**IN THE EMPLOYMENT TRIBUNAL** **Case Number: 2302023/2014 and 2301466/2015**

**LONDON SOUTH**

**B E T W E E N :-**

**Dr CHRISTOPHER DAY**

**-and-**

**HILL DICKINSON LLP**

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**Claimants skeleton argument for PH 30.01.24**

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Introduction

1. It is now 10 years since these employment tribunal proceedings were commenced by Doctor Day the claimant. The substantive hearing commenced in October 2018 and the significant time between issuing the Claim and that hearing, some 4 years, was taken up in resolving whether the claimant and 54,000 doctors were a worker of Health Education England [HEE] under the extended meaning of worker in Section 43 K of the Employment Rights Act 1996. Throughout these proceedings HEE had been represented by Hill Dickinson [HD].

2. The situation was widely reported in the national press and even featured on national TV including ITV News at 10. It was also discussed in the House of Commons on more than one occasion **(see page 1108-09)**. For instance, in a debate in the House of Commons the MP and former lawyer Justin Madders MP stated;

> *"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."*

3. Before this matter was determined by Court of Appeal , there was widespread concern as to the implications of the decisions of the employment tribunal and EAT**(see page 436-437)**. The medical regulator the GMC acknowledged as early as 12 August 2016 the effect that the decisions had on patient safety nationally **(see page 1046);**

> *"We recognise that a level of concern now exists among doctors in training in England about whether they are adequately protected in their relationship with 3 Health Education England (HEE), and that, as a result, some may feel less secure about raising concerns for fear of suffering detriment to their career."*

4. The history of the claim is set in the judgment of EJ Self and is not repeated here but some further history is germane :

a. HEE at the material time was the national NHS body that both funded and commissioned junior doctors' [1]training and employment path to hospital consultant or GP, following their graduation from medical school.

b. At the material time C was a doctor with just under 5 years' experience employed in the NHS after graduating from medical school in 2009.

c. HEE recruited C and was contractually bound to commission and fund a series of one year training and employment placements at a series of NHS Trusts. The First Respondent { Lewisham and Greenwich NHS Trust] was second on a series of 7 NHS Trusts C would have worked at as part of the agreement with HEE to train as a hospital consultant.

d. HEE's agreement to commission and fund C's employment at each NHS Trust relied on C adhering to various training and governance requirements which were assessed annually by way of an ARCP appraisal conducted by an HEE appointed panel. The commissioning and funding of the employment and training by HEE doctors was also conditional on the relevant NHS Trust abiding by

[1] the terms trainee or junior doctor are extremely broad and encompasses doctors that have just graduated from medical school all the way through to senior registrars with over 10 years of working in the NHS before they become consultants.

various terms imposed by HEE. This was in return for significant funding from HEE **(see page 1058-85).**

e. The 2014 specific LDA at the centre of this wasted cost application was the relevant commissioning contract at the material time between the First and Second Respondent in this claim **(see page 719-870).** The value of similar LDA contracts ranges from between £6-79 million **(see page 1058-85)**. This LDA contract clearly shows HEE, at the material time, imposing the terms on the First Respondent on which they engaged C and all other HEE doctors in return for significant sums of money.

f. On 20 February 2015, HD acting for HEE made a strike out application which included the following factual assertion which the C says was materially misleading (Page ???? not in bundle).

> *"The Claimant was not supplied by the Second and Third Respondent to carry out work for the First Respondent he was simply appointed to a training programme which consisted of various placements at NHS Hospitals. In any event it was not the Second Respondent or Third Respondent who determined the terms on which the Claimant was engaged this was the responsibility of the NHS employer Trust who was the First Respondent at the relevant time"*

***g.*** This materially misleading factual submission was followed with further submissions in the Employment Tribunal, Employment Appeal Tribunal and Court of Appeal as set out in the List of issues, which the C says were materially misleading

***h.*** Based on the materially misleading picture presented, Langstaff J in the EAT Judgment, commented ;

> "HEE was little different from any third party who might have acted detrimentally towards him as a whistleblower"

**i.** The 2014 specific LDA was never disclosed in the litigation but was obtained by the Journalist Tommy Greene on 13 July 2019 by way of a Freedom of Information request to HEE **(see page 871-873)** . The specific 2014 LDA

disclosed was not signed, and the C seeks disclosure of the signed version (or detail as to who signed on behalf of HEE). Mr Plummer who was HEE investigating officer of C's case and understood to be the HEE Director instructing HD in defence of the C's 2014 claims signed LDAs at other London NHS Trusts in 2014 **( see page 1049-1053).**

j. It took until 13 November 2020 for HEE to concede that C had made the protected disclosures he claimed back in 2014. The concession made applied both to reasonable belief in patient safety concerns but also of deliberate concealment following the service by C on HEE voluntary Further and Better Particulars, and C (acting in person at the hearing ) making clear during the hearing that day that he would progress a strike out application if concessions were not made on all his protected disclosures on both reasonable belief of patient safety and deliberate concealment **(see page 1038-1045).**

