr Milsom has confirmed in writing that the respondents’ counsel made these threats at these stages in the litigation. I will turn to this evidence in detail later in this statement.

15. Over a month after the settlement of the case, my former counsel, Mr Chris Milsom, informed me that the respondents’ lawyers had made reference to a wasted costs application against my former legal team and also a possible referral of me to the General Medical Council**.** Mr Milsom also confirmed what he said in private to me in the Tribunal waiting room in October 2018 in respect of the Respondents’ reference to a referral of my former solicitors to the Solicitor Regulation Authority **[Page 1123]**. At the time of settlement, Mr Milsom had referenced the respondents’ wasted cost threat as arising from the covert recordings and raised this together with the other cost threats from the respondents that I was potentially liable for **[Page 976].**

16. The Second Respondent had threatened costs against me at a previous stage of the litigation related to the worker status point (which I ultimately won) **[SB p183-86]**; but at no point prior to the commencement of the October 2018 hearing were cost consequences or a regulator referral referred to either for me or my former legal team in relation to the substantive case. The first time the respondents mentioned such costs consequences was during the period that that I was under oath giving my evidence and therefore at a time when I could not discuss my case with anyone.

17. By 5pm on Friday 12 October 2018, the managers in the respondents that were instructing the relevant legal teams and I had agreed to the terms of the settlement agreement. In open Tribunal, Ben Cooper QC stated on behalf of the First Respondent, that the settlement agreement could not be finalized that day by the Chief Executive of the Respondent and that there would need to be final approval of the settlement from the Trust Board.

18. A Trust Board meeting occurred in the form of a Teleconference on Sunday 14 October 2018. Despite there being a clear duty to keep a record of all Trust Board meetings, the First Respondent has claimed no such record was kept. I understand that Trusts can be referred to the Secretary of State for failing to keep records of their Board meetings **[Page 1479].** I return to this later.

19. My claim, which led to the hearing in October 2018, had attracted widespread coverage, both in the press and social media. During my 6 days of cross examination that occurred from 3-11 October 2018, the substance of my protected disclosures and the NHS response to them was explored and reported in the press and on social media. This is evidenced by the large volume of social media content the Respondent has inserted into the bundle, the subsequent press coverage and the intervention of MPs. The interest in the case from the public, press and medical profession and desire for accountability in response to my disclosures persisted despite me withdrawing the case and despite the wording of the agreed public statement. Significant numbers of people found the wording of the agreed statement a surprising thing for me to have agreed to, given the facts of the case.

20. Instead of letting the matter rest post-settlement, both respondents sought to continue to fight the case through public statements. Both respondents, after settlement, made public statements, and statements to the newspapers and to MPs and local stakeholders that no costs threats or threats of any kind were made during and after cross examination or during negotiation of the terms of the settlement agreement **[Page 169-184]**. Yet, I can clearly show that they were made from the written evidence from the lawyers involved **[Page 1123]**.

21. The First Respondent has also chosen to publish false and misleading public statements to MPs and to the press about the substance of my whistleblowing case and the results of certain formal investigations into those disclosures **[Page 169-172].** It seems to me that this is a clear attempt to smear me; to make me out to have been a vexatious Claimant with a hopeless case that I chose to freely withdraw; and to diminish my standing in the eyes of those who supported me, including the MPs and journalists that were engaged with the issues that I had raised.

22. Mr Travis, the CEO of the First Respondent, had written 18 letters to local MPs and influential stakeholders about my case **[Page 1179-1183].** Mr Travis did this on 4 December 2018 and enclosed with his letter, two of the very same public statements claimed as detriments in this claim**.** The Chief Executive's cover letter suggests that the written material he was sending would leave the various public officials "fully briefed" about my case. I did not know about this until much later and these letters were not included in the First Respondent's Standard Disclosure in this claim – which I explore in more detail below.

23. On 28 January 2019, the MP and former Health Minister and former lawyer, Norman Lamb wrote to the Respondent's Chief Executive and stated **[Page 272-3]**:

> *"It is my belief that aspects of the Trust's public statements (as referred to in Chris Day's letter) are severely defamatory and should be withdrawn forthwith and that there should be a full apology. I should stress again that the inaccuracies in the public statements by the Trust are not only defamatory but are deeply distressing. They are damaging to Chris Day's reputation."*

24. In January 2021, I inspected both Respondents' standard disclosure in this claim. I noticed in an internal email from the former Second Respondent **[SB p216]**, a reference to the fact the First Respondent's Chief Executive, Mr Travis had written and sent 18 letters to local MPs and influential stakeholders about my case **[Page 1179-1183]**. The Chief Executive's cover letter suggests that the written material he was enclosing would leave the various public officials "fully briefed" about my case. These 18 letters were left out of the First Respondent's standard disclosure. I requested disclosure of this material on the 18 January 2021 **[SB p240]** and it was provided on 26 January 2021 [**SB p241]**. It is clear that these 18 letters would not have been provided had I not followed up with the First Respondent the relevant internal email from the Second Respondent. A briefing to the Health Service Journal was also left out of disclosure and may have been deleted according to Capsticks Solicitors **[SB p241]**. Judge Kelly acknowledged the following on this in an order dated 2 September 2021 **[see Page 583-5]:**

"(v)

(1) . . .We also consider that the 18 Letters sent by R1 to the claimant on 22 January 2021 were relevant to the issues; had they not been relevant, we consider R1 would have resisted supplying them on the basis that they were irrelevant, in the face of the Claimant's request for specific discovery. To that extent, R1 failed to comply with its discovery obligations. If the amendment is not allowed, R1 may be seen to be benefitting from its failure."

(2) We consider that the claimant would still have a substantive claim to bring if the amendment is not allowed. However, we can see that sending allegedly detrimental material to specific local stakeholders is more clearly potentially damaging to the claimant than merely posting information on a website where it cannot be said who will see it, if anyone. Therefore, allowing the amendment may be important to the quantum of damage if the claimant succeeds in his claim.."

25. A debate in the House of Commons on 3 July 2019 further sets out the seriousness and importance of my protected disclosures**.** Norman Lamb began the session's reference to my whistleblowing case with the following words **[Page 1431]**:

> **"***Scrolling forward to 2013, Dr Chris Day, a brave junior doctor working in a south London hospital, raised safety concerns about night staffing levels in an intensive care unit. It is in all our interests that brave people should speak out about safety concerns in any part of our health service, but perhaps particularly in intensive care units.*
>
> *What happened to Dr Day, because he spoke out, is wholly unacceptable. He suffered a significant detriment. His whole career has been pushed off track, and his young family have been massively affected. Junior doctors in that unit were put in the invidious position of being responsible for far too many people compared with national standards, so he pursued a claim against both the trust and Health Education England. The NHS spent £700,000 of public money on defending the claim and, in large part, on attempting to deny protection to junior doctors who blow the whistle against Health Education England. Lawyers, disgustingly, were enriched.*
>
> *Late last year, the tribunal that eventually heard Dr Day's case ended early after he was threatened with a claim for substantial costs. He and his wife could not face the prospect of losing their young family's home, so he caved in. That is surely scandalous treatment of a junior doctor. He was defeated by superior firepower. We have the grotesque spectacle of the NHS, of all organizations, deploying expensive QCs to defeat a junior doctor who raised serious and legitimate patient safety issues."*

26. The broad thrust of the present claim is that after my protected disclosures and the NHS response to them had been explored publicly during my cross examination, the respondents felt the need to mislead the public, press and MPs on the nature of my protected disclosures, the findings of the external investigation into them and the real

reason for the case suddenly settling. In short, the respondents wanted to give the impression to the public and MPs that I suddenly withdrew a whistleblowing case freely that I knew was at least weak if not perhaps even dishonest.

27. When it came to costs, the Respondent wanted to initially give the public the impression that costs played no part my decision to settle the claim. The sequence of events presented clearly implied that I decided to withdraw the case and then the Trust had decided not to seek costs "*because [the Trust] does not want to discourage other colleagues raising matters of concern"* **[Page 1181].** This position then evolved over a series of public statements which led to even the Second Respondent internally questioning the First Respondent for their shifting public positions on costs, referring to their *"slightly weasel-worded line"* and observing that "*The more they twist, the clearer and more trustworthy our position is"* [**Page 1146].**

28. Following the settlement, I have had the support in this claim of 4,000 crowdfunders, two MPs that are former employment lawyers **[Page 258-259]** and more recently the support of my union, the British Medical Association. I am also grateful to have the Secretary of State for Health in post at the time of my case and a former Government health minister as supportive witnesses in these proceedings.

29. It took until the 13 November 2020 for both Respondents to accept that the communications that I made to them in 2013-2014 during my time working as an Intensive Care Unit doctor at the First Respondent amounted to protected disclosures. Both respondents had spent public money contesting the status of my protected disclosures for 4 and 6 years respectively. The Second Respondent's position from 2014 to 13 November 2020 on my protected disclosures had been that it made no admissions as to the alleged protected disclosures. The Second Respondent's concession on my disclosures is recorded in their amended Grounds of Resistance, showing the amendment made to the grounds of resistance on 11 December 2020, which includes the broad concession that the disclosures taken as a whole contain a reasonable belief in the public interest of both patient safety issues and issues of deliberate concealment. This can only mean that the category of deliberate concealment must apply to at least one (if not more) of the protected disclosures conceded by the Second Respondent **[Page 525]**.

30. The concession on my protected disclosures from the Second Respondent occurred at a hearing on 13 November 2020, where I was a Litigant in Person. Prior to the hearing, I had served on the respondents and the Tribunal, a letter dated 11 November 2020 **[SB p230-32]** enclosing Further and Better Particulars **[Page 481-488]**. I made clear in my letter that I would apply to strike out the Second Respondent's resistance to my protected disclosures, if it continued. This resulted in the volte face described above and in the Second Respondent's amended Grounds of Resistance **[Page 525]**.

31. The First Respondent in this claim still has not conceded that my belief in deliberate concealment is reasonable, despite Health Education England's (the former Second Respondent) concession in this regard. As stated above, the First Respondent took 4 years to accept that I had made protected disclosures on patient safety issues and this

only occurred after being asked to reflect on their position by the Employment Judge at the October 2018 hearing.

32. Both respondents in this case, have gone to considerable efforts in the Tribunal and outside of the Tribunal to make me and the information and my professional opinion contained in my protected disclosures, seem unreasonable, vexatious and dishonest. It is my case that the strong desire that both respondents have had to discredit me is what has motivated the respondents' detrimental actions in this present case and are at the heart of the present claim.

33. Although the Second Respondent has been dismissed from the present claim, the Second Respondent's actions on denying their employer status is relevant to the present claim, when the Tribunal considers a clause in the relevant settlement agreement that protects all lawyers on all sides in this litigation from wasted costs **[Page 992, para 2.2]**. The interests served by such a clause are clearly not mine. Also of relevance to the Second Respondent's employer/worker point, is the threat from Angus Moon QC to attempt to recover the £55k in costs paid to me, which was one of the cost threats that I claim was made in October 2018 but which the Respondents have both denied. Both will be referred to later in the statement.

34. The Second Respondent's actions on the employer point are now subject to a wasted cost application against the Second Respondent's law firm Hill Dickinson; and Hill Dickinson heavily rely on the relevant clause in my settlement agreement regarding wasted costs in their defense rather than explaining the facts. In her Order dated 13 November 2020, Judge Andrews referred the wasted application to the Regional Employment Judge Freer to determine a dispute about which Judge should hear it **[Page 489]**. There has been no further update since. The Second Respondent's solicitor's conduct that is the subject to the wasted cost application has been criticized by two MPs in the House of Commons on 3 July 2019. The Second Respondent's denial of worker status was maintained whilst there was a material failure on their part to disclose large numbers of contracts that were drafted by the very law firm that had represented the Second Respondent in these proceedings, and were highly relevant to the employer/worker status issue **[SB p204-208]**. This included a contract between the First and Second Respondent in my case, that is likely to have been signed by the Second Respondent's investigating Director in my case, Mr Plummer **[SB p207-208].** The significance of Mr Plummer's other actions will be set out later. The First Respondent would have signed the relevant contract in 2014 with Health Education England but they also, like the Second Respondent, failed to disclose the contact either at the time in 2014 or subsequently in these proceedings.

35. The actions of the Second Respondent were discussed in the House of Commons on 3 July 2019. Justin Madders first raised the issue **[Page 1431-33]:**

> "*The Tribunal action that followed resulted in a lengthy and, in my view, wholly unnecessary legal battle in which Health Education England effectively sought to remove around 54,000 doctors from whistleblowing protection by claiming that it was not their employer."*

36. Norman Lamb then stated **[Page 1433]**;

> *"Is the hon. Gentleman aware that the contract between Health Education England and the trusts, which demonstrates the degree of control that Health Education England has over the employment of junior doctors, was not disclosed for some three years in that litigation? It was drafted by the very law firm that was making loads of money out of defending the case against Chris Day. I have raised this with Health Education England, but it will not give me a proper response because it says that the case is at an end. Does the hon. Gentleman agree that this is totally unacceptable and that it smacks of unethical behavior for that law firm to make money out of not disclosing a contract that it itself drafted?"*

37. Those that have supported my case, including those acting for me as legal professionals, have been subject to various legal threats in addition to the various cost and regulator threats set out in the present claim. My former solicitor, Tim Johnson, was threatened with Data Protection Offences when acting for me. The letter he received dated 9 December 2016 made reference "*to a criminal offence contrary to s.55 of the Data Protection Act 1998 ("DPA L998")*" [**SB p190-92].** The same month Mr Johnson was threatened with defamation **[SB p188-89].** Both these threats came as a result of Mr Johnson trying to ensure the medical profession was not misled on the HEE worker/employer point that we eventually won. This determined whether 54,000 doctors were protected by whistleblowing law. Mr Johnson's efforts on this (and mine) are now accepted, even by my opponents, as a public service.

38. I anticipate that the Respondent will assert to the Tribunal that the real reason that I settled my first whistleblowing case was because I knew it was weak and unreasonable if not vexatious. Yet that is inconsistent with me, when a Litigant in Person in this claim, being able to secure concession of all my protected disclosures that were resisted for 6 years in the last claim as I did on the 13 November 2020 (including the concession on deliberate concealment). Moreover, the debate in the House of Commons involving my case that occurred after my settlement **[Page 1431-1433]** is a further indicator of the serious issues my case raises. The debate included the words "*smacks of unethical behavior"* in referring to the actions of the law firm representing the Second Respondent in this case.

39. During the final hearing of my case in October 2018, at the London South Employment Tribunal, the public 'gallery' was full to capacity with overflow seating provided by the Tribunal. I am aware that several journalists were present.

40. There were also several doctors present of the 4,000 that had contributed to my crowdfund over the years. Over 4,000 people have given in total over £300k on the Crowdjustice platform for this case to be litigated and so have invested time in order to gain a working knowledge of the case.

41. My evidence at the Tribunal on my protected disclosures was heard by those in the public gallery and reported on social media at the time. My evidence in respect of my protected disclosures and how they were handled was subsequently reported in the magazine Private Eye on 30 October 2018 **[Page 1056].** This occurred after the First

Respondent attempted to mislead on the substance of my protected disclosures in their 24 October 2018 public statement following the settlement of the case **[Page 169-172]**. The Private Eye piece was written by an experienced doctor, Dr Phil Hammond. (Dr Hammond has been widely praised for his coverage of the Covid-19 pandemic):

> *"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 anesthetics and intensive care, he [Day] was alarmed to find that at night a single junior doctor was responsible for up to 18 ICU patients, plus any ICU 'outliers', and was expected to admit new patients. He [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 published for ICUs 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 them to ICU in a timely manner. Both SUIs were somehow excluded from the safety investigation into Dr Day's concerns, which concluded the night time ICU staffing was 'acceptable'."*

42. The substance, scope and validity of my protected disclosures was also communicated to the then Secretary of State for Health, Jeremy Hunt. On 23 May 2018, Norman Lamb MP arranged for me and my then solicitor, Tim Johnson, to meet.
Mr Hunt. On 26 July 2018, Norman Lamb sent a letter to the then newly appointed Health Secretary, Matt Hancock, providing a summary of what was discussed at the 23 May 2018 meeting with Jeremy Hunt **[Page 258-259].** This letter included Norman Lamb repeating the substance of my protected disclosures and the NHS response to them. Norman Lamb is a former health minister;

> *"He [Dr Day] set out the reality of the night time staffing in the relevant hospital's intensive Care Unit, the fact that it departed significantly from national standards of safe levels of staffing, and that there were two deaths associated with the working conditions. The investigations at time described clearly unacceptable staffing as acceptable."*

43. From my verbal and written evidence at the Tribunal and also from the meeting with the Heath Secretary, it was clearly apparent, that my protected disclosures consisted of raising serious patient safety issues relating to the First Respondent's Intensive Care Unit that were associated with 2 Serious Untoward Incidents involving patient deaths. For the First Respondent to deny this and mislead on it in written material sent to public

officials and MPs, that it claims to have 'fully briefed' about my case, is extremely serious and damaging to both me and the public interest.

44. I now address the detriments claimed in this case in the following order:

    a) the public statement that "*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."*

    b) The public statement that "*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"*

    c) The various public statements pleaded as detriments deny that any costs threats were made.

What is a Junior Doctor

45. I want to also make clear what the terms 'ICU Resident', 'Clinical Fellow', 'junior doctor' and 'trainee doctor' refer to this case, as the terms are sometimes used interchangeably. Each of these terms refer to any doctor that has qualified as a doctor after 5/6 years of medical school but has yet not fully reached the grade of hospital consultant. The term "trainee" will apply to a junior doctor in a formal training relationship with the Second Respondent (Health Education England) and on a formal career path to consultant (with a National Training Number). It should be noted by the Tribunal that a 'junior doctor' or 'trainee' could be a doctor with 10 years post graduate experience who then might well be months off becoming a consultant. In complete contrast it could also be a doctor with less than a year's experience working after graduation.

46. At the material time in 2014, I was a doctor who had qualified in 2009 and had over 4 years experience as a qualified doctor. I was in my second year of training with Health Education England on a career path to becoming a consultant. When working in ICU, I was termed an ICU Resident but the term 'trainee doctor' or 'junior doctor' would also have been an accurate term for me.

47. At night in District General Hospitals it is common for specialties to be covered by senior junior doctors - traditionally termed Registrars. 'Registrar' is a term still widely used and will be used in this case. Registrars would have several years of experience in a certain specialism. A doctor with less experience than a Registrar traditionally was called a Senior House Officer (SHO) which is also a term used in this case.

SECTION TWO – MISREPRESENTING MY PROTECTED DISCLOSURES

> **"The public statement by the Respondent was that "*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."* (Page 169-172)**

48. The Respondent has actively misrepresented the substance, scope and validity of my protected disclosures throughout the 8 year history of this case. My disclosures were not limited to January 2014 and my January 2014 disclosures were not limited to junior doctor cover on the medical wards.

49. As explained above, what are now accepted to have been protected disclosures in this case centered on one of the Intensive Care Units at the First Respondent, located at the Queen Elizabeth Hospital in Woolwich. The relevant ICU serves critically ill patients from the London Boroughs of Greenwich and Bexley. The initial protected disclosures became associated with two 'Serious Untoward Incidents' involving patient deaths.

50. Intensive Care is where the sickest patients in the hospital are admitted from the hospital wards, theatres or from Accident and Emergency as emergency cases. ICU staff use advanced skills and equipment to treat and ultimately reverse critical illness. The stakes are high for the patients and their loved ones.

August 2013 Protected Disclosure

51. The substance of my initial protected disclosures is evident from my August 2013 protected disclosure **[Page 167-168].** This disclosure was made by email to the ICU clinical lead, Dr Roberts, but also sent to Dr Brooke who is both a Deputy Director in the Respondent and a Training Program Director for HEE. The protected disclosure was also sent to Dr Harding, who is an Assistant Medical Director in the Respondent. In my email I express the view, "*that it is unfair to expect one SHO with little or no experience of critical care to be left alone at night with between 15-20 ICU patients, have outliers and be expected to admit new patients."* My email concludes with the following summary;

> *"The other deanery [HEE] trainees have expressed similar concerns to me as has Dr Villar. I strongly believe that this situation is not only unfair to a cohort of inexperienced junior doctors but it is also unfair to you as consultants. I believe you deserve more experienced junior support than you have at the moment and the trust should provide you with funding for more experienced staff grades or registrars to support the SHO grades as in Bromley. I cannot understand how a smaller unit in the same trust operates with a SpR and SHO. Is there anyway Deanery pressure could secure you more resources?"*

52. I referred in my protected disclosure to the fact that similar concerns were expressed by other junior and senior doctors about the night arrangements in ICU. The issue of concern was clearly about a single junior doctor, without the right training or experience, working with an off-site consultant being responsible for far too many patients than would be safe for even an experienced ICU doctor, as indicated by the then applicable national staffing standards ICU Core Standards which provided:- **[SB p3-8].**

> "*The ICU Resident/Patient ratio should not exceed 1:8"* ***[SB p6]***
>
> *"The best current evidence is a Consultant / patient ratio in excess of 1:14 is deleterious to patient care and Consultant wellbeing"* ***[SB p6]***
>
> *"There must be immediate access to a practitioner who is skilled with advanced airway techniques"* ***[SB p7]***

53. The importance and substance of what I was saying was evidenced by two subsequent 'Serious Untoward Incidents' (SUI)s, involving patient deaths. These were excluded from the formal investigation into my disclosures and also excluded from the chronology at the hearing of my first whistleblowing claim in October 2018. I was therefore prevented from giving evidence about these SUIs at the 2018 hearing.

54. The SUIs clearly supported my position and show that the issues that I raised were quite literally a matter of life and death. They also suggest that what I was saying in my August 2013 disclosures was not only reasonably believed but actually correct.

55. SUI 656 occurred on 5 December 2013, a few months after my initial August 2013 protected disclosure **[SB p59-84]**. This incident and its report validate my warning about the grade and experience of doctor being used alone at night to cover the ICU. It describes a procedure being undertaken incorrectly by an inexperienced doctor, the relevant doctor then not noticing and the patient slowly bleeding to death in ICU through the night. An internal email dated 3 December 2014, shows that the external investigation into my protected disclosures by Roddis Associates, was told by a Trust admin officer about SUI 656 after I alerted the investigation to the existence of several serious incidents. The email sent by Ms. Rochefort to Roddis Associates states specifically of SUI 656 **[SB p151]**

> *"the Incident occurred on 05/12/13 - involved insertion of a chest drain which was incorrectly sited and pierced the liver. The patient died from haemorrhage (coroner's PM report)"*

56. The report for SUI 656 made findings relevant to my protected disclosures on ICU culture **[SB p75]** and findings on the cause of the patient's death that clearly support the stated concerns in my protected disclosures about the grade and experience of the doctor being used at night in the ICU;

> *"**3b – misinterpretation of cause of blood in the chest drain tube following insertion**. It was not appreciated at the time by senior staff that the clinical fellow was too inexperienced (i.e.: lacked exposure to other similar type*

situations such as complications of other procedures to be able to broaden the differential diagnosis of the unexpected bleeding (as possible misplacement of the drain). Consequently he communicated incomplete information to the (off site) on call consultant and surgeon who was subsequently called to attend" ***[SB p73]***

57. In the report on SUI 656 several lessons to be learnt are set out but perhaps the most relevant to my protected disclosures is the third **[SB p76];**

> *"3. It is vital that senior doctor staff implement proactive supervision of more junior staff. To minimize the chance of any complication a consultant must authorize procedures associated with excess risk and either perform them him/herself or be fully confident of the competency of anyone else directed to perform the procedure. "*

58. The significance of such an incident so soon after my August 2013 disclosure and before my January 2014 disclosures and the support it gives my position is obvious. Yet the respondents sought to exclude such incidents from the investigation into my disclosures and the Tribunal proceedings, as the thrust of the Respondents' case in October 2018 was that my stance on my protected disclosures and how they were handled was hyperbolic, exaggerated and vexatious.

59. A second SUI will be discussed later in the statement. Broadly the second SUI supports the concerns expressed in my August 2013 disclosure about an inexperienced and overstretched ICU doctor's ability at night to deal properly with and admit patients from the wards that become critically ill. The issue of the ICU doctor's ability to deal properly with critically ill patients on the wards (outside of ICU) is clearly referenced in my August 2013 protected disclosure but is fundamental to my 10 January 2014 protected disclosure which I will set out below.

60. I must emphasise, that I considered the doctors at the center of both Serious Untoward Incidents referred to in this statement to be excellent doctors who are credit to the medical profession who were simply put in an unacceptable position by the First Respondent. I witnessed first hand the toll these incidents, early on in their career, took on these doctors, who were actually less experienced than I was at the time. The plight of the patients that died must also not be forgotten.

10 January Protected Disclosures

61. On the night of 10 January 2014, as usual, I was the only ICU doctor covering the ICU on site. I was experiencing an unusually quiet night on the ICU and as a result I went to see my ICU outlier patients on the wards. I did this early in the evening in case the ICU got busy later. On nights that are busier it would be difficult, if not impossible, to have time to check on the ICU outlier patients.

62. Whilst on the Coronary Care Unit ("CCU") I was asked by the Critical Care Outreach nurse, Jane Dann, to assist with a patient that was not known to me and had not been

referred by another doctor. CCU is a specialist ward where patients with heart problems are cared for.

63. I assessed the patient and presented my assessment over the phone to the duty ICU Consultant who decided, based on my assessment, that the patient should be transferred from the CCU to the ICU. I arranged the transfer with Jane Dann's assistance. This process required me to undertake a series of specialist medical procedures to prepare the patient for ICU.

64. Whilst I was on the CCU, I was approached by the Duty Site Manager, Karen O'Connell, who was the most senior nurse in the hospital that night and the person with overall managerial responsibility. Karen O'Connell seemed concerned. She stated that she was worried about medical staffing on account of the two doctors that would normally look after the patients on the wards not showing up. Karen O'Connell was understandably and appropriately stressed by this situation as she was the person on-site with overall responsibility for the hospital.

65. I discussed what I had been told by Karen O'Connell with the Critical Care Outreach Nurse, Jane Dann, the next most senior nurse after Karen O'Connell. Jane Dann told me that she was aware of the medical staffing shortfall and there was potential for it to be unsafe as a result. Ms Dann confirmed this in her 2018 Tribunal statement **[SB p297]**. I proposed phoning the on-call manager and we deliberated about whether I should or not.

66. The factors in the situation that made me concerned about safety and motivated me to make the phone call to Joanne Jarrett were as follows:

    a) The fact that the wards in the hospital did not have a dedicated doctor (they would usually have 2);

    b) The fact the Clinical Site Manager, Karen O'Connell, was concerned enough to inform me of the situation but did not really have a clear plan for dealing with the problem;

    c) The fact Jane Dann also seemed concerned;

    d) The fact that I was working in an understaffed ICU; had already admitted a ward patient; and would not be able to offer a huge amount of support to the wards if the ICU got busy, as it often did;

    e) The patient death that was subject to SUI 596 **[SB p30-58]** that will be turned to later in this statement;

    f) My desire to give a senior manager an opportunity to know the reality of the situation so that the situation could be resolved early in the night, for example by offering enhanced locum rates.

67. So because of these concerns, I decided to phone the Senior Manager on Call, Joanne Jarrett, to tell her this. I did so with Jane Dann sitting beside me at 23:10 on 10th January 2014.

68. At paragraph 40 of my statement for the 2018 hearing, I confirmed that the tone of this telephone call was “professional and polite”. Jane Dann, the second most senior nurse in the hospital that night witnessed the telephone call and confirmed in her Tribunal statement that my call was “calm, professional and rational during the course of the whole telephone conversation” [**SB p297]**

69. This telephone call on 10 January 2014 was followed up by an email exchange between me and Joanne Jarrett. In my email, I asserted my professional opinion that there was a risk to patient safety. There is no sense of me blaming anyone and my email also makes clear *“I am sure some effort was made to avoid this situation”* **[SB p87].**

70. My telephone call on the night of 10 January 2014 was initially described by a Director in the First Respondent, Dr Sulch, after the Director had a meeting with the senior manager that received my telephone protected disclosure on 10 January (Joanne Jarrett). The Director describes in an email dated 15 January 2014 what he understood from Joanne Jarrett about my tone in the telephone call, “*Dr Day is of course quite welcome to raise his concerns and clearly did so in what seems to be a very amicable conversation with Joanne Jarrett”* (emphasis added) **[SB p90].**

71. The 2018 bundle clearly shows that allegations against me about my phone call started to be made once it had been accepted by the First Respondent’s management that my concerns about staffing and safety that night had “come to pass” **[SB p135]**. These were the words used by the First Respondent’s senior management to describe my stated concerns about the night of 10 January 2014 to the Trust’s external investigation into my case. In her evidence, Joanne Jarrett, in respect of the medical staffing provision for the hospital that night, used the words,“the plan had died” **[SB p134]** and “unravelled at 0115” **[SB p135]** . It should be noted that the words “come to pass”, “unravelled”, and “died” were not my words but the words of Joanne Jarrett, the First Respondent’s senior manager and the recipient of my protected disclosure, (as recorded by the Trust’s formal external investigation **[SB p129-143])**.

72. The First Respondent’s account of my 10 January 2014 phone call was then changed in evidence to the First Respondent’s external investigation. In her evidence to Roddis Associates in November 2014, Joanne Jarrett changed her description from the one she gave to Dr Sulch, which led him to describe my telephone call with the words, ‘what seems to have been a very amicable conversation’ as set out in Dr Sulch’s 15 January 2014 email **[SB p90]**. In her evidence to Roddis Associates, Joanne Jarrett describes my phone call on the record with the words, “a little ridiculous” **[SB p137],** “becoming emotional” **[SB p138]** “very offensive” **[SB p138]**, “all I have got back are allegations and insults**” [SB p138]** and “communicating through anger, upset or worry”, **[SB p139]**.

73. This change in position would have been obvious to the senior management of the First Respondent and their external investigation but both the Respondent and Roddis Associates chose to ignore it.

74. My ICU Clinical Supervisor, Dr Robert's, attempted to warn me about the false briefing from management about the 10 January 2014 phone call. The Trusts external investigation criticises Dr Robert for this;

> "*Dr Roberts's passing on of this to Dr Day in fact escalated the problem, allowing Dr Day to believe that Ms Jarrett had tried to undermine him* **[Page 757]"**

75. At the October 2018 hearing it was asserted by Mr Cooper, counsel for the First respondent that I had got my facts wrong in my phone call about the two doctors not attending for work on 10 January 2014. It should be noted that Karen O'Connell had not provided a witness statement for the 2018 hearing . I stated in response that in my phone call, I was only repeating over the phone to Joanne Jarrett what I had been told by the Site Manager, Ms O'Connell, which was consistent with Jane Dann's statement. I also attempted to show Mr Cooper an internal Trust email dated 15 January 2014 that was sent to various senior managers in the Trust including its Medical Director that stated **[SB p89]***, "I am aware of the problem that occurred, It seems that somehow, two SHOs were booked but they did not turn up for their shift."* (emphasis added). Clearly the fact that Joanne Jarrett acknowledged that my concerns had "come to pass" is another indicator of the validity of the information that I passed on over the phone to Joanne Jarrett **[SB p135].**

76. What is also clear from Joanne Jarrett's evidence to the Roddis Investigation is that in addition to the concerns that I raised about the medical ward cover situation on 10 January 2014, I also raised the serious issues from my previous protected disclosures about the routine ICU night time situation. In her evidence to the Respondent's external investigation, Joanne Jarrett reports making enquiries about the ICU situation following the call with me on 10 January 2014 **[SB p138];**

> ***"****JJ replied that from CD's comment 'it's only me' she was very concerned about what would happen if CD did get very busy with patients elsewhere in the hospital what the overnight cover arrangements were, so she asked Peter Roberts who explained about the on call ICU consultant being available, that the SHO's don't make any decisions without talking to the consultant first and actually that's a normal thing and no-one has ever raised any concerns about it before. CMc asked whether there was registrar cover. JJ confirmed that CD was the resident on call and JJ didn't know if it was unusual not to have registrar cover but that the impression she got from Peter Roberts was it wasn't unusual because that was the process, everyone knew and the consultant was on call and would be more than happy to have a conversation."* (emphasis added)

77. On the evidence of the Respondent's own senior manager, Joanne Jarrett, it is clear that it is not true to describe even my telephone protected disclosure made on the 10 January as being limited to junior doctor medical ward cover issues. The phone call clearly involved issues to do with the routine night time ICU arrangements that clearly

worried Joanne Jarrett enough for her to look into them. However, what appears to worry Joanne Jarrett the most is the fact I as a junior doctor in ICU had involved her in the ICU situation **[SB p135];**

> *"JJ described her continuing unease in the morning when she woke. She debated what to do next and felt she had a responsibility which she had to act on, the fact that CD was very worried, that he had called her rather than going to the CSM, that he felt managers were 'winging it' and 'patients were at risk', the fact that he said 'it's just me' really concerned her…*
>
> *He was concerned about a potential problem which you wouldn't normally expect and he hadn't gone through what you would expect to be his management line, which would be his consultant to flag his concerns or to the site practitioner who would agree or disagree and then escalate if needed because that is the process. The idea is only the CSM calls the SCOM otherwise you get phone calls from everybody overnight"*

78. I dispute how Joanne Jarrett's reports my use of the term 'winging it'. I stated on the phone that given the situation at night in ICU, I did not want to try and 'wing it' covering the medical wards and ICU. At the time it was perfectly understood by Joanne Jarrett and Jane Dann and did not cause any offence whatsoever as confirmed by Jane Dann in her statement.

ARCP 3 June 2014 Protected Disclosure

79. On the 3 June 2014, I made a protected disclosure to a Second Respondent ARCP/appraisal panel that was chaired by an employee of the First Respondent, Dr Harrison. I repeated the substance of my August 2013 protected disclosure with general reference to the SUIs; my 10 January 2014 disclosure; and my assertion that my disclosures were not handled properly in a way that was to my detriment. This disclosure is set out in my Further and Better Particulars **[Page 481-488]** at paragraph 25-37.

80. As he was one of their employees, the First Respondent was responsible for the actions of Dr Harrison on 3 June. Dr Harrison took a decision not to record the details of my protected disclosure which he set out in paragraph 34 of his 2018 Tribunal statement **[SB p309**]. Dr Harrison also signed what I claimed to be a false and detrimental formal ARCP/appraisal document. Dr Frankel of the Second Respondent conceded to Norman Lamb in January 2019 that Dr Harrison's ARCP record was inappropriate **[Page 1305].** Dr Harrison then refused for several months to give an account of his reasoning for the ARCP record, which, it has since transpired, involved a negative briefing about me by a Dr Brooke, who is a Director of the First Respondent. Dr Brooke was one of three recipients of my August 2013 protected disclosure. The Respondent has attempted to distance themselves from the protected disclosure on 3 June 2014, asserting that it is the sole responsibility of HEE; yet this cannot be the case given Dr Harrison and Dr Brooke's involvement for whom the Respondent is clearly responsible for.

81. My 2018 Tribunal statement covers by ARCP in detail from **(paragraph 59-98 on [SB p262-270])**

Validity of the Protected Disclosures

82. The substance of my protected disclosures was strongly supported by then applicable national ICU Core Standards **[SB p6-7]** and supported by subsequent reports such as the October 2014 HEE Quality Visit and the 2017 Critical Care Peer Review, which I will turn to later in this statement.

83. The issues are not complicated. They consist of using a doctor without the required training or experience to cover an ICU at night for more than double the patients than would be safe for even an experienced ICU doctor as set out by ICU Core Standards **[SB p6-7]**. If that situation was not significant enough, the doctor then had additional duties on the wards and in the Emergency Department.

84. As foreshadowed by my 2013 protected disclosure, because some of the cohort of ICU doctors when I was there were even less experienced than me, it didn't work. This is clearly demonstrated by the two Serious Untoward Incidents. The Respondent excluded the SUIs from their formal investigation into my case in 2014, attempted to exclude them from the 2018 Tribunal (and they are included in my supplementary bundle as the Respondent was not prepared to include them in the main bundle for this hearing). I note the Respondent's Chief Executive now claims that *"I did not raise any concerns regarding patient safety or Serious Incidents as part of [my] complaint at any stage"* **[Page 1416-19]** which I will deal with later by quoting the record of my meeting with the Roddis Associates on 18 September 2014 showing the Chief Executive is wrong **[SB p85-86]**.

85. In short my 2013 protected disclosures and subsequent disclosures involved an ongoing situation that put patient safety at risk in an Intensive Care Unit, which were closely followed by two Serious Untoward incidents involving patient deaths associated with the issues months after I raised them.

86. In addition to the various supportive reports and guidelines, my protected disclosures about staffing and airway support in the Intensive Care Unit have been explicitly validated by the following senior people at HEE, as was in evidence before the Tribunal in October 2018;

    a) The dialogue from the Second Respondent's Post Graduate Dean, Dr Frankel, on 2 September 2014 that was captured by covert audio **[SB p97-98]** in which Dr Frankel states in response to the substance of my protected disclosure*, "the whole thing what you described is unsafe*". Dr Frankel also makes clear;

        "What you describe to me is totally unacceptable for me to have trainees in a situation that you were in. In ICU where you are non-- You are not trained for intubation and airway care and you're in charge of 19, never mind all the other issues. It's totally unacceptable."

b) The ARCP Panellist Dr Umo-Etuk in an email on 5 December 2014 **[SB p148-149]**

> ". . . *I did form the opinion that the hospital in question failed to provide enough support out of hours (i.e. Registrar covered more than one specialty at night and consequently may not have been readily at hand to assist).*
>
> *I remember that you had sole responsibility for ITU which seems to be beyond the expected competency of a CT1/2 doctor.*
>
> *I was of the opinion that you came across as assertive and confident . . ."*

87. When it was put to me in October 2018 by opposing counsel that my protected disclosures were factually incorrect, exaggerated and hyperbolic, I was prevented from making clear the robust support for my position that came from various investigations/guidelines and the quoted words of senior doctors such as Dr Frankel and Dr Umo-Etuk. I referenced the robust support for my position from these senior doctors and documents but was often prevented from accessing the bundle. Dr Frankel left out of his witness statement for the 2018 hearing, the strong and explicit support he clearly had for my protected disclosures as evidenced by his remarks on 2 September 2014 in the meeting with the BMA **[SB p97].**

88. In conclusion on this point, the substance, gravity and validity of my protected disclosures were set out in my evidence to the Tribunal and had been communicated to the Secretary of State for Health. They have clearly been misrepresented publicly by the First Respondent by referring to only selective facts relating to the content of only one of many disclosures made on many dates including a number on 10 January 2014.

89. This is clearly an attempt to suggest that my protected disclosures were a fuss about nothing and confined to an unavoidable medical ward cover situation on one night. The Respondents knew that the reality was that my disclosures contained serious and ongoing issues about their Intensive Care Unit, which could be linked to two deaths. The Second Respondent has also in these current proceedings, conceded the existence of my reasonable belief that the content in some of my protected disclosures related to deliberate concealment for the purposes of ERA s43b(f).

90. The Respondent has chosen to represent the serious content of my protected disclosures as a one-off situation outside of the ICU about junior doctor cover of medical wards. Such an occurrence, although not trivial, is all too common in the NHS. It is clearly not the main thrust of my protected disclosures. The fact the Respondent has wholly misrepresented to the press and MPs my disclosures as not being about the Intensive Care Unit/critical care, but being limited to junior doctor cover on the medical wards paints a picture that my protected disclosures were making a fuss about nothing. I would imagine that would certainly be how most experienced NHS workers would view such a position. Such people could then take issue with how my protected disclosures have been described by me to interested MPs and in my crowdfunding campaign.

SECTION THREE – MISREPRESENTING FORMAL INVESTIGATION FINDINGS

Context and Significance of the detriment

91. In addition to trying smear and damage me by misleading on the scope and validity of my protected disclosures, the respondents have misled on the results of formal investigations, which they have said found that the Respondent had responded "in the right way" to my protected disclosures **[Page 169]**. The Respondent has further stated that there was an incorrect link of my case 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 **[Page 172]** . If certain formal investigations support the validity and importance of my protected disclosures and my claims of detriment, it is damaging to my reputation for the Respondent to claim to the public, press and MPs that is not the case by relying on false statements about the relevant investigations and my protected disclosures.

92. As with misleading on the protected disclosures and the cost threats, the obvious aim is to make me and my whistleblowing case seem unreasonable and vexatious.

93. The following statements pleaded as detriments are relevant to the broad allegation that the Respondent has misrepresented certain formal investigations related to my protected disclosures in order to discredit both the disclosures and me.

    a) *"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"* (emphasis added by my underlining) **[Page 172].**

    b) "*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"* **[Page 169].**

94. It is necessary for me to briefly set out the various investigations that were undertaken into my protected disclosures. Both the First Respondent and the Second Respondent (HEE) conducted formal investigations. The Trust adopted the results of an external investigation by Roddis Associates and Health Education England conducted an investigation by a Director of Human Resources, Malcolm Plummer **[SB p154-175]**. Both processes reported in late 2014 and are described in my 2018 tribunal statement. My account of the Roddis investigation is found at paragraph 160-180 **[SB p283-289]** and the Plummer investigation at para 127-159 **[SB p276-282].** These investigations excluded key evidence and were objectively flawed to such an extent that the former Second Respondent's own witnesses conceded of the Plummer investigation that it was "terrible" (Dr Frankel) **[SB p223-224]** and "gives an exaggerated or distorted impression" (Dr Chakravarti Tribunal statement paragraph 21) **[SB p302].**

95. Two further independent investigations occurred that looked at the Intensive Care Unit and the issues raised in my protected disclosures about safety, staffing, airway

support, incident reporting and culture. These were the October 2014 HEE Quality Visit **[Page 634-659]** and in 2017, a Critical Care Peer Review **[Page 774-776].** This peer review was performed by clinicians external to both Respondents. Both processes were strongly supportive of the positions expressed in my protected disclosures but were concealed and misrepresented by the First Respondent in formal reports, at the employment tribunal hearing and publicly.

96. In respect of the First Respondent in the present claim, they have not only misrepresented their own external investigation by Roddis Associates but also that of the October 2014 Health Education England Quality Visit.

97. I will provide robust examples of this, as understanding what is behind this need to mislead on the various formal investigations and how long this has been going on, is central to understanding the causation of the detriments that I have been subjected to in this claim.

98. It is also important for the Tribunal to note, that the First Respondent's misrepresentation of formal investigations began in 2014 when they approved their external investigation report that they must have known materially misrepresented the findings of the October 2014 HEE Quality Visit amongst other things.

99. This occurred prior to any press articles or my crowdfunding campaigns when the details of the case were entirely confidential between the parties. This exposes the fact that the Respondents' actions to discredit and undermine me and my protected disclosures existed long before I opened a Twitter account or undertook to crowdfund litigation that even the Respondents now accept was a public service **[Page 996].**

Misrepresenting the October 2014 HEE Quality Visit

100. The First Respondent has misrepresented on several occasions in my litigation the findings of the HEE October 2014 Quality Visit by claiming it identified no concerns about staffing or supervision **[Page 676-677].** This Quality Visit consisted of a team of senior doctors, NHS managers and a junior doctor convened by the Second Respondent to investigate the same or similar issues raised in my protected disclosures at the First Respondent. These included explicitly concerns expressed by other junior doctors about *"Inappropriate levels of clinical supervision for Post Graduate doctors in training"* **[Page 634].** The findings are summarized at page **[634-636]**. The following serious issues were identified by the evidence provided by junior doctors at the First Respondent to the Quality Visit;

    a) Culture; *"There were concerns raised regarding a culture of bullying and undermining, with some trainees being too scared to name consultants that were responsible for this for fear of repercussion. It was felt that this was a problem that had been seen if not experienced by most if not all trainees. Trainees reported not wanting to be perceived as troublemakers and for this reason did not include comments in the GMC survey [**Page 634-635]"***

b) Supervision "*A lack of supervision of trainees who felt they had to go out of their way to get supervision if required"* **[Page 635]**

c) Incident Reporting; "*Potential SUIs are not being reported or there is no apparent action when they are* **[Page 640]."**

d) Incident Reporting, *"Core ACCS trainees indicated to the visit team that SI's have been reported on numerous occasions but that no feedback has ever been received. They added that this seems to be the consensus among trainees and other staff members having spoken to their colleagues [**Page 640]**"*

e) *ICU night-time staffing ; " ACCS Trainees felt that the ITU was well covered during in the day but at night if a patient required particular attention they could become overstretched...* **[Page 641].**

f) *Airway Support "The trainees reported that the availability of an anaesthetic registrar out of hours very much depends on the emergency workload in the Trust. Very often the anaesthetic registrars were busy and unavailable to assist immediately (emphasis added)"* **[Page 641]**

g) ICU night-time staffing, "*The trainees reported that there are 18 beds which are often full but last winter this was stretched to 26." **[Page 642]***

h) Undermining "*The trainees highlighted a culture of undermining within the hospital. They had concerns that this culture was not nurturing positive behaviors in most junior trainees" **[Page 647].***

101. Contrary to the serious concerns set out above from other junior doctors as clearly recorded within the October 2014 HEE Quality Visit, the Respondent advanced the following objectively false description of the Quality visit in their approved external investigation by Roddis Associates;

> *"A recent Deanery Visit concluded that staffing levels (unchanged since January 2014) were safe and there were no concerns about supervision highlighted by them" **[Page 676-677]***
>
> *"Dr Day had immediate access to the resident anaesthetic registrar for airway management" **[Page 676] (see also paragraph 100(f) above)***

102. The above description was then adopted by both respondents at the Tribunal in 2018 and then subsequently by the First Respondent in correspondence to Norman Lamb dated 3 April 2019. In his letter to Norman Lamb, Mr Travis defends the Roddis Associates' investigation into my case. He rejects Sir Norman Lamb's request for a further review into my case **[Page 1422-23]**. Mr Travis states he is *"unconvinced of the merit of undertaking a further review"*. For this conclusion, Mr Travis relies on the

settlement agreement of my case and states that he is "*unclear that any review that did not reach an opinion consistent with [my] own view would be accepted by [me]".* Mr Travis further states, *"given any 'new' review would review the existing body of evidence, it is difficult to see how a further scrutiny would reach a different conclusion"*.

103. It seems clear that what is described above by the 2014 HEE Quality Visit are serious concerns about the First Respondent. It is also clear that the above Quality visit cannot be accurately described by Roddis Associates and then by the Respondent as showing "no concerns about supervision" **[Page 677]**. The finding on the HEE October Quality Visit from Roddis Associates, endorsed by Mr Travis, is therefore untrue and misleading. In short, it cannot be said that the HEE October 2014 Quality visit showed 'no concerns about supervision'.

104. It therefore follows that senior managers in the First Respondent may have misled: their Board in 2014 by approving the Roddis Associates external investigation report; the Tribunal in 2018; and Norman Lamb in 2019 when they explicitly endorsed the report yet again.

105. The relevant former Post Graduate Dean, Dr Frankel, confirmed to Norman Lamb in 2019 the support the HEE Quality visit gave my protected disclosures when challenged with my Tribunal statement by Norman Lamb's office before our joint meeting. Dr Frankel wrote in January 2019 **[Page 1302-1303];**

> "*The visit confirmed the issues raised by Dr Day in relation to his disclosures a and b above . . . Progress was slow and a further visit took place on 15 March 2015 because of this . . . the ICU was reviewed and unfortunately only limited improvement had occurred in this area"*

106. Although Dr Frankel stated the above in a document sent to Sir Norman Lamb in 2019, he left the findings of the 2014 HEE Quality visit and his view that they supported my protected disclosures out of his 2018 Tribunal statement. As stated, Dr Frankel also left out of his 2018 Tribunal statement his stated personal view of my protected disclosure captured by covert audio on 2 September 2014 **[SB p97]**. Dr Frankel states in response to the substance of my protected disclosure: *"the whole thing what you described is unsafe"*. Dr Frankel further states with relevance to key ICU Core Standards not being met on airway support and staffing ratios, "*What you describe to me is totally unacceptable for me to have trainees in a situation that you were in. In ICU where you are non--You are not trained for intubation and airway care and you're in charge of 19, never mind all the other issues. It's totally unacceptable*."

107. Despite holding this strong view on my protected disclosures, this was not reflected at the Tribunal in 2018. Both Respondents misrepresented the serious findings of the HEE Quality Visit and sought to discredit my protected disclosures as hyperbolic. Both respondents adopted the position found by Roddis Associates as their position at the 2018 Tribunal on my protected disclosures [**Page 675-677]** which was:

> *"On the night of 10 January 2014 Dr Day (an ACCS CT2 in emergency medicine) was expected to cover the 18 bedded ICU, ward outliers, A/E and*

ward ICU assessments as a resident SHO in QEH a district general hospital. In my opinion this was acceptable in light of his experience and skills at that time." ***[Page 675]***

. *"A recent Deanery Visit concluded that staffing levels (unchanged since January 2014) were safe and there were no concerns about supervision highlighted by them"* **[page 677].**

108. I am astonished that the First Respondent's Chief Executive, Mr Travis would yet again endorse such a conclusion from Roddis Associates in his letter to Norman Lamb dated 3 April 2019 **[Page 1423-24].** This is after I clearly set these issues out to him in a meeting with Norman Lamb on 14 January 2019 and subsequently in a letter to Norman Lamb that was forwarded to Mr Travis **[Page 157-167].**

Misrepresenting the Respondent's External Investigation by Roddis Associates

109. I now turn in particular to the following detriment pleaded in the present claim **[Page 164]:**

> **"*The public statement that "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"***

110. The First Respondent has given a false and detrimental impression to the public, multiple MPs and influential local stakeholders by asserting in their public statements that their external investigation (by Roddis Associates) found that they had responded to my disclosures "in the right way". This is in the face of the investigation report making significant criticisms of the First Respondent's response to my disclosures. The Respondent's false claim sought to diminish the validity of part of my original claim, which is an attack on my reputation and therefore is pleaded as a detriment in the present claim. **[Page 169-173].**

111. The external investigation's analysis of the Trust's response to my protected disclosures includes several references to the words bullying and harassment and refers specifically to taking a Datix incident report out of routine governance processes and responding detrimentally to it. It also makes clear that the assistant senior medical director, Dr Harding, that was one of the recipients of my protected disclosures should have handled things differently **[Page 758]**. It does this, after setting out several of his clearly detrimental actions. I set out below 14 quotations from the investigation criticizing the First Respondent's response to my protected disclosures, which show the detriment that I have referred to above.

112. The First Respondent's external investigation by Roddis Associates is described in detail at **paragraphs 160-180** of my 2018 Tribunal statement **[SB p283-289].**

113. It is clear from what I have stated above in this statement about the Roddis Associates investigation misrepresenting the findings of the HEE Quality Visit, that the

Respondent's external investigation into my protected disclosures could not be complete or reliable. This trend of deliberate concealment is further indicated by other actions of the Roddis Associates' investigation including the deliberate exclusion of the two SUIs from consideration; the false record of their meeting with me; and forming conclusions about serious patient safety issues that are clearly contradicted by the evidence before them from multiple sources. I will turn to this evidence after I have set out the criticism of the Trust made by Roddis Associates. It is these criticisms that are key to proving the pleaded detriment in the present claim.

114. As stated, despite the serious flaws in the First Respondent's external investigation by Roddis Associates it did not find as claimed by the First Respondent that the Trust had responded "in the right way" to my protected disclosures. Therefore, the Respondent's public claim to the press, MPs and public stakeholders in this regard is false and detrimental to my reputation

115. I will now set out in detail how the Roddis Associates investigation criticized the First Respondent's response to the content of my protected disclosures in particular when I raised concerns by formally entering them on to the Datix system.

116. Datix is the system used in the NHS to report safety incidents and other significant events. I entered my January 2014 protected disclosure onto the Datix system. The First Respondent external investigation made the following criticisms of the way my now accepted protected disclosures contained in a Datix report were processed by the First Respondent. The Datix report contained content related to my August 2013 and 10 January 2014 protected disclosures and how they were dealt with by the Trust. The below criticisms of the First Respondent were made by Roddis Associates:

a) "*the Datix report was not formally followed up and logged on the system as would be expected"* ***[Page 695];***

b) *"Dr Day then shares his experience with Dr Harding who involves Dr Ward who then copies his response to a wide and senior audience which is undermining and could be perceived as bullying"* ***[Page 712];***

c) *"When a Datix report was submitted on 15 January 2014 it was not dealt with through routine governance processes. If it had been, this may have helped provide a corporate response to Dr Day through 'normal' channels. This was a missed opportunity for the Trust"* ***[Page 713];***

d) *"The responses to the clinical issues Dr Day raised were addressed in an informal and uncoordinated way" [****Page 713****];*

e) *"Although Dr Day's concerns were informally investigated by Dr Ward, there was confusion and ambiguity about the consequent 'report'. . . Unfortunately the ambiguity was not clarified immediately when it would have been easy to do so"* ***[Page 713];***

f) "*There has been no input that I can see from HR until after Dr Day's letter of complaint to Mr Higginson when this independent investigation began. Those*

trying to deal with the situation have therefore been unsupported which has meant that they were not advised about process or policy" ***[Page 713]****;*

g) *"Dr Harding's response was more considered and he lets his feelings known which was ill advised given his position in the Trust. Despite his assertions to the contrary he holds influence and power, certainly when compared with a CT2 (junior doctor)" [****Page 713];***

h) The Roddis investigation records the allegation from the First Respondent's Assistant Medical Director, Dr Harding, that he found me *"markedly self -centred and he thought he [I] hid behind a façade of patient safety"* ***[Page 751];***

i) *"Dr Roberts's passing on of this to Dr Day in fact escalated the problem, allowing Dr Day to believe that Ms Jarrett had tried to undermine him" [****Page 757];***

j) "*In my opinion, the manner of Dr Ward's dealing with him by email, in effect dressing him down in front of seven people was ill judged. The matter should have remained confidential between Drs Ward, Harding and Day and/or a face-to-face meeting could have been convened to deal with the matter"* ***[Page 757];***

k) *"Dr Harding's reaction that given the opportunity he would not employ Dr Day again also suggests that Dr Harding found Dr Day an irritation rather than a worried colleague who needed support"****[Page 757]****;*

[This is a reference to Dr Harding (the Trust Assistant Medical Director)'s 7 May 2014 email to HEE, with his view on my protected disclosures, that included the words, *"<u>His inability to let these issues go is starting to worry me. I would consider not employing him again as a result"</u>]* **[Page 756]** (my emphasis by underlining).

l) *"Subsequent events with Dr Harding indicate that collectively the doctors were unsure how to deal with Dr Day's concerns and the way he was expressing them. This culminated in the email from Dr Harding to Dr Patel in which Dr Harding states that he would not employ Dr Day again given the opportunity"* **[Page 757];**

m) *"There is evidence that Dr Day feels bullied in the way he has suggested".* **[Page 757];**

n) *"I am, however, of the opinion that Dr Day feels that he has been bullied and I consider that Dr Ward and Dr Harding should have handled matters differently* ***[Page 758];***

117. Clearly the findings above, whatever way they are spun, cannot amount to Roddis Associates finding that the Respondent responded in the "right way" to my now accepted protected disclosures.

118. The assertion that the external investigation had found that they had responded "*in the right way",* brings into question why I had raised my claim of detrimental treatment, with the clear implication that my claim was vexatious. This chimes with the likely

intent behind the false public statements and various cost threats that are also pleaded as detriments in the present claim. Those detrimental statements seek to make my first whistleblowing claim appear vexatious which will be dealt with in Section 4 of this statement.

119. I can now see from the certain documents in the bundle that the Respondent is seeking to give the further false impression that I did not inform the Roddis Associates investigation in 2014 about the serious concerns that I had about the Intensive Care Unit and Serious Untoward Incidents.

120. From a draft letter inserted into the bundle, dated 6 March 2019 **[Page 1416-141]**, I can see that Respondent's Chief Executive was intending to give Norman Lamb MP the false impression that my serious concerns about the Intensive Care Unit and reference to the SUIs were not set out to the Roddis Associates investigation **[Page 1417].** This is consistent with the approach that was adopted by their counsel Ben Cooper QC at the Tribunal in October 2018. Mr Travis states;

> "*I would note that Dr Day did not raise any concerns regarding patient safety or Serious Incidents as part of his complaint at any stage, with the focus of his concerns centered on junior doctor staffing levels."*

121. My record of the 18 September 2014 meeting with Roddis Associates shows that Mr Travis' assertion is not true as set out in the draft supplementary statement that I sent to Norman Lamb **[Page 922-931].** This point and some other more troubling points about my Roddis Associates meeting on 18 September 2014 were made very early on in this case in my 2014 pleadings. I highlight paragraph 57 from my 2014 Grounds of Claim **[Page 21];**

> *"The Claimant attended an interview on 18 September 2014 with the independent investigators, MJ Roddis Associates, who had been appointed by the Trust to investigate the Claimant's concerns and complaints about safety at Woolwich Hospital ICU. The investigators' record of that meeting failed to record much of what the Claimant had said regarding patient safety at Woolwich Hospital, for instance hypoxic cardiac arrests from displaced ETT as a result of staffing issues on the ICU. The investigators' report also distorted what he had said and attributed statements to him which had not been said.*
>
> *On 27 September 2014, the Claimant wrote to Dr Roddis of MJ Roddis Associates with his record of the meeting, correcting the factual inaccuracies in the investigators' record of the meeting. MJ Roddis Associates responded by email on 7 October to the Claimant's concerns. They offered written apologies for their record of the meeting and accepted the Claimant's written account as representing "the full content of the meeting." The Email was sent by Claire Mclaughlan, one of the investigators."*

122. The draft supplementary tribunal statement **[Page 922-931]** that was never submitted to the Tribunal but was provided to Sir Norman Lamb in January 2019 explores the above pleading in more detail. I understand, this was forwarded to the First

Respondent by Norman Lamb's assistant in advance of our meeting on 14 January 2019. I will turn to this meeting later in this statement in Section 5.

123. Below I set out the examples of serious patient safety issues and reference to 'serious incidents', that I clearly stated in the 18 September 2014 meeting with Roddis Associates that were excluded from their initial record of the meeting (as evidenced by the revised Roddis Associates' record of the meeting) **[SB p-85-86];**

    a) *"Some of the other Residents have found themselves in the middle of serious incidents (SIs). CD suggested that he was lucky that none of what he described applies to him. He said what I have described show an inadequate night time ICU situation" **[SB p85]**;*

    b) "*CM asked who intubates if there is a cardiac arrest at night. Who intubates in ICU? CD answered that there is an onsite anaesthetic team who are called to ICU. CD said "on occasions the nursing ratios are not ICU for intubated patients. I have observed a number of hypoxic cardiac arrests from tubes getting displaced. The unit's self-extubation rate was high when I was there" **[SB p86];***

    c) *"CD believes this situation is about reorganization of services in South London, a hospital struggling." **[SB p86]**;*

124. Roddis Associates initially chose not to record the above content and it would not have appeared in the Roddis Associates record of my meeting had it not been for my own record of the 18 September 2014 meeting and my challenging the initial record of the meeting for being false. As the pleading states, Roddis Associates were forced to adopt the content of my note of the meeting as the formal record of the meeting and offered written apologies for their initial record of the meeting..

125. There is further evidence of me informing Roddis Associates of the SUIs in an internal email to Roddis Associates from a Trust administrator. This email is clearly a result of Roddis Associates initially acting on the information that I gave them. The email sent by Ms. Rochefort to Roddis Associates states specifically of SUI 656 **[SB p151]:**

    > *"the Incident occurred on 05/12/13 - involved insertion of a chest drain which was incorrectly sited and pierced the liver. The patient died from haemorrhage (coroner's PM report"*

126. As stated, the above evidence shows me clearly describing serious patient safety issues and referencing serious incidents to Roddis Associates. It also shows Roddis Associates initially acting on the information (behind the scenes at least). I have therefore shown that the following assertion from the Respondent's Chief Executive is false: **[Page 1417].** "*I would note that Dr Day did not raise any concerns regarding patient safety or Serious Incidents as part of his complaint at any stage".*

127. As the Roddis external investigation continues to be defended by the Chief Executive of the First Respondent, it is important to make clear that the following Roddis Associates findings in relation to patient safety are not sustainable and are untrue

given the evidence that was presented to the investigation by me **[SB p-85-86**] and other doctors in the HEE Quality visit (**see above paragraph 100 and [Page 634-647]:**

a) "Dr Day has immediate access to the resident anaesthetic registrar for airway management" see **[Page 676]** and compare **[Page 641] [SB p86]**;

b) "A recent Deanery Visit concluded that staffing levels (unchanged since January 2014) were safe and there were no concerns about supervision highlighted by them" see **(Page 677)** and compare **[Page 634-636] and [Page 637-650]**;

128. The below finding by Roddis Associates in respect of my protected disclosures is clearly discredited by the then applicable ICU Core Standards **[SB p6-7]**, the stated views of Dr Frankel **[SB p97]**, the stated view of Dr Umo-Etuk **[SB p149]** and the 2 Serious Untoward Incident reports referenced in this claim **[SB p30-84].**

> *"Dr Day was expected to cover the 18 bedded ICU, ward outliers, A&E and ward ICU as a Resident SHO in QEH. In my opinion this was acceptable in light of his experience and skills at the time."* **[Page 675]**

129. The Roddis Associates conclusions above regarding ICU resourcing are also clearly discredited by the 2017 Critical Care Peer Review which I will now turn to.

Misrepresenting the 2017 Critical Care Peer Review and Falsely Denying The Support It Gives My Protected Disclosures

130. The Critical Care Peer Review was conducted by impartial experts from the South London Critical Care Operational Delivery Network who visited and assessed the First Respondent's ICU at the center of this case in early 2017. More about the ("LCCODN") can be found at **[Page 773-774]** with a description of what a Peer Review involves;

> *"The peer review process involved the panel reviewing evidence submitted in advance of the visit, spending the day visiting the Unit, interviewing various members of the multidisciplinary team, patients and visitors, as well as speaking to members of the Outreach team, a recent patient of the Unit and service users including medical registrars and the Trust resuscitation officer. We also considered the results of the Unit's 360° feedback survey."*

131. Some of the issues focused on in the 2017 Critical Care Peer Review were the same or similar issues raised in my protected disclosures. The Peer Review also made findings that supported my claims of whistleblowing detriment including in respect of culture and more specifically the Trust management's responses to incident reporting. The Peer Review also discredits key findings of the Roddis Associates investigation into my case. If it is true that the 2017 Critical Care Peer Review actually supports my position in my first whistleblowing case, then as an independent review by ICU experts,

it offers a very significant source of validation for my position in that case. It is predictable that the Respondent would wish to undermine such support.

132. Support for my position from a Peer Review was clearly helpful to me to defend myself from attacks from people and organisations that wished to discredit me. This is why it was used in my case and crowdfunding campaign with other evidence to validate my position.

133. To make a statement wrongly denying that support or to claim that the Peer Review is irrelevant to my case had the impact of discrediting me, which was most likely its intention. In the context of my crowdfunding campaigns, which have been reported in the press, where I referenced the Peer Review, for the First Respondent to deny that relevance opens me up to allegations of having misled those crowdfunders. It could be implied from what the Respondent says that I raised money under false pretenses.

134. The Respondent's denial of the support that the Peer Review gives to my position, presents a misleading and false impression of the scope and substance of my protected disclosures in this case (that are now accepted as such).

135. The Respondent, by falsely implying that my protected disclosures were just about medical ward cover one night, amounts to them stating that I was wrong to claim publicly that the 2017 Critical Care Peer Review supported the issues raised in my first whistleblowing case or was even relevant. The First Respondent's public statements on this are pleaded as a detriment;

> "*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. This review found a range of concerns including the number of consultants employed in critical care. 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****" [Page 479]***

136. The Respondent is wholly misrepresenting the scope of my protected disclosures in order to damage and discredit me, which I hope I have made clear above **(see Section 2 / paragraph 48-90).**

137. I wish to clearly demonstrate how the Critical Care Peer Review supports my position in my first whistleblowing case and therefore to show how misleading and detrimental to me it is to state otherwise. The clear issues of overlap between my case and the Peer Review include;

a) The Peer Review's support for my position on Intensive Care Unit medical staffing ratios and the unit's adherence to ICU Core Standards;

b) The fact the Peer Review clearly discredits the Roddis Associate's conclusions in my case that explain away ICU Core Standards on both ICU Resident and Consultant staffing ratios;

c) The Peer Review offers support for my claims of detriment on culture and specifically in response to how my January 2014 protected disclosure was improperly and detrimentally handled when entered as an incident report on the Datix system;

d) The Peer Review makes similar points about a night-time ICU doctor's ability to care for critically ill patients on the wards which is relevant to my 10 January 2014 protected disclosure.

138. The Peer Review makes similar if not identical observations to those that the Serious Untoward Incident 597 Report made which occurred shortly after my protected disclosure. (Roddis associates excluded this SUI from their investigation).

139. Given my crowdfunding campaign and certain publicity, the Respondent's pleaded detriment damages me by effectively giving 4 false impressions:-

a) That it was false for me to claim that there are issues in my protected disclosures that were the same issues identified by the Peer Review;

b) That it was false for me to claim that the Peer Review supports the validity of any of the issues raised in my protected disclosures;

c) That it was false for me to claim that the Peer Review gives support to certain detrimental actions in my case in particular on Datix incident reporting and culture;

d) That it was false for me to claim the Peer Review discredits Roddis Associates investigation's findings on ICU staffing and adherence to ICU Core Standards.

Example 1 – The Critical Peer Review Supports My Protected Disclosures on ICU Staffing Ratios and Discredits the Findings of the Respondent's External Investigation By Roddis Associates

140. The Peer Review findings raises the same ICU staffing issues raised in my protected disclosures and discredits the conclusions of the First Respondent's external investigation in 2014 by Roddis Associates into my protected disclosures.

141. The Roddis external investigation when commenting on the validity of my protected disclosure explains away national guidelines (ICU Core Standards) and found **[Page 675-676]**;

> ". . . *Dr Day . . . was expected to cover the 18 bedded ICU, ward outliers, A/E and ward ICU assessments as a resident SHO in QEH a district general hospital. In my opinion this was acceptable in light of his experience and skills at the time*". **[Page 675]**
>
> "*The ICU core standards say that in general the consultant/patient ratio should not exceed between 1:8 and 1:15 and that anything in excess of 1:14 is*

deleterious to patient care and consultant well being. The core standards say that the ICU resident / patient ration should not exceed 1:8. These ratios are therefore not absolute." **[Page 676]**

142. In contrast to Roddis Associates, the 2017 Critical Peer Review states in respect of ICU staffing in 2017 [**Page 774];**

> *"High patient to consultant ratio within the unit. On the day of the visit there were 19 patients and only 1 consultant, exceeding the recommended ratio of between 1:8 and 1:15. It was apparent that this is a consistent issue with no clear recognition of the need for extra consultant input, nor any plans to address this."*

143. Even if the First Respondent wishes to now disagree with the Peer Review (despite accepting the findings at the time in 2017), it cannot be said that the Peer Review's conclusions quoted above and the Roddis Associates conclusions on my protected disclosures also quoted are not focusing on the same issues. The Peer Review is clearly considering the same issue of adherence to ICU Core Standards in respect of staffing and siding with my position and discrediting that of Roddis Associates who effectively just explain away ICU Core Standards.

144. The Peer Review also comments on the Respondent's ability to recognise ICU staffing issues and show insight into them which is also relevant and supportive to my claims of detriment **[Page 774]**:

"It was apparent that this is a consistent issue with no clear recognition of the need for extra consultant input, nor any plans to address this."

145. The evidence set out above from my case in 2014 and the Peer Review in 2017 exposes the following quote that the First Respondent gave to the Evening Standard in 2016 as false and misleading **[Page 763]** (my emphasis by underlining):

> *"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. <u>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</u>."*

146. This quote to the Evening Standard misleads the readers in 2 ways. Firstly, it falsely implies to the Evening Standard that the Roddis investigation in my case validated my staffing concerns and identified a need to increase the medical staffing in the ICU following the investigation into my disclosure. The opposite was true as the Roddis investigation denied there was a problem with staffing or supervision in the ICU **[Page 675-676].**

147. Secondly, the Evening Standard quote gives the impression that following such recognition by Roddis Associates of a need to increase medical staffing on the ICU, intervention occurred to make the unit compliant with national ICU Core Standards. The Roddis Associates investigation made no such recommendation and explains

away the relevant quality standards (ICU Core Standards) that the Respondent claimed to the Evening Standard their unit was fully complaint with as a result of Roddis' recommendations. The Peer Review **[Page 774]** clearly indicates the unit was not compliant with national standards as does the HEE Quality Visit **[Page 641-2].**

Example 2 – The Peer Review Supports The Validity of My Concerns About the Way My January 2014 Protected Disclosure And Datix Incident Report Was Handled

148. The 2017 Critical Care Peer Review sets outs criticism of the way clinical incidents were responded to by the First Respondent when reported by Intensive Care Unit staff on the Datix system **[Page 775]**;

> *"13. Poor incident reporting culture. Two members of staff . . . report being approached by their respective managers after submitting incident report forms. One was told "she had created a lot of work". The other was told she should have said something at the time to address the issue rather than submitting an incident form."*

149. What is set out above in the Peer Review in 2017 about ICU incident reporting culture and the two examples of what happened to staff raising Datix incident reports supports and validates the claims in my first whistleblowing case about the way my January 2014 protected disclosure was handled after I entered it onto the Datix system as an incident report.

150. In 2014, the Roddis Associates investigation makes several criticisms of the way my protected disclosure were responded to when I entered them as a Datix incident report onto the Datix system;

a) "*the Datix report was not formally followed up and logged on the system as would be expected*." **[Page 695]**

b) "*When a Datix report was submitted on 15 January 2014 it was not dealt with through routine governance processes. If it had been, this may have helped provide a corporate response to Dr Day through 'normal channels'. This was a missed opportunity for the Trust"* **[Page 713]**

c) *"The responses to the clinical issues Dr Day raised were addressed in an informal and uncoordinated way"* **[Page 713]**

d) *"Dr Day then shares his experience with Dr Harding who involves Dr Ward who then copies his response to a wide and senior audience which is undermining and could be perceived as bullying"* **[Page 712]**

151. Both the Critical Care Peer Review in 2017 and the Roddis Associates Investigation into my own case in 2014 report a negative and inappropriate response by the Respondent to Datix incident reports made by ICU staff. It follows that the Critical Care Peer Review supports my claim to have suffered detriment on account of entering my protected disclosure onto the Datix system. That was relevant to my case.

152. The Peer Review indicates that ICU staff were experiencing the same negative reaction in 2017 when making Datix Incident reports as Roddis Associates finds occurred in my case in 2014.

153. Moreover, junior doctors made the following comments to the October 2014 HEE Quality Visit about how their incident reports were handled which is yet another link to my case from the comments in the Peer Review to my case;

    a) *"SI (Serious Incident) Reporting; "Core ACCS Trainees indicated to the visit team that SIs have been reported on numerous occasions but no feedback has ever been received.* ***[Page 640]****;*

    b) *"Potential SIU's are not being reported or there is no apparent action when they are"* ***[Page 635].***

154. The evidence set out above shows that the Peer Review supports and identifies similar issues on incident reporting culture in 2017 that my case claims occurred in 2014 which is supported by the findings of Roddis Associates and the HEE Quality Visit.

155. It therefore cannot be said that the findings that the Peer Review makes on incident reporting culture are not relevant to my case or have been incorrectly linked to my whistleblowing case by my crowdfunding campaign.

156. This example alone shows that it is false and detrimental for the Respondent to imply that that the Critical Care Peer Review did not address the same issues as my protected disclosures.

Example 3 – The Critical Care Peer Review robustly supports the concerns raised in my protected disclosures about the single night time ICU doctor's ability at night to manage sick ward patients properly

157. My protected disclosures clearly raise concerns about the level of resourcing a single night-time ICU doctor can give to the other hospital wards and the way potential critical care patients are managed on the wards by ICU. The Critical Care Peer Review directly supports the concerns that I raised about this in my August 2013 and January 2014 protected disclosures.

158. A further Serious Untoward Incident occurred involving an ICU doctor on a night shift. The patient that died was a urology patient that had recent day case surgery and was referred to ICU from a ward. This incident occurred a few months after my initial protected disclosure in August 2013. The patient death in this incident occurred on 8 November 2013 in SUI 596 **[SB p30-58**]. As stated, this SUI (like SUI 656) occurred a few months after my August 2013 protected disclosure as would have been clear to the 2018 Tribunal if the SUIs had not been excluded from the 2018 hearing chronology. Both my August 2013 protected disclosure and SUI 596 raised concerns about the training, experience and workload of the ICU doctor at night as does SUI 656. It also raises consultant : patient ratios and how that impacts the care both the junior doctor

and the consultant could give to new ICU referrals from the ward or the Emergency Department. The SUI report of SUI 596 made findings in 2014 almost identical to what the Peer Review found in 2017 about similar issues **[SB p46-49].** This is clearly relevant and important to my protected disclosures;

> ***"5. Communication pathway and quality of information given to ICU consultant***
>
> *a. The ICU resident discussed the patient by telephone with his consultant. However, as the resident failed to appreciate the severity of Mr As condition, the communication failed to result in an escalation of care. This is something that could be made mandatory if a standardised referral format was introduced.*
>
> *b. Within the statement provided by the Outreach nurse, (who overheard this conversation), they stated that the discussion between the ICU resident and consultant hadn't resulted in the appropriate outcome for Mr A, but did not feel able to revisit this decision with the Consultant."* ***[SB p46]***
>
> ***"6. Inadequate senior medical input into Outreach service***
>
> *a. Despite an arrangement made at 08:20 hrs being in place for Mr A to be reviewed by the ICU consultant this did not happen before his cardiac arrest at 12:40. This was because the ICU was busy and occupied the consultant for longer than anticipated and there is no separate consultant assigned to the Outreach service****."[SB p47]***

159. Given the SUI report findings, I have included with permission from the relevant ICU Resident their position on the SUI at **[SB p152-153].** Of particular relevance is what the ICU Resident says about the delay in admitting the patient that died to ICU;

> ***"****This decision was in part influenced as Dr Harding felt the Critical Care unit was already quite full with limited numbers of nursing staff****" [SB p153]***

160. As stated, the Critical Peer Review makes similar observations to SUI 596 in 2017 about ward patients that become critically ill outside of ICU; **[page 775]**:

> *"7. In the wider hospital, there are a high number of peri-arrest calls (60-80 per month), suggesting that the escalation pathway for deteriorating patients is ineffective and patients are not being identified early enough and appropriate interventions are not being made in a timely fashion. It was reported that frequently the ward teams are not alerted to high NEWS scores until the score reaches 9…*
>
> *10.There was no clear clinical leadership of the identification of the deteriorating patient, and no ownership of the care of deteriorating patients in the wider hospital. Whilst it was reported that there was a vital signs policy in place, there was no knowledge of any monitoring of compliance with that policy or audit of*

patients that had not been escalated in a timely fashion according to policy." (my emphasis by underlining)"

161. The Coroner inquest report into SUI 597 that occurred in 2013 identifies the failure of timely escalation of ICU care as a key cause of the death. This is the exact point with the exact wording the Peer Review uses to highlight the same problem in 2017. The Coroner states **[page 925];**

> "*The failures to first investigate the cause of hypertension on 07/11 and to admit in a timely manner to ICU contributed to his death*."

162. The above content in the Critical Care Peer Review robustly supports my protected disclosures in relation to the ICU doctor Resident's ability to care for patients on the wards (outside of ICU) at night. It particularly supports my 10 January 2014 protected disclosure. There is clear overlap between my concerns about two ward cover doctors not attending for work and the inability for ICU to mitigate such an occurrence and the likely consequences for sick patient patients requiring ICU care on the wards.

163. The similarities between the unstable patient that dies in SUI 596 and the patient that I admitted from CCU on 10 January 2014 after referral from ICU outreach, before I made my 10 January 2014 protected disclosure, are clear. It is exactly this type of patient the 2017 Critical Care Peer Review is warning about when it states;

> "*In the wider hospital, there are a high number of peri-arrest calls (60-80 per month), suggesting that the escalation pathway for deteriorating patients is ineffective and patients are not being identified early enough and appropriate interventions are not being made in a timely fashion" **[Page 775]***

164. Based on this example alone, it is demonstrably false for the First Respondent to claim the Critical Care Peer Review does not cover the same issues as the substance of my protected disclosure that expresses concerns about the single night ICU doctor's ability to offer critical care to ward patients. For the First Respondent to have made that claim in their public statement diminishes the importance of the disclosures that I had made and therefore diminishes me in the eyes of those who had supported me and other interested parties such as the press and MPs.

Peer Review in the Health Service Journal

165. A Health Service Journal article that summarises the 2017 Peer Review explicitly links it to my case **[page 840-44].**

> *"A "complete lack of medical leadership", low consultant staffing levels, "inadequate clinical governance" and poor culture are among key findings in a damning peer review into a south London intensive care unit… The ICU is at the centre of Dr Chris Day's whistleblowing employment tribunal to be heard next year."*

166. The Heath Service Journal is a specialist healthcare journal which clearly understood the issues in the Peer Review were central to my first whistleblowing case. I have always been impressed with the Health Service Journal's understanding of my case. They have written several good pieces.

167. A retired senior doctor from the First Respondent, Dr Tony O'Sullivan who I understood also held a senior management position, commented under the HSJ piece about the relevance of the issues in the Peer Review to my whistleblowing case **[Page 843].**

> ***"****What we have is a scenario played out of underfunding, understaffing, financial priorities over clinical and low morale. None of us would welcome ourselves or friends or relatives working in that environment.*
>
> *Chris Day was working in the ITU in one of the affected hospital[s] in 2014. He raised an important clinical issue . . ."*

CREDIBILITY

168. As for any doctor, my credibility both professionally and personally is important, and the approach adopted by the Respondent in their public statements has been, or had the impact of, undermining that credibility which has also been so vigorously attacked by the respondents in these proceedings.

169. I have sought to maintain high standards as evidenced by the words of my actual day to day clinical supervisor at the First Respondent. Of all the senior doctors at the First Respondent, as my day to day clinical supervisor, Dr Sauer was best placed to comment on my performance as a doctor and the reasonableness of my challenge of various whistleblowing detriments.

170. Dr Sauer' stated in his written evidence to the Tribunal in 2018 in respect of my performance at the Respondent **[Page 1598-1561];**

> *"Chris is a very keen trainee and progressed very well since February. He is extremely interested in all aspects of Anaesthesia and worked hard to achieve his IAC. He has good technical skills and record keeping. He is a very good team player and always takes utmost care to put patient's priorities first . Chris is fully engaged in the educational process and works well with colleagues*
>
> *He is a competent and confident trainee with a skill set which exceeds the expectations of someone of his level of training. He is aware of his limitation and not afraid to ask for help or advice"* ***[paragraph 6 Page 1599]***

171. Dr Sauer's statement also provides helpful evidence in respect of my claims of whistleblowing detriment **[paragraph 11 page 1600]**

> *" the Claimant has informed me that the Second Respondent and senior managers at the First Respondent have made allegations about his performance, state of mind, engagement with supervisors and personal, as well*

as, professional conduct. I find these allegations extremely surprising as during the whole period of my engagement with the Claimant I never noticed any basis for such allegations. The reference I provided on 12 August 2014 concludes with the statement . . . ;

"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."

It is also surprising that these allegations were never discussed with me. As the Claimant's clinical supervisor, I would expect to hear about such concerns as a matter of urgency. I confirm that I clearly do not support these allegations and believe they have no grounds. It is also not consistent with anything that has been written in the Claimant's Eportfolio by the over 30 health professionals that have worked with or assessed the Claimant during his training . . . ." (emphasis added)

172. Both Respondents decided to exclude Dr Sauer's evidence from each of their separate formal investigations into my protected disclosures and claims of detriment. It was the Second Respondent's formal investigation that made the damaging findings described in Dr Sauer's statement (that Dr Sauer believes have no grounds). The fact these allegations were made in a formal investigation report that excluded evidence from my clinical supervisor, Dr Sauer, and over 30 members of NHS staff that worked with me speaks volumes about the attacks on my credibility in this case. It is clear to me that the Respondent's motivation in the present claim is identical to the previous claim which is the need to discredit me and conceal the truth about my protected disclosures and how they were dealt with.

173. In the detriments alleged in this present claim, the Respondent has attempted to deny the link between my first whistleblowing case and the serious patient safety and governance issues in my protected disclosures and the support there is for the issues that I raised from various reviews and investigations, in particular the a 2017 Critical Care Peer Review. In addition the Respondent has made the false claim that its external investigation by Roddis Associates found that it responded to my disclosures in the "the right way". This has now been covered in details in Section 2 and 3 of this statement.

174. At the Tribunal, in October 2018, the Respondent accepted that I had grounds for reasonable belief in these protected disclosures. I have provided an honest account of these issues in my Crowdjustice campaign and they have been clearly central to this and my first whistleblowing claim. For the Respondent to represent that my protected disclosures were not about serious patient safety issues in ICU is effectively accusing me of lying publicly and to MPs about the substance of my protected disclosures. To suggest they responded in the "right way" further suggests that my first whistle blowing claim was inappropriate as the trust responded appropriately to my disclosures. This is clearly very damaging for me as a doctor and some have even suggested that I may

have been fraudulent in my crowdfunding activities by misrepresenting the substance of my disclosures; and the response to them; and have done this publicly.

175. Issues raised in my protected disclosures are plainly about the Respondent's ICU and not limited to a one-off situation of medical ward cover as claimed by the Respondent. The protected disclosures have been supported by senior people and various external reports but in particular a Critical Care Peer Review in 2017 and to deny this is clearly detrimental.

SECTION 4 – COST THREAT DETRIMENTS

Concessions Made by the Respondents in this Case

176. The most objective way to demonstrate the impact the cost threats had on the likely progress of my case is to set out the Respondents various concessions that have occurred. I do so in order to demonstrate as dispassionately as I can manage, that I had at the very least an arguable case back in October 2018 when the costs threats were made. That is to say nothing of the possibility of my side of the story being accepted by the Tribunal in addition to the significant number of concessions from the Respondents which I will now set out.

First Respondent's Concessions

177. In addition to waiting 4 years for the Respondent to accept (at the October 2018 hearing) many of my protected disclosures as reasonable beliefs, the Respondent has made other concessions. By explicitly accepting the finding of their external investigation by Roddis Associates, the Respondent must now accept the criticisms set out above in the investigation report and at **(paragraph [116] of this statement or paragraph 36 of my Grounds of Claim)**. By this, the Respondent is effectively accepting multiple detriments that I have been subject to, the subject of my first whistleblowing claim. I believe that the link to the now accepted protected disclosures to these detriments is clear and in particular the January 2014 protected disclosures. There is certainly an arguable case to that effect. The detrimental activity set out by Roddis Associates all comes as a result the processing of my January 2014 protected disclosure.

Second Respondent's Concessions

178. Notwithstanding the Second Respondent's exit from this case. I would ask the Tribunal to note that prior to their exit from this litigation, the Second Respondent has made the following concessions in this litigation which I suggest points to the allegations in my first claim also clearly amounting to whistleblowing detriments by the Second Respondent:

a) **Conceding protected disclosures including reasonable belief in issues of patient safety and deliberate concealment**; After 6 years of denial of my

protected disclosures (see para 25 of the Second Respondent's original ET3 Grounds of Resistance **[Page 100]** and attempts to discredit me, HEE accepted the content of my protected disclosures as reasonable beliefs in the public interest of both the patient safety class of disclosure and also the class that indicates that such issues have been or were likely to have been deliberately concealed. The concession is set out in the Second Respondent's amended Grounds of Resistance for the present claim at paragraph 15 **[Page 525].** That dramatic concession came after me sending this letter dated 11 November 2020 **[SB p230-232**] enclosing Further Better Particulars on my protected disclosures **[Page 481-488].** It is clearly detrimental to portray, for 6 years, a doctor's 13 important protected disclosures as unreasonable and vexatious when it is known all along that they are reasonable and important.

b) **Concession that formal investigation was terrible and misleading**; 2 senior HEE doctors involved in my case have been forced to concede that HEE's formal investigation into my whistleblowing case was "terrible" (Dr Frankel) **[SB p223-224]** and "*gives an exaggerated or distorted impression"* **(see Dr Chakravarti Tribunal statement paragraph 21 [SB p302]).**

c) **Conceding a false account of my protected disclosure in a formal report;** A senior doctor of the Second Respondent, Dr Chakravarti has conceded that damaging statements were falsely attributed to her in a formal Plummer report about my 3 June 2014 protected disclosure at the ARCP meeting. In her statement at paragraph 20 **[SB p301]** She states in relation to an email that she sent Mr Plummer on 5 January 2015, "*I felt baffled at the quotes attributed to me*". She further states at paragraph 21 **[SB p302]** "*I was very surprised to find various phrases in inverted commas seemingly quoting me, when I could not recall saying those phrases."* Dr Chakravarti in paragraph 21 of her statement accuses the Second Respondent's investigating director Mr Plummer of giving an "*exaggerated or distorted impression*" in his formal investigation into the protected disclosure at my ARCP. The covert audio secured the above concession which is referenced in Dr Chakravarti's 2018 Tribunal statement. Further context on this is set out at **(see paragraph 25-35 of the Further and Better Particulars (page 485-7))**.

d) Conceding that my formal ARCP/Appraisal document was inappropriate; The Second Respondent's former Post Graduate Dean Dr Frankel conceded in writing to Norman Lamb in January 2019 that the formal ARCP document completed for my 2014 appraisal "*was inappropriate*" **[Page 1305]** and seems to criticise another senior doctor Dr Lacy when he states, *"It is clear that Dr Lacy had not appreciated that the fact that U boxes had been ticked was inappropriate*" Dr Frankel further concedes that in my objection to the ARCP document, "*he was quite correct that these boxes needed to be removed".* The ticking of the 'U-Boxes' on my ARCP record indicated firstly that I had professional/ personal issues and secondly that I did not engage with supervision. It was further stated that an unsatisfactory ARCP outcome had occurred as a direct result of these reasons **(see paragraph 84 [SB p267]).**

e) **Conceding that a briefing document sent by former Post Graduate Dean was misleading;** The Second Respondent have accepted that their former Post Graduate Dean, Dr Frankel, sent a document about me and my case to the Chair of the Conference of UK Post Graduate Deans and former Health Minister Norman Lamb. HEE accept they did nothing to correct the document despite HEE knowing that one of their own senior doctors (Dr Lacy) had described the document as "misleading" in an email to the Second Respondent's management dated 16 January 2019 **[SB p224b];**

f) **Conceding "wholly inappropriate" use/sharing of my personal data;** HEE accepted that their former Post Graduate Dean obtained confidential material about me and my case by falsely stating that they had authorisation from the HEE Medical Director to obtain such information from my file in order to produce a briefing document (conceded as misleading by HEE). Judge Andrews described this as *"wholly inappropriate"* in her Judgment dated 12 February 2022. **[Page 607-624] at [Page 622];**

g) **Concession of "perhaps being deceitful".** The relevant former HEE Post Graduate Dean has conceded in open Tribunal that his actions were "perhaps being deceitful" (recorded in the recent Judgment dated 16 February 2022). **[Page 607-624] at [page 615].**

179. Given the above concessions from the Respondents, including the now accepted protected disclosures, any suggestion that I did not have at least a clearly arguable case of whistleblowing detriment back in 2018 is not credible. All of the above detriments from the Second Respondent are actions related to my ARCP/appraisal meeting on 3 June 2014, where I made one of the most serious of my protected disclosures.

180. Some if not all of these concessions from the respondents could have been obtained/used if the respondents witnesses had been cross examined in October 2018. They are clearly an indicator of how potentially fruitful a cross examination process could have been against the respondents had it occurred.

181. This raises the question of why I would abandon my claim just before cross examining the Respondents' witnesses. I clearly knew the above or similar concessions were possible and even had some of them at the time of settlement.

182. I will now turn to my reasons for agreeing to settling my previous claim. My decision, supported by my wife, to enter into the settlement agreement for my previous consolidated claim was a result of what I was told about alleged cost threats from the respondents by my former legal team.

183. In respect of the above, I emphasise that my case is that the cost threats occurred; the Respondent's categorical denials that they did occur are false and detrimental statements; and those denials were made on the grounds that I had made various

protected disclosures. The conduct of my former legal team is subject to proposed professional negligence proceedings which I will briefly turn to.

Conduct of my Former Legal Team

184. As stated, at the October 2018 hearing, I was represented by Tim Johnson Law and the barrister Chris Milsom.

185. As a result of Mr Milsom failing to provide answers to questions from both me and my solicitor following the settlement of my case and also as a result of Mr Milsom's breaching of General Data Protection Regulation legislation, I submitted a formal complaint against Mr Milsom to his chambers "Cloisters" on 5 May 2020 **[Page 1458-1466].**

186. Mr Donovan QC of Cloisters in his response to my complaint dated 13 May 2020 **[Page 1467-1477]** states, "*the Settlement Allegations raised issues of professional conduct and/or professional negligence which were too wide-ranging and too serious to be suitable for determination under the Procedure"* **[Page 1471]**. Mr Donovan further states more generally about my complaint, "*Plainly, Dr Day's complaint involves very serious allegations of professional misconduct and/or negligence"* **[Page 1474].** Mr Donovan summarises his understanding of the issues raised in my complaint at **[Page 1475].**

187. Mr Donovan further states effectively that he wishes to remain neutral on the matters forming *"no view on the merits or the demerits of the complaint" **[Page 1476]**.* Lastly, Mr Donovan signposts me towards seeking advice in respect of professional negligence by stating that I was "*entitled to seek independent legal advice on the prospects of a claim against Mr Milsom for professional negligence" **[Page 1477]**.*

188. The chief source of evidence for the complaint has been Ben Cooper QC and Angus Moon QC, the Counsel acting for the NHS in my case. Mr Cooper and Mr Moon had responded to a Data Subject Access Request from me.

189. A serious situation has clearly developed between the former barristers in this case. It is wrong for me to be disadvantaged by it any further.

190. On 27 August 2020, I instructed a Letter Before Action to be sent to Mr Milsom which Mr Milsom had 3 months to respond to as per the pre-action protocol on professional negligence **[Page 1485-1501].**

191. It took Mr Milsom until the 27 July 2021 (11 months) to finally respond to my Letter Before Action dated 27 August 2020 about questions put to him about his conduct that remained unanswered. In his formal response to my LBA, Mr Milsom sets out for the first time his explanation of his actions on my case in October 2018 **[Page 1560-1582].** This has been redacted accordingly to preserve legal advice privilege.

192. It is obvious that the matters put by me to Mr Milsom in 2020 on the basis of information I had acquired since October 2018 and the response from him in 2021 played no part

in my decision to settle in 2018 as it was not known about at that time. The reason for the settlement was the various cost threats from the respondents.

193. Whether there may have been negligence and/or professional misconduct in the manner in which I was represented at the 2018 hearing is not a question for this tribunal (and would require a very detailed explanation).

194. I do not agree with what Mr Milsom says in his response to the letter before action much of which can be shown to be demonstrably inaccurate with reference to the 2018 hearing bundle.

What is Understood by the Term 'Cost Threat'?

195. I want to be clear what I mean when I use the term 'cost threat' when applied to employment tribunal litigation. This may not be necessarily as it is a widely understood term by employment law practitioners. I accept that it has its appropriate limited place in adversarial litigation as set out in the employment tribunal rules. The rights and wrongs of that is not what this case is about and it is certainly not my complaint.

196. In the present claim, the respondents are seeking to muddy the waters and manufacture confusion on what is meant by a cost threat in the employment tribunal because they are on the wrong side of the simple arguments in this case.

197. My complaint in this claim is not about multiple cost threats being *made* by the respondents. Rather the allegation is that multiple cost threats were made and then *denied* to MPs and to the press. There is also a very clearly obvious issue with what the Board of the First Respondent and I were told by our respective legal teams about respective without prejudice positions before and after agreeing to the settlement as they cannot both be true **[see Page 1123 and Page 1283-1285].**

198. My position in this litigation cannot be interpreted as some vague objection to the fact cost threats were used . My position is simply that multiple cost threats were used to induce settlement and to force the agreed statement and that it is false and to my detriment to deny that they were.

199. Since the settlement of my first whistleblowing claim, I have been open to hearing both sides of the story from both my former legal team and the legal teams of the NHS Respondents on the various cost and regulator threats. This is evidenced by my Data Subject Access Requests to opposing counsel. My application to set aside the settlement is yet further indication that I was open to and considered the possibility of what I had been told about the cost threats actually being a mistake or misrepresentation of the Respondents' actual position and to their publicly stated position being the accurate one.

200. I am surprised that after the respondents, responding to my application to set aside the settlement, denied what I have been told about the cost threats by Mr Milsom [**Page 1123]** was a mistake or misrepresentation, they now seem to claim that it is a mistake

or misrepresentation in their defence of the present claim. Either what is set out on **[Page 1123]** by Mr Milsom is a mistake or misrepresentation and the settlement agreement should be set aside or it is the true position of the respondents and the present claim cannot be resisted. It appears the respondents have sought to advance one position to resist my application to set aside the settlement and another position in the present claim.

What do Employment Lawyers Mean by the term Cost Threat?

201. I accept that this Employment Tribunal will have a view of what amounts to a cost threat in adversarial litigation, which I accept is important. However, it is also important to consider what many others consider by the term cost threat in order to consider whether or not the respondents have detrimentally misled the press, public and MPs.

202. Mr Shah Qureshi, the Head of Employment at the large national law firm, Irwin Mitchel, helpfully describes in the below quote from a Financial Times piece what most lawyers understand by the term cost threat in whistleblowing cases. The FT piece covered the use of cost threats in my whistleblowing case and other whistleblowing cases. Mr Qureshi states **[SB p242-247].**

> *"Employers and their lawyers routinely threaten costs against whistleblowers to frighten them into dropping their claims or watering them down"* **[SB p245].**

203. What I am claiming and what the respondent is counter-claiming is actually quite simple. I am saying that the same sort of cost threats that experienced employment lawyers are saying are routinely used against whistleblowers to frighten them into dropping their claims or watering them down were used against me by the Respondents and their lawyers. The Respondent has stated that they made no such cost threats and further stated that any suggestion that they did is simply untrue. The relevant detriments in the present claim are as follows **[Page 174]**

> "[Dr Day] *claims that the Trust threatened him with the prospect of paying our legal costs. All of this is simply untrue"*
>
> *"We did not threaten Dr Day with legal costs to pressure him to drop his claim"*

204. The First Respondent has also given the impression in their public statements and in communications to MPs that that they made it clear to me prior to my agreement to settle that they would not seek costs against me before I made the decision to withdraw my case, "*On the issue of costs, we had decided not to pursue Dr Day for legal fees before he withdrew his claim*" **[Page 174].**

205. In a Times Law piece in March 2022 that also mentioned my case, Shazia Khan the senior partner on the law firm Cole and Khan Solicitors states of NHS panel law firms in whistleblowing cases;

> "*Those seeking to vindicate their rights before an employment tribunal, Khan adds, will often be "priced out of justice" by well-resourced NHS trust lawyers*

who at public expense "deploy a menu of tactics" to defend cases. This includes triggering satellite litigation to strike out claims as a means to drain resources and threatening six-figure costs applications" (emphasis added)

What MPs Understand by the term 'Cost Threats'

206. I have been quite open with my evidence from my former Barrister Chris Milsom on the various cost threats made, including with the two MPs, Norman Lamb and Justin Madders. Both are former employment lawyers. In a letter dated 17 December 2018 to the Secretary of State for Health they summarise their understanding of what the evidence shows **[Page 260-261];**

> *"We are very concerned that the allegation that cost threats were made has been denied by both Health Education England and the Trust. Dr Day's barrister in the hearing has confirmed that threats were made. This is very troubling.*

Cost Threat on the Employer/Worker Point in 2016

207. Both Respondents have now accepted that the litigation position that I advanced in respect of Health Education England's (Second Respondent's) employer status in respect of junior doctor whistleblowing protection was not only correct but a 'public service' **[Page 996]**. Yet the day before the Employment Appeal Tribunal hearing on that point in 2016, my position was described as unreasonable by Health Education England, and they proceeded to make a written cost threat of £24,084.50 which included a schedule for costs **[SB p184-186].**

208. This cost threat was made when both respondents in the litigation knew my position was reasonable and a public service and both respondents had failed to disclose an LDA contract signed by both respondents that would help establish that Health Education England were my employer for the purpose of ERA s43K **[SB p204-208].**

209. In response to this cost threat, my solicitor, Tim Johnson, sent a letter dated 9 February 2016 that stated **[SB p183];**

> *"We are extremely surprised that your client intends to apply for costs in relation to this appeal as the appeal obviously raises issue of great public interest. In the aftermath of the Francis Report it is very important that the law is clear on exactly what whistleblowing protection junior doctors have.*
>
> *In your skeleton argument your client argues that there is a lacuna in the law. Yet you client intends to seek costs against a doctor who seeks to establish" the law in this area. This is a shameful abrogation of responsibility on the part of a public authority which is responsible for the training of junior doctors."*

210. This example illustrates perfectly how costs threats have been used in my case namely to intimidate me away from pursuing credible litigation in the public interest.

Summary of Cost Threats at the October 2018 Hearing

211. My former barrister, Mr Chris Milsom's failure to give me access to relevant communications with opposing counsel resulted in me having to lodge a Data Subject Access Request against the Respondents' former Counsel in order to establish the position about various 'without prejudice communication'.

212. I will now set out what the evidence shows in respect of ordinary costs threats, wasted cost threats and various references to referring me and my former solicitor to our respective regulators. As far as I know, these threats first started during the period I was giving evidence in purdah at the October 2018 hearing.

213. I would encourage the Tribunal to think of the cost threats in 3 waves;

a) **First Wave** – Friday 5 October 2018 – Ordinary Cost Threat from only the First Respondent Lewisham and Greenwich (which DID NOT induce settlement);

b) **Second Wave** – From 8 -11 October 2018 – Multiple ordinary cost threats from both the First and Second Respondent, and a wasted cost threat (the second wave of threats DID induce settlement) – there were also references to a medical regulator referral and legal regulator referral;

c) **Third Wave** - Friday 12 October 2018 – Using cost threats to force the wording of the agreed statement

Cost Threat Friday 5 October 2018

214. The first of several ordinary cost threats occurred on Friday 5 October 2018. By this time, I had completed only two half days of a 6-day cross examination. On Friday 5 October, the Tribunal did not sit due to the personal circumstances of one of the Counsel.

215. The evidence shows that at on 5 October 2018 at 12:59, my Counsel, Mr Milsom sent an email to the First Respondent's Counsel Mr Ben Cooper QC with the words, "*You around for a chat this afternoon"* with no further text in the body of the email **[Page 942]**. Mr Cooper replied giving his mobile number at 13:06. **[Page 945]**.

216. In a document sent to my then solicitor, Jahad Rahman, on 30 October 2019 **[Page 1550 at 1552],** my former Counsel, Mr Milsom, described how a drop hands offer and corollary cost threat came about during his phone call with Mr Cooper (my emphasis below by underlining)**:**

> *"I needed to speak to Mr Cooper on a few housekeeping matters in any event on that day. During the course of a telephone discussion, I asked whether there was – hypothetically - scope for resolution of matters. I made it emphatically clear that I had no instructions to do this: nor could I since Dr Day was in purdah.*

> *It seemed to me unlikely that there would be any prospect of financial resolution since this would be subject to Treasury approval I made it perfectly clear that I was not making an offer of settlement and had no authority to do so but was interested to consider the thoughts of the Trust to resolution in principle. Mr Cooper QC confirmed that he would explore that and reverted by way of his text message."*

217. As part of the DSAR Mr Cooper has provided a file note of his telephone conversation with Mr Milsom that occurred at 1:13pm on 5 October 2019. It can be found at **[Page 948]**. The note describes a discussion of a drop hands offer and a reference to Mr Cooper anticipating making a cost threat at the end of my evidence. There is no mention in that file note of any link to any potential credibility findings against me. There is also no record of any discussion whatsoever about the truthfulness of my evidence;

> *" . . . I was anticipating approach[ing] CM at end of C's evidence to say drop hands then & we won't go for costs but otherwise we will – but won't want to waste hrg time for him to have the conversations*
>
> *- CM indicates it would be helpful for me to approach him on that basis in any event"*

218. After the telephone contact between Mr Milsom and Mr Cooper, Mr Cooper sent an email to the managing Partner of Capsticks Solicitors, Martin Hamilton at 13:38 **[Page 949]** (my emphasis below by underlining):

> "*I indicated* [to Mr Milsom] *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, we would make a cost application"*

219. Mr Cooper's emailed account **[Page 949]** of his phone call with Mr Milsom in respect of his 'anticipated' drop hands offer and cost threat is not the same as his account in his file note at the time of the phone call **[Page 948].** Included in the email but not in the file note is Mr Cooper recording that he indicated to Mr Milsom that there was "*now clearly a real risk that there may findings that . . . [I had] been untruthful in [my] evidence"*. Mr Milsom in an email to me on 13 January 2019 denies that in that Friday phone call with Mr Cooper there was any link made to the truthfulness of my evidence **[Page 1338]**. As I have stated, Mr Cooper's file note appears to support Mr Milsom's account whereas Mr Cooper's email to the Capsticks managing partner does not. Both accounts however provide proof that a cost threat had already effectively been made (despite being couched at that point in the day in language relating to an anticipation).

220. The cost threat and drop hands offer communicated by Mr Cooper to Mr Milsom was passed on to my solicitor Tim Johnson by an email at 13:42. Mr Milsom does not state that the cost threat is linked to any suggestion by Mr Cooper that my evidence could be found to be untruthful **[Page 938]:**

> *"acting without formal instructions Ben Cooper has broached the prospect of a drop hands offer with the corollary that if we proceed to a negative judgment they will seek to recover costs".*

221. Mr Milsom sent a text message to Mr Cooper at 13:48 **[Page 952]** that reads;

> *"Hi Ben, Chris here. It would be handy for him to have the weekend as thinking time would you object to me speaking to my client along the lines we discussed? I would understand if you did but it would be handy to make use of the hiatus."*

222. Mr Cooper has provided to me a copy of the text message that he sent Mr Milsom on Friday 5 October at 16:14. I did not know this existed until Mr Milsom later informed one of my legal team over 6 weeks after the settlement. Mr Milsom did not disclose this text message to the instructing solicitor, Tim Johnson, at the time. Mr Milsom subsequently claimed to have permanently lost it and I would not have obtained it at all had it not been for my DSAR to Mr Cooper and his assistance [**Page 952-953]**:

> *"I can confirm that I now have instructions to offer a drops hands if your client agrees to it before we start our evidence, but if he continues and loses with adverse findings as to his truthfulness there would be an issue as to costs. We are also content for you to speak to your client about this so he can reflect over the weekend, but on the basis that you don't any specific aspect of the case or his evidence . . .".*

223. A further text is sent by Mr Cooper to Mr Milsom the same afternoon stating a clear intention to rely on the earlier communication in any future proposed application for costs. It is explicitly stated by Ben Cooper that the communication is without prejudice save as to costs. That reinforces that by this point in the day there was unequivocally a costs threat being made **[Page 954]:**

> *"For the avoidance of doubt this is all wp save as to costs. B"*

224. I accept from the evidence that Mr Cooper has provided that he has shown that somewhere between 13:42 and 16:14, he was instructed to make a drop hands offer with a cost threat limited only to applying to a finding that I not been truthful in my evidence. It is also clear that the Manging Partner of Capsticks Solicitors was aware by that stage so there is no suggestion that Mr Cooper was acting without instructions by 16:14. Mr Cooper's file note **[Page 948]** and Mr Milsom's email to Tim Johnson shortly after the phone call with Ben Cooper at **[Page 938]** may suggest that the initial drop hands offer and corollary cost threat communicated to Mr Milsom verbally on the phone at 1:13pm did *not* link the threat to any Tribunal finding of untruthfulness of my evidence and that this clarification came later by text at 16:14 **[Page 953]**. There is no evidence in Mr Cooper's file note of his telephone call with Mr Milsom of any reference

to my evidence being untruthful either by Mr Cooper or Mr Milsom. Mr Milsom in an email to me on 13 January 2019 has also denied that any such discussion about the truthfulness of my evidence took place on the phone with Mr Cooper on 5 October 2018 **[Page 1338]**:

> "*I did seek clarity on costs should matters proceed in the course of my discussions with Ben on the Friday because he indicated the only offer that the Trust might make would be a drop hands offer: It was not as specific as the public statement suggests and did not link matters to the truthfulness of your evidence. I certainly made no comments as to your evidence being untruthful. (emphasis added)"*

225. I have learnt from a Data Subject Access Request that on the same day, Mr Milsom had a similar telephone conversation with the Second Respondent's Counsel Mr Angus Moon QC. During this conversation the Second Respondent did not formally adopt the drop hands offer offered by Ben Cooper QC on behalf of the First Respondent. However, Mr Moon did informally state a desire to recover the £55k awarded to me in May 2018 in respect of the worker/employer point (now subject to legal regulator investigation and the wasted cost application). This is recorded in Mr Moon's file note that was helpfully disclosed by Mr Moon in response to my DSAR **[SB p209b].**

226. At this time there is a clear difference between the two respondents in their position. The Second Respondent's position was their counsel giving an uninstructed warning about costs. In contrast, the First Respondent's counsel states that he has been instructed to offer a drop hands offer with a corollary of what is clearly in employment tribunal terms, a cost threat explicitly linked to an implication that the tribunal may find that my evidence may not be truthful. Mr Cooper then explicitly applies a 'Without Prejudice Save As For Costs' status to his communication with Mr Milsom.

227. It is unclear from the evidence whether Mr Moon and Mr Cooper had communicated between themselves prior to or after the call.

228. This drop hands offer, and corollary cost threat was passed on to me on Sunday 7 October during a telephone conference.

Conference on Sunday 7 October 2018

229. On the morning of Sunday 7 October at approximately 10 am, I was phoned by my Solicitor, Tim Johnson, who informed me that my counsel, Chris Milsom had requested a telephone conference. I agreed and shortly after we proceeded to have a telephone conference. I was informed that counsel for the respondents, Ben Cooper QC and Angus Moon QC had authorized the conference but had also stated that my evidence could not be discussed during the conference. I set out an account of this conference in my statement for my application to set aside the settlement agreement dated 11 December 2018 **[Page 137].**

230. The stated purpose of the contact was to inform me of a 'drop hands offer' that had been made by Mr Cooper on behalf of the First Respondent Lewisham and Greenwich NHS Trust. The stated offer was that if I withdrew all my claims the Trust would not pursue me for costs. I was then informed that it was the Trust's position that if I failed to accept the offer, proceeded to cross examine any of the Trust witnesses and ended up losing the case that the Trust would seek to recover its costs for the hearing. My Counsel reported being told that that figure would be in excess of £100k. This figure was later clarified by more detailed financial information from Mr Cooper.

231. I was also told that there was no formal offer from HEE at that point but that they were talking about seeking to recover the £55k in costs awarded to me at the May hearing.

232. With a family to support and as a homeowner the potential cost consequences now being applied to the case made me seriously question whether I could continue with the case. Despite the important issues at stake in the case, it was made clear to me that proceeding would place my family's home and security at risk. I decided to complete my 6 days of cross examination. I decided at that stage to proceed with the case.

233. I clearly rejected the drop hands offer as Mr Milsom confirmed in the document he sent to my former solicitor, Jahad Rahman in early 2021, **"***Dr Day rejected the offer as he was entitled to do so"* **[Page 1550 at 1553]**

234. The unexpected costs threat, combined with not being able to discuss it properly with my lawyers for 6 days, had a negative effect on my physical health. I developed a severe back pain that occurred within minutes of the 7 October telephone conference and required a combination of pain killers in order for me to get up off the floor. This pain continued to varying degrees throughout the rest of my evidence. I am normally fit and well, working as an A&E Locum Doctor and I regularly play football. I cannot remember another time in my life where I have required regular pain killers on consecutive days. This was exacerbated during my evidence by the low table on which the 6 volumes of the trial bundle were situated, perpendicular to the witness table. This was kindly rectified by the tribunal staff.

235. I would like to make clear that at no point in the conference on Sunday 7 October 2018 was it stated to me that the drop hands offer and cost threat was limited only to circumstances where there was a finding by the Tribunal that my evidence had been untruthful. When this was first suggested by the Respondent in their public statement dated 10 January 2019 **[Page 178-179]** which in fact went further and suggested that my "legal representatives" [plural] had sought a statement from the Trust as to what its position would be if the tribunal made findings that I had not been truthful in my evidence, I immediately sought clarification from my legal team as I was outraged that the Respondent could assert such a thing publicly. I emailed Tim Johnson, my former solicitor on 13 January 2019 and he promptly replied to my email on the same day [**Page 1332-1333]**;

> *"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."*

236. My email to Mr Milsom on 13 January 2019 at 19:34 begins with the words, "I assume this is a formality" **[Page 1338]**. Mr Milsom replied on the same day (13 January 2019) at 7:51pm and could not have been clearer about the terms of the drop hands offer and corollary cost threat made on 5 October by Ben Cooper QC **[Page 1338]**:

> ***"****I did seek clarity on costs should matters proceed in the course of my discussions with Ben on the Friday because he indicated the only offer that the Trust might make would be a drop hands offer. It was not as specific as the public statement suggests and did not link matters to the truthfulness of your evidence. I certainly made no comments as to your evidence being untruthful."*

237. Whilst I accept Mr Cooper has shown what Mr Milsom has stated about the 5 October 2018 drop hands offer is not correct in respect of the offer not being linked to findings that my evidence was untruthful **[Page 953],** that does not mean that I have been in anyway inaccurate about what I have reported being told by Chris Milsom about the drop hands offer and cost threat as this email from Mr Milsom makes clear **[Page 1338]** nor does the contemporaneous evidence suggest that my legal team were the ones to broach the possibility of my evidence being found to be untruthful**.**

238. Clearly if there had been a discussion in October 2018 between me and my legal team about any of the Respondents' cost threats at any point in this litigation being linked to a finding or implication that my evidence was untruthful, the 13 January 2019 email exchange set out above between Tim Johnson, Chris Milsom and myself would not have been worded in the way that it was.

239. What is also clear from the evidence is that, whatever transpired in the telephone conversation between Mr Cooper and Mr Milsom on 5 October 2018, it was done without the knowledge or instruction of either me or the instructing solicitors from Tim Johnson Law. Therefore, it cannot be represented as me initiating settlement (I was still giving evidence after all) especially as I rejected the drop hands offer within minutes of finding out about it, 2 days after it was made.

240. I would also like to make clear that during my 6 days of cross examination both respondents made clear challenges to my credibility in open Tribunal. The credibility challenges focused mainly on my use of covert audio and my concession in open tribunal that use of covert audio could be underhand, although I made clear I felt justified in its use in this case. Another issue was the date in which I disclosed it to my legal team which I confirmed was in 2014.

241. I only resorted to covert audio after I had reason to suspect instances of deliberate attempts from the respondents to fabricate the tone and content of my dialogue in certain important situations. The first example was the protected disclosure I made by phone call on 10 January 2014 and second was the protected disclosure on 3 June 2014 to the ARCP panel. I believe that I have clearly demonstrated attempts by the respondents to misrepresent my dialogue on these dates both in formal documents

and even in Tribunal pleadings **[see FBP (Page 484-487].** The existence of the covert audio forced false accounts about me in certain meetings to be disowned by certain senior doctors. The first of these accounts was by Dr Chakravarti about the ARCP protected disclosure on 3 June 2014 and then subsequently by Roddis Associates in respect of the meeting on 18 September 2014 [**see para 121-123 of this statement].** The primary purpose was to record what I said so that I could demonstrate both what I said and the way I said it and counter any further false accounts of my dialogue. I proved this action had reasonable justification by the concessions I was able to secure from Roddis Associates and Dr Chakravarti on false reporting of my dialogue.

242. It should also be noted that the covert audio was taken by me of formal meetings after my employment at the Respondent had ended and whistleblowing claims were registered with ACAS. At the point of me taking covert audio, I had commenced the process of adversarial litigation and my trade union had made legal threats of whistleblowing claims. That is very different from an employee recording an informal interaction with no justification which is very much how the Respondents wished to paint the covert audio.

243. There were also alleged credibility issues relating to when the audio was disclosed both to my legal team and to the other side. The credibility issues surrounding the covert audio and my genuine worries about them cannot now be re-invented into issues to do with the truthfulness of my evidence under oath.

Further Cost Threats from 8-11 October 2018

244. An email dated 30 November 2018 **[Page 1123]** sent to me from Mr Milsom sets out how the Respondents' position on costs had moved on by the 11 October 2018 from what is described in the Data Subject Access Request material from Mr Cooper and Mr Moon in respect of Friday 5 October.

Ordinary Cost Threats

245. By 11 October 2018 the situation of the Respondents on costs was very different from the position on 5 October. The Second Respondent by that time had also adopted a drop hands offer of their own. Mr Milsom sets this out in his 30 November 2018 email and in particular the nature of the updated cost threat/consequences. Unlike the 5 October drop hands offer which was only from the First Respondent, the drop hands offers on 11 October were from both respondents and stated by Mr Milsom to be "*sophisticated"* with a "*two tier approach"* and also involved seeking the recovery of the £55k awarded to the me in May 2018. Mr Milsom also makes clear that it was "*in no way invited by him",* **[Page 1123]** (emphasis added):-

> *"In addition to my discussion with Ben Collins [Cooper] on the Friday (after two 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 adverse credibility findings would lead to an application in respect of ongoing costs of trial.*

b) *as above but with adverse credibility findings; the Respondents expressly stated that costs of the entire litigation may be at large.*

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

Wasted Costs and Legal Regulator Referral Against the Claimant's Legal Team

246. In his email dated 30 November 2018, Mr Milsom confirms reference to wasted costs against my former legal team in respect of the alleged late disclosure of covert audio recordings. However prior to my agreement to the settlement, Mr Milsom listed the potential liabilities associated with the respondents' wasted cost threat in respect of the covert recordings with the other ordinary cost threats from the respondents that I was liable for **[Page 976].**

247. As stated, the existence of covert audio evidence of formal meetings was instrumental in getting a senior doctor of the Second Respondent, Dr Chaktravarti, to disown damaging statements about me which had apparently falsely been attributed to her in a formal report by the Second Respondent's investigating director Mr Plummer (see Dr Chakravarti's Tribunal statement at paragraph 20-21 **[SB p301-302]**). Mr Plummer was also the likely signature of the undisclosed LDA contract on the HEE employer point **[SB p207-208].** The statements that were falsely attributed to Dr Chaktravari give a dramatic and damaging account of my 3 June 2014 protected disclosure to the HEE ARCP/appraisal panel **[SB p178-179].** In her 2018 Tribunal evidence, Dr Chaktravarti went on to disown the statements falsely attributed to her in a formal report and to describe the relevant Director of the Second Respondent, Mr Plummer, as giving an "exaggerated or distorted impression" in his investigation of my case **(see paragraph 21 [SB p302]).**

248. I now set out a good example of why I believe it was reasonable for me to resort to covert audio once my employment had ended and the whistleblowing dispute had begun. As stated Mr Plummer's actions involved falsely attributing statements to Dr Chaktravarti that she did not say. The following statement falsely attributed to Dr Chakravarti by Mr Plummer records in his formal report the allegation that I would go on to make in September 2014 about Roddis Associates as something that I apparently said at my 3 June 2014 ARCP meeting (according to Dr Chakrvarti); **[SB p165];**

"On a personal level she felt bad for him as he clearly felt `let down` and `frustrated' however she also said that Dr Day had alleged the Trust's internal investigations had falsified documents which was a very serious allegation.

249. As stated, Mr Plummer is referring to an allegation that I would go on to make about the Trust's external investigation by Roddis Associates, about their false record of our 18 September 2014 meeting. Proving this allegation like securing Dr Chakravarti's

concessions on statements falsely attributed to her was only possible because of my covert audio evidence **[see paragraph 121-123 of this statement**] and **[Page 922-931].** Clearly, I could not have made such an allegation about the Trust's investigation by Roddis associates on 3 June 2014 about a record of a meeting that would happen 3 months after the ARCP. At the time of the ARCP, I had not made a formal complaint against the Trust nor had there been any kind of investigation. The ARCP was the trigger for my complaint. Mr Plummer includes my allegation against the Trust investigation in his account of my ARCP to give a certain impression but did not think enough about the chronology of events.

250. Mr Milsom stated the following about the threat of wasted costs and regulator referral against my former legal team in his email to me dated 30 November 2018 **[Page 1123]**:

> "*The sole issue was in relation to the non-disclosure of covert recordings which was 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. My advice to you and conduct of litigation was entirely unaffected by this: you were my client and wasted costs considerations, however unattractive, had no impact on you personally. I would remind you that I was prepared to divulge in open tribunal that responsibility for late disclosure rested with TJL until you gave me instructions that you no longer wished to do this once the implications on TJL were explained."*

251. 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. Moreover, the following unusual clause was inserted into the settlement agreement at clause 2.2 **[Page 992]**:

> *"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).

252. There is evidence of Mr Moon QC making reference to matters relating to covert audio in an email dated 21 September 2018 **[SB p209]** to my former lawyers a week before the final hearing of the case.

253. At the Tribunal in October 2018, the lawyers on all sides appeared to be unaware of a letter dated 17 August 2015 from Hill Dickinson to Tim Johnson Law Solicitors that would have been fatal to any wasted cost application against my former lawyers in respect of disclosure of covert audio **[SB p176]**. The letter enclosed an email chain from me challenging a false and damaging account of my dialogue in the formal ARCP meeting on 3 June 2014 when I made a key protected disclosure **[SB p177 – 182])**. In

my email dated 7 August 2015, enclosed with the HD letter, I confirm the following **[SB p180-181];**

> *"I have covert audio recordings that I intend to use at the Tribunal… I felt I had no choice but to take covert digital recordings in order to demonstrate my ability to describe the Woolwich ICU situation both calmly, objectively and politely".*

254. Dr Chakravarti at paragraph 26-27 of her Tribunal statement explicitly states that I informed her on 7 August 2015 of my intention to use covert audio in my case to challenge false accounts of my dialogue in formal meetings. Dr Chakravarti also confirms she passed this information to HEE and their lawyers Hill Dickinson **[SB p302-303]**.

255. The accusations of dishonesty against me and my former instructing solicitor for allegedly keeping the covert audio hidden until 2018 should have been robustly challenged on the basis of this 17 August 2015 letter. In any event the truth of the matter is that the respondents could have asked for the audio at any time after August 2015. Clearly it was thought by all sides that the covert audio was only relevant to the final hearing of the case which had been greatly delayed for 4 years as a result of the Second Respondent's actions. The wasted cost threat was vexatious and wholly inappropriate.

<u>Threat of Referral of the Claimant to the General Medical Council</u>

256. Mr Milsom' s email dated 30 November 2018 stated the following **[Page 1123]**

> "*the prospect of a GMC referral/conduct which may warrant GMC interest (principally as regards covert recording) was raised not only by Ms. Motraghi for the Trust (junior to Ben Cooper) but also explicitly in open tribunal through cross examination by Angus Moon QC. I mentioned it to you at the time as a potential issue in that context."*

257. An email dated 3 January 2019 containing an embargoed public statement **[Page 176-177]** that the First Respondent's CEO instructed be sent to me in advance refers to the Respondent's position on any threat to refer me to the General Medical Council (Medical Regulator)

> *"We did not consider referring Dr Day to the GMC and have no intention of doing so."*

258. The Capsticks managing partner, Martin Hamilton in a letter dated 22 December 2018 to the Board and CEO of the First Respondent stated **[Page 1284-5];**

> *"We had no instructions from the Trust to threaten to refer Dr Day to the GMC, and we did not make such a threat on the Trust's behalf. You have confirmed*

that the Trust has never considered referring Dr Day to the GMC and has no intention of doing so."

259. For some reason the embargoed statement was never published following me asserting in an email dated 3 January 2019 that the Trust check with their counsel before publishing any further public statements.

260. The threat to refer me to the GMC had no impact on my decision to settle as I did not know about it until a month after the settlement.

Conference on Thursday 11 October 2018

261. Following the conclusion of my evidence on Thursday 11 October, it was suggested by all sides' Counsel that the tribunal finish for the day without beginning to cross-examine any of the Respondents' witnesses.

262. I travelled back to Cloisters barristers' chambers for a conference. My wife and I attended the meeting with my barrister, Chris Milsom and Solicitors Tim Johnson and Ellie Wilson. An account of the conference and subsequent events has been provided in witness statements to set aside the settlement in December 2018 by me **[Page 136 -142]** and my wife Mrs Melissa Day **[149-151]**

263. At the conference, I was informed by Chris Milsom that both respondents had adopted the 'drop hands offer' described to me on 7 October 2018. It was clearly expressed to both me and my wife that in the event that I did not take up the offer and proceeded to cross examine witnesses that the offer would be withdrawn. I was told that if I were to proceed to judgment then the respondents would proceed to attempt to recover their costs for the whole of the proceedings if I lost. The respondents' counsel had told my barrister what the costs were likely to be, and Mr Milsom passed this information on to my wife and me.

264. Mr Milsom described details of the financial information given to him from the respondents' side. I was told Ben Cooper QC's brief fee was around £70,000 and the total cost liability that I could be exposed to would be estimated at £500k.

265. In consultation with my wife, I decided very quickly in the conference that on the basis of the costs threats that we were not prepared to accept the risk to our family home and security that proceeding with the case would involve. In these circumstances and as a direct result of the cost threats I decided to withdraw the case.

266. I remember stating to my wife that we should go out to dinner and discuss the cost threats properly. This was met with a firmness from my wife that continuing with the case was simply not in her view an option in light of the various cost threats and that there would be nothing to discuss. This was a position that took me only a few minutes to accept as proceeding with case without my wife's blessing was not an option for me. I therefore instructed my lawyers to settle. I will now set out my reasoning.

267. I understood the £500k figure to be a worst-case scenario but took it extremely seriously for the reasons that I will now set out.

268. By the end of the conference on 11 October 2018, I understood from Mr Milsom there to be the following cost threats from the respondents that amounted to that very significant £500k figure:

a) The £55k Worker/Employer cost threat (Second Respondent)

b) The cost threat associated with just losing the case (both respondents)

c) An additional cost threats relating to covert audio and credibility findings (both respondents).

The Worker/Employer Cost threat

269. I understood from Mr Milsom in the conference of a stated intention from the Second Respondent to recover at the very least the £55K awarded to me on the employer/worker point in the event that I lost the case. The conference note states, "*CM said that AM told him that if we go ahead then they would ask for their £55,000 back."* **[page 976].** Mr Milsom' s email dated 30 November 2018 **[page 1123],** further confirms this cost threat, "*I challenged this with Angus Moon QC 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."* (my emphasis by underlining).

270. This cost threat clearly centres on recovery of the funds paid over to me by the Second Respondent in respect of costs incurred in litigating the employer / junior doctor whistleblowing protection point earlier in this case's history. Mr Moon used the term in any event to describe the cost threat; which is certainly how I understood it at the conference. Any suggestion that this cost threat was related to my credibility, or the truthfulness of my evidence is clearly not what is said in either the conference note or Mr Milsom's subsequent email **[Page 1123].**

The cost threat associated with just losing the case

271. I understood in the conference, from what Mr Milsom said, that both Respondents had made clear to Mr Milsom that proceeding with the case and losing could lead to them seeking to recover substantial costs. This cost threat is described in the conference note as "*the costs between now and the end of the hearing (£120,00[0] or more)"* **[Page 976].** It is further set out in Mr Milsom' s email dated 30 November 2018, "*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 **[Page 1123]***.

272. This threat was clearly not related to any adverse finding on my credibility and just associated with losing the case.

Cost threat relating to covert audio/credibility

273. It was made clear to me by Mr Milsom that the Respondents would seek additional costs against me to what I have described above if there were credibility findings made by the Tribunal. Mr Milsom describes this cost threat in his email dated 30 November 2018 **[Page 1123],** "*as above but with adverse credibility findings; the Respondents expressly stated that costs for the entire litigation may be at large*.

274. As stated, my credibility was brought into question on several occasions in respect of my use and allegedly late disclosure of covert audio. Another issue was the fact that, in open tribunal, I had accepted the use of covert audio could be underhand. A further issue was an assertion in open Tribunal by Angus Moon QC that I should be referred to the medical regulator because of the covert audio. As stated, I made clear that I believed that covert audio was justified in my case but had to consider the possibility of a Judge not agreeing with that. Any cost threats related to the covert audio had to be seriously considered, particularly given the fact I have a house and a family to look after. I understand that lawyers and judges may have strong views on covert audio, but I believe I have clearly shown why it was needed in this case and also how misled the Tribunal would have been without it. I wasn't prepared to bet my house on a Judge seeing things my way on covert audio.

275. At the time of the 12 October conference, I took the additional threat related to my use of covert audio to be the wasted cost threat. At the time I understood wasted costs to be a penalty for Claimants behaving badly in litigation, and in my case over the covert audio. When I asked what the costs were likely to be, Mr Milsom responded by explicitly including wasted costs with reference to covert audio when he listed the respondents cost threats and the stated potential liabilities **[Page 976]** (my emphasis added);

> "*CD asked what the costs are likely to be. CM said that there are two types of costs: wasted costs (in relation to the covert recordings) and the costs between now and the end of the hearing (£120,00[0] or more). CM said that BC's brief fee is around £70,000 and the total cost is of an estimate of half a million. CM said that AM told him that if we go ahead then they would ask for their £55,000 back."*

276. At no point in the conference was I told that a wasted cost threat was being made by the respondents against my solicitor rather than me. At the time, I had no idea of the possibility of my legal team being separated off to be pressured with their own legal threat that they themselves would be liable for.

277. I gained some awareness, from what my wife, who overheard Mr Johnson and Mr Milsom speaking about details in Cloisters Chambers of a potential separate process with the legal regulator and Tim Johnson Law. A potential fine was mentioned. At the time I believed that was entirely separate from the employment tribunal cost threats. This was not discussed in the conference. It had no impact on my decision to settle.

My experience/knowledge on costs in the employment tribunal at the time

278. At the time of the October 2018 hearing, I had very little knowledge of the basis in the employment tribunal rules for the legitimate use of cost threats in employment tribunal litigation. I accept cost threats have a legitimate place in deterring vexatious claims. For the issues raised in this case to be put in that category is extremely unfair.

279. I was aware in October 2018 that costs have been a live issue in the history of this case. As stated in 2016 we were threatened in the EAT for costs by the Second Respondent for pursuing the employer/worker point. In May 2018, we actually benefitted from an award on £55k of costs. This experience informed my consideration of the cost threats that were made in October 2018.

Cost threat related to agreed statement – Friday 12 October

280. We attended the Tribunal on the following day to negotiate a settlement agreement.

281. I attended the London South Employment Tribunal at 10am and I understand that counsel informed the Tribunal that settlement negotiations had commenced.

282. On 12 October 2018 during the negotiations, the Respondents, through the communications from their counsel to my counsel, started to apply the cost threat originally associated with my proceeding to cross examining the respondents' witnesses to getting me to consent to an agreed statement that stated that all individuals employed by the Respondents had 'acted in good faith'.

283. During a conversation my wife and I had with Mr Milsom, in a Costa Coffee local to the employment tribunal, I was told that the wording of the 'respondents had acted in good faith' was referred to by the HEE Barrister, Mr Moon, as a 'red line'. Negotiations about the agreed statement went on for most of the day (Friday 12 December). Often, they took the form of a phone call between Mr Milsom and the respondents' counsel. On this occasion it was definitely Mr Moon that Mr Milsom was speaking to.

284. Mr Milsom has confirmed this account in his 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."* (my emphasis by underlining)

285. I can clearly recollect several key objections that I had to the wording that the respondents had acted in good faith. Mr Milsom passed these objections on whilst we were in Costa Coffee. Mr Milsom appeared to be speaking to Mr Moon QC who appeared to be in a room with Mr Cooper QC or at least someone representing the

First Respondent. Managers from the First Respondent or their legal team were clearly providing the position of the First Respondent to Mr Moon on what I was saying as my objections to the agreed statement. My objections were based on what the respondents' own witnesses had conceded and the findings of the Trust's external investigation. There were several examples but these I were raised with Mr Milsom:

a) Dr Chakravarti conceding the Second Respondent's director Mr Plummer gave an "exaggerated or distorted impression" in his investigation of my case and falsely attributed damaging statements about me to Dr Chakravarti in his report. **[see above paragraph 178]**

b) The First Respondent's external investigation criticisms of the Trust on bullying;

c) Roddis Associate's false account of the 18 September 2014 meeting and their apologies and adoption of my note of the meeting to substitute their initial false account **[see paragraph [121-123 of this statement]**;

d) The fact the First Respondent had used public money to deny the status and reasonableness of my protected disclosures for 4 years before conceding them on the first day of the hearing on 3 October 2018;

e) The Second Respondent's conduct on the ERA s43K point including the failure to disclose a key contract. It should be noted that this conduct has been described by an MP with the words "smacks of unethical behaviour". The agreement to pay costs of £55k of must have indicated a concession by the Second Respondent that they had not acted in good faith or reasonably**.[See above paragraph [35-36]**

286. I remember Mr Milsom passing on an argument from the Second Respondent that amounted to the point that because Mr Plummer (the Second Respondent's investigating director) was no longer employed for the Second Respondent that the agreed public statement could seem true on the points that I raised as he was no longer an employee of the Second Respondent. The First Respondent advanced a similar argument about Roddis Associates being contractors and that their conduct didn't need to be taken into account in any comment about employees of the respondents acting in good faith. I am certain this position came after the lawyers took instruction from the Respondent. The First Respondent was clearly aware of how the cost threats were being used to force the wording of the agreed statement **[Page 996].** I remember the employment status of Dr Roddis had to be looked into and this took time.

287. Eventually, I had no choice but to accept the following wording as we were approaching the end of the afternoon. The financial duress of the costs threat was the reason for my agreement to such wording. Mr Milsom secured the words the "the tribunal was likely to find" so the agreed statement was not expressed as my view on the facts.

> *"Dr Day blew the whistle by raising patient safety concerns in good faith. Dr Day has performed a public service in establishing additional whistleblowing protection for junior doctors. The Tribunal is likely to find that both the Trust and HEE acted in good faith towards Dr Day following his whistleblowing and that*

Dr Day has not been treated detrimentally on the grounds of whistleblowing. Dr Day's claims are dismissed upon withdrawal" ***[Page 996].***

288. At around 17:00, the parties went before the Tribunal and stated that agreement on a settlement had been reached. Ben Cooper QC informed the Tribunal that the Trust CEO had approved the settlement but that there would need to be a board meeting that would take place on Sunday 14 October as the nature of the settlement was one that would need board approval. This led several people in the Public Gallery to the wrong conclusion that I had received a substantial pay off. This erroneous conclusion then started to circulate.

Sunday 14 October – Respondent Board Meeting

289. It was referred to in open Tribunal on Friday 12 October, that the First Respondent's Chief Executive did not have the authority alone to approve the proposed settlement agreement and that Board approval would be needed. Several journalists suspected that I had been paid off and gagged as a result of this dialogue in open Tribunal. This is not the case.

290. I am aware this Board meeting occurred on the evening of Sunday 14 October. The First Respondent has not disclosed any record of this meeting or initially even any reference to its existence in emails or other documents.

291. On 15 July 2020, I was copied into the following email that was sent to the Solicitor Regulation Authority from the Journalist Tommy Greene **[Page 1479-1483];**

> "*Attached to the forwarded email is a response to a Freedom of Information request by Lewisham and Greenwich Trust. It is a fairly straightforward request, asking for the details of a trust board meeting that took place in October 2018. It has been stated in open tribunal that at this board meeting the controversial settlement agreement in Dr Day's whistleblowing case was approved by the trust's board. I believe the SRA and Dr Day should both seek the records of this conference, as my FOI request and all questions I have put to the trust board secretary on this matter have been met with the same response - they have declined to answer any questions on the meeting (which have been put to them several times) and now claim no records of the meeting can be provided as they say it took the form of a 'confidential teleconference'. Trusts can be referred to the Secretary of State for failing to keep records of their meetings - particularly ones that deal with matters of such public interest as this one - and for failing to disclose them.*

292. On the 21 July 2020, I sent the First Respondent's solicitor an email attaching Mr Greene's email sent to the SRA [**SB p233-236];**

> "*Please can I request an explanation as to why the written record of the Trust board meeting/teleconference that occurred on Sunday 14 October 2018 that approved the settlement of my case, was not disclosed in the recent application*

proceedings and or appeal. It is likely that such a record will make clear what the Trust Board knew at the time of settling in respect of the following;

1. The Trust's stated position/instruction on wasted costs during settlement talks;

2. The Trust's stated position/instruction on ordinary costs during settlement talks;

3. The use of any reference to costs to secure the wording of the agreed statement and to discourage the cross examining of witnesses.

4. The Board's knowledge/consent to the above tactics while I was giving evidence in purdah

5. The Board's understanding of the patient safety issues in my case and whether they have been accurately reported in the various Trust public statements.

It is likely to also make clear what the Trust Board knew about my reasons for settling and agreeing to the wording of the agreed statement. "

293. The Respondent's solicitor replied on 4 August 2020 referring to the anticipated standard disclosure order, "*the Employment Tribunal will no doubt in due course make an order for disclosure of relevant documents. If any documents exist relating to the meeting you refer that are relevant to the issues in that claim, they will be disclosed in accordance with that direction".*

294. On 21 December 2020, I applied for an order for the formal record of this Board meeting and other relevant documentation/communication relating to it, as none of this material was listed in standard disclosure **[SB p237]** The Respondent's solicitor responded by email dated 23 December 2020 and stated, "*there is no documentation that falls within the class of documentation"* **[SB p238].** When I pressed for an order on 19 March 2021 **[Page 535],** documents were finally disclosed **[Page 985-989]**. These documents fall short of an actual record of the meeting but are clearly relevant but were not included in standard disclosure or provided after I made a specific request for them in an application dated 21 December 2020 when the existence of such documents was denied to the Tribunal.

Monday 15 October – Settlement Finalised

295. At 10am on 15 October, Counsel for the parties signed the settlement on behalf of their clients. At the time I was in transit to the Tribunal, and I authorised this by text message to Chris Milsom for the reasons outlined above.

296. The parties' representatives went before the Tribunal and the agreed statement was read out by Counsel for one of the Respondents.

297. As the case had been crowdfunded, on 15 October I sent the agreed statement to our 4,000 backers on Crowd Justice only adding the following words **[Page 997];**

> *"We would like to thank you for your encouragement and generosity. We are very proud of what we have been able to achieve together with our supporters on Crowd Justice."*

298. The Second Respondent released a statement [**Page 182-184]** on their website which they report in emails that they circulated to the press. It contained the agreed statement and the following additional text before the agreed statement;

> *"The claim brought against HEE and the Trust was settled on the basis of Dr Day withdrawing his case, the published position statement and the parties agreeing not to seek any award for legal cost. No financial payment will be made by HEE as part of the settlement and the settlement is not subject to confidentiality.*
>
> *We have always been clear we did not act against Dr Day because of his protected disclosures or cause him any detriment. We are delighted that it is now accepted that the Tribunal was likely to find that too if the claims against HEE had not been withdrawn and dismissed.*
>
> *This process has caused tremendous stress for staff involved, especially those accused of causing detriment and we thank them for their forbearance, diligence and commitment and we are delighted that the allegations against them have been withdrawn.*
>
> *HEE has always supported healthcare staff blowing the whistle, it is part of the education and training we oversee for new clinicians. This process led us to voluntarily agree a new legal route to hold HEE to account should whistle blowing doctors in training feel it necessary and it saw the law change to give access to redress through Tribunal as well.*
>
> *We hope that all doctors and other staff know they will be supported by HEE should they blow the whistle and that HEE has not and will not cause detriment to those that do." (emphasis added)*

299. As part of the Data Subject Access Request, Mr Cooper QC disclosed the following email dated 15 October 2018 from Mr Milsom that he sent them on the day of settlement **[Page 1021]**

> *"Both,*
>
> *After two pretty gruelling weeks I just want to say chapeau. It would be condescending of me to say any more about the immense quality of cross-examination: QC status rarely arrives by luck alone. But the decency and spirit in which this was conducted was greatly appreciated. There was no crowing or bravado: quite the contrary. I for one appreciated it enormously.*
>
> *All the best and see you soon no doubt*

Best wishes, Chris"

300. Mr Cooper provided a reply to Mr Milsom in an email dated 16 October 2018 **[Page 1020]** (my emphasis in underlining);

> *"Likewise, to thought the collegiate spirit all round on the Day trial made it a much more pleasant experience than it might otherwise have been -Angus and I both understood the position you found yourself in and I for one was immensely impressed that your persuasive powers has an effect where little else previously had (I appreciate you can't comment on that!) Hope to catch up soon."*

301. I imagine these are the sorts of emails that will mean different things to different people perhaps particularly given their context both in 2018 and now in 2022. Mr Milsom did not disclose them to me. They came to me from Mr Cooper.

The Respondent's Evolving Public Position on Costs

302. The First Respondent claimed the following position on costs in December 2018 - which are claimed as objectively false statements and detrimental statements in the present claim **[Page 1166].** The context of these statements will be set out later in this statement;

> "*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."* **[Page 174]**

303. It appears that the Second Respondent (Vicky Diaz) had intended to mirror the position of the First Respondent of a categorical denial of cost threats with a further reference for it to be untrue to suggest otherwise. On 12 November 2018 after proposing such wording, she was advised to remove the sentence containing the word 'untrue' by the Second Respondent's Director Mr Lee Whitehead, "*Do we need the last sentence**?"*** **[Page 1076].** We now know from the hearing in January 2022 that Mr Whitehead was the person giving instructions to the Second Respondents lawyers **[page 1075-1077].** Mr Whitehead responds to Vicky Diaz;

> *"It's tempting but I don't think we should go there. I would say that's starting to get into territory where Day may feel he has to come back to us (and/or the Trust) to say that we have broken the spirit or letter of our agreement.*
>
> *There is no evidence so far that Day himself is talking and I think we have enough ammunition without taking the risk."*

304. The First Respondent's position on the cost threats then evolved in various subsequent press statements and Tweets leading to Health Education England, the former Second Respondent in these proceedings to mock their various changes in position [**Page 1146];**

> *"HEE keeping to the consistent and clear line that we did not threaten costs is aided by the Trust's current, slightly weasel-worded line, and any subsequent changes they make. The more they twist, the clearer and more trustworthy our position is."* (my emphasis by underlining)

305. In a public statement released on 10 January 2019, the First Respondent attempts to disguise the fact that they are publicly changing their position from their categorical denial of making costs threats in my case. They have attempted this by giving a series of false impressions to smear and discredit me further in respect of how my case settled **[Page 1314 -1316]**:

> "*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...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 to costs. This reflects that we are an NHS body responsible for public funds'"*

306. The above dialogue can only be referring to the telephone contact that Mr Cooper and Mr Milsom had on Friday 5 October which resulted in the First Respondent instructing a drop hands offer of settlement and a corollary cost threat. This evidence from Mr Cooper and Mr Milsom in relation to this phone call and subsequent drop hands offer is set out at **[paragraph 214- 243 above].**

307. Firstly, it is misleading for the Respondent to refer publicly to the Friday 5 October drop hands offer and imply that my side initiated it when the Respondent knew that I rejected the offer as soon as I found out about it on Sunday 7 October (a fact they exclude from their public statement). This also gives the false impression that it was the terms of this offer linked to an implication about the truthfulness of my evidence that induced the settlement of my case. The Respondent knew this to be untrue as they knew I had rejected the offer. Clearly the aim of this content is to give the public impression that my side was concerned that a dishonesty finding was a real possibility in my case and that I settled the case on that basis.