5. As material Section 43 K states:

> *(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who—*
>
> *(a) works or worked for a person in circumstances in which—*
>
> *(i) he is or was introduced or supplied to do that work by a third person, and*
>
> *(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,*

**<u>The claim for wasted costs</u>**

6. The claim for wasted costs arises from a failure on the part of HEE to disclose throughout the proceedings at any time before the settlement in October 2018 the Learning and Development Agreement between HEE and Lewisham and Greenwich NHS Trust taking effect from 1 April 2014 (the specific 214 LDA)_ or the generic LDA of 2014 , both of which were drafted by HD **(see page 881-82).**

7. No version of the LDA was disclosed by HEE in the proceedings until February 2018 when the version disclosed was from 2012 that had neither the First

Respondent or the Second Respondent as a party. Despite what is said in HD's response to the wasted costs application **( see page 1099)** the LDA disclosed in 2018 was from 2012. Even though the relevant agreement at the time was the 2014 specific LDA, which had been drafted by HD, that was still not disclosed . the existence of the specific 2014 LDA and the fact that it had been drafted by HD was only discovered by C in July 2019 as described above following a response to a Freedom of Information act request made by a Daily Telegraph journalist Tommy Greene **(see page 871-873).**

8. The claim for wasted costs was first made by letter dated 12 June 2019 **(page 677-82)** . A claim on similar grounds has been made by the claimant to the Employment Appeal Tribunal and that application has been stayed pending resolution of the claim before the employment tribunal.

9. There has already been considerable delay in the processing of this application which at one stage required the intervention of the REJ Freer , despite the C chasing the tribunal to address the application **( see para 43 Judgment of EJ Self, p 975 )** for which REJ Freer apologised .

10. HD have previously applied to strike out the application for wasted costs, which was heard in December 2022, and this was rejected by Employment Judge Self in his judgement dated 18 January 2023 **( see pages 966-987) .**

**Should there be a preliminary hearing?**

11. Employment Judge Evans directed on 17 November 2023 that there be a further preliminary hearing for case management purposes to include consideration as to "*whether all of the issues in the List of Issues should be dealt with at the same time at one hearing or whether some of them should be dealt with as "preliminary issues" at a separate hearing on the basis that they would be capable of determining the application for wasted costs."*

12. The Claimant does not consider that any issues should be addressed as preliminary issues at a separate hearing. The Respondent says there should be a preliminary hearing (and their proposed 3 issues for preliminary hearing are addressed below).

13. It is a trite phrase but nevertheless apposite that justice delayed is justice denied. The respondent has sought and failed to strike out the application for wasted costs which was first over 4 ½ years ago. Though it is accepted that this is ultimately a matter for the tribunal, the tribunal is urged to have in mind the substantial delay in resolving this application such that C says there should be a an overwhelmingly compelling case for any a preliminary issue to be addressed at a preliminary hearing which not only would be capable of determining the application for wasted costs but also would on its face appear to have reasonable prospects of success.

14. Turning to the specific issues proposed by the respondent for a separate preliminary hearing

15. The first issue proposed is that :

"…..until the decision of the Court of Appeal, at all material times, the law was (wrongly – it is now known) thought to be that the opening words of s.43K ("*(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by Section 230(3) but who* …") meant that C, who <u>was</u> a worker as defined by section 230(3) (as an employee of the Trust) could <u>not</u> rely on the extended definition of 'worker; set out in s.43K, <u>regardless</u> of any influence HEE had in practice on the terms on which C was engaged to do the work. In essence, being a s.230(3) worker (as C plainly was) constituted a legal bar to his also being a s.43K extended definition worker, due to the specific words of s.43(K)(1)"

16. This issue may reflect the decision in the EAT ( see in particular para 44, page 149/150) but not that of the Employment tribunal. Employment Judge Hyde in she decision ( see page 93) referred to germane guidance given by HHJ Eady about the provisions of section 43K(1) and (2) in terms that "the provisions allow for the possibility that the terms of engagement might have been determined by more than one entity, distinguished between terms substantially determined by the Claimant themselves and

terms substantially determined by others, and at 43K(2)(a) defines the employer as the being the party ( not the claimant) who substantially determines or determined those terms". Though this interpretation (providing for more than one entity determining the terms , was subsequently found to be wrong) nevertheless it was evident that the law was at the time far form settled

17. The terms on which HEE progressed their strike out application were as recorded by EJ Hyde, was not based on "the law [being that] the opening words of s.43K ("*(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by Section 230(3) but who* …") meant that C, who <u>was</u> a worker as defined by section 230(3) (as an employee of the Trust) could <u>not</u> rely on the extended definition of 'worker". There is no mention of this in the judgment of EJ Hyde. Indeed, the EAT acknowledged that it was not an argument recorded by the Tribunal **( see page 139)** . That is odd if it was as contended by HD was thought to be as HD now contend.

18. Rather HEE are recorded as submitting , by reference to the terms of section 43K(1)(a)(ii) that though it was arguable that the terms were not substantially determined by C , in determining whether the terms *"were in practice substantially determined by the person for whom he works or worked, by the third person or by both of them* " , " it was fanciful to suggest that the party which substantially determined the terms and conditions of the claimants engagements was or could have been the respondents [HEE}".