308. Secondly, the Respondent seeks to also give the false public impression that my legal representatives (which can only mean in my case my solicitor and barrister) approached the Trust's legal team and indicated that they were concerned that my evidence may be found to be untruthful. I can only assume that the Respondent is relying on Mr Cooper's account of his phone call with Mr Milsom on 5 October. Nowhere in Mr Cooper's file note of his conversation with Mr Milsom **[Page 948]** is there a mention of Mr Milsom making any reference to the possibility of a finding that my evidence was untruthful or indeed any reference to Mr Cooper making such a reference. Mr Cooper records other significant things Mr Milsom says in the phone call

in his note. Mr Milsom has categorically denied he said anything of the sort:-, *"I certainly made no comments as to your evidence being untruthful"* **[Page 1338].** Even if Mr Cooper seeks to rely on his subsequent email to the managing partner of Capsticks **[Page 949],** this note at **[Page 948]** is not consistent with his contemporaneous file note when it describes the drop hands offer, this email also does not provide support for the Respondent's allegation that *my* legal representatives were concerned that my evidence may be found to be untruthful. Even in that email to his instructing solicitors, Mr Cooper clearly states that it was *him* that indicated to Mr Milsom the risk that my evidence may be found untruthful and not the other way around - but as I say, this does not feature at all in Mr Cooper's contemporaneous note of his phone call.

309. Thirdly, the Respondent by using the term 'legal representatives' in the context of my case and this situation are giving the impression of a well thought out and planned formal approach involving my solicitor and barrister, where both legal professionals apparently initiate settlement discussions and express concerns about the possibility of a finding about the truthfulness of my evidence. The reality was an informal and disputed account of a discussion between two barristers during a telephone conversation about employment tribunal housekeeping matters. It is objectively wrong to imply that Tim Johnson Law had any involvement in this interaction between Mr Milsom and Mr Cooper on 5 October, as the firm only found out about it after it had happened. This was confirmed by letter dated 14 January 2019 from my former firm of solicitors, Tim Johnson Law to Martin Hamilton, the Managing Partner of the First Respondent's solicitors, Capsticks, which states **[Page 1356]**:

> *"As your firm is aware Tim Johnson/Law made no approach to your firm, your client or counsel to ask for settlement discussions in Dr Day's case"*.

310. As stated Mr Chris Milsom wrote to me and Tim Johnson Law on 13 January 2019 to confirm in writing that he "certainly made no comments as to [my] evidence being untruthful**" [Page 1338].** This position was further endorsed by my former Solicitor Tim Johnson in an email also dated 13 January 2019, *"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"* **[Page 1333]**.

311. I wish to highlight the following text from paragraph 34 of my Grounds of Claim: (my emphasis):

> *"The Claimant's counsel, Chris Milsom, has confirmed in writing that the costs consequences communicated by Ben Cooper QC for the Trust "did not link matters to the truthfulness of [the Claimant's] evidence" and also that he "certainly made no comments as to [the Claimant's] evidence being untruthful." This position has been further endorsed by the Claimant's Solicitor Tim Johnson in an email dated 13 January 2019, "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."*

312. From the evidence it seems likely that the underlined portion of paragraph 34 of my Grounds of Claim that reports something that Chris Milsom has written may not be a true reflection of the situation, despite it being a true reflection of what Chris Milsom wrote to me, at least in relation to the 5 October 2018 drop hands offer. It seems to me Mr Cooper has shown that offer at least (on Friday 5 October) was linked to findings that my evidence was untruthful as clearly stated in Mr Cooper's Friday 5 October text. However, the text does not prove what was said on the phone to Mr Milsom and certainly does not assist Mr Cooper with the subsequent cost threats he made after I had rejected the initial drop hands offer.

313. However, the rest of paragraph 34 in my Grounds of Claim is supported by the evidence, in particular Ben Cooper's email to Martin Hamilton **[Page 949].** The key to the pleaded detriment is the First Respondent falsely implying that *both* my solicitor and barrister gave the impression that my evidence may be found to be untrue to Mr Cooper; or that it was the terms of the drop hands offer linked to the truthfulness of my evidence that induced the settlement of my case. The Respondent knew that I rejected the drop hands offer made on Friday 5 October 2018 as soon as I found out about it.

314. The Respondent's false and detrimental statements continue to damage me and have been categorically denied by both Mr Milsom and Tim Johnson Law and are not supported by Mr Cooper's contemporaneous note of his phone call with Chris Milsom on Friday 5 October. Two good examples of the large amount abuse that I have suffered on social media as a result the Respondent's 10 January 2019 public statements are these tweets from two senior doctors. I have never met these people before **[Page 1535-1536]**. Norman Lamb warns one of the doctors of the defamatory consequences of his actions with his own tweet.

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

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.

SECTION 5 - EVENTS POST SETTLEMENT

Press and the Media

318. My case has had extensive media coverage on and around the dates of my various hearings. I am used to being contacted by a number of journalists near a hearing date.

319. As stated, the wording of the agreed statement and the publicly stated need for the Trust Board to approve the settlement agreement had led some journalists and NHS activists to speculate on whether I had received a significant pay-off. When I denied this, it became obvious to some that I had been threatened in some way.

320. On the day of the settlement 15 October 2018, I was contacted by the Journalist Jack Serle of the Health Service Journal, Mr Serle wrote **[Page 998];**

> *"I'm writing up a report on the decision today to withdraw your claim against HEE and Lewisham and Greenwich. Do you have any comments you'd like to make about the Tribunal outcome?*

321. I replied, "*Hi Jack. Please see below. C*". I provided the Crowdjustice update which was the agreed statement to our 4,000 backers on Crowd Justice with the addition of the following words **[Page 999];**

> *"We would like to thank you for your encouragement and generosity. We are very proud of what we have been able to achieve together with our supporters on Crowd Justice."*

322. On 16 October 2018 I was contacted by the British Medical Journal for comment on the outcome of the case **[Page 1010].** I forwarded the Crowdjustice email referred to above to the BMJ with the additional words **[Page 1008-09]:**

> *"Thanks for your email. I have been advised this is all I can say, please see below. Thanks for covering the story."*

323. The BMJ published the article on 16 October 2018 "Junior doctor withdraws claim that whistleblowing ruined his career" **[Page 1011-1012].** On 17 October 2018, I was telephoned by Dr Phil Hammond who is a doctor and journalist with Private Eye. Dr Hammond has taken a personal interest in my case and my welfare and had written several pieces about the case in Private Eye. My best recollection of the call was that he enquired as to me and my family's welfare and then asked, referring to my reasons for settling, whether or not I had been paid off or gagged. I confirmed that I had not been gagged and certainly made clear I had not been paid off. I said something along the lines of I settled because I did not want to end up like Edwin Jesudason. Dr Jesudason is a well known NHS whistleblower that was subject to several crippling cost orders. Dr Hammond showed an interest in writing a piece on my evidence to the Tribunal. I remember stating that because I had not been gagged that I was free to provide my witness statements and did so by email dated 17 October 2018 **[Page 1022]**.

324. On 19 October 2018, I was telephoned by Jo Macfarlane who wrote in a piece in the Mail on Sunday about my case and was present in the public gallery during my evidence. My best recollection of the call was that she made reference to the Lewisham and Greenwich Board needing to approve my settlement and questions as to whether or not I had been paid off or gagged. I confirmed that I had not been paid off or gagged and sent Ms Macfarlane the same Crowdjustice email I sent the BMJ and HSJ by email dated 19 October 2018 with the words, "Hi Jo, Please see Crowdjustice email and Guardian Pic." **[Page 1026-27]**.

Respondent's October Public Statement then Private Eye

325. My parents had funded a few days away in Bath for me and my wife to recover from our experiences of the employment tribunal. On 23 October, I was telephoned again by Dr Phil Hammond for a welfare check and also to ask me for a link to the Critical Care Peer Review and for various other links of already published documents on the 54000Doctors website. I replied by email dated 23 October 2018 **[Page 1035].**

326. Whilst in Bath City centre on holiday with my wife, I received an email dated 24 October 2018 **[Page 1036]** from Dr Hammond with an attachment that was a draft of a proposed Private Eye article **[Page 1042].**

327. Dr Hammond stated the article was based on "info publicly available from your ET and previous proceedings." I replied quicky to say I was on holiday and didn't have access to a computer. Dr Hammond stated the deadline was the following day. I wrote back to say that I would try and find an internet Café which turned into finding Bath Library **[Page 1036].**

328. I advised removing certain content and added wording that I felt made it more accurate. At paragraph 1, I added "The Tribunal was likely to find" to make reporting of the agreed statement more accurate. At paragraph 2 I firstly, added the words, "were declared as Serious Untoward Incidents and went to Coroner inquest", secondly added the words "low blood pressure" and thirdly, "Both SUIs were excluded from the safety investigation into Dr Day's concerns". At paragraph 3, I added "evidence that was excluded from formal investigations" and the word "investigated". I sent my edited version back to Dr Hammond by an email dated 24 October 2018 that stated [**Page 1043-5];**

> "*Hi Phil*
>
> *I have added some stuff in red and have taken out the hypoxic cardiac arrests. The stuff about the SUIs is rock solid and backed up by SUI investigations and Coroner papers. The Hypoxic cardiac arrests will be harder to prove although they were excluded from the investigators initial record of my safety investigation which sends a powerful message.*

The SUIs were excluded from the safety investigation in my case."

329. Dr Phil Hammond published his piece with the title Safety Catch on 30 October 2018 Private Eye **[Page 1056].**

330. On 24 October 2018 at 9:59am, an hour and a half before Dr Hammond had sent his proposed draft Private Eye article to me, Lewisham and Greenwich NHS Trust had published their first public statement about my case including the following false and detrimental statements:

a) *"At the point that Dr Day withdrew his claim, we decided that we should not pursue Dr Day for costs and we have been clear from the outset that the Trust does not want to discourage other colleagues raising matters of concern."* **[Page 171]**

b) *"Some of the publicity around this case has incorrectly made a link to the findings of a peer review of the critical care unit at QEH undertaken by the South London Critical Care Network in February 2017…It is important to be clear that these were not the same issues that Dr Day had raised in January 2014, which related to junior doctor cover on the medical wards"* **[Page 172]**

c) *"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"* **[Page 170]**

331. At this time abuse started to circulate on social media that I had effectively made up the important safety issues about the Intensive Care Unit and I started to get accused of fraud on the basis that I was crowdfunding under false pretences. The misleading narrative about the jurisdictional process in the statement was also referred to as a basis of accusing me of fraud.

> "*Dr Day's case against HEE was rejected on the grounds that HEE was not his employer. However, this was overturned after Dr Day appealed the decision. Following this, HEE has worked with the British Medical Association and NHS Employers to ensure whistleblowers can take legal proceedings against HEE for detriment."* **[Page 170]**

332. It is objectively false for it to be claimed that both the BMA and HEE worked together following my Court of Appeal victory to ensure junior doctors could take legal proceedings against HEE. This is not true. HEE publicly undermined my Court of Appeal litigation and HEE actively fought this litigation even after our Court of Appeal victory and this continued for nearly a year after our Court of Appeal victory until HEE finally conceded their employer status in May 2018, only when challenged with the significance of an undisclosed out of date contract. The whistleblowing charity Public Concern at Work criticised the misleading narrative **[Page 204-209].**

333. I remember both me and my wife being utterly depressed in a Bath Café about how much abuse I was getting online. When Dr Hammond's proposed Private Eye article was emailed to me. I cannot describe the relief both me and my wife felt to have a chance to have my evidence to the Tribunal reported on the protected disclosures and NHS' response to these objectively serious issues.

334. As stated, a few hours before Dr Phil Hammond had sent me his draft of his Private Eye piece, Lewisham and Greenwich had released their public statement dated 24 October 2018 **[Page 169-172].** I have since found out from disclosure that this statement and virtually nothing else was used to brief the Board of Lewisham and Greenwich NHS Trust on my case **[1052-1055]**.

335. It may be that the Board of Lewisham and Greenwich were misled by the Capsticks Solicitors and those NHS managers instructing the firm, on what induced the settlement of my case and the reality of what forced the wording of the agreed statement. It may be that the Board were also misled on the scope of my protected disclosures being led to believe that the only patient safety issues associated with the case amounted only to the fairly unavoidable but unfortunate occurrence of two locum doctors not attending for work on one night in January.

336. If so, the Board were deprived of an understanding of the serious issues I and others had raised relating to the Intensive Care Unit that were linked to 2 deaths and the Board were also misled into believing that the external investigation into my case had found that the Trust had responded in the right way to my protected disclosures.

337. As stated, I have since found out that the First Respondent has sent this misleading 24 October 2018 statement enclosed with 18 separate letters to 7 of the local MPs in South East London, the Mayor of Lewisham, several councillors and other influential local stake-holders in the healthcare sector **[Page 1179-1183].** As stated, these letters were not on the First Respondent's disclosure list and were only disclosed after an internal email within the Second Respondent made reference to them and a Health Service Journal briefing that was also not disclosed **[SB p216].** I requested disclosure of this material on the 18 January 2021 **[SB p240]** and it was provided on 26 January 2021 [**SB p241]**. A briefing to the Health Service Journal was also left out of disclosure and may have been deleted according to Capsticks Solicitors **[SB p241]**. Judge Kelly acknowledged the failure in disclosure in an order dated 2 September 2021 **[see page 583-5]** cited above **(at paragraph 24).**

<u>Briefing of Norman Lamb on Settlement</u>

338. On 1 November 2018, I met with Norman Lamb at Portcullis House. I briefed him on the settlement of my whistleblowing case. I set out why I felt the Trust's 24 October 2018 public statement was false in respect of my protected disclosures and the external investigation findings. I also made clear that costs were used to force me to settle and to force the wording of the agreed statement. I also informed Mr Lamb of the abuse I was getting on social media and how it was upsetting me and my wife. This was the first time I had been open with anyone who was not a close friend or family member about what had happened in respect of the settlement.

339. The abuse against me on Twitter was particularly bad in early November with many of the worst Tweets now deleted. It ranged from me being criticised for taking a payoff to me being dishonest or fraudulent with my claims or crowdfunding. On several

occasions, Norman Lamb intervened on Twitter. I will provide examples but often the offending Tweet has since been deleted leaving only Norman Lamb's tweet;

a) *3 November 2018 – (Quoted Tweet Unavailable). @NormanLamb states "I'm interested in your motivation? I'm not a conspiracy theorist, thankyou. But I am certainly horrified by what I know of this case* **[SB p228]**

b) *4 November 2018 – (Quoted Tweet Unavailable) @Norman Lamb stated, "I used to be an employment lawyer, I believe in proper process. I don't pre-judge the outcome but in a case as serious at this it was wholly wrong to frighten Chris Day into withdrawing on this basis."* **[SB p226]**

c) *@NormanLamb replies to a Tweet " Please do NOT risk making the assumption he lied. This could be defamatory"* **[SB p225]**

340. @normanLamb send a further Tweet dated 4 November 2018**, [SB p227]**

> "*No, but I am not prejudicing the Tribunal outcome. My very simple case is that the Tribunal should have been able to reach a Judgment on the full case after hearing ALL the evidence. Threatening a claimant leaving them feeling that they could be financially destroyed is no way to promote a culture of openness in the NHS and to encourage others to be brave in exposing potential patient safety issues! What message does this send out?"*

341. @DrPeteCampbell sent a Tweet in reply dated 4 November 2018 **[SB p227]**

> "*Hi Norman. Sorry but there is no evidence in the public domain that costs were threatened and you are the first to publicly make this claim so earnestly. Can we be shown the evidence so we can hold @NHS_HealthEdng to account?"*

Telegraph Journalist Approach and Article

342. On 13 November 2018 I was contacted by a journalist working with the Telegraph, Mr Tommy Greene **[Page 1080];**

> *"We have been in touch in the past about your case. I am currently working with the Daily Telegraph on a news piece concerning your legal battle, in light of events which have taken place over the past few weeks.*
>
> *Over the past 10 days (approximately), I have been contacting a number of parties in relation to the outcome of your recent tribunal hearing. As part of my questions to both HEE and the Trust (Lewisham and Greenwich) over the past week or so, I have been told the following:*
>
> *1) Both HEE and the Trust denied any cost threat was ever made against you, not just during the 6 days of cross-examination, but ever.*

2) The Trust told me that "settlement negotiations were initiated by Dr Day himself, firstly through his legal representative while Dr Day was in the course of giving evidence, and then again at the point when Dr Day had concluded his evidence. Dr Day and his legal representative made these approaches to the Trust to settle by withdrawing the claim, not as a result of any pressure placed upon them by the Trust, but because it was apparent to them that Dr Day's case was not going well. At the point that Dr Day withdrew his claim, the Trust had decided that we should not pursue Dr Day for costs and we have been clear from the outset that the Trust does not want to discourage other colleagues raising matters of concern.

3) The Trust also seemed to dismiss the importance of the cost threat, suggesting the alleged cost threat - had it taken place, according to them - didn't play or wouldn't have played any part in the final agreed statement signed by all parties.

How would you respond to these claims made by the two Respondents in your legal case? Would it be possible for you to provide me with a comment in relation to the issues and claims discussed here?"

343. On 13 November 2018, I made my Counsel Chris Milsom aware of the above approach from the Telegraph. From Mr Cooper's Data Subject Access request response, I have seen an email sent from Mr Milsom to Mr Moon and Mr Cooper dated 13 November 2018 **[Page 1086]**. Tim Johnson Law Solicitors were not copied in neither was I. The email states;

"I understand a Telegraph journalist is sniffing around investigating the conversations which led to Day settling. We have been asked to respond to an account of WP conversations given my one or both of the Respondents (I'm not sure which).

Given this is all WP, I am not quite sure who first attempted to unilaterally waiver those discussions, can you look into this? Do you agree any media coverage of this is out of bounds?"

344. Mr Moon QC replied to Mr Milsom in an email dated 14 November 2018 **[Page 1087]:**

> "*I am instructed that HEE's approach is that is does not intend to disclose or discuss without prejudice negotiations.*
>
> *If more is needed may I suggest contacting Richard Green at HEE by email – Richard.green@hee.nhs.net. I understand that he deals with HEE's responses to such enquiries."*

345. Mr Cooper QC replied to Mr Milsom in an email dated 14 November 2018 **[Page 1086]**:

> *"I'm afraid I can't really help. It seems to me that if there are media questions around the case those are matters for our respective clients and instructing solicitors to address and I have no instructions in relation to any of those matters. Sorry I can't be of more assistance".*

346. I responded to Mr Greene's request for comment by email dated 14 November 2018. I provided my side of the story in respect of the Respondents' costs threats during and after my evidence **[Page 1084-85]**. The Telegraph published the story on 2 December 2018 that included my quote;

> *"After two and a half days of my six day cross examination I was contacted by my legal team and told that the NHS respondents had decided to inform me of their intention to seek costs for the entire four week hearing if I proceeded to cross examine any of the NHS' 14 witnesses and ended up losing the case, he told The Telegraph.*
>
> *It seems to me that this was designed to affect my ability to give evidence and to intimidate me into withdrawing my whistleblowing claims.*
>
> *After completing my six days of evidence, my wife and I, considering our responsibilities as parents, felt that we had no choice but to drop the case.*
>
> *"I am disgusted at the way me and my family have been treated given that it has now finally been accepted that I was acting in good faith raising important safety issues and that I have performed a public service defending junior doctor whistleblowing protection from attempts to undermine it from NHS leaders."*

347. On the 21 November 2018, I wrote to my Crowdfunders to inform them of the quote that I had given to the Telegraph **[Page 1115].**

348. The Telegraph piece published on the 2 December 2018 also included a quote from the MP and former health minister Sir Norman Lamb. I can see a version of article inserted into the bundle at **[Page 1141-1142]** has significant content from the online article removed. The full article can be read at **[SB p210-215]**;

> *"Norman Lamb MP who brought up the case with Jeremy Hunt, the former Health Secretary and current health secretary Matt Hancock has now called for*

a public inquiry saying Dr Day had not so much been 'priced out of justice' as 'crushed.

"When you have serious allegations relating to patient safety raised – by a person, a whistleblower, who's risking everything to get them heard – there should be a fair and full hearing.

"What appears to be the case is that Chris Day and his family were put into, in effect, an impossible position – they were faced with a threat of costs, an abdication for costs, which would've destroyed them financially.

"It's an outrageous use of taxpayer money to crush and prevent the full facts of a whistleblower's case being aired it completely goes against the Department's talk of openness and transparency," he said."

349. On 25 November 2018 I had sent an email to the Tommy Greene requesting the hard copies of the emails from the Respondents that his original emails were based on **[Page 1121-1122]**.

350. On 26 November Tommy Greene provided the relevant emails with a cover email:

"I provide the relevant emails on the basis that they potentially serve as key evidence, and that this forms part of the legal process surrounding your case."

351. The emails forwarded to me by Tommy Greene identified Vicki Diaz a senior communications officer at HEE and Kirsten Edwards at the Trust as the source of the information about my case given to the Telegraph.

Respondent's December Public Statement

352. On 4 December 2018 the Trust published a further public statement on their website **[Page 173-175]:**

"We are extremely disappointed to see that Dr Day has subsequently claimed on social media and in the press that he was forced to withdraw his case as he claims that the Trust threatened him with the prospect of paying our legal costs. All of this is simply untrue: we did not threaten Dr Day with legal costs to pressure him to drop his claim – his legal representatives approached us to settle the claim on Dr Day's behalf. This is because it was clear to them that Dr Day's case was not going well." (my emphasis by underlining)

353. On 4 December 2018, I wrote a letter to the Trust and HEE's Solicitors and Counsel challenging the statements that were appearing in the press that I knew not to be in accordance with what I had been previously told **[Page 1184-1186**]. Both the Trust and HEE replied on 10 December 2018 both essentially denying that costs threats were ever made.

354. On 18 December 2018 I wrote to my Crowdfunders and stated **[page 1213-14]**:

> "*These actions and the recent publication of the Telegraph and HSJ articles have enabled me to speak openly for the first time about the various threats made that led to the settlement agreement. Last Sunday's Telegraph piece can be read here.*
>
> *The threats were as follows;*
>
> *1. A six figure ordinary costs threat against me for the entire 21 day hearing if I cross examined any of the witnesses and lost the case. (Payable by me)*
>
> *2.Reference to a wasted costs application against my lawyers (Payable by my lawyers)*
>
> *3. Reference to a referral to the legal regulator for my lawyers.*
>
> *4. Reference to a referral for me to the GMC."*

355. On Friday 7 December, I was surprised even after the 4 December letter, to see the Trust CEO Ben Travis endorsing on Twitter the Trust's statement released on their website referred to stating that my claim of a cost threat was "simply untrue".

356. The contradictory statements that have been made by the respondents and the various legal professionals that have been involved in this case are unacceptable. It seems that both I and possibly the Lewisham and Greenwich Board entered into the settlement agreement under false pretences. I have attempted unsuccessfully to have the settlement agreement set aside and attempted to appeal the decision both in the Employment Appeal Tribunal and Court of Appeal.

357. On the 13 December 2018, I sent my application to set aside the settlement agreement and my witness statement for those proceedings to Dr Phil Hammond. As without prejudice privilege had clearly been waived, there was a clear public interest in both the public, doctors and my crowdfunders knowing the truth about what induced settlement of my case and the agreed public statement. I also informed my crowdfunders of the application by email dated 12 December 2018 **[Page 1224].**

358. On the 21 December I sent an email to my Crowdjustice backers **[Page 1282**] enclosing a letter to the Secretary of State for Health written by the MPs Norman Lamb and Justin Madders dated 17 December 2018 expressing concerns about how my case settled **[Page 260-61].**

Mr Hamilton - Capsticks Managing Partner

359. Martin Hamilton is the national managing partner for the large public sector law firm Capsticks Solicitors LLP that has represented the First Respondent in these proceedings.

360. It is clear from Tribunal disclosure that Mr Hamilton was the contact at Capsticks briefing the Lewisham and Greenwich NHS Trust Board about this case. He but did not appear to be conducting the litigation but was copied into most of the emails relating to the settlement. For some reason, Mr Hamilton sent two successive letters dated 21 December 2018 and 22 December explicitly denying Mr Milsom's account of what led to the settlement of my case and agreed statement **[Page 1283-1285**]. I surmise that the most likely reason for this is members of the Board challenging Capsticks. The letters from the Board that Mr Hamilton appears to be responding to have not been disclosed.

361. It should be noted that Mr Hamilton is copied to all emails that Ben Cooper QC sent to Capsticks Solicitors in particular the email dated 5 October 2018 setting out an intended cost threat and drop hands offer **[Page 949].**

362. The letter from Mr Hamilton to the Board dated 21 December 2018 states **[Page 1283];**

> *"We are writing to confirm as follows: Lewisham and Greenwich NHS Trust 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."*

363. Mr Hamilton's letter dated 22 December 2018 states **[Page 1284-85];**

> *"We write further to our letters of 21 December 2018 and can further confirm that, in the settlement negotiations with Dr Day's legal representatives:*
>
> *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.*
>
> *2. We had no instructions from the Trust to threaten Dr Day's legal representative with a referral to their regulator. We did not make such a threat and we have not made such a referral.*
>
> *3. We had no instruction from the Trust to threaten to refer Dr Day to the GMC, and we did not make such a threat on the Trust's behalf. You have confirmed that the Trust has never considered referring Dr Day to the GMC and has no intention of doing so."*

364. The only logical reason for Mr Hamilton to need to write two letters like this to the Board of Lewisham and Greenwich NHS Trust, so close to Christmas, is the Board beginning to doubt what it had been told by the managers and lawyers involved in my case. This includes the briefing document given to the Board dated October 30 October 2018 **[Page 1052-1055].** This document repeats the 24 October 2018 public statements **[Page 1044-1045]** and misleads the Board on the scope of protected disclosures (now accepted) and results of the external investigation and advances the following position on costs;

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

365. It appears likely that Mr Hamilton would have been involved in the 14 October 2018 undisclosed teleconference that briefed certain members of the Board prior to their approval of the settlement.

366. Mr Hamilton was copied to an email from Ben Cooper QC clearly describing a drop hands offer linked to a cost threat.

Private Eye's Coverage of the Settlement

367. On 31 December 2018, I received a draft of a proposed Private Eye article **[Page 1288-1924]** and I suggested some changes (in red) and sent the edited version back to Dr Hammond. The wording added was as follows. Firstly, " *grounds that when agreeing to the settle the case he was operating under a mistake or pursuant to a misrepresentation."* Secondly, "*Day was told that the total cost liability for the October hearing was estimated at £500,000, with the £55,000 claim from HEE for the May hearing on top."* Thirdly, "*Angus Moon QC*" and "*Mr Moon as a 'red line' for HEE"*. Lastly, "*references/threats made to his barrister while he was under oath".*

368. Private Eye published "Whacking the Whistleblower" the above article on 8 January 2019 which I sent to my crowdfunders **[Page 1323]** by email dated 11 January 2019.

Summary of Public Statements

369. To assist the Tribunal, I will summarize the various detrimental public statements.

370. Since the settlement of the case and the agreed position statement, the First Respondent has released three damaging public statements about my case and provided them to journalists and also published them on their NHS Trust website. The first statement was released on 24 October 2018 **[Page 169-172]**, the second on 5 December 2018 **[page 173-175]** and the third on 10 January 2019 **[Page 178-181].** An embargoed statement was sent to me on 3 January 2018 at the request of the Chief Executive with view to being published on 4 January but has never been published **[Page 176-177].**

The Embargoed Statement

371. On 3 January 2019, the Respondent's CEO, Mr Travis. sent me a private message on the social media platform Twitter to inform me of his intention to release a further public statement at 10am the following day. This statement apparently dealt with the various alleged cost and regulator threats. This message exchange can be read and begins with **[Page XXXX]**

> *"Hi Chris, hope you had a good break. We're planning to issue our statement tomorrow at 10am. I've asked our comms team to email it to you so you are sighted on it advance, Best wishes, Ben"*

372. I reply thanking Mr Travis for his message with a request for him to confirm that the Trust's former counsel, Ben Cooper QC and Nadia Montraghi, have seen and agreed with the wording of the statement, that this confirmation is included in the text of the statement and that it is not published without such confirmation. In my reply, I further challenge Mr Travis on his proposed statement for changing the sense of my allegation that the SUIs were excluded from the Roddis investigation. Mr Travis' re-invented form of this allegation states that my position was that the two deaths were not investigated at all. The way the statement is worded gives the impression that I was falsely claiming there were no SUI investigations or Coroner process for the two deaths which is yet another misrepresentation to make me seem objectively dishonest. Mr Travis would have known that I went to significant lengths to include the SUI and Coroner papers in the 2018 bundle against fierce resistance. As stated the embargoed statement sent to me on 3 January was never published by the Trust. Given the content of the proposed statement and the nature of our dispute the tone of Mr Travis' message and the form it took as a Twitter message is surprising to say the least.

Summary of the Respondent's Changing Position on Costs

373. In respect of the denial of alleged cost threats, pleaded as detriments, the First Respondent has given multiple different positions in public statements which they accept they have circulated to all their local MPs, to the press and to key stake holders;

a) **24 October 2018 Public statement and Board Briefing Document,** "At the point that Dr Day withdrew his claim, we decided that we should not pursue Dr Day for costs and we have been clear from the outset that the Trust does not want to discourage other colleagues raising matters of concern. **[Page 1044-45]**;

b) **Sunday Telegraph published 2 December 2018,** "[the Trust] *did not ask its legal representatives in the case to make a significant cost threat to Dr Day when he was under oath and, further, did not make this request at any point."* **[SB p213];**

c) **On 4 December 2018 in a public statement [1165-1167]**

(i) “he claims that the Trust threatened him with the prospect of paying our legal costs. All of this is simply untrue”;

(ii) “we did not threaten Dr Day with legal costs to pressure him to drop his claim;

(iii) “[o]n the issue of costs, we had decided not to pursue Dr. Day for legal fees before he withdrew his case”;

374. **On 10 January 2019 public statement the Trust change their position;** “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…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 to costs. This reflects that we are an NHS body responsible for public funds'"**[Page 1314-1317].**

375. In an email dated 3 December 2018, the Second Respondent mocks the First Respondent’s various changes in position on costs and states that it makes the Second Respondent’s position on costs seem more trustworthy. This email is copied to the Second Respondent’s CEO, Prof Cummings and Medical Director, Prof Reid. It is also copied to Mr Farrar, the Hill Dickinson Head of NHS Employment **[Page 1146];**

> “*HEE keeping to the consistent and clear line that we did not threaten costs is aided by the Trust’s current, slightly weasel-worded line, and any subsequent changes they make. The more they twist, the clearer and more trustworthy our position is; (my emphaisis by underlining)*

Approach to Sir Norman Lamb from the First Respondent’s CEO

376. In December 2018, the Chief Executive of the First Respondent, Mr Ben Travis, made an approach to The Right Hon Norman Lamb MP to offer “a full briefing on all the background to the case” and to advance the content of the Trust’s public statements. Mr Travis has also endorsed the public statements on social media platforms such as Twitter and authorised for the public statements to be shared with the national newspapers for instance the Telegraph.

My Meeting with Ben Travis and Norman Lamb MP Portcullis House Westminster

377. Mr Travis also made a request to meet Mr Lamb which was agreed and occurred on the 14 January 2019. Mr Lamb invited me to the meeting. The First Respondent sent a bundle of documents to the meeting in advance . I also provided my 2018 Tribunal witness statement **[SB p250-295]** and a draft supplementary witness statement on the Serious Untoward Incidents **[Page 922-931]**. I also provided the tribunal statements of Dr Sauer **[Page 1598-1561]** and Ms Dann **[SB 296-298].** The Medical Director Dr Aitken was due to attend the meeting but cancelled at short notice. My account of the meeting is based on my recollection and a letter dated 23 January 2019 that I sent to Norman Lamb following the meeting **[Page 1386-1397].**

378. I attended the meeting with my wife, Mrs Melissa Day. Mr Travis brought Mr David Cocke the Head of Communications as a note taker.

379. Prior to the meeting I was sent the following email from the Respondent Trust via Norman Lamb's assistant. It was on the evening of Friday 11 January **[Page 1340]**

> "*As Dr Day has subsequently made an application to the employment tribunal case to be re-opened, we do not feel it would now be appropriate to discuss any of the detail that will be covered through legal process. However, we would be very happy to meet on Monday, as planned, for a discussion around whether there is any common ground so we can move forward.*

380. I stated at the meeting that a key objective of mine for the meeting was to challenge the false statements about my case that had appeared in the three public statements published on the Trust's website that had also been shared with journalists. The statements were and still are occasionally used to attack me on social media and have caused distress to me and my family. One Tweet from Dan Wilson (@mrdanfresh) on 10 January 2019 stated **[SB p225]**

> *"I don't think it's unreasonable for the trust to pursue costs against him if it was found he lied... call it a threat if you want but there needs to be some deterrent for lying"*

381. I also made the point that if the Trust felt they wanted to keep the material for the legal process they shouldn't have released material into the public domain in their 3 statements on the very matters they were now saying that they couldn't discuss. Their latest statement was released 2 working days before our meeting; and nearly a month after my application to set aside the settlement was lodged.

382. In the meeting and prior to the meeting by email dated 14 January 2019 **[Page 1342],** I made the point that the Respondent should be prepared to discuss the factual content of their public statement in the meeting or remove them from their website.

383. I proceeded in the meeting to highlight the false content in the public statements that I also set out in my 23 January 2019 letter **[Page 157-168**] to Norman Lamb. This letter was forwarded to the First Respondent's Chief Executive with a strongly worded cover letter **[Page 272-273]** . The basis for me saying the public statements are false has been set out in this statement and I see no need to repeat this content **[See Section 2 and 3 of this statement**]. I also made clear the reality of the Trust's external investigation which has also been set out in this statement.

384. Mr Travis made some fairly vague statements about being committed to changing culture at the First Respondent but then referred to a recent external report that the First Respondent had recently published about culture. I commended Mr Travis in the meeting for commissioning this work and for also publishing the report. We briefly discussed its findings which I had also researched. The Health Service Journal published the reports key findings **[Page 1250-1253];**

a) *The presence of overt bullying , both witnessed and reported, particularly at the most senior levels, coupled not only with a lack of visible action to address it, but a laissez fair attitude which appears to condone it, can be interpreted as a lack of willingness to recognise and tackle bullying behavior"* ***[page 1251]***

b) *"Many examples were given of members of the senior leadership team demonstrating a leadership style that was at best was described as "menacing, threatening and heavy-handed****" [Page 1251]***

c) *"learned behavior filtered down to the lower levels particularly the general manager group"* ***[page 1251]***

d) *"Whilst I would not describe the bullying in the trust as institutionalised, it is however widespread in that is evident across all sites, in all divisions, at all levels and perpetrated by managerial, non-managerial and clinical staff";* ***[Page 1252]***

e) ***"****The evidence clearly shows the HR function, seemingly. If not actually, being inappropriately persuaded or overly influenced by divisional management in relation to many complaints, investigations or outcome" [****page 1252]***

385. I asked Mr Travis how he could be so sure that I had not been a victim of the culture set out in the recent report given what I had set out in the meeting. At this point both Norman Lamb and I asked Mr Travis to commission the author of this report to investigate my whistleblowing case. Mr Lamb also made reference for a need for a public inquiry into my case which he had previously called for in his quote to the Telegraph the previous month and in a letter with Justin Madders to the Secretary of State for Health **[Page 260-261]**.

386. This may have prompted Mr Cocke, Director of Communications of the First Respondent to describe Norman Lamb's request for a public inquiry in an email copied to many people in the First Respondent as appalling **[Page 1138]**. Mr Cocke did not have the courage to say it to Norman Lamb's face in the meeting. It should be noted that Norman Lamb was the Government Minister that pushed for the enquiry into 458 deaths at Gosport Memorial Hospital.

387. In the meeting, Mr Travis did make it very clear that neither he nor the Trust instructed the costs consequences described by me in the meeting in respect of settling the case and in order to secure the wording of the agreed statement. In the meeting, Mr Travis repeated the substance of this quote given to Private Eye in its December 2018 issue;

> *"Lewisham and Greenwich NHS Trust did not ask its legal representatives to make a significant cost threat to Dr Day when he was under oath and further, did not make this request at any point. The Trust had decided that it would not pursue Dr Day for costs and we have been clear from the outset that the Trust does not want to discourage other colleagues from raising concerns"*

388. As stated, on 23 January 2019, I wrote to Mr Lamb repeating the examples and explanation in respect of the false public statements that I had set out in the meeting

on the 14 January. I asked for Mr Lamb's assistance in getting the statements removed from the Trust's website.

389. It is hugely damaging for me as a regulated medical professional to have the content of my protected disclosures publicly undermined, the findings of an external investigation into the issues raised by my case misrepresented and for it to be falsely implied that my own legal team thought my evidence would be found to be untruthful.

390. On 28 January 2019 Norman Lamb MP wrote a letter to Mr Travis and enclosed my letter dated 23 January 2019 **[Page 272-3]**:

> *"Thank you for coming to meet with Dr Chris Day and myself on 14 January.*
>
> *I refer you to the enclosed letter sent to me from Dr Chris Day on 23 January. I have read through Chris Day's letter very carefully. Your urgent response would be appreciated. It is very important that you confirm whether, in the light of the contents of Chris's letter, you stand by all the statements made by the Trust and publicly available on your Trust website. Further, is there anything in Chris Day's letter which you believe is in any way inaccurate?*
>
> *It is my belief that aspects of the Trust's public statements (as referred to in Chris Day's letter) are severely defamatory and should be withdrawn forthwith and that there should be a full apology. I should stress again that the inaccuracies in the public statements by the Trust are not only defamatory but are deeply distressing. They are damaging to Chris Day's reputation*." (my emphasis by underlining)

391. My letter dated 23 January 2019 to Mr Lamb sets out the following [**Page 157-168]**:

> *a)* Mr Milsom confirming that the costs consequences communicated by Ben Cooper QC for the Trust did not link matters to the truthfulness of the Claimant's evidence and that the Claimant's counsel certainly made no comments as to the Claimant's evidence being untruthful.
>
> *b)* Several examples of serious criticisms of the First Respondent about its handling of my concerns from its external investigation showing that the Trust's claim that they had responded in the right way to my concerns not to be true.
>
> *c)* Information indicating the true content of my protected disclosures and how such content was supported by the findings of Serious Untoward Incident (SUI) Investigations, a Peer Review, a CQC Report and national staffing standards. Examples are set out that show a clear link between the issues investigated in the external investigation into my case and to the Critical Care Peer Review which the First Respondent has publicly claimed has been incorrectly linked to my whistleblowing case.

392. On 7 February 2019, Mr Travis wrote back to Mr Lamb but did not refer to the false public statements either to justify them or to remove them. Mr Lamb responded in a letter dated 18 February **[Page 1413]**:

> *"Thank you very much for your letter of 7th February. I have forwarded your letter to Chris Day and we have since discussed its contents.*
>
> *The problem I have with it is that, by failing to address the clear inaccuracies in the public statements made by the Trust, the damage to Chris' reputation continues. This, I feel, is unconscionable and needs to be addressed. You made clear your desire to change the culture in your Trust but by failing to address these matters, it inevitably raises doubt over the Trust's commitment to change. I would urge you again to seriously consider the analysis I enclosed with my previous letter from Chris Day and to act upon it so as to bring to an end what we believe to be defamatory statements in respect of Chris Day."*

393. Norman Lamb's letter was copied to my crowdfunders on 25 February 2019 **[Page 1413]**. The letter also questions the following;

> "*Finally, I note that a Freedom of Information request from Tommy Greene has resulted in information being provided by the Trust to confirm that the external investigators, MJ Roddis, charged £12,983 plus VAT simply for attending the tribunal hearing for six days. There was no reason for them to be there. They did not need to be there in order to give evidence in the tribunal hearing at a later time (which never occurred because of the settlement which Chris Day is now challenging). What is the possible justification for public money being spent in this way?"*

394. The fact an NHS Trust paid two private investigators to be present throughout my 6 days of my evidence speaks volumes about how worried the Respondent was about the strength of my case and the importance of the issues.

Sir Roberts Francis QC/ Care Quality Commission Involvement

395. The NHS Whistleblowing expert, Sir Robert Francis QC, wrote to the Care Quality Commission to express concerns about the First Respondent's public statements in my case. A letter from the Care Quality Commission to Sir Robert Francis dated 29 May 2019 that Sir Robert Forwarded to me states **[Page 1425-6];**

> *"Regarding the concerns raised for Lewisham and Greenwich NHS Trust, the panel have considered the concerns raised about the statements which are publicly available on the Trust's website and agreed that these fall outside the scope of Regulation 5.*

> *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." (emphasis added)* ***[Page 1426]***

396. This letter clearly shows that the CQC put the serious concerns raised by me, Sir Robert Francis and their own clearly stated concerns to the First Respondent about the "publicly available statements" pleaded as detriments in the present claim. I cannot see how the Respondent can expect to deny this. The letter also makes clear that the CQC put the concerns directly to the Trust Chief Executive, Mr Travis, as the letter records his response to the concerns put to him about the "publicly available statements" about my case, "*The CEO is confident the statements reflect the version of events as they happened."* ***[Page 1426]***

397. The CQC have subsequently confirmed in a letter dated 18 January 2021 that CQC put the concerns about the public statement in the case to the Trust at a meeting that occurred on 29 March 2021 **[Page 1532].** The meeting was attended by the Trust's Chief Executive, Chief Nurse and Deputy Director of Governance **[Page 1532].** It is therefore clear that at this meeting when the concerns about the public statements were put to the Trust the following responses were provided;

    a) "*The trust advised that they 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.'"* **[Page 1426]**

    b) *"The CEO is confident the statements reflect the version of events as they happened"* ***[Page 1426]***

398. Sir Robert Francis also forwarded me a letter dated 10 June 2019 from the former CQC Deputy Chief Inspector that stated **[Page 1427-9];**

> "*I can confirm that I have not had any direct contact with Dr Day and I am happy for you to share any part of this letter that you feel would be appropriate. I can also confirm that the concerns raised by Dr Day are being considered more broadly by the CQC and the inspectorate and these will continue to be discussed at engagement meetings" (my emphasis by underlining)*

399. I have pleaded the following detriment against the First Respondent **[Page 479]**

> "*The deliberate failure of the First Respondent 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"*

400. The First Respondent has pleaded the following in response that is not compatible with the CQC position **[Page 501]:**

"It is admitted that the Trust did not "remove or update" its public statements, however, it is denied that the Trust was contacted by Sir Robert Francis QC and/or the CQC. Whilst it is admitted that the Trust took its own proactive steps to contact the CQC, the CQC confirmed in response that it had not and would not be following up further on the issue of the statements with the Trust." (my emphasis by underlining)

401. This is clearly an attempt to give the impression that the Trust Chief Executive, Mr Travis, was unaware of any concerns expressed by the CQC about the public statements. The truth is, Mr Travis was not only aware of the concerns expressed by the CQC but responded to them with the following as set out in the CQC's letter dated 29 May 2019;

a) *"The trust advised that they 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 applying for jobs.*

b) *"The CEO is confident the statements reflect the version of events as they happened"*

402. The British Medical Association wrote an email to Ms. Nair **[page 1547-1549]** Director of Human Resources at Lewisham and Greenwich NHS Trust that stated:

"I write on behalf of the above-named member of the Association and, further to his recent communication, in which he has requested that the Trust clarify the contact that it had with the CQC, in relation to his whistle blowing claim, as well the actions that it took, regarding the public statements on the Trust's website.

Our member has referred us to a copy of a letter from the former Deputy Chief Inspector of Hospitals, Ms. Ellen Armisted, to Sir Robert Francis QC dated 29 May 2019. In the letter she makes comments, on behalf of the CQC, about statements concerning our member appearing publicly on the Trust's website. She says:

"We share your concerns raised 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."

We understand, from our member, that the Trust now denies that it was contacted at all by the CQC in relation to the statements on its website. It seems to us that in light of the letter from Ms. Armistead, the Trust's position must be mistaken and should urgently be corrected? On behalf of our member, we ask that you urgently reconsider your position and advise whether or not

you now accept that the Trust was contacted by the CQC with concerns about the content and tone of the public statements about our member?

It is disappointing that, to date, the Trust has failed to furnish Dr Day with a response to the issues he has raised about this and, I look forward to your response at the earliest opportunity.

With many thanks for your assistance in this matter and, I look forward to hearing from you."

403. The BMA never received a substantive response to this communication.

Impact of the Case on Me

404. I cannot believe what my family and I have been through after having raised serious patient safety issues about an Intensive Care Unit about 8 years ago, and then challenging objectively flawed investigations that failed not only me, but also the public interest. I have then faced detrimental treatment for doing this. In addition, I spent 4 years of my life defending the statutory protection for the nation's doctors when they blow the whistle from attempts (funded by the taxpayer) to undermine it. Unsurprisingly, all of this has come at a huge cost to me and my family. The settlement agreement in my previous claim that apparently has been properly made has deprived me and my family of any justice for the loss of my career.

405. This present case is therefore not about justice for me and my family for the loss of my career. It is about attempts to undermine my reputation by preventing the disclosures I had raised being understood by the public, press and MPs.

406. The actions of the Respondents in their reactions to the issues that I had raised had meant the destruction of my career; and then for them to further undermine my professional and personal reputation to such an extent, could make it likely that many will not listen to a word I say about anything ever again.

407. I have been in an unimaginably difficult situation for 8 years since I first raised my disclosures, during which senior people have chosen not only to ignore what I raised but have actively opted to damage me and conceal the issues. The public statements forming the subject of this case are yet a further example of the detriments that I have been subjected to over the last 8 years.

408. This Tribunal will be fully aware of what happens time after time to Claimants that bring whistleblowing cases against senior and established interests. To some extent this Tribunal may also be aware of the speak up culture in the NHS. The toxic speak up culture in the NHS has been documented in scandal after scandal with the latest being the maternity scandal at Shrewsbury and Telford. This Tribunal will therefore be more than able to understand the pressure that me and my family have been under over the last 8 years. I hope it is clear from what I have set out, that I have raised serious issues that deserve proper consideration.

This statement is true to the best of my knowledge and belief.

Signed: 

Dr Christopher Day

24 May 2022

Case No. 2302023/2014 and 2301446/2015

EMPLOYMENT TRIBUNALS

Claimant: Dr C Day

Respondent: Lewisham and Greenwich NHS Trust (1)

Health Education England (2)

Heard at: London South (By CVP) **On:** 5 and 6 December 2022

Before: Employment Judge Self

Appearances

For the Claimant: Mr A Allen KC - Counsel

For Respondent: Mr A Moon KC - Counsel

RESERVED JUDGMENT

Upon the Tribunal determining that the test for striking out the Claimant's Application for a wasted costs order against the Second Respondent's solicitors (Hill Dickinson), pursuant to Rule 37 (1) (a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 (The Tribunal Rules), is not met, the application will be listed for a Case Management Hearing to enable directions to be made for a determination of the Application.

WRITTEN REASONS

1. This hearing was listed, of the Tribunal's own initiative, to consider whether the Claimant's application seeking wasted costs against Hill Dickinson LLP, dated 12 June 2019, pursuant to Rule 80 of the Tribunal Rules, should be

struck out pursuant to Rule 37 (1) (a) of the same Rules, as having no reasonable prospect of success. There was a preliminary point raised about the scope of this hearing at the outset and the above summarises my ruling thereon. Both parties have indicated to me that they do not need anything other than my oral ruling on that matter.

2. Within the course of the hearing and prior to the parties commencing their submissions an issue was raised whether such an application for wasted costs came within the definition of "Claim" pursuant to the Employment Tribunal Rules and both parties were, eventually, in agreement that it could and both wished the hearing to proceed.

3. These claims have been running since 2014 and it is not possible to deal with the application without being clear about the chronology and what has taken place to date. Indeed, both advocates rightly spent some time working through the chronology as they saw it and I will do the same drawing from both of their submissions

4. The Claimant brought claims of whistleblowing detriment against a number of Respondents on 27 October 2014 and then brought a further Claim on 10 April 2015. One of those Respondents was Health Education England (HEE) who were represented at all material times by Hill Dickinson LLP. The Claimant asserted that he was a worker under the extended definition of worker in section 43K Employment Rights Act 1996 (ERA) between 5 August 2013 and 10 September 2014, which was the material period for the Claim, and that he had been subjected to a series of detriments on account of protected disclosures he had made.

5. HEE defended the allegations against it and the Response was received in late November 2014. Within that document HEE took the point that the Claimant did not fall within the extended definition of worker set out at section 43K of the Employment Rights Act 1996. It averred, at paragraph 8 of its Response (55), that it did not determine the terms upon which the Claimant was engaged and that that was the responsibility of the Trust who were employing the Claimant at the material time. It was pleaded that the Claimant had no reasonable prospect of success of coming within the section 43K definition of worker and that the Claim should be struck out on that basis (para 11 page 55).

6. This position was reiterated in a letter of 25 November 2014 and the Regional Judge in situ at that time listed a hearing so as to consider that point (among others) at an Open Preliminary Hearing (OPH). HEE points out that there was no order for disclosure prior to that hearing but the Claimant counters with the observation that there was a bundle prepared for the hearing into which documents the parties considered relevant were placed and then

considered by the Judge and referred to by her in the course of her Judgment.

7. That hearing was listed before EJ Hyde on 25 February 2015 and she struck out the claims against HEE after hearing representations from the parties. The basis for striking out the Claims was that they had no reasonable prospect of success.

8. At para. 42 of the Judgment it was recorded that counsel for HEE stated that it was fanciful to suggest that the party who substantially determined the Claimant's terms and conditions was HEE. At para. 43 the Judge reflected that she had before her terms and conditions of employment with the various Trusts with whom the Claimant was placed and that was a good start point.

9. At para. 45 EJ Hyde set out relevant sections of what was known as the "Gold Guide" and at para. 46 utilising that document accepted that that document ***"overwhelmingly pointed to the First Respondent (Lewisham) as being the body which was substantially responsible for determining the Claimant's terms and conditions of work"***

10. At paragraphs 48, 49 and 50 the Tribunal cites certain documents in the bundle in support of the HEE position and that it accepted certain evidence from a witness (Mr McKay).

11. At paragraph 52 of that Judgmen,t which was sent to the parties on 14 April 2015, EJ Hyde said:

"In conclusion, I accepted the primary submissions on behalf of the Second and Third Respondents that in construing section 43K the focus is in relation to the work and as to who has substantially determined the terms on which the employee or the worker does that work. I agreed that it was relevant that (HEE's) role was to arrange the training of Dr Day over an extended period but that it was not (HEE) who substantially determined the terms on which he did the work for the trust. Here there was a training relationship which subsisted alongside the employment relationships with the various trusts who were the Claimant's employers and determined the terms upon which he performed his work either on their own or with others not including the Respondents. The claim against (HEE) therefore has no reasonable prospects of success".

12. It is clear that EJ Hyde carefully considered the evidence provided to her including the documentary evidence that was placed in the bundle and made her decision on the information before her.

13. The Claimant appealed that Judgment and the matter came before Mr Justice Langstaff at the Employment Appeal Tribunal on 10 February 2016

with Judgment being handed down on 9 March 2016. The appeal was refused. It does not seem to me that the reasoning is relevant to the issues of this case and so I need not go into the Judgment in any great detail. Mr Moon referred to a passage in the Judgment at page 139 of the bundle where the issue was referred to as ***"one of hard-edged law".*** The issue in dispute still required a factual assessment and evidence of what the Claimant's situation was and, in particular, identification by that evidence of who determined his terms and conditions and whether it brought him within the extended definition of worker set out in the Employment Rights Act 1996.

14. The matter was then further appealed to the Court of Appeal and the hearing took place on 21 March 2017 with Judgment being handed down on 5 May 2017. At this point both parties not only engaged established senior Employment law Juniors on their case bus also had instructed QCs in order to argue the point. In addition, Public Concern at Work were permitted to intervene and were also represented by Queen's Counsel. The parties to this litigation agreed on 27 October 2016 that they would not pursue costs against each other whatever the outcome of the appeal and an Order reflecting that was made by the Court of Appeal to the effect that whatever the outcome each would bear their own costs. This effectively prevented the need for an application to be made by the Claimant to limit recoverable costs pursuant to Rule 52.19 of the CPR.

15. The lead judgment at the Court of Appeal was given by Lord Justice Elias who noted at paragraph 6 that whilst he accepted that the issue was suitable to have been dealt with as a Preliminary Hearing it would have been ***"desirable"*** for the issue to be determined as a Preliminary Issue following findings of fact as opposed to being dealt with via a strike-out.

16. Since the EAT hearing there had been another case (**McTigue**) which the Court of Appeal was able to draw from and at para. 23 of the Court of Appeal judgment they observed that **"in principle HEE could fall within the scope of section 43K (2) (a) ERA notwithstanding that the Claimant had a contract with the Hospital Trust."**

17. The Court of Appeal then went onto consider whether the EAT had applied the correct test in that it did not properly consider that both the employing Trust and HEE could both substantially determine the terms of agreement. It was found (para. 27) that the Tribunal had not engaged directly with the question whether HEE itself substantially determined the terms on which the Claimant was engaged and therefore the Tribunal and the EAT had fallen into error. It was not accepted that the answer to the correct question to be asked was clear and obvious and so the Claim was remitted to the Tribunal for that to be considered by way of a Preliminary Issue i.e., whether HEE substantially determined the Claimant's terms of engagement.

18. The matter made its way back to the Employment Tribunal and REJ Hildebrand presided over a directions hearing on 10 July 2017 and sent out an Order with directions for a four-day hearing on the Preliminary Issue identified as ***"Whether the (Claimant) was a worker of HEE pursuant to section 43K Employment Rights Act 1996"*** and that was to be considered ***"on the facts and in light of the guidance provided by the Court of Appeal Judgment"*** .

19. Standard disclosure by List and then inspection of any documents ***relevant to the issue*** identified in the case as set out in the preceding paragraph was made (my emphasis). Further standard directions preparing his matter for a hearing were also made.

20. Although the Order gave dates in August 2017 for the disclosure and inspection it was not until 14 February 2018 that a Senior Associate at Hill Dickinson sent a list and copies to the Claimant's then solicitors and in a covering email she stated that she looked forward to receiving disclosure from other parties in due course. Neither party asserted that there was any dilatory conduct in relation to the timing of disclosure and so I proceed on the basis that an extension was agreed by the parties.

21. One of the documents disclosed was listed as being **"Learning and Development Agreement between London Strategic Health Authority (LSHA) and South London Healthcare NHS Trust"** (2012 LDA Agreement). Although the background is slightly more complicated than I am about to set out, LHSA was a predecessor of HEE and the Lewisham Trust fell under South London etc at the time of this agreement which is dated 1 April 2012.

22. At this point in time I have been given no information as to how this document came to light or how it came to be in the List of Documents and, no doubt, if this application proceeds to a final hearing those matters are likely to be the subject of evidence. All I can take from it at the moment, however, is that a decision was taken by Hill Dickinson that this document was one that met the criteria of being a document relevant to the issue to be determined as of February 2018. It is also apparent that it was not a document placed within the bundle when the issue was first at the Employment Tribunal some years earlier and I have received no explanation for that omission in the course of this hearing.

23. Matters proceeded and the hearing was listed for 14-17 May 2018. Mr Linden QC (as he then was) was instructed by the Claimant for the hearing and I have seen his skeleton argument for that hearing (314 - 330). At paragraph 6 he states that the Claimant's position is that HEE and the Trust both substantially determined the terms upon which the Claimant was engaged but that HEE had a far more important role than the Trust.

24. At paragraph 10 Mr Linden identified documents that, in his view, the Tribunal ***"may wish to consider more carefully"*** and the first of these was the 2012 LDA Agreement ***"which sets out the obligations of the Trust and HEE in relation to the specialist training programme which the Claimant was undertaking".***

25. At paragraph 13 Mr Linden identified the importance of the case as it affected approximately 54,000 junior doctors and specialist registrars in the NHS and also had wider ramifications where working arrangements were determined by more than one organisation. At para 14 he explained that in his view the possibility that HEE would be able to retaliate against a whistle blower without any recourse by the whistle blower, taking into account the role it played in relation to doctors in training, was surprising to say the least.

26. At paragraph 32 Mr Linden referred to the 2012 LDA Agreement and stated that:

"The important point for present purposes is that it includes a number of terms that governs the relationship between the Trust and the Trainee. HEE therefore also "determines" the terms on which the trainee is to be engaged at work, through the LDA".

He then provided a substantial number of examples from the Agreement to demonstrate this point and then referred to part of a witness statement from one of the HEE witnesses which he described as effectively an admission that through the LDA, HEE substantially determined the terms upon which Junior Doctors are engaged.

27. Mr Moon KC's skeleton argument is dated 11 May 2018. I do not know whether he had had sight of Mr Linden's skeleton before he drafted his own. At paragraph 3 of that document Mr Moon wrote:

"After very careful consideration, including consideration of the evidence, HEE has decided to concede the preliminary issue on the basis that postgraduate trainees are workers within the meaning of section 43K (ERA)."

Mr Moon invited the Tribunal to make an Order which reflected the concession on the Claimant's status and to make a formal finding that:

"The Claimant was a "worker" within the meaning of section 43K(1) ERA and that HEE was his "employer" within the meaning of 43K(1) ERA throughout the period from 5 August 2013 to 10 September 2014 when the Claimant was a Postgraduate Trainee and that the Claimant is accordingly entitled to bring these proceedings under the ERA against HEE".

28. On 14 May a document was signed by EJ Freer in which the concession drafted by Mr Moon was recorded and the Tribunal made the finding requested above. In addition, it was recorded:

"By consent the Employment Tribunal orders that in full and settlement) of all the Claimant's claims for costs in respect of the "worker" issue HEE will pay the Claimant's costs to the Claimant's solicitors in the sum of £55,000 inclusive of VAT within 28 days of today."

29. The Claimant indicated at this hearing that the £55,000 was only part of the costs which he had expended on the preliminary point. No doubt if this application proceeds that will be evidenced.

30. The substantive claims were listed for a final hearing commencing on 1 October 2018. The Claimant was cross examined and it is common ground that before the end of that cross examination a settlement agreement was entered into on 15 October 2018. The Claimant was represented by counsel at that hearing and the settlement agreement entered into is in relatively standard form. It records in a preamble that in the course of the hearing ***"the parties have reached agreement for the withdrawal and settlement of those claims"*** brought before the Employment tribunal at that time. Further in the preamble it was said that the Agreement was ***"in full and final settlement of those claims and all or any claims the claimant has or may have against…. HEE, their directors, officers, agents and / or employees arising out of or in connection with the Claimant's employment and / or training and / or their termination."***

31. At paragraph 2.2 of the Agreement (338) the Agreement states:

"This Agreement is also in full and final settlement of all or any claim or application for costs / expenses that any of the parties may have against any other party or parties representative , whether in relation to the claims or their conduct or otherwise".

32. On 28 November 2018 a Judgment was sent to the parties which simply stated that **"Upon Agreement having been reached between the parties, the Claimant's claims are dismissed upon withdrawal."** And so it was that the first set of proceedings were compromised and ended.

33. On 11 December 2018 the Claimant sought to set aside the Settlement Agreement and to have the Judgment referred to in the previous paragraph reconsidered and then revoked. (344 et seq). The Claimant asserted that he had entered into the Agreement "operating under a mistake or pursuant to a misrepresentation given that he entered into the Agreement on the basis that he believed that the Respondent had said that it would pursue the Claimant

for costs if he proceeded with the trial and ultimately lost whereas he was now told that that was not the case (345). The Claimant attached a witness statement to his application in support (347-353).

34. In that document the Claimant described his account of what had happened during the hearing and, in particular, how it had come to be that he had come to withdraw his claim and how ***"as a direct result of the costs threats we decided to withdraw the case."*** The Claimant then described how he was contacted by a journalist (Mr Greene) and how other information had come to light to the effect that the Respondent denied making any form of costs threat. If that was true, said the Claimant, then the basis upon which he entered into the Agreement was a false one as there had either been a misrepresentation or a mistake.

35. On 18 February 2019 EJ Martin considered the application and concluded that there was no reasonable prospect of a reconsideration being successful and the application was refused (394-395). On 26 February 2019 the Claimant asked for a reconsideration of that decision and set out his reasons for that. He also intimated that he was also taking steps to appeal EJ Martin's order and that appeal was received by the Employment Appeal Tribunal on 26 or 28 March 2019 (the date stamp is not clear on the document I have). That appeal was rejected on the sift by HHJ Eady (as she was then) who indicated that in her view it had no reasonable prospect of success.

36. On 24 July 2019 the Claimant requested an oral 3 (10) hearing to plead his case in person but permission to appeal was dismissed by Heather Williams QC sitting as a Deputy Judge of the High Court. On 30 December 2019 the Claimant appealed to the Court of Appeal and on 7 April 2020 Lady Justice Simler refused permission to appeal on all grounds. And so it was that the Claimant's first attempt to set aside the Settlement Agreement concluded in failure.

37. A further Employment Tribunal claim was commenced in early March 2019 against HEE (inter alia) but the case against HEE was struck out in mid-February 2022 for reasons that are not relevant to the issues I have to determine. Similarly, the fate of the Claimant's claims against the NHS Trust also has no bearing on the issues in this Claim.

38. On 12 June 2019 the Claimant's then solicitors made an application for wasted costs under Rule 80 of the Tribunal Rules **"for the legal costs incurred in defending a preliminary strikeout issue raised by the Second Respondent (HEE)…"** It was confirmed that HEE were represented by Hill Dickinson LLP who were the subject of the wasted costs application.

39. The application gave a brief account of the background set out above and then stated as follows:

"The Second Respondent (HEE) had not disclosed a vital document in the case, the Learning Development Agreement (LDA) between the First and Second Respondents until the 14th of February 2018.

In May 2019 in response to a Freedom of Information (FOI) request made by a journalist Mr Tommy Greene the Claimant discovered that Hill Dickinson were also the solicitors who drafted the LDA. The Claimant understands that Hill Dickinson drafted this document in generic form, in the specific form used between the First and Second Respondents and for other NHS Trusts and the Second Respondent (HEE). It was a significant piece of work for that firm, for which they were well remunerated.

We attach a copy of HEE's response for the tribunal's consideration"

40. The Claimant contended that he had to incur significant costs as a result of the improper, unreasonable and/or negligent acts of Hill Dickinson. It was asserted that "***Hill Dickinson must have known of the LDA which it drafted and ought to have brought the significance of the LDA to its Client's attention in the early stages of these proceedings as this would have disposed of the need to make an application for strike out of the Claimants claim and the Claimant incurring substantial costs in responding to and preparing for a hearing associated with the application.***

The Claimant has decided to pursue this application now on the basis of the information obtained through the FOI by Mr. Greene where the claimant has discovered that Hill Dickinson were also the solicitors who drafted the LDA and were paid for doing so, thereby making it apparent to the Claimant that Hill Dickinson were aware or should have been aware of his existence at a much earlier stage and advised their clients accordingly".

Further on in the application:

"We submit that this application is consistent with the overriding objective of the Tribunal and the rules of natural justice because the Claimant would suffer a substantial injustice if the application is not heard and granted. Recognising the potential relevance of the Settlement Agreement of the 15th of October 2018 and in order to avoid expenditure of any further unnecessary legal costs the Claimant proposes that this application is immediately stayed pending the resolution of his appeal to the Employment Appeal Tribunal in relation

to the October 2018 settlement agreement and the Employment Tribunal order of the 28th of November 2018".

41. I read that paragraph as an acknowledgement that the issue of setting aside the settlement agreement would have to be resolved before the application for wasted costs could be considered and that if it was set aside on the basis of the existing application then there would be no need to go into the matters raised in this application thereby saving costs. I am satisfied that there have been two entirely separate and distinct arguments being advanced as to why the Settlement Agreement needs to be set aside. The first being in relation to Costs being sought in the event the Claimant lost and the second on the basis of material non-disclosure / misrepresentation/ fraud.

42. As at the date of the application the change in circumstance relied upon was that the Claimant became aware that the LDA document which had been key to the concession made by HEE on the preliminary point at a late stage had been drafted by Hill Dickinson and it called for an explanation as to why Hill Dickinson did not alert HEE to that earlier. In July 2019 the relevant LDA between HEE and Lewisham was disclosed to Mr Greene, the journalist.

43. Whilst it is clear to me that nothing happened on the Wasted Costs Application I have not been able to find any evidence of a formal stay being ordered. The issue was considered by REJ Freer in his letter of 3 October 2022. He concluded that the wasted costs application should first be considered at a Preliminary Hearing to determine whether it had sufficient prospects of success to proceed to a substantive hearing having regard to the nature and content of the relevant Settlement Agreements entered into between the Claimant and HEE and the consent order entered into by the parties at the Court of Appeal dated the 27th October 2016.

44. On the final page of the letter REJ Freer confirmed that the issue to be determined was

"Whether or not the Claimant's application for wasted costs should be struck out on the basis that it has no reasonable prospect of success having regard the content and nature of relevant compromise agreements reached between the Claimant and the Second Respondent (HEE) and / or the consent order dated the 27th October 2016".

45. In particular the parties were asked to address relevant authorities on the setting aside of compromise agreements and / or the consent order particularly on the basis of fraud / misrepresentation / mistake. The parties were also asked to address whether or not despite any agreements that may preclude the claimant himself pursuing a wasted costs order the tribunal should nevertheless make an order of its own initiative.

The Statutory Basis for the Application

Wasted Costs Orders

46. Under the Tribunal Rules, Rule 80 - 82 deals with wasted costs applications as follows (so far as is relevant):

80.— (1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or

(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay. Costs so incurred are described as "wasted costs".

(2) "Representative" means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.

(3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.

81. A wasted costs order may order the representative to pay the whole or part of any wasted costs of the receiving party or disallow any wasted costs otherwise payable to the representative, including an order that the representative repay to its client any costs which have already been paid. The amount to be paid, disallowed or repaid must in each case be specified in the order.

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

47. In order to be successful on an application for wasted costs the Claimant must demonstrate, on the balance of probabilities that he has incurred costs as a result of an improper, unreasonable or negligent act or omission on the part of Hill Dickinson.

48. Rule 80 is based on the wasted costs provisions that apply in the Civil Courts, with the definition of 'wasted costs' being identical to that contained in S.51(7) of the Senior Courts Act 1981. Accordingly, the authorities applicable to wasted costs in the civil law generally are equally applicable in the Employment Tribunal. The two leading authorities analysing the scope of S.51 and the circumstances in which such orders can be made are **Ridehalgh v Horsefield (1994) 3 All ER 848, CA**, and **Medcalf v Mardell (2002) 3 All ER 721, HL**.

49. In **Ridehalgh** the Court of Appeal had advocated a three-stage to adopt in respect of wasted costs orders:

a) Has the legal representative acted improperly, unreasonably, or negligently?
b) If so, did such conduct cause the applicant to incur unnecessary costs?
c) If so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

50. The Court of Appeal in **Ridehalgh** emphasised that even where the Court / Tribunal is satisfied that the first two stages of the test are satisfied (i.e., conduct and causation) it must nevertheless consider again whether to exercise the discretion to make the order and to what extent and that it still has a discretion at that stage to dismiss an application for wasted costs where it considers it appropriate to do so.

51. In **Ridehalgh** the Court of Appeal examined the meaning of 'improper', 'unreasonable' and 'negligent and this was subsequently approved by the House of Lords in **Medcalf**— as follows:

a) 'improper' covers, but is not confined to, conduct that would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty;

b) 'unreasonable' describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case;

c) 'negligent' should be understood in a non-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

52. Mr Justice Elias (as he then was) confirmed these principles **in Ratcliffe Duce and Gammer v Binns (2008) EAT**, where he observed that where a wasted costs order is concerned, the question is not whether the party has acted unreasonably. The test is a more rigorous one, as the leading authorities make plain. The distinction therefore is between conduct that is an abuse of process and conduct falling short of that. A wasted costs order requires a high standard of misconduct on a representative's part. An abuse of the court includes such matters as issuing or pursuing proceedings for reasons unconnected with success in the litigation; pursuing a case known to be dishonest; and knowingly making incomplete disclosure of documents.

Strike Out Order

53. An employment judge or tribunal has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on any of the following five grounds pursuant to Rule 37 (1) of the Tribunal Rules. There are a number of grounds upon which a claim can be struck out but in this case we are looking at subsection (a) i.e., that the Application "***has no reasonable prospect of success"***.

54. The power to strike out all or part of a claim or response is discretionary. Even if one of the five grounds in r 37(1) is made out, the tribunal must consider whether to exercise their discretion or make an alternative order. The first stage involves a finding that one of the specified grounds for striking out has been established and, if it has, the second stage requires the Tribunal to decide as a matter of discretion whether to strike out the claim or response (or part thereof).

55. Lady Smith in ***Balls v Downham Market High School and College*** **UKEAT/0343/10** said at paragraph 6 of that Judgment:

"Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their

written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects."

56. Once a claim / application has properly been identified, the power to strike it out under the Tribunal Rules on the ground that it has no reasonable prospect of success will only be exercised in comparatively rare circumstances (**Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755, at [30])**. In particular, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute as often a hearing is required where evidence is challenged and evaluated. (**Tayside**). As such, a Claimant's case must ordinarily be taken at its highest – with the assumption being that the Claimant will establish that the facts which they have asserted in their claim are true, however vehemently the other side takes issue with them. Taking the claim at its highest means taking it at its highest not just in the pleadings but in any relevant supporting documentation available to the tribunal.

57. It is also important that the reference to 'disputed facts' is not limited to disputes about factual events (what happened) but also covers disputes over the reasons why those events happened, where that is relevant to the legal claim that has been brought. There will therefore be a crucial core of disputed fact in a case which turns on why a decision maker acted as they did, and the parties have competing assertions on those reasons, even where there is no dispute as to how that decision maker acted and what they in fact did. Where a claim will turn on the question of how a decision maker evaluated disputes of fact, and precisely what conclusions they reached, these are matters that can only be resolved at a full hearing.

58. It is not impossible for a claim which involves disputed facts to legitimately be struck out as having no reasonable prospect of success, but it will be an exceptional case where this is justified (see **Ezsias v North Glamorgan NHS Trust [2007] IRLR 603**), An example, however, where a strike out may be appropriate notwithstanding a dispute of fact is where 'it is instantly demonstrable that the central facts in the claim are untrue' (see **Tayside)**. The qualification that it must be 'instantly demonstrable' that the pleaded facts are untrue is significant – it must be possible to quickly and decisively show that the central foundations of the claimant's case are untrue for a strike out to

be warranted. It is not enough that with further time and examination (whether of witnesses or documents) it is likely that the claimant's assertions will be shown to be untrue. Thus, where the assertions made in the claim are contradicted by plainly inconsistent documents, that will provide a basis for a Tribunal to strike out a claim as having no reasonable prospect of success; or, as it was put in **Ezsias**, where the facts sought to be established by the Claimant were ***'totally and inexplicably inconsistent with the undisputed contemporaneous documentation'*** (at [29], per Maurice Kay LJ).

59. All Claims and parts of Claims are subject to the same principles regarding strike out and, of course, the same wording of **Rule 37 (1) (a)**. There has been a line of cases, however, that makes it clear that as discrimination and whistleblowing cases in particular, commonly turn on matters such as the mental processes of decision makers and inferences to be drawn from behaviour, as well as credibility of witnesses, and may involve a reversal of the burden of proof, they are particularly unsuitable for resolution at a preliminary stage on a strike out application.

60. This is an application for a wasted costs order and not a claim for discrimination or whistleblowing. Having said that the same test is in situ for all claims and in my view there is no special power invested in a discrimination case to withstand strike-out in appropriate circumstances, but care needs to be taken where there are core issues of fact turning on oral evidence whatever the subject matter of the case. As discrimination cases are often of that nature it is that which means that great care has to be taken.

61. The listing of this application for a hearing to determine whether or not the merits of the application were such that the application should be struck out was made of the Tribunal's own motion as opposed to an application by either of the parties. It was determined however that the Respondent would provide their submissions, in favour of the strike-out first.

The Respondent's representations

62. I will attempt to summarise the Respondent's submissions and I emphasise that I have carefully read and re-read both parties' skeleton arguments and also my notes of the extensive oral submissions made by Mr Moon KC and Mr Allen KC and have taken all they have said and written into account.

63. At para 7 of the Respondent's submissions stated:

"In short the application for wasted costs has no prospect of succeeding because such an application is not open to the Claimant in light of the terms of the settlement agreement entered into by the Claimant in October 2018. The Claimant says that this settlement agreement should be set aside and his application for wasted costs should be heard on its merits."

That would seem to place the Respondent's primary focus as being what they consider to be the insuperable difficulty that the Claimant will have in setting aside the October 2018 Settlement Agreement and in particular paragraph 2.2 thereof which is clear as a compromise of either party's ability to pursue costs including wasted costs in relation to those claims.

64. At para. 22 of the Respondent's submissions that primary focus is confirmed and the observations of Simler LJ, when she refused the Claimant's appeal on the sift in relation to his first attempt to set aside the settlement agreement, to the effect that the agreement met the terms of s.203 Employment Rights Act 1996 and that the Claimant had been advised by both counsel and solicitors when entering into the contract are used as support for the Respondent's position.

65. At para 23. The submissions concede that:

"Nonetheless it is accepted that a settlement agreement made in accordance with section 203 ERA may be set aside on certain common law grounds including ….. misrepresentation".

Counsel then cites a definition of misrepresentation from Foskett on Compromise (para 4-37 9th Edition):

"A false representation of a material fact made prior to a compromise and which induces it may at the instance of the party misled operate to vitiate the compromise".

66. The Respondent goes on to accept that a failure to disclose a *material* document in litigation might involve a misrepresentation and cites Para 4-40 of Foskett:

"A suppression of a fact or document which, if its existence were revealed would destroy totally (rather than perhaps merely undermine to some extent) a claim being advanced by a Claimant would involve the Claimant in pursuing a claim which he knew to be unfounded . A compromise of such a claim could be invalidated".

67. At paragraph 26 the Respondent makes it clear that if the matter were to proceed to a full hearing then HD would "strenuously maintain" that they have not acted in a manner that would justify a wasted costs order. At paragraph 27 the Respondent sets out its reasons why the application is "bound to fail" and therefore should be struck out as having no reasonable prospects of success. In summary they are as follows:
    a) The 2012 LDA was disclosed on 14 February 2018 and was in the list of documents;
    b) There can be no legitimate criticism of HD prior to the decision of the Court of Appeal on the worker issue as there was no order for disclosure;
    c) The documents not disclosed by HD prior to the October 2018 settlement agreement were not material. There is no difference in real terms between the 2012 LDA agreement known prior to the settlement and the 2014 LDA after the settlement
    d) The Claimant has already received his costs for the late disclosure of the 2012 LDA already and received £55,000 for it.
    e) The Claimant had complained about the disclosure point in his previous applications to set aside and so should not be permitted a second chance.

68. At para 29 HD make representations as to why it is that the Tribunal should not make an order for wasted costs of its own initiative which relate to the importance of finality in litigation and the weight to be attributed in the event that the October 2018 agreement not being set aside. All of the points above were amplified by Mr Moon KC in his eloquent submissions to me over several hours.

The Claimant's Representations

69. Mr Allen KC drafted submissions on behalf of the Respondent. At para.39 he contends that the Court of Appeal costs agreement is no bar to the application as it plainly only relates to the costs of the Appeal and was a means by which applications did not need to be made to the Court of Appeal for such an order.

70. At paragraph 40 he refers to the 17 May 2018 agreement for HEE to pay £55,000 costs to the Claimant and points out that this deals with inter partes costs only, that it was a contribution to costs only and that it could not have been in the contemplation of the Claimant that there was any potential for a wasted costs order against HD as they did not know the full picture of HD's involvement in the LDAs at that time. It is asserted that had the Claimant known what he now knows ***"he would have sought an Order for all of his costs against HD or HEE."***

71. At paragraph 45 Mr Allen KC accepts that the wording of the settlement agreement does cover wasted costs applications. In the next paragraph (46) he accepts it in order to progress his wasted costs application against HD he must argue either that either the costs are not covered by this agreement or that the agreement should not prevent him from seeking a wasted costs given that he was unaware at the time of entering into the settlement agreement that the grounds for such an application existed.

72. Paragraph 47 contains the nub of the Claimant's contentions in which he acknowledges that the finality of litigation principle but asserts that ***"As at October 2018 the Claimant did not know that HD had drafted the LDA (and indeed drafted many documents in relation to HEE's relationship with various Trusts). Had the claimant known then what he knows now he would not have entered into an agreement which could stop him applying for costs against HD. It is in the interests of justice to permit the Claimant to progress this application".***

73. At para 49 it is asserted that a settlement agreement can be set aside on the basis of misrepresentation, mistake or duress and it is confirmed that duress is not being relied upon by the Claimant. The case of **Hayward v Zurich Insurance Company** is relied upon to show that fraud, misrepresentation or mistake need not be the sole cause but only needs to be the material cause which induced a party to enter into a settlement agreement. Mr Allen KC states at paragraph 52 that:

"Whether or not the actions of HD full within the categories identified in Hayward V Zurich can only be determined following disclosure and witness evidence."

Conclusions

74. During the course of the hearing, I asked the advocates to draw up what they considered to be the List of legal and factual Issues they considered a Tribunal would have to consider in the event that this matter proceeded past today. I asked for it to be agreed if possible but also indicated that if there were differences then they could be marked upon the document so that I could see where there was dispute. Despite asking for progress over the hearing and being assured that one was being curated one was never provided. That is highly unfortunate. It is unclear to me as to why that has not been undertaken but I will proceed without such a document..

75. Of necessity, in my view, there has been a lengthy preamble in this judgment leading to these conclusions which will, in comparison, be (perhaps mercifully) brief.

76. The application which the Claimant wishes to pursue is one of wasted costs against HD in relation to their involvement in a series of hearings in the early parts of this litigation. The Claimant has made his allegations and HD has denied those allegations although the factual position of HD's conduct has not been given in any detail at all. A full hearing will enable both parties to produce documents and evidence in relation to that

77. The following seems to be common ground:

a) The Claimant will need to set aside the October settlement agreement as a pre-requisite to being able to have his wasted costs application heard.
b) There is a route by which a Claimant could have the settlement agreement set aside if he can show a misrepresentation / fraud / mistake.

78. It is an agreed fact that HEE raised the issue of whether the Claimant came within the extended definition of worker in their Response and that there was then an extended period of litigation during which substantial costs were incurred culminating in HEE's concession prior to the matter being litigated. HD were HEE's retained legal representatives through that whole period

79. It is an agreed fact that no LDA was disclosed prior to a generic document being disclosed in the document list following REJ Hildebrand's order. Although there was no order for disclosure at the original Employment Tribunal hearing before EJ Hyde HEE and their solicitors had supplied a bundle of documents which they must have considered relevant to the issue to be determined and that bundle did not include any LDA. There would appear to be a need to enquire into how the original bundle did not contain that document and an assessment of the materiality or otherwise. At first blush it seems an important document which was highlighted in Mr Linden's skeleton argument as being key and there was a concession shortly thereafter. Findings will need to be found about the materiality of that document in HEE's consideration, subject of course to any privilege issues.

80. Clearly the generic LDA disclosed and the specific LDA between Lewisham and HEE were in existence at all material times and there will need to be a fact-finding process as to why it was that those documents were disclosed in the way and at the time they were. A determination will have to be made about the factual circumstances that gave rise to the disclosure of the LDA document within the disclosure list, why it was not disclosed before and the subsequent disclosure of the actual LDA agreement and the information that HD had drafted all of those documents. The Claimant will have to persuade the Tribunal that the information that was received after the settlement had

been entered into was sufficient to enable the settelement agreement to be swept aside. That is a matter of evidence and assessment of that evidence.

81. It may well be, of course, that privilege is not waived and the Tribunal has to consider the situation with that handicap. I have had no definitive information from the parties at this stage (nor would I expect any) as to what is to happen to privilege.

82. The mechanism by which the setting aside of the agreement would be argued is going to be by a consideration of oral evidence and then applying that oral evidence to the law. At this stage I have no clear idea about precisely what either party will say. The Claimant will say in broad terms that he was misled / the victim of fraud by HD's conduct and that would be sufficient to have caused him to act in a different way and accordingly the Settlement Agreement needs and can be, according to case law, set aside. There will be an assessment of HD's conduct (if they choose to provide an explanation) which will feed into the assessment process.

83. As stated there will be an issue as to the importance of the LDA in the Respondent's abandonment of their primary contention on the status point. The Claimant will point to the payment of £55,000 in costs as supporting their contention that the document was a material one that should have been disclosed earlier. The Respondent may argue otherwise.

84. It is beyond doubt that the Claimant was fully aware of the LDA at the time the status point was conceded and accepted £55,000 from the Trust in recompense for that. He has indicated that his position would be that he would never have entered into that agreement had he known that potentially there was an improper, unreasonable or negligent act or omission on the part of HD and instead he would have sought a higher payment of costs and/or made an application against HD for their part in the situation. That is an evidential matter which can only be considered in light of all the circumstances and upon the Claimant being cross-examined.

85. I return to the legal position relating to strike-outs and in particular the fact that I am obliged to take the Claimant's case at its highest and the dicta of Lady Smith in the **Balls** litigation, which I repeat again here for ease of reference:

"Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a

careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects."

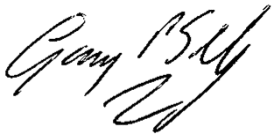
86. I am satisfied on the information and representations laid before me that the Respondent has failed to persuade me that there are no reasonable prospects of success. As stated previously it is acknowledged that there is a route through which the Claimant could travel to set aside the Settlement Agreement and then persuade the Tribunal that HD have acted in such a manner that a wasted costs order is appropriate. Whilst I acknowledge that the Claimant's path appears to be one with a number of hurdles I am not persuaded that any of those hurdles is insuperable either individually or taken together and taking the Claimant's case at its highest I am satisfied that the strike-out test is not met. I am satisfied that the application can only properly be considered taking into account the evidence of the parties and factual findings found.

87. Using the dicta in Tayside I am not satisfied that the Respondent has demonstrated that this is one of those cases where **"it is instantly demonstrable that central facts in the claim are untrue."** It is arguable that documents that should have been before EJ Hyde were not before EJ Hyde. It is arguable that the fault lay with HEE or it is arguable that some culpability lay with HD. It is arguable that had the full picture been known at the time the Settlement Agreement was entered into that the Claimant would have declined to enter into it and sought other terms / outcomes. It is arguable that depending on the evidence which is presented about the circumstances that HD's conduct could be impugned to such an extent that there was a misrepresentation / fraud which would allow the Settlement Agreement to fall away. If the Settlement Agreement falls away then it is possible that HD could be found to meet the test whereby a wasted costs order could be made depending on the findings of fact on their conduct once their position has been put

I am quite satisfied that all those matters need to be scrutinised following appropriate disclosure and evidence.

88. I have considered the specific points raised by the Respondent and which I have set out at paragraph 67 above and do not consider that any of the points raised either individually or in any combination leads me to a conclusion that there is no reasonable prospect of success.

89. Following disclosure of relevant documents and the evidence of the parties it is my view, at least possible that the Settlement Agreement could be set aside and if that is the case at least possible that a Wasted Costs order could then be made. The Respondent has not persuaded me that there is no chance of that taking place and accordingly I decline to strike this Application out. The matter will be listed for a Case Management Hearing in order to give directions for a full hearing of the Claimant's wasted costs application.



Employment Judge Self
Date: 18 January 2023

Sent to the parties on:
19 January 2023

Mr A Byndloss-De'Allie
For the Tribunal Office