*19.* The employment tribunal had to consider this question based on a bundle of documents which did not include the specific 2014 LDA or indeed any LDA but were left to make their decision based solely on the Gold Guide as summarised at paragraph 45. As EJ Self remarked *:*

> *"There would appear to be a need to enquire into how the original bundle did not contain that document* [though EJ Self may have been referring to the 2012 LDA the commentary applies equally to the the 2014 Specific LDA which applied at the time] *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."*
{see para 79 p984)

20. It is the Claimant's contention that the documents before the tribunal presented a misleading and incomplete picture by reason of the 2014 specific LDA ( which was the applicable LDA at the relevant time) not being before the tribunal in circumstances where that document had been drafted by HD.

21. The resolution of the issue raised by the respondent as their first proposed preliminary issue would not resolve the wasted costs application and little if any time would be gained by such a point being carved out for separate consideration. It further does not reflect the reality of the position at the time of the employment tribunal decision as outlined above, nor how HEE are recorded as arguing the matter before the EJ Hyde, and so has limited prospects in any event.

22. The second issue proposed by HD is that :

*"furthermore, until the decision of the Court of Appeal, at all material times, the law was (wrongly – it is now known) thought to be that the relevant question was **which**[2] of the parties (here, Lewisham and Greenwich NHS Trust and HEE) in practice determined the terms on which C was engaged to do his work more than the other and that the answer to that question had to be the Trust, rather than the correct question, which is **whether** (regardless of whether Lewisham and Greenwich NHS Trust substantially determined them, as they did – under a contract of employment) HEE) in practice **also** substantially (that is, more than trivially) determined the terms on which C was engaged to do the work. HD says that its skeleton arguments and position before the ET, the EAT and the CoA reflected this understanding of the law which was corrected by the CoA in its judgment and that, on this understanding of the law, any agreement between HEE and the Trust, including the LDA and specific LDA, was irrelevant"*

23. The respondent appears to suggest that it was available for the Employment Tribunal, EAT and Court of Appeal to make a determination as between the parties, that is Lewisham and Greenwich NHS trust and HEE as to which party determined the terms of which C was engaged **more than the other** without the benefit of having the 2014 LDA (or indeed the 2012 LDA) before those tribunals. It is unrealistic to suggest that such a comparison can be made without a complete picture of the role of the HEE.

24. It is germane that in the claimants skeleton argument before the employment tribunal hearing in May 2018, drafted by Tom Linden QC (as he then was) at paragraph 6, **(pages 317 and 318)** C contended that HEE and the Trust " 'both'... "substantially determined the terms on which [C] was engaged. In fact, HEE had a far more important role than the Trust. (though the submission reflects that HEE did not agree this] But this is disputed by HEE. By this time, of course, the employment tribunal had before them the 2012 LDA, though not the specific or generic 2014 LDA on which to make this judgement.

25. Even if, which is not accepted, the issue raised by the respondent was determined in their favour it would not resolve the wasted costs application as it would not address the still outstanding question as to why notwithstanding an order for disclosure in February 2018 the respondent only disclosed the 2012 LDA and neither the 2014 specific nor generic LDA, which had been drafted by HD.

26. The third proposed issue is

> *once the Court of Appeal had given judgment setting out the correct legal test, the '**Gold Guide**' – of which C and his advisers were very well aware – made plain that the degree to which HEE determined the terms on which C was engaged to do his work was more than sufficient for him to amount to a worker employed by HEE, within the meaning of ss.43K(1)(a)(ii) and 43K(2)(a) ERA,*

27. This assertion runs counter to what HEE (HD acting) stated at Paragraph 30 of the ET skeleton argument:-

> "*Thus on the wording of the Gold guide it is submitted to be unarguable that the body which is responsible substantially for determining the claimant's terms and conditions as regards work is other than R1" [R1 being the Trust"*

28. The Claimant has some difficulty understanding this issue in light of the fact that it appears to be suggesting that, notwithstanding the decisions reached based on the Gold guide prior to February 2018 , that incomplete disclosure was sufficient and in circumstances where based on that limited disclosure the respondent made the representations they did as referred to in C's skeleton argument before the employment tribunal, the Employment Appeal Tribunal and the Court of Appeal.

29. No senior counsel representing the C to date ( James Laddie QC, before the Court of Appeal , and Tom Linden QC (for the May 2018 ET) appear to have taken this view based on their skeleton arguments

30. Indeed, it is noted that the claimant's counsel [Tom Linden QC, as he then was] in his skeleton argument prior to the May 2018 employment tribunal hearing, made only passing reference to the Gold Guide but extensive reference to the 2012 LDA, for good reason.

31. A resolution of this wasted costs application is now well overdue, and directions should be given for a hearing to determine the application without yet further delay arising by having a hearing of any preliminary issue, which neither has reasonable prospects of success nor would not resolve the application is any event.

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29.01.